



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC PETITION NO.943 OF 2015

**ALL AFRICA CONFERENCE OF CHURCHES,
REGISTERED TRUSTEES.....PETITIONER**

VERSUS

NAIROBI CITY COUNTY.....RESPONDENT

RULING

The petitioner filed the petition herein on 18th August 2015. Together with the petition, the petitioner brought an application by way of Chamber Summons dated 18th August, 2015 seeking conservatory orders against the respondent.

The application which was filed under Certificate of Urgency was placed before Korir J. on 18th August 2015 who directed that the same be served for hearing interpartes on 20th August 2015. The application was served and when it came up for hearing interpartes before the same Judge on 20th August 2015, Mr. Gachie appeared for the petitioner while Mr. Murage appeared for the respondent. On that day, Mr. Murage informed the court that he was not ready to proceed. He sought more time to respond to the application. Mr. Gachie did not object to the respondent being given time to respond to the application. He however urged the court to grant the orders sought in the application in the interim period pending the interpartes hearing of the same. Korir J. after considering the submissions by both advocates gave the respondent time to file a replying affidavit in response to the petition and also granted interim conservatory orders restraining the respondent and its contractor, Mogoi Quality Supplier Limited from continuing with the construction of a public toilet on a road reserve adjacent to L.R No. 1/366 (Original No. 1/347/14) (“the suit property”) pending the hearing and determination of the petition or further orders of the court. The order by Korir J. was extracted and issued by the court on 20th August 2015.

What is now before me is another Chamber Summons application by the petitioner dated 26th August, 2015 seeking orders that one, Dr. Ayisi and one, Mr. Oanda Orina be cited for contempt of court for disobeying the orders made by Korir J. on 20th August 2015 and that the court do impose such fines, sanction and/or sentences as the court may deem fit and appropriate. The application is supported by the affidavit of the petitioner’s Deputy General Secretary, Ms. Bright Mawudor sworn on 26th August 2015 and the affidavit of service sworn by Stephen Mwanza Gachie on the same date. The application is opposed by the respondent through grounds of opposition dated 8th October 2015. The application was argued by way of written submissions.

I have considered the application together with the affidavits filed in support thereof. I have also considered the grounds of opposition filed by the respondent in opposition to the application. What I

need to determine in the application before me is whether Dr. Ayisi and Mr. Oanda Orina are guilty of contempt of court. In the case of **Hadkison vs. Hadkinson [1952]All E.R 567**, It was held that:-

“it was the plain and unqualified obligation of every person against, or in respect of whom an order was made by a court of competent jurisdiction to obey it unless and until it was discharged and disobedience of such an order would, as a general rule result in the person disobeying it being in contempt and punishable by committal or attachment”.

There is no dispute that Korir J. issued an order on 20th August 2015 restraining the respondent and its contractor Mogoi Quality Suppliers Limited from continuing with any further construction of a public toilet on the road reserve adjacent to the suit property pending the hearing and determination of the petition herein. There is also no dispute that the order was extracted. According to the affidavit of service sworn by Stephen Mwanza Gachie Advocate on 25th August 2015, the extracted order was served upon unnamed advocate in the office of the Legal Director of the respondent on 20th August 2015 at 4:09p.m. Mr. Gachie has stated further in his affidavit that on the same day, he served Mr. Oanda Orina one of the alleged contemnor with the same court order at the construction site adjacent to the suit property. The alleged contemnors did not file affidavits in reply to the petitioner’s application. The respondent chose to oppose the application by way of grounds of opposition. In its grounds of opposition, the respondent has contended that one of the alleged contemnors who I believe is Dr. Ayisi was neither served with the contempt application nor the order said to have been disobeyed by him. The respondent has contended further that the petitioner’s application is bad in law for want of leave of the court. The second alleged contemnor Mr. Oanda Orina did not oppose the application.

In the case of **Mutitikavs. Baharini Farm Ltd.[1985] KLR 227**, It was held that:-

“The standard of proof in contempt proceedings must be higher than proof on a balance of probabilities and almost but not exactly beyond reasonable doubt and it is not safe to extend the latter standard to an offence which is quasi-criminal in nature. The guilt of the contemnor has to be proved with such strictness of proof as is consistent with the gravity of the charge.”

In the case of **Ochino & another vs. Okombo & 4 others [1989] KLR 165**, it was held that:-

“As a general rule, no order of court requiring a person to do or abstain from going any act may be enforced (by committing for contempt) unless a copy of the order has been served personally on the person required to do or abstain from doing the act in question.”

In the case of **BasilCriticos vs. Attorney General & 8 others (2012) eKLR** Lenaola J. stated that:-

“However the law has changed and as it stands today knowledge supersedes personal service and for good reason.....The point above is that where a party clearly acts and shows that he had knowledge of court order the strict requirement that personal service must be proved is rendered unnecessary. That should be the correct legal position and I subscribe to it.”

I am entirely in agreement with the statement of the law set out in the above cases. The onus was upon the petitioner to prove that the alleged contemnors were either served with the court order they are accused of defying or were aware of the existence and the terms thereof. As I have stated above, the process server has stated in his affidavit that he served the order upon unnamed advocate in the office of the Legal Director of the respondent and upon a Mr. Oanda Orina. According to the affidavit of Bright Mawudor filed in support of the present application, Dr. Ayisi who is the 1st alleged contemnor is the respondent’s director of public health while Mr. Oanda Orina who is the 2nd alleged contemnor is a director of Mogoi Quality Suppliers Ltd. which has been engaged by the respondent to construct the disputed public toilet. Ms. Bright Mawudor has stated in her affidavit that Dr. Ayisi is sought to be cited for contempt because it is the department of public health that is overseeing the construction of the said

public toilet. It is not clear to me why the petitioner who was seized of that knowledge did not serve the order upon Dr. Ayisi instead of serving the same upon unnamed advocate in the office of the respondent's legal Director. Can it be said in the circumstances that Dr. Ayisi was served with the court order of 20th August 2015 or that he was aware of the same? I don't think so. There is no evidence to that effect. The evidence before the court is that the order was served upon some advocate in the office of the respondent's director of legal services. This service has been disputed. Although an order directed at a corporate body binds also its officers, I am of the view that in the circumstances such as the present one where the officer in charge of the project in dispute was known, attempts should have been made to serve him with the order. In the absence of service upon him of the order or evidence that he was aware of the same, I am of the view that it would be unsafe to say that he defied the order in question. The other issue which has been raised by the respondent which I think is important is that Dr. Ayisi who is sought to be committed to fail for contempt was not served with the present application. There is no evidence on record that Dr. Ayisi was served with the application. In the circumstances, even if I had made a finding that Dr. Ayisi had been served with the court order aforesaid, I would not have found him guilty of contempt of court in the absence of service of the application upon him. In addition to serving the application upon the respondent, the petitioner ought to have also served the same upon Dr. Ayisi.

With regard to the 2nd alleged contemnor, Mr. Oanda Orina, he was duly served with the application and he has not opposed the same. He has not contested that he was served with the court order in question and that he defied the same. The petitioner has placed evidence before the court showing that the 2nd alleged contemnor was served with the court order made by Korir J. 20th August 2015 and that he continued with the construction of the disputed public toilet in defiance of the said order. I am satisfied on the material before me that the petitioner has proved to the required standard that the 2nd alleged contemnor, Mr. Oanda Orina committed an act of contempt. I therefore find him guilty of contempt of court. I find no basis for the respondent's contention that leave was necessary before these proceedings could be instituted. I am in agreement with the petitioner that in the circumstances of this case, no such leave was required.

In conclusion, the petitioner's Chamber Summons application dated 26th August 2015 succeeds in part. Mr. Oanda Orina is found guilty of contempt of court while Dr. Ayisi is discharged. Mr. Oanda Orina shall be summoned to appear before this court on a date to be fixed to address the court in mitigation before a sentence is passed against him. I will also grant to the petitioner prayer 3 of the application and the costs of the application. Orders shall issue accordingly.

Delivered and dated at Nairobi this 4th day of November, 2016

S. OKONG'O

JUDGE

In the presence of

Mr. Wachira for the Petitioner

Mr. Nderitu for the Respondent

Kajuju Court Assistant