



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISII

E.L.C CASE NO. 31 OF 2017

GEORGE MORARA ONGERI.....PLAINTIFF

VERSUS

COUNTY GOVERNMENT OF KISII.....DEFENDANT

AND

ABEL SAGINI.....1ST CONTEMNOR

PATRICK LUMUMBA2ND CONTEMNOR

RULING

INTRODUCTION

1.This ruling pertains to the Plaintiff's Notice of Motion dated 1st October 2018 whereby the Defendant/Applicant seeks a stay of execution and setting aside of the orders of this court given on the 1st October 2018. The application is supported by the affidavit of Kennedy Chweya Onsembe. It is opposed by the Plaintiff's Replying Affidavit sworn on the 18th December 2018.

The brief background of this matter is necessary in order to put things into perspective.

2. The Plaintiff filed suit against the County Government of Kisii on 13th February 2017 claiming that the defendant had trespassed onto his land parcel known as L.R NO. CENTRAL KITUTU/MWAMANWA/520 and commenced construction of ward offices thereon. Contemporaneously with the plaint, he filed an application for injunction to restrain the defendant from interfering with his land. On 6th March 2017, the court issued an order of injunction against the defendant. The plaintiff subsequently filed an application dated 22nd June 2018 seeking to punish Abel Sagini and Patrick Lumumba for contempt of court. When the application came up for hearing on 30th June 2018, the court issued a Notice to show cause for the alleged contemnors to appear in court on 1st October 2018 to show cause why they should not be punished for contempt of court. On 1st October 2018, the alleged contemnors failed to appear in court and the court issued warrants of arrest against them. The said warrants were lifted by the court on 3rd October 2018. The applicants then filed the instant application seeking a stay of execution and setting aside of the orders issued on the 1st October 2018.

3. The court directed that the application be canvassed by way of written submissions and both parties filed their submissions which I have considered.

ISSUES FOR DETERMINATION

4. Having considered the Notice of Motion dated 1.10.2018, the rival affidavits and submissions, the following issues arise for determination:

- i. Whether the court ought to grant a stay of execution of the orders issued on 1st October 2018
- ii. Whether the orders issued on 1st October 2018 ought to be set aside.

ANALYSIS AND DETERMINATION

5. Counsel for the defendant submitted that the two alleged contemnors were not served personally nor are they the ones responsible for construction of ward offices. He cited the case of **Kariuki & 2 Others v Minister for Gender, Sports Culture and Social Services HC Misc Civil Application No. 389 of 2004** where Lenaola J (as he then was) faced with a situation where service was not effected personally on the Minister for Sports held as follows:

“ Had our law been as in the case of Re Tuck (supra) or as in Kamapanje Banda (supra), I would have had no hesitation in finding that knowledge is higher than service and dealt with the contemnor appropriately. But in our law service is higher than knowledge and since the service here was frustrated by the Minister’s body guards, I shall firmly hold in accord with the existing law that there was no service. Without personal service, there cannot be contempt....”

6. He further submitted that counsel for the contemnors had filed Grounds of Opposition in which they denied that there was construction being carried out on L.R NO CENTRAL KITUTU/MWAMANWA/520 and further said the orders of 1st October 2018 are difficult to implement as they are directed at the wrong parties who were not served with the court order. He concluded by arguing that all the elements of the offence of contempt of court were not proved and the orders were therefore issued in error and ought to be set aside.

7. In his submissions in response, counsel for the plaintiff submitted that the defendant was duly served with the court order through its agents who are the chief officer works and County Secretary. He submitted that there was no dispute that the construction of Nyatieko ward offices was still going on and the contemnors ought to appear in court to show cause why the contempt has not been purged. Counsel relied on the case of **Dr. Fred Matiang’i v Miguna Miguna & 4 Others (2018) eKLR** for the proposition that court orders are compulsive, peremptory and expressly binding and must be obeyed. He also cited **Michael Sistu Mwaura Kamau v DPP & 4 others (2018) eKLR** for the proposition that to commit a person for contempt, the court must be satisfied that he has willfully and deliberately disobeyed a court order that he was aware of.

8. In the instant case, the court order was served on the secretaries of the contemnors. The Notices to show cause attached to the Affidavit of service sworn by Isaiah Miruka on 20th August 2018 indicates that the persons served may appear in person or by an advocate of this court or an agent duly authorized and instructed to show cause. Counsel for the defendant has submitted that he filed Grounds of Opposition indicating that the officers cited were not the ones concerned with construction of the ward offices. The question is whether having filed the said Grounds of Opposition, the contemnors or their advocate were still required to appear in court in response to the Notice to Show Cause to explain why it was difficult for them to implement the said order.

9. From the explanation given by counsel for the defendant he seems to have interpreted “appear” to mean explain why execution should not be granted. This is arguable and whereas he may be wrong, this case is distinguishable from the above-cited authorities where the contemnors deliberately disobeyed court orders, as in the instant case the alleged contemnors are saying that they are not the officers responsible for the alleged acts of contempt.

10. In the circumstances, I find merit in application and I exercise my discretion and set aside the Notice to Show Cause issued on 1st October 2018. It should however be noted that what is being set aside is merely the Notice to Show Cause against and not the order of injunction which shall remain in force until this matter is heard and determined. Should the order be disobeyed the court shall not hesitate to take appropriate action against the right contemnors.

Dated, signed and delivered at Kisii this 17th day of January 2020.

J.M ONYANGO

JUDGE