



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MACHAKOS

ELC. CASE NO. 313 OF 2009

SIMON NGAO MBITHIPLAINTIFF/APPLICANT

VERSUS

DANIEL KIILU NGOMO....DEFENDANT/RESPONDENT

RULING

1. In the Notice of Motion dated 15th August, 2018, the Plaintiff/Applicant is seeking for the following orders:

- a. The Respondent be cited for contempt of court and be committed to civil jail until he purges his contempt and complies with the Judgment of this Honourable Court delivered on 25th May, 2018 by Justice Angote.**
- b. The Respondent be cited for contempt of court for not complying with the Judgment of this Honourable Court as he proceeded to construct a commercial building on the parcel known as Muputi/Kimutwa/1820 with the knowledge of the existence of the Judgment issued by Justice Angote on 25th May, 2018.**
- c. The Respondent be cited for contempt of court for not complying with the Judgment of this Honourable Court issued on 25th May, 2018 as he refused to move out of Muputi/Kimutwa/1820 and has been cutting down trees and grass growing on the parcel.**
- d. This Honourable Court be pleased to make any such other order for purposes of enforcing the Judgment delivered on 25th May, 2018.**
- e. The costs of this Application be borne by the Respondent.**

2. According to the Affidavit of the Plaintiff, this court delivered its Ruling on 25th May, 2018; that the Defendant and his advocate are well aware of the Judgment of this court and that the Judgment of this court has never been stayed.

3. The Plaintiff deponed that the Defendant and his son have been cutting down trees and grass growing on parcel of land known as Muputi/Kimutwa/1820; that the Defendant has also constructed a commercial building on the suit land and that the Defendant should be punished for disobeying the orders of this court.

4. In reply, the Defendant deponed that neither the Judgment nor the Decree of this court has ever been served on him by the Applicant; that the images produced in the photos annexed on the Supporting Affidavit were taken long before the hearing and that he is not guilty of disobedience of a lawful Decree of the court.

5. The Plaintiff's advocate submitted that the Respondent's advocates having knowledge of the Judgment of the court delivered on 25th May, 2018 should have informed the Defendant of the Judgment and that the Defendant should be punished for disobeying the orders of this court. Counsel relied on numerous authorities, including the decision of the Court of Appeal in the case of *Shimmers Plaza Limited vs. National Bank of Kenya (2015) eKLR*.

6. The Defendant's advocate submitted that there is no proof that the Defendant was ever served with the Decree of the court; that there is no proof that the Defendant has disobeyed the orders of the court and that it is not true that the Defendant has constructed commercial buildings on the suit land after the Judgment of the court.

7. The Defendant's advocate finally submitted that no evidence was led to show that the Defendant cut down trees on the suit land after the

Judgment of the court; that the standard of proof in contempt proceedings must be higher than proof on the balance of probabilities, almost but not exactly, as beyond reasonable doubt and that the Application falls short of this standard of proof. The Defendant's advocate relied on numerous authorities including the cases of **Hakika Transport Services Limited vs. Kenya Long Distance Truck Drivers & Allied Workers Union (2015) eKLR**.

8. It is not in dispute that on 25th May, 2018 this court delivered Judgment in favour of the Plaintiff. In the Judgment, the court restrained the Defendant either by himself or agents from trespassing into, cultivating, cutting trees, grazing or in any manner interfering with parcel of land known as Muputi/Kimutwa/1820 (*the suit land*).

9. The record shows that when the Judgment was read in open court on 25th May, 2018, neither the Plaintiff's nor the Defendant's advocate was in court. However, the Defendant's advocate must have learnt about the said Judgment a few days because he filed the Notice of Appeal in this court on 31st May, 2018. In the said Notice of Appeal, the Defendant was categorical that he intends to appeal the entire decision of the court in the Court of Appeal.

10. The record shows that after filing the Notice of Appeal on 31st May, 2018, the Defendant's advocate applied to the Deputy Registrar of this court for typed proceedings as well as a certified copy of the Judgment issued on 25th May, 2018. The said letter, coupled with the Notice of Appeal dated 30th May, 2018 and filed on 31st May, 2018 shows that the Defendant's advocate was aware, not only of the delivery of the Judgement of 25th May, 2018, but the contents thereof.

11. The law has now been settled that where an advocate representing a litigant becomes aware of an order of the court, it is presumed that he will inform his client of such an order. In **Shimmers Plaza Limited vs. National Bank of Kenya (2015) eKLR**, the Court of Appeal held as follows:

“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.”

12. Having learnt of the Judgment of this court on or about 30th May, 2018, which is the date that the Notice of Appeal was filed, the Defendant's advocate should have informed the Defendant of the said Judgment. The orders of this court restraining the Defendant from interfering with the suit land became binding on the Defendant from 30th May, 2018, the date that his advocate signed the Notice of Appeal challenging the decision of this court. This is the position that was held by court in the case of **United States vs. Revie 834 F.2d 1198, 1203 (5th Cir. 1987)** where it was held as follows:

“the Defendant had adequate notice of a show cause order because his attorney was on notice. Therefore, a client may be similarly “served” with a court's order by his attorney's communication of its contents and this communication is presumed if the attorney has knowledge of the order.”

13. Having been satisfied that the Defendant was aware of the Judgment of this court on 30th May, 2018, the only other issue that I am supposed to consider is whether he disobeyed the order of the court of 25th May, 2018.

14. It is the Plaintiff's deposition that despite the orders of 25th May, 2019, the Defendant and his son have been cutting down trees and grass situated on the suit land, including grazing on the land and that the Defendant has gone ahead to put up a commercial building on the suit land.

15. The photographs annexed on the Plaintiff's Affidavit showing the alleged acts of contempt by the Plaintiff are not dated. Indeed, the first photographs showing four (4) individuals neither shows the alleged acts of contempt nor the identity of the four (4) individuals. The other photograph showing a structure does not also show when the same was taken and whether the structure is on the suit land or another different piece of land altogether.

16. It is trite that before the court can find a person to be in contempt of an order of the court, it must be satisfied that the person alleged to be in contempt committed the act complained of with full knowledge or notice of the existence of the order of the court complained of. In the case of **Hakika Transport Services Limited vs. Kenya Long Distance Truck Drivers & Allied Workers Union (2015) eKLR**, the Court of Appeal held as follows:

“As stated by the Court of Appeal in *Mutitika v. Baharini Farm limited [1985] KLR 229, 234* as cited in *TSC v. KNUT*, the standard of proof in contempt proceedings must be higher than proof on the balance of probabilities, almost but not exactly, as beyond reasonable doubt. The Respondent has not met the standard of proof, whether on the balance of probability, on a standard almost but not exactly as beyond reasonable doubt, or on the standard of beyond reasonable doubt. In short, there is no evidence tabled before the Court that would warrant the jailing of Richard Okwiri and Abdulhakim Lahmar for Contempt of Court. There is no basis for the Respondent to seek damages from the Claimant. The Application has no merit.”

17. Having perused the photographs that the Plaintiff is relying on, I find and hold that the Plaintiff has not proved on the required standards that the Defendant committed the acts complained of.

18. For those reasons, I dismiss the Notice of Motion dated 15th August, 2018 with costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 12TH DAY OF JULY, 2019.

O.A. ANGOTE

JUDGE