



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**LAND AND ENVIRONMENTAL DIVISION**  
**ELC CIVIL SUIT NO. 962 OF 2014**

**PHELIX POLYCARP ODHIAMBO OGOLLA..... PLAINTIFF**

**VERSUS**

**WILLIAM KANGARA .....DEFENDANT**

**R U L I N G**

The Plaintiff/Applicant by a Notice of Motion dated 30<sup>th</sup> July 2014 seeks an orders that:-

1. That this Honourable court be pleased to order the Respondent to be committed to Civil jail for a period of six months for contempt for disobedience of the orders issued on 23/7/2014 by **Hon. Lady Justice Gacheru**, sitting in the High Court of Kenya at Nairobi, in **ELC NO. 962 of 2014**.
2. That the Respondent do pay costs of this application.

The application is grounded on the supporting affidavit of the plaintiff, **Phelix Polycarp Odhiambo Ogola** sworn on 30<sup>th</sup> July 2014 and on the grounds set out on the body of the application inter alia:-

1. That the court on 23/7/2014 issued an order in the following terms:-

**“That a temporary injunction be and is hereby issued restraining the Defendant/Respondent, their servants and/or agents or any person acting by or through them from constructing, erecting or putting up any buildings, structures or developments on plot 85/13436, I.R. NO. 72957 for a period of 14 days only”.**

2. That the said court order was served upon the Respondent on 25/7/2014 together with the application thereto, which he acknowledged receipt but declined to sign on the applicant’s copy.
3. That since the service of the said court order the Respondent has continued to construct and or erect a building on the suit premises and has ever since continued to ignore and or neglect the said court order for no apparent reason.
4. That in the interest of justice, fairness and to conserve, maintain and uphold the dignity of the court, the applicants pray that the orders sought herein be granted.

The plaintiff depones vide the supporting affidavit that the Respondent was served with the formal

extracted order by a **Mr. Peter Mwangi**, process server on 25/7/2014 as per the annexed copy of the affidavit of service marked “PP2”. The annexed affidavit of service is marked “PP3” and the process server is stated to be one **Johnson Muthama Kitheka** and not **Peter Mwangi**. The plaintiff states that in spite of being served with the order which was endorsed with a penal notice the Respondent nonetheless continued with the construction in total disregard and disobedience of the court order prompting the filing of the instant application.

The Respondent in a replying affidavit sworn on 10<sup>th</sup> November 2014 denies that he was served with the court order and the other court documents on 25<sup>th</sup> July 2014 as alleged in the affidavit of service filed herein. The Respondent states that the documents were in fact served on the officials of **Kiambu Dandora Farmers** on Saturday 2<sup>nd</sup> August 2014 who passed the documents to their Advocate, **Boniface & Company Advocates**. That it is the said officials of **Kiambu Dandora Farmers** who informed the Respondent of the order whereupon he promptly put a stoppage to all further construction and discharged his workers from the site. The Respondent states that he got to see the court documents at the offices of **Njiru Boniface & company Advocates** on the Monday following the 2<sup>nd</sup> August 2014 and he gave instructions to the said Advocates to act for him. The Respondent states that once he became aware of the court order he promptly put a stop to all construction activities in the disputed suit premises.

The parties filed written submissions as directed by the court. The plaintiff's submissions dated 15<sup>th</sup> January 2015 were filed in court on 19<sup>th</sup> January 2015 while the Defendant/Respondent's submissions dated 19<sup>th</sup> February 2015 were filed on the same date. The parties in their filed submissions reiterate the facts as set out in their respective affidavits. The parties' submissions also address the legal issues that arise for determination.

I have reviewed the application by the applicant, the affidavit in support and in opposition and the parties' filed submissions and the issues that stand to be determined are:-

- i. Whether the respondent was duly served with the court order issued on 23<sup>rd</sup> July 2014 as alleged by the Applicant.
- ii. Whether the respondent breached the court order and is therefore liable for punishment for contempt of court.

For a party to be punished for contempt of court it has to be positively established that either the respondent was served with the court order personally and/or at any rate the respondent had knowledge of and the contents of the order and nonetheless went ahead to disobey the order. Indeed until the rule was recently relaxed through case law the requirement was that a party had to be personally served with the court order for him or her to be held to be in contempt. See the cases of **Jacob Zedekiah Ochino & Another –vs- George Aura Okombo & others Civil Appeal NO. 36 of 1989**, **Mwangi Wangonde –vs- Nairobi City Council Civil Appeal NO. 95 of 1988** and **Mutitika –vs- Baharini Farm Limited (1985) KLR 229**. These cases represent the traditional and conservative view that held personal service had to be proved before contempt could be established.

The present position is represented by the position adopted by **Mabeya, J** in the case of **Communications International Ltd –vs- Joseph Mathenge Mugo & Another (2013) eKLR** which basically is that where it is shown the respondent had knowledge of the order, proof of personal service is not a prerequisite for contempt to be established. **Mabeya, J** in the case stated:-

“-----To that extent, I find that the 1<sup>st</sup> Defendant had knowledge of the order and the issue of personal service upon him does not therefore arise. In any event, the 1<sup>st</sup> Defendant did not contest knowledge of the existence of the order. I am guided by the holding of **Lenaola J** in the case of **Basil Criticos –vs- Attorney General & 8 others (2012) eKLR** where he stated that:-

“-----the law has changed and as it stands today knowledge supercedes personal service---- where a party clearly acts and shows that he had knowledge of a court order, the strict

**requirement that personal service must be proved is rendered unnecessary”.**

In the present case the Respondent states he was not served with the court order when it is alleged he was and that he only got knowledge of the order on 2<sup>nd</sup> August 2014 when he put stoppage to the construction works. The Applicant for his part contends that the Respondent was personally served and relies on the affidavit of service annexed as “PP3” to the supporting affidavit. This affidavit of service does not indicate the date when it was sworn though it is signed by the deponent. The affidavit of service indicates that the deponent was informed by one **Wakaruara** that he was the one who sold the plot to the Defendant and that the said **Wakaruara** offered to show him the Defendant at the construction site. The affidavit does not indicate who pointed out the defendant to the Deponent and merely states the Deponent served the Defendant in the presence of several labourers and the said **Wakaruara**. Does this **Wakaruara** have another name and how did the process server establish linkage with him? This is unclear from the affidavit of service as the process server does not indicate how the said Wakaruara came into the scene.

I would perhaps have allowed the service to stand but for the subsequent service done by the same process server on the same Defendant on 2<sup>nd</sup> August 2014. As per the affidavit of service sworn on 4<sup>th</sup> August 2014 by **Johnson Muthama Kithaka** the same process server who states he served the Defendant on 25<sup>th</sup> July 2014 states that “-----on 2<sup>nd</sup> August, 2014 at around 4.00p.m I again proceeded to the Respondent’s place of business whereupon I found the Respondent who was pointed out to me by a patron, who was seated near the entrance, then I introduced myself and the purpose, of my visit-----“ (emphasis mine).

It would have been expected that the process server having only served the defendant barely a week earlier he would not have needed somebody to point out the defendant to him as he would have known him. This casts doubts in my mind as to whether the defendant was appropriately served in the first instance. Contempt of court being in the nature of a criminal offence where proof is on a standard higher than on a balance of probability I am inclined to resolve the doubt in favour of the defendant that he may actually not have been appropriately served with the court order on 25<sup>th</sup> July 2014 as alleged.

As to whether the Defendant had notice of the court order and nonetheless continued to undertake construction, it is difficult to say. What is not disputed is that once he learnt of the order on 2<sup>nd</sup> August 2014 he immediately put a stoppage to all construction works and that in my view is not the conduct of a person who intentionally and deliberately sought to disobey the court order.

In the premises therefore it is my view that the Applicant has not proved the defendant had willfully and intentionally disobeyed the court order so as to be held to be in contempt of court and liable to be punished for it. I hold that no contempt of court has been established and I accordingly order the Plaintiff/Applicant’s application dated 30<sup>th</sup> July 2014 dismissed with no order as to costs.

Orders accordingly.

Ruling dated, signed and delivered this...23<sup>rd</sup>...day of April ..2015.

**J. M. MUTUNGI**

**JUDGE**

**In the Presence of:**

Kinaro..... Plaintiff

N/A..... Defendant