



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 108 OF 2014

**ALFRED KARASHA1ST
PLAINTIFF/APPLICANT**

MARY KARASHA wife of WILLIAM M. KARASHA

(Deceased) who is the eldest son of

**SIMEON J. OLE KARASHA).....2ND
PLAINTIFF/APPLICANT**

VERSUS

**SIMEON JOSEPH OLE KARASHA.....1ST
DEFENDANT/RESPONDENT**

LAND REGISTRAR KAJIADO

**NORTH SUB COUNTY2ND
DEFENDANT/RESPONDENT**

DISTRICT LAND SURVEYOR,

KAJIADO.....3RD DEFENDANT/RESPONDENT

**THE HON. ATTORNEY GENERAL.....4TH
DEFENDANT/RESPONDENT**

RULING

1. By a Motion dated 13th February, 2015 the Plaintiffs/Applicants seek for an order to commit to civil jail Respondents Nos. 1, 2 and 3.
2. The Applicants are also praying for cancellation of the titles that were issued in breach of a court order.
3. The Application is supported by the Affidavit of Alfred Karasha and on the grounds that: the Respondents were served with orders issued on 9th October, 2014 and dated 8th September, 2014 but defied the same by registering RIM Mutations and issuance of the mentioned Title Deeds.
4. The Applicants' case is that on 9th October, 2014, the court issued orders together with a penal notice

which were served upon the Defendants/Respondents Nos. 1, 2 and 3 stopping them from disposing land known as of Ngong/Ngong/506 and registration of Mutations.

5. According to the Plaintiffs, the order was served upon the 1st and 2nd Defendants on 13th October, 2013 and upon Defendants 3 and 4 on 17th and 15th respectively.

6. The 1st Defendant/Respondent denies service of the order but only the Application. Defendants Nos. 2, 3 and 4 did not file any reply to oppose the Application, neither did they file submissions.

7. The Applicants submitted that service of the order on the 1st Defendant was done on 13th October, 2014 at his home and he accepted the service by signing on the flip side. According to the Applicant, the 2nd Defendant was served on the same day and he received both the order and the penal notice but declined to sign. Counsel submitted that the 3rd Defendant was served with the order on 17th October, 2014 but decline to acknowledge service.

8. It was submitted that the 1st Defendant does not deny in his Replying Affidavit sworn on 2nd December, 2014 the existence of the orders; that he is deemed to have had the knowledge of the order and that he did not seek to cross-examine the process server who served him with the order and the Application.

9. If he was aware of the order, it was submitted, personal service was not necessary (*See Criticos vs. Attorney General & 8 others (2012) eKLR*).

10. Counsel submitted that at the time of the purported service of the order, the disposition of the suit land had not been finalized. When the titles were issued on 21st October, 2014, the 2nd Defendant had already been served with the orders.

11. In his submissions, the 1st Respondent contends that on 23rd October, 2014, the Applicants sought adjournment to serve Defendants No. 2 and 3. This, according to counsel, contradicts the process server who claims to have served the 2nd Defendant on 13th October, 2014.

12. After going through the materials before the court, the court finds the following issues emerge;

a) *Whether the court orders of 8th October, 2014 together penal notice were served upon Respondents Nos. 1, 2, and 3?*

b) *If yes, were they disobeyed?*

c) *If yes, what is the consequences thereof?*

d) *What is the order as to costs?*

13. The court issued orders on 8th October, 2014 restraining the Respondents from amending the Registered Index Map (RIM) or partitioning or transferring Ngong/Ngong/506 for fourteen (14) days.

14. The orders, according to the process server, were served upon the Defendants as follows;

- *1st Defendant 13th October, 2014*
- *2nd Defendant 14th October, 2014*
- *3rd Defendant 17th October, 2014*
- *4th Defendant 15th October, 2014*

15. On 21st October, 2014, the subdivision of the suit land was effectively registered with Title Deeds

being issued for Ngong /Ngong/63986, 63987, 63988, 63989, 63990, 63991, 63992, 63993, 63994, 63995, 63996, 63997, 63998 and 63999 all measuring 0.10Ha each.

16. The sub-divisions were all in the name of Simeon Ole Karosha, the 1st Defendant herein. Defendants Nos. 2, 3 and 4 did not file any Replying Affidavits to oppose the Application and are therefore deemed to have been served with the court order.

17. However, the record shows that on 23rd October, 2014, the Applicants' advocate sought an adjournment on the basis that the 2nd and 3rd Defendants had not been served. This clearly contradicts the Affidavit of service of the process-server which intimates that the same had been served on 13th October, 2014 and 17th October, 2014 respectively.

18. The process server never filed an Affidavit in this matter to support the instant Application.

19. The advocate who told the court that they had not effected service by 23rd October, 2014 has not sworn an affidavit to repudiate the said statement on court record.

20. The aforesaid contradiction creates doubts as to whether Defendants Nos. 1, 2 and 3 were really served with the court orders. In the case of ***Shimmers Plaza Ltd vs. National Bank Ltd Nairobi Civil Appeal No. 33 of 2012***, the court held as follows: *“it is important that the court satisfies itself beyond any shadow of doubt that the person alleged to be in contempt committed the acts complained of with knowledge or notice of the existence of the order of the court forbidding it.”* The threshold for contempt proceedings is quite high as it involves possible deprivation of a person's liberty.

21. In view of the aforesaid contradictions, and taking into account that the process server was not called for examination by either side, the court finds a shadow of doubt which is in favour of Respondents Nos. 1, 2 and 3.

22. The Application dated 13th February, 2015 is therefore dismissed with no orders as to costs. The *status quo* on the resultant subdivision of the suit land to be maintained until further orders of the court.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 22ND DAY OF SEPTEMBER, 2017.

O.A. ANGOTE

JUDGE