



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
IN THE ENVIRONMENT AND LAND DIVISION
H. C. C NO. 134 OF 2013

KAZUNGU MOLI CHOGO & OTHERS.....PLAINTIFFS/APPLICANTS

-VERSUS-

PERIHAN TORUN & OTHERS.....DEFENDANTS/RESPONDENTS

RULING

1. The plaintiffs (hereinafter referred to as the applicants) have commenced contempt proceedings against the defendants (hereinafter referred to as the respondents) vide their notice of motion dated 13th February 2015. In the motion, the applicants seeks to have the 1st to 5th defendants and their officers detained in prison for a term of six (6) months for disobeying the Court order issued on 28th June 2013. They also sought compensation and costs of the application. The motion is premised on the grounds on the face of it and the affidavit deposed by Kazungu Moli Chogo.
2. The application is opposed by the respondents who have filed a replying affidavit, grounds of opposition and notice of preliminary objection. The replying affidavit is sworn by Mohamed Amin Ali who deposed that the respondents have not faulted the temporary order of 28.6.2013. He deposed that the orders were served 10 days after the order was given contrary to law. Further that the Court on 11.7.2013 did not extend the earlier orders issued on 28.6.2013. The defendants have denied colluding with the police who is deposed to be an independent body. Instead the respondents aver that the applicants are abusing the Court process with a clear intention of avoiding the full hearing of this case. They urged the Court to dismiss the application with costs.
3. The parties' advocates filed rival submissions to argue the motion. There are mainly two issues submitted on i.e ;

a) Whether the orders issued on 28.6.2013 lapsed by operation.

b) Whether if the order was in operation, disobedience of the order has been proved.

The applicant paraphrasing the order as issued submitted that the order did not lapse as alleged by the respondents because the order was to remain in force pending the hearing of the application inter partes. It is also submitted for the applicants that the order was served on 8.7.13 a fact not denied by the 1st – 5th respondents. On disobedience, the applicants submitted that the respondents moved into the suit land and are hurriedly constructing permanent structures with the aim of defeating the plaintiffs' claim. Lastly the applicant submitted that an order must be obeyed however irregular and relied on the cases of **Hadkinson vs Hadkinson (1952) PD 285, Moses P.N Njoroge & Others vs Rev. Musa Njuguna & Another Nakuru HCC No 247 'A' of 2004.**

4. The respondents on their part submits that the ex parte orders lapsed by operation of law as they were served outside the 3 days as provided under order 40 rule 4(3) of the Civil Procedure Rules. Secondly the orders were not extended on 11.7.2013 and so the orders expired on 12.7.15 as provided for under order 40 rules 4(1), (2) & (3) and rule 7. The respondent in support of this submission referred to case law of **Omega Enterprises vs Kenya Tourist Development Corporation C.A No 59 of 1993 and Nyayo Embakasi Residents Association vs NSSF (2015) eKLR**. Further the respondents submitted the orders expired by operation of law after the lapse of one year on 28.6.14 under order 40 rule 6. The respondents went further to submit that a temporary injunction cannot be sustained pending the hearing of the suit without hearing a defendant which they say was the holding in **Mobil Kitale Service Station vs Mobil Oil Kenya (2004) eKLR**.

5. On proof of disobedience, the respondents cited the case of **Kariuki & Others vs Minister for Gender (2004) IKLR 229**. The respondents submit the photos annexed did not connect the respondents to the alleged interferences & they have no dates. They have also denied colluding with police officers who they say is run by an independent body. They urged the Court to dismiss the application.

6. I shall pick up the two issues raised by the parties both in the pleadings filed and the submissions rendered :-

i) Whether the order issued on 28.6.2013 lapsed by operation of the law.

ii. If the order is in operation, whether there is proof of disobedience.

It is admitted by parties herein that there was an order issued on 28.6.2013.

It is also admitted that this order was served on the 8th July 2013. The respondents submitted it was served outside the 3 days as provided under Order 40 rule 4(3). The applicant said nothing about this. This rule is couched in mandatory terms and require the order to be served within three days from the date of issue. In default, the injunction automatically lapses.

In the order annexed as “KMC – 1”, the order although given on 28.6.2013 was issued on 8th July 2013. Since it is admitted it was served on 8.7.2013, I find that it was served the same day as the date it was issued and thus does not contravene the provisions of Order 40 rule 4 (3).

7. The second limb is whether this order expired after the lapse of one year.

Order 40 rule 6 provides that an interlocutory order lapses where a suit is not determined within a period of 12 months **unless the Court for any sufficient reason orders otherwise**. In this instant the interlocutory injunction was issued pending inter partes hearing of the application. I have perused the proceedings. Before the application could proceed inter partes, the 1st to 5th respondents raised a preliminary objection which the Court heard on 6th December 2013. The Court fixed the ruling on the preliminary objection for 26.2.2014 and extended the interim orders till then. The ruling was subsequently delivered on 14.3.2014 in which prayer 1 and 2 of the motion was granted. The subsequent proceedings related to the 1st – 5th defendants/respondents application. There is no mention of initial application dated 27.6.13, if the orders were extended until delivery of the ruling on the preliminary objection. There was no mention on way forward for the application.

8. The applicant submitted that the order was to last until the application was heard inter partes. After the determination of the preliminary objection, the applicant has not endeavoured to fix his application for hearing. Instead it is the respondents who obtained some orders against the applicant. This Court is therefore at a loss which orders the applicant refers to as being disobeyed. In my opinion arguing the preliminary objection was part of hearing the application inter partes. Since the applicants went to sleep, they cannot wake up from their slumber of indolence and ask the Court to punish the respondents for disobeying an order they do not know if it exists or not. I

do find that the order issued on 28.6.13 lapsed on 14.3.2014 and the injunction orders available is the one in favour of the respondent.

9. Since there is no injunctive order in force in favour of applicant it would be a mere academic exercise to delve into the matter of whether contempt was proved to have been committed by the 1st to 5th respondents or not. Consequently I find the notice of motion application dated 13th February 2015 to be without merit and hereby dismiss it with costs.

Ruling Dated and Delivered this **18th** day of **September, 2015**

A. OMOLLO

JUDGE