



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISUMU

JR APPLICATION NO. 3 OF 2019

RAPHAEL OBONGO OGUTU.....APPLICANT

VERSUS

SENIOR RESIDENT MAGISTRATE, SIAYA.....RESPONDENT

AND

PETER OGUTU OTIENO.....INTERSTED PARTY

JUDGMENT

The Applicant is seeking judicial review orders in the nature of Certiorari to remove into the High Court and to quash the decision, ruling and orders of the Senior Resident Magistrate's Court Siaya made on the 20th February 2019 in Siaya SRMC Land Case No. 7 of 2018 and the Finding that Raphael Obongo Ogutu is in contempt of court having disobeyed the court order issued on 15/12/2018. The applicant beseeches the court to quash the finding that Raphael Obongo Ogutu to pay a fine of Kshs 50,000/= or in default sentencing him to serve 4 months in prison for disobeying the court orders.

Lastly, the applicant seeks an order of mandamus compelling the Senior Resident Magistrate's Court to forthwith refund to the Applicant Raphael Obongo Ogutu the sum of Kshs 50,000/= which was paid as fine consequent upon the said orders.

The Applicant states that the basis for his application is that he was never a party to the suit as the same was a suit which had been commenced by the Interested Party against one Michael Odhiambo Ayimba. That the orders against the Applicant in the circumstances were made without due process and in violation of the Applicant's right to a hearing, right to liberty and freedom and right to property. That the orders were made without jurisdiction and in violation of the right to a fair trial, right to a hearing and right of natural justice and that the Respondent's act was contrary to Articles 47 and 50 of the Constitution and the Civil Procedure Act and the Applicant had a legitimate expectation that that the Respondent would at all times be guided by the Constitution and laws of the Republic in executing its mandate.

That the actions of the Respondent violated Section 72(j) of the Fair Administrative Action Act 2015 which guaranteed the Applicant expeditious, reasonable and efficient administrative action.

The Applicant contends that there is a higher burden of proof imposed on an applicant in contempt proceedings to prove that a contemnor's conduct was deliberate and wilfully done in breach of court orders which burden was never discharged in the case before the subordinate court. That the court relied on a law that had been declared unconstitutional and invalid for want of public participation in convicting the Applicant.

The Applicant filed a supporting affidavit dated 5th August 2019 in which he deponed that he did not disobey any court order and that he was not served with any court order and neither could he be served as he was not a party to the proceedings. That no evidence was placed before the court proving that he had violated any court order. That he had lived on Parcel No. SIAYA/KARAPUL RAMBA/2083 since 2008 when he established his home and built a permanent house. That the land in question belonged to his father Paul Ogutu Ayimba who died when the Interested Party, the Applicant's step brother, was hardly a year old. That his late brother, Michael Ayimba, and adult children had also constructed permanent houses on the land.

Respondent's Response

The Respondent filed Grounds of Opposition dated 31st October 2019 stating that the Applicant was enjoined as a co-administrator of the estate of Paul Agutu Ayimba by virtue of consent dated 27th March 2018. That the order issued on 15th January 2018 applied to any other party where parcel No. SIAYA KARAPUL/RAMBA/2083, 308 and 466 is situated.

Interested Party's Response

The Interested Party filed a Replying Affidavit dated 13th January 2020 opposing the application. The Interested Party averred that the Applicant had not come to court with clean hands and that the application was an abuse of the court's process. That the Applicant was duly served with the Contempt Application to which he acknowledged service and an affidavit of service was prepared to that effect.

That the court order of 15th January 2018 was duly served upon the Applicant and an affidavit of service prepared to that effect. That the order barred the Respondent, his agents, servants and/or employees from intermeddling/interfering with the estate of the deceased Paul Ogutu Ayimba alias Ogutu Ayimba to which the Applicant was a beneficiary.

That in land case No. 7 of 2018, the Applicant was falling in the bracket of agents being a beneficiary to the suit land and the temporary orders issued by the Senior Resident Magistrates' Court barred the parties to the suit, agents and employees. That the Applicant was formally represented in contempt proceedings by Wakla and Co. Advocates.

Issues for Determination

1. Whether the orders sought are merited

The contempt proceedings were based on the alleged violation of the court order made on 15th January 2018 restraining the Respondent, his agents, servants and/or employees and any other party *in rem* from building, constructing, selling, alienating, sub-dividing, interfering, and/or in any other way dealing with the suit properties.

The order was an order *in rem*, which is distinct from an ordinary order that would only be binding upon the parties to it. The *Black's Law Dictionary* (9th Ed. 2009) at 892 defines *in rem* as:

"Involving or determining the status of a thing, and therefore the rights of persons generally with respect to that thing..."

"An action in rem is one in which the judgment of the court determines the title to property and the rights of the parties, not merely as between themselves, but also as against all persons at any time dealing with them or with the property upon which the court had adjudicated." R.H. Graveson, *Conflict of Laws* 98 (7th ed. 1974)."

In *Japheth Nzila Muangi vs. Kenya Safari Lodges & Hotels Ltd* [2008] eKLR, it was held that:

"It is trite law that ordinarily a judgment binds only the parties to it. This is known as Judgment in personem. A judgment may also be conclusive not only against the parties to it but also against all the world.

This is known as a judgment in rem. This is a judgment which declares, defines or otherwise determines the status of a person or of a thing i.e. the jural relation of the person or thing to the world generally."

The effect of a decision *in rem* was summed up in *Kamunyu and others v AG and others* [2007] 1 EA 116 as follows:

"...in a suit seeking judgment, in rem that is a judgment applicable to the whole world, an individual does not sue on behalf of the whole world, but sues for judgment which is effective against the whole world. In other words, in the present case, the appellants when successful in the suit, obtain judgment which is effective against the whole world but does not confer benefits upon the whole world."

The court order of 15th January 2018 was binding upon not only the parties in the suit but all other parties dealing with the suit properties, including the Applicant herein. Further, the Applicant was served with the court order and an affidavit of service dated 24th January 2018 was filed. The affidavit of service remained unchallenged during the contempt proceedings. The Applicant was therefore aware of the existence of the court order but nonetheless proceeded to construct permanent structures on the suit land in disregard of the court order. The Learned Magistrate rightly pointed out that the Applicant's assertion that a consent was entered into without his consent could not be a basis for disregarding subsequent court orders. This application is therefore without merit and ought to be, and is hereby dismissed.

DATED AT KISUMU THIS 28th DAY OF MAY 2020

A.O. OMBWAYO

ENVIRONMENT & LAND

JUDGE

This judgment is hereby delivered to the parties by electronic mail due to the measures restricting court operations due to COVID -19 pandemic and in light of directions issued by the Honourable Chief Justice on 15TH March 2019 and with the consent of the parties.

A.O. OMBWAYO

ENVIRONMENT & LAND

JUDGE