



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MAKUENI**

**ELC NO. 354 OF 2017(O.S)**

**ELIZABETH KANINI MUSYOKA.....APPLICANT**

**VERSUS**

**BENARD KILONZO MUTISI.....1<sup>ST</sup> RESPONDENT**

**CHRISTINE MWIKALI MUNYWOKI.....2<sup>ND</sup> RESPONDENT**

**RULING**

1) There is before me a notice of motion application expressed to be brought under sections 1A, 13, 3A of the Civil Procedure Act and Order 40 Rule 3 of Civil Procedure Rule for orders:

**1. Spent**

**2. That the Respondents herein be cited for contempt of the orders of this honourable court issued on 19/12/2017 and they be subsequently imprisoned for a period not exceeding six months.**

**3. That the costs of this application be borne by the respondent in any event.**

2) The application is predicated on the grounds on its face and is supported by the supporting and further affidavits of Elizabeth Kanini Musyoka, the Applicant herein, both sworn on 5<sup>th</sup> March, 2018 and 10<sup>th</sup> April, 2018 respectively.

3) The application is opposed by the first and the second Respondents who filed their respective replying affidavits on the 15<sup>th</sup> May, 2018 and 19<sup>th</sup> March, 2018. The replying affidavit by the first Respondent was sworn at Wote on the 14<sup>th</sup> May, 2018 while that of the second Respondent was sworn at Nairobi on the 14<sup>th</sup> March, 2018.

4) On the 17<sup>th</sup> May, 2018 the court directed that the application be disposed off by way of written submissions. The Applicant filed her submissions on the 4<sup>th</sup> July, 2018 while the second Respondent filed hers on the 26<sup>th</sup> October, 2018. The first Respondent filed his submissions on the 20<sup>th</sup> October, 2018.

5) The Applicant has deposed in paragraphs 3 to 6 of her replying affidavit that the orders issued on the 19<sup>th</sup> December, 2017 and marked EKMI-1 were served upon KCB bank on the same date.

6) That the orders required the Respondents to jointly or severally transfer to his account accumulative sum of Kshs. 2,166,660/= from the funds held at KCB Wote account NO. [...] and [...]. That the Respondents have failed to comply with the said orders issued on the 19<sup>th</sup> December, 2017 and have instead breached the court's order. That as a result of the said contempt, the Applicant stands to suffer loss. In her further affidavit, the Applicant has deposed in paragraphs 4 and 5 that the Respondents were duly served with the court's order dated 19<sup>th</sup> December, 2017 and the one dated 5<sup>th</sup> March, 2018 as per a copy of the affidavit of service marked as EKMI1.

7) That the second Respondent received the court orders and application on her own behalf and on behalf of the first Respondent who is her husband.

8) The Applicant termed the second Respondent's affidavit of service sworn on the 19<sup>th</sup> March, 2018 as hollow and defective in law.

9) The second Respondent in her replying affidavit has deposed in paragraph 3 that she is not aware of any court order alleged to have been

served on her regarding the issues in this matter.

10) The second Respondent has further deposed in paragraph 4 of her replying affidavit that when she appeared in court on the 5<sup>th</sup> December, 2017 the matter was set down for hearing inter partes on the 17<sup>th</sup> January, 2018 on which dated they were informed that the matter had been finalized. She deposed in paragraph 6 that she did not sign any document and that the signature appearing on the consent filed in court is not hers and thus it is a forgery and ought to be struck out of the proceedings.

11) The first Respondent has deposed in paragraph 9 of his replying affidavit that he too was never served with the orders issued on the 19<sup>th</sup> December, 2017 and that he only became aware of it when the application was brought to court. He has also deposed in paragraph 11 and 12 that he did not have the capacity/locus and or authority to enter into any consent especially the one dated 19<sup>th</sup> December, 2017 and asked the court to set aside.

12) I have read the application, the supporting and further affidavits as well as the replying affidavits by the two Respondents and the submissions that were filed by the counsel on record. In my view the only issue for determination is whether or not the two Respondents were served with the order issued on 19<sup>th</sup> December, 2017. The Applicant contends that the Respondents were served with the order dated 19<sup>th</sup> December, 2017 as can be seen from the affidavit of service annexed to the further affidavit and marked as EKM1. The affidavit of service in question refers to the copies of the order which were issued prior to 19<sup>th</sup> December, 2017 and which orders were received by the process server on the 22<sup>nd</sup> November, 2017 and served upon the second Respondent on the same day. There is nothing in the said affidavit of service that shows that the orders of the 19<sup>th</sup> December, 2017 were ever served upon the two Respondents or even Kenya Commercial Bank Wote Branch itself. That being the case, the two Respondents cannot be said to have disobeyed any court order in order for them to be in contempt of court.

13) In my view, the application dated 5<sup>th</sup> March, 2018 and filed in court on even date lacks merit. In the circumstances, I hereby dismiss the same with costs to the two Respondents.

**SIGNED, DATED and DELIVERED at MAKUENI this 26<sup>TH</sup> day of NOVEMBER, 2018.**

**MBOGO C.G**

**JUDGE**

**IN THE PRESENCE OF:**

MsKyalo for the Plaintiff/Applicant

Mr. Mutunga holding brief for Munyasia for the 2<sup>nd</sup> Defendant/Respondent

**MBOGO C.G, JUDGE**

**26/11/2018**