



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

MATRIMONIAL CAUSE NO. 10 OF 2015

A W M.....PLAINTIFF

VERSUS

L W M.....DEFENDANT

RULING

1. INTRODUCTION

This Ruling is in respect of the application dated 3rd November, 2015.

The Orders sought are:-

a) Spent.

b) That this Honourable Court be pleased to cite the defendant for contempt of court and to be committed to Civil jail for a term of six months.

c) That in the alternative, this court do order that the property of the second defendant herein be attached due to the defendant's disobedience of the orders of court given on 10th October, 2014.

The application is opposed and a replying affidavit by the defendant is on record.

2. THE APPLICANTS CASE

In a nutshell, the Applicants case is that on the 21st October, 2014 the court granted interim orders of injunction in favour of the plaintiff.

The orders were served on the defendant as well as on other parties whom the court ordered to be served. Those orders restrained the defendant from selling, disposing of or adversely dealing in any other way with plot No. UNS. Commercial Plot [particulars withheld], PLOT No. [...] situate in Njoro Township and motor vehicle registration No. [...].

It is urged that in-total disregard of the orders the defendant has dealt with plot No. 91 above by commencing construction thereon.

A letter by the applicants Advocate to defendant Counsel advising him on the legal dealings is exhibited. The Act by the defendant/Respondent is contemptors and he should be punished.

3. THE RESPONDENT'S CASE.

The respondent in a replying affidavit sworn on 7th December, 2015 depones that he has not breached the orders of court. He denies service of the order on himself. He states that he has had communication problems with his erstwhile Advocates on record. He states that plot No. [...] Njoro Jua Kali was sold on 1st January, 2012 and the proceeds thereof were used to develop Plot No. [particulars withheld], at Njoro. A sale agreement is exhibited.

It is urged that the injunction orders were issued after the sale. He further avers that his erstwhile Advocates advised him that since there was in existence a suit being CMCC. NO. 773 of 2009 over Plot No. [...] Jua Kali Njoro, the injunction could not issue. He has since changed Advocates after realizing he was not getting proper legal counsel.

4. THE APPLICANTS SUBMISSIONS.

Counsel for the applicant has in written submissions stated that the Respondent was served as seen in annexure "AWMI" in the supporting Affidavit. The Respondent was in court when the order was given.

The respondent was represented and as such he could not have been legally served with the orders. Though not personally served, he had knowledge of the order.

I am referred to the decision in *Africa Management Communication International Limited -vrs- Joseph Mathenge and Another (2013) eKLR.*

The sale agreement in respect of Plot 91 is challenged on ground that if it existed, it ought to have featured in the application for injunction.

It is submitted that the evidence of photographs prove there is construction on site and therefore a breach of the court order.

The Applicant prays that prayer (b) of the application be allowed. The court is urged to order stoppage of construction and that the respondent be condemned to pay costs.

5. THE RESPONDENTS SUBMISSIONS.

Counsel for the respondent maintains that he (the respondent) did not have notice of the order complained of. The respondent's erstwhile Lawyers are blamed for ineffective communication with the respondent. It is supported that the defendant was not in court on the many instances the application for injunction came up for hearing.

Emphasis is laid that the land in question had been sold before orders were given. It is urged that the orders issued were in vain. The court was misled.

6. ISSUES FOR DETERMINATION.

The issues for determination are:-

- (a) Whether the Respondent was served with the court orders in question.**
- (b) Whether in the alternative the Respondent had knowledge of the order.**
- (c) What is the place of the purported earlier sale of the suit land in the present application.**
- (d) Was the order disobeyed.**
- (e) What sanctions are available if (iv) above answers in the affirmative.**

7. ANALYSIS AND DETERMINATION.

As held in the case of ***Teachers Service Commission -VRS- Kenya National Union of teachers & 2 other (2013) eKLR***. The reason why courts punish for contempt of court then is to safeguard the rule of law which is fundamental in the administration of justice. It has nothing to do with the integrity of the Judiciary or the court or even the personal ego of the presiding Judge. Neither is it about placating the applicant who moves the court by taking out contempt proceedings. It is about preserving and safeguarding the rule of law.

I may add that whatever contrary view a party may have over orders issued by a court of law, they must first be obeyed before a legal challenge is mounted as provided for in Legal procedures of review, setting aside or appeal. For a party to be found guilty of contempt service or knowledge of the existence of the orders is paramount.

The courts have developed the Law progressively departing from the long held view that personal service was a must for contempt of court to be. In the case of ***Basil Criticos -VRS- Attorney General*** this court (Lenaola Judge) had this to say,

“.....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.”

In our instant suit, was the Respondent served with the order? There is no evidence offered to show personal service on the respondent. Indeed it is conceded that there was no personal service on the respondent. The explanation given is that since he had Counsel it was not legally necessary that he served personally. It is stated from submission that the Respondent was present when Ruling was delivered. This, of course, is an averment from the bar whose probative value as evidence is questionable.

Which moves me to the next question; did the defendant have knowledge of the existence of the order?

As stated above, the law as then was in contempt of court has since changed. The law as it stands today is that knowledge of an order is sufficient for purposes of contempt proceedings.

And what then does knowledge constitute?

The court of Appeal has in the recent past had the opportunity to deliver itself on this issue in the case of ***Shimmers Plaza Ltd -VRS- National Bank Of KENYA LTD (2015) eKLR*** where the court stated that notice of an order is satisfied if the person or his agent can be said to either have been present when the Judgment or order was given or made, or was notified of its terms by telephone, email or otherwise. In the courts view otherwise would mean any other action that can be proved to have facilitated the person having come into knowledge of the terms of the Judgment or order. This would definitely include a situation where a person is represented in court by Counsel.

In the instant case, the subject Ruling giving rise to the order in question was delivered on the 10th October, 2014.

The record of court shows the appearances as;

Ms Mukira for the plaintiff

Mr. Ndungu Njuguna holding brief for Mr. Githui for the defendant.

The respondent herein was thus represented by his agent in court. He cannot thus be heard to feign ignorance of the existence of the court order. Indeed, Counsel for the Applicant followed up the matter upon notice that the court order had been disregarded by writing to Counsel for the Respondent on the 9th October, 2015 seeking that the Respondent desists from such disobedience of the orders of court.

Apparently, this call too went unheeded. This letter buttresses the fact of notice on the respondent about the existence of the court order.

In light of the foregoing, the protestations by the respondent about service or lack of it cannot stand. He had knowledge of the order and that was sufficient. The alleged poor communication with the erstwhile Advocates is vague and unsubstantiated. In my view it is a red herring to avoid consequences of his willful act.

Was the suit premises sold before the application for injunction was filed? This is obviously a matter that should have been raised at the hearing of that application.

There is no evidence that it was raised before the trial court and even if it was raised, the court addressing itself on the material before it found that the parameters for issuance of an injunction had been met.

The respondent cannot successfully raise this issue in the application before me. He would be better advised to reserve his energies to ventilate that issue during the full hearing of the matter as the same is not useful in this application as am not re-hearing the application for injunction.

Was there disobedience of the court order? This answers the in the affirmative. There is evidence in form of photographs showing construction work going on. Indeed, the Respondent does not deny construction work is ongoing on site but he unsuccessfully attempts to explain it away. It was his duty to ensure that he or anyone claiming through him obeyed the court order until the same was reviewed, set aside or successfully appealed against.

DETERMINATION

From the foregoing, the applicant's notice of motion dated 3rd October, 2015 is wholly successful and is allowed. I find the Respondent guilty of contempt of Court for disobeying the order made on 10th October, 2014. He is hereby committed to Civil Jail for six months effective immediately or as soon as he is apprehended if not present in court today.

The respondent shall bear the costs of this application.

Dated, signed and delivered in open court at Nakuru this 29th day of September 2016.

A. K. NDUNG'U.

JUDGE.