



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CASE NO 224 OF 2017

JAMES ODUOR WANYANDE.....PLAINTIFF

VERSUS

MAURICE ODUOR AMBIRO.....DEFENDANT

RULING

1. This ruling relates to the plaintiff's notice of motion dated 10/1/2018 through which the plaintiff contended that the defendant had committed contempt. The plaintiff prayed that the defendant be punished through committal to civil jail and/or attachment of his property. The plaintiff further prayed that the structures erected on the suit property in disobedience of this court's orders be pulled down at the defendant's costs.
2. The application was supported by the plaintiff's affidavit sworn on 6/1/2018 in which the plaintiff deposed that on 27/3/2017, this court issued an order on the motion dated 21/3/2017, restraining any further construction on the suit property till 31/5/2017 when the motion was to be heard inter partes. It was contended that the said order was served upon the defendant's site foreman because the defendant was unavailable during the day. The plaintiff further deposed that the defendant confirmed in his replying affidavit dated 24/7/2017 that he was aware of the restraining orders. He contended that the defendant had deliberately refused to comply with the said court order and the defendant's actions constituted an affront to the dignity and authority of the court.
3. I have painstakingly searched for the defendant's replying affidavit to the said application. None is in the file. What is in the file is a replying affidavit sworn on 9/4/2018 and exhibited as annexure "DO2" to the defendant's affidavit in support of his notice motion dated 9/4/2018. The defendant deposed in the said annexure that the said order had not been served on him and he was not aware of it. He further deposed that no construction was continuing on the suit property. He contested the plaintiff's allegation that he had been personally attending court.
4. The application was canvassed through written submissions. Mr Masinde, counsel for the plaintiff submitted that under Order 40 of the Civil Procedure Rules, all that the applicant was required to establish was that the offending party or his agents were served or were aware of the court order in issue. He added that in the present application, the defendant confirmed that his advocate on record informed him of the court order. He added that on 31/5/2017 the court reiterated the importance of obeying the court order. It was Mr Masinde's view that the plaintiff had proved beyond reasonable doubt that the respondent was fully aware of the order but chose to disobey it, calling it scandalous. He urged the court to punish the defendant as prayed. He relied on the decisions in **Mawani v Mawani (1977)KLR 139; Dr Fred Matiangi v Miguna Miguna Court of Appeal (Nairobi) Criminal Application No 1 of 2018 (UR 1/2018); and Basil Critocos v Attorney General and 5 others Nairobi HC Petition No 258 of 2011.**
5. The defendant opposed the application through written submissions dated 21/2/2019 and filed on 25/2/2019. Although the said written submissions were erroneously captured as relating to the notice of motion dated "**16 January 2018**" it is clear from the content of the written submissions that the date of "**16th January 2018**" was a typographical error and the correct date should read **10th January 2018**. The defendant's counsel, Mr Odero, submitted that the said order was not served on the defendant who resided on the suit property. He referred to the supporting affidavit of the defendant dated 10/1/2018 and filed on 15/1/2018 and contended that the structures on the suit property were there "from day one" and nothing else had been added. Counsel further submitted that the photographs exhibited by the plaintiff only showed structures but did not have the dates when they were taken. Counsel added that the law of contempt requires that the procedure prescribed in the law be adhered to. He relied on, inter alia, the decisions in **Basil Criticos v Attorney General and 4 others (2012) eKLR;** and **Kasturilal Laroya v Mityana Staple Cotton Co Ltd and another (1958) EA 194**. He urged the court to dismiss the application.
6. I have considered the application together with the parties' submissions. I have also considered the law and principles that guide this court's exercise of jurisdiction to punish a party on account of contempt. Two key issues fall for determination in the application. The first issue is whether the defendant was aware of the court order at the time of the alleged contempt. The second issue is whether the defendant, while aware of the court order, engaged in acts that constitute contempt.
7. It is now settled law that the court can properly punish a party for contempt notwithstanding the fact that there was no personal service of

the restraining order. The view expressed by Lenaola J (as he then was) in **Basil Criticos v Attorney General and 4 others (2012) eKLR** has generally been accepted as the correct position in law. The Learned Judge rendered himself thus:

“The law has changed and as it stands today knowledge supercedes personal service and for good reason.....The point is that where a party clearly acts and shows that he had knowledge of a court order, the strict requirements that personal service must be proved is rendered unnecessary”

8. In the application under consideration, there is common ground that the court order was not personally served on the defendant. The plaintiff contends that he served the defendant’s foreman. He has not identified the said foreman by name. The defendant on his part contends that he resides on the suit property and contests the plaintiff’s contention that he only goes to the suit premises at night. Secondly, he states that he was not aware of the court order. Thirdly, he contends that no construction has taken place on the suit property during the pendency of this suit.

9. While contending that the defendant was fully aware of the order, the plaintiff in paragraph 4 of the supplementary affidavit made reference to annexure 2. The said annexure is an affidavit by the defendant sworn on 30/6/2017 (not 24/7/2017 as deponed by the applicant in paragraph 4 of the supporting affidavit). I have perused the said annexure. There is no indication in the said annexure that the defendant was aware of the said order.

10. What emerges from the totality of the materials placed before court is that, firstly, there was no personal service. Secondly, there is no evidence to support the view that the defendant was aware of the court order. In the absence of clear evidence that either the party alleged to have committed contempt was personally served or was aware of the order, the court cannot invoke the draconian power to punish a party for contempt. In determining whether or not a party accused of contempt was aware, the court considers the totality of all the evidential materials placed before it, including, where appropriate, the presence of the respondent in the court room when the order was pronounced. In the present suit, there is no evidence to suggest that the defendant was in the court room when the order was pronounced. The net result is that the court makes the finding that there is no evidence that the defendant was aware of the court order at the time of the alleged contempt.

11. I would add that in a dispute of this kind, the court is liberal in granting leave to effect service of court order through alternative modes such as advertisement in the newspapers. Secondly, a finding of guilty relating to contempt is a serious indictment and carries severe consequences. Indeed, had the requisite threshold been satisfied, this court would not have hesitated to hand down a severe punishment against the offending party.

12. Having come to the conclusion that the plaintiff has failed to satisfy the court that the defendant was personally served or was aware of the court order, the answer to the second issue is inevitably in the negative. The net result is that the notice of motion dated 10/1/2018 is declined. Costs shall be in the cause.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 3RD DAY OF OCTOBER 2019.

B M EBOSO

JUDGE

In the presence of:-

Mr Masinde Advocate for the plaintiff

Ms Nasambu Advocate for the defendant

Court Clerk - June Nafula