



SOO v HFO & another; Registrar of Lands Busia (Interested Party) (Matrimonial Cause E002 of 2023) [2024] KEHC 2593 (KLR) (15 March 2024) (Ruling)

Neutral citation: [2024] KEHC 2593 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUSIA
MATRIMONIAL CAUSE E002 OF 2023
WM MUSYOKA, J
MARCH 15, 2024**

BETWEEN

SOO PLAINTIFF

AND

HFO 1ST DEFENDANT

PWO 2ND DEFENDANT

AND

REGISTRAR OF LANDS BUSIA INTERESTED PARTY

RULING

1. The plaintiff initiated these proceedings by way of an Originating Summons, dated 21st June 2023. The proceedings relate to Bukhayo/Bugengi/4407. The plaintiff and the 1st defendant were previously married, but the marriage was subsequently dissolved through proceedings conducted in Busia Divorce Cause No. 3 of 2000. The plaintiff alleges that the divorce court awarded occupation of the matrimonial home on Bukhayo/Bugengi/4407 to her, but granted visitation rights on the 1st defendant. The plaintiff has initiated these proceedings, alleging that the 1st defendant was in the process of disposing of that property to the 2nd defendant.
2. The Originating Summons was filed simultaneously with a Motion, of even date, which seeks an inhibition to restrain the interested party from dealing with or transferring or issuing of obtaining a title deed for the suit property. It also seeks similar restraining orders against the defendants. The application was placed before me, on 21st June 2023, and I granted temporary relief, in terms of prayer 3 of the Motion, with relation to eviction, trespass, disposal, mortgage or transfer of the property.
3. The 2nd defendant filed grounds of opposition, dated 26th June 2023. It is averred that there was no proof that the plaintiff was ever a spouse of the deceased, that the suit property was obtained during



- coverture, that the property was not matrimonial property, the property was sold legally and the 2nd defendant was an innocent purchaser, and the spousal consent was executed by the current spouse of the 1st defendant. The 2nd defendant also filed a replying affidavit, sworn on 10th August 2023. He avers that the plaintiff was a total stranger to him. He concedes to entering into a sale agreement with the 1st defendant with respect to the said property, after doing due diligence, he fully paid for the property and acquired a title to the same. He fears that he would suffer prejudice, and loss of access occupation and use. He also prays to be reimbursed the Kshs.1,500,000.00 that he paid as purchase price.
4. The plaintiff filed an originating Motion, dated 31st August 2023, in Busia HC Matrimonial Property Cause No. E039 of 2023, seeking that the 2 defendants be summoned to court to show cause why they should not be punished for contempt of the court orders made on 23rd June 2023, and that they be thereafter cited for contempt of the said court orders. It is averred that the order, together with the pleadings and the application, were served on the defendants, and the land registrar. It is further averred that the defendants have defied those orders, and are constructing on the suit property. The 2nd defendant, in particular, is said to have dug a borehole on the land. It is further averred that the 1st defendant has been using the police to protect the unlawful activities of the 2nd defendant. The plaintiff indicates that she was arrested on 13th July 2023, and was detained at the police station, and was set to be charged on 17th July 2023, save that the Director of Public Prosecution declined. She avers that she was physically abused by the police in the course of the whole affair. That application of 31st August 2023, was placed before Kemei J, the Recess Judge, who directed that it be served, for inter partes hearing on 20th September 2023. Apparently, the same was withdrawn before it could be placed before me
 5. The plaintiff then re-filed the Motion, dated 31st August 2023, in this cause, as a Motion dated 25th September 2023, for the said is a true replica of the application dated 31st August 2023, filed in Busia HC Matrimonial Property Cause No. E039 of 2023.
 6. The 2nd defendant has responded to the said application, dated 25th September 2023, vide his affidavit of 8th November 2023. He states that he was not served with the order of 21st June 2023, and that he only became aware of it after he was served with the order made by Kemei J. in Busia HC Matrimonial Property Cause No. E039 of 2023. He avers that the interim orders have lapsed, as they were not extended on 26th October 2023. He further avers that the affidavits of service were also not clear on whether service was ever effected. He states that it was the plaintiff who trespassed on the subject property, and her arrest had something to do with that. He states that there was no evidence of any evictions, trespass, disposal or mortgage of the suit property by him. He asserts that the main application for injunction, dated 19th June 2023, was yet to be determined.
 7. The application was canvassed by way of written submissions, based on directions given on 29th November 2023, although they referred to an application dated 31st August 2023. Both sides have complied, and I have read through the written submissions filed, and noted the arguments made in them.
 8. Civil contempt proceedings, like these, are quasi-criminal in nature. They are civil proceedings, with some aspect of the criminal process in them. That aspect is with respect to the sanctions imposed where contempt of court is proved. The sanctions are not civil in nature, for they entail imprisonment or payment of a fine, by way of sequestration of property. It is about deprivation of freedom or property. The rights to freedom and to private property are guaranteed by the Constitution, and deprivation can only be in accordance with the law. Any deprivation must be justified. That justification has to be through a legal process, where the person proposed to be cited for contempt of court is heard. There must be due process in short. Article 50 of the Constitution is about due process. It sets out



the fair hearing principles. No one should be condemned unheard. Being a quasi-criminal process, the compliance expected should be to a higher degree than that in ordinary civil processes.

9. Part of the due process in contempt proceedings is about the person proposed to be cited for contempt of court being shown to have been aware of the order that he allegedly showed contempt to. The awareness of existence of the order allegedly disobeyed is brought to the attention of the person by way of service of the order. The practice in this country is that such order is served on the person by a court process server, who, thereafter, files an affidavit of service, as proof of the service.
10. Was there service of the impugned order in this case? The plaintiff claims to have had served the defendants, and there is an affidavit of service on record as proof of the alleged service. The 2nd defendant claims that he was not served with the impugned order at all, and that he only got wind of it when he was being served with a different process. To support his assertion, that there was no proper service, he has poked holes on the affidavit of service placed on record. So, the service of the impugned order is contested. I can only pronounce on whether or not the 2nd defendant should show cause upon it being established that he had been served with that order at the time of the alleged act or acts which constitute the alleged contempt of court, for a person can only disobey an order that he is aware of or whose existence has been brought to his attention.
11. So, before I decide on whether or not I should summon the defendants to show cause, the plaintiff shall have to prove service of the order on them. Proof shall take the form of the plaintiff availing the court process server, who allegedly served the said order on her behalf, Moses Kuloba Keya, to be cross-examined, by the defendants, on the contents of his affidavit of service of 26th June 2023. That cross-examination shall happen on a date that I shall appoint at the delivery of this ruling.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT BUSIA ON 15TH MARCH 2024

WM MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Advocates

Ms. Ayieko, instructed by Mukongolo & Company, Advocates for the plaintiff.

Mr. Omeri, instructed by Omeri & Associates, Advocates for the 1st defendant.

Mr. Were, instructed by Fwaya Masakhwe Were & Advocates, Advocates for the 2nd defendant.

