



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISUMU
ENVIRONMENT & LAND COURT
LAND CASE NO.281 OF 2014

EVALYNE MANDE OLOO.....1ST APPLICANT

EDWIN ODHAIMBO SIALA.....2ND APPLICANT

VERSUS

THE COUNTY GOVERNMENT OF SIAYA.....1ST RESPONDENT

THE NATIONAL LAND COMMISSION.....2ND RESPONDENT

RULING

1. **Evalyne Mande Oloo** and **Edwin Odhaimbo Siala**, hereinafter referred to as the 1st and 2nd Applicants, filed the notice of Motion dated 23rd, January 2015 for an order that **Cornel Rasanga, the Governor County Government of Siaya**, and **Mr Mkanda, the legal advisor to the County Government of Siaya**, herein after referred as the 1st and 2nd Respondents be detained in prison for 6 months for disobeying this courts orders of 23rd September 2014 and 7th October 2014. The application is based on the five grounds marked (a) to (e) and the supporting affidavit of Bruce O. Odeny sworn on 23rd January 2015.
2. The application is opposed through the replying affidavit sworn by Kefa Marube County Secretary, on 16th June 2015.
3. The application came up for hearing on 28th September 2015 when Mr Odeny and M/S Wafula for the Applicants and Respondents respectively made their oral rival submissions.
4. The issue for determination is first whether or not the Respondents were served with the said order and secondly, if so, whether they disobeyed the order. Thirdly whether the prayer sought should be granted.
5. The court has considered the grounds on the notice of motion, the affidavit evidence by both parties and the rival submissions by counsel and come to the following conclusions:
 - (a) That the Applicants moved the court through the notice of motion under certificate of urgency dated 16th September 2014. The Applicant's counsel appeared before the court on 23rd September 2014 Exparte and prayers 1 and 2 were granted pending interpartes hearing on 7th October 2014. When the matter come

for interpartes hearing on 7th October 2014, the Applicant's counsel informed the court that the application had been served and no response had been filed. The application was therefore allowed effectively confirming prayers 2 in terms of prayer 3. The order was that the County government of Siaya, its servants and or agents were "restrained from entering, remaining thereon, trespassing, building any structures thereon or in any way interfering with the quiet, possession of the plaintiffs said parcel title No.Siaya/Township/Block 1/541 until the hearing and determination of this suit."

(b) That upon the orders of 23rd September 2014 and 7th October 2014 being given by the court, the same were extracted on 25th September and 9th October 2014 respectively. The copies of the two orders are attached to the supporting affidavit and both contain a penal notice in the following terms:

" This is a court order and the parties mentioned herein are required to immediately and strictly comply with the terms of the said orders in default of which the offending party shall be liable for citation for contempt of court and for imprisonment for a term not exceeding six (6) months in Civil jail."

The affidavit of service of David Elvis Ochieng sworn on 29th September 2014 and annexed to the supporting shows that the court documents including the order with a penal notice were served on 29th September 2014 at 10.45 am at the offices of 1st Defendant at Siaya on one " Mr Okanda the legal advisor who instructed his clerk a Mr Alexander to receive the documents on his behalf...."

Also attached to the supporting affidavit is the second affidavit of service by David Elvis Ochieng sworn on 21st October 2014 on service of the order with penal notice served on 21st October 2014 on " Mr. Mkanda the legal advisor of the 1st Defendant who instructed his clerk a Mr Alexander to receive and stamp the copy on his behalf" This second affidavit of service do not appear to have been filed with the court unlike the first one.

c. The Respondent has denied disobeying the order and deponed that by the time the said orders were issued the construction had already been completed and business were being operated in the market. This disposition has not been controverted or challenged. The court has also noted that in the affidavits sworn by the Applicants on 16th September 2014 in support of their application under which the orders said to have been disobeyed were issued, the two deponents had confirmed development on the suit land had began as far back as July 2014. {see paragraph 7 of the supporting affidavit sworn by Evalyne Mande Oloo on 16th September 2014}. The two deponent had also annexed photographs of structures that were evidently in use by traders or almost complete from the high number of people seen in the photos.. This confirms the Respondent deposition that by the time the orders of 23rd September 2014 were issued and confirmed on 7th October, the construction was complete and the structures in use. There is no evidence availed by the Applicants to show that the Respondent did any further constructions on the suit land after the date of service of either of the two orders.

(d) That the plaint dated 16th September 2014 seeks for permanent injunction, removal of the structures built on the suit land and eviction orders among others. The orders of 23rd September 2014 and confirmed on 7th October 2014 did not require removal of the structures and eviction 1st Defendant from the suit land. That will have to wait for the hearing of the main suit. The 1st Defendant has already filed a statement of defence dated 10th December 2014 and it is only fair and just that the orders of demolition and eviction await the main hearing.

(e) That from the foregoing and considering that there is no other act the Respondent is said to have done on the suit land since the orders of 7th October 2014, the court is of the view that there is nothing to show disobedience of the court orders. The court is of the considered view that the parties should urgently comply with Order 11 of Civil Procedure Rules so that the main suit could be heard and a decision made without undue delay. Alternatively, as it is evident public money has already been expended on the construction of the structures which are being used by many people, the parties could explore the possibilities of an out of court settlement as they comply with Order 11 of Civil Procedure

Rules.

6. That having come to the findings set out above the application dated 23rd January 2015 is without merit and is dismissed with costs in the cause.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

11/11/2015

Dated and delivered this **11th day of November 2015**

In presence of;

Applicants N/A

Respondents N/A

Counsel Mr Rakewo for Madialo foe Respondents and Mr Mwamu for Odeny for Applicant.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

11/11/2015

11/11/2015

S.M. Kibunja J

Court clerk Oyugi

Parties absent

Mr Mwamu for Tom Mutai for Applicant

Mr Rakewa for Respondent

Court: Ruling delivered in open court in presence of Mr Mwamu for Mutai for Defendant/Applicant and Mr Rakewa for Plaintiff/Respondent

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

11/11/2015

