



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

LAND 226 OF 2013

CHARLES GUYA APOME.....PLAINTIFF

VERSUS

ANTONE OCHICH APIYO.....DEFENDANT

RULING

1. This ruling follows interpartes hearing of the application filed and dated 11/11/2013. The application is a Notice of Motion brought under Order 40 Rule 3 of Civil Procedure Rules, Sections 1A,1B and 3A of Civil Procedure Act (Cap 21), and article 159 of the Constitution of Kenya. Two prayers are sought as follows:-
 - (i) The defendant/Respondent be cited for contempt, and be detained in prison for a term not exceeding six (6) months for disobeying the order of injunction issued herein.
 - (ii) Costs of this application be provided for.
2. Various grounds are advanced for the application. The defendant/Respondent was said to have been served with the injunctive order issued on 18/9/2013; despite this however, he continued with construction of his house on land parcel NO. **SOUTH GEM/KANYANDET/78**. This is said to erode the dignity of the court and punishment for contempt is required for the fair administration of justice.
3. The supporting affidavit accompanying the application states, inter alia, that the order issued restrained the defendant/respondent, by himself, servants, agents or proxies from occupying, entering, remaining on, developing or in any way using or interfering with plaintiffs/applicants access into, peaceful possession, user and enjoyment of land parcel No. **SOUTH GEM/KANYANDET/78** or any portion thereof pending interpartes hearing of the pending application for injunction. The order was served on 19/9/2013 and following that the defendant/respondent sought services of counsel to represent him.
4. Thereafter, a replying affidavit was filed and the defendant/Respondent admitted occupation of land parcel **SOUTH GEM/KANYANDET/78** (Suit land hereafter). He also deponed to having constructed a house which had reached "**Linton Stage**". The plaintiff/Applicant photographed the house under construction at the point it was said to have reached "**Linton Stage**". He expected construction to stop there but the construction continued. Some photographs were availed showing the latter stages of construction.
5. The orders issued were extended on 1/10/2013 in presence of the defendant and his counsel and have been extended several times thereafter.
6. The defendant/Respondent filed a replying affidavit on 25/11/2013. He said, inter alia, that the suit land is ancestral land and he has always occupied it. He said that by the time the order was issued,

- he had constructed a house which had reached “**Linton stage**” and the roof had been put up. The orders are said to be ambiguous and meant to evict him from the suit property. He also said he complied with the order as no further construction of the house was carried out.
7. The defendant/Respondent said the order was not extended on 1/10/2013 by the time his counsel left the court on that day. He also averred that an *ex parte* order has a lifespan of 14 days and can only be extended once with consent of both sides. According to the defendant, if the orders were extended on that day, there should have been notification of that to either him and/or counsel.
 8. The defendant/Respondent also took issues with the photos availed as annexures saying that it is not clear when they were taken.
 9. The court heard the application *inter partes* on 26/3/2014. Orengo for the plaintiff/Applicant emphasized that the order was served and was extended in presence of the defendant and his counsel on 1/10/2013. Orengo also pointed out that the defendant, in reply to the earlier application for restraining orders, stated to have constructed a house that had reached “**linton stage.**” The defendant however continued with construction even after service.
 10. The defendant's counsel, Odoyo, argued that by the time the defendant/Respondent was served with the order, the house under construction had reached “**Linton stage**” and the roof had also been put up. Odoyo also said that the order was not served on the defendant/Respondent personally as the law requires in this type of application. The order is said to be ambiguous because of seeking to restrain occupation when the defendant/Respondent was already in occupation. A lot more was said by Odoyo but it all echoed what I have highlighted as contents of the replying affidavit.
 11. The defendant/Respondent availed the following decided authorities:

(a) **JOSEPH MWANGI IRUNGU VS GEOFFREY MWANGI WACHIRA: HCC NO.2/1990, NYERI**

(b) **OLIVIA MARIGO VS MWANIKI WAMICI & 2 OTHERS: HCC: MISC NO.22/08, EMBU**

(c) **CATHERINE MUTHONI IRERI VS GEORGE MWAURA KIBUI: HCC NO.1032/03**

12. I have read the authorities availed. It seems to me that in the case of **JOSEPH MWANGI IRUNGU**, the application failed because the proper procedure was not followed. The court observed “**the plaintiff's application is therefore defeated by failure to abide by the laid down procedure as provided in Section 5(1)**” (of Judicature Act). The **OLIVIA MARIGU**'s case cited many flaws. The order complained of was not annexed to the application and the court observed that that was a serious omission. The Court also emphasized that the very nature of contempt of court proceedings requires that the order disobeyed be a proper court order and proof be availed that it was personally served on the alleged contemnor. In the case, evidence of extension of the order, which had been issued *ex parte*, was lacking. In Catherine Muthoni's case, the court observed that the photographs availed did not show the construction complained of as very new as alleged by the applicant. And there was contradictory information concerning the stage of construction at the time the orders were issued.
13. It appears to me that the issues here have to do with service, extension, and ambiguity of the order. The other concern is the stage of construction of the house at the time of alleged service and the import of photographs availed to show various stages of construction.
14. The court has to address these issues but before then, some background is necessary. The application herein is an off-shoot of an earlier application for restraining orders filed contemporaneously with a suit filed on 3/9/2014. The court issued restraining orders *Ex parte* on the basis of the earlier application. The present application arises from alleged violation of these orders. The parties to the tussle are **CHARLES GUYA APOME** as Plaintiff/Applicant while **ANTHONY OKACH APIYO** is the defendant/Respondent.
15. Background over, it is now apt to look at the issues. The first issue is service. According to defendant/Respondent, the service should be personal and in this case it was not. True, given the serious nature of contempt proceedings, the law has always insisted that service should be effected personally on the alleged contemnor. But there is need to go further and ask: why this requirement? I think this requirement is necessary because of the need for effectiveness and

- certitude of service. The proceedings can lead to deprivation of liberty. Personal service is emphasized to ensure that there is no doubt as to whether service reached the alleged contemnor. Personal service is not therefore insisted on for the sake of it. Then a question arises: Suppose a different kind of service is able to ensure the attainment of the same requirements? Would an alleged contemnor go scot-free because such service was not personal service? If one wants to be merely legalistic and insist on procedure, the answer to this question is YES. But if one considers that the guiding consideration should be the attainment of the objectives, then the answer is no. I subscribe to this second view. What matters is the certainty that the alleged contemnor was served, not blind insistence on personal service. This, though, is not to de-emphasize personal service but rather to assert that another service that attains the same objectives is acceptable.
16. In this matter, it is clear the defendant/Respondent was served. The process server set out to effect personal service on the defendant/Respondent but, upon not finding him, served the mother. It is clear that the defendant/respondent was served because he made responses both to the main suit and to the application without delay. Among the documents served was the order complained of here. I therefore reject the arguments trying to fault service in this matter.
 17. There is the issue of extension of orders. According to counsel for the defendant, the matter came up in court on 1/10/2013 and by the time he left, the orders had not been extended. The plaintiff's counsel however said that the orders were extended in presence of both the defendant and his counsel. Court records bear out the plaintiff's counsel. The record shows clearly that both the defendant and his counsel were present and the orders were extended. I am unable to believe the defendant's counsel. I choose to go by court records. That being the position, I see no point in the assertion by Odoyo that the defence should have been notified of the extension.
 18. Odoyo talked of the ambiguity of the order served. The ambiguity, he said, consisted in restraining occupation when the defendant was already in occupation. This assertion is flawed and cannot amount to ambiguity. Ambiguity consists in an order having unclear meaning or lending itself capable of different interpretations. The order served was clear and it restrained the defendant from among other things, developing the suit land. There is no denying that construction is development. I am therefore unable to agree with the defendant's counsel.
 19. Let's now look at the stage of construction and the photographs available. The defendant avers in his replying affidavit to this application that by the time service was allegedly effected on his mother, construction had reached "Linton stage" and the roof had been put up. But a look at paragraph 23 of his replying affidavit to the application for injunction shows that construction had reached the "**Linton stage**". This same position is repeated at paragraph 21 of his defence. Both these documents were filed on 26/9/2013, about one or so weeks after service. The replying affidavit to this application was filed on 25/11/2013. It is obvious that it was filed after the present application for contempt had been served. It is not surprising that the defendant ingeniously tries to change the position. According to him, the house was now at the "Linton stage" with the roof up. But it should be plain to any discerning mind that the defendant now has the benefit of hindsight. He plays the clever dick by introducing the aspect of roofing. I must say that the defendant's argument is not persuasive and I am therefore unable to believe it.
 20. Together with the issue of construction are the photographs available as proof of progressing construction. The defendant's main argument is that it is not clear when they were taken.

I have looked at the photographs. It is true that one cannot tell the exact dates they were taken. But one needs to observe that photographs do not usually contain dates or other period – indicating information. It is necessary to appreciate that photographs are not meant to be stand-alone evidence. Their evaluation therefore must go hand in hand with the other information available. There are four photographs available. One (GGA-2) shows the house under construction at the "**Linton Stage**". The other (GG-3a) shows the house with roofing timber put in place and the third one (CGA-3b) is not very much different. The final one, which is the fourth (CGA 3(c)) shows the house already roofed with iron sheets.

21. When the plaintiff came to Court, the defendant's house had reached the "**Linton stage**" and the defendant's own defence is indicative of the fact. The other stages obviously came later when the restraining order was already in force. I assert here the restraining order was in force because it was given even before the defendant's defence, which shows the stage of construction, was filed. The argument about photographs is therefore unhelpful.

22.I need to say something about my appreciation of the authorities availed by the defendant. There is Mwanga Irungu's case. I observed that it failed because the correct procedure was not followed. The issue of procedure does not arise here. Neither side has raised it. The application concerns an issue covered by Order 40 of Civil Procedure Rules, 2010, and reinforced by the other law invoked by the plaintiff. This decided authority is therefore not relevant to this case.

23.**OLIVIA MARIGU**'s case is one that was faulted because of the applicant's failure to annex the order complained of. The court also emphasized that the order must be proper and be personally served. I have already expressed myself on the issue of service. I hasten to add that the order herein was proper and the same was served on the defendant. That authority is not therefore on all fours with the matter at hand. The final authority – Catherine Muthoni's case – revolved around the relevance of availed photographs as the main issue. It seemed to me that the applicant had alleged the construction as new while the photographic evidence availed showed a different thing. In addition, credibility as to the stage of construction lacking.

24.The matter at hand is different. The pictures show a new construction. The plaintiff has not alleged that the construction was old. And there is no contradiction as to the stage of construction. It is clear the construction was at “Linton stage” when the order was issued. The decided authority also is not one that can appropriately apply here.

25.I now need to state the final position. Given the foregoing, it is clear that the plaintiff/applicant has shown well that the defendant/Respondent is in contempt. Court orders must be obeyed. A wilful or intentional violation, as seems to be the case here, is an affront not only to court's dignity but also to the rule of law. The plaintiff/Applicant has met the standard of proof required. I allow the application but reserve the penalty to be imposed until the appearance of the defendant in court.

A.K. KANIARU – JUDGE

29/1/2015

29/1/2015

A.K. Kaniaru – Judge

Diang'a G – Court clerk

No party present

Orengo M. for Plaintiff

Anyul for Odoyo for defendant

COURT: This is an application for contempt. The presence of the parties is necessary. Let counsels tell the parties to come. Ruling on 5/2/2015. I have signed the ruling today because I thought parties were present. I will sign it again when the ruling is delivered.

A.K. KANIARU – JUDGE

29/1/2015