



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KAKAMEGA**

**SUCCESSION CAUSE NO.488 OF 2013**

**IN THE MATTER OF THE ESTATE OF ABDALLA WESONGA MUKHWANA ALIAS  
WESONGA MUKHWANA – DECEASED**

**RAMADHAN FIBANDA WESONGA ....PETITIONER/APPLICANT**

**VERSUS**

**1. MOHAMMED MUMALI MUNYENDO.....RESPONDENT**

**2. HESBON MAKANI.....RESPONDENT**

**3. JORAM RAPANDO NAMBANYA.....RESPONDENT**

**4. ERIC WASHIOYA RAPANDO .....RESPONDENT**

**R U L I N G**

**The Application**

1. The application for determination is the Notice of Motion dated 14<sup>th</sup> September 2015 brought pursuant to Section 47 of the Law of Succession Act Cap 160 Laws of Kenya. The applicant seeks for orders as follows:-

1. THAT ERICK WASHIOYA RAPANDO be enjoined in this case as the 4<sup>th</sup> Respondent.

2. THAT the Respondents herein be held to be in disobedience of the Honourable Courts order given on 25.11.2014.

3. THAT an order of committal to prison be made against the Respondents herein for such a period as this Honourable Court may deem just for the disobedience of its order issued on 25.11.2014.

4. THAT in the alternative to prayer 3 above the respondents be fined for the said contempt.

5. THAT costs be provided.

2. The application is based on the grounds set out on the face thereof and supported by the affidavit of the applicant herein. Briefly the applicant depones that he obtained an order on the 25.4.2014 restraining the respondents from interfering in any manner with L.R. EAST WANGA/ISONGO/1240 pending the finalization of this cause. That he served the said order upon the respondents but the 1<sup>st</sup> respondent has gone ahead and constructed houses on the said land and now occupies and lives thereon.
3. He further claims that the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents have encroached on the said land and have ploughed, planted crops and dug terraces thereon and are continuing with such action. He adds that his house was stoned by the respondent who broke windows and also destroyed trees and crops. That he made a report at Shianda Police Station vide OB No.7/6/2015. ERICK WASHIOYA RAPANDO is the son to the 3<sup>rd</sup> respondent and the applicant wants him enjoined in these proceedings. He maintains that the respondents are in contempt of the Court orders.

### **Response to the Application**

4. The application is opposed. The respondents have filed various replying affidavits. JORAM RAPANDO NAMBANYA in his affidavit states that he occupies land parcel number EAST WANGA/ISONGO/1239 which is separate from the suit land herein. He claims that the applicant's trees and crops were destroyed at the behest of the Mumias East Assistant Deputy County Commissioner and that he has not intermeddled with the deceased's estate EAST WANGA/ISONGO/1240 as alleged or at all.
5. He adds that he was not served with the Court order of 13/1/2015. He also contends that this matter is not properly before the succession Court and that the dispute relating to the access road is a matter pending before the Environment and Land Court in Civil Case No.102 of 2015. He wants the application herein dismissed.
6. HESBON NATSE MAKANI also filed a replying affidavit wherein he denies intermeddling with Land Parcel No.EAST WANGA/ISONGO/1240. He claims to occupy land parcel No.EAST WANGA/ISONGO/1238 where he does sugarcane farming. He also claims that he was not served with any Court orders and that he sold the suitland EAST WANGA/ISONGO/1238 to a third party.
7. ERICK WASHIOYA RAPANDO filed a replying affidavit in which he depones that he occupies land parcel No.East Wanga/Isongo/1239 which is distinct and separate from the suit property. He denies that he has intermeddled with land parcel No. East Wanga/Isongo/1240 and adds that the applicant's trees and crops were destroyed by the Mumias East Assistant Deputy County Commissioner when he was opening access road between the suit property and their land. He also claims that he was not served with the order of 13/01/2015.

### **Submissions and Analysis**

8. Parties canvassed the application herein orally. Having considered the affidavits on record and the submissions by Counsel this Court will first deal with the issue of contempt and committal to civil jail.
9. Section 5 of the judicature Act provides as follows:

**“5(1) The High Court and the Court of Appeal shall have the same power to punish for contempt of Court as is for the time being possessed by the High Court of Justice in England and that power shall extend to upholding the authority and dignity of subordinate Courts.”**

On the other hand Section 63( c) of the Civil Procedure Act provides that:

**“63) In order to prevent the ends of justice from being defeated, the Court may, if it is so prescribed:-**

**( c ) 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. “Pursuant to**

Section 63 ( c ) of the Civil Procedure Act, Order 40 Rule 3 (1) of the Civil Procedure Rules applies where the breach relates to orders of an injunctive nature.”

10. In this particular case the Court issued an order of injunction on 15/11/2014 with regard to L.R. No.EAST WANGA/ISONGO/1240 restraining the respondents from intermeddling. The respondents maintain that they were not served with the said order and that it was the Mumias East Assistant Deputy County Commissioner who committed the alleged acts of interference when he was opening an access road between the suit property and the adjacent property. They have all claimed that they live in different land parcels from the one mentioned by the applicant and that they are just neighbours. There is a letter from the District Surveyor/Kakamega which the Respondents have annexed and which shows that there was demarcation of boundaries.
11. The issue now is whether the respondents were served with the orders of 15/10/2014 and whether they had knowledge of the said order. There is an affidavit of service by FRANCIS L. OMIRE wherein he claims to have served the Respondents by the help of the Applicant and D.O's clerk. Although the affidavit of service is not very clear, I find that the respondents had knowledge of the said order. See Lenaola J's holding in the case of **Basil Criticos –vs- Attorney General & 8 others 2012 e KLR** where he stated that “the Law has changed and as it stands today knowledge supersedes personal service.... Where a party clearly acts and shows that he had knowledge of a Court order, the strict requirement that personal service must be proved is rendered unnecessary.”
12. From the foregoing, I find and hold that the respondents had knowledge of the Court order. However, it is not established that they indeed disobeyed the order. The evidence on record shows that there was some work being undertaken by the Ministry of Lands through the District Surveyor. It cannot therefore be said with any degree of certainty that it is the respondents who committed the acts of interference complained of by the applicant. This being the case, the issue of contempt and committal to civil jail does not arise. Prayer 2 of the application therefore fails as the evidence does not meet the threshold for disobedience. In the same vein, prayers 3 and 4 of the application also fail.
13. Regarding prayer 1 of the application, I note that the same is not opposed. Accordingly the order is granted as prayed and Erick Washiya Rapando is now enjoined as 4<sup>th</sup> Respondent to these proceedings.
14. Lastly this Court notes that there is another suit being ELC Civil Case No.102 of 2015, pending before the Environment and Land Court. In my considered view, it would be in the interests of justice for any future applications touching on the various parcels of land to be filed before the said land Court. This will definitely forestall confusion over land issues between and amongst the parties herein.
15. For the above stated reasons, this Court finds no merit in the instant application save for prayer 1 thereof.
16. Orders accordingly.

**Ruling delivered, dated and signed in open Court at Kakamega this 29<sup>th</sup> day February 2016.**

**RUTH N. SITATI**

**J U D G E**

In the presence of:

Mr. Masheti (present) for Applicant

Mr. Namatsi (absent) for Respondents

Mr. Lagat - Court Assistant