Omanwa v Kanyuku & 2 others; Maina (Plaintiff); Omanwa & 4 others (Defendant) (Environment & Land Case E078 of 2022) [2022] KEELC 13507 (KLR) (3 October 2022) (Ruling)

Neutral citation: [2022] KEELC 13507 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND CASE E078 OF 2022

JO MBOYA, J

OCTOBER 3, 2022

BETWEEN

HEDRICK MASAKI OMANWA ..... PLAINTIFF

AND

JULIUS KANYUKU ..... 1ST DEFENDANT

CYRUS KIBERA MAINA ..... 2ND DEFENDANT

EMBAKASI RANCHING CO.LTD ..... 3RD DEFENDANT

AND

CYRUS KIBERA MAINA ..... PLAINTIFF

AND

HEDRICK MASAKI OMANWA ..... DEFENDANT

EMBAKASI RANCHING CO.LTD ..... DEFENDANT

NATIONAL LAND COMMISSION ..... DEFENDANT

CHIEF LAND REGISTRAR ..... DEFENDANT

ATTORNEY GENERAL ..... DEFENDANT

RULING

Introduction and Background:

1. Vide the Notice of Motion Application dated July 20, 2022, the 1st and 2nd Defendants/ Applicants herein have approached the court seeking for the following Reliefs;

i. That for reasons to be recorded, this Application be certified urgent and be heard *Ex-Parte* in the first instance.

ii. That the Honourable Court be pleased to order the attendance of Peter Muendo Keli before the Honourable Court for the purposes of cross examination on the contents of the Affidavit of Service sworn on March 22, 2022.

iii. That the costs of and incidental to this Application be costs in the Cause.

2. The subject application is premised on the various grounds, which have been enumerated at the foot of the application and same is further supported by the affidavit of one Cyrus Kibera Maina sworn on July 20, 2022.

3. Upon being served with the Application herein, the Plaintiff responded thereto by filing Grounds of opposition dated September 20, 2022. For clarity, the Plaintiff/Respondent has contended, *inter-alia*, that the subject application constitutes or amount to a waste of the precious judicial time.

Deposition by the Parties:

a. 1st and 2nd Defendant's/applicant's Case:

4. The subject application is premised and anchored on the basis of a sSupporting affidavit sworn on July 20, 2022.

5. Pursuant to the affidavit under reference, the deponent has averred that though the process server by the name Peter Muendo Kelli, purports to have effected service of the court order on both the 1st Defendant and himself, the truth however is that same has never been served with any court order relating to and emanating from the subject suit.

6. The deponent has further added that the deposition and contention that both the 1st Defendant and himself were duly served with the impugned court order, are therefore misleading, incorrect and thus false.

7. To the extent that the deponent has contended that same was not served with the impugned court order, the deponent has therefore averred that it would be appropriate that the process server herein be summoned for purposes of cross examination.

8. At any rate, the deponent has added that though same is aware of the orders which were made by this Honourable court by consent of the Parties, the said orders have never been served on him.

9. In the premises, the deponent has thus averred that it would be appropriate, just and expedient to cross examine the Process server and to be able to authenticate the contents of the impugned affidavit of service.

b. Response by the Plaintiff/respondent:

10. On his behalf, the Plaintiff herein responded to the application by filing Grounds of opposition dated September 20, 2022. For clarity, the Plaintiff raised the following Grounds;

i. The Application is an abuse of the court process and meant to delay the hearing and determination of the application for contempt dated June 16, 2022.

ii. The Application lacks merits and ought to be struck out.

iii. The 1st and 2nd Defendant's/Applicant's participated in the consent order recorded on March 15, 2022 and thereafter went ahead to start construction of the wall.

iv. The Advocate for the 1st and 2nd Defendant had expressed instruction from his clients to record a consent on March 15, 2022. Consequently, as an agent, the principal is deemed to be of aware of the court order.

v. The calling of a process server to come to court and testify about service of the consent/court order upon the 1st and 2nd Defendant does not change the knowledge of the consent order issued on March 15, 2022.

vi. The Application amounts to an outright abuse of the court process.

vii. The Application offends the clear provisions of Sections 1A and 1B of the *Civil Procedure Act*.

viii. The Application amounts to a wastage of the courts precious time and a burden cause in time to the Respondent.

ix. The application ought to be dismissed with costs to be paid forthwith.

Submissions by the Parties:

a. Applicants' Submissions:

11. The Application came up for hearing on September 28, 2022, when the court ordered and directed that same be canvased vide oral submissions.

12. Pursuant to the directions of the court, counsel for the Applicants submitted that though it is true that the Parties herein entered into a Consent, which was thereafter endorsed and adopted by the court on the March 15, 2022, the said consent order was never served upon the 1st and 2nd Defendants.

13. Further, counsel contended that despite the fact that no service was ever effected upon the 1st and 2nd Defendants, the Plaintiff/Respondent procured the services of a process server, who proceeded to and filed a False affidavit, purporting to have served the 1st and 2nd Defendants.

14. Given that there was no service, Learned Counsel for the 1st and 2nd Defendants has submitted that the contents of the affidavit of service are therefore misleading, erroneous and comprised of deliberate falsehoods.

15. At any rate, Counsel for the 1st and 2nd Defendants has also submitted that to the extent that the issue of service is critical and essential in the determination of an application for contempt, it is therefore appropriate that the issue of service be determined before the court can proceed to and deal with the Application for contempt.

16. On the other hand, Counsel for the 1st and 2nd Defendants also added that there is also the issue of the honesty of the process server and that if it were found that the process server was dishonest, then such a finding would impact on or affect the veracity of the allegations contained in the supporting affidavit attached to the application for Contempt.

17. Finally, Counsel for the 1st and 2nd Defendants submitted that where there is a Dispute pertaining to and concerning service of the Court process, it is appropriate that the Process server be summoned for cross examination.

18. In support of his submissions, counsel Cited and relied on the decision in the case of *Miruka versus Abok* (1989)eKLR and underscored that where service is disputed, it is appropriate for the Process server to be summoned for Cross Examination.

Plaintiff's/ Respondent's Submissions:

19. On his part, Counsel for the Plaintiff/Respondent submitted that the impugned orders that were issued on March 15, 2022, were issued in the presence of counsel for the 1st and 2nd Defendants.

20. To the extent that the said orders were issued in the presence of counsel for the 1st and 2nd Defendants, it was contended that whether or not service was effected upon the 1st and 2nd Defendants, becomes irrelevant, insofar as same are deemed to be knowledgeable and aware of the terms of the court order.

21. Secondly, counsel for the Plaintiff/Respondent has added that the contempt proceedings are premised on the issue of both knowledge of the court order and service of same.

22. Consequently, it was added that in respect of the subject matter, even if the court were to strike out or expunge the affidavit of service, the contempt proceedings will still be well grounded and the court will be called upon to determine the contempt proceedings on merits.

23. Finally, counsel for the Plaintiff/Respondent submitted that court orders are meant to achieve a purpose and not for the sake of it. In this regard, counsel contended that the intended cross examination, whose purpose is to discern whether the court order was duly served, would serve no meaningful purpose given that the 1st and 2nd Defendants were already aware of the court orders.

24. Essentially, Counsel for the Plaintiff/Respondent has contended that the subject application is therefore calculated to delay, obstruct and otherwise defeat the expeditious determination of the Contempt proceedings.

25. In a nutshell, Learned Counsel has implored the court to find and hold that the application amounts to and constitutes an abuse of the due process of the court.

26. To vindicate his submissions, counsel for the Plaintiff/Respondent has invoked and relied on the holding in the case of *Shimmers Plaza v National Bank K Ltd* (2015)eKLR, where the Court of Appeal underscored the place and importance of Knowledge of the Court Orders in matters of Contempt of Court.

Issues for Determination:

27. Having reviewed the Application dated July 20, 2022, the Supporting affidavit thereto and the Grounds of opposition filed by the Plaintiff/Respondent: and having similarly considered the oral submissions made on behalf of the Parties, the following issues are pertinent and thus germane of determination;

    i. Whether the terms of the court orders issued on March 15, 2022, were known to and within the knowledge of the 1st and 2nd Defendants.

    ii. Whether the intended Cross examination of the process server will be relevant and significant in the determination of the Contempt proceedings.

Analysis and Determination

Issue Number 1 Whether the terms of the court orders issued on March 15, 2022, were known to and within the knowledge of the 1st and 2nd Defendants.

28. Before venturing to address and deal with the first issue herein, it is imperative to supply a brief background to the subject application and the facts leading to the filing of same.

29. Suffice it to note, that the Plaintiff/Respondent herein filed an application dated March 1, 2022 and which application came up for hearing and was indeed disposed of by consent of the Parties on March 15, 2022.

30. For coherence, the advocate for the Parties entered into a consent, whereby same agreed to maintain the status quo obtaining over and in respect of L R No Nairobi/Block 105/6133, pending the hearing and determination of the suit herein.

31. In any event, the Parties further agreed that the terms of the Status quo be defined and clarified. In this regard, the terms of the status quo were to the effect that the title of the suit property shall be maintained in its current state and that the current occupation and possession shall also be maintained.

32. On the other hand, it was also clarified that during the pendency of the suit, there shall be No development/construction of whatsoever nature on the suit property.

33. Premised on the foregoing, it is common ground to state and or observe that the impugned orders having been entered into by consent and in the presence of the advocates for the respective Parties, it was thus deemed that the concerned Parties were knowledgeable and aware of the terms and tenor of the court orders.

34. To this end, there is no gainsaying that the 1st and 2nd Defendants are indeed deemed to be knowledgeable of and conversant with the terms of the court order.

35. In the premises, where there is No dispute pertaining to knowledge of the terms of the court order, then the issue of service would become irrelevant and of no practical significance.

36. At any rate, it is appropriate to state that the law pertaining to and concerning contempt proceedings has since evolved and therefore where it can be proved and shown that a Party was knowledgeable of the terms of the court order, then service of such court order, can be dispensed with.

37. To vindicate the foregoing observation, it is appropriate to take cognizance of the holding in the case of *Basil Criticos v- Attorney General* [2012] eKLR, Where it was observed as hereunder:

> "...where a party clearly acts and shows that he had knowledge of a court order, the strict requirement that personal service must be proved is rendered unnecessary". Similarly, the requirement of notice of the prohibitory judgement or order would also be satisfied where a party is represented counsel who was present in court when the orders were made.

38. Secondly, there is the decision in the case of *Justus Kariuki Mate & another –v- Martin Nyaga Wambora & another* [2017] eKLR), where the Court of appeal similarly observed as hereunder;

> (31) As set out in the affidavit of service, the service of the order was not made personally on the appellants as required under Rule 18.6 of the Civil Procedure (Amendment No. 2) Rules 2012. What is the consequence thereof? Rule 18.8 (1) of the Civil Procedure (Amendment No. 2)

Rules 2012 provides for circumstances when the court can dispense with personal service of an order as follows:-

"1. In the case of a judgment or order requiring a person not to do an act, the court may dispense with service of a copy of the judgment or order in accordance with rules 81.5 to 81.7 if it is satisfied that the person has had notice of it—

a. by being present when the judgment or order was given or made; or

b. by being notified of its terms by telephone, email or otherwise".

Atkins Court Forms, Contempt of Court Volume 8 (2) at para 320, the learned commentators expressed themselves as herein below:-

"In the case of an application to commit for breach of an order, judgment or undertaking, the evidence supporting an application for committal must prove:

1. Personal service of the order, judgment or undertaking duly indorsed in with a penal notice. Where a person is required to do an act, service must be made before the expiry of the time limited for doing the act but where a person is required to abstain from doing an act, the court has a discretion, which may be exercised prospectively or retrospectively, to dispense with service of the order, judgment or undertaking, if the alleged contemnor has had notice of it;...".

Black's Law Dictionary, 9th Ed defines notice as-

"A person has notice of a fact or condition if that person-

Has actual knowledge of it;
Has received information about it;Has reason to know about it;Knows about a related fact;Is considered as having been able to ascertain it by checking an official filing or recording."

(32) The trial court was correct in holding that the law as then was in contempt of court had since changed; the law as it stands today is that knowledge of an order is sufficient for purposes of contempt proceedings. The appellants herein had notice of the said order through service upon Boniface Njiru and out of what the 1st respondent referred to as "abundant caution" the same orders were advertised in the local daily newspaper to notify all and sundry. The newspaper adverts as correctly pointed out by the trial court were merely notices to the public of the existence of the orders and not means of substituted service. In view of the circumstances of the matter, bearing in mind the time constraint, we agree the 1st respondent cannot be faulted for advertising the order in the local dailies without first seeking the leave of the court. Firstly, there was no time to seek leave, secondly personal service was attempted and the orders were served in the offices of the Embu County Assembly and the adverts in daily newspapers was meant to notify everybody including the appellants. We also find the argument that using the advert in the circumstances of this case without first obtaining the leave of the court was a nullity is a mere technicality.

39. Premised on the foregoing observations, what becomes apparent is that where the contemnor is knowledgeable of or deemed to be aware of the terms of the impugned court order, then the service of the court order becomes irrelevant.

40. In the premises, I come to the conclusion that insofar as the impugned order was issued by consent and in the presence of the counsel for the 1st and 2nd Defendants, same are therefore deemed to be conversant with the terms of the impugned orders.

41. Consequently, in the determination and disposal of the contempt application, the court would be concerned with knowledge other than service. In this regard, the intended Cross Examination of the Process Server, will not serve any meaningful purpose or at all.

Issue Number 2

Whether the intended cross examination of the process server will be relevant and significant in the determination of the Contempt Proceedings.

42. Counsel for the 1st and 2nd Defendants has emphasized and underscored the need and importance of cross examining the process server, to ascertain the veracity of the allegation contained in the affidavit of service.

43. Essentially, what I hear the counsel for the 1st and 2nd Defendants to be stating and agitating, is that it is important to authenticate whether or not the 1st and 2nd Defendant were served.

44. Secondly, I hear counsel for the 1st and 2nd Defendants to be starting that service of the impugned court order on the 1st and 2nd Defendants, would be necessary and paramount in the determination of the pending contempt proceedings.

45. Be that as it may, the question that needs to be resolved is; whether the dispute as to service, would affect the established and common position that the impugned orders were issued in the presence of counsel.

46. Assuming that the intended cross examination establishes that the 1st and 2nd Defendants, were not served, would such a finding negate the hearing and determination of the contempt proceedings on its merits.

47. To my mind, the only issue that the court will be obliged to address and deal with in the contempt proceedings is whether the actions complained of, were indeed taken or otherwise on the face of a court order.

48. To the contrary, the issue of whether or not service was effected would be irrelevant and of no consequence, given the settled and established position that the impugned orders were issued in the presence of counsel for the 1st and 2nd Defendants.

49. Premised on the foregoing, I am constrained to find and hold that the intended cross examination would be an exercise in futility, insofar as same would be inclined to facilitate the ascertainment of service of the court order, yet the terms of the said court order are already deemed to be within the knowledge of the alleged contemnors.

50. In any event, it is appropriate to point out that a court of law should proceed to and make orders which are calculated to achieve practical relevance and meaning, as opposed to making orders for the sake of it. Simply put, the Court should not engage in academic activities or seek to issue Orders for Cosmetic/ aesthetic Purposes.

51. Despite the foregoing, the circumstances relating to the subject matter show that the 1st and 2nd Defendant, are keen to drag the court on an academic journey and futile exercise of ascertaining service of the court order, when indeed knowledge of the said court order is acknowledged, admitted, conceded and legally deemed.

52. In short, I am afraid that the subject application is a futile exercise, whose net effect is clearly calculated to waste the precious Judicial time. Same must therefore be deprecated and frowned upon.

Final Disposition:

53. To my mind, a court of law should be weary of invitation to undertake futile exercises and academic Journeys, whose net effect are tantamount to encouraging Lottery with the Due process of the court.

54. Clearly, the subject application is not calculated to add any value in the Justice chain process, taking cognizance of the obtaining Jurisprudential position, relating to the place of Knowledge in the Contempt Proceedings.

55. Consequently and premised on the reasons that have been highlighted in the preceding paragraphs, the application dated July 20, is devoid of merits. Consequently, same and is hereby dismissed with cost.

56. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 3RD DAY OF OCTOBER 2022.

OGUTTU MBOYA

JUDGE

In the Presence of;

Kevin Court Assistant.

Mr Moindi for the Plaintiff/Respondent

Mr Nderitu for the 1st and 2nd Respondent

N/A for the 3rd Defendant