



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC CASE NO. 224 OF 2017**

**JAMES ODUOR WANYANDE.....PLAINTIFF**

**VERSUS**

**MAURICE ODUOR OMBIRO.....DEFENDANT**

**RULING**

1. On 9/4/2018, the defendant, Maurice Oduor Ombiro, brought a notice of motion dated 9/4/2018 seeking the setting aside and/or variation of the order issued by this court on 22/3/2018. The said order of 22/3/2018 reads as follows:

*I have considered the notice of motion dated 10/1/2018. It is unopposed. The evidence in the Supporting affidavit is uncontroverted. I will not grant the prayers in the notice of motion in the manner they have been framed. At his point I make a finding that there is indeed uncontroverted evidence that the defendant is in contempt of court contrary to the provisions of the Contempt of Court Act. He is found guilty. The defendant will personally attend court on 21/5/2018 for sentencing. The defendant is required to file a brief affidavit within 10 days to show cause why he should not be committed to civil jail and why the structures should not be demolished.*

*Plaintiff to extract and serve this order within three working days.*

2. The applicant's case is that the said order was issued pursuant to the plaintiff's notice of motion dated 10/1/2018 which was scheduled for hearing *interpartes* on 22/3/2018. He contends that on the said day, this case was listed for mention before the Deputy Registrar of the court. Without his counsel's knowledge, the court file was placed before this court and argued in his counsel's absence. This deprived him the opportunity to be heard on the plaintiff's application dated 10/1/2018. The application is supported by an affidavit sworn on 9/4/2018 by Diana Odero. Annexed to the affidavit as "D03" is the Deputy Registrar's causelist for 22/3/2018 in which ELC Civil Case No. 224/2017 is listed as number 54.

3. The plaintiff opposes the application through a replying affidavit sworn by Masinde John Simiyu on 23/4/2018. He contends that the hearing date of 22/3/2018 was fixed in the presence of both counsel and the matter was properly listed before this court. He did not, however, exhibit a copy of the court's causelist for 22/3/2018.

4. I have considered the notice of motion dated 9/4/2018 together with the rival affidavits and submissions. The applicant's contention that on the appointed day this matter was listed before the Deputy Registrar of this court, Honourable Isabel Baraza, has not been controverted. The plaintiff has not exhibited the court's causelist for 22/3/2018. On my own, I have perused the court's digital cause list for 22/3/2018. I have also perused the Deputy Registrar's digital causelist for the same day. It does appear that the matter was listed before both this court and the Deputy Registrar. This fact was not brought to the attention of the court at the time of disposing the plaintiff's application dated 10/1/2018. The defendant contends that his counsel's failure to attend the hearing of the application was occasioned by the listing of the matter before the Deputy Registrar.

5. In my view, the explanation tendered by the defendant appears *bonafide*. Consequently, I will exercise discretion and set aside the *ex parte* orders made on 22/3/2018. Directions relating to the plaintiff's notice of motion dated 10/1/2018 will be given at the time of reading this ruling in open court. There will be no order as to costs of the application dated 9/4/2018.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 25TH DAY OF OCTOBER 2018.**

**B M EBOSO**

**JUDGE**

**In the presence of:-**

Mr Masinde advocate for the Plaintiff

Mr Odero for the Defendant

June Nafula - Court Clerk