

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

ELC. NO. 181 OF 2014

MWANAHAMISI IDD MWACHANYUMA.....PLAINTIFF

- V E R S U S -

1.HASHUM SALIM AWADH

2.PHILIP NGUGI MUCHEMIDEFENDANTS

RULING

1. The application dated 1/12/2014 is brought under order 40 rule 3 and Order 51 of the Civil Procedure Rules and Section 1A, 1B and 3A of the Act plus all enabling statutes. The applicant seeks to have the 2nd defendant committed to jail and all structures put up by the said defendant on plot no. Kwale/Diani Beach Block/902 demolished and removed at their cost. The motion is supported by the grounds on the face of it and the affidavit of Mwanamisi Iddi Mwachanyuma together with all the annexures thereto.

2. The applicant argues that the defendants have disobeyed the order of this court issued on 14th November 2014 which order was a stay of execution of the decree for 21 days. The order was made in the presence of the parties and their advocates. On 19.11.2014 the applicant contends that the 2nd defendant commenced fencing and construction on the suit plot in contravention of the order which is a deliberate act of disobedience and ought to be punished as requested for in the application. The applicant submits further that the defendant has not denied he is in contempt. Lastly the applicant submits that the respondent ought to have come back to court for interpretation of the order if he was not sure of its meaning. He urged the court to allow the motion.

3. The 2nd defendant has denied being in contempt and filed a replying affidavit to oppose the motion. It is his case that there can be no stay of negative orders such as dismissal and that the order of stay of negative orders such as dismissal and that the order of stay reverted the parties back to the position before filing of the suit. In support of this submission he cited **Nguruman Limited vs Shompole Group Ranch & Another (2014) eKLR**. In the 2nd defendant's view, the stay could only operate against execution of costs. Further the photographs taken are undated so you cannot know/tell whether they were taken before or after the order. He submitted that the applicant has not proved his case within the standards required and urged the court to dismiss the motion with costs.

4. The brief background of this matter is; Mukunya J. dismissed the applicant's suit and the pending application on 14/1/2014 for being res judicata and a clear abuse of the court process. Immediately on delivery of that ruling Mr. Asige for the plaintiff applied orally for leave to appeal and stay of execution before filing a formal application under order 42 rule 6. The court on this application granted stay order for a period of 21 days for Mr. Asige to consider his further options in the matter. The question therefore is what was stayed? Mr. Asige's submission take a view that the stay re-instated the earlier orders of injunction that were in force before dismissal therefore none of the defendants ought to carry out any activities on this land as contained in paragraph 5 of the affidavit in support of the motion.

5. Mr. Onyango on his part submitted that stay orders cannot be issued in case of negativity and the only

thing that could be stayed is execution of costs. In the case of **Nguruman Ltd** *supra*, the Court of Appeal at page 23 stated that there was no possibility of the bench before them granting stay order to stay the negative order of G. B. M. Kariuki which would result in them staying the orders of Ang'awa J. without jurisdiction. Under order 42 quoted by the applicant in seeking temporary order of stay, the purpose is to stay execution of a decree which if executed would result in substantial loss to the appellant or render the appeal nugatory. In this instance, once the suit was dismissed, was there a decree capable of being executed to the detriment of the applicant?

6. In my understanding and interpretation of the order of 14th November 2014, it did not restore the temporary orders of injunction that were in force before the dismissal of the suit. I say so because the judge could not stay his order dismissing the application and the suit. If that were the case, then there would be no decree capable of being executed. Once the order struck off the application, there ceased to exist any temporary orders in this matter that could be extended or re-instated by a stay order. Consequently what could be executed from such a decree as submitted by the respondent is only cost. I agree with the respondent's submission that you cannot issue a stay in circumstances where the decree is negative. The parties in this case reverted to the position they were in before this suit was filed for as long as the dismissal order has not been set aside or varied.

7. The other question is whether the alleged contempt was proved. The applicant annexed photographs of the building under construction in flagrant breach of the orders of stay. The applicant also said he wrote to the respondents through their advocates warning them to cease being in contempt of the order of the court. The 2nd respondent on his part submitted the photographs were undated therefore they cannot be said to have been taken before or after the order of 14/11/2014 was issued. I have seen the photographs of the applicant which shows that indeed there are works on going. It is also not disputed that the photographs are undated. The applicant however failed to disclose whether the 2nd respondent personally undertook the construction work or his source of information who stated the construction was being undertaken under strict instructions of the 2nd respondent. The order complained of was issued against two defendants. The order to punish for contempt is against the 2nd respondent only. It was prudent on the part of the applicant to prove that the actions were being undertaken specifically by the 2nd defendant. This has not been done.

8. Further the photographs were not dated so the 2nd respondent is right to submit that you cannot tell whether they were taken before or after the issuance of the order. Since contempt proceedings have a criminal element, before punishing a person proof must be above the standard in civil cases and in case of doubt as in the present scenario, the doubt is decided in favour of the respondent. In conclusion, I find this motion must fail for the dual reasons that you cannot issue stay of execution of a negative order and the lack of proof of disobedience of the order by the 2nd defendant/respondent. The same be and is hereby dismissed with costs to the respondent.

Dated and delivered in open court at Mombasa this 17th day of April 2015.

A. OMOLLO

JUDGE