REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC CASE NO. 91 OF 2011

ABDULRAZAK ABDULREHHMAN ADAM.....PLAINTIFF/APPLICANT

-VS-

ASLAM ABDULREHMAN ADAM & 4 OTHERS....DEFENDANTS/RESPONDENTS

RULING

1. The Plaintiff/Applicant filed the notice of motion dated 15.10.2015 seeking for an order;

> "**That the Respondents be cited for contempt and be detained in prison for a term of six months for disobeying and/or being in flagrant breach of the orders of the honourable Court issued on 15.7.14 by Mukunya J. The costs of the application be provided for.''**

2. The application is premised on the ground that the order issued on 15.7.2014 was extracted and duly served upon the Respondents. The second ground is that the Respondents on or about 30.9.2015 continued construction on the said property contrary to the order. The application is further supported by the affidavit sworn by the applicant.

3. In the affidavit, the applicant deposes that the Respondents without any authority have continued to construct on the suit property contrary to the order. That on 30th September 2015, he learnt of the Respondents' actions and had his advocate write to the Respondents' advocates. Lastly he deposes that the contemptuous acts of the Respondents deserve no less than stipulated under the law. He annexed copy of the order, photos of the alleged constructions and the letter addressed to the Respondents' advocates.

4. The application is opposed by the Respondents vide a replying affidavit sworn by the 2nd Respondent Ms Shamim Abdulrehman Adam. The 2nd Respondent deposes that all the litigants are siblings. That the orders sought by the applicant cannot be granted because they have not faulted the order dated 1.7.14 and issued on 15.7.14. She deposed that they live in the suit premises; on 28th November 2013, the Court ordered for a status quo except for the repair of the leaking roof.

5. The 2nd Respondent deposed further that they were given permission by the Court to repair the roof and that the hearing of the suit be done on priority to which their advocate obtained a hearing date for 20.11.14. The Respondents depose that the order which reinstated the suit did not re-instate the interim orders of 1.7.14. In any event, the Respondents contend that the orders of 1.7.14 were not in force when the letter dated 30.9.2015 was drafted as they had lapsed by operation of law.

6. The Respondents contend the applicant is abusing the Court process and only intends to alarm the Court since 17.4.15 the applicant has not taken any steps to fix the case for hearing. They urged the Court to dismiss the application.

7. The parties advocates consented to filing of written submissions which were highlighted on 5.5.2016. The applicant submitted that when the Court granted the prayers sought in the application dated 25.11.2014, the orders in place as at 20.11.2014 were, ''the Court be and is hereby pleased to order the completion of roofing of the suit property by use of concrete slab instead of corrugated iron sheets pending hearing and determination of the suit herein.'' That this order was a variation of the order of the Court issued on 17.12.2013. The applicant referred the Court of the orders existing prior to maintenance of status quo made by the Court on 13th April 2011.

8. With this background, the applicant submits that the Respondents have not denied continuing with the acts of construction. The applicant quoted Ojwang J (as he then was) **in Wildlife Lodges Ltd vs County Council of Narok & Another (2005) 2 E A 344 at 350** to support his prayers. He urged the Court to grant the orders sought.

9. The Respondents in their submissions also gave a narrative of this suit from the date of filing and the orders of the Court made on 15.7.2014 and the dismissal of the suit on 20.11.2014. The Respondents clarified that the suit was dismissed on 20.11.2014 and not 19.11.14 hence the orders of 10th November have not been set aside. The Respondents further submitted that the application of 25.11.14 sought to reinstate the non-existing orders issued on 20.11.15 as the only orders in force were of 20.11.14.

10. The Respondents also submitted that there was no prayer seeking to reinstate the interim orders of 15th July 2014 and the same was never re-instated. To buttress their submissions, the applicant has cited the case of **Malawi Railways Ltd vs Nyasulu (1998) MW SC** *3 i.e that each party is bound by its pleadings and cannot be allowed to raise a different or fresh case without the amendment properly made. The Court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the Court to enter upon inquiry into the case before it other than to adjudicate on the specific matter in dispute raised by the pleadings.*

11. The Respondents submitted that the re-instated orders were never served on them nor were they served with a penal notice. To buttress this, they have cited the case of **Josephine Muthinya vs Lilian Muthama & 2 Others (2014) e KLR**. The Respondents aver they cannot be held liable for the disobedience of an order they were never made aware of. Lastly that the grounds on the face of the application and the affidavit in support thereof did not specify the particulars of the alleged breach. They urged the Court to dismiss this application.

12. The law treats contempt of Court as quasi – criminal. In the decision of Re Bramblevale Ltd, the Court stated that proceedings for contempt of Court <u>are criminal or quasi criminal in nature and the standard of proof to be applied is the criminal standard</u>. Further the Court of Appeal in **Christine Wanjiru & Elizabeth Wanjiru Evans & 11 others (2014) e KLR**, held that, ''Because in terms of section 5 (2) of the Judicature Act the Court in punishing contempt exercises ordinary criminal jurisdiction. It is paramount that procedure for instituting such proceedings be scrupulously followed.

13. Havelock J. in **Edward Njuguna Kangethe vs Another (2014) e KLR** restated the position taken in the cases of **Highlands Plant Ltd vs Alice Wairimu Mwangi (2005) e KLR and Monica Waithera Munyua vs Joshua Sorora & 3 Others (2005) e KLR** that personal service of the Court order and the penal notice is mandatory. In both instances, the applications for committal to civil jail were dismissed for failing to adhere to the provisions of section 5 of the Judicature Act as read together with Order 39 rule 2 of the Civil Procedure Rules.

14. In our instance, it is not in dispute that the Respondents were not served. The applicant felt this was a non – issue as their advocates were in Court when the ruling was delivered on 17th April 2015. The record does show the ruling was delivered in the presence of counsel for the Respondents. Does this exempt the applicant from serving the Court order upon the Respondents?

15. In answering whether service upon the advocate is sufficient, Havelock J in the Edward Kangethe supra quoted rules 81.6, 81.7 and 81.8 of the Civil Procedure (Amendment No 2) Rules 2012 in the schedule applications and proceedings in relation to contempt of Court (England).

Rule 81.5 (5) reads;

> ‘’Unless the Court dispenses with service, under rule 81.8, a judgement or order may not be enforced under rule 81.4 unless a copy of it has been served on the person required to do or not do the act in question.’’

16. In light of the above, it is my finding that this application fails because the order was not served together with the mandatory penal notice. I will thus not delve into the other aspects raised by the parties whether there was an order to be obeyed and if the same has been breached. This application is therefore dismissed with costs.

Ruling dated and delivered at Mombasa this 7th day of September 2016

A. OMOLLO

JUDGE