



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII

CIVIL SUIT NO. 36 OF 2014

SAMSON RATEMO MOMANYI.....PLAINTIFF/APPLICANT

VERSUS

VANE MISOKO.....1ST DEFENDANT/RESPONDENT

EVANS MOSE MOGUSU..... 2ND DEFENDANT/RESPONDENT

RULING

What is before the court is the plaintiff's Notice of Motion application dated 16th June 2014 that was brought under section 5 of the Judicature Act and Order 52 of the Rules of the Supreme Court of England. The application seeks an order that the defendant be cited for contempt of court for disobeying the orders issued herein on 13th May 2014. The plaintiff has also sought leave to attach the defendants' properties to defray the damages occasioned by their disobedience of the said order.

The application is premised on grounds set out on the face thereof and on the affidavit sworn by the plaintiff on 16th June 2014. In the said affidavit, the plaintiff has contended that he filed the suit herein together with an application under certificate of urgency dated 6th February 2014 and that the defendants were duly served with the said application for inter partes hearing on 13th May 2014. The plaintiff averred that the defendants did not attend court for inter partes hearing of the said application and the court issued a temporary injunction restraining the defendants, their agents, servants and/ or employees from erecting structures on, alienating, selling and/or damaging all that property known as **LR.No. Wanjare/Bogiakumu/3529** (hereinafter referred to as "the suit property") pending the hearing and determination of this suit. The plaintiff stated that despite the defendants having been served with the said court order of 13th May 2014, they proceeded to erect permanent houses on the suit property.

The application was opposed by the defendants through a replying affidavit sworn by the 1st defendant on 2nd December, 2014. The defendants denied having disobeyed the court order issued herein on 13th May, 2014. The defendants contended that the said court order, summons to enter appearance as well as the plaint were never served upon them. The defendants also denied that they had destroyed the plaintiff's fence and other properties. The defendants contended that the suit property is none existent the same having been sold to a third party through an agreement for sale dated 10th February 2014. The defendants contended that it is the said third party who was in occupation of the suit property and who had fenced and developed the same with a permanent building. The defendants contended that the injunctive orders that had been sought herein against them by the plaintiff were sought and issued in vacuum since they do not reside on the suit property.

The plaintiff filed a supplementary affidavit sworn on 21st January 2015, in which the plaintiff reiterated that the defendants were duly served with court documents but declined to acknowledge receipt thereof.

The plaintiff referred the court to the affidavit of service by William Ogwara sworn on 18th February 2014.

The application was argued through written submissions. The plaintiff in his submissions filed on 22nd June 2015 argued that the defendants were served with lawful court orders and disobeyed the same by disposing of the suit property and constructing a permanent building thereon contrary to the terms of the said order. The plaintiff submitted that service was effected upon the defendants as evidenced by the affidavit of service sworn by William Ogwara on 18th February 2014. The plaintiff submitted that the defendants had admitted disobeying the said court orders in their replying affidavit in which they stated that the suit property had been sold to a third party who had constructed a storey building thereon. The plaintiff submitted that since the defendants had not disclosed the identity of the alleged third party, the said third party ought to be regarded and the defendants' agent.

The plaintiff relied on among others, the cases of **Beatrice Mghambi Onyonka & another vs. The Land Registrar Kisii and 7 others, Kisii HCCC No. 116 of 2009** and **Wachuri Farmers Co-op Society Ltd & another vs. Mburu Mungai T/A Mburu Mungai & Associates & another, Nairobi HC Misc. No. 1097 of 2002** in support of his submission that court orders must be obeyed at all times.

The defendants filed their submissions on 30th June 2015. In their submissions, the defendants reiterated that they were not served with the court order that was issued on 13th May, 2014 and as such there is no basis for the reliefs sought by the plaintiff. In reference to the case of **Hadkinson vs. Hadkinson (1952) 2 All ER 567** on which the plaintiff had also relied on, the defendants submitted that they could not be expected to obey orders the existence of which they were not aware of. The defendants submitted further that the plaintiff's application is incompetent for want of leave. The defendants submitted that under section 5 of the Judicature Act and Order 52 of the Supreme Court of England Rules which formed the basis of the plaintiff's application, leave was a condition precedent to bringing contempt of court proceedings.

I have considered the plaintiff's application and the affidavits filed in support thereof. I have also considered the affidavit in reply by the defendants and the submissions by counsel. In the case of **Shimmers Plaza Ltd vs. National Bank of Kenya CA No 33 of 2012**, the Court of Appeal observed that section 5 of the Judicature Act subjects the proceedings relating to contempt of court in Kenya to the current law governing the High Court of Justice in England. In England, contempt of court now falls under the Contempt of Court Act of 1981 and Part 81 of the Civil Procedure (Amendment No. 2) Rules, 2012 which replaced Order 52 of the Supreme Court Rules. Rule 81.10 of the said rules does not require an applicant to obtain the leave of the court before commencing committal proceedings. The defendants' contention that the application herein is defective for want of leave is therefore misconceived. Rule 81.5 of the said rules makes provision for service of a court order or judgement which must carry a penal notice. It provides that unless the court has dispensed with service, a judgment or order may not be enforced under rule 81.4 of the said rules unless a copy of it has been served on the person required to do or not do the act in question.

The dispensation with service of a judgment or order is at the discretion of the court and Rule 81.8 provides that the discretion can be exercised where the court is satisfied that the person has had notice of the order by being present when the order was given or by being notified of its terms by telephone, email or otherwise. The court can also dispense with service where in it thinks it just to do so.

It is not disputed that on 13th May 2014, this court made an order of a temporary injunction restraining the defendants, by themselves or through their agents, employees and/ or servants from erecting structures, alienating, selling and/ or damaging the suit property until the hearing and determination of this suit. The order was extracted and issued on 20th May 2014 duly endorsed with a penal notice indicating the consequence for disobeying the same.

The plaintiff has alleged that the defendants were served with the said order and proceeded to disobey the same by committing acts that were restrained by the court. There is no affidavit of service on the court record showing that the defendants were served with the order they are said to have disobeyed. The

affidavit of William Ogwara sworn on 18th February 2014 on which the plaintiff has put reliance does not refer at all to the order of 13th May, 2014. In any event, the order made on 13th May, 2014 could not have been served in February, 2014. It is clear from the foregoing that the defendants were neither served with the court order of 13th May, 2014 nor were they aware of the same. In the circumstances, the plaintiff has failed to prove the primary elements of a contempt of court charge.

In the final analysis and for the reasons given above, I find no merit in the application dated 16th June 2014. The same is accordingly dismissed with costs to the defendants.

Signed at Nairobi this.....Day of2016

S. OKONG'O

JUDGE

Delivered, Dated and Signed at Kisii this 8th day of April 2016

J.M.MUTUNGI

JUDGE

In the presence of

.....**for the Plaintiff**

.....**for the Defendants**