



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA

ELC NO. 33 OF 2019

ASHOK LABSHANKER DOSHI.....1ST PLAINTIFF

PRATIBHA ASHOK DOSHI.....2ND PLAINTIFF

VERSUS

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

BENARD OCHIENG OGUTU.....2ND DEFENDANT

NATIONAL LAND COMMISSION.....INTERESTED PARTY

AND

ALI HASSAN JOHO.....APPLICANT

RULING

(On application dated 20 February 2020)

1. The application before me is that dated 20 February 2020 which has been filed by Ali Hassan Joho and he seeks to set aside the ruling of 12 February 2020. The application is opposed.

2. To put matters into context, this suit was commenced by way of a plaint which was filed on 28 February 2019. In his plaint, the plaintiffs averred to be the owners of the land parcel MN/IV/3458 (the suit land) situated in Changamwe, Mombasa County. They sued the County Government of Mombasa as 1st defendant and one Benard Ochieng Ogutu, the Member of County Assembly (MCA) of Changamwe as 2nd defendant, and the National Land Commission as interested party. The plaintiffs pleaded that on 25 February 2019, the 2nd defendant, accompanied by several officers and employees of the 1st defendant, invaded the suit land, vandalised the gate and part of the perimeter wall, on the allegation that the suit land was grabbed from Changamwe Secondary School and they had come to repossess it. It is pleaded that on 26 February 2019, the 1st defendant, through the County Chief Officer of Physical Planning & Housing Department, served an enforcement notice and placed a mark 'X- CGM DEMOLISH' on the property. In the suit, the plaintiffs sought orders *inter alia* for a declaration that they are the lawful owners of the suit land and a permanent injunction to restrain the defendants from the suit land.

3. Together with the plaint, the plaintiffs filed an application for an interlocutory injunction to restrain the defendants and/or their servants agents, from the suit land, first, pending the *inter-partes* hearing of the application, and ultimately, pending the hearing and determination of the suit. The application was placed before my predecessor, A. Omollo J, on 28 February 2019. She certified the application as urgent and directed that it be heard *inter partes* on 3 March 2019. On 3 March 2019, Ms. Kuria was present for the 1st defendant and Mr. Mwandeje held brief for Mr. Wahome for the interested party. There was no appearance on the part of the 2nd defendant who had not been served. No reply to the application had been filed and the court allowed the defendants and interested parties additional time to respond to the application, and in the meantime, granted interim orders pending *inter partes* hearing which was fixed for 9 April 2019. On 5 March 2019, a formal Memorandum of Appearance on behalf of the 1st defendant, was filed by Elizabeth Kuria, Advocate, on behalf of the County Attorney, County Government of Mombasa. Subsequently, in response to the application for injunction, a replying affidavit sworn by Jaffar Suleiman Moshesh, the then Chief Officer in the Department of Lands, Planning and Housing of the 1st defendant, was filed. For the 2nd defendant, the law firm of M/s Chebukaka & Associates Advocates was instructed.

4. On 9 April 2019, Mr. Oluga, learned counsel, was present for the plaintiffs, Ms. Kuria learned counsel, present for the 1st defendant, and

Mr. Chebukaka , learned counsel, was present for the 2nd defendant. Parties agreed to give Mr. Chebukaka 14 days to reply to the application for injunction, and by consent, agreed to extend the interim orders to 27 June 2019 when the application was fixed for *inter-partes* hearing.

5. Before the date for the *inter-partes* hearing of the application for injunction, the plaintiffs filed an application dated 17 May 2019, complaining that there was disobedience of the interim orders of injunction. Specifically, the plaintiffs sought an order that Ali Hassan Joho, 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, be summoned by the court to show cause why they should not be committed to civil jail for six months for disobeying the orders of injunction made on 6 March 2019 and 9 April 2019. Among the grounds mentioned in support of the application, was that on 10 May 2019, the 1st defendant's officers, employees and agents, led by their senior most officer in the County, the Governor Ali Hassan Joho, invaded the suit property, demolished the gate, and held a public rally on it. The plaintiffs were of opinion that Ali Hassan Joho, Jaffer Suleiman Moshesh, as officers, employees, agents and persons acting on behalf of the 1st defendant, and Benard Ochieng Ogutu, the 2nd defendant, had thus deliberately disobeyed the court orders of 6 March 2019 and 9 April 2019.

6. To oppose the application, replying affidavits were filed by Jaffar Suleiman Moshesh and by Benard Ochieng Ogutu. Counsel were directed to file written submissions in respect of the application. Mr. Oluga filed submissions on behalf of the plaintiffs, Mr. Chebukaka for the 2nd defendant, and for the 1st defendant, joint submissions were filed for both the application for injunction and the application for disobedience of the order of injunction. The submissions were filed by Elizabeth Kuria Advocate, for the County Attorney. Oral arguments were made by counsel on 13 November 2019, with Mr. Oluga present for the plaintiffs, Mr. Tajbai present for the 1st defendant, and Mr. Chebukaka present for the 2nd defendant. I delivered ruling on the application on 12 February 2020 in the presence of Mr. Tajbai for the 1st defendant, holding brief for Ms. Kuria, Mr. Oluga for the plaintiff and Mr. Chebukaka for the 2nd defendant. In my ruling, I held that there was a disobedience of the interim order of injunction. I *inter alia* found that Mr. Joho and Mr. Ogutu did visit the suit property contrary to the interim order of injunction. I thereafter directed that the parties appear for mitigation on 3 March 2020 prior to sentencing. Before that date, this application was filed.

7. It is noteworthy to state that this application has been filed by the law firm of M/s Balala & Abed Advocates. The said law firm filed a Notice of Appeal against the ruling of 12 February 2020 on behalf of the 1st defendant, and filed a Notice of Appointment of Advocates on behalf of Ali Hassan Joho, the applicant herein. The said firm of advocates also filed this application on behalf of Ali Hassan Joho.

8. In the application, Ali Hassan Joho (hereinafter also referred to as the applicant), wants the orders of 12 February 2020 set aside, on the principal ground that the application dated 17 May 2019 was never personally served upon him, and as such, he is a stranger to these proceedings. It is argued that the applicant is a separate legal entity from the County Government of Mombasa, and it was paramount that he be given an opportunity to be heard. It is contended that the applicant was never served with a Notice to Show Cause (NTSC), or any decree or order, that he is alleged to have been in contempt of, and was therefore unaware of the said orders. In the supporting affidavit, the applicant has deposed that he only got to know that he has been held in contempt of court through the mainstream and social media. He has contended that he has never disobeyed a court order, and that as a matter of principle, he fully respects the sanctity of the rule of law and all court orders. He has argued that the orders of 6 March and 9 April 2019 were only served upon the 1st defendant, and not upon him, yet he is a separate entity from the 1st defendant. He has averred that he is not a party to the proceedings herein and he was not aware of the injunctive orders of 6 March and 9 April 2019.

9. The application is opposed by the plaintiffs, who have filed a replying affidavit sworn by the 1st plaintiff. He has responded to the claim that the applicant was not personally served with the application for disobedience of the order of injunction. He has deposed that firstly, personal service is not mandatory in such an application and that this issue (of need for personal service) was raised and dismissed in my ruling of 12 February 2020. He has deposed that nevertheless, he sent a process server, one Mr. Gordon Odhiambo, to personally serve Mr. Joho with the application dated 17 May 2019 and he annexed the affidavit of service. I have gone through the affidavit of service of Mr. Odhiambo, and I note that he deposes that on 20 May 2019, he went to serve Mr. Joho. He arrived at his office, and the secretary informed him that the Governor (Mr. Joho) was away on official duties until 22 May 2019. He went back on 22 May 2019 with intention to serve Mr. Joho, but he was informed by the Chief of Staff, one Joab Tumbo, that there is no way he could serve Mr. Joho, while their (1st defendant's) legal officers are available, and he was advised to proceed to Bima Towers, 6th floor, where the 1st defendant's legal office is located. He then proceeded to this office and the legal officer acknowledged service on behalf of the Governor and affixed their official stamp. The 1st plaintiff has deposed that the County Attorney appeared in court and handled the application on behalf of Mr. Joho and that the record speaks for itself. In his view, the issues now being raised should be grounds for appeal and that this court is *functus officio*.

10. I invited counsel to file written submissions, which they duly did, and I also gave them a chance to highlight their submissions. I have taken note of these submissions before arriving at my decision. In brief however, Mr. Mohammed, learned counsel for the applicant, did submit *inter alia* that the application dated 17 May 2019 was fatally defective for offending Section 5 (1) of the Judicature Act, Cap 8, Laws of Kenya. He did submit that the Judicature Act, is the default position on applications for contempt following the nullification of the Contempt of Court Act, Act No. 46 of 2016, by the High Court. He stressed the point that the applicant was not a party to the proceedings herein and therefore needed to be personally served with the application of 17 May 2018, and that he was not personally served. He submitted that the applicant was not aware of the orders of injunction. I have taken note of the authorities that he supplied.

11. On the part of the plaintiff, Mr. Oluga, learned counsel, *inter alia* submitted that in the ruling of 12 February 2020, the Court already held that personal service was not mandatory and that knowledge of the order was sufficient and the issue cannot now be revisited, but can only be raised before the Court of Appeal. He nevertheless reiterated the point that personal service is not mandatory, and that it was thus not necessary for the applicant to be served, since the order of injunction was made in the presence of counsel for the 1st defendant. He submitted that to assert that the applicant needed to be served was akin to argue that all employees of the County Government of Mombasa needed to be personally served so that they may obey the orders of injunction, a near impossible task. He submitted that the ruling of 12 February 2020, was not against Mr. Joho, as a person, but in his capacity as Governor of the 1st defendant and the highest ranking employee of the County Government of Mombasa who was bound by the order. On service of the application dated 17 May 2019, he referred me to the affidavit of service, whereupon the process server had gone to serve Mr. Joho personally, but was directed to the Office of the County Attorney, where he eventually effected service of the application. He submitted that the applicant was represented and submissions were made on his behalf

within the application dated 17 May 2019. He thought that Mr. Joho has now appointed a private advocate so as to pretend that he was not represented at the hearing of the application. He finally submitted that the application of 17 May 2019 was one under Order 40 Rule 3 and there was no requirement to file a NTSC.

12. I have considered the application and I take the following view of the matter.

13. I will first deal with the argument that there needed to have been taken out a NTSC prior to the hearing of the application dated 17 May 2019, and whether or not the procedure outlined in the Judicature Act, was applicable, before the application of 17 May 2019 could be heard. My view is that this was not an application for contempt falling under the Judicature Act, but an application for disobedience of an order of injunction, for which the provisions of Order 40 of the Civil Procedure Rules apply. Order 40 is indeed self-contained, in that it provides for the grant of the order of injunction (Rule 1 and 2) and also provides for the consequences of disobedience of that order of injunction (Rule 3). It is thus not necessary to refer to any other law. For the avoidance of doubt, Order 40 Rule 3 is drawn as follows :-

Order 40 Rule 3 - Consequence of breach

(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.

14. From the above, it will be seen that where the complaint is that one has breached an order of injunction, issued under Order 40 Rule 1 or 2 , the aggrieved party only needs to file a Notice of Motion in the same suit (sub-rule 3 above), and there are no other preconditions, such as filing and service of a NTSC. In the case at hand, the application for injunction that was filed contemporaneously with the suit was explicit that it is an application brought pursuant to the provisions of Order 40 Rule 1. The interim orders of injunction were therefore issued pursuant to this rule, and where there was disobedience, the aggrieved party could file an application under Order 40 Rule 3. The application of 17 May 2019, was expressed to be brought pursuant *inter alia* to the provisions of Order 40 Rules 3(1) and (3) of the Civil Procedure Rules. I therefore see no point in the argument that the application of 17 May 2019 was fatally defective for failure to follow the procedure laid down in the Judicature Act.

15. The second argument raised is that the applicant needed to be personally served with the order alleged to have been disobeyed. I already dealt with that issue within the hearing of the said application, for one of the arguments raised, was that there was no personal service of the interim order of injunction. I held that in modern jurisprudence, the position is that personal service of an order is not mandatory, and it is sufficient if an applicant demonstrates that the respondent was aware of the order, yet proceeded to disobey it. This, as I stated in my ruling, was settled by the Court of Appeal, in the case of *Shimmers Plaza Limited vs National Bank of Kenya Limited (2015) eKLR*. In the said case, an order was made in the presence of counsel, and it was deemed that the clients were aware of the order made. In our case, the interim order of injunction was made in the presence of Mr. Oluga for the plaintiff, Ms. Kuria for the 1st defendant and Mr. Chebukaka for the 2nd defendant. It follows that all employees, servants and agents of the 1st defendant, and that included Mr. Joho as Governor, are deemed to have been aware of the order of injunction and needed to obey it. There is no need of me saying more on that point, for as I have mentioned, that issue is now settled.

16. The third argument raised by the applicant is that he was not served with the application of 17 May 2019 (the application claiming disobedience of the order of injunction). It is submitted that Mr. Joho needed to be personally served, and that service upon the 1st defendant was not sufficient, since Mr. Joho and the 1st defendant are different entities, and Mr. Joho was not a party to the proceedings.

17. It is true that Mr. Joho was not, and is not, a defendant in this suit and that it is the County Government of Mombasa which is defendant. It is also true that Mr. Joho and the County Government of Mombasa are two different persons. However, the County Government of Mombasa is not a natural person but can only act through the agency of human beings. Thus, when one says that there is an order to be obeyed by the County Government of Mombasa, in essence, what is being said is that all employees, agents and all other persons who act at the behest of the County Government of Mombasa are bound by the said Order. If one of them fails to follow the order, it is the same as saying that the County Government of Mombasa has failed to follow the order. If an application for disobedience is then filed and served upon the County Government of Mombasa, that to me would be sufficient service. I do not think that it can be argued that the Governor cannot be held liable for acts of disobedience of County employees, unless the Governor shows that the employees acted against some very explicit instructions and were thus on a frolic of their own, and need to be dealt with separately from the County Government. That is not the case here, for the acts of disobedience are attributed to the Governor himself, and the Governor is the Chief Executive Officer of the County Government.

18. The above aside, I am convinced that Mr. Joho was aware of the application of 17 May 2019. Mr. Oluga referred me to the affidavit of Gordon Odhiambo to demonstrate that the process server went to serve Mr. Joho and was directed to the office of the County Attorney. I have no reason to doubt that deposition. Indeed, Mr. Joho actively participated in the application of 17 May 2019 through the County Attorney, which is an office within the County Government of Mombasa, and certainly an office under his control as Governor. I have gone through the arguments presented when the application dated 17 May 2019 was being argued and much of the submissions were made to press the point that the applicant herein did not disobey the order of injunction. The County Attorney *inter alia* made the following written submissions while making arguments to oppose that application :-

“Is the electronic evidence adduced incriminating Ali Hassan Joho admissible in court ? (submissions follow)....

Did the Governor Ali Hassan Joho have knowledge of or proper notice of the terms of the order and should he be cited for contempt ? (Submissions follow including the following :- “..the governor was not aware of any court order served and this was not occasioned by negligence on our part by the fact that the relevant department was served and did not disobey the order. The Governor is a politician and was convening a public rally in which the Lands department has no control of. If by any chance the electronic evidence was admissible as far as the Governor is concerned it would clearly show that he was not aware of any court order... The governor neither instructed anyone to demolish the perimeter wall nor did he do it himself as alleged by the plaintiffs. He was briefly giving a history of the said government plot with reference to previous cases that have been in court and not in any relation to the current case further emphasizing that he was not aware of any fresh orders given in relation to the said plot... It is clear that the Governor had no knowledge of the court order and thus he could have no way acted deliberately in breach of the order. The plaintiffs have failed to make a case for civil contempt and it would be unfair for the court to take someone’s liberty on an offence that they knew nothing about.”

19. In his oral submissions, during the hearing of the application dated 17 May 2019, Mr. Tajbai, for the County Attorney, submitted inter alia as follows :-

“My submission is that the Governor was never served with the contempt application or order and he was not aware of any order... There is no evidence to show that the Governor or 2nd defendant are inside the suit property. Thus so far, there is no disobedience of the court order.”

20. It is as clear as day that the County Attorney was thus acting, not only on behalf of the 1st defendant, but also on behalf of the Governor, as an officer of the 1st defendant. I can reach no other conclusion other than to find that the applicant herein was well aware of the application dated 17 May 2019, and was ably represented by the County Attorney at the hearing of that application.

21. I am thus not persuaded by the arguments raised in this application that Mr. Joho was not served with the application dated 17 May 2019 or was not aware of it, and that he did not participate in it. In essence, I find no merit in this application. The same is hereby dismissed with costs.

22. Orders accordingly.

DATED and delivered this 22ND day of APRIL 2020

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

MOMBASA