



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MIGORI

ELC CASE NO. 688 OF 2017 (OS)

IN THE MATTER OF ESTATE OF GEOFFREY OKOTH OYOYE –DECEASED

IN THE MATTER OF AN APPLICATION BY: MARK COLLINS KOTH JAMES OMONDI OKOTH,

ROSELYNE ACHIENG OKOTH, ALICE ANYANGO OKOTH, KEVIN OPIYO OKOTH,

JULIUS ODONGO OKOTH and CHRISTOPHER OKELLO OKOTH.

IN THE MATTER OF A CLAIM FOR ADVERSE POSSESSION PURSUANT TO

SECTION 38 OF THE LIMITATION OF ACTIONS ACAT (CAP 22)

AND

IN THE MATTER OF : TITLE NO. 345/W. NYOKAL/KANYIKELA

BETWEEN

MARK COLLINS OKOTH and

JAMES OMONDI OKOTH (Suing as Administrators to the Estate of

Geoffrey Okoth Oyoye (Deceased).....APPLICANTS/PLAINTIFFS

VERSUS

SUKARI INDUSTRIES LIMITED.....1ST RESPONDENT

AMRITA KAU RAI.....2ND RESPONDENT

ONKAR SINGH RAI.....3RD RESPONDENT

TEJVEER SINGH RAI.....4TH RESPONDENT

JASWANT SINGH RAI.....5TH RESPONDENT

RULING

1. This ruling is in respect of an application by way of a Notice of Motion dated 25th September, 2018 brought under Rule 81.4, of the Civil Procedure (Amendment NO.2) Rules 2012 NO.2208(L.8), SENIOR COURTS OF ENGLAND & WALES COUNTY COURTS, ENGLAND AND WALES) AND THE INHERENT POWERS AND JURISDICTION OF THIS HONORABLE COURT. The 1st and 2nd applicants, MARK COLLINS OKOTH and JAMES OMONDI OKOTH respectively (suing as administrators to the estate of GEOFFREY OKOTH OYOYE, deceased) through NCHOE, JAOKO and company advocates, are seeking the following orders:

a) Spent

b) **THAT** an order of this honorable court compelling the 1st to 5th respondents comply with court orders given on 19th September, 2017 in presence of their advocate Miss. Beryl Achieng and issued on 22nd September, 2017, duly served upon them on 28th September, 2017.

c) **THAT** an order of this honorable court cite for contempt the 1st to 5th Respondents jointly and singly for disobeying the court orders given on 19th September, 2017 in presence of their advocate Miss. Beryl Achieng and issued on 22nd September, 2017, duly served upon them on 28th September, 2017.

d) **THAT** an order of this honorable court directing that the 1st respondent and the officers of the 1st respondent namely, AMRITA KAU RAI, ONKAR SINGH RAI, TEJVEER SINGH RAI, and JASWANT SINGH RAI) upon whom the court orders given on 19th September, 2017 in presence of their advocate Miss. Beryl Achieng and issued on 22nd September, 2017, duly served upon them on 28th September, 2017, ("the contemnors") be cited for contempt of valid court orders and be committed to civil jail for a period of 6 months or such period as deemed just and sufficient by this Honorable Court and such further orders be made as the Court may deem necessary for contempt of court by disobeying this honorable Court Orders, facts which are well within their knowledge.

e) **THAT** the said contemnors, be ordered to comply with court orders given on 19th September, 2017 in presence of their advocate Miss. Beryl Achieng and issued on 22nd September, 2017, duly served upon them on 28th September, 2017, particularly order number 2, which directed that "That the status quo namely the plaintiffs/applicants to be in occupation or use of the suit property pending inter-partes hearing the chambers summons of 1st June, 2017, which summons are pending hearing on 11th October, 2018 and were extended on 25th April, 2018.

f) **THAT** this honorable court do impose a mandatory penalty to be paid by the 1st respondent and the officers of the 1st respondent namely, AMRITA KAU RAI, ONKAR SINGH RAI, TEJVEER SINGH RAI, and JASWANT SINGH RAI). The officer commanding Ndiwa Police Station and/or the relevant police station with the requisite territorial jurisdiction do execute the orders herein.

g) **THAT** an order of this honorable court directing that; the 1st respondent and the officers of the 1st respondent namely, AMRITA KAU RAI, ONKAR SINGH RAI, TEJVEER SINGH RAI, and JASWANT SINGH RAI do reconstruct the three houses they pulled down/destroyed; which houses belongs to; EASTHER AKINYI OKOTH, build in the year 1986, the mother to the applicants, the house of JANE AOKO OKOTH, build in the year 1994, the step-mother to the applicants herein and the house of the eldest son and the 2nd applicant/administrator MARK COLLINS OKOTH build in the year 1996, who now have no house to live in, and seeks for damages compensation for the building materials such as iron sheets, grilled metallic doors, furniture which the respondents carted away.

h) Costs of this application be provided for.

2. The application is premised on grounds (1) to (4) set out of its face. The applicants stated inter alia, that the 1st, 2nd and 5th respondents disobeyed court orders given on 19th September, 2017 issued on 22nd September, 2017 and duly served upon them on 28th September, 2017. That the disobedience was in the sense that the said respondents pulled down and destroyed three(3) houses belonging to the plaintiffs'/applicants' families of 30th July, 2018 and 2nd July 2018 using Tractor registration number KHMA 560K KOMATSU assisted by the factory guards duly instructed by the respondents while accompanied by uniformed administration police officers. That by disobeying the orders of the honorable court, the respondents have nurtured the seeds of impunity and disrespect towards the court hence they should be cited for contempt and punished accordingly.

3. The application is further premised on a 16-paragraphed supporting affidavit of the even date sworn by 2nd applicant, James Omondi Okoth. The said affidavit is accompanied by copies of annexed documents which include a grant of letters of administration intestate issued to the applicants jointly and severally on 25th September, 2015 in Homabay High Court succession cause No.31 of 2015 in respect of the estate of Geoffrey Okoth Oyoye (deceased) and marked as "J001", court orders made on 19th September, 2017 and issued on 22nd September, 2017 herein marked as "J002" and duly served as revealed in an affidavit of service sworn on 2nd October, 2017 by David Okumu Ojill, an authorized process served and marked as "J003".

4. By grounds of opposition dated 8th July, 2019 and filed on even date, the 1st to 5th respondents through their counsel, Ogejo, Olendo and company Advocates, opposed the application in its entirety. The grounds are;

i. That the application is defective, bad and unavailable in law for failure by the applicant to serve the respondents personally.

ii. The applicant lacks locus to be granted the orders sought.

5. In order to expedite trial, the application was argued by way of written submissions further to directions of the court given on 5th July, 2019: see **Order 51 Rule 16 of the Civil Procedure Rules, 2010** as read with **Practice Direction number 33(a) and (b) of the Environment and Land Court Practice Directions, 2014.**

6. In his 12-paged submissions dated 5th December, 2019 and filed in court on 10th December, 2019, learned counsel for the applicants gave a brief history and facts of the case culminating to the orders sought in the instant application. In favor of the applicants, their counsel identified and analyzed the trio issues for determination namely:

i. Whether the 1st respondent and the officers of the 1st respondent (NAMELY: AMRITA KAU RAI, ONKAR SINGH RAI, TEJVEER SINGH RAI, and JASWANT SINGH RAI) deliberately eroded the authority and dignity of this honorable court;

ii. Should the 1st respondent and the officers of the 1st respondent (namely: AMRITA KAU RAI, ONKAR SINGH RAI, TEJVEER SINGH RA), AND JASWANT SINGH RAI) be committed to prison.

iii. Costs of the application.

7. Counsel also submitted that the 1st to the 5th respondents have disobeyed court orders marked as “J002” continue to do so as demonstrated in the application and should be punished accordingly because the authority and dignity of this honorable court has been undermined. That the respondents have not been remorseful or apologetic hence should be dealt with firmly in order to protect and uphold the reputation of this court.

8. To buttress his submissions, learned counsel further relied on the authorities which include;

a) **Hadkinson-vs-Hadkinson (1952) 2 ALLER567, Commercial Bank of Africa Ltd-vs-Ndirangu (1992) KLR 30B-vs-Attorney General (2004) IKLR 431**

b) **Black’s Law Dictionary 9th Edition** on the definition of the term “contempt” and in particular, “Civil contempt”

c) **The Director of Pensions -vs- Abdul Majid Cockar (1999) eKLR**

9. On the other hand, by their 11-paged submissions dated 30th August, 2019 and filed on 9th September, 2019, learned counsel for the 1st to 5th respondents in the preface urged that largely the purport of the application is 3-pronged namely, the application is nonstarter, a waste of the courts precious and limited time as well as an abuse of the due process of the court. That the same has not met the threshold for the grant of the orders sought therein thus it is amenable to its dismissal with costs.

10. Counsel further submitted that the application is not attainable for reason that there were no orders of court capable of obedience or disobedience. That the contemned court order was specifically and exclusively directed at the 1st respondent but not the 2nd respondent and that it was not personally served on the respondents. That the alleged contemned court order does not bear a penal notice and that contempt process should be exercised with great caution.

11. To reinforce his submissions, counsel cited the Court of Appeal decision in **Woburn Estate Limited –vs- Margaret Bashforth (2016) and KLR** on the procedure for commencing and proceeding for contempt of court. Counsel also relied on persuasive authorities including **Katsuri Limited –vs- Kapurchand Depar Shah (2016) eKLR, Kenya Tea Growers Association –vs- Francis Atwoli and 5 others (2012) eKLR and Fredrick Okolla Ojwang –vs- Orange Democratic Movement and 2 others (2017) eKLR, John Zacharia Mogueche –vs- County Executive Committee Member of Kisii and 16 others (2019) eKLR, and Sam Nyamweya and 3 others –vs- Kenya Premier League Ltd and 2 others (2015) eKLR** regarding the character of contempt of court as a last resort remedy.

12. I have anxiously considered the entire application, the grounds of opposition and rival submissions together with all authorities relied upon as well as issues framed and analyzed therein. Concisely and precisely put, the issues for consideration are whether the respondents disobeyed court orders and whether they can be committed to prison for contempt court as sought in the application.

13. It is common baseline that on 19th September, 2017, this court made an order marked as “J002” and issued on 22nd September 2017. The order reads, inter alia;-

a) ***“THAT status quo namely the plaintiff/applicant to be in occupation or use of the suit pending parties hearing of chamber summons of 1/6/17 fixed for 30/10/2017.***

b) ***THAT Mr. Kisera counsel for the 1st defendant/respondent be served.”***

14. Quite clearly, the order marked as “J00”2 was directed at the 1st respondent. It was for the maintenance of status quo over the suit land, LR NO. 345 W. Nyakal/Kanyikela, which is the subject matter of the instant suit; see **Ogada –vs- Mollin (2009) KLR 620**.

15. The court order was served on 26th September 2017, as disclosed in affidavit of service sworn on 2nd October 2017, by a duly authorized process server, David Okumu Ojill.

16. Besides, as shown in the affidavit of service sworn on 2nd October, 2017, the contents of “J002” were drawn to the attention of the 1st respondent through the 1st respondent office secretary who was served on 26th September 2017. However, the identity of the secretary is not revealed or at all therein.

17. Paragraphs 3 and 4 of the affidavit of service reveal that the order was duly served on secretary. To that extent, the respondents were not served personally. Furthermore, the court did not dispense with personal service thereof as recognized in **Worburn Case (supra)**.

18. In the **case of Hadkinson (supra)**, it was held that every person has an unqualified obligation to obey court orders unless discharged therefrom. That is the essence of sovereign power and Judicial authority under **Articles 1 (3) (c) and 159 (1) of the Constitution of Kenya**,

2010.

19. Moreover, the order “JOO2” bears no penal notice at its foot or at all. Therefore, the same as duly extracted is fundamentally defective as observed in **Moguche and Nyamweya cases (supra)** which authorities I hereby endorse accordingly.

20. It is further noted that the document marked as “JOO3” annexed to the 2nd applicant’s affidavit is an affidavit of Nicky Otieno Ndiga, a neighbour of the applicants. That the deponent was called by the 2nd applicant who showed him “JOO2”. That the deponent allegedly witnessed demolition and pulling down of the applicants’ houses by the respondents.

21. It has emerged from the application and the response thereto together with the rival submissions that the 1st respondent and counsel for the 1st respondent were not properly served. The details of the secretary who was purportedly served is not disclosed in the affidavit of service sworn on 2nd October 2017.

22. Additionally, there was no personal service of order “JOO2” on the 2nd to 5th respondents. Therefore, the defendants had no knowledge of the order as envisaged in **Kenya Tea Growers Association and Woburn cases (supra)**.

23. I am aware that the grant of the orders sought in the application be exercised with greatest care. I approve the stand point that power to commit alleged contemnors has to be adopted as a last resort remedy see; **Alken and Okolla Ojwang cases (supra)**.

24. In the instant application, I find that the order “JOO2” as extracted is fundamentally defective. The same was not duly served on the respondents as required by law. The application is thus not merited in the obtaining circumstances.

25. Accordingly, I disallow the application dated 25th September 2018 and filed in court on 11th October 2018 with costs in the cause.

DATED, SIGNED and DELIVERED at MIGORI this 16th Day of JANUARY 2020.

G.M.A ONGONDO

JUDGE

In the presence of:-

Mr. Jaoko learned counsel for the applicants/plaintiffs

Mr. Olendo learned counsel for the 1st to 5th respondents/defendants

Court Assistant – Tom Maurice