



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MOMBASA

ELC NO. 33 OF 2019

ASHOK LABSHANKER DOSHI.....1ST PLAINTIFF

PRATIBHA ASHOK DOSHI.....2ND PLAINTIFF

VERSUS

COUNTY GOVERNMENT OF MOMBASA.....1ST DEFENDANT

BERNARD OCHIENG OGUTU.....2ND DEFENDANT

RULING

(Application to commit the Governor of Mombasa County and certain other persons to jail for disobedience of an order of injunction; court having issued interim orders of injunction stopping the visitation or trespass into the suit property; defendant being the County Government of Mombasa and a Member of County Assembly; the Governor and the 2nd defendant visiting the property and overseeing the vandalisation of part of the structures; clear that this was in violation of the order of injunction; the Governor and the 2nd defendant held guilty of disobedience.)

1. The application before me is that dated 17 May 2019. The principal prayer, which is prayer (3) in the application, seeks orders to have the Governor of the 1st defendant, Jaffer Suleiman Moshesh the Chief Officer in the Department of Lands, Planning and Housing of the 1st defendant, and Benard Ochieng Ogutu, the 2nd defendant, to be committed to civil jail for a period of six months for disobeying the orders of this court made on 6 March 2019 and amended on 9 April 2019. The application is based on various grounds and is supported by the affidavits of Ashok Labshanker Doshi the 1st plaintiff, Joash Willis Wasonga, Philip Mwendwa and Sudi Ali Said. The application is opposed.

2. To put matters into context, this suit was commenced through a plaint which was filed on 28 February 2019. In the plaint, the plaintiffs/applicants averred that they are owners of the leasehold interest in the land parcel MN/VI/3458 situated in Changamwe, Mombasa County (the suit property) having purchased it from Turf Developers Limited. The applicants pleaded that on 25 February 2019, the 2nd defendant, Benard Ochieng Ogutu, accompanied by some officers and agents of the 1st defendant (the County Government of Mombasa), invaded the suit property, vandalised the gate and part of the perimeter wall, alleging that the applicants have grabbed the land from Changamwe Secondary School. It is pleaded that three security guards of the plaintiffs were arrested but they were later released without any charges being preferred against them. On 26 February 2019, the 1st defendant through the County Chief Officer of Physical Planning & Housing Department served an enforcement notice which the applicants contest to be improper. In the suit, the applicants seek orders inter alia for a declaration that they are the rightful owners of the leasehold title in the suit property; a permanent injunction to restrain the defendants from the suit property; and refund of money used to repair the damage caused to their property.

3. Together with the plaint, the applicants filed an application dated 28 February 2019, seeking orders of injunction to restrain the defendants from inter alia visiting, invading or demolishing their perimeter wall and gate, pending the hearing of the application, and eventually pending the hearing of the case. That application was placed before my predecessor, Honourable A. Omollo J, who certified it urgent and directed that it be served for *inter partes* hearing on 6 March 2019. Present in court were Mr. Oluga, learned counsel for the applicants, Ms. Kuria for the 1st defendant, and Mr. Mwandeje holding brief for Mr. Wahome for the interested party (National Land Commission). There was no appearance for the 2nd defendant and Mr. Oluga mentioned that he had not been served. Counsel present for the defendants sought adjournment which the court allowed but the court did allow prayer 2 of the application which sought interim orders of injunction pending hearing of the application. The Court directed that the application be heard *inter partes* on 9 April 2019 with direction that the 2nd defendant be served.

4. On 9 April 2019, Mr. Oluga was present for the applicants while Ms. Kuria appeared for the 1st defendant, and Mr. Chebukaka appeared

for the 2nd defendant. Mr. Oluga informed court that they had agreed to give Mr. Chebukaka 14 days to allow him reply to the application and interim orders be extended. This was confirmed by Ms. Kuria and Mr. Chebukaka, and the Court adopted this agreement and extended interim orders to 27 June 2019 when the application was to be heard *inter partes*.

5. It is between that period that this application was filed on 17 May 2019.

6. In the supporting affidavit, Mr. Doshi has deposed *inter alia* that the interim orders of injunction were made in the presence of and consented to by counsel for the respondents and thus the respondents are bound by the said orders. He has deposed that on 10 May 2019, the Governor of the 1st defendant, Ali Hassan Joho, accompanied by the 2nd defendant and many other leaders from Mombasa County, some County Askaris and about 100 hired goons, invaded the suit property, broke down the gate and carried it away, and held a public rally on the property where they accused the 1st applicant of being a land grabber. He deposed that the incident was reported in the 7pm Swahili news bulletin of NTV and he annexed a Compact Disk (CD) of the report which he stated he downloaded from Youtube. He deposed that the Governor and the leaders who accompanied him made a public declaration and resolved that they would settle furniture making *jua kali* artisans on the suit property. It is deposed that on the night of 10 May 2019, the 1st defendant through its authorised officers, agents and employees, brought and dumped sofa sets and other furniture on the suit property in a bid to make true their resolve. Some photographs were annexed said to be of the furniture dumped on the suit property. Mr. Doshi has further deposed that on 12 May 2019, the defendants' employees and agents led by the 2nd defendant, brought a bulldozer and demolished a substantial part of the boundary wall of the suit property. He has annexed a photograph which he has stated shows the demolished wall. He has complained that in the public rally held at the suit property, the Governor stated that as "President" of Mombasa County, he has revoked the title of the applicants, which "revocation" was followed by breaking and carrying away the gate, and the demolishing of the wall and an attempt to settle furniture makers. It is his view that the utterances of the Governor of 10 May 2019 and his actions and that of his officers, together with the 2nd defendant, of invading the suit property, breaking the gate and demolishing the wall, are in breach of the Court's order made on 6 March 2019 and 9 April 2019.

7. He has contended that Jaffer Suleiman Mohesh, as the Chief Officer in the Department of Lands, Planning and Housing of the County Government of Mombasa was under obligation to advise the 1st defendant's officers agents and employees to obey the court order but he instead instructed them to invade it and carry out acts of vandalism. He has stated that Ali Hassan Joho, and Jaffer Suleiman Mohesh, being officers and employees of the 1st defendant, and Benard Ochieng Ogutu, the 2nd defendant, deliberately disobeyed the Court orders mentioned.

8. In his supporting affidavit, Joas Willis Wasonga, has deposed *inter alia* that he is a security guard at the suit property. He has deposed that on 10 May 2019, people from the County Government of Mombasa led by the Governor, Ali Hassan Joho, the area Member of County Assembly (MCA) Benard Ochieng Ogutu (the 2nd defendant), and other leaders invaded the suit property. He deposed that they handcuffed him, but he remained in the area, and saw everything. He deposed that the people acting on the instructions of the Governor and the MCA broke down the gate and gained forceful entry. Led by the Governor, they held a public rally on the property upon which they instructed the youth and county askaris to carry away the gate, which they did, and took it to an unknown destination. Before they left, they released him from the handcuffs. He later reported the incident at Changamwe Police Station vide OB No. 60/10/5/2019. At around 10pm, a lorry came and dumped sofa sets on the suit property. On 12 May 2019, while he was on duty, employees of the County Government of Mombasa, led by the 2nd defendant came to the suit property. A few minutes later, a yellow bulldozer without number plates but with markings on the side reading "County Government of Mombasa" arrived and demolished a substantial part of the boundary wall. Two canter lorries that had come to carry away the debris were arrested by the police.

9. Philip Mwendwa, the deponent of the third supporting affidavit, deposed *inter alia* that he is also a security guard at the suit property. He deposed that on 12 May 2019, while he was on duty, employees of the County Government of Mombasa, led by the 2nd defendant, came to the suit property aboard a Toyota Land Cruiser KBX 140V. He reiterated that a few minutes after they arrived the yellow bulldozer came and knocked down part of the wall which was done under the guidance and supervision of the 2nd defendant.

10. The fourth supporting affidavit is sworn by Sudi Ali Said. He has deposed that on 12 May 2019, he was on the suit property. He managed to take photos and videos using his phone, an Infinix Note 2. He deposed that at the time he took the photos and videos, his phone was working properly. The images were stored in the phone and later printed via a printer that was in good working condition. The video was also stored in the phone and later converted into a CD using a laptop HP Model 3168NGW which was working properly at the time.

11. Jaffer Suleiman Mohesh, filed a replying affidavit. He deposed *inter alia* that on 8 March 2019, he received a letter addressed to him as the Chief Officer Lands, Physical Planning and Housing, from Ms. Elizabeth Kuria Advocate, attaching a court order dated 6 March 2019, giving notice of the injunction. He averred that he complied with the order and did not issue any instructions to interfere in any way with the suit property. He deposed that on 18 April 2019, he proceeded on leave upon being instructed to do so by the Acting County Secretary, Mr. Joab Tumbo, and he handed over all his responsibilities to Dr. June Mwajuma as instructed in the leave letter. He has annexed a copy of the leave letter. He deposed that on 10 May 2019, he was on compulsory leave and he could not have issued any orders to interfere with the court order. He has pointed out that he does not appear in the video clips annexed by the applicants.

12. Benard Ochieng Ogutu, the 2nd defendant, also filed a Replying Affidavit. He deposed that he is the current MCA of Changamwe Ward. He averred that he has no authority over the County Government of Mombasa workers and cannot instruct them to demolish property. He has deposed that on 19 May 2019, he was unwell and could not have been at the suit property. He has stated that the videos annexed do not show him inciting anybody and what they show is that he is walking away. He has denied committing any of the acts.

13. Ali Hassan Joho did not swear any replying affidavit.

14. I have taken note of the written and oral submissions of counsel. The video annexed to Mr. Doshi's affidavit was also played out in court and was viewed by the court.

15. I note that in his submissions, Mr. Tajbai, learned counsel for the 1st defendant, submitted inter alia that the electronic evidence, that of the compact disc (CD) is not admissible in evidence for want of compliance with the provisions of Section 106B of the Evidence Act, Cap 80, Laws of Kenya. He also submitted that Mr. Doshi has not attached any evidence that the original device used was working properly and referred me to the case of *Ndwiga Steve Mbogo vs Independent Electoral and Boundaries Commission & 2 Others (2017) eKLR*. He submitted that the correct person to depose on the electronic evidence would have been the original producer of the contents of the video clip. He submitted that Mr. Doshi has not shown that part of his ordinary activities is to download videos from Youtube contrary to Section 106B of the Evidence Act. He submitted likewise in respect of the photos and video of Mr. Sudi. He further submitted that Mr. Joho was not aware of the court orders, and that this was not because he was negligent, but because it is the Department which was served. He submitted that the Governor neither instructed anyone to demolish the perimeter wall nor did he do it himself. He referred me to the standard of proof in such a matter. In respect of Jaffer Suleiman Mosheh, he submitted that he was not on duty at the material time.

16. Mr. Chebukaka learned counsel, on behalf of the 2nd defendant, inter alia submitted that the 2nd defendant never incited anybody and the pictures do not prove that he was on the suit property as alleged. He submitted that his client has no power and control over the County employees. He also raised a technical issue on the drawing of the application, that it does not bear the words “*if any party served does not appear at the time and place above mentioned such order will be made and proceedings taken as the court may think just and expedient*” thus offending Order 51 Rule 13 which requires these words to be printed in applications.

17. Mr. Oluga on his part submitted inter alia that the Governor has not sworn any affidavit. He submitted that that current jurisprudence is that personal service of a court order is not mandatory and knowledge of it is sufficient. He submitted that the Governor is officer No. 1 of the 1st defendant and is thus bound by the order. He referred me to the video and submitted that contempt is demonstrated.

18. The question that arises in this application is whether there has been disobedience of the court orders issued on 6 March and 9 April 2019. There are three respondents to the application, the first being Ali Hassan Joho the Governor of the County Government of Mombasa, Jaffer Suleiman Mohesh and Benard Ochieng Ogutu. I will refer to them henceforth as the 1st, 2nd and 3rd respondents respectively. I observe that only the 2nd and 3rd respondents filed replying affidavits and nothing was filed by the 1st respondent.

19. None of the respondents have denied that the court orders of 6 March 2019 and 9 April 2019 exist. To be specific, the order of 6 March 2019 provided as follows:-

“There be and is hereby issued an order of injunction to restrain the 1st defendant either by itself, officers, agents, employees, assigns or any person acting for the 1st defendant from visiting, invading and trespassing on the plaintiffs’ property known as Land Reference No. MN/VI/3458 and from demolishing the perimeter wall, gate or any other structure erected on the said property and from generally interfering with the plaintiffs’ quiet and peaceable use, occupation, possession, ownership and title of the property known as Land Reference NO. MN/VI/3458 pending hearing and determination of the plaintiffs’ application dated 28th February 2019.”

20. The order of 9 April 2019 was in similar terms to the above only that it provided that the order extends to apply to both defendants.

21. The application herein is brought pursuant to the provisions *inter alia* of Order 40 Rules 3(1) and (3) of the Civil Procedure Rules, 2010 which provides as follows :-

Consequence of breach [Order 40, rule 3.]

(1) In cases of disobedience, or of breach of any such terms, the court granting an injunction may order the property of the person guilty of such disobedience or breach to be attached, and may also order such person to be detained in prison for a term not exceeding six months unless in the meantime the court directs his release.

(2) No attachment under this rule shall remain in force for more than one year, at the end of which time, if the disobedience or breach continues, the property attached may be sold, and out of the proceeds the court may award such compensation as it thinks fit, and shall pay the balance, if any, to the party entitled thereto.

(3) An application under this rule shall be made by notice of motion in the same suit.

22. The orders claimed to have been disobeyed were orders of injunction issued pursuant to the provisions of Order 40 and thus Order 40 Rule 3 is applicable. I however need to state that Section 29 of the Environment and Land Court also provides for an offence where there is disobedience of an order or direction of the Court. The same provides as follows :-

29. *Offences*

Any person who refuses, fails or neglects to obey an order or direction of the Court given under this Act, commits an offence, and shall, on conviction, be liable to a fine not exceeding twenty million shillings or to imprisonment for a term not exceeding two years, or to both.

23. Before I go to the gist of the application, I find it necessary to explain the role of the court and the importance of obeying court orders. It is inevitable that persons will have disputes of one sort or another including disputes over ownership of land. The role of the court is that of an arbiter through which the court makes decisions on the rights and obligations of the litigants. This exercise of judicial authority has been derived from the people of Kenya, and is manifested in Article 159 (1) of the Constitution which provides as follows :-

Article 159 (1) Judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under this Constitution.

24. Thus, when the court is conducting its role, it is doing so on behalf of the people of Kenya. The people of Kenya wish and do have an institution which they have entrusted to hear and determine disputes. In other words, Kenyans do not want a situation where jungle law and anarchy prevails. Kenyans wish to have order in the resolution of their disputes, and that is why the people of the country created courts and tribunals, and vested them with power to exercise judicial authority. When a judicial officer makes decisions, that officer is making decisions for the benefit of all Kenyans following the mandate that the people have vested in the court. If we remove the court from the equation, then we open ourselves to anarchy and jungle law, where the high and mighty trample over the rights of the weak in society. It is therefore imperative that all persons within our borders do obey court orders. Anybody not doing so will be negating what the people of Kenya have underscored through Article 159 (1) of the Constitution. As a country, we should never allow anybody to go against an order of the court for this will be a recipe for anarchy and a lawless society. As individuals, we bear the responsibility of adhering to each and every order that a court has made. There must be an understanding that everybody is under the law and nobody is above the law. There is no heroism in going against any order of the court and indeed any person disobeying a court order ought to look himself in the mirror and shame his image.

25. Getting to the issue at hand, what I need to decide is whether there has been a disobedience by the three persons mentioned in this application of the orders issued on 6 March 2019 and 9 April 2019. I have already set out the orders earlier in this ruling and I need not copy the same again, but in essence, the court did make orders of interim injunction. I have already alluded to the affidavits supporting the application. These affidavits give personal accounts of what the deponents saw and some electronic evidence in form of two CDs is provided. There is of course objection to these CDs being used as evidence.

26. In my view, the objection is coming too late in the day after the Court has already seen the videos. I think that where a party is objecting to the admissibility of evidence, he needs to do that before the evidence is presented, for it is difficult for the court to close its eyes and ears on what it has already seen and heard. What the respondents needed to do was to seek to have that evidence expunged before it is presented. In fact, the court can conduct a sort of mini “trial within a trial” to determine whether or not the evidence is admissible. That is indeed what happened in the case of *Ndwiga Steve Mbogo vs Independent Electoral and Boundaries Commission & 2 Others (2017) eKLR* and *William Odhiambo Oduol vs The Independent Electoral and Boundaries Commission & 2 Others (2013) eKLR* referred to me by Mr. Tajbai for the 1st defendant. In our instance, no objection was taken to have the electronic evidence expunged from the supporting affidavits and again no objection was raised before the videos were played out. It is in my view too late to contest admissibility at the submissions stage when already the evidence has been presented.

27. But that aside, even if I am not to use the electronic evidence, I think the affidavits of Mr. Wasonga and Mr. Mwendwa, are elaborate in presenting the events that occurred on 10 May 2019, and 12 May 2019. I am persuaded by the two affidavits of Mr. Wasonga and Mr. Mwendwa that Mr. Joho and Mr. Ogutu were present at the suit property on 10 May 2019 and that they incited persons to undertake acts of vandalism. Mr. Joho has sworn no affidavit to refute that he was present on the suit property on 10 May 2019. Mr. Joho has not denied that he was on the suit property and neither has he denied inciting the persons present to undertake the acts of vandalism complained of. Mr. Ogutu does not also deny being present in the meeting on the site and it follows that he also at the very least “visited” the suit property on 10 May 2019 contrary to the orders in issue. He has of course denied visiting the property on 12 May 2019 on the claim that he was unwell but the fact that he visited the property on 10 May 2019 is sufficient to hold him culpable. The only person who I am persuaded did not visit the property is Mr. Jaffer, who I have seen at the material time had been suspended and was no longer exercising any authority in the institution of the County Government of Mombasa.

28. The evidence is overwhelming that there was at the very least a visitation of the property by the 1st and 3rd respondents contrary to the orders of court. Further, their visit led to the demolition of the gate and the wall of the applicants. All these are not denied. If Mr. Joho and Mr. Ogutu had not visited the property, I do not think that there would have been any demolition or vandalism of the suit property. The two hold political offices and they know, or ought to know, that the masses would be quick to follow their prompt. Given their political power, they are not only responsible for their own actions, but also the actions of people who act on their behest and call, unless they can show that the people were acting on a frolic of their own despite their pleas for a different action.

29. It is not therefore difficult for me to find that there was a violation of the court orders by Mr. Joho and Mr. Ogutu, as I have demonstrated above. The evidence on the violation is overwhelming and most importantly is not disputed.

30. It was argued that the respondents ought not to be held culpable because there was no service of the order and therefore the respondents were not aware of it. I agree with Mr. Oluga that the emerging jurisprudence does not call for personal service. Knowledge of the order is sufficient. This was affirmed by the Court of Appeal in the case of *Shimmers Plaza Limited vs National Bank of Kenya Limited (2015) eKLR* relied upon by Mr. Oluga. In the said decision, the Court of Appeal further elaborated that the presence of counsel when the order is made would infer that the client is aware of the order. The Court stated as follows on this point :-

“Would the knowledge of the judgment or order by the advocate of the alleged contemnor suffice for contempt proceedings ? We hold the view that it does. This is more so in a case such as this one where the advocate was in Court representing the alleged contemnor and the orders were made in his presence. There is an assumption which is not unfounded, and which in our view is irrefutable to the effect that when an advocate appears in court on instructions of a party, then it behoves him/her to report back to the client all that transpired in court that has a bearing on the client’s case.”

31. In our instance, when the orders in issue were made, counsel for the defendants were present and it must thus be inferred that the defendants were aware of the orders made.

32. I am aware that Mr. Joho is not individually named as defendant in this matter but he has been cited because he is the Governor of the 1st defendant and he visited the site and was present when the vandalism occurred. The 1st defendant is a corporate body and of course acts through the agency of persons. The 1st respondent is the Chief Executive of the 1st defendant and he cannot escape responsibility for acts of disobedience which he himself undertook, and it must be deemed that when he acted as he did, he was acting as the Chief Executive of the

1st defendant. He is thus culpable for the acts of disobedience on behalf of the 1st defendant.

33. It will be seen from the above that I am persuaded that Mr. Joho and Mr. Ogutu acted in disobedience of the orders of court. I have already exonerated the 2nd respondent, Mr. Jaffer from culpability as it is not alleged that he visited the site and he was under suspension and not in office when the acts of disobedience occurred. The application for disobedience as against Mr. Jaffer is therefore dismissed but is allowed as against Mr. Joho and Mr. Ogutu.

34. The only issue left is sentence and before I go to this I believe it will only be fair that I allow the two a chance to mitigate. They can attend court on a date that I will give for purposes of mitigation.

35. The costs of this application will be borne personally by Mr. Joho and Mr. Ogutu jointly and/or severally and the applicants are at liberty to tax the costs at any time and need not wait for the conclusion of this suit.

36. Orders accordingly.

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

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MUNYAO SILA,

JUDGE.

IN THE PRESENCE OF:

Mr.Oluga for the plaintiffs.

Mr Tajbai for the 1st defendant.

Mr Chebukaka for the 2nd defendant.

Court Assistant; David Koitamet.