



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
ELC CIVIL SUIT NO. 18 OF 2014

GEOFFREY TENAI.....PLAINTIFF

VERSUS

1. SALOME NJOKI SIMEON

2. DAPIAS KARINGA MUREITHIDEFENDANTS

RULING

1. The applicants Duncan Wangoya and John Ndungu Nyambura in the notice of motion dated 4th June, 2015 called themselves as affected parties as they are not party to this suit. The motion brought under section 1A, 1B, 3A and 80 of the Civil Procedure Act and Order 45 Rule 1(a) of the Civil Procedure Rules sought several orders i.e.
 - 1) Spent
 - 2) Overtaken
 - 3) The Honourable Court be pleased to review its proceedings of 13th March, 2014, 18th March, 2014, 8th May, 2014, 23rd June, 2014 and 14th November, 2014 with a view to setting aside the proceedings and all orders emanating therefrom.
 - 4) The affected parties be granted leave to file replying affidavit to the contempt proceedings.
 - 5) The Honourable Court do make further orders as it may deem fit and just in the circumstances.
2. The motion is premised also on the grounds on its face and the affidavits in support sworn by both applicants. A brief background is that the applicants are charged alongside others with the offence of forcible detainer in Shanzu Principal Magistrate's Criminal case No. 17 of 2014 in regard to several parcels of Land listed in that charge sheet. While they attended hearing of this criminal case, they were arrested and committed to civil jail for six (6) months on warrants of the Court emanating from this file. The basis of their applications is that there is error apparent on the face of the record as the Court acted on the mistaken belief that they were served with the orders of the Court issued on 29th January, 2014. Secondly, they have never instructed Ogero Ogeto advocate who misled the Court that he represented them.
3. The application is opposed by the plaintiff/respondent. The respondent in his replying affidavit has deponed that the applicants were served with the order but declined to sign as evidenced by

the process server's affidavit annexed. Further that on 3rd March, 2014 at Shanzu Law Courts he saw Mr. Wachira advocate serve Mr. Karinga with ST.EA, Plaint, Application and Order. Lastly, that the applicants were in Court on 8th May, 2015 during the hearing of the contempt application. Thus the applicants were all along aware of the order and that they have not denied being agents of the defendants. The respondent depones further that the applicants have not denied they live on the suit property and if they are released, they will continue disobeying the order. He urged the Court to disallow the application.

4. The advocates on record made oral submissions for and against the motion and cited relevant case law which I have taken note of. Mr. Kabebe submitted that there was no evidence that the application for contempt was served upon the applicants neither were they served with the injunctive orders. Mr. Wachira submitted the applicants were made aware of the order and the contempt proceedings when they appeared before the deputy registrar on 8th May, 2015. Mr. Wachira submitted that he attempted to serve the applicants but they declined and advised him to serve their advocates on record. He therefore served Ms. Kedeki who was holding brief for Ogero Ogeto & Company advocates and that the applicants were the three construction workers referred to by the process server in his affidavit of non-service. Lastly, that the applicants were agents of the defendants and since the 2nd defendant was served, they should be made to serve the sentence to learn. He urged the Court to dismiss the application.
5. The respondent did obtain orders of injunction on 29th January, 2014 against the two defendants and their agents. In annexure "GT 1" sworn by the process server, he deponed that he served three workers with a copy of the order. He did not give any names. Annex "GT 2" is service deposing serving the 2nd defendant with pleadings in this matter. The applicants were not served. The application for leave to commence contempt proceedings was filed on 13th March, 2014 which motion listed the names of the applicant. The leave was granted on the same date. The application for contempt was subsequently filed on 17th March, 2014 and heard on 23rd June, 2014. On this date, Ogero Ogeto appeared for the respondents. I have perused the Court file but I have not seen any document showing the appointment of Ogero Ogeto to be on record prior to or on 23rd June, 2014.
6. The application for contempt was allowed as there seems to be no submission made on behalf of the respondents. The plaintiff/respondent has not demonstrated to Court the evidence of service of the order that is alleged to be disobeyed by the applicants. Secondly, there is no evidence that indeed they were served with the contempt application. No explanation is given why the process server did not endeavour to establish or know the names even of one of the construction workers. The process server filed "*affidavit of non-service*" confirming there was no service. This is confirmed by the deposition in paragraph 20 of Duncan's supporting highlighting the record that the respondent filed an application dated 12th February, 2014 seeking to effect service by way of substituted service. The applicants were not party to these proceedings and the Court condemned them unheard having been misled by the respondent that service was proper.
7. In the case of *Payless Car Hire & Tours Ltd. Vs Imperial Bank Ltd. (2012) eKL* Mabeya Judge quoted *Mander Vs Falekie (1891) 43ch 488* stating thus,

"That the notice of motion must be served personally on the respondent (even if he has an address of service) unless the Court dispenses with such service".

Lenaola Judge also pointed in the case of *Basil Criticoss Vs Attorney General & Others (2012) eKLR* that the Law as it stands today, knowledge of the order supersedes service. The respondent has not convinced this Court that the applicants were indeed aware of the order they are alleged to have disobeyed. Therefore neither service of the order of injunction of 29th January, 2014 and contempt application or knowledge of the same was proved. In the absence of that evidence I find the present application to be merited. Consequently, it is allowed and all the exparte proceedings of 13th March, 2014, 18th March, 2014, 8th May, 2014 and the 23rd June, 2014 ruling of the Court delivered on 14th November, 2014 and the subsequent proceedings conducted by the deputy

registrar on 20th May, 2015 be and are hereby set aside. The applicants are granted liberty to file necessary replying affidavits to respond to application for contempt and or apply to join this suit. They are hereby ordered released from prison unless lawfully held for other reasons besides this case. The costs of the application is also awarded to the applicants.

Ruling signed, dated and delivered this **17th** day of **July,2015**

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A. OMOLLO

JUDGE

In the presence of:-

Learned Counsel for the Plaintiff

Learned Counsel for the Defendants

Court Assistant Jescah