



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

LAND CASE NO. 87 OF 2012

GLOBAL REAL ESTATE.....PLAINTIFF

=VERSUS=

SIMONE MANCINI.....1ST DEFENDANT

SARA FERRAR.....2ND DEFENDANT

RULING

1. The Preliminary Objection by the Defendants is dated 9th December 2013. The Preliminary Objection is in respect to the Plaintiff's Application dated 2nd December 2013. It is based on the grounds that the Application dated 2nd December is misconceived, devoid of any merits and it is an abuse of the process of the court as no court order was disobeyed by the Defendants and the same ought to be struck out with costs.
2. The Application dated 2nd December 2012 by the Plaintiff is seeking for an order that the Defendants be committed to civil jail for a period of 6 months and their property be attached for disobedience of the order of the court made on 18th November 2013.
3. According to the Plaintiff's supporting Affidavit, the Plaintiff could not trace the Defendants for immediate service of the order of 18th November 2013 and that it was only on 26th November 2013 that the Defendants and in particular the 1st Defendant were served with the order.
4. While arguing the Preliminary Objection, Mr. Kiarie, counsel for the Defendants submitted that the Application for contempt must be struck out because no order was served on the Defendants.
5. The Defendants' counsel submitted that by 26th November 2013, when the Order was allegedly served on the Defendants, there was no Order capable of being served. Counsel submitted that pursuant to the provisions of Order 40 Rule 4(3) of the Civil Procedure Rules, an *ex-parte* order of injunction must be served within three days from the date of issue of the order and in default of service within the said three days, the injunction automatically lapses.
6. Consequently, it was submitted, the Plaintiff's counsel should have moved the court after the lapse of three days for the reinstatement of the *ex-parte* order before serving it on the Defendants. Counsel submitted that what was served on the Defendants on 26th November 2013 was not an Order capable of enforcement.
7. On the other hand, Mr. Macharia, counsel for the Plaintiff submitted that the Defendants have filed an Application dated 2nd December 2013 seeking to vacate and/or discharge the order of 18th November 2013. Counsel wondered why the Defendants filed the Application to have the *ex parte* Orders discharged if indeed there was no Order capable of enforcement as submitted.
8. The Plaintiff's counsel further submitted that the Order that was extracted states that it shall

remain valid for 14 days. Consequently, it was argued, the provisions of Section 3A of the Civil Procedure Act should be invoked by the court to enforce its Orders. Counsel submitted that the drafters of Order 40 Rule 4(3) of the Civil Procedure Rules contemplated a situation whereby the Respondent will be available for him to be served with an Order within three days from the date of issue.

9. Counsel submitted that the Preliminary Objection should be dismissed with costs.

Analysis & findings:

10. It is not in dispute that on 18th November, 2013, this court issued an *ex-parte* Order restraining the Defendants or their agents from undertaking any further construction of the roof of villa 47 which is next to the Plaintiff's residential premises pending the hearing of the suit.

11. The Plaintiff's director has deponed that it was not until 26th November, 2013 that the process server managed to trace the 1st Defendant and served him with the Order that was issued on 18th November 2013. The Order was served after three days but within 14 days from the date of issue. The Plaintiff wants the Defendants to be committed to civil jail for having disobeyed the said Order.

12. Order 40 Rule 4(3) of the Civil Procedure Rules provides as follows:

“In any case where the court grants an ex-parte injunction the applicant shall within three days from the date of issue of the order serve the order, the application and pleadings on the party sought to be restrained. In default of service of any of the documents specified under this rule, the injunction shall automatically lapse.”

13. The Defendant's counsel has submitted that by the time his client was served with the Order, the same had automatically lapsed pursuant to the provisions of order 40 Rule (4)(3). There was therefore no Order to be obeyed by his client.

14. I do not agree with that argument. It is trite law that once the court issues an order, a party served with such an order must first of all obey it and then either move the court to vary or discharge it or appeal against the Order.

15. It is my view that it is not in the province of litigants and their advocates to decide the validity or otherwise of court orders notwithstanding the provisions of the law. In the case of *Johnson Vs Walton (1990) 1 FLR 350 at 352*, Lord Donaldson M.R. Held as follows:

“It cannot be too clearly stated that when an injunctive order is made or when an undertaking is given, it operates until it is revoked on appeal or by the court itself, and it has to be obeyed whether or not it should have been granted in the first place.”

16. The Order that I issued on 18th November 2013 clearly states that it was to remain valid for 14 days. It was served within 14 days and the Defendants were under an obligation to obey it until they set it aside. One of the grounds for setting aside could be that the Order was not served within three days as stipulated by the Rules.

17. It is only the court that can determine whether indeed such an Order had lapsed after analysing the law and the circumstances of each case. Rules made under the Civil Procedure Act are subservient to the provisions of the Act and it is in that scheme of things that the court has to interpret them.

18. Indeed, Rules under the Civil Procedure Act are not cast in stone. The said rules are subject to the inherent jurisdiction of the court as stipulated under Section 3A of the Civil Procedure Act and must be read wholesomely.

19. I say so because although Order 40 Rule 4(3) provides that *ex-parte* injunctive orders must be served within three days, the Rule must be read alongside Section 3A of the Civil Procedure Act which provides that nothing in the Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.

20. The inherent jurisdiction of this court, which is a residual jurisdiction that ought to be invoked in special circumstances, is meant to maintain the integrity and character of the court and ensure that

- the Orders of the court, where appropriate, are not issued in vain.
21. Order 40 Rule 4(3) of the Civil Procedure Rules should also be read together with the provisions of Order 50 Rule 6. That Rule provides that where a limited time has been fixed for doing any act or taking any proceedings under the Rules, or by an order of the court, the court shall have power to enlarge such time upon such terms as the justice of the case may require.
 22. It is in light of the above provisions of the law that I disagree with the argument that because the Defendants were served with the Order of 18th November, 2013 after three days had lapsed, there was no Order to be obeyed. Such a scenario and interpretation of the Rule can only bring disrepute to the entire trial process and the integrity of court orders.
 23. What the parties who are supposed to be served with injunctive orders will invariably do to defeat justice is to disappear the moment they learn that an *ex parte* order has been issued against them just to re appear on the fourth day and continue with whatever activity the court would have stopped them from doing. That is an absurdity that a court of law and equity cannot allow.
 24. Considering that the Order of 18th November, 2013 specifically stated that it shall remain in force for 14 days, I find and hold that the same was valid as at the time the Defendants were served notwithstanding the provisions of Order 40 Rule 4 (3) of the Civil Procedure Rules.
 25. In the circumstances, and for the reasons I have given above, I dismiss the Defendants' Preliminary Objection dated 9th December, 2013 with costs.

Dated and delivered in Malindi this 9th day of May, 2014.

O. A. Angote

Judge