



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT BUSIA

ELC CASE NO. 154 OF 2013

ROBERT OUMA ODUORI.....1ST PLAINTIFF/APPLICANT

ESHIKONI AUCTIONEERS.....RESPONDENT

VERSUS

THOMAS MUKA MAULA.....1ST DEFENDANT/RESPONDENT

WALTER WASHINGTON.....2ND DEFENDANT/RESPONDENT

R U L I N G

1. The 1st Plaintiff/Applicant brought an application dated 8th March 2021 under Order 9 Rule 9, Order 45 Rule 1 of the Civil Procedure Rules, Section 3 and 3A of the Civil Procedure Act and all enabling provisions of the law seeking for the following orders;

a) That the plaintiff/applicant be granted leave to appoint the firm of OBURA-OBWATINYA & CO. ADVOCATES in place of the firm of MARISIO LUCHIVYA & ASSOCIATES ADVOCATES.

b) That the Honourable Court be pleased to set aside and/or review its order/ruling issued herein on the 16th day of December 2020, and the order of payment of Kshs.200,000/= and all consequential orders made to the respondents be and are hereby vacated as the Kisumu Civil Appeal No 76 of 2016 has been heard and dismissed.

c) That costs be provided for.

2. The application is supported by the grounds on the face of it inter alia and the affidavit of Robert Ouma Oduori;

i) That this Honourable Court by its decision/judgment delivered on 18th June 2015 found merits in the Plaintiff/Applicant's claim.

ii) That the Respondents then the appellants herein being dissatisfied with the decision/judgment in the BUSIA ELC NO. 154 of 2013 lodged an appeal in the Court of Appeal.

iii) That BUSIA ELC NO. 154 of 2013 gave rise to appeal no. 76 of 2016.

iv) That the Court of Appeal in Kisumu found no reason to disturb the findings by the trial judge.

v) That the Court of Appeal in Kisumu Civil Appeal no. 76 of 2016 has rendered its decision dismissing the Appeal.

vi) That litigation has come to an end.

3. The 2nd Defendant/Respondent opposed the application and filed their Replying Affidavit on 1st April 2021 sworn by Walter Washington Barasa Nyongesa. He deposed that he had the authority to swear the affidavit on behalf of the 1st Respondent and annexed the power of attorney. He deposed that on 18th June 2015, Hon. S. M. Kibunja delivered a judgment in Busia ELC No. 154 of 2013. The defendants/respondents being dissatisfied with the aforementioned judgment filed their Notice of Appeal dated 29th June 2015 and served the same upon the Respondent. On 23rd July 2015, the defendants/respondents and the plaintiff/applicant recorded a consent order staying the

execution of the decree and judgment delivered on 18th June 2015. The said consent was filed in court on 27th July 2015, in effect barring any dealings upon the suit land by either parties and staying execution of the decree and judgment issued by court on 18th June 2015 pending the hearing and determination of the Defendants' Appeal.

4. He further deposed that on 27th March 2017, the Court of Appeal reiterated that the status quo as relating the land Bukhayo/Matayos/3116 be maintained. The plaintiff/applicant in breach of the Consent Order transferred the suit title to his name while the land is still being the subject matter of the appeal. He stated that the plaintiff/applicant being in breach of the consent order and status quo order by the Kisumu Court of Appeal caused illegal sale of movable property belonging to them. The attachment and sale of movable property conducted on behalf of the Defendant/Respondent was illegal, null and void as the Plaintiff/Applicant herein did not disclose that the matter was appealed and there was a pre-existing stay of execution on record. He stated that due to the illegality perpetrated by the Plaintiff/Applicant substantial loss was occasioned upon them as auctioneers sold off their livestock. They instituted contempt of court proceedings against the Plaintiff/Applicant and the court ruling dated 16th December 2020 found the plaintiff/applicant guilty of contempt of court and awarded damages of Kshs. 200,000/= to the Defendants/Respondents for the loss of their movable property occasioned by the Plaintiff/Applicant.

5. The 1st defendant/respondent further stated that this court already made a decision on the application for contempt of court orders and therefore the plaintiff's option is to appeal the ruling dated 16th December 2020. He stated that the plaintiff/applicant has not satisfied the criteria under Order 45 of the Civil Procedure Rules for review or setting aside the ruling dated 16th December 2020 and specifically stated that there is no new and important matter or evidence as far as the application dated 31st August 2020 for contempt proceedings is concerned and the ruling dated 16th December 2020 was not on the same matter that the Court of Appeal delivered a judgment on 19th February 2021 and there was no mistake or error apparent on the face of the ruling. He further stated that the Plaintiff/Applicant had filed an application before the Court of Appeal seeking leave to appeal to the Supreme Court.

6. The Defendants/Respondents filed their submissions on 10th June 2021 in which they submitted that the Plaintiff/Applicant has not met any of the requirements enlisted in Order 45 Rule 1 of the Civil Procedure Rules. They also submitted that the contempt proceedings against the Applicant and the Civil Appeal 76/2016 at Kisumu Court of Appeal were independent of each other based on different causes of action, namely, contempt of court and ownership of land. They further submitted that there was finality as to the proceedings, merits and decision by this Honourable Court's ruling dated 16th December 2020 hence the court became *functus officio*. The Respondent relied on the decisions made in **TELKOM KENYA LIMITED V JOHN OCHANDA (SUING ON HIS OWN BEHALF AND ON BEHALF OF 996 FORMER EMPLOYEES OF TELKOM KENYA LIMITED) (2016) ECLR and KIKM & another (Suing through their mother and guardian ad litem FCK) V DMN (2020) ECLR at Eldoret High Court in Civil Appeal No. 84 of 2016.**

7. The Plaintiff/Applicant filed their submissions on 28th June 2021 submitting that the crux of the application is that since he was represented by the firm of M/S MANUARI & CO. ADVOCATES who were under obligation and as an officer of the court to advise promptly be it even terms of signing court documents. He submitted that he was never a beneficiary of the proceeds resulting from the alleged illegal attachment and sale of the Respondents movable property, rather the proceeds were treated as party costs of his then advocate on record and his Agent then ESHIKHONI AUCTIONEERS.

8. The Applicant denied through the submissions that he was in breach of the orders of this court issued on 27th July 2015 and which breach resulted into the ruling of this court issued on 16th December 2020. He contends that all illegalities leading to breach of the consent orders were his then advocates doing and that the mistake of an advocate should not be visited on an innocent litigant. He urged the court to review its earlier orders in view of the decision in Kisumu Civil Appeal no. 76 of 2016 and further craves that litigation has come to an end as the Court of Appeal decision is a stare decisis.

9. From the Applicant's pleadings, he was aware of the consent order dated 23rd July 2015 but he argues that his then advocate actions were not on his instructions hence the mistakes of an advocate should not be visited on the client. In the ruling dated 16th December 2020, the court addressed itself on the issue of authority of the plaintiff/applicant's authority and the applicant only brought up the issue of the advocate acting without his authority in his submissions and the said sales were towards the settling the party and party bill of costs.

10. The current application is seeking to have the orders of 16th December 2020 reviewed in light of the Court of Appeal in Kisumu Civil Appeal no. 76 of 2016 dismissing the Respondents appeal and upholding the judgment of this court delivered on 18th June 2015. The order sought to be reviewed had determined that the plaintiff/applicant was in contempt of court orders for stay of execution. The Applicant was ordered to pay the defendants/respondents Kshs.200,000/= as compensation for the illegal attachment and sale of their livestock.

11. It is on this background that the court is called to determine the question whether or not the current application meets the threshold of review as set out in Section 80 of the Civil Procedure Act and Order 45 of Civil Procedure Rules. The first issue this court considers is whether there is a new and important matter brought up by the plaintiff/applicant which could not have been brought up before the impugned ruling. The plaintiff/applicant has submitted that their advocate acted without his authority and entered into a consent order with the defendants/respondents. This is an issue which was canvassed in the former application which gave rise to the impugned order.

12. The second ground for review is whether there is sufficient reason for the court to review its ruling. The plaintiff/applicant has submitted that even if it can be assumed that he fully participated in the signing and adoption of the said consent order, he was never a beneficiary of the proceeds from the illegal attachment and sale of the respondents' movable property. The issue of who benefitted from the proceeds of the illegal sale is a matter between the Applicant and his previous counsel for which the Respondent cannot be faulted. As i had stated in the previous finding that if the advocate acted outside his mandate, the applicant's recourse lied in suing his advocate for negligence and or breach of trust.

13. The applicant mistakenly believes that because he was the successful party in the outcome of the appeal then the ruling dated 16th December 2020 should be vacated. However, the true position is that the subject matter in the appeal and the ruling originated in the same matter but the cause of action was different. The ruling was on contempt of court orders which by their nature are quasi-criminal. The reason

why courts punish for contempt is to uphold the dignity and authority of the court; ensure compliance with directions of the court, observance and respect of due process of law, preserve an effective and impartial system of justice, and maintain public confidence in the administration of justice by courts.

14. Without sanctions for contempt, there would be a serious threat to the rule of law and administration of justice. For a party to be cited for contempt, he must have violated and or disobeyed an order that was directing him to do or refrain from doing a thing. The finding made against the Applicant that he disregarded the order of stay in place has not been challenged. The outcome from the Court of Appeal does not in any way invalidate the order reached by this court on 16th December 2020. As such it does not amount to sufficient reason for the court to review its order.

15. The upshot of the foregoing is that the application lacks merit and is hereby dismissed with costs to the Defendant/Respondent.

DATED, SIGNED AND DELIVERED AT BUSIA THIS 7TH DAY OF OCTOBER 2021.

A. OMOLLO

JUDGE