



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

CIVIL CASE NO. 664 OF 2014

IN THE MATTER OF AN APPLICATION FOR LEAVE TO COMMIT TO CIVIL JAIL FOR CONTEMPT OF COURT MR. PETER OWERA OLUOCH

AND

IN THE MATTER OF CIVIL CASE NO. ELC NO.644 OF 2014 AT NAIROBI

AND

IN THE MATTER OF LIMITATION OF ACTIONS ACT CAP 22 LAWS OF KENYA SECTION 38

RONE ACHOKI.....1ST PLAINTIFF/APPLICANT

KEPHER AYIEKO2ND PLAINTIFF/APPLICANT

GEORGE ODONGO.....3RD PLAINTIFF/APPLICANT

=VERSUS=

PETER OWERA OLUOCH.....DEFENDANT/RESPONDENT

RULING

1. The Plaintiffs/Applicants filed a notice of motion dated 17th June 2015 in which they seek the court to order committal of the Defendant/Respondent to civil jail for disobeying a court order given on 3rd November 2014. The applicants contend that they are the owners of two properties known as **Plot No. 9754/252 and Plot No. 9754/253**. **Plot No. 9754/252** belongs to the first applicant Rone Achoki whereas Plot No. 9754/253 jointly belongs to all the three applicants.

2. On 28th May 2014, the applicants filed a suit against the respondent. The applicants contemporaneously filed an application seeking to restrain the respondent from interfering with the two plots and the structures thereon. The respondent was duly served with the application which was slated for hearing on 3rd November 2014. The respondent did not attend court. The trial judge having been satisfied that the respondent was properly served proceeded to allow the application.

3. The applicants now contend that the respondent was duly served with the order of 3rd November 2014

but that he disobeyed it. That the respondent went ahead to demolish the structures which were on the two properties and that he started constructing a building on the two plots. The applicants contend that the respondent's actions are in disobedience of the court order and that therefore, he should be punished by the court to protect the court's dignity.

4. The respondent opposed the applicant's application based on the grounds of opposition filed on 2nd November 2016. The respondent contends that there was no leave sought and obtained to initiate contempt proceedings. That the applicants have not exhibited an affidavit of service of the order alleged to have been disobeyed. That the notice of motion is fatally defective and that the applicants have not enjoined the County Government of Nairobi who is the real owner of the suit properties.

5. I have considered the applicants' application as well as the grounds of opposition by the respondent. I have also considered the submissions filed on behalf of both the applicants and the respondent. The only issue for determination in this application is whether the respondent who I shall hereinafter refer to as the contemnor is in contempt of the court order given on 3rd November 2014.

6. In an application for contempt of a court order, the applicant is supposed to demonstrate the following before a contemnor can be punished:-

(a) That there was a valid order issued by the court.

(b) That the said order required the contemnor to do or not to do a certain act.

(c) That the said order was served upon the contemnor or that the contemnor was aware of the same by either the contemnor being present when the order was given or his counsel being present when the order was given or by any means was aware of the order.

(d) That the contemnor disobeyed the order notwithstanding knowledge of the same.

7. In the instant case, there is no doubt that the court gave an order on 3rd November 2014 which order restrained the contemnor or his agents from interfering with the two properties or destroying any structures thereon. The order was duly extracted and given on 10th November 2014.

8. The applicants have not demonstrated that the court order was served upon the contemnor or that the contemnor knew that he had been restrained from interfering with the two properties in any manner. There was no affidavit of service of the order annexed to the Supporting Affidavit for contempt. There was no attempt by the applicants to show that they brought to the attention of the contemnor the order which had been given by the court. Proof of contempt is beyond a balance of probability. Contempt of court being of a criminal nature in that the contemnor may be sent to jail, it is expected that the contempt be proved beyond reasonable doubt. In the case of **Duncan Manuel Murigi –Vs- Kenya Railways Corporation (2008) KLR** the court in emphasising the need for personal service cited with approval the case of **Bramblevale Ltd [1970] CH 128** at page 137 in which Lord Denning stated that:-

“A contempt of court is an offence of a criminal character. A man may be sent to prison for it. It must be satisfactorily proved.....”

9. The court record shows that when the order was given, the contemnor was not present in court. There is nothing to show if he was made aware of the court order. As I have said hereinabove, there was no affidavit of service filed to show that the contemnor was served. In as much as it is essential for the maintenance of the rule of law and good order that the authority of the court is upheld at all times, a contemnor cannot be punished if it is not satisfactorily proved that he was aware of the order and that he disobeyed it. It therefore follows that even though the contemnor may have done what is complained of, he cannot be punished as the applicants have not met the threshold required by the law. I therefore find that the applicants have failed in their application which is hereby dismissed with costs to the alleged contemnor.

It is so ordered.

Dated, signed and delivered at Nairobi on this **13th** day of **June**, 2017

E.O. OBAGA

JUDGE

In the presence of ;-

Ms. Kathungu for Mr. Ndege for defendant/respondent

Court clerk - Hilda