



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KITALE**

**LAND CASE NO. 125 OF 2014**

**DAVID SIKUKU KONES .....PLAINTIFF**

**VERSUS**

**BASHIR TOWET CHEMASWET..... 1ST DEFENDANT**

**VINCENT WASAMA KIRUNYI ..... 2ND DEFENDANT**

**R U L I N G**

1. The applicant **Vincent Wasama Kirunyi** is the second defendant in this suit. He filed a notice of motion dated 3/3/2015 in which he seeks the following prayers:-

- (1) That the application be certified urgent and service be dispensed with in the first instance.**
- (2) That there be stay of execution of this court's ex parte order issued on 21/1/2015 pending the hearing and determination of this application inter partes.**
- (3) That the ex-parte orders issued by this court on 21/1/2015 be set aside.**
- (4) That the status quo prevailing at the commencement of this suit be maintained pending the hearing and determination of the main suit inter partes.**
- (5) That costs of this application be provided for.**

2. Prayer (1) and (2) have already been spent. The prayers remaining for determination are prayers 3, 4 and 5. The applicant contends that he was neither served with summons to enter appearance nor any application filed in this matter. He contends that the first time he learnt of this case is on 26/1/2015 when the first defendant informed him that he had been in court and heard his name mentioned in connection with this case.

3. The applicant states that his house and a fence have already been demolished following ex-parte orders and that the respondent is intent on preventing him from planting on land he lawfully bought.

4. The respondent **David Sikuku Kones** has opposed the applicant's application based on the replying affidavit sworn on 5/5/2015 and filed in court on 19/5/2015. The respondent contends that the applicant's claims that he was not served are not true. He states that contrary to the applicant's allegations that he first learnt of this case on 26/1/2015, when his name was mentioned in connection with it, there was nothing like that as the case was in court on 21/1/2015 when orders were issued. The respondent contends

that the applicant was actually served on 17/12/2014 and that he became violent forcing the process server to leave the papers for service on the ground and fled for his life.

5. The respondent states that already the orders of the court have been executed and there is nothing to be stayed. The respondent further contends that the applicant lodged a complaint against the first defendant who was charged for the offence of obtaining money by false pretences. This case was withdrawn at the request of the applicant who then went back to the suit land and fenced off part of the respondent's land and erected a structure on it. This is what prompted him to come to court seeking orders of mandatory injunction ordering removal of the fence and the structure. The orders were served upon the applicant giving him seven days to demolish the fence and structures. He failed to do so and on 28/2/2015 the orders were executed by the respondent. He therefore contends that the applicant's prayers have been overtaken by events.

6. The respondent further contends that the prayer for maintenance of status quo is ambiguous and that it cannot be granted.

7. I have carefully gone through the applicant's application as well as the opposition by the respondent. The main issue for determination in this matter is whether the applicant was served with summons to enter appearance and application which resulted in the orders he now seeks to set aside. The application which is sought to be set aside came up for hearing on 24/9/2014. The first respondent **Bashir Towet Chemaswet** was present but the applicant and the respondent herein were not present. The same was dismissed with costs to the first respondent for non attendance. The applicant then brought an application seeking to set aside the dismissal order. The application was allowed after the court was convinced that there was proper service. The application of **15/9/2014** was thus reinstated. The reinstated application was fixed for hearing on **8/12/2014**. When the same was called out, the court noticed that the second respondent who is the applicant in the present application had not been served. It was stated that he was served through the first respondent. The court found that this was not proper service. The application was then adjourned to **21/1/2015**.

8. On **21/1/2015** the application dated **15/9/2014** was allowed as there was no opposition to the same. This is the application which resulted in the orders the applicant seeks to set aside. The applicant claims that he was never served with summons to enter appearance or any application. He claims that the first time he heard of this case was on 26/1/2015 when he was informed by the first defendant that he was in court and heard his name mentioned in connection with this case. This cannot be true because the only time the first defendant appeared in court was on 29/9/2014 when the application of 15/9/2014 was dismissed. There was no hearing or mention of this case on 26/1/2015. The applicant herein entered appearance through a lawyer on 26/1/2015. How can he then claim that he had not been served with any documents in this case? How did he know that he had been served for him to enter appearance? It is clear that the applicant was aware of this matter. He was aware that orders against him had been issued on 21/1/2015 and that is why he instructed a lawyer who entered appearance on 26/1/2015. He cannot claim that he learnt of this case from the first defendant who was in court on 26/1/2015. It is his advocate who filed appearance on 26/1/2015. The advocate would not have filed appearance if he did not have instructions from the applicant.

9. To demonstrate that the applicant herein is not being genuine, his advocate again entered another appearance on 3/3/2015. The applicant did not file an application soon after entering appearance on 26/1/2015. He came to file the application on 3/3/2015. I do not find any merit in the applicant's application. The applicant got orders of mandatory injunction in a proper way. He had served the applicant but the applicant did not attend court. There is therefore no ground shown upon which the orders of 21/1/2015 can be set aside. There can be no order for maintenance of status quo. Already the applicant's structure which he put up and the fence have been demolished. The applicant's application is hereby dismissed with costs to the respondent.

It is so ordered.

Dated, signed and delivered at Kitale on this **14th** day of **July, 2015**.

**E. OBAGA**

**JUDGE**

In the presence of Mr. Magut for Respondent and Mr. Kisa for Mr. Okile for Applicant.

Court Assistant – Isabellah.

**E. OBAGA**

**JUDGE**

**14/7/2015**