



No.25/2014

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS
ELC PETITION NO.149 OF 2014

NGURUMANLIMITED..... PLAINTIFF

VERSUS

DAVID NKEDIANYE 1ST DEFENDANT

JOSEPH OLE LENKU 2ND DEFENDANT

JOSEPH NKAISSERY 3RD DEFENDANT

PETER MOSITET..... 4TH DEFENDANT

TARAIYA KORES..... 5TH DEFENDANT

PETER PARIKEN 6TH DEFENDANT

PERIS TOBIKO..... 7TH DEFENDANT

MOSES SEKUDA..... 8TH DEFENDANT

RULING

1. The matter herein came under certificate of urgency on 30.11.2014 for Notice of Motion dated 30.10.2014 seeking 11 prayers. The court granted prayers 1 – 5 on the basis of the material placed before the court and the interparte hearing was fixed on 13.11.2014. The application and all the documents were to be served for the inter parte hearing. On 30.10.2014 the Applicant once more moved the court by way of Notice of Motion dated 3.11.2014 and filed on 3.11.2014 under certificate of urgency.
2. Once again the court granted prayers 1 to 8 in the motion on the basis of the materials before the court. The matter was fixed for inter parte hearing on 10.11.2014 and meanwhile the 1st Defendant/Respondent was to attend court. The Respondent was to be served with the application and all the documents for inter parte hearing on 10.11.2014.
3. The Defendant has attended court together with his team of advocates led by Prof. Tom Ojiambo together with Mr. Opondo. The Applicant was with its advocates Pheros Nowrojee and Mr. Nyaencha. The Defendants No.4, 5, 6, 7 and 8 also attended court though they claim that they were not served with the application dated 3.11.2014 or hearing notice for today.
4. The Defendant has filed under certificate of urgency a motion dated 7.11.2014 and filed on

- 10.11.2014. The Notice of Motion was served upon the Plaintiff's advocates today in court. The motion seeks prayers a, b, c, d, e, f. The principle prayer is to set aside the court's orders dated 3.11.2014. In his submission, the Defendant seeks specifically the lifting of the orders No.2 and 8 issued on the 3.11.2014 pending inter parte hearing of the 1st Defendant/Applicant's motion dated 7.11.2014. The principle ground for seeking specifically the lifting of the orders of 3.11.2014 is that he was not served with the application dated 30.11.2014 or even the orders issued thereof. The 1st Defendant's advocate submits that they will be demonstrating during the hearing of the motion that no service was effected. The Defendant undertakes to comply with orders of the court and all the directions the court may make. The 1st Defendant has also intimated that he intends to enjoin 10,000 people as parties herein.
5. The Plaintiff via its advocate oppose the lifting of the orders. This is because the 1st Respondent was served and an affidavit of service has been filed. On application to set aside the orders of 3.11.2014 the plaintiffs advocate states that the same was served in court this morning and and thus seeks 7 days to reply to the same application.
 6. On lifting of the orders of 3.11.2014, the advocates submits that the same orders are interim pending inter parte hearing of the motion dated 3.11.2014. The counsel submits that there are people still in the suit property and they are seeking the Inspector General of Police (IG) to furnish information thereof. The advocate submitted that such information is important for both sides and thus the need for the IG to attend court in person for the purposes of informing the court of the steps taken on orders No.4 and 5 of the motion dated 3.11.2014.
 7. The Advocate for the Plaintiff seeks the contempt proceedings dated 3.11.2014 to await the IG report and meanwhile the interim orders of 30.10.2014 and 3.11.2014 be extended. He undertakes to serve the IG.
 8. In reply to the submissions by the Plaintiff's advocate, the 1st Defendant's advocate submits that the orders complained of herein were issued without the Plaintiff making material disclosure. The advocate submits that if the court was aware of the concealed material facts, it could not have granted the orders exparte. Prof. Tom Ojienda reiterates that orders No.2 and 8 of the motion dated 3.11.2014 are configured in finality mode.
 9. He submits that the 1st Defendant does not oppose the IG attending court and making a report on orders 4 and 5 as sought by the plaintiff herein. I have listened to both sides rivaling submissions and I have perused the record of the court. The principle issues are:
 1. Whether the 1st Defendant was served with the orders issued on 30.10.2014 together with the Application dated 30.10.2014?
 2. Whether the orders of 3.11.2014 properly issued?
 3. Whether the orders of 3.11.2014 will be stayed and/or discharged pending the application dated 7.11.2014?
 4. What is the court directions on the matter herein?
 10. When the court issued the orders dated 30.10.2014 it directed same together with the application and all the documents be served upon the defendant. The Applicant/Plaintiff appeared in court on 3.11.2014 with a notice of motion and sought specifically prayers 1 to 8 on the basis that despite service with orders of 30.10.2014 the 1st Defendant was continuing to disobey court orders.
 11. The 1st Defendant has attended court with the advocate and denies service of the orders and seeks the orders of 3.11.2014 to be discharged. Of course the court will have to hear the motion dated 7.11.2014 on merit upon the replies by the parties. The court cannot determine the issue of service before the parties are heard. Issues No.1 and 2 are thus to await the hearing of the application dated 7.11.2014.
 12. The court is alive to the provisions of Articles 50 (1) and 25(c) of the Constitution on the right to due process. If the 1st Defendant was to prove that he was not served as alleged, then he will have been condemned unheard contrary to the principles of natural justice.
 13. The court observes the effect of specifically prayers No.2 and 8 on the 1st Defendant person and his properties. At this stage the court is not making a ruling on the motion dated 7.11.2014 but the

court is weighing conveniences between the parties pending the interparte hearing of the motion dated 7.11.2014.

14.The court is of the view that in the interest of justice and taking into account that the issue of service is very contorted, it is fair to give the 1st Defendant some reprieve pending the hearing of the motion dated 7.11.2014. The court therefore, makes the following orders:

1. The orders No.2 and 8 in the orders dated 3.11.2014 are stayed pending hearing and determination of the Notice of Motion dated 7.11.2014.

2. The Respondent in the Notice of Motion dated 7.11.2014 to file and serve Plaintiff/Applicant within 7 days. The Applicant/Defendant to file and serve further affidavit if need be within 7 days of service.

3. The Inspector General of Police to appear in court personally to give report on orders No.4 and 5 of the orders issued on 3.11.2014 on 18.11.2014.

4. The orders of 30.10.2014 and orders No.1, 3, 4, 5, 6 and 7 of Motion date 3.11.2014 are extended to 2.12.2014.

5. Matter is fixed for Motion date 3.11.2014 of 7.11.2014 on 2.12.2014.

Dated and delivered at Machakos this 10th day of November, 2014.

CHARLES KARIUKI

JUDGE