



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT KISUMU

ELC CASE NO.177 OF 2013

HIPPOLITUS OMONDI OCHIENG.....APPLICANT

VERSUS

FRANCIS OMONDI ODHIAMBORESPONDENT

RULING

1. **Hippolitus Omondi Ochieng**, the Applicant filed the notice of motion dated 19th March 2014 praying for an order to commit the Respondent to Civil jail for disobeying the court order issued on the 8th July 2013 to stop construction on **Siaya/Mulaha/2141**. The application is based on the four grounds including that the order of 8th July 2013 was served on the Respondent on 9th July 2013 but that the Respondent has continued with the construction contrary to the court order. The application is also supported by the affidavit of the Applicant sworn on 19th March 2014.

2. The application is opposed by the Respondent through his replying affidavit sworn on 5th May 2014 that he had not been served with this suit papers and did not know of its existence until the 23rd July 2013 when he came to court for the hearing of **ELC 183 of 2013** in which he had sued the Applicant. The Respondent denies that he has continued with the construction indicating that the structure is still as it is on the photos attached by Applicant and is ready and willing to obey the court orders.

3. The Applicant counsel filed written submissions dated 15th July 2014 while the Respondent's counsel failed theirs dated 24th September 2014. The court has carefully considered the grounds on the notice of motion, affidavit evidence by both parties and counsel's rival submissions and found as follows:

a) That on 8th July 2013, the court issued *ex parte* orders in terms of prayer 2 restraining the Respondent or any other person acting under his instructions "**from continuing to build any structure upon or in any way interfering and or dealing with the plaintiff's property being parcel No.Siaya/Mulaha/2141 pending the hearing and determination of this application.**" Though the Respondent denies having known about the existence of this suit until on 23rd July 2013, the Applicant has filed the affidavit of service of **Julius Otieno Raminya** sworn on 9th July 2013, and filed in court on 22nd July 2013 that confirms that the Respondent was served with the suit papers, including the order of 8th July 2013 with penal notice on 9th July 2013. The Respondent has not specifically denied the depositions in the said affidavit of service or applied to cross-examine the process server. The court therefore finds that the Respondent was duly served with the order of 8th July 2013 on the 9th July 2013.

b) That in the application dated 1st July 2013, pursuant to which the *ex parte* order of 8th July 2013 and subject matter of the application was issued, the Applicant did not provide facts to enable the court establish the stage or level of any construction that was being undertaken by the Respondent on the suit property. In response to the Applicant contention that the Respondent has

failed to refrain "**from continuing construction of the suit parcel**", the Respondent response is that he has not carried out any construction since the suit was filed and that his home is as reflected in the two photographs annexed to the Applicant's supporting affidavit. The court has carefully considered the two photographs marked **H.004** and noted that they are undated. They also do not contain evidence of ongoing construction activities that may have been carried out after the 8th day of July 2013, when the order the Respondent is being accused of disobeying, was issued. The Applicant has not provided any evidence on what structure or structures on the two photographs were constructed after the service of the order on the Respondent. That the Respondent rebuttal of the Applicant claim on continuing construction is found to be a reasonable response.

4. That in view of the forgoing the Applicant has filed to establish his claim that the Respondent has disobeyed the order of 8th July 2013 and the notice of motion dated 19th March 2014 is dismissed with costs.

SM. KIBUNJA

ENVIRONMENT & LAND – JUDGE

Dated and delivered this 16th day of March 2016

In presence of;

Applicant Absent

Respondent Absent

Counsel Mr Yogo for Plaintiff/Applicant

Mr Obwonyo for Defendant/Respondent

SM. KIBUNJA

ENVIRONMENT & LAND – JUDGE

16/3/2016

16/3/2016

S.M. Kibjuna J

Mr Oyugi court assistant

Mr Obwonyo for Defendant/Respondent

Mr Yogo for Plaintiff/applicant

Court: Ruling delivered in open court in the presence of Mr Obwonyo and Yogo for Defendant and Plaintiff respectively.

SM. KIBUNJA

ENVIRONMENT & LAND – JUDGE

16/3/2016