



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT BUNGOMA

ELC CASE NO. 102 OF 2012

THE CHAIRMAN BOARD OF TRUSTEES NDALU MOSQUE.....1ST PLAINTIFF

THE SECRETARY BOARD OF TRUSTEES NDALU MOSQUE..... 2ND PLAINTIFF

VERSUS

MARTIN MABELE 1ST DEFENDANT

MOSES WAFULA 2ND DEFENDANT

COUNTY COUNCIL OF BUNGOMA.....3RD DEFENDANT

RULING

By a ruling dated 4th February 2014, **OMOLLO J** granted the plaintiff's prayers 5 and 6 of their Notice of Motion dated 11th April 2013. That motion was premised under the provisions of **Order 8 Rule 3 of the Civil Procedure Rules** and prayers 5 and 6 were worded as follows: -

5: That the defendants be restrained by themselves, their servants, agents or otherwise howsoever from demolishing the Mosque built on plot NO 2 NDALU MARKET pending the hearing of this suit.

6: That the 1st defendant be ordered to grant the plaintiffs and all members of the Mosque un – restricted access to the Mosque for purposes of conducting prayers and religious ceremonies pending hearing of this suit.

Although the said Notice of Motion was premised on the provisions of **Order 8 Rule 3 of the Civil Procedure Rules** which deals with amendment of pleadings, it is clear to me that prayers 5 and 6 were essentially injunctive orders. It is important to note that the said Notice of Motion also sought in prayer 2 leave to amend the plaint. What **OMOLLO J** granted was an interlocutory injunction pending trial under **Order 40 of the Civil Procedure Rules** and therefore prayers No. 5 and 6 automatically lapsed after 12 months. This is because **Order 40 Rule 6 of the Civil procedure Rules** reads: -

“Where a suit in respect of which an interlocutory injunction has been granted is not determined within a period of twelve months from the date of the grant, the injunction shall lapse unless for any sufficient reason the Court orders otherwise”

See also **ERICK KIMINGICHI WAPANG'ANA & ANOTHER .V. EQUITY BANK LTD & ANOTHER [2015 eKLR]** where the Court of Appeal stated that:-

“ Notwithstanding the wording of any order of interlocutory injunction, the same lapses if the suit in which it was made is not determined within twelve months unless as the Rule provides, for any sufficient reason the Court orders otherwise.”

It follows therefore that the orders issued by **OMOLLO J** on 4th February 2014 lapsed on 4th February 2015 because this suit is yet to be determined.

The plaintiffs again filed another Notice of Motion dated 11th September 2019 this time citing the provisions of **Section 63 (e) of the Civil Procedure Act** and **Order 40 Rules 1 (a) (b) 3(1) and (4) of the Civil Procedure Rules** seeking the following remedies: -

1. Spent

2. Spent

3. That this Honourable Court be pleased to find the 1st, and 2nd defendants guilty of contempt of Court committed on the 4th day of September 2019 and 9th day of September and order that they be committed to jail for a period of six months or for a term as the Court may deem fit.

4. That the 1st and 2nd defendants be ordered to rebuild the demolished pit latrine and repair the house belonging to the IMAM.

5. Any other order as the Court deems fit and just to give in the interest of justice of this cause and to preserve the dignity and integrity of the rule of law.

6. Costs of this application be provided for.

The application is premised on the grounds set out therein and is also supported by the affidavit of **IBRAHIM BARAKA** the **CHAIRMAN BOARD OF TRUSTEES NDALU MOSQUE** which is the 1st plaintiff herein.

The gravamen of the application is that notwithstanding the orders of **OMOLLO J** issued on 14th February 2014 (the orders were actually issued on 4th February 2014 as per the copy of the Judge's ruling) the 1st and 2nd defendants demolished the plaintiffs' pit latrine on 4th September 2019 and have also placed building materials on plot No. 2 **NDALU MARKET** with the intention of developing the same yet this case is still pending. That the 1st and 2nd defendants also proceeded to demolish the **IMAM'S** house in contravention of the same orders.

That application was placed before **MWANGI NJOROGE J** who directed that it be served for inter parte hearing on 22nd October 2019. That is the application subject of this ruling.

The application is opposed and **MARTIN MABELE** the 1st defendant has, in his replying affidavit dated 5th October 2019 and also sworn on behalf of **MOSES WAFULA** the 2nd defendant, deponed that neither him nor the 2nd defendant have demolished the pit latrine or the **IMAM'S** house in contravention of the Court orders. He adds further that the pit latrine was located on a road reserve and was demolished, along with other illegal structures, by the **COUNTY COUNCIL OF BUNGOMA** the 3rd defendant herein. That the **IMAM'S** house is unoccupied, neglected and is in the process of sinking due to the heavy rains. Photograph of the house are annexed to the affidavit – annexure **MM 1**. That in any event, the pit latrine and the **IMAM'S** house were not mentioned in the said order which did not bar the 1st and 2nd defendants from continuing with construction work on the said plot. That this application is only meant to create confusion and delay the full hearing and determination of this suit and is also a gross abuse of due process and ought to be dismissed with costs.

The application has been canvassed by way of written submissions which have been filed by the firm of **KRAIDO & COMPANY ADVOCATES** for the plaintiffs and the firm of **OKILE & COMPANY ADVOCATES** for the 1st and 2nd defendants. The firm of **J.O MAKALI & COMPANY ADVOCATES** for the 3rd defendant did not participate in the application as it did not affect their client.

I have considered the application, the rival affidavits and submissions by counsel.

The application seeks the following main prayers: -

1. Spent

2. Spent

3. That this Honourable Court be pleased to find the 1st and 2nd defendants guilty of contempt of Court.

4. That the 1st and 2nd defendants be ordered to rebuild the demolished pit latrine and repair the house belonging to the IMAM.

5. Any other order as the Court deems fit and just to grant in the interest of justice so as to preserve the dignity and integrity of the rule of law.

6. Costs.

With regard to the prayer that this Court finds the 1st and 2nd defendants in contempt of Court, I have at the commencement of this ruling found that the order purported to have been disobeyed by the 1st and 2nd defendants was the order issued by **OMOLLO J** on 4th February 2014. That is made abundantly clear in paragraph 3 of the supporting affidavit by the 1st defendant in which he had deponed as follows: -

“That there is a Court order dated 14th February 2014 restraining the defendants by themselves, their servants, agents or otherwise howsoever from demolishing the Mosque built on plot NO 2 NDALU MARKET pending the hearing of this suit.”

In paragraph 4 of the same affidavit, it is deponed that the demolition of the pit latrine was done on 4th September 2019. Then on 9th September 2019, they demolished the **IMAM**'s house. The 1st and 2nd defendants have denied having demolished the pit latrine or **IMAM**'s house. However, as I have already indicated above, the orders by **OMOLLO J** having been issued on 4th February 2014 and this suit not having been heard and determined within twelve (12) months, those orders lapsed on 4th February 2015. Faced with a similar application in **SIMON NJAGI NJOKA .V. JAMES GATIMU MURIITHI & OTHERS 2017 eKLR** and after citing the provisions of **Order 40 Rule 6 of the Civil Procedure Rules**, I stated as follows: -

“My understanding of this provision is that once an interlocutory injunction is granted, the suit upon which that injunction is premised must be heard and determined within a period of twelve months. If for some reasons the suit cannot be heard and determined within that period, then the onus is on the party in whose favour it was issued to go back to the Court with sufficient reason seeking an extension of the said order otherwise it “shall lapse” automatically by effluxion of time. The mischief that this rule was intended to cure was the practice whereby a party moves to Court, obtains an interlocutory injunction and while enjoying that relief, takes no steps towards prosecuting the suit.”

I then proceeded to add in the same case that: -

“The result is that a lapsed order cannot form the basis upon which the 3rd defendant can be cited for contempt.”

The same scenario obtains here. **Order 40 Rule 6 of the Civil Procedure Rules** provides that if the suit in which an interlocutory injunction has been granted is not heard and determined within twelve months from the date on which it was issued, the injunction **“shall lapse.”** The word **“lapse”** is defined in **BLACK’S LAW DICTIONARY 9TH EDITION** as: -

“The termination of a right or privilege because of a failure to exercise it within some time limit or because a contingency has occurred or not occurred.”

The orders issued on **OMOLLO J** on 4th February 2014 and upon which the plaintiffs seek to have the 1st and 2nd defendants cited for contempt lapsed twelve months after that date and were not extended. They cannot be invoked to cite the 1st and 2nd defendants for contempt. That prayer is accordingly dismissed.

Prayer **NO 4** is really seeking the remedy of a mandatory injunction because it is intended to direct the 1st and 2nd defendants to rebuild the demolished latrine and repair the **IMAM**'s house. It seeks a final order even before the suit is heard. In the way in which it is worded, granting it will amount to determining this suit in a summary manner. And even assuming that it was intended to be a temporary mandatory injunction, the law is that such an order can only be issued in the clearest of cases and with caution – **LOCABAIL INTERNATIONAL FINANCE LTD.V. AGRO EXPORT 1986 1 ALL ER 901**. In **KENYA BREWERIES LTD & ANOTHER .V. WASHINGTON OKEYO 2002 eKLR**, the Court of Appeal citing **HALBURY LAWS OF ENGLAND 4TH EDITION** said: -

“A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but, in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the Court thinks it ought to be decided at once, or if the act done is a simple and summary one which can be easily remedied, or if the defendant attempted to steal a march on the plaintiff, a mandatory injunction will be granted on an interlocutory injunction.”

See also **HELLEN MUKAMI .V. DORINA ATIENO AMOLLO & ANOTHER 2017 eKLR**. I do not consider this to be one of those clear cases in which to grant that prayer.

The up – shot of the above is that the plaintiffs' Notice of Motion dated 11th September 2019 is devoid of any merits. It is dismissed with costs to the 1st and 2nd defendants.

Before I leave this matter, I wish again to remind the parties of my directions in the ruling that I delivered on 15th November 2018 when I asked them to expedite the hearing of this suit which was filed in 2012. Once again, I will echo those sentiments and advise the parties, if they have not already done so, to prioritize the pre – trial directions so that this suit, which is now 20 years old, can be expedited.

Boaz N. Olao.

J U D G E

20th February 2020.

Ruling dated, delivered and signed in Open Court this 20th day of February 2020 at Bungoma.

Mr Olonyi for Mr. Okile for 1st and 2nd defendants present

Mr. Wekesa for Mr. Kraido for plaintiff present

Mr Kundu for Mr Murunga for 3rd defendant present

Plaintiff present

1st defendant present

2nd defendant present

Joy/Okwaro – Court Assistants

Boaz N. Olao.

J U D G E

20th February 2020.