



REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT AT NAIROBI

ELC CIVIL SUIT NO. 731 OF 2014

ANNE BARONGO.....PLAINTIFF

VERSUS

AWLIYO ABDI AHMED.....1ST DEFENDANT

MANAGING TRUSTEE, NSSF.....2ND DEFENDANT

GEOINFO SURVEYS LIMITED.....3RD DEFENDANT

RULING

The Application

The Plaintiff in her application by way of a Notice of Motion dated 15th September 2014 is seeking the following substantive orders:

1. That 1st Defendant and his agents be deemed to be in contempt of Court orders issued by this Court on 12th day of June, 2014 and that warrants of his arrest do issue.
2. The contemnor be committed to civil jail for a period not exceeding six (6) months as a consequence.
3. The Court does order attachment of property of the 1st Defendant and his agents.

The application is premised on the grounds that this Court issued orders of a temporary injunction on 12th June 2014 restraining the 1st Defendant either by himself or through his agents, servants, nominees or otherwise from entering, remaining upon, or in any way interfering with the Plaintiff’s enjoyment and/or possession of the property L.R No. NRB/BLK 79/1463/303 Tassia Estate II. Further, that the 1st Defendant was served with the Order and that despite the temporary injunction being in place the 1st Defendant and his agents continued to construct a perimeter wall on the suit property and on 10th September 2014 erected some iron sheets thereon while threatening the Plaintiff.

These grounds were reiterated in a supporting affidavit sworn on 15th September 2014 by Faraday Nyangoro, the Plaintiff’s advocate, wherein she averred that this Court further ordered that the Plaintiff to serve the Notice of Motion dated and filed on 11th June 2014 upon the Defendants for *inter partes* hearing on 25th June 2014, and that at the said *inter parties* hearing, the orders were extended to 21st October 2014, and the parties were asked to file written submissions and appear in court on 21st October 2014 to take a ruling date. She annexed copies of the orders and affidavits of service, as well as of the pictures taken showing the continuance of the building works on the suit property.

The Plaintiff's counsel filed written submissions dated 28th October 2014 wherein she argued that it is not in dispute that the court made an order for injunction under Order 40 Rule 3(1) of the Civil Procedure Rules, and that such order was made in the presence of the 1st Defendant's Advocate. She also relied on the decision in **Africa Management Communication International Limited vs Joesph Mathenge Mugo (2013) e KLR** that it is the supremacy of the law and administration of justice that is under challenge when contempt of court is committed.

The Response

The 1st Defendant filed Grounds of Opposition dated 30th September 2014 and two replying affidavits in response to the Plaintiff's application. The first replying affidavit was sworn on 14th October 2014 by Mohammed Munir Chaudhri, the advocate for the 1st Defendant, and the second replying affidavit was sworn by the 1st Defendant on 9th December 2014. The 1st Defendant's advocate stated that the copy of the order annexed by the Plaintiff was never and to date has never been personally served upon the 1st Defendant as required by law, and that the contents of the annexed Affidavit of Service are unambiguously clear that there was no attempt to serve the 1st Defendant.

Further, that the Plaintiff has not taken any steps to fulfill the conditions precedent before filing the instant motion, as no application for leave was made and leave obtained before commencing the contempt proceedings, and no notice has been issued to the Registrar and the Attorney General within the prescribed timeline prior to the filing of the contempt application herein. Therefore, that the said application is therefore fatally flawed *ab initio* and procedurally incompetent.

The 1st Defendant in his replying affidavit stated that he was in the United Kingdom at the time of the institution of this suit and the application herein up to and including any date of alleged service by the Plaintiff, and only came to Kenya on the 4th July, 2014. He annexed an extract of his passport indicating the entry stamp and visa to Kenya.

The 1st Defendant further averred that he learnt of the present suit sometime on the 23rd June, 2014 through a friend whom he had sent to the National Social Security Fund Offices to pick a letter of his ownership of **NRB/BLK 97/1463/301 – TASSIA ESTATE II**, and who was informed that he was being sued for trespassing onto **NRB/BLK 79/1463/303 TASSIA ESTATE II**. Further, that the said friend was given copies of the court documents which the 1st Defendant advised be taken to his Advocates, which Advocates entered appearance on his behalf on the 24th June 2014 on the strength of the said documents.

The 1st Defendant contended that his property namely **NRB/BLK 97/1463/301 TASSIA ESTATE II** is distinct from the Plaintiff's property **NRB/BLK 79/1463/303 TASSIA ESTATE II**, and he annexed copies of a letter confirming his ownership of **NRB/BLK 97/1463/301 TASSIA ESTATE II** together with the Beacon Certificate and Location Plan for the said property.

The 1st Defendant's counsel filed written submissions dated 9th December 2014, wherein he argued relying on various judicial authorities that the 1st Defendant cannot be found culpable of contempt of court, as there was no personal service of the court orders of 12th June 2014 on him. He cited the decisions to this effect given in **Alken Connections Ltd vs Safaricom Limited & 2 Others (2013) eKLR**, **Sahihi Housing Ltd vs Ferdinand Ndungu Waititu (2014) e KLR**, **Africa Management Communication International Limited vs Joesph Mathenge Mugo (2013) eKLR** and **Alvine Kamande vs Esther Njeri Njenga (2014) eKLR**.

The 1st Defendant's counsel further submitted that the 1st Defendant was not culpable of any contempt of court as the orders issued on 12th June 2014 only related to the property known as **NRB/BLK 97/1463/301 TASSIA ESTATE II**, and that the 1st Defendant had brought evidence to show that his property is **NRB/BLK 79/1463/303 TASSIA ESTATE II**. Further, that the Plaintiff had taken

photographs of the said property belonging to the 1st Defendant and which is not the subject of the court order. He further cited the decision in **George Kinuthia & 15 Others vs Municipal Council of Nakuru, (2005) e KLR** in support of this submission, as well as the decision in **Mutitika vs Baharani Farm Limited, (1985) KLR 229** for the position that the Plaintiff had failed to meet the standard of proof required in contempt proceedings.

The Issues and Determination

There are three issues before the court for determination arising from the pleadings and submissions highlighted in the foregoing. The first is whether there was personal service of the orders issued by the court on 12th June 2014 on the 1st Defendant. Secondly, if there was such service, whether the 1st Defendant is culpable for contempt of court. The last issue is if the 1st Defendant is found culpable, whether the Plaintiff can be granted the remedies sought.

A brief summary of the law applicable to these issues is as follows. Order 40 Rule 3 of the Civil Procedure Rules provides for the consequences of breach of an order of injunction, and states that in cases of disobedience, or of breach of any such terms, the court granting an injunction may order the property of the person guilty of such disobedience or breach to be attached, and may also order such person to be detained in prison for a term not exceeding six months unless in the meantime the court directs his release.

The substantive law that applies is the English law on committal for contempt of court by virtue of section 5(1) of the Judicature Act which provides that:

“The High Court and the Court of Appeal shall have the same power to punish for contempt of court as is for the time being possessed by the High Court of Justice in England, and that power shall extend to upholding the authority and dignity of subordinate courts.”

The applicable English Law in this respect is Part 81 of the English Civil Procedure Rules of 1998 as variously amended, which part repealed in most part the Rules of the Supreme Court that previously applied, including Order 52 and parts of Order 45 of the Rules of the Supreme Court. It is notable that one of the sections of Order 52 of the Rules of the Supreme Court that was repealed is that requiring leave before an application for committal for contempt of Court can be made, and such leave is now no longer necessary.

This position was confirmed by the Court of Appeal in its decision in **Christine Wangari Gachege V Elizabeth Wanjiru Evans & 11 Others [2014] eKLR** where the Court held as follows:-

“We find on the basis of the new Civil Procedure Rules (of England) which are now contained in the Second Supplement to the 2012 White Book that no leave is required before bringing an application like the one before us, for committal for contempt relating to breach of this court's order ---”

This finding also applies to the argument by the 1st Defendant that notice first be issued to the Registrar and the Attorney General as there is now no longer any such requirement in the applicable law.

The law on the personal service of court orders is now found in Rule 81.8 of the English Civil Procedure Rules. The said rule provides that unless the court dispenses with service, a judgment or order may not be enforced by way of an order for committal unless a copy of it has been served on the person required to do or not do the act in question. Rule 81.6 of the English Civil Procedure Rules specifically provides that the method of service shall be personal service, which is effected by leaving the order with the person to be served.

Rule 81.9 (1) of the English Civil Procedure Rules of 1998 is also clear that a judgment or order to do or not do an act may not be enforced unless there is a prominently displayed a warning to the person that

disobedience to the order would be a contempt of court punishable by imprisonment, a fine or sequestration of assets. Under sub-rule (2) of the said Rule, it is only in the case of an undertaking to do or not to do an act which is contained in a judgment or order where the notice of penal consequences may be dispensed with.

This Court notes that Kenyan courts have also held that personal service of orders and a penal notice is a requirement in contempt of court proceedings, and reference is made to the Court of Appeal decisions in **Nyamogo & Another v Kenya Posts and Telecommunications Corporation, (1994) KLR 1**, and **Ochino & Another v Okombo & 4 Others (1989) KLR 165** in this respect.

Coming back to the facts of the present application, the personal service of the order alleged to have been disobeyed has been disputed. I have perused the undated affidavit of service sworn by Godfrey Kinyanjui Mbugua, a process server of the High Court of Kenya, and filed in Court on 25th June 2014 that was relied on by the Plaintiff as evidence of service of the court order of 12th June 2014 on the 1st Defendant. The said deponent stated as follows in paragraphs 2 – 5 thereof:

2. **“That on 13th June 2014, I received Notice of Motion dated 9th June, 2014 and Order dated 12th June, 2014 from M/S Alphonce Mutinda Advocates with instructions to serve it upon the NSSF and Geoinfo Surveys Limited at their offices situated at Social Security House, 4th Floor and Elgon Court, Block D6, Ralph Bunche Road, Nairobi respectively.**
3. **That on the same day at around 2:21p.m. I surveyed the said documents on NSSF at the said office by tendering one copy thereof to their legal clerk requiring his signature on the other copy.**
4. **That on the same day at around 3:10 p.m. I served the said documents on Geoinfo Surveys limited at the said office by tendering one copy thereof to their secretary requiring her signature on the other copy.**
5. **That the said secretary and legal clerk accepted service and stamped and signed at the front of my copies returned herewith duly served.”**

It is evident from the said affidavit of service that there was no personal service of the court order or of a notice of penal consequences on the 1st Defendant. In addition, for this court to dispense with personal service of the orders issued on 12th June 2014 and to find that the 1st Defendant was aware of the court's order, the Plaintiff must show that the 1st Defendant was personally aware of the court order through some other means other than personal service.

The notification and awareness of the orders that is required is personal to the person sought to be committed for contempt of court, and it cannot therefore suffice that the 1st Defendant's Advocate was aware of the said orders. No evidence of any such personal awareness of the order on the part of the 1st Defendant was adduced, and the averments and evidence by the 1st Defendant that he was out of the country at the time of the issue and service of the said orders was not controverted.

Arising from the foregoing, I find that the 1st Defendant was not personally served or shown to be personally aware of the orders issued by the Court on 12th June 2014, and he cannot therefore be found culpable of disobeying the same or for contempt of court.

The prayers sought in the Plaintiff's Notice of Motion dated 15th September 2014 are accordingly denied for the foregoing reasons, and the Plaintiff shall meet the costs of the said Notice of Motion.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this 5th day of March 2015.

P. NYAMWEYA

JUDGE