



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUNGOMA
Civil Suit 41 of 2008

IN THE MATTER OF LAND REFERENCE NO.E. BUKUSU/SOUTH NALONDO/661

AND

IN THE MATTER OF SECTIONS 7, 17 AND 38 OF THE LIMITATION OF ACTIONS ACT

AND

IN THE MATTER OF ADVERSE POSSESSION

BETWEEN

GEORGE MASINDE MURUNGAAPPLICANT

~VRS~

BARASA NYONGESA MAMATI.....RESPONDENT

RULING

This is a ruling on an application brought by the Plaintiff/Applicant George Masinde Murunga against the Respondent/Defendant, Barasa Nyongesa Mamati. It is for this honourable court to order the property of the Respondent to be attached and/or the Respondent to be detained in prison for a term not exceeding six months for disobedience of the order of this court issued on 29th July 2008 and confirmed on 10th December 2008. The Applicant obtained an interim injunction order against the Respondent on the 29th July 2008 which orders were confirmed on 10/12/2008. The orders were restraining the Respondent and his agents from encroaching on, cultivating, disposing of or interfering with land parcel no. E.BUKUSU/S.NALONDO/661. The orders were served on the Respondent on 18th August 2008 and on 22nd December 2008. Thereafter the Respondent constructed structures on the suit land in breach of the said orders which prompted the Applicant to file this application.

The Respondent opposed the application on grounds contained in his replying affidavit sworn on 18th June 2009. He deponed that, he was aggrieved by the said orders to evict him from the land together with his family. He further claimed that the orders were obtained on non-disclosure of material facts. He denied that he was served with any order by Caleb Sasita as alleged. He also states that he lives at Kasule Village and not at Nalondo market. He further avers that he has already applied for review of the said orders because he was aggrieved by them. Mrs. Mumalasi for the Applicant and Mr. Situma for the Respondent referred the court to some authorities in regard to the issues in this application. I have looked at the said authorities whose subject is the importance of establishing personal service of court orders. In the case of STALLION INSURANCE COMPANY LIMITED AT MILIMANI COMMERCIAL COURTS CIVIL CASE NO.694 OF 1998 it was held that the applicant must establish that personal service has been effected on the party in breach. In that case, Justice Onyango Otieno set aside an order committing the Applicant to civil jail for disobedience of a court order on ground that personal service was not effected. I am well guided by that decision that

personal service be satisfied before the Respondent is committed to civil jail for contempt.

In the case of MUTITIKA VRS. BAHARINI FARM LTD COURT OF APPEAL AT NAIROBI CIVIL APPEAL NO. NAI. 124 OF 1985 the Court of Appeal held that anyone guilty of disobedience of a court order has obstructed justice and ought to be committed for contempt of court. It was also held that the standard of proof in contempt proceedings must be higher than proof of balance of probabilities. As, I consider the merits of this application, the principles laid down in the decision will also be taken into consideration.

The Applicant has annexed to his application the order issued on the 29th July 2008 and the one confirmed on 10th December 2008. The order restrains the Respondent from cultivating, encroaching, constructing, disposing of and interfering with the applicant's application of parcel no.E. BUKUSU/S.NALONDO/661 until the hearing and determination of this suit.

The affidavit of service by the process server Mayeku Isaac shows that the Respondent was served with the interim order on

19th August 2008 at 1.35 p.m personally. In his replying affidavit, he does not deny the service of this order. The affidavit of service by the second process server Caleb Sasita shows that the confirmed order was served on the Respondent on 22nd December 2008 at 11.00 p.m. It is clearly stated in the affidavit that the Respondent accepted service but refused to sign claiming that he was to contact his counsel on the matter.

The Respondent denies service of this second order and says that he does not live at Nalondo Market but lives at Kasule. The process server explains in candid details that he traveled to Nalondo Village to the home of the Respondent and that he found him there. He talked to him and confirmed that he was indeed Mr. Barasa Nyongesa Mamati. The process server was taken to the home by a boda boda cyclist known as Wafula. Although the Respondent denies knowing the said Wafula, it does not mean that one must know all the people who may know him and where he lives and his residence. The process server may only have obtained one name of the boda boda cyclist as he rendered service to him. The most important thing is not to cite the full names of any person showing the home or identifying the person to be served but for the process server to show that he served the order. If the applicant is genuinely denying service, he ought to have applied to cross-examine the process servers concerned. I find the details given in the affidavit of service quite convincing that service was effected on the Respondent. The land in issue is situated at S. Nalondo but not at Kasule Market and a copy of the extract of the register supports this. In his replying affidavit, the Respondent does not explain what he does at Kasule Village while the suit land is at Nalondo. Neither did he explain the distance between the two places since the place of residence is a contentious issue in the service of the order. It would have been expected that the Respondent would have explained in details what he does at Kasule Market while his family resides at Nalondo. In paragraph 5 of the replying affidavit, the Respondent states that the orders in issue were meant to evict him and his family from the land which land is at Nalondo. This is a confirmation that the Respondent has a residence at Nalondo Village where he was served with the order.

Apart from service of the said orders on the Respondent, Annet Mumalasi & Co. Advocates for the Applicant wrote a letter to the respondent dated 27th October 2008 warning him of the consequences of disobedience of the order. At that time the Respondent had been served with interim order and had already breached it by putting up structures on the suit land. The said letter was copied to Bulimo & Co. Advocates for the Respondent. The orders which were served on the Respondent contained penal notices which warned the Respondent that the effect of non-compliance constitutes contempt of court which is punishable with imprisonment or fine or both.

The Applicant has satisfied the court that the orders in issue were served personally on the Respondent. After being served, he proceeded to construct structures on the land which are shown in the annexed photographs. In his replying affidavit the Respondent does not deny putting up the said structures after being served with the court orders. It is my finding that, the application is merited and I allow it accordingly. I hereby order that the respondent be committed to civil jail for a period of three (3) months. A warrant of arrest to issue against him. Costs of this application to the Applicant.

F. N. MUCHEMI

JUDGE

Dated, Delivered and Signed at Bungoma

This 10th day of November 2009 in the presence of

Ms Mumalasi for Applicant and Mr. Situma for Respondent