



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. PETITION NO. 66 OF 2018

PRISCILLA NANIA MBILA.....1ST PETITIONER

EDWARD NTHEI MBILA.....2ND PETITIONER

(Suing as the legal representatives of the Estate of

DAVID MBILA LOLE (deceased)

VERSUS

THE DISTRICT COMMISSIONER

KATHIANI DISTRICT.....1ST RESPONDENT

THE CABINET SECRETARY MINISTRY OF LANDS,

HOUSING AND URBAN DEVELOPMENT.....2ND RESPONDENT

THE HON. ATTORNEY GENERAL.....3RD RESPONDENT

WAMBUA LOLE.....4TH RESPONDENT

MATHEW MUMO TATIA.....5TH RESPONDENT

KIOKO TATIA.....6TH RESPONDENT

HARRISON MULWA MUSANGA.....7TH RESPONDENT

PETER KAMWILU.....8TH RESPONDENT

RULING

1. In the Notice of Motion dated 13th June, 2019, the Petitioners are seeking for the following orders:

a. This Honourable Court be pleased to issue an order for committal to civil jail against the 5th Respondent herein Mathew Mumo Tatia for a period not exceeding six (6) months for the said 5th Respondent is in contempt of the orders of this Honourable Court made on 7th February, 2019.

b. The OCS Kathiani Police Station to enforce the orders of this Honourable Court sought in prayer 2 above and the order made on 7th February, 2019.

c. The costs of this Application be borne by the 5th Respondent.

2. The Application is premised on the Affidavit of the 2nd Petitioner who has deponed that on 7th February, 2019, their Application for injunctive order was allowed by the court; that the Respondents instructed an advocate to file an Application to set aside the said order and that the said Application was dismissed by the court.

3. It is the deposition of the 2nd Petitioner that on 25th February, 2019, the 4th-8th Respondents' Advocates were served with the order of this court; that the 5th Respondent is still farming on the suit land and that the Respondents' action of disobeying the court order are an attack on the dignity of this court.

4. In the Replying Affidavit, the 5th Respondent deponed that he was not personally served with the order of this court; that the photograph annexed on the 2nd Petitioner's Affidavit is inadmissible for failing to comply with the mandatory requirements of the law of evidence and that it is not true that he disobeyed the orders of the court.

5. The 2nd Petitioner filed a Further Affidavit in which he deponed that the 5th Respondent has not disputed knowledge of the order of the court; that service upon an alleged contemnor's advocate on record is deemed as service upon the alleged contemnor and that the photograph shows the 5th Respondent is in contempt of the orders of the court. Both the Petitioners' and the Respondents' advocate filed submissions and authorities which I have considered.

6. The evidence before this court shows that on 7th February, 2019, the Petitioners' Application dated 27th December, 2018 for injunctive orders was allowed by the court. The Petitioners have exhibited the Affidavit of Service of the process-server sworn on 2nd April, 2019.

7. According to the process-server, he served upon the Respondents' advocate the order of the court on 25th February, 2019. The copy of the order that was served on the Respondents' advocate on 25th February, 2019 has been exhibited.

8. The law is now settled that service of an order on an advocate representing a party is good enough. In the case of ***Shimmers Plaza Limited vs. National Bank of Kenya Limited (2015) eKLR***, the Court of Appeal held as follows:

“We hold the view that is does. This is more so in a case 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 behooves him to report back to the client all that transpired in court that has a bearing on the clients' case...”

9. The 5th Respondent's advocate having been served with the order of 7th February, 2019, a fact he has not denied, it is presumed the 5th Respondent was made aware of the order by his advocate.

10. Although the Petitioners have stated that the 5th Respondent disobeyed the order of the court by cultivating the suit property, the photographs annexed on the Supporting Affidavit neither shows the date on which they were taken nor the fact that indeed it is the 5th Defendant who was farming the suit land.

11. In the absence of evidence to show that the alleged contemptuous actions happened after the order of this court were made, and that it is the 5th Respondent who was farming the suit land subsequent to the order being made, I find that the Petitioners have not proved that the 5th Respondents is in contempt of the order of the court.

12. For those reasons, the Application dated 13th June, 2019 is dismissed with costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 8TH DAY OF MAY, 2020.

O.A. ANGOTE

JUDGE