



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

HIGH COURT CIVIL APPEAL NO. 31 OF 2018

ESTHER KAKONYO WANJOHI.....APPELLANT

V E R S U S

JULIAN WAMBUI GAKURU.....RESPONDENT

RULING

The appellant/applicant filed an application dated 30/08/2018 for orders that the court detains the respondent in prison for 6 months and order attachment of her tea bushes growing on **Land Parcel No. Inoi/Thaita/130** for breaching the court orders of 19/07/2018.

On 19/07/2018, this Court granted the appellant stay of further proceedings in lower court case No. 243 of 2014 and stayed execution of orders given on 02/05/2018. In addition, it issued an injunction restraining the respondent, her servants, agents and anyone claiming under her from entering, remaining on, picking tea or in any way interfering with 700 tea bushes on **Land Parcel No. Inoi/Thaita/130** pending hearing and determination of the application dated 16/07/2018.

The order was issued on 27/07/2018 and served on the respondent on 02/08/2018.

**Applicant's case**

She confirms that in total disregard to the order, the respondent entered the suit land on 14/08/2018 accompanied by labourers and picked the tea bushes. That she commented that the court order was fake and continues to pick the tea bushes.

**Respondent's case**

In response, she stated that she was not a party to the said order dated 19/07/2018 and she had not been served with the application dated 16/07/2018. That the orders were served on 04/08/2016 and not on 02/08/2018 which was 8 days after it was issued. That by the time the order was served the same had lapsed by virtue of provisions of **Order 40 Rule 4(3)** which require ex-parte injunction be served within 3 days from date of issue together with the application and pleadings. That on 13/06/2018, the court had previously ordered that she remains in possession of the tea bushes.

**Issues arising:**

**1. Jurisdiction**

Jurisdiction having been raised its needs to be dealt with in the first instance since if this court had no jurisdiction, then the entire proceedings and injunction orders would be a nullity. This is because jurisdiction is fundamental and goes to the core of any proceedings. Without jurisdiction, the proceedings have no integrity and have to be declared null and void.

Nyarangi J, in the case of ***Owners of the Motor Vessel " Lillian S" v Caltex Oil (Kenya) Ltd (1989) KLR 1*** stated : -

*I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything, without it, a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds that it is without jurisdiction.*

**Ideal Locations Limited v Nakumatt Holdings Limited & another [2018] Eklr.** The Court held;

The dispute herein is about landlord/tenant relationship. It relates to non-payment of rent for the premises that 1<sup>st</sup> Defendant leased from the Plaintiff. The same clearly relates to use and occupation of land. Therefore under Article 162(2) (b) of the Constitution and Section 13 (2)(a) of the Environment and Land Court Act, this Court has jurisdiction to hear the Suit and the application and issue the orders sought by the Plaintiff.

From the memorandum of appeal, the claim concerns breach of lease agreement for **Inoi/Thaita/130** therefore this court does not have jurisdiction. The subject matter of the dispute is land. The court with jurisdiction is Environment and Land Court.

## **2. Contempt proceedings**

### **Section 63(c) of the Civil Procedure Act**

*In order to prevent the ends of justice from being defeated, the court may, if it is so prescribed—grant a temporary injunction and in case of disobedience commit the person guilty thereof to prison and order that his property be attached and sold;*

### **Shimmers Plaza Limited v National Bank of Kenya Limited [2015] eKLR**

The Court of Appeal held the following on Contempt proceedings;

**We reiterate here that court orders must be obeyed. Parties against whom such orders are made cannot be allowed to trash them with impunity. Obedience of Court orders is not optional, rather, it is mandatory and a person does not choose whether to obey a court order or not.....**

**The courts should not fold their hands in helplessness and watch as their orders are disobeyed with impunity left, right and centre. This would amount to abdication of our sacrosanct duty bestowed on us by the Constitution. The dignity, and authority of the Court must be protected, and that is why those who flagrantly disobey them must be punished, lest they lead us all to a state of anarchy.**

### **Katsuri Limited v Kapurchand Depar Shah [2016] eKLR.** The Court held ;

**In *Peter K. Yego & Others vs Pauline Nekesa Kode* the court recognizing that contempt of court is criminal, held that it must be proved that one has actually disobeyed the court order before one is cited for contempt. The applicant in an application for contempt must prove beyond peradventure that the respondent is guilty of contempt.....**

**Although the proceedings are civil in nature, it is well established that an applicant must prove the elements beyond reasonable doubt, at least higher than the standard in civil cases, The fact that the liberty of the defendant could be affected means that the standard of prove is higher than the standard in civil cases. It is incumbent on the applicant to prove that the defendant's conduct was deliberate in the sense that he or she deliberately or willfully acted in a manner that breached the order.**

**The prayer sought is for committal for contempt. The power to commit for contempt is one to be exercised with great care. An order committing a person to prison for contempt is to be adopted only as a last resort.**

**According to the respondent, the orders were served on her though she claims they were served 8 days after it was issued and therefore as per Order 40 Rule 4(3) below, the orders had lapsed.**

### **Order 40 Rule 4(3) of the Civil Procedure Rules** provides:

*In any case where the court grants an ex parte injunction the applicant shall within three days from the date of issue of the order serve the order, the application and pleading on the party sought to be restrained. In default of service of any of the documents specified under this rule, the injunction shall automatically lapse.*

### **Immaculate Wambia Mungai v Fredrick Mwai Mwhia [2017] eKLR.** The high Court held;

**Secondly, under Order 40 Rule 4 (3) of the Civil Procedure Rules, once the Court grants an ex-parte injunction, the order shall be served upon the other party “within three days from the date of issue of the order”. Order 50 Rule 8 of the Civil Procedure Rules which deals with computation of time reads as follows:-**

**“In any case in which any particular number of days not expressed to be clear days is prescribed under these Rules or by an order or directions of the Court, the same shall be reckoned exclusively of the first day and inclusively of the last day”.**

**Similarly, it is clear that under Order 50 Rule 2 of the Civil Procedure Rules, only Sundays, Christmas Day, Good Friday and any other public holiday are excluded in computation of time where the period for doing anything is less than six days. The injunction herein was granted Ex-parte on 8th February 2016 and the order issued by Deputy Registrar on 11th February 2016. When 14th February 2016 which is a Sunday is excluded, it is clear that the three days within which the order should have been served upon the defendant expired on 15th February 2016 which was the third day. That order, as is clear from the affidavit of the process server was served upon the defendant on 16th February 2016 one day after the day on which it ought to have been served as provided by the Rules. As was held by the Court of Appeal in NICHOLAS SALAT VS I.E.B.C &**

OTHERS 2013 e K.L.R

*“This Court, indeed all Courts, must never provide succor and cover to parties who exhibit scant respect for rules and timelines. Those rules and timelines serve to make the process of judicial adjudication and determination fair, just, certain and even-handed. Courts cannot aid in the bending or circumventing of rules and shifting of goal posts for, while it may seem to aid one side, it unfairly harms the innocent party who strives to abide by the rules”.*

The Supreme Court of Kenya has also in the case of ZACHARIA OKOTH OBADO VS EDWARD AKONG’O OYUGI & OTHERS (2014) e K.L.R emphasized that Article 159 of the Constitution is not a panacea for all procedural shortfalls and is applicable on a case by case basis.....

It follows therefore that the order for injunction issued on 11th February 2016 “*automatically*” lapsed on 15th February 2016.

Jason Sore Shikuku v Christopher Naibey Chemengu [2018] eKLR. The high Court held;

Indeed, there is no evidence that the said ex-parte Orders were ever served upon the defendant as mandated by Order 40 Rule 4(3) of the Civil Procedure Rules.

Those Orders therefore lapsed automatically by effluxion of law three days after they were issued. An order that has lapsed ceases to exist and cannot be the basis upon which any contempt proceedings can be founded.

Wanjala Mining Company Limited v National Land Commission & 3 others [2017] eKLR. The high Court held;

All the defendants/respondents argue that because the order was not served within 3 days as is required under Order 40 rule 4(3), the order automatically lapsed. I do agree with the provisions of this rule entirely. However in the spirit of article 159 of the Constitution and the overriding objectives of the Civil Procedure Act together with case law, this rule must be applied while taking into account the circumstances of each case.

As per the above binding and persuasive cases, the courts have held view that failure to serve the ex-parte order within 3 days, the orders automatically lapses. However the case of Wanjala Mining Company, the court considered Article 159 of the Constitution and the overriding objectives of Civil Procedure Act.

In this case, the interim orders herein were granted pending inter-partes hearing on 19/07/2018 but was issued by the Deputy Registrar on 27/07/2018. According to **Order 40, rule 4 (3) of the Civil Procedure Rules** the order is to be served within 3 days of date of issue, therefore the same ought to be served on 01/08/2018 excluding Sunday. The affidavit of service indicates it was served on 02/08/2018 and which is 4 days after being issued.

The applicant herein did not give any explanation for the delay in serving the order. The order had lapsed at the time it was served and a party failing to obey such an order cannot be held in contempt of court order. Based on the fact that this court had not jurisdiction and the order had lapsed, I find that the application lacks merits and is dismissed with costs.

I also direct that the matter be transferred to Environment and Land Court for hearing and determination.

**Dated at Kerugoya this 22<sup>nd</sup> November 2018.**

**L. W. GITARI**

**JUDGE**