



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT MIGORI

ELC. 782 OF 2017

JANET AKINYI ATING'A.....1ST PLAINTIFF/APPLICANT

JEROME MODECHAI ATING'A.....2ND PLAINTIFF/APPLICANT

VERSUS

HILDA LINET ACHIENG.....1ST DEFENDANT/RESPONDENT

JAPHETH ANGILA ATING'A.....2ND DEFENDANT/RESPONDENT

REGISTRAR OF LANDS

MIGORI COUNTY.....3RD DEFENDANT/RESPONDENT

HON. ATTORNEY GENERAL.....4TH DEFENDANT/RESPONDENT

RULING

1. This ruling is in respect of an application by way of Notice of motion dated

13th July 2018 and filed on 16th July 2018. The application is expressed under Section 4 (a), section 5(b),(c) section 7 (1) of Contempt of Court Act 2016, sections 1A 1B and 3A of the Civil Procedure Act, Order 40 and Order 51 (1) of the Civil Procedure Rules 2010, Article 159 (2) (d) and all the enabling provisions of the law. The applicants, who are the plaintiffs in this suit, are seeking the following orders:-

a) Spent

b) Spent

c) THAT this honourable court be pleased to find the 1st and 2nd defendants herein, HILDA LINET ACHIENG and JAPHETH ANGILA ATINGA in contempt of court order of Honourable Justice Ong'ondo in the Environment and Land Court of Kenya at Migori in ELC No. 782 of 2017 issued on 31st August 2017 and thereafter reinstated by honourable Justice Ong'ondo on 8th March 2018.

d) THAT the 1st and 2nd defendant/respondents be punished for contempt of court order by being fined a sum not exceeding two hundred thousand shillings or to imprisonment for a term not exceeding six (6) months thus upholding the dignity and authority of this honourable court.

e) That this honourable court be pleased to order that the 1st and 2nd defendant not be heard by the court until they purge their contempt.

f) THAT this honourable court be pleased to preserve the orders issued on 8th March 2018.

g) THAT interim orders be granted restraining the 1st and 2nd defendants either by themselves, their agents, employees, servants or proxies from entering and remaining on, trespassing, encroaching, dealing with, alienating, constructing on, erecting buildings and permanent structures upon or in any way interfering with the status quo on ALL THAT parcel of land originally known as KAMAGAMBO/KABUORO/2971 and after subdivision now known as KAMAGAMBO/KABUORO/9975 as per this honourable court's orders aforementioned pending the hearing and determination of the application and the main suit.

h) THAT the honourable court be pleased to issue such other or further punitive orders in respect of the said contempt as may be necessary for the ends of justice to be met.

i) THAT the costs of this application be awarded to the applicants.

2. The application is anchored on an annexed supporting affidavit sworn on the even date by Professor John E. Oluoch Atinga who averred that he has full instruction and authority of the applicants herein. Documents namely orders (JEOA 1 to 2) and photographs of the current status of the suit property (JEOA 3) accompany the supporting affidavit.

3. The said application is further anchored on eight (8) grounds which include:-

i. **THAT** on 31st August 2017, the court made orders, inter alia, status quo to be maintained to the effect that no party shall put any permanent structure on it and change of character of the suit land should not be undertaken by party to this suit.

ii. **THAT** on the 1st day of March 2018, the respondents' advocates, through misrepresentation to the court had the said orders discharged in the absence of the applicants and their advocates.

iii. **THAT** the applicants' advocates proceeded to court under certificate of urgency and had the court reinstate the said preservative orders and duly served the order of reinstatement upon the respondents' advocates on record, Odondi Awino and Company Advcoates.

iv. **THAT** in spite of being fully aware of the existence of the court's clear orders, the respondents in derogation of the same contemptuously and in a vile manner have proceeded with the construction of the building on the suit premises as though court orders did not exist or are irrelevant and were granted in vain.

v. **THAT** it is essential for the Rule of Law and Administration of Justice that court orders must be obeyed.

vi. **THAT** it is essential for the court to commit the contemnors to imprisonment term not exceeding six (6) months to compel obedience of court orders.

vii. **THAT** it is important that this application be allowed, and the contemnors punished as their breach of the order has brought the court's dignity into disrepute and has caused the applicant great prejudice, loss and irreparable harm.

4. The defendants /respondents raised a preliminary objection dated 24th July 2018 to the application on the ground;-

“That the Notice of Motion dated 13th July 2018 is incurably defective for failure to comply with Order 1 Rule 13)1) and (2) of the Civil Procedure Code Cap 21 laws of Kenya as mandatory required.”

5. The preliminary objection in supported by a 13 paragraphed replying affidavit sworn on 24th July, 2018 by the 1st respondent, who averred, inter alia, that the applicant is a stranger to the proceedings and is merely a busy body. That there was confusion as to the service of court order dated 9th March, 2017 and orders issued on 31st August 2017. That there is no indication when the photos (JEOA 3) were taken, by who and they are without accompanying certificate.

6. Formerly Okundi and Company Advocates represented the applicants. Currently, Okoth and Kiplagat Advocates appear for the applicant. Mr. Ezra Awino of Ondodi Awino and Company Advocates represents the 1st and 2nd respondents. Ms. E.Opiyo, litigation counsel appears for the 3rd and 4th respondents.

7. By chamber summons dated 3rd September 2018, the applicants sought leave to file further affidavit in support of application dated 13th July 2018. On 5th September 2018, the leave sought was granted accordingly. In that regard, a further affidavit sworn on 3rd September 2018 by Professor John E. Oluoch Ating'a was duly filed.

8. It is worthy to note that a power of attorney of the 1st and 2nd defendants to Professor John. E. Oluoch Ating'a made on 6th April, 2007 (JEOA 4), an affidavit of service sworn on 13th March 2018 (JEOA5) and a letter dated 6th March 2018 by the applicant's counsel (JEOA 6) and an authority to swear affidavit or pleading dated 24th July, 2018 by the 2nd respondents are annexed to the further affidavit in this application.

9. On 26th July, 2018 the court directed that the notice of motion application and the preliminary objection be argued by written submissions; see **Order 51 Rule 16 of the Civil Procedure Rules, 2010 and Practice Direction No. 33 (a) of the Environment and Land Court Practice Directions, 2014.**

10. In their submissions dated 9th October 2018, learned counsel for the applicants urged the court to find the 1st and 2nd respondents to be in contempt of court order made on 31st August 2017 and in particular order No. 7 thereof (JEOA)-1). Counsel also submitted, inter alia, that an affidavit and further affidavit in support in of the application were sworn by the applicants' uncle and their duly appointed attorney under the power of attorney registered as No. P/A 06017. Recital No. 4.

11. Counsel further relied on **Section 23 of the Contempt of Court Act**, the case of **African Management Communications international**

Ltd –v- Joseph Mathenge Mugo and another (2016) eKLR and Blacks Law Dictionary 8th Edition on the definition of “**Contempt of Court**”, among other authorities. Counsel urged the court to impose a fine or imprisonment on the respondents for contempt of court and reverse the construction works on the suit property to restore it to the foundation level as shown on annexed document (JEO 2).

12. The 1st and 2nd respondents’ counsel filed submissions dated 29th September 2018 where reference was made to **Order 1 Rule 13 (1) and (2) of the Civil Procedure Rules, 2010**. Counsel submitted that the supporting affidavit to the application is sworn by a stranger to these proceedings hence he has no locus standi herein.

13. Counsel further submitted that there was neither letter of authority nor power of attorney given by the applicants to the deponent of the supporting affidavit and further affidavit to the application to act on their behalf. Counsel contended that the supporting affidavit ought to be expunged for being vexatious, frivolous and an abuse of the court process and that the suit be dismissed with costs to the respondents.

14. Learned counsel for the 3rd and 4th respondents did not file and serve submission or at all in the instant application.

15. I have reviewed the entire application, the preliminary objection, affidavit and submissions in this application. Therefore, are the respondents in contempt of court and are the orders sought in the application merited in the circumstances?

16. The applicants contend that the 1st and 2nd respondents are in contempt of court of an order issued by this court on 31st August 2017 and thereafter reinstated by the court on 8th March 2018. It is pretty clear from a copy of the order marked (“JEO 1”) and the court record that the court made the order thus:-

“That status quo to be maintained to the effect that no party shall put up any permanent structure on it and change of character of the suit land should not be undertaken by party to this suit.”

17. The said order was made on 31st August 2017 in the presence of counsel for the respective parties pursuant to the notice of motion dated 1st August 2017. The court vacated the order on 1st March 2018 for reasons given by the 1st and 2nd respondents counsel and in the absence of the applicants’ counsel who were well aware of that date.

18. On 8th March 2018, the status quo order was reinstated and the order of 1st March 2018 revoked accordingly. The reinstatement order duly extracted and signed by the Deputy Registrar, Migori reads in part that the interim status quo order was issued on 31st August 2018 and that the reinstatement order made on 8th March 2018(JEO-2) was issued at Migori this 9 day of March 2018.

19. In that respect, the 1st respondent asserted that there was confusion as to the service of court orders dated 9th March 2017 and 31st August 2018 as shown on court order (JEO2). Apparently, there was an error relating to 31/8/2018 and 9th March 2017 as discerned in copy of order marked JEO 2. Whereas the error is subject to amendment under Section 99 of the Civil Procedure Act (Cap 21), I think it was not drawn to the attention of the Deputy Registrar. Thus I find that JEO-2 raised issues as to its precision and was bound to cause somewhat confusion upon the 1st and 2nd respondents.

20. It is also contended by the applicants especially at paragraph 7 of the supporting affidavit to the application that court orders of 31st August 2017 and 8th March 2017 were duly served on the 1st and 2nd respondents who are aware of the existence of the orders. However, the 1st and 2nd respondents stated otherwise. I observe that there is no document annexed to the application or on record to show that the order marked (JEO 2) was served on the 1st and 2nd respondents.

21. The 1st and 2nd respondents further contend that the photographs (JEOA 3) do not show when they were taken who took them and they lack an accompanying certificate. Having examined JEOA 3 and the contention by the 1st and 2nd respondents. I find that the document (JEOA -3) is want of precision and of low evidential value.

22. The 1st and 2nd respondents also asserted that the deponent of the supporting affidavit and further affidavit to the application is a stranger to the proceedings. A copy of power of attorney marked JEOA -4 prominently features at paragraph 2 of the further affidavit and is attached thereto. By the said affidavit and JEOA -4, the deponent, Professor John E. Oluoch Ating’a has *locus standi* in this matter which springs from the management of the estate of the applicants’ deceased father, Dr. Polycap Erick Wambi Ating’a.

23. The applicants have sought to have the 1st and 2nd respondents cited for contempt of courts. **Blacks Law Dictionary 10th Edition** defines the term “**Contempt**” (contempt of court) as:-

“Conduct that defines the authority or dignity of a court or legislature”

24. I have, considered the cited case law including, **African Management Case (Supra) and Econet Wireless Kenya Ltd – v- Minister for Information and Communication of Kenya and another (2005) eKLR** in this application. I appreciate the said decisions. However, owing to the nature and circumstances of the instant application, I find the cases distinguishable herein.

25. The 1st and 2nd respondents, too, asserted that the structures shown on JEO 3 were erected between 1st March 2018 and 8th March 2018. As already noted, there are issues raised regarding to JEO 2 and 3. Moreover, it is not clear whether the order referred to in the affidavit of service sworn on 15th September 2017 by a private process server, Opiyo Juma, is the one dated 31st August 2017. The affidavit of service is not precise on the order so served. Therefore, the service of the order of 31st August 2017 and 8th March 2018 is in serious

dispute.

26. I bear in mind the finding that the entire contempt of Court Act, 2016 fails the Constitution test of validity for lack of public participation and for encroaching on the independence of the judiciary; see **Kenya Human Rights Commission –v- Attorney General and another (2018) eKLR.**

27. In a nutshell, the service of orders (JEO 1 and 2) and the photos (JEO -3) are drawn into question. I find that the 1st and 2nd respondents were not quite aware of the existence of the said orders. In that regard, contempt of court cannot be invoked against them as sought in the application.

27. The net result is that the preliminary objection dated 24th July 2018 flops. On the strength of paragraphs 8 to 11 of the replying affidavit sworn on 24th July, 2018, and as already stated, the application dated 13th July, 2018 is want of merit.

28. Thus I dismiss the applicants' Notice of motion dated 13th July 2018 with costs in the cause.

29. Orders of 8th March 2018 extended accordingly.

DELIVERED, SIGNED and DATED in open court at MIGORI this 15th day of **JANUARY, 2019.**

G. M. A. ONGONDO

JUDGE

In the presence of:

Mr. Kisia holding brief for Okoth and Kiplagat counsel for the plaintiff/applicants

Mr. Msafiri holding brief for Mr. Anyango Ogutu for 1st and 2nd respondents.

Tom Maurice Court Assistant