



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 280 OF 2017

LAKEVIEW INVESTMENTS LTD.....PLAINTIFF

VERSUS

PROF. JOHN PAUL ODERO (*Sued as the Chairman,*

NAIROBI KENYA SECONDARY SCHOOLS

HEADS ASSOCIATION.....DEFENDANT

RULING

1. In the Application dated 1st March, 2019, the Defendant is seeking for the following orders:

a. That this Honourable Court be pleased to issue an order for committal to prison against Joseph Oduor Okwaro for a period of six (6) months for disobeying the court order issued on 25th January, 2019 by Hon. O. Angote, Judge.

b. That this Honourable Court be pleased to make such orders and or give directions as it may deem fit and just.

c. That the costs of this Application be in the cause.

2. The Application is supported by the Affidavit of the Defendant who has deponed that on 25th January, 2019, this court issued an order to the effect that the prevailing status quo in respect of L.R. No. 24561 and 20154- 20163 to be maintained pending the hearing of the suit; that the order was duly served upon the Plaintiff and that the Plaintiff has failed, neglected and refused to comply with the order of the court.

3. In response, the Plaintiff's Director deponed that prior to the institution of this suit, the Defendant had been in occupation of the suit property when it purchased the same; that the Plaintiff had also sold several sub-plots of the suit property to third parties who have since developed the land and that after the order of the court of 25th January, 2019, he personally advised all the parties in occupation of the suit properties to maintain the *status quo* and cease any construction on the suit property.

4. The Plaintiff's Director finally deponed that the photographs annexed to the Applicant's Supporting Affidavit do not indicate the dates when they were allegedly taken and that the said photographs were taken before the Ruling of 25th January, 2019.

5. In his Supplementary Affidavit, the Defendant deponed that the Plaintiff has admitted that he was aware of the terms of the orders of the court; that it is in bad faith for the Plaintiff to continue building on the suit land and that the construction by the Plaintiff on the suit property continued after the orders of the court of 25th January, 2019.

6. According to the Defendant, even after the last attendance in court on 27th June, 2019, the Plaintiff started building another house on the suit land; that the Plaintiff is determined to continue building on the suit land with no regard to the Defendant's interests, and that his actions are a mockery of the authority and the dignity of the court.

7. In the Supplementary Affidavit, the Defendant deponed that the photographs taken on 20th February, 2019 shows the illegal building that the Plaintiff's agents were undertaking on the suit land; that after the court attendance on 27th June, 2019, the Plaintiff's agents recklessly started putting up another building on the suit land and that the Plaintiff is determined to continue developing the suit land without any regard to the Defendant's interests.

8. In his submissions, the Defendant's advocate submitted that in a deliberate contempt of the order of the court, the Plaintiff's agents continued building on the suit land and have since completed one building; that while the Application for contempt was pending, the Plaintiff's agents dug another foundation and deposited construction materials on site and that the Plaintiff has admitted actual knowledge of

the existence of the terms of the order.

9. Counsel submitted that the Defendant has satisfied the legal grounds for bringing the contempt Application against the Plaintiff and that the Plaintiff's Director should be punished as provided for under Section 29 of the Environment and Land Court Act.

10. The Plaintiff's counsel submitted that as at the time of the order of 25th January, 2019 was issued, there were semi-permanent and temporary structures erected on the suit property; that in its Ruling, the court recognized that the Plaintiff and other third parties were in possession of the suit property and that it is possible that the alleged construction on the suit property could have been carried out by third parties.

11. According to counsel, the Plaintiff is aware that the building whose photographs appear in the exhibits attached on the Applicant's Affidavit belongs to a third party who claims that he purchased her portion of the land from a different entity and not from the Plaintiff and that the Plaintiff, through its representative, has not disobeyed any order of the court.

12. It is not in dispute that on 25th January, 2019, this court delivered a Ruling whose ultimate order was as follows:

a. The prevailing status quo in respect of L.R. No. 24561 and/or L.R. Nos. 20154-20163 to be maintained pending the hearing and determination of the suit, meaning that neither the Plaintiff nor the Defendant or their agents, servants, employees and or people acting under them should alienate, transfer or charge the above mentioned parcels of land or put up any further developments on the suit land.

b. Each party to bear his or its own costs.

13. The said order was issued by the court on 4th February, 2019 and served on the Plaintiff's advocate on 20th February, 2019.

14. It is the Defendant's case that even after the order of 25th January, 2019 was served upon the Plaintiff's advocate, the Plaintiff has continued to disobey the same by developing the suit property. The Defendant annexed undated photographs on his initial Affidavit showing people on top of what appears to be a one storey building.

15. In his Supplementary Affidavit, the Defendant exhibited the same photographs appearing on the Supporting Affidavit but with timestamps of 20th February, 2019. The Defendant also annexed on the Supplementary Affidavit the certificate of computer printout prepared by Mrs. Christine Simwa together with the photographs that she took in July, 2019.

16. The Plaintiff's Director's defence is that even before the Ruling of 25th January, 2019, him, and other third parties, were already in occupation of the suit property and that after the order of 25th January, 2019 he stopped any further development of the suit property. According to the Plaintiff's Director, he was not served with the order of this court.

17. It is trite that the issue of personal service of an order of the court is no longer necessary. All that the court ought to satisfy itself is that the alleged contemnor was aware of the existence of the order of the court. Where an alleged contemnor is represented by an advocate, and the advocate is made aware of the order of the court, it is presumed that the contents of the order will be explained to the alleged contemnor by his advocate. This is the position that the Court of Appeal restated in the case of ***Shimmers Plaza Limited vs. National Bank of Kenya (2015) eKLR*** as follows:

“This court has slowly and gradually moved from the position that service of the order along with the panel notice must be personally served on a person. This is in line with the dispensation covered under 81.8(1) (supra). Kenya's growing jurisprudence right from the High Court has reiterated that knowledge of a court order suffices to prove service and dispense with personal service for the purposes of contempt proceedings... 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.”

18. The fact that the Plaintiff's advocate was served with the order of the court on 20th February, 2019, which he acknowledged, is good service of the order on the Plaintiff's Directors. It is therefore my finding that the Plaintiff's Directors were served with the order of 25th January, 2019 on 20th February, 2019.

19. The tests applicable to a contempt Application are the existence of a clear and unambiguous court order; service or knowledge of the court order; and disobedience of the said order (*See Abida Werimba Mwaniki & 2 Others vs. Samuel Njeru M'ngendo & 2 others [2017] eKLR*).

20. In the ***Shimmers Plaza Case*** (*supra*), the Court of Appeal stated that it is important for the court to satisfy itself that the person alleged to be in contempt committed the act complained of with full knowledge or notice of the existence of the order of the court forbidding it. This is so because contempt of a court order involves possible deprivation of a person's liberty.

21. Indeed, the duty to obey court orders cannot be gainsaid. This duty is paramount in the maintenance of law, good order and the due administration of justice. This position was succinctly stated by ***Romer L.J. in Hadkinson vs. Hadkinson [1952] ALL ER 567*** as follows:

“It is the plain and unqualified obligation of every person against, or in respect of whom, an order is made by a 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 even void.”

22. In the case of *Refrigeration and Kitchen Utensils Ltd vs. Gulabchand Popatlal Shah and Another*, Civil Application No. 39 of 1990, the Court of Appeal held as follows:

“... It is essential for the maintenance of the rule of law and good order that the authority and dignity of our courts is upheld at all times”.

23. In the *Shimmers Case* (*supra*), the Court of Appeal reiterated that court orders must be obeyed. The court further stated as follows:

“Parties against whom such orders are made cannot be allowed to trash them with impunity. Obedience of court orders is not optional, rather, it is mandatory and a person does not choose whether to obey a court order or not. For as Theodore Roosevelt, the 26th President of the United States of America once said: -

“No man is above the law and no man is below it: nor do we ask any man’s permission to obey it. Obedience to the law is demanded as a right, not as a favour.”

24. The photographs attached on the Defendant’s Further Affidavit shows a one storey incomplete building on the suit property as at 20th February, 2019. The photographs taken on 15th April, 2019 by Christine Simwa, who signed a certificate of computer printout, shows the same building, but now complete with a perimeter wall around it.

25. Indeed, the photographs taken on 15th April, 2019 shows that the construction of the one storey building and the perimeter wall was completed between 20th February, 2019 and 15th April, 2019 when the two photographs were taken.

26. Although the Plaintiff’s Director has denied that the building was done by the Plaintiff, he has not offered any explanation as to the person who continued with the construction of the one storey building and the perimeter wall despite the court restraining the parties and “any people acting under them” not to put up any further developments on the suit land.

27. The evidence before me shows that despite the orders for 25th January, 2019 restraining the parties herein from developing the suit property, the Plaintiff, or its agents, put up and completed constructing a one storey building together with the perimeter wall on the suit property. The Plaintiff’s Directors are therefore in contempt of the orders of this court dated 25th January, 2019 and served on their advocate on 20th February, 2019.

28. For those reasons, it is my finding that the Plaintiff’s Director, Joseph Oduor Okwaro, is in contempt of the orders of this court of 25th January, 2019. The said Joseph Oduor Okwaro is directed to appear in this court personally, on a date to be fixed in the registry, for mitigation and sentencing.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 15TH DAY OF MAY, 2020.

O.A. ANGOTE

JUDGE