



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MOMBASA
ELC CASE NO. 225 OF 2016

ABDALLA A. ABDULRHMAN.....PLAINTIFF

VERSUS

THE MINISTRY OF LANDS AND PLANNING &

HOUSING MOMBASA COUNTY1ST RESPONDENT

THE CHIEF OFFICER, MINISTRY OF PLANNING.....2ND RESPONDENT

THE COUNTY SURVEYOR.....3RD RESPONDENT

THE COUNTY GOVERNMENT OF MOMBASA.....4TH RESPONDENT

THE REGISTRAR MOMBASA DISTRICT.....5TH RESPONDENT

THE HONOURABLE ATTORNEY GENERAL.....6^{HT} RESPONDENT

AND

MAHMOUD HAIDERALI KHIMJI.....1ST INTERESTED PARTY

SAKAINA MAHMOOD KHIMJI.....2ND INTERESTED PARTY

RULING

1. The interested parties/Applicants herein moved the court by their Notice of Motion dated 1st March 2017 in which the Applicants are seeking six prayers. Prayer 1 and 2 thereof are already spent while prayer 3 was granted at the ex-parte stage of this Application. The prayers left for determination are as follows: -

4. That pending the hearing and determination of this Application inter-partes, the court be pleased to grant an Order that the O.C.S. Central Police Station do provide security to the Applicants herein to enable the applicants and restore the gate and perimeter wall previously demolished by the Respondent and resulting in the creation of unlawful access road through the Applicant’s land on plot Number MOMBASA/BLOCK XXII/107.

5. That upon inter-partes hearing, the Honourable Court will be pleased to Order that the Respondent be cited for contempt of court's Order by this court on 17th February, 2017 which declined to grant the Respondent herein a temporary access road through the Applicants' premise on plot Number MOMBASA/BLOCK XVII/107.

6. That costs of this Application be provided for.

2. The Application is brought under provisions of **Order 51 and Order 40 Rule 3 (1) of the Civil Procedure Rules, Sections 1A, 1B and 3A of the Civil Procedure Act, Section 13 (7) of the Environment and Land Court Act** and the inherent jurisdiction of the court and all the enabling provisions of the Law.

3. The Application is based on the following grounds:

a. The ruling delivered on 17th February 2017 (Hon. Lady Justice A. Omollo) dismissed the Respondent's Notice of Motion Application dated 15th August 2016 thereby vacating the temporary access road Order the Respondent had obtained ex-parte.

b. That since the delivery of the ruling, the Respondent has consistently defied the Orders of the court and continuously harasses the Applicants with violence and trespassed upon the Applicants land.

c. The Applicants herein are apprehensive that the Respondent may immediately cause damage to their premises on plot Number MOMBASA/BLOCK XVII/107 which parcel of land they use as their family home.

d. That the Applicants are exposed to insecurity on their property due to the continuous trespass and actions of Respondent's and the disobedience of this Honourable Court's Order granted on 17th February 2017.

e. The Applicants land on Plot NUMBER MOMBASA/BLOCK XVII/107 is being wasted and damaged by the Respondent's disobedience and continuous trespass.

4. There is also filed in support of the Application an affidavit by Mahmood Haiderali Khimji, the 1st Applicant sworn on 1st March 2017, in which it is deposed inter alia that the Respondent 's Application vide a Notice of Motions dated 15th August, 2016 for an Order to continue using a temporary road of access through the Applicant's plot was dismissed on 17th February 2017 and since then the Respondent has continuously disobeyed the court Orders by trespassing on the Applicants plot and preventing the Applicants from erecting and restoring a gate previously demolished by the Respondent . The Applicants have also filed a Supplementary Affidavit by the 1st Applicant sworn on 14th March 2017 in which copies of photographs are attached allegedly showing the Respondent committing the acts complained of. Also attached to the said Supplementary Affidavit is a copy of cash bail releasing the 1st Applicant who had been arrested and detained by the police allegedly at the instigation of the Respondent. In addition, the Applicants have filed a Further Affidavit by the 1st Applicant sworn on 27th March 2017, attaching copies of affidavits of service reiterating that the Order and Notice were served upon the Respondent as well as a copy of authorization and payment made to the County Government of Mombasa for the construction made on plot Number MOMBASA/BLOCK XVII/107.

5. Counsel for the Applicants made oral submissions in which he urged the court to allow the Application and cite the Respondent for contempt of court. The learned counsel submitted that the Order was extracted and served on the Respondent, even though the ruling was delivered in the presence of the Respondent and his counsel. Counsel maintained that the Respondent was aware of the Order of the court.

6. The Application was opposed by the Respondent who filed a Replying Affidavit sworn on 22nd March 2017 in which he depones that he was neither served with the Court Order nor the Notice as alleged by the Applicants. He denied having trespassed on the Applicants' property. According to the Respondent, the Applicants were erecting a gate on plot Number MOMBASA/BLOCK XVII/106 which belongs to the County Government of Mombasa. The Respondent attached a letter dated 1st March 2017 from the County Government of Mombasa. The Respondent also attached to his affidavit, photographs which he alleges shows that the Applicants poured gravel in front of the Respondent's gate and in the process tampered with an electricity pole. The Respondent further depones that he reported the matter to the police who, after carrying out their own investigations, arrested and charged the 1st Applicant with the offence of causing disturbance and later released him on cash bail.

7. In his submissions, counsel for the Respondent reiterated the contents of the Respondent's replying affidavit. Learned counsel further submitted that the Applicants failed to prove that Respondent had knowledge and was served. He submitted that the Respondent was not in court and that although his counsel was in court, he failed to notify the Respondent of the Order. It was submitted further that the letter to the Respondent annexed to the Applicants supporting affidavit did not have a certificate of posting and therefore is insufficient to show that the Respondent was notified of the Order. The Respondent's counsel also faulted the affidavit of service of Babuji B. Aleli dated 14th March 2017 for failure to attach the alleged signed copy of the Order or photograph showing a copy of the court Order was affixed on the disputed gate as alleged. He submitted that the two affidavits by the process servers were defective and wanting for failure to attach the necessary supporting documents. According to counsel, proper service was not effected.

8. Regarding prayer 4 of the Notice of Motion in which the Applicants are seeking for security to enable them secure and restore the gate that was previously demolished, the Respondent's counsel submitted that issuance of such Order would amount to an infringement of the rights of the owner of the property which is the County Government of Mombasa. On the photographs produced by the Applicants it was submitted on behalf of the Respondent that the same were unreliable and not credible as they did not bear the year they were taken. Counsel cited the case of **REPUBLIC EX-PARTE FARID MOHAMED, AT MAARY HIBA ADVAN ALAMMEDIN & SURYAKANT M. SARANI -V- COUNTY GOVERNMENT OF MOMBASA (2016) eKLR** in which a similar application was dismissed for the reason, inter alia, that the photographic evidence failed to show the date when they were taken. Learned counsel submitted that the evidence placed before the court was not sufficient to prove the alleged contempt and urged the court to dismiss the Application.

9. I have considered the Application, the affidavit on record, the submissions of counsel and the authorities cited. I have also considered the applicable law. There are three issues for determination by this court: -

i. Whether the Order of 17th February 2017 was served upon the Respondent or whether the Respondent was aware of the said Order of 17th February 2017.

ii. Whether the Respondent is guilty of contempt of the court Order of 17th February 2017 and what Orders should this court make in the circumstances.

iii. Whether the Applicants are entitled to the Order in terms of prayer number 4 of the Application.

10. The standard of proof in matters of contempt of court is well settled. The Court of Appeal in **Civil Application No.39/1990, REFRIGERATOR & KITCHEN UTENSILS LIMITED VS-GULABCHAND POPATTAL SHAH & OTHERS** approving the standard of proof in contempt cases as set to in the case of **GATHARIA MITIKA & OTHER -V- BAHARINI FARM LIMITED CIV.APPL. NO 24.1995** held that in cases of alleged contempt, the breach for which the contemnor is cited must not only be precisely defined but proven to a standard which is higher than proof on a balance of Probabilities but not as high as proof beyond reasonable doubt. This is because the charge of contempt

of court is an offence of criminal character and a party may lose his liberty.

11. On 27th February 2017 the court (Omollo, J) delivered a ruling dismissing the Applicant's (now the Respondent in the present Application) Notice of Motion dated 15th August 2016. The extracted Order stated :

“1. That the Applicant's Notice of Motion dated 15th August 2016 be and is hereby dismissed.

2. That the costs of the Application shall be borne by the Applicant”

The Order had a penal notice. It is this Order that the Applicants contend that the Respondent had defied and disobeyed.

In the Notice of Motion dated 15th August 2016 the Respondent was seeking an Order allowing him to continue using the temporary road of access through Plot No. MOMBASA/BLOCK XVII/107 which plot belongs to the applicants herein. The court declined to grant the Order and dismissed the Application. In dismissing the Application, the learned judge noted that the Respondent had previously been denied the same by both the High Court and Court of Appeal.

12. The Applicants have stated that the Order was made in the presence of the Respondent and his former advocate. In addition, they have stated that the Respondent was duly served with the Order. On the other hand, the Respondent contends that he had no knowledge of the Order and that he was never served.

13. I have perused the court record and I note that the said ruling was read in open court on 17th February 2017 in the presence of counsel for the Applicant and for the 1st Interested Party. There is no indication that the parties were present in person. This court will not be in a position to tell whether counsel notified the Respondent of the outcome of the ruling. That advocate is no longer acting for the Respondent as the Respondent has since instructed another advocate to act for him. In their affidavit in support of the Application sworn by the 1st Applicant on 1st March 2017, the Applicants have attached a letter dated 24th February 2017 and marked “MK2” addressed to the Respondent regarding the delivery of the ruling by the court on 17th February 2017. The same is indicated as “Under Certificate Of Delivery”. The delivery book or an extract thereof was not attached to show that it was delivered. In the absence of any tangible evidence regarding the Respondent's presence in court and the delivery of the said letter, I cannot safely hold that the Respondent had personal knowledge of the Order.

14. The Applicants maintain that the Order was served on the Respondent. The Respondent has disputed, insisting that he was never served. I have looked at the affidavit in support of the Application filed on the same date with the notice of motion. Apart from the notice given vide the letter dated 24th February 2017 by the Applicants advocate to the Respondent, there is no mention of service of the court Order by the Applicants. There is however an Affidavit of Service by one Babuji B, Aleli annexed to the Applicant's supplementary affidavit dated 14th March 2017 and filed on 15th March 2017. In the said affidavit of service, the process server refers to an Order issued by the court on 3rd March 2017. There is no reference to the Order of the court given on 17th February 2017. The Applicants made reference to the Order of 17th February 2017 through their Further Affidavit filed on 27th March 2017, only after the Respondent had filed his replying affidavit in which he denied having been served. In my view, evidence of service was crucial to this Application that the Applicants should have brought it up at the time of filing the Application. It did not have to take a denial by the Respondent through his Replying Affidavit for the Applicants to bring it up.

15. The Court of Appeal in the case of **SHIMMERS PLAZA LTD –VS- NBK (2015)** approved the growing juris prudence that has reiterated that knowledge of a Court Order suffices to prove service for the purpose of contempt proceedings, and cited with approval Hon. Lenaola, J (as he then was) in **BASIL CRITICOS –VS- A. G. & 8 OTHERS (2012)**eKLR where the learned judge stated:

“...the law has changed and as it stands today knowledge superseded 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”.

The court of appeal also affirmed the position in the case of **JUSTUS KARIUKI MATE & ANOTHER –VS- MARTIN NYAGA WAMBORA & ANOTHER C. A.** 24/14, and added that:

“it is important however, that the court satisfies itself beyond any shadow of a doubt that the person alleged to be in contempt committed the act complained of with full knowledge or notice of the existence of the Order of the court forbidding it. The threshold is quite high as it involved possible deprivation of a person’s liberty”

16. In the instant case, there was indeed an Order issued on 17th February 2017. What is disputed is service and or knowledge of the said Order. I have already held that, from the evidence on record, I cannot safely hold that the Respondent had personal knowledge of the Order.

Since service was denied, it was incumbent upon the Applicants to prove that indeed the Respondent was served as the evidence on record is insufficient. Consequently, I find that the personal service allegedly made on the Respondent has not been proved to the required standard. Even the photographs exhibited had no proper dates hence not credible.

17. I now turn to the issue whether the Applicants are entitled to the Order in terms of prayer 4 of the Application. In his Application dated 15th August 2016, the Respondent wanted to be allowed to continue using the temporary road to access going through the Applicants’ plot NO.MOMBASA/BLOCK XVII/107. The court in its ruling and as captured by the Order given on 17th February 2017 declined to grant that Order. That Order is still in operation and has not been reversed on appeal or by this court, and it has to be obeyed whether or not it should have been granted in the first place. In his response to the Application, the Respondent, attempted to bring issues purporting to justify why the temporary road of access should be permitted. The Respondent has attached to his replying affidavit a letter from the County Government of Mombasa touching on the issue. The County Government of Mombasa are parties to this case and expressly told the court through their counsel on record that the Application did not affect them, hence their decision not to take part in this Application. The said letter is therefore of no consequence. All parties must comply with the Order of the court whatever they think of such Order. To my mind, parties who are unsatisfied with the Order of 17th February 2017 should have attempted to get rid of the same through the proper course that is either setting aside or through appeal. So long as the Order exists, the parties are bound to obey the same to the letter. The court declined to allow the temporary road of access going through the Applicants’ plot and the Applicants have every right to take such steps or measures to enforce the Order so as to secure their property and are therefore entitled to the Order in terms of prayer 4 of the Application.

18. Consequently, and for the foregoing reasons, the Application is partly successful as follows:

- a. The contempt of court has not been proved in this case to the standard required and is dismissed.**
- b. The Applicants are granted Orders in terms of prayer 4 of the Notice of Motion dated 1st March 2017.**
- c. Costs of the Application to abide the outcome of the main suit.**

19. It is so Ordered

Dated, signed and delivered at Mombasa this 15th day of June 2017

C. YANO

JUDGE