



**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT**

**AT NYERI**

**ELC CASE NO 36 OF 2016**

**FIONA ANSETT.....PLAINTIFF/RESPONDENT**

**VERSUS**

**GEORGE ODINGA ORARO .....1<sup>st</sup> DEFENDANT/RESPONDENT**

**DAVID MORTON SILVERTEIN**

**(being executors of the Estate**

**of LIVIA LE POER TRENCH).....2<sup>nd</sup> DEFENDANT/RESPONDENT**

**ANTHONY KIMARU MUTAHI.....3<sup>rd</sup> DEFENDANT/APPLICANT**

**CHIEF LAND REGISTRAR.....4<sup>th</sup> DEFENDANT/RESPONDENT**

**RULING**

1. Pursuant to a ruling delivered by the court on the 23<sup>rd</sup> June 2020 where it found the 3<sup>rd</sup> Defendant/Applicant herein in contempt of the court orders issued on 8<sup>th</sup> November 2017, (wherein parties had been directed to desist from further developments on the suit property, disposing off, transferring and/ or alienating the parcel of land pending the hearing of the suit) his sentencing had been suspended to the 23<sup>rd</sup> September 2020, due to the Covid-19 pandemic.
2. While awaiting, sentencing the 3<sup>rd</sup> Defendant/Applicant herein filed the present application dated 20<sup>th</sup> August 2020 under Certificate of Urgency and pursuant to the provisions of Order 51 Rule 15, Order 45 Rule 1 of the Civil Procedure Rules, Section 1A, 3, and 3A of the Civil Procedure Act and Articles 25 and 29 of the Constitution as well as all other enabling provisions of the law wherein he sought to set aside and/or vary the orders of 23<sup>rd</sup> July 2020.
3. The said application was supported by the grounds on its face as well as the supporting affidavit of Anthony Kimaru Mutahi the 3<sup>rd</sup> Defendant/Applicant herein sworn on the 20<sup>th</sup> August 2020.
4. The application was opposed by the Plaintiff/Respondent’s Replying and Supplementary Affidavits dated the 18<sup>th</sup> September 2020 and 1<sup>st</sup> October 2020 respectively to the effect that the application was a ploy to delay justice and defeat the rule of law. That the Applicant was aware of the application dated 6<sup>th</sup> April 2020 way before the ruling was delivered. That on 20<sup>th</sup> February 2020 all parties were present in Court when the matter was fixed for hearing but he did not file any response to the contempt application.
5. That further the Applicant had not disclosed any discovery of a new and important matter which was not at his knowledge or could not be produced by him at the time the order was made and neither had he alleged any mistake or error apparent on the face of the record.
6. Directions were taken to the effect that the application herein be disposed of by way of written submissions to which the Applicant filed his submissions in support of his application to the effect that he was not made aware of the proceedings leading to the hearing and determination of the application dated 6<sup>th</sup> April (sic) 2020 seeking for contempt orders against him, which was in violation of his right under Article 50 of the Constitution and Sections 1A and 1B of the Civil Procedure Act.
7. The Applicant further submitted that whereas his Counsel on record had been served with the application dated 6<sup>th</sup> February 2020 and had

filed his grounds of opposition, he had not been given an opportunity to be heard due to the confusion caused by the Covid-19 pandemic.

8. That indeed when the matter came up for hearing on 2<sup>nd</sup> April 2020, the same could not proceed as the protocols for proceeding in court had not been worked out and in any event the Chief Justice had announced a blanket stay of proceedings in all matters across the state wherein the Applicant had understood the same to mean that the matter had been stood over generally and was therefore surprised at the Order of 23<sup>rd</sup> to July 2020 issued against him.

9. That the present application being criminal in nature, the Applicant ought to have been given an opportunity to be heard and as his liberty was at stake. He conceded that the Plaintiff /Respondent had filed their replying affidavit dated the 15<sup>th</sup> September 2020 which was served upon him on the 5<sup>th</sup> October 2020 without any annexure of either the hearing notice or a notice of the ruling date to the application dated 6<sup>th</sup> February 2020.

10. The Plaintiff /Respondent did not file their written submissions.

#### **Determination**

11. The issue for determination is *whether the Application dated the 20<sup>th</sup> August 2020 is merited.*

12. The Application before me is brought under the provisions of Order 51 Rule 15 and Order 45 Rule 1 of the Civil Procedure Rules.

13. Order 51 Rule 15 provide as follows:

*The court may set aside an order made ex parte*

14. The Application is premised on the fact that the Applicant was not made aware of the proceedings leading to the hearing and determination of the application dated 6<sup>th</sup> February 2020 seeking for contempt orders against him. That indeed although his Counsel had been served with the application dated 6<sup>th</sup> February 2020 wherein he had filed his grounds of opposition, yet he had not been given an opportunity to be heard due to the confusion caused by the covid-19 pandemic. That since the Chief Justice had announced a blanket stay of proceedings in all matters across the state, the applicant had understood the same to mean that the matter had been stood over generally.

15. I have endeavored to peruse the court proceeding and note that on the 20<sup>th</sup> February 2020, when the application dated the 6<sup>th</sup> February 2020 came up for mention, the Applicant's Counsel Mr. Ng'an'ga was present in court when the deceased Plaintiff Stuart Richard Cunningham was by consent substituted with Flora Ansett and the application for contempt of court against the 3<sup>rd</sup> Defendant/Applicant herein was slated for hearing on the 2<sup>nd</sup> April 2020 wherein indeed the 3<sup>rd</sup> Defendant/Applicant filed their grounds of objection dated the 20<sup>th</sup> February 2020 on an equal date.

16. This matter did not proceed on scheduled date due to the Covid-19 pandemic and closure of courts thereafter. In the meantime the Plaintiff/Respondent herein filed another application dated 6<sup>th</sup> April 2020 seeking protection and/or further orders of the court as the 3<sup>rd</sup> Defendant/Applicant herein had continued to be in blatant contempt of Court orders. On the 9<sup>th</sup> April 2020, the court directed the parties to file their written submissions to the application dated 6 February 2020 and affect service wherein upon the registry personnel would confirm compliance and the Court would subsequently deliver its ruling in a mode and date to be communicated.

17. On the 12<sup>th</sup> May 2020 the court noted that only the Plaintiff/Respondent had filed their written submissions and directed for service upon the Respondents who were to file their written submissions within 14 days. The matter was scheduled for mention to confirm compliance and to take a date for ruling on the 4<sup>th</sup> June, 2020 wherein a mention notice dated the 25<sup>th</sup> May 2020 was served by the Court.

18. It is on record that the 3<sup>rd</sup> Respondent herein was served with the Court orders, submissions and mention dates relating to this matter through the digital platform, to mitigate the Covid-19 pandemic, and in light with the directions by the Hon Chief Justice via legal notice No. 22 of 2020 (Civil Procedure Amendment Rules) as per evidenced by the affidavit of service dated the 2<sup>nd</sup> June 2020, sworn by Michael Amalemba Counsel for the Plaintiff/Respondent filed on the 3<sup>rd</sup> June 2020.

19. Although there were no proceedings on the scheduled date, the 4<sup>th</sup> June, 2020, yet on the 8<sup>th</sup> June 2020, the court noted that despite service, the 3<sup>rd</sup> Defendant/Applicant was yet to file their written submissions wherein it (court) then scheduled the delivery of the ruling on the 23<sup>rd</sup> July, 2020 granting the 3<sup>rd</sup> Defendant/Applicant another chance to redeem himself by directing that he files his written submissions within 14 days of the order.

20. Jurisdiction to vary and or set aside the orders of a Court is one which is sparingly exercised and the reasons for invoking that jurisdiction must be specified and must be on solid basis. In deciding on whether or not to grant the orders sought and for the court to exercise its discretion, the Court is also guided by whether there is sufficient cause. This court has considered the application and the submissions therein, the Contemnor/Applicant was served both electronically and through the WhatsApp platform and given many opportunities to respond but failed to file any response. He cannot now turn around due to the impending sentencing and state that he was unaware of the proceedings leading to the hearing and determination of the application dated 6<sup>th</sup> February 2020.

21. In the circumstance, I find that the Applicant had failed to satisfy the court to grant the orders sought under the provisions of Order 51 Rule 15 of the Civil Procedure Rules.

22. Order 45 Rule 1 of the Act provides as follows;

*Any person considering himself aggrieved-*

*a. By a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or*

*b. By a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for review of judgement to the court which passed the decree or made the order without unreasonable delay.”*

23. Order 45 Rule 1 of the Civil Procedure Rules sets out the rules which restrict the grounds upon which an application for review may be made. These grounds include;

*i. discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made or;*

*ii. on account of some mistake or error apparent on the face of the record, or*

*iii. for any other sufficient reason and whatever the ground there is a requirement that the application has to be made without un reasonable delay.*

24. In the decided case by the Supreme Court of India in **Ajit Kumar Rath vs State of Orisa & Others 9 Supreme Court Cases 596 at Page 608** the Court had this to say:-

*“the power can be exercised on the application of a person on the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the order was made. The power can also be exercised on account of some mistake or error apparent on the face of the record or for any other sufficient reason. A review cannot be claimed or asked for merely for a fresh hearing or arguments or correction of an erroneous view taken earlier, that is to say, the power of review can be exercised only for correction of a patent error of law or fact which stares in the face without any elaborate argument being needed for stabling it. It may be pointed out that the expression “any other sufficient reason” used in Order 47 Rule 1 means a reason sufficiently analogous to those specified in the rule”*

25. Although the present application has been brought under the provisions of Order 45 Rule 1 of the Civil Procedure Rules, yet the Applicant has not demonstrated that he had made discovery of any new and important matter to enable the Court deliberate on the same. The reason given by the Applicant to the effect that following an announcement by the Hon Chief Justice that there had been a blanket stay of proceedings in all matters across the state due to the covid-19 pandemic wherein he had understood the same to mean that the matter had been stood over generally in my humble view does not fall within the scope of the provisions of Order 45 Rule 1 of the Civil procedure Rules more so in view of the legal notice No. 22 of 2020 (Civil Procedure Amendment Rules)

26. Litigation cannot be conducted on the basis of trial and error and that is why there are provisions of the law and the procedure to be adhered to. I find that this limb of the Application has also not met the threshold set out under Order 45 Rule 1 of the Civil Procedure Rules and thus this is not a proper case for the court to exercise its discretion in favour of the Applicant.

27. Article 24 of the Constitution provides that a person’s right or fundamental freedom shall not be limited except by law to the extent that the limitation is reasonable and justifiable. Having regard to the facts in the matter before me, I find that this is not a proper case for this court to exercise its discretion in favour of the Applicant. His application dated the 20<sup>th</sup> August 2020 is herein dismissed in its entirety with costs.

**Dated and delivered at Nakuru this 13<sup>th</sup> day of January 2021.**

**M.C. OUNDO**

**ENVIRONMENT & LAND – JUDGE**