



Mbawa v Director of Criminal Investigations & another; Chunky Limited & 5 others (Interested Parties) (Petition 202 of 2016) [2020] KEHC 9227 (KLR) (12 May 2020) (Ruling)

Julius Kea Mbawa v Director of Criminal Investigations & another; Chunky Limited & 5 others (Interested Parties) [2020] eKLR

Neutral citation: [2020] KEHC 9227 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
PETITION 202 OF 2016**

**EKO OGOLA, J
MAY 12, 2020**

BETWEEN

JULIUS KEA MBAWA PETITIONER

AND

DIRECTOR OF CRIMINAL INVESTIGATIONS 1ST RESPONDENT

DIRECTOR OF SURVEY 2ND RESPONDENT

AND

CHUNKY LIMITED INTERESTED PARTY

CURLY WURLY LIMITED INTERESTED PARTY

KAHIA TRANSPORTERS LIMITED INTERESTED PARTY

TRADE LEAD LIMITED INTERESTED PARTY

NATIONAL LAND COMMISSION INTERESTED PARTY

JUDICIAL SERVICE COMMISSION INTERESTED PARTY

RULING

1. The Applications before me are the Notice of Motions dated 20/2/2019 and 8/10/2019. The former is brought under the provisions of rule 25 of the Constitution of Kenya (“Mutunga Rules”). The application seeks the following orders:

a) Spent



- b) That there be a Temporary Stay of the Orders given on the 14/8/2018 and any other subsequent orders issued in this matter pending the hearing and determination of this application.
 - c) That the Orders given on 14/8/2018 and any other subsequent Orders issued be set aside pending hearing and determination of the Application herein.
 - d) That all proceedings conducted in this matter in the absence of the 2nd and 4th Interested Parties be set aside.
 - e) That the costs of this Application be in the cause.
2. The Application is premised on the grounds set out therein, and the Supporting Affidavits dated 20/2/2019, and separately sworn by Osman Ahmed Kahia who is described as the Applicant's Director and Peter Omwenga who is the Applicant's Advocate. They both averred that, the Petition was never served upon any of them and that the affidavit of service sworn by one Patrick Muema on the 30/7/2018 was false, misleading and simply a ploy by some parties to steal a match. Consequently, the orders issued on the 17/8/2018 and any subsequent orders ought to be set-aside.
 3. The Application was opposed based on Petitioner's Replying Affidavit sworn on the 6/5/2019 and Grounds of Opposition dated 6/5/2019. He deponed that the Applicants' were duly served with the Petition and have all along been aware of the orders issued. Therefore, they are guilty of laches in originating their Application so late in the day.
 4. In the Grounds of Opposition, it was stated that the Application is ill conceived, bad in law, fatally defective and tainted with mala fides because it seeks orders that are untenable.
 5. The 2nd Interested Party also opposed the Application via its Replying Affidavit sworn on the 16/10/2019 by Attet Jetha who is described as its director. They also filed Grounds of Opposition dated 10/5/2019. The deponent avers that there was no factual basis for setting aside the order since there is sufficient evidence of service on the Applicant, and that the Applicant did not enter appearance or otherwise defend the suit despite service.
 6. He further deposed that the order was made in the presence of the Petitioner's and the Respondents' advocates, and that the proceedings have no adverse effect on the Applicants because the Applicants are not required to Act or refrain from acting. Further, the orders issued on the 14/8/2018 are neutral as they do not affect the rights of any party. In fact they are of mutual importance because they compel investigations on the contested issues of fact that will shed light on the circumstances prevailing the subdivision and subsequent registration of Plot No. 909/VI/MN and help the Court in dispensing justice to the parties.
 7. In the Grounds of Opposition, the 2nd Interested Party states that the remedy for the Applicant is not setting aside the impugned order, but to file a Replying Affidavit to the Petition and that the plea of sub-judice is not enough to set aside the orders and proceedings.
 8. The 1st Interested Party adopted the pleadings filed by the 2nd Interested Party. However, the 5th and 6th Interested Parties did not file any response to this Application.

Determination

9. I have considered the Application, the respective Affidavits in support and opposition thereto and the written submissions by the respective parties. In my view the issues arising for determination



are Whether the Applicants have met the threshold for setting aside of those orders issued on the 14/8/2018 and Whether the Court can review, set aside or vacate the said orders.

Whether the Applicants have met the threshold for setting aside of those orders issued on the 14/8/2018

10. In any application for setting aside any orders of Court on account that the same were granted in the absence of the Applicant, the Applicant is required to show that he failed to attend Court on justifiable grounds. One such ground is that it was not served with the notice to appear in Court. The other consideration is the prejudice to be suffered by the Applicant if the orders are not reversed. In the present application, the Applicant avers that it was not served with the hearing notice of the application. The Applicant disputes the Replying Affidavit sworn by Patrick Muema on 30/7/2018 which purports to have served the Applicant with notice of hearing of the application dated 26/7/2018.
11. It is noteworthy that although the Applicants had expressed the intention to have Patrick Muema the process server cross-examined on the contents of his Return of Service, this was not followed through and no such cross-examination was undertaken. Accordingly, it must be presumed then that the Process Server's averments are indeed correct, in line with the decision of the Court of Appeal in Shadrack arap Baiywo v. Bodi Bach [1987] eKLR, that:

“There is a presumption of service as stated in the process server's report, and the burden lies on the party questioning it, to show that the return is incorrect. But an affidavit of the process server is admissible in evidence and in the absence of contest it would normally be considered sufficient evidence of the regularity of the proceedings. But if the fact of service is denied, it is desirable that the process server should be put into the witness box and opportunity of cross-examination given to those who deny the service.”
12. In light of all the matters foretasted, it is evident that the proceedings of the 14/8/2018 were regular as the Applicants had been duly served with the Petition and the chamber summons dated 26/7/2016. Nevertheless, whereas the Court would not normally set aside such orders, it does have the discretion to do so if sufficient cause is shown in that regard, and more importantly if there is a serious prejudice to be suffered by the Applicant, or if the dictates of justice demand it.
13. What does the term "sufficient cause" mean.? The Supreme Court of India in the case of Parimal v. Veena, (2011) 3 SCC 545 observed that:

“sufficient cause” is an expression which has been used in large number of statutes. The meaning of the word "sufficient" is "adequate" or "enough", in as much as may be necessary to answer the purpose intended. Therefore the word "sufficient" embraces no more than that which provides a platitude which when the act done suffices to accomplish the purpose intended in the facts and circumstances existing in a case and duly examined from the view point of a reasonable standard of a curious man. In this context, "sufficient cause" means that party had not acted in a negligent manner or there was want of bona fide on its part in view of the facts and circumstances of a case or the party cannot be alleged to have been "not acting diligently" or "remaining inactive." However, the facts and circumstances of each case must afford sufficient ground to enable the court concerned to exercise discretion for the reason that whenever the court exercises discretion, it has to be exercised judiciously”
14. The court in the above case added that while deciding whether there is a sufficient cause or not, the court must bear in mind the object of doing substantial justice to all the parties concerned and that the



technicalities of the law should not prevent the court from doing substantial justice and doing away with the illegality perpetuated on the basis of the judgement or order impugned before it.

15. On the issue of the Court's discretion, in the case of *Esther Wamaittha Njibia & two others v. Safaricom Ltd* HCCC No. 62 of 2011, Nairobi the court held *inter alia*: -

“the discretion is free and the main concern of the courts is to do justice to the parties before it. see *Patel v E.A. Cargo Handling Services Ltd* {1974} EA 7. The discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but is not designed to assist a person who deliberately sought, whether by evasion or otherwise, to obstruct or delay the cause of justice. see *Shah v Mbogo* {1969} EA 116. The nature of the action should be considered, the defence if any should also be considered; and so should the question as to whether the plaintiff can reasonably be compensated by costs for any delay bearing in mind that to deny a litigant a hearing should be the last resort of a court. See *Sebei District Administration v Gasyali* 1968} E.Way 300 It also goes without saying that the reason for failure to attend should be considered.”

16. In this case, it is noteworthy that the Petition herein is yet to be heard, and that the Applicants still have an opportunity to file their responses to the petition. The orders sought to be set aside herein have no serious impact on the case of the Applicants herein, but, as submitted by the 2nd Interested Party, are meant to assist this Court to establish the real dispute between the parties and to shed light on the circumstances prevailing the sub-division and subsequent registration of Plot No. 909/VI/MN. Therefore, the Applicants will suffer no prejudice and it is in the interest of justice for the said orders to remain in force.
17. In the premises, it is this Court's considered finding that service of the Petition and Chamber Summons was duly effected upon the Applicants herein and that the orders were issued regularly. In the result, I dismiss the Notice of Motion dated 20/2/2019 with costs in the cause.
18. The second Application is the Application by the Petitioner dated 8/10/2019. The Application seeks the following orders:
- a) Spent
 - b) That the Applicant be granted leave to commence contempt proceedings against the 1st and 2nd Respondents i.e the Director of Criminal Investigations and the Director of Survey who has blatantly ignored and disobeyed this Honourable Court order issued on the 14th August 2018 without any reasonable justification.
 - c) That in the Alternative to the foregoing the said 1st and 2nd Respondents i.e. the Director of Criminal Investigations and the Director of Survey who has blatantly ignored and disobeyed this Honourable Court order issued on the 14th August 2018 without any reasonable justification be summoned to appear before this Honourable Court to show cause why they should not be committed to civil jail for blatant disobedience of valid orders issued by this Honorable Court.
 - d) That the costs of this Application be provided for.
19. The Application is premised on the grounds set out therein and on the affidavit sworn on the 8/10/2019 by the Petitioner herein. He depones that the 1st and 2nd Respondents have without any justification, and in a contemptuous, manner ignored, disobeyed and breached this Court's



orders issued on the 14/8/2018, which were duly served upon them on the 4/9/2018 when they acknowledged receipt and proceeded to instruct advocates on their behalf.

20. The Petitioner avers that the alleged contemnors are under an obligation to comply with orders issued by this Court and the continued malicious disregard of the orders of this Court is an erosion of the dignity of this Court as Court orders should not be issued in vain as this amounts to demeaning the Court and putting it in disrepute.
21. The 1st Respondent opposed the Application via its Replying Affidavit sworn on the 15/11/2019 by Lawson Shuma who is described as a Police Officer attached to the Directorate of Criminal Investigations and Grounds of Opposition dated 15/11/2019. He deponed that pursuant to the Court order issued on the 14/8/2018, and in obedience thereto, the 1st Respondent swore an Affidavit dated 18/3/2019 and submitted its investigation report dated 18/3/2019 which was duly filed in Court by the office of the Attorney General on the 18/3/2019. In the said affidavit, the 1st Respondent deponed that the investigations are still ongoing owing to the complexity of the matter and upon conclusion of the same, the respective file will be forwarded to the Director of Public Prosecutions for perusal and advice.
22. In the Grounds of Opposition, the 1st Respondent states that there has been compliance with the said Court order as stated above and that the Petitioner may not be interested in the Investigating Report filed together with the Replying affidavit as it does not support his claim of ownership of the suit parcel of land, and that this Application is devoid of merit and is intended to coerce the alleged contemnors to sing the Petitioner's tune.

Determination

23. After consideration of the pleadings and arguments to the application for contempt of Court dated 8/10/2019, it is evident that the Application concerns itself with the question on whether or not the Respondents ought to be found guilty of contempt of Court.
24. According to the *Black's Law Dictionary* Contempt is
“a disregard of, disobedience to, the rules or orders of a legislative or judicial body, or an interruption of its proceedings by disorderly behavior or insolvent language, in its presence or so near thereto as to disturb the proceedings or to impair the respect due to such a body”
25. In the case of *Econet wireless Kenya Limited v Minister for Information & Communication of Kenya & Another*, the court stated as follows:
“It is essential for the maintenance of the rule of law and order that the authority and the dignity of our courts are upheld at all times. The court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors. It is the plain and unqualified obligation of every person against or in respect of whom, an order is made by the court of competent jurisdiction to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or void.”
26. This Court notes that the orders issued on the 14/8/2018 directed both the 1st and 2nd Respondent to perform some specific duties. The 2nd Respondent was ordered to give a report on the deed plan registration carried out in relation to ownership dispute for Plot No. 909/VI/MN out of a complaint



made by the 1st Interested Party. From the foregoing, it is noteworthy that the 2nd Respondent has not filed any affidavit to challenge the averments in the Application dated 8/10/2019. Considering the complete and unexplained lack of compliance by the 2nd Respondent, the only reasonable conclusion is that the 2nd Respondent non-compliance is a total disregard and disrespect for the orders issued by this Court, hence a show of contempt of court. In the premises, I find the averments raised by the Petitioner/Applicant to be valid against the 2nd Respondent. I concur with the Petitioner/Applicant that an outright disobedience of court orders not only prejudices the affected parties but tramples on the dignity of the courts.

27. On the part of the 1st Respondent, it is averred that there has been obedience of the Court orders issued on the 14/8/2018 as the 1st Respondent indeed furnished the Court with an Investigation Report via its Replying Affidavit sworn on the 18/3/2019 and that due to the complexity of the matter the investigations are still pending and that when finalized the investigation file will be forwarded to the Director of Public Prosecutions.
28. The threshold for proving Contempt of Court was stated in the case of *Peter K. Yego & Others v Pauline Nekesa Kode* Nakuru HCC No. 194 of 2004 where the court, in recognizing that contempt of court is criminal, held that it must be proved that one has actually disobeyed the court order before one is cited for contempt. The applicant in an application for contempt must prove beyond peradventure that the respondent is guilty of contempt. See G. V. Odunga J in *Misc App No 268 of 2014 (J.R.)*
29. From the foregoing the Court finds that while the 2nd Respondent is in contempt of this Court, the 1st Respondent is not guilty of any such conduct. Accordingly, the motion succeeds against the 2nd Respondent and orders issued as follows:
 - a) The Director of Survey, the 2nd Respondent herein, is found to be in contempt of the Court order issued on 14.8.2018 for failure to comply with the said order.
 - b) Consequently, the 2nd Respondent is hereby ordered to appear on a date to be fixed by the Applicant herein to show cause as to why he/she should not be committed to civil jail for being in contempt of the court order.
 - c) The Petitioner Applicant shall have the costs of the Motion to be borne by the 2nd Respondent.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 12TH DAY OF MAY, 2020.

E.K OGOLA

JUDGE

Ruling delivered in Chambers via MS Teams in the presence of:

Mr. Khagram for 1st Interested Party

Mr. Omwenga for 3rd and 4th Interested Parties

Mr. Kaunda Court Assistant

