



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 188 OF 2016

SHARIF MOLANA HABIBI MOHAMED.....PLAINTIFF

=VERSUS=

COUNTY GOVERNMENT OF KILIFI..... DEFENDANT

R U L I N G

1. The Notice of Motion dated 6th October 2016 is said to be brought pursuant to *Order 52 Rules 2 and 3 of the Supreme Court of England, Section 5 of the Judicature Act, Section 3A and 63 of the Civil Procedure Act and Orders 38 and 50 of the Civil Procedure Rules.*
2. The Applicant Sharif Molana Habib Mohamed has brought the Motion against the County Government of Kilifi seeking the following orders: -
 - i. That this Honourable Court do issue a Warrant of Arrest to arrest the Respondent's County Executive Committee Member-Lands, Energy, Housing & Physical Planning for open and flagrant contempt of court orders given on 22nd July 2006 and extended on 13th September 2016.**
 - ii. That the Officer Commanding Kilifi Police Station do assist in enforcing this order.**
 - iii. That the costs of this Application be provided for.**
3. The Application is supported by an affidavit sworn by the Applicant on 6th October 2016 accompanied by a number of annexures including photos of what is said to be the suit property.
4. A perusal of the Court Record reveals that this application was first served on Ms Oluga, Counsel for the Defendant/Respondent in court on 12th October 2016 when the Plaintiff's application dated 22nd July 2016 came up for hearing before my brother the Hon. Justice Angote. It is on the record that Ms Oluga requested for time to consult the Respondent as Counsel was not aware of the issues being raised therein.
5. By the time of the hearing of the application dated 22nd July 2016, the Respondent was yet to file any Grounds of Opposition and/or Replying Affidavit and the Honourable Judge proceeded to allow the application as prayed. The contempt application was subsequently fixed for hearing on 8th November 2016 given what was observed as the urgent nature of the proceedings.
6. However, when the Contempt application came up for hearing on 8th November 2016, the Respondents

applied for an adjournment on the basis that their Counsel on record had just recently filed a Notice of Appointment and thus they needed time (21 days) to file papers in response to the application. Their request was granted and the application was adjourned to 13th February 2017 for hearing.

7. Subsequently, the Application came before me on 13th February 2017. When the matter was called for hearing, it became apparent that the Respondents had not filed any papers as ordered by the court. Ms Emukule then holding brief for Mr. Muthama for the Respondent applied for 2 more days to file papers, an application that was opposed by Mr. Ole Kina who was holding brief for Mr. Kanyi for the Plaintiff. Being satisfied that there were no good grounds to adjourn the application any longer, this court ordered the hearing of the application to proceed.

8. It was Mr. Ole Kina's submission that the Defendant had without any colour of right invaded the Plaintiff's land in Watamu Area known as Plot No 74 and demolished the Plaintiff's existing structures despite having been served with a Court Order restraining them from taking any such action. According to the Plaintiff's Counsel, the Defendants were fully aware of the existence of the court orders issued on 13th July 2016 as at the time they entered Plot No 74 and demolished the structures. Rather than obey the Court's directions and orders, the Defendant had contemptuously ignored them and proceeded to commence its own development on the suit land.

9. It was submitted by the Plaintiff/Applicant that disobedience of court orders undermines the authority of the courts and compromises the rule of law and administration of Justice. This Court therefore has a duty to protect and preserve wanton encroachment of its authority by officers both from the national and county government who perceive themselves to be above the law.

10. It is not in dispute that on 22nd July 2016 this Honourable Court granted Orders in the Interim to the Plaintiff in terms of prayer "b" of the Notice of Motion Application dated the same date. The said Prayer 'b' of the application read as follows:

(b) That an Interlocutory injunction do issue restraining the Defendants, Servants, employees and/or agents, or any other party from interfering, trespassing, encroaching, on and/or interfering with the peaceful enjoyment of all that property known as Portion Number 74, situated in Watamu pending the hearing of this application inter-partes.

11. The Plaintiff/Applicant depones at paragraph 4 of the Supporting Affidavit that these orders were duly served upon the Respondents on the 25th July 2016 and that in spite of the service, the Respondents have refused and/or ignored to comply with the said order and have instead continued to make (their own) developments on the suit property.

12. The Respondent did not file any reply in response to the application. When called upon to respond to the Submissions made by Mr Ole Kina Learned Counsel for the Plaintiff/Applicant, Ms Emkule's only response was that they had required time to respond and the same having having been denied, they had nothing more to say.

13. I cannot agree more with the Plaintiff/Applicant's Submissions that the duty to obey the law by all individuals and institutions is paramount in the maintenance of the rule of law, good order and the due administration of Justice. Court Orders must be obeyed. Courts cannot hold their hands in helplessness and watch as their orders are disobeyed with impunity left, right and centre. This would amount to an abdication of the sacrosanct duty bestowed upon the courts by the Constitution.

14. Commenting on the duty of all to obey court orders *in Hadkinson-vs Hadkinson, (1952) ALL ER 567, Romer, L.J stated:*

"It is the Plain and unqualified obligation of every person against, or in respect of, whom an order is made by a court of competent jurisdiction to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends

even to cases where the person affected by an order believes it to be irregular or even void.”

15. The law on contempt of court is one of those vestiges of the laws we adopted from our colonisers. Until recently when the Contempt of Court Act 2016 came into force on 13th January 2017, Section 5 of the Judicature Act required the courts to refer to the procedure set out under the Rules of the Supreme Court of England. The application before me was filed on 6th October 2016 and since the Contempt of Court Act 2016 does not apply retroactively, it is to the old procedure that I must turn.

16. Section 5 of the Judicature Act Provides:

Contempt of Court

i. That the High Court and the Court of Appeal shall have the same power to punish contempt of court as is for the time being possessed by the High Court of Justice in England, and such power shall extend to upholding the authority and dignity of subordinate courts.

iii. That an order of the High Court made by way of punishment for contempt of court shall be applicable as if it were a conviction and sentence made in the exercise of the ordinary original criminal jurisdiction of the High Court.

17. As was observed by the Court of Appeal in *Mutitika vs-Baharini Farm Ltd(1985) KLR 229 at 234*, a Contempt of Court is an offence of a criminal character. It may lead to one being sent to prison and it must therefore be satisfactorily proved beyond a balance of probabilities

18. The Law governing the justices in England previously was subject to the common law and Order 52 of the Supreme Court Rules. However, England subsequently enacted the Contempt of Court Act 1981, part 81 of whose Civil Procedure (Amendment No 2) Rules 2012, replaced the original Order 52 of the Supreme Court Rules (*see Shimmers Plaza Ltd vs-National Bank of Kenya Ltd(2015) KLR Page 4*).

19. **Rule 81(9)** of the said Rules provided as a general rule that no order of court requiring a person to do or abstain from doing any act may be enforced unless a copy of the order has been served personally on the person requiring him to do or abstain from doing the act in question. In other words, both the order and a notice cautioning of penal consequences must be served simultaneously on the person required to comply with the order. **Rule 81.8** however, provides circumstances when personal service may be dispensed with. These include circumstances when the court is satisfied that the person has had notice of the order either by being present when the order was given or made; or by being notified of its terms by telephone, email or otherwise.

20. The new proposition that personal service of the order alleged to have been disobeyed is no longer mandatory was upheld by the Court of Appeal in *Justus Kariuki Mate & Another, vs- Hon. Martin Nyaga Wambora & Another, Civil Appeal No. 24 of 2014*. With this endorsement the law has changed and the hitherto strict requirement that personal service must be proved was rendered unnecessary.

Was the Defendant served?

21. It is not clear from the record if the orders issued on 22nd July 2016 were initially served upon the Defendant. It is however certain that the matter came up for hearing on 4th August 2016 before Hon. Justice PJ Otieno during which proceedings both sides were represented and a consent order extending the Interim Orders were granted. Ms Oluga representing the

Defendant then confirmed that the Defendant needed 30 days to conduct a survey of the property and file a response to the application. The said application was then fixed for hearing on 12th September 2016. As it were, 12th September 2016 turned out to be a public holiday and the matter was subsequently mentioned before Angote J on 13th September 2016 in the absence of the Defendants when the Interim Orders were extended to 12th October 2016 when the application was again fixed for hearing.

22. It is evident that the extended orders were extracted afresh on 16th September 2016. By an Affidavit of Service sworn and filed by Ms Lucy Mwangi Advocate on 12th October 2016, she depones inter alia as follows:

i.

ii. THAT on 16/9/2016 an Order was issued by Justice O. Angote for service upon the Defendant.

iii. THAT on 22/9/2016, I caused an order to be served upon the Defendant's office, situated at Kilifi, the office of the Deputy Governor.

iv. THAT the said order was received on 22/9/2016 wherein they appended their stamp and signature at the back of the order.

v.

23. It is on this background that on 10th October 2016, the Plaintiff/Applicant filed this application under certificate of urgency asking the court to issue a warrant of arrest to arrest the Respondent's County Executive Committee Member-Lands, Energy, Housing & Physical Planning for "Open and flagrant contempt" of the court's orders issued on 22/7/2016 and extended on 13/9/2016.

24. I think it is now settled that courts will only punish for breach of an injunction where it is established that the terms of an injunction are clear and unambiguous and where as we have seen above, it has been shown that the Defendant has had proper notice of its terms. In addition,

I must add, there is need for clear evidence that the terms of the injunction have been broken (*see Gordon Bonie and Nigel Lowe, The Law of Contempt (4th Edition, Butterworth's 2010) 129*).

25. The Plaintiff depones at paragraph 9 of the Supporting Affidavit to the application that on 5th October 2016, the Respondent commenced construction of a perimeter wall after completing the grading and flattening of the Suit property. It is however not clear from the documents on record when this flattening and/or grading was completed. What is clear is that at the time of initiation of this suit, the Defendant had already moved to the suit property and commenced excavation thereon. In the Plaintiff's Affidavit in support of the Application dated 22/7/2016, he depones at Paragraph 7 thereof that the Defendants had on 21st July 2016 placed a bull dozer and a lorry on the suit property and commenced excavations thereon. Indeed, the Affidavit of service sworn by one Samson Kimbeja, the Process Server who served the initial orders mentions service of the driver of the grader, a confirmation that the Defendant had by then moved into the suit land and commenced some work.

26. It is not clear if the Defendants ever removed the bull dozer and/or other equipment from the suit land. Whatever the case, on 5th October 2016 when they are said to have commenced construction, there were orders in place restraining them, their servants and/or agents from interfering, trespassing, encroaching on and/or interfering with the (Plaintiff's) peaceful enjoyment of the property known as Portion No. 74 situated at Watamu.

27. As we have seen, these orders were extracted and served upon the Defendant's office by Ms Lucy Mwangi Advocate on 22nd September 2016. A careful perusal of the Affidavit of Service by Ms Mwangi indicates that the orders were served upon the Defendant's office situated at the office of the Deputy Governor, Kilifi. According to Ms Mwangi,

"the said order was received on 22nd September 2016 wherein they appended their stamps and signature at the back of the order."

28. While there is a County Government of Kilifi stamp at the back of the order indicating receipt of the

order on 22nd September 2016 at precisely 2.55pm, the Affidavit does not indicate the name of the person served and/or the one who signed in acknowledgment of receipt.

29. It is instructive to note that the Application before me prays for warrant of arrest to issue against a specific officer in the Respondent's employment, to wit, the County Executive Committee Member-Lands, Energy, Housing and Physical Planning. This particular officer is accused of open and flagrant contempt of the court's orders. No evidence has however, been placed before this court showing any nexus between this office, if indeed it exists, and the contemptuous acts complained of. In actual fact, other than asking that Warrant of Arrest be issued against the said County Executive Committee Member, there is no reason advanced either in the body of the application or the Supporting Affidavit as to why he should bear responsibility for the acts and/or omissions of the Defendant County Government.

30. The County Government is a body Corporate with power to sue and be sued. **Section 6(i) of the County Government Act** provides that "as an entity exercising Constitutional Authority, a County Government shall be a body corporate with perpetual succession and shall have all the powers necessary for the discharge of its functions." As was held by Justice Anyara Emkule in **Republic Ex Parte Farid Mohammed; & Another-vs- The County Government of Mombasa** eKLR, as a Government entity, the defendant's accountability lies squarely with its respective officials who hold the responsibility to account for every action or inaction attached to the Respondent. To paraphrase the learned Judge, to find the County Government of Kilifi in contempt of court herein would amount to making an order in vacuo which order would be incapable of execution

31. Either way, the Applicant has not shown that the County Executive County Member sought to be cited herein for contempt of this court's orders was served and/or that he had knowledge of the orders in issue. In the circumstances, I must find and so hold, that the Notice of Motion

Application dated 6th October 2016 lacks merit. I dismiss the same with no order as to costs.

Dated, signed and delivered in Malindi on 3rd day March 2017.

J. O. OLOLA

JUDGE