



No. 241

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

ENVIRONMENT AND LAND PETITION NO. 30 OF 2013

IN THE MATTER OF ARTICLES 20, 21, 22, 23(3) AND 40 OF THE CONSTITUTION, 2010

AND

**IN THE MATTER OF VIOLATION AND/OR INFRINGEMENT ON THE PROPERTY RIGHTS
OF THE PETITIONER**

AND

IN THE MATTER OF THE LAND REGISTRATION ACT, NO. 3 OF 2012

AND

IN THE MATTER OF LR NO. KISII MUNICIPALITY/BLOCK I/980

AND

IN THE MATTER OF SECTION 19 (SIXTH SCHEDULE) OF THE CONSTITUTION, 2010

BETWEEN

EBSONS CONSTRUCTION CO. LTD.....PETITIONER

VERSUS

THE GOVERNOR, KISII COUNTY.....1ST RESPONDENT

KISII COUNTY GOVERNMENT.....2ND RESPONDENT

THE ATTORNEY GENERAL.....3RD RESPONDENT

RULING

1. On 22nd October 2013, the Petitioner herein brought an application under certificate of urgency seeking the following reliefs:

- 1. That the application be certified urgent and the same be heard ex parte in the first instance.**
- 2. That pending the hearing and determination of the application, an interim conservatory order does issue, to protect, preserve and/or conserve LR No. Kisii Municipality/Block I/980, (hereinafter referred to as the suit land).**
- 3. That pending the hearing and determination of the application, the an interim order of injunction be issued restraining the 1st and 2nd respondent either by themselves, or through their agents, servants and/or anyone claiming under the said respondents, from entering upon, trespassing onto, taking possession, building on, demolishing structures on and/or in any other way, whatsoever, interfering with the Petitioner's/Applicant's rights over the suit land, that is, LR No. Kisii Municipality/Block I/980.**
- 4. That a Conservatory Order be issued, to preserve and/or conserve the suit land, that is, LR No. Kisii Municipality/Block I/980, from being alienated, interfered with, encumbered and/or wasted, whatsoever, pending the hearing and determination of this petition.**
- 5. That an order of temporary injunction be issued restraining the 1st and 2nd respondent either by themselves, or through their agents, servants and/or anyone claiming under the said respondents, from entering upon, trespassing onto, taking possession, building on, demolishing structures on and/or in any other way, whatsoever, interfering with the petitioner's/applicant's rights over the suit land, that is, LR No. Kisii Municipality/block I/980 pending the hearing and determination of this petition.**
- 6. That the costs of the application be borne by the respondents jointly and/or severally.**
- 7. That such further and/or other orders are made as the court may deem fit and expedient.**

2. The petitioner's application came up for hearing before me ex parte in the first instance on the same day when I certified the application as urgent and granted prayers 2 and 3 thereof ex parte pending the hearing of the application inter-partes. I directed the petitioner to serve the application upon the respondents for hearing inter-partes on 4th November 2013. On 4th November 2013, only the petitioner and the 3rd respondent were represented in court. There was no appearance for the 1st and 2nd respondents. The petitioner's advocate informed the court that all the respondents were served with the application and that the petitioner was ready to proceed with the application. In proof of service upon the respondents, the petitioner's advocate referred the court to the affidavit of service sworn by one, David Okumu Ojill on 4th November 2013. In the said affidavit, the said process server swore that on 29th October 2013 at about 4.10pm he went to the offices of the 1st respondent which is situated within Kisii town and personally served the 1st respondent with the petitioner's petition and the application dated 22nd October 2013 together with the interim ex parte orders that had been issued on the same day and that the 1st respondent accepted service of the same on his own behalf and on behalf of the 2nd respondent although he declined to acknowledge service by signing the duplicate copies of the said petition, application and order. Having satisfied myself from the said affidavit that the 1st and 2nd respondents were served, I allowed the petitioner to proceed with its application dated 22nd October 2013 the absence of the 1st and 2nd respondent notwithstanding. The petitioner argued the application which was allowed on the same day.

3. On 25th November 2013 the 1st and 2nd respondents brought an application under certificate of urgency seeking an order to set aside the orders that were made ex parte on 4th November 2013 in favour of the petitioner on the grounds that the 1st and 2nd respondents were not served with the application dated 22nd October, 2013 which gave rise to the said orders. The 1st and 2nd respondents application was supported by the affidavit of James Ongwae, the Governor of Kisii County sworn on 25th November 2013 in which he deposed that he was never served with the aforesaid application as claimed in the affidavit of the

process server, David Okumu Ojill sworn on 4th November 2013. James Ongwae annexed to his affidavit in support of the application, copies of air ticket and daily work ticket to demonstrate that on 29th November 2011 when he is alleged to have been served with the petitioner's application, he was on official duty in Nairobi.

4. The 1st and 2nd petitioners' application was opposed by the petitioner. The petitioner filed a replying affidavit sworn by one, Elijah Amota Onsika on 7th February 2014 and grounds of opposition dated 22nd January 2014. Elijah Amota Onsika who is the managing director of the petitioner deposed in his affidavit that he went to the offices of James Ongwae on 29th November 2013 and confirmed that he (James Ongwae) was present. He thereafter informed the petitioner's advocates to come and effect service upon him. Elijah Amota Onsika deposed further that James Ongwae who is personally known to him was present in his office on the day and around the time when he is said to have been served with the petitioner's application by David Okumu Ojill. In addition to the said replying affidavit and grounds of opposition, the petitioner also filed and served upon the 1st and 2nd respondents advocates a notice of intention to cross-examine James Ongwae on his affidavit sworn on 25th November 2013 at the hearing of the 1st and 2nd respondents' application dated 25th November 2013.

5. When the 1st and 2nd respondents' application dated 25th November 2013 came up for hearing on 3rd March 2014, I directed that the same be heard by way of written submissions. I directed further that before the parties file their written submissions; the advocates for the parties should address me on the petitioner's request for the appearance of James Ongwae in court for the purposes of cross examination on his affidavit sworn on 25th November 2013 and the advocates for the petitioner and the 1st and 2nd respondents did address me on the issue on 25th March 2014. This ruling is limited to the determination of that issue. In his submission in support of the petitioner's application to cross examine James Ongwae (hereinafter referred to only as "**the 1st respondent**") on his affidavit sworn on 25th November 2013 (hereinafter referred to only as "**the affidavit**"), the petitioner's advocate Mr. Oguttu Mboya submitted that the central issue for determination in the 1st and 2nd respondents application dated 25th November 2013 is whether or not the 1st respondent was served with the petitioner's application dated 22nd October 2013 which gave rise to the orders made herein on 4th November 2013 which are sought to be set aside by the 1st and 2nd respondents. The petitioner's advocate submitted that there are three (3) affidavits on record on the issue of service of the said application upon the 1st respondent. There is the affidavit of the process server and that of the petitioner which are to the effect that the 1st respondent was duly served with the petitioner's application dated 22nd October 2013 on 29th October 2013. On the other hand is the affidavit by the 1st respondent through which he denied service and claimed that on the day he is alleged to have been served at Kisii, he was away in Nairobi on official duty. The petitioner's advocate submitted that the court would not be able to determine the truth on this issue of service of the petitioner's application upon the 1st respondent on these conflicting affidavits. Counsel submitted that the issue can only be resolved through cross-examination of the deponents of these affidavits one of which is the 1st respondent. Counsel submitted that this is an appropriate case in which the court should exercise the powers conferred upon him by the proviso to Order 19 Rule 1 of the Civil Procedure Rules and order the 1st respondent to appear for cross-examination on his affidavit in contention. In support of his submission, the petitioner's advocate cited the Court of Appeal case of **Dickson Daniel Karaba vs. John Ngata Kariuki & 2 Others, Nairobi Civil Appeal No. 125 of 2008 (Unreported)**.

6. In his submission in reply, the 1st and 2nd respondent's advocate, Mr. Onsembe submitted that no basis had been laid by the petitioner to warrant the granting of the orders sought. Mr. Onsembe submitted that the 1st respondent's affidavit is self-explanatory and as such there is no need at all to cross-examine him on the same. According to counsel, the 1st respondent has denied that he was served and that the process server who served him has not sworn any affidavit to controvert that averment. The 1st and 2nd respondents advocate submitted that the sole purpose for the present application is to embarrass the 1st respondent who is the Governor of Kisii County whom the counsel termed not to be an ordinary person.

The 1st and 2nd respondents' advocate submitted that the issue at hand is so minor that it does not warrant summoning the person of the stature of a Governor of a County to appear in court for cross-examination on the same. Counsel submitted that if there is someone to be cross-examined, it should be the process server and not the 1st respondent. The 1st and 2nd respondent's advocate urged the court to reject the petitioner's application.

7. I have considered the petitioner's application to cross-examine the 1st respondent on the affidavit and the opposition thereto by the 1st and 2nd respondents. The proviso to order 19 rule 1 of the Civil Procedure Rules, 2010 gives the court the power on application to order a deponent of an affidavit to appear in court for cross-examination on his/her affidavit. I am fully in agreement with the submission by the advocate for the 1st and 2nd respondent that the order for cross-examination of a deponent of an affidavit is not a right and that the same cannot be given as a matter of course. A party seeking such an order must lay a basis for the same and must also demonstrate that the order is sought in good faith. I am satisfied that the petitioner has laid a basis for the order sought. It is not in dispute that the main issue for determination in the 1st and 2nd respondents' application dated 25th November 2013 is whether or not the 1st respondent was served with the petitioner's application dated 22nd October 2013. It is also not in dispute that on this issue of service of the said application, the process server and the petitioner on one hand and the 1st respondent on the other hand have sworn affidavits which are conflicting. Whereas the process server and the petitioner have maintained on oath that the 1st respondent was duly served in his office with the petitioner's application in issue, the 1st respondent has denied such service and has in fact contended that he was not in Kisii on the material day when he is alleged to have been served.

8. In the Court of Appeal case of **Karatina Garments Ltd vs. Nyanarua [1976] KLR 94** that was cited with approval in the case of, **Dickson Daniel Karaba vs. John Ngata Kariuki & 2 Others** (Supra), it was stated that;

“Where one party to proceedings denies having been served with a relevant document, it is proper for the court to look into the matter, if the court is faced with conflicting affidavits as to the alleged service of process, it is proper that the deponents should be examined on oath in order to establish the truth”.

I am satisfied that this is an appropriate case to order the deponents of all the conflicting affidavits filed herein to be cross-examined on the same. This court would not be able to establish the truth as concerns the service in dispute unless all those who have sworn affidavits on the issue are cross-examined. Although the cross-examination was sought only with respect to the 1st respondent, I am of the opinion that since the exercise is aimed at establishing the truth, the justice of the matter demands that all the deponents of the conflicting affidavits be summoned to appear for cross-examination.

9. The upshot of the foregoing is that the petitioner's application is for granting. I therefore hereby order that, David Okumu Ojill, Hon. James Ongwae and Elijah Amota Onsika shall appear before this court on a date to be fixed by the parties at the registry for the purpose of cross-examination on their affidavits sworn on 4th November 2013, 25th November 2013 and 7th February 2014 respectively. The said cross-examination shall be limited only to the issue of service of the petitioner's application dated 22nd October 2013 and related pleadings upon the 1st respondent. The costs of the petitioner's application shall be in the cause.

Delivered, dated and signed at Kisii this 9th day of May 2014.

S. OKONG'O

JUDGE

In the presence of:-

Mr. Ochwang'i for the Petitioner

Mr. Onsembe for the 1st Respondent

Mr. Onsembe for the 2nd Respondent

N/A for the 3rd Respondent

Mr. Mobisa Court Clerk

S. OKONG'O

JUDGE