



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 31 OF 2017

TITUS KIPUNGAR.....1ST PLAINTIFF

FRANCIS WASIKE CHERERE.....2ND PLAINTIFF

VERSUS

MICHAEL KISOO NGESEMWO.....DEFENDANT

RULING

1. On the 22nd February, 2017 while in Chambers this court granted an interim orders of injunction restraining the defendant from any dealings with the subject land, pending the hearing of the application dated 21/2/2017 *interpartes*. This order was extracted on the 27th February, 2017 and at least according to the affidavit of service sworn by one Archibald Wekesa Nyukuri on 18/3/2017, served together with the application dated 21/2/2017 upon the defendant on 4th March, 2017. Service was however not effected upon the defendant personally, but upon his daughter as the defendant was away, presumably, from his home. The process server avers that the service upon the defendant's daughter was authorized by her father, through the phone.

2. Following that event, the plaintiffs filed the application dated 21st March, 2017 on 23rd March, 2017 seeking the following orders:-

“1. That the Honourable Court do issue an order citing the defendant/respondent (Michael Kisoo Ngesemwo) for contempt of court and be (sic) committed to jail for a period of six (6) months.

2. That the Honorable Court be pleased to order the respondent to purge his contemptuous acts for with. (sic)

3. Costs of this application be granted to the applicants”.

3. It was urged that the defendant was duly served with a formal order which was duly acknowledged; that the respondent has during the subsistence of the orders of injunction commenced cutting down the trees from the estate of the deceased through force and has threatened the plaintiffs with physical violence; that the defendant has during the pendency of the orders of this court ploughed the land; that the respondent's actions are calculated at defeating or frustrating the applicants' quiet use of the deceased's estate and that the defendant's actions are calculated at demeaning, undermining and eroding the authority of the court.

4. The application currently under consideration was, according to the sworn affidavit of service made by

one Archibald Wekesa Nyukuri, served upon the defendant on 24th March, 2017 at his home.

5. The issue arising from the application which is unopposed is whether the defendant is guilty of contempt of court. Contempt of court is comprised of two aspects: knowledge of contents of an order and willful disobedience thereof. Without these ingredients of the offence, a person may not be committed to jail for contempt of court. It was observed in the case of *Justus Kariuki Mate & Another -vs- Martin Nyaga Wambora & Another 2014 eKLR* that the power of guarding and protecting the authority and dignity of court orders, although jealously guarded, is also balanced with the prospect of a person being subjected to a punishment that may entail loss of his or her liberty thus the courts will always allow a person to state their case.

6. In the present case, there is evidence that the defendant was served with the application seeking to have him cited for contempt of this court's orders. He never filed any response thereto. He also never appeared in court or by an advocate to make any submission. I find that the affidavit of service filed by Archibald Wekesa Nyukuri on 30/3/2017 is sufficient proof of service of the application under consideration. One telltale sign that the defendant is aware of this suit is the Memorandum of Appearance dated 20/3/2017 and filed on 21/3/2017. This filing was done seventeen days after the date of service of the Notice of Motion and order dated 22nd February, 2017. There is no other affidavit of service filed before 23/3/2017. If the defendant was made aware of the application he must have been made aware of the order which was served with the application. There is no other reason as to why the firm of Katina & Co. could have filed the Memorandum of Appearance dated 20/3/2017 unless the defendant instructed them, and he could not have done so unless the service of the motion and the order was effective.

7. In the Court of Appeal decision of *Justus Kariuki Mate & Another -vs- Martin Nyaga Wambora & Another CA 24/2014 (Nyeri)* the Court of Appeal held as follows:-

“On the other hand however this court has slowly and gradually moved from the position that service of the order along with the penal notice must be personally served on a person before contempt can be proved. This is in line with the dispensations covered under Rule 81(1) (Supra)”.

Knowledge of a court order therefore is sufficient to prove service and dispenses with personal service for the purposes of contempt proceedings.

8. In the case of *Basis Criticos -vs- The Attorney General & 8 Others 2012 eKLR* the court stated as follows:-

“.....the law has changed and as it stands today, knowledge supersedes personal service.....where a party clearly acts and shows that he had knowledge of a court order the strict requirement that personal service must be proved is rendered unnecessary”.

I therefore find that even in the absence of personal service of the order in this case. There is evidence that the defendant had knowledge of the order.

9. As to the question of willful disobedience, it is to be noted that the affidavit of the 1st plaintiff sworn on 21/3/2017 states the actions undertaken by the defendants after service of the court order. The deponent states that the defendant commenced cutting down trees and ploughing the land “through force”. The order attached to the affidavit as Exhibit T.K.7 requires the defendant, whether by himself or by agents, to refrain from, among other things, entering, ploughing or cultivating on the land. There is no reply filed to this supporting affidavit. The averments of the deponent are therefore unopposed. There is photographic evidence that the land has been ploughed. This is said to have been done by the defendant. Even after service of the current application upon him, the defendant, has refused or neglected to come to court to defend himself.

10. I therefore find that the defendant is in contempt of orders of this court issued on 22/2/2017 and

convict him accordingly. I further order that the defendant be arrested and brought before this court on 26th June 2017 for sentencing. Warrant of arrest to issue.

Signed, dated and delivered at Kitale on this 29th day of **May, 2017**.

MWANGI NJOROGE

JUDGE

29/05/2017

Before - Mwangi Njoroge Judge

Court Assistant - Isabellah

Ruling read in open Court in absence of the parties.

MWANGI NJOROGE

JUDGE

29/05/2017