



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT BUSIA

CIVIL CASE NO. 154 OF 2013

ROBERT OUMA ODUORI.....PLAINTIFF/1ST RESPONDENT

ESHIKHONI AUCTIONEERS.....PLAINTIFF/2ND RESPONDENT

= VERSUS =

THOMAS MUKA MAULO.....DEFENDANT/1ST APPLICANT

WALTER WASHINGTON BARASA NYONGESA.....DEFENDANT/2ND APPLICANT

RULING

1. The defendants herein brought this notice of motion application dated 31/8/2020 under the provisions of Order 40 rule 3, Order 51 rule 1 of the Civil Procedure Rules; sections 1A, 1B and 3A of the Civil Procedure Act; section 10 of Judicature Act, Rule 3 High Court (Practice & Procedure) Rules Cap 8 and all other enabling laws. The Defendants (hereinafter referred to as Applicants) asked for orders;

- 1) **This application be heard and determined on priority.**
- 2) **That this application be admitted for hearing during the current High Court vacation.**
- 3) **This Honourable Court be pleased to order the Respondent to compensate the Applicants/Defendants' moveable property worth Kshs.294,000 maliciously auctioned at Kshs.60,000.**
- 4) **That this Honourable Court be pleased to order the Respondents to show cause why they should not be committed to civil jail for 6 months for disobedience of the consent order entered into on 23rd July, 2015 by both the counsel for the plaintiff and defendants ordering the stay of execution of the decree and the status quo order issued on the 27th day of March, 2017 by the Court of Appeal at Kisumu in Civil Application No. 13 of 2017.**
- 5) **The Honourable Court be pleased to issue an order instructing the 1st Respondent/Plaintiff to deposit the title deed of the suit property to this Honourable Court pending hearing and determination of this application.**
- 6) **Pending the hearing and determination of this application and the appeal, an order of temporary injunction restraining the defendant whether by himself or his agents or representatives from any dealings on the suit property Parcel No. BUKHAYO/MATAYOS/3116.**
- 7) **This Honourable Court be pleased to award damages to the Applicants due to the illegal sale of their moveable property.**
- 8) **This Honourable Court be pleased to reverse the title that was fraudulently registered in the Respondent's name**
- 9) **Unless the 1st Respondent/Defendant is firmly dealt with by this Honourable Court, he will continue and persist in making a mockery of the justice system to the detriment of the Applicant.**
- 10) **This application has been brought promptly and in good faith.**
- 11) **The 1st Respondent do pay costs of this application personally.**

2. The application is supported by the grounds on the face of it and on the affidavits of Walter Washington Barasa Nyongesa sworn on 31st August 2020 and further affidavit sworn on 21st September 2020. Mr. Nyongesa deposed that he filed a notice of appeal dated 29/6/2015 raised against the judgment delivered on 18/6/2015. Subsequently a consent order was recorded on 23/7/2015 ordering stay of execution of the decree pending hearing and determination of the Applicants' Appeal. Further that the Court of Appeal in Kisumu Civil Appeal No. 76 of 2016 on 27/3/2017 ordered that the status quo be maintained pending determination of the appeal. In the further affidavit, the Applicants acts of contempt committed by the Respondents *inter alia*;

- a) *Burying a 3rd party on the suit land.*
- b) *1st Respondent transferring suit title to his name.*
- c) *2nd Respondent executing the decree inspite of stay.*
- d) *2nd Respondent breached the Auctioneers Rules 1997.*

3. The application was vehemently opposed by the Respondents. The 1st Respondent swore a replying affidavit on 15th September 2020 deposing that according to the official search for Bukhayo/Matayos/3116, the land was registered in his name on 20.07/2016. That there is no Court order annexed prior to 20/07/2016 staying the execution of the decree. That this Court cannot grant prayers 5 – 9 of the motion since the Court cannot issue orders affecting a title on a preliminary stage and the court is also *functus officio*. That the application is vexatious and frivolous and should be dismissed with costs.

4. The 2nd Respondent filed a replying affidavit sworn on 17th September 2020 and further affidavit dated 15/10/2020 both sworn by Kennedy Shikuku. He deposed that on 11/6/2020 he received warrants of attachment to levy execution against the Applicants and proceeded to serve a proclamation on 20th June 2020. That on 3rd July 2020 they proceeded to the homestead of the judgment debtors and removed the proclaimed goods which were then sold on 6th July 2020. That all these time, they received no stay order or proposal of payment. The 2nd Respondent averred that he was neither served with any order nor made aware of the existence of the stay order and therefore he should not be punished for any disobedience. Secondly, the 2nd Respondent contends that no material has been placed before court to suggest that the Applicants' livestock were worth Kshs.294,000.

5. In his further affidavit, the 2nd Respondent deposed that upon perusal of the Court file after being served with this application, he learnt that there was a court order which was never extracted for service upon concerned parties thus 3rd parties would not have known about the same. That the plaintiff did not attend court during the party and party bill of costs so that he could inform the Deputy Registrar to halt the taxation process because of the consent order. That the "plaintiff" have no claim to the heads of cattle in light of the objection proceedings filed by Daniel Ouma. He urged the Court to dismiss the application for being misconceived and lacking in merit.

6. The parties argued the application by filing written submissions. The Applicants filed their submissions on 14/10/2020; the 1st Respondent on 17th September 2020 and the 2nd Respondent on 23rd October 2020. I have read and considered the rival submissions. The question in dispute is whether or not the Defendants/Applicants have proved contempt against the Respondents. The question on whether or not the Applicants have locus to claim the attached moveable goods was resolved on 27th October 2020 when a notice to withdraw objection proceedings was filed by Daniel Ouma (the objector).

7. It is an established principle of law that contempt proceedings are quasi-criminal thus standard of proof is on strict liability. In the case of ***Kiru Tea Factory Co. Limited Vs Stephen Maina & 14 others (2019) eKLR*** it was held that for a person to be punished for contempt, it must be proved that;

- (i) *He has been served with the order or was aware of the order said to have been disobeyed.*
- (ii) *The order must be clean.*
- (iii) *Disobedience has been proved.*

8. From the court record, there is a letter dated 23/7/2015 and filed in court on 27/7/2015 executed between Gikera & Vadgama Advocates for the defendants on one part and Manwari & Co. Advocates for the plaintiffs on the other part. The said letter read thus;

“Kindly record the following consent order: - By consent of both counsel for the plaintiff and the defendants there be and it is hereby ordered a stay of execution of the decree and judgement delivered herein on the 18th June 2015 pending the hearing and determination of the defendants' appeal to the court of appeal”.

9. The consent was recorded as an order of the court on the same date i.e. 27/07/2015. The order was extracted and signed by the Deputy Registrar and issued on 18th May 2017. However, it became a court order on 27/7/2015 when the letter of consent was filed and order adopted by the Deputy Registrar on the court file. The first breach levelled against the 1st Respondent is transferring the suit title into his name inspite of the court order staying execution of the decree. The 1st Respondent admits transferring the title to his name on 20/7/2016 but defends the same that there was no court order staying the execution.

10. The stay of execution was granted by consent of the 1st Respondent's counsel and the Applicants counsel. There is nothing stated by the 1st Respondent that his advocate then on record acted without his authority. In any event, an advocate representing a litigant represents to 3rd

parties that he has such authority. If he acts outside his mandate, the affected party's recourse lies in suing for negligence and or breach of trust. In this instance, the consent order not having been set aside, the 1st Respondent had a duty to obey it. The transfer & registration undertaken on 20/7/2016 was done in breach of orders in place given on 27/7/2015 see case of *Shimmers Plaza Ltd Vs NBK (2015) eKLR* thus; **"Would the knowledge of the judgment or order by the advocate of the alleged contemnor suffice for contempt proceedings" We hold the view that it does. This is more so in a case such as this one where the advocate was in Court representing the alleged contemnor and the orders were made in his presence. There is an assumption which is not unfounded, and which in our view is irrefutable to the effect that when an advocate appears in court on instructions of a party, then it behoves him/her to report back to the client all that transpired in court that has a bearing on the client's case. This is the position in other jurisdictions within and outside the commonwealth."**

The Applicants have thus proved the first violation of the orders of this Court by the 1st Respondent in so far as the transfer of the suit title was done when there was an order in place.

11. The 2nd Respondent has pleaded that he received warrants of execution on 11/6/2020. That he was unaware of any order of stay of execution. The 2nd Respondent was acting as an agent of the 1st Respondent as the owner of the decree. In the case of *Kiru Tea Factory Ltd supra*, the Court of Appeal cited the decision in the case of *Eliud Muturi Mwangi (Practising in the name and style of Muturi & Co. Advocates) Vs LSG Lufthansa Services Europa/Africa GMBH & Another (2015) eKLR* held thus; **"The law is that any person who has committed an act of contempt of court is liable for indictment. Therefore, even third parties who are not parties in a suit may be committed for contempt of court and classic examples are contempt on the face of the court, contempt by officers of a company or corporation, contempt by persons who are claiming under the title of a party in a suit or as assigns or successors in title. I therefore agree with the submissions by Mr. Nderitu that the intended contemnors herein being officers of a corporation may be cited for contempt of court. The only question is whether the acts complained of amount to contempt or could be a basis for issuance of leave to initiate contempt proceedings against those individuals. This question will be ultimately answered after the court has fully carried out an analysis of the entire circumstances of the case. Let me consider the other two issues."**

12. The above decision goes to show that persons who are not parties to the suit can also be punished for contempt. The question herein is whether or not the 2nd Respondent was in a position to know the existence of the order issued on 27/7/2015. Needless to state here that the 1st Respondent being aware of the stay order was acting in disobedience when he issued instructions to the auctioneer to attach the Applicants' moveable goods in execution of the decree. The 2nd Respondent was working as an agent of the 1st Respondent while executing of the warrants given to him. Therefore, in my opinion and I so hold, the 2nd Respondent cannot be held liable in so far as disobedience of the order of 23/7/2015 is concerned because he was an agent of a disclosed principal.

13. The Applicants in prayer number 3 and 7 of the motion sought an order for an award of damages due to the illegal sale of their movable properties. As stated in paragraph 12 above, the attachment and sale conducted on behalf of the 1st Respondent went against the order of stay in place and was therefore illegal null and void. The 1st Respondent submitted that compensation can only be granted after full determination via viva voce evidence stating the injury suffered and not at a preliminary stage. The 1st Respondent did not however apply to have this limb of the application proceed by way of oral evidence.

14. The claim of compensation arose out of the execution of the decree in this file. Section 64(1)(a) of the Civil Procedure Act provides thus;

"(1) Where, in any suit in which an arrest or attachment has been effected or a temporary injunction granted under section 63 -

(a) it appears to the court that the arrest, attachment or injunction was applied for on insufficient grounds"

"64(2) An order determining an application under subsection (1) shall bar any suit for compensation in respect of the arrest, attachment or injunction."

Order 22 rule 65 of Civil Procedure Rules provides that **"No irregularity in publishing or conducting the sale of movable property shall vitiate the sale; but any person sustaining any injury by reason of such irregularity at the hand of any other person may institute a suit against him for compensation, or (if such person is the purchaser) for the recovery of the specific property and for compensation in default of such recovery"**.

15. Further to the above provisions of section 64 contempt proceedings empowers the court to order for compensation without filing a fresh suit. Order 22 refers to irregularities done during the execution process and not in reference to contempt proceedings. Thus the Applicants can either claim compensation through this application and or institute a suit.

16. Since the court is granted powers under the law to make an order for compensation and having found that the attachment and sale of the defendants' properties were done in contravention of the orders of stay in place. I now make an order that the Applicants are entitled to be compensated for the value of the goods unlawfully attached and sold. The Applicants gave the value of the cattle attached at Kshs.294,000. None of the Respondents gave an alternative value for the Court's comparison. Therefore using the value stated by the Applicants, this court forms the opinion that the compensation payable to the Applicants whose cattle was taken in execution of the decree is Kshs.200,000 payable by the 1st Respondent.

17. In conclusion to the foregoing analysis, this court finds the 1st Respondent guilty of contempt of this court's order made on 23/7/2015. He shall be brought before this court on 10/2/2021 for sentencing. In the event he does not bring himself, a warrant of arrest shall issue. The application is thus allowed in terms of prayers:

3) An award of Kshs.200,000 made to the Applicants and payable within 60 days hereof in default execution shall issue.

4) The 1st Respondent found guilty of contempt and shall be sentenced accordingly.

6) Pending the hearing and determination of this application and the appeal, an order of temporary injunction be and is hereby issued restraining the defendant whether by himself or his agents or representatives from any dealings on the suit property Parcel No. BUKHAYO/MATAYOS/3116.

11) Costs of the application awarded to the Applicants.

Dated, signed & delivered at BUSIA this 16th day of Dec., 2020.

A. OMOLLO

JUDGE