



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT BUSIA

ELC CASE NO. 69 OF 2017

ISAAC OUMA NYABERA.....PLAINTIFF/APPLICANT

VERSUS

COUNTY GOVERNMENT OF BUSIA.....DEFENDANT/RESPONDENT

RULING

1. What is before the Court for determination is the Notice of Motion Application dated and filed on 14th September, 2018. It is brought under Section 5(1) of the Judicature Act, Sections 1A, 3A and 63 (e) of the Civil Procedure Act, Orders 40 rule 3 and 53 rule 1 of the Civil Procedure Rules and all other enabling provisions of the law. The Applicant – **ISAAC OUMA NYABERA** – is the Plaintiff/Decree holder while – **THE COUNTY GOVERNMENT OF BUSIA** – is the Defendant/Judgment Debtor who, through its officers, is accused of violating orders issued by the court.

2. The application is for contempt of Court with, inter alia, the following prayers on the face of it:

- a. That the Honourable Court be pleased to find that the Defendant/Respondent and/or its agents are in contempt for the disobedience of the court order/judgment of 11th April, 2018.
- b. That upon granting the above prayer, the Respondent's agents namely NICODEMUS ONYANGO MULAKU, the County Secretary, MAURICE ODINDO, the Chief Officer, Ministry of Lands and CAROLINE ANNE ODUORI, Administrator Butula Sub-County be arrested and committed to jail for a period of 6 months for contempt of court.
- c. Any other employer, agent, servant or person acting on behalf of the Defendant who during the hearing hereof will be found to have disobeyed the said order be punished accordingly.
- d. The open air animal/livestock market known as Bumala Market, Auction Ring on Land Parcel LR No. Marachi/Bujumba/2414be closed forthwith to ensure compliance.
- e. The costs be borne by the Defendant.

3. In his supporting affidavit to the application, the Plaintiff deponed that pursuant to the issuance of judgment herein, the decree was duly extracted on 30th April, 2018. The same was to the effect that the aforementioned open air market to be closed down. Injunctive orders were also issued against Defendant restraining it from encroaching, trespassing, using or interfering with the property by itself or through its servants or agent acting on its behalf. The order bore a penal notice spelling consequences of noncompliance. The Plaintiff's advocates had the court order and a 90 day notice dated 12th May, 2018 served upon the Defendant in accordance with the Court's directives. Service was effected on 8th May, 2018 by Joseph Orata Kweyu, a licensed process server.

4. The Plaintiff deposes further that the Defendant's officials were aware of the Court Order to which its officers reacted and vastly quoted in their Application dated 1st August, 2018 and its supporting affidavit sworn by Maurice Odindo on the same date. Shortly after the date of service, **CAROLINE ANNE ODUORI**, the Butula Subcounty Administrator in concert with other officers of the Defendant caused the suit property to be fenced with concrete poles and barbed wire. In June 2018, the County Secretary penned a letter dated 26th June, 2018 addressed to Mr. John Oloo Duu, requesting a meeting to discuss matters of purchase of the suit property by the Defendant.

5. The Plaintiff states further that on 7th August, 2018, the Defendant's officer, **NICODEMUS ONYANGO MULAKU** and **MAURICE ODINDO**, among others, authorized workmen to enter upon the property and undertake compacting, grading and levelling works using county tractors. The market has been taking place every Saturday since then. The Plaintiff deposes that the Defendant's activities were

reported in the Standard newspaper of 8th September, 2018 under an inaccurate caption painting him as a land grabber. The Defendant in defiance of the Court orders continues to use the property. The Plaintiff claims he has spoken to the Defendant's agents who coupled with the aforementioned state of affairs vow that they will never obey the orders, hence the current application.

6. The Application is opposed vide Grounds of Opposition dated and filed on 19th September, 2018. The Interested parties, **NICHODEMUS MULAKU, MAURICE ODINDO** and **CAROLINE ANN ODUOR** opposed the Application on the grounds that they were not served with the order complained of, they are not parties to the suit, the affidavit by Joseph Orata is full of falsehood and they wish to cross-examine him and finally, the application is malicious. There is a second set of Grounds of opposition by the Defendant. The Defendant contends that the Application was meant to forestall its Application dated 1st August, 2018 seeking to stay the orders of this Court due to an intended or pending review of succession proceedings through which the Plaintiff acquired title to the suit property that may lead to its cancellation. The same is spent as this Court dismissed the said application on 27th November, 2018. The Defendant's only prayer was that the hearing of the contempt Application be stayed to await the outcome of its own Application.

7. Parties elected to canvas the Application by way of written submissions. The Plaintiff's submissions were filed on 15th January, 2019. Counsel for the Plaintiff reiterated contents of the Application, Supporting affidavit and annexures to the effect that the Court Order complete with a penal notice was extracted and served upon the Defendant in the appropriate manner. As stated in Joseph Orata Kweyu's supporting affidavit, service was acknowledged as the Order and 90 day notice were stamped. Moreover, the Defendant's Application of 1st August, 2018 was sworn by **MAURICE ODINDO** to stay the order proving that he had knowledge of it. The other two, **NICODEMUS O. MULUKU** and **CAROLINE ANNE ODUORI** are employees of the Defendant hence they were properly cited due to their actions in defiance of the Order.

8. The Defendant's submissions were filed on 10th May, 2019. Once again the Defendant advanced arguments concerning Succession Proceedings which it had argued in its spent Application for Stay of Execution. Those are irrelevant to the present Application. On the issue of contempt, it is submitted that the Plaintiff seeks to commit a host of the Defendant's officers on the assumption that they were aware of the decree yet it is not demonstrated vide a return of service that a specific order with an accompanying penal notice was extracted and personally served on the said officer. The return of service alleges that the Order was served upon an unnamed legal clerk which fact cannot sustain the Application.

9. I have read the parties' pleadings, submissions and the applicable law. In the case of **OCHINO AND ANOTHER VS OKOMBO AND 4 OTHERS (1989) KLR** the Court of Appeal held inter alia that:

"1. As a general rule, no order of court requiring a person to do or to abstain from doing any act may be enforced (by committing him for contempt) unless a copy of the order has been served personally on the person required to do or abstain from doing the act in question.

2. The copy of the order served must be endorsed with a notice informing the person on whom the copy is served that if he disobeys the order he is liable to the process of execution to compel him to obey it.

3. The court will only punish as contempt a breach of injunction if it is satisfied that the terms of the injunction are clear unambiguous.

4. The defendants had proper notice of the terms and the breach of the injunction must be proved beyond reasonable doubt.

5. That proper procedure was followed for bringing the application for contempt."

10. The return of service presented by the Plaintiff is the crucial document that the Court shall evaluate to determine if service was properly effected. The court takes cognizance of the fact that the Defendant is a juristic person acting through its officers. Particular persons have however been cited as contemnors by the Plaintiff and the orders sought can only apply if the Court is satisfied that they were personally served or that they were fully aware of the Court order and its attendant consequences. The return of service sworn by Joseph Orata Kweyu on 11th May, 2018 stated thus:

"On 8/5/2018, while in Busia Town, I proceeded to Busia County Government Offices at Busia County Government Hall where I headed to the Defendant's secretary's office where I found the Legal Clerk whom after introducing myself to and my intentions, I served him with a copy of the Order thereof to him at 11.00am..."

11. It is trite law that he who alleges must prove. The details relayed by the process server are grossly insufficient. He has not stated which office he went to. The Court takes judicial notice of the fact that County Office must have several offices with several secretaries. He has also not stated the names of the said secretary and "legal clerk" as well as their identifiers; whether they were known to him or pointed out by a third party.

12. However, the Plaintiff in his submissions stated that the Defendant being fully aware of the Court order as well as their import reacted to it by filing an Application for Stay of Execution of the Judgment. This is an inescapable reality. Such conduct has been deemed to be sufficient notice making the requirement of personal service as only one of the guiding factors. In the case of **SAM NYAMWEYA & 3 OTHERS VS KENYA PREMIER LEAGUE LIMITED & 2 OTHERS (2015)eKLR**, the Court observed as follows:

"In the Court of Appeal decision of **Justus Kariuki Mate & Another Vs Martin Nyaga Wambora & Another (CA 24/2014) Nyeri**, the CA per Visram, Koome and Odek JJA held that personal service of the order alleged to have been disobeyed is not mandatory. The court stated:

On the other hand, however, this court has slowly and gradually moved from the position that service of the order along with the Penal Notice must be personally served on a person before contempt can be proved. This is in line with the dispensations covered under rule 81:8 (1) (Supra).”

Shimmers Plaza Ltd VS NBK (2015)Eklr Karanja, Mwera, Mwilu JJA also approved the growing jurisprudence right from the High Court that has reiterated that knowledge of a court order suffices to prove service and dispenses with personal service for the purposes of contempt proceedings. The Court of Appeal in the above Shimmers Plaza case cited with approval Hon. Lenaola J **in Basil Criticos VS Attorney General & 8 Others (2012)eKLR** where the learned Judge pronounced himself thus:-

“...the law has changed and as it stands today knowledge supersedes, personal service.....where a party clearly acts and shows that he had knowledge as a court order, the strict requirement that personal service must be proved is rendered unnecessary.”

13. The above exposition applies to **MAURICE ODUNDO** who swore an Affidavit in support of the application for stay and the response to the current application on behalf of the Defendant. As the Chief Officer, Ministry of Land, Busia County Government the Court orders to stop operation of the market on the suit land fall within his docket. The roles played by the other two alleged contemnors is however unclear. It has not been demonstrated why they have been singled out by the Plaintiff and there is no proof of service of the Court order and penal notice upon them.

14. The Defendants casual handling of this case is apparent. They have all along had notice of this suit as well as its outcome. No appeal has been preferred to the Judgment of 11th April, 2018 and it has been well over a year since then. Yet there is blatant disregard and defiance of the resultant orders by the Defendant. As quoted by the Court in **Sam Nyamweya & 3 Others V Kenya Premier League Limited & 2 others (supra)**. I associate myself with the holding in **ROMER L.J in HADKINSON VS HADKINSON (1952) ALL ER 567:**

“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.

For, a party who knows of an order, whether null and valid, regular or irregular cannot be permitted to disobey it. It would be most dangerous to hold that the suitors or their solicitors could themselves judge whether an order was null and valid. Whether it was regular or irregular, that they should come to the court and not take upon themselves to determine such question. That the course of a party knowing of an order which was null and irregular, and who might be affected by it, was plain, he should apply to court that it might be discharged. As long as it exists, it should not be disobeyed.” Per Lord Coteenhan L.C in *Chuck Vs Cremer*(1) 1 COOP TEMP COTT 342).”

15. It is clear that obedience of court orders is paramount as it plays a primal role in the sustenance of judicial authority and efficacy. Disobedience on the other hand undermines the very foundation of the rule of law and also undermines the dignity and authority of the courts. In fact, it is the very concept of justice that is undermined by contempt and not necessarily the individual court or judge who is trying to administer it. Because of this, obedience of court orders is not optional; it is compulsory and one does not choose whether to obey or not.

16. As already pointed out, **MAURICE ODUNDO** was aware of the order. Yet, being so ware, chose not to obey or comply. He instead allowed market activities to go on as before. As regards him therefore, this application has merits. In fact, as the second citee, Maurice Ondo’s disobedience is blatant, completely careless, and flagrant. He is therefore found guilty of contempt. I therefore grant prayer (2) and (3) in the application to the extent that the two prayers relate to the defendant and the second citee – MAURICE ODUNDO. Prayer 4 is not granted. It is superfluous to grant prayer 5 as it is the same order granted in the judgment. That order is still in force. Prayer 6 is about costs. It is granted. The defendant is ordered to pay costs.

Dated and signed at Jericho this 8th day of July, 2020.

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A. K. KANIARU

JUDGE

Dated, signed and delivered at Busia this 22nd day of July, 2020.

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A. OMOLLO

JUDGE