



**REPUBLIC OF KENYA**

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

**ENVIRONMENT AND LAND CIVIL CASE NO. 149 OF 2008 (OS)**

**IN THE MATTER OF LIMITATION OF ACTIONS ACT, CAP 22 OF THE LAWS OF KENYA**

**AND**

**IN THE MATTER OF REGISTERED LAND ACT, CAP 300 OF THE LAWS OF KENYA**

**AND**

**JEREMIAH ONSARE SOIRE ..... APPLICANT**

**VERSUS**

**DANIEL A. SOSI MAINA .....1<sup>ST</sup> RESPONDENT**

**DAVID FELIX OMAE ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. What is before me is the applicant's application by way of Notice of Motion dated 2<sup>nd</sup> February 2015 in which the applicant is seeking an order to commit the 2<sup>nd</sup> respondent to civil jail for disobeying this court's order for the maintenance of status quo that was given on 15<sup>th</sup> December 2008, and in the alternative, an order that the 2<sup>nd</sup> respondent be condemned to pay a fine of Kshs. 300,000 for the damage and wastage caused on LR No. West Kitutu/ Bomatara/1756 (hereinafter also known as "the suit property") and for his property to be attached.
2. The application is supported by the applicant's affidavit sworn on 2<sup>nd</sup> February 2015 in which the applicant has deposed that on 15<sup>th</sup> December, 2008 this court made an order that the parties herein do maintain the status quo in relation to the suit property pending the hearing and determination of this suit. The applicant has stated further that he visited the suit property on 29<sup>th</sup> January, 2015 and found out that the 2<sup>nd</sup> respondent had sold the suit property to a third party who had put up a structure thereon and a fence contrary to the said order of status quo. The applicant has contended that court orders are not issued in vain and as such the 2<sup>nd</sup> respondent should be punished for disobeying the said order of 15<sup>th</sup> December, 2008 and stopped from doing any activity on the suit property until the suit herein is heard and determined by this court.
3. When the application came up for hearing on 23<sup>rd</sup> March 2015, Mr. Sagwe, advocate who appeared for the 2<sup>nd</sup> respondent asked for more time to take instructions from the 2<sup>nd</sup> respondent to enable him respond to the application. Following that request, the 2<sup>nd</sup> respondent was granted 14 days within which to file a replying affidavit to the applicant's application. When the matter came before me again on 10<sup>th</sup> June 2015 for hearing, the 2<sup>nd</sup> respondent's advocates did not

appear. They had also not filed a replying affidavit in response to the application pursuant to the leave that had been granted by the court on 23<sup>rd</sup> March, 2015. Since the hearing date was taken by consent, I allowed the applicant's advocate to proceed with the application in the absence of the 2<sup>nd</sup> respondent and his advocates notwithstanding. The applicant's advocate Mr. Anyona relied entirely on the applicant's affidavit in support of the application and urged the court to grant the orders sought.

4. The law on contempt of court is now fairly settled. The onus was upon the applicant to prove the elements of contempt complained of. The proof required is above a balance of probability but not beyond any reasonable doubt. See, the holding in the Court of Appeal case of **Mutitika –vs- Baharini Farm Ltd (1985) KLR 227** where the court stated that the standard of proof in contempt proceedings must be higher than proof on a balance of probabilities and almost but not exactly beyond reasonable doubt. The applicant had a duty to prove that; the court did issue an order requiring the parties to maintain the status quo pending the hearing and determination of this suit, the order was extracted and served upon the 2<sup>nd</sup> respondent, the order had a penal notice warning the 2<sup>nd</sup> respondent that if he disobeyed the same he would be liable to be punished by the court and, that the 2<sup>nd</sup> respondent did disobey the said order after service thereof upon him. See, the decision of Seron J. in the case of **Awadh –vs- Marumbu (No.2) [2004] 1 KLR 458**. The applicant did not annex to his affidavit in support of the present application, a copy of the court order of 15<sup>th</sup> December 2008 which the 2<sup>nd</sup> respondent is accused of disobeying and the affidavit of service of the same upon the 2<sup>nd</sup> respondent. These omissions are sufficient to dispose of the applicant's application. I wish however to consider the application on merit.
5. Upon perusal of the court file, I noted that the applicant had brought an application by way of Chamber Summons dated 7<sup>th</sup> November, 2008 on 11<sup>th</sup> November, 2008 in which he sought the following prayers:
  - a. **“That this application be certified as urgent.**
  - b. **Pending the hearing and determination of the application a temporary injunction do issue against the 2<sup>nd</sup> respondent his agents and/or servants and/or family members, from entering into and/or interfering with and/or tilling and/or cultivating and/or erecting any structures and/or planting any crops and/or alienate a portion of land measuring 0.054ha in land parcel West Kitutu/Bomatara/1756.**
  - c. **Pending the hearing and determination of this suit, a temporary injunction do issue against the 2<sup>nd</sup> respondent, his agents and/or servants and/or family members from entering into and/or interfering with and/or tilling and/or cultivating and/or erecting any structures and/or planting any crops or trees and/or alienating a portion of land measuring 0.05ha in a land parcel No. West Kitutu/Bomatara/1756.**
  - d. **That the costs of this application be provided for”.**

The said application came up for hearing before Musinga J. (as he then was) on 25<sup>th</sup> November, 2008 in the presence of the advocates for both parties when the court made the following order:-

**“The application dated 7<sup>th</sup> November, 2008 will be heard on 15<sup>th</sup> December, 2008 at 9.00a.m. The status quo to be maintained”.**

6. When the application came up for hearing on 15<sup>th</sup> December, 2008, Musinga J. did not sit and the matter was placed before the deputy registrar, Kimutai SRM for directions. The said deputy registrar directed that the application be heard on 17<sup>th</sup> December 2008 before the High court and that the status quo be maintained. I doubt whether the deputy registrar had powers to extend the orders of status quo that were made by Musinga J. on 25<sup>th</sup> November, 2008. The issue was however not raised before me and I think that the less said on the same the better. After all, court orders whether irregular or not have to be obeyed unless they are varied or set aside. See, the case of **Hadkinson vs. Hadkinson [1952]All ER 567 at 569**. It is this order of status quo that was made by Musinga J. on 25<sup>th</sup> November, 2008 and extended by Kimutai SRM on 15<sup>th</sup> December,

- 2008 that the applicant claims to have been disobeyed by the 2<sup>nd</sup> respondent.
7. The applicant has claimed that in breach of the said order of status quo, the 2<sup>nd</sup> respondent has sold the suit property to a third party who has put up a structure thereon and fenced off the same. The applicant has annexed to his affidavit in support of the application copies of photographs said to have been taken on the suit property. The photographs show some iron sheet structure put up on an otherwise vacant parcel of land and a barbed wire fence mounted on wooden poles around the said structure. The applicant has contended that the said structure and fence has been put up by the 2<sup>nd</sup> respondent or by a third party with the consent of the 2<sup>nd</sup> respondent.
  8. If indeed these activities have been carried out by the 2<sup>nd</sup> respondent after the order that was made on 25<sup>th</sup> November, 2008 that required the parties to maintain the status quo then the 2<sup>nd</sup> respondent is in contempt of court. This court cannot however find the 2<sup>nd</sup> respondent guilty of such contempt unless it satisfies itself that the said order was served upon the 2<sup>nd</sup> respondent or that the 2<sup>nd</sup> respondent was aware of the same. The applicant has failed to prove either of these scenarios. Although the order seems to have been breached, the conditions for punishing the contemnor have not been met.
  9. In the circumstances, the applicant's application dated 2<sup>nd</sup> February, 2015 must fail. That being my view of the matter, the said application is dismissed with no order as to costs.

**Delivered, Dated and Signed at Kisii this 27<sup>th</sup> day of August, 2015.**

**S.OKONG'O**

**JUDGE**

**In the presence of:**

Mr. Anyona for the applicant

Mr. Abobo for the respondents

Mr. Omwoyo court clerk

**S.OKONG'O**

**JUDGE**