



**IN THE ENVIRONMENTAL AND LAND COURT AT NAIROBI**

**ELC CIVIL SUIT NO. 766 OF 2012**

**SHEILA M. N. WANGWE.....1<sup>ST</sup> PLAINTIFF**

**JOHN O. OLOO.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**CALLEB WERE WANYONYI.....1<sup>ST</sup> DEFENDANT**

**EMBAKASI RANCHING CO. LIMITED.....2<sup>ND</sup> DEFENDANT**

**RULING**

**The Plaintiffs' Application**

The Plaintiffs are seeking the following orders in an application they made by way of a Notice of Motion dated 9<sup>th</sup> February 2013:

1. That this Court commits the 1<sup>st</sup> Defendant herein to prison for a maximum of six (6) months for deliberately refusing and/or continuing to disobey, flout or circumvent orders issued on the 30<sup>th</sup> October 2012 and confirm on 16<sup>th</sup> January 2013.
2. That this Court orders the attachment of such real and personal property of the 1<sup>st</sup> Defendant herein or otherwise imposes a fine on the 1<sup>st</sup> Defendant for his continued flagrant disobedience of this Court's Order issued on 30<sup>th</sup> October 2012 and confirmed on 16<sup>th</sup> January 2013.

The Plaintiffs' application is supported by a supporting affidavit sworn by the 2<sup>nd</sup> Plaintiff on 9<sup>th</sup> February 2013, and is premised on the grounds that the 1<sup>st</sup> Defendant, being fully aware of the terms of the order issued by the Court on 30<sup>th</sup> October, 2012 restraining him from interfering with the Plaintiff's quiet possession of the suit premises, has intentionally, fragrantly and maliciously disobeyed the said Court order. The 2<sup>nd</sup> Plaintiff stated that the said order together with a penal notice was served upon the 1<sup>st</sup> and 2<sup>n</sup> Defendants as deponed in the Affidavits of Service sworn and filed in Court on 12<sup>th</sup> November 2012 and 13<sup>th</sup> November 2012, which he attached to his affidavit. Further, that on at least four occasions including 15<sup>th</sup> November 2012, he personally talked to the 1<sup>st</sup> Defendant on his mobile phone number to demand that he abide by the Court order, and that the said Defendant indicated that he will not abide by the Court Order as his advocates had advised him that the orders issued herein do not affect him.

The Plaintiffs further state that the 1<sup>st</sup> Defendant has willfully disobeyed and ignored the orders issued herein since the filing of the suit and service of the said orders, specifically by destroying the Plaintiffs' building foundation, septic pit, boundary fence and beacons, ploughing and planting crops on the suit

premises and having one John Andango to reside and guard the suit premises and keep away the Plaintiffs, despite being aware of the Court Order. The Plaintiffs aver that the 1<sup>st</sup> Defendant's conduct amounts to contempt of Court which is punishable by the Court to protect the authority and dignity of the Court.

### **The 1<sup>st</sup> Defendant's Response**

The 1<sup>st</sup> Defendant opposed the said Notice of Motion in a replying affidavit which he swore on 3<sup>rd</sup> July 2013 and he also relied on two affidavits both sworn on 3<sup>rd</sup> July 2013 by Florence Kavulani and Churchill Nanjero Andago respectively. The 1<sup>st</sup> Defendant stated that the property he has developed and fenced is the property known as plot No. P1653, which was allocated to his wife Mrs. Florence Kavulani by the 2<sup>nd</sup> Defendant in the year 1982, a share certificate was issued to her in 1988 and possession given to her in the year 1989. Further, that the 2<sup>nd</sup> Defendant identified the said plot under its Map number 10 and allocated his wife a further Bonus plot No. P1653B in the year 1998. The 1<sup>st</sup> Defendant attached copies of the letters of allocation, share certificates, and receipts of payments made to the 2<sup>nd</sup> Defendant.

The 1<sup>st</sup> Defendant further stated that Florence Kavulani retired in the year 2009 and proceeded to farm in Kitale, and that he joined her in the year 2011 when he retired. He claimed that he came back to Nairobi in May 2012 and found that the plot had been interfered, with and somebody had dug a 2 feet trench and scooped some soil from the said plot. Further, that he then paid the 2<sup>nd</sup> Defendant for the re-establishment of the beacons and he attached a copy of the receipt. The 1<sup>st</sup> Defendant averred that he again came back to Nairobi in September 2012 and fenced the plot, ploughed and planted maize, constructed a mabati structure, dug a pit and deposited stones meant to construct a pit latrine thereon.

The 1<sup>st</sup> Defendant denied that he started cultivating on the said plot recently, and stated that he has always done it from the year 1989 and has been in possession of the plot from the date the same was shown to him and his wife by the 2<sup>nd</sup> Defendant. He stated that in October 2012, the Plaintiffs came to his plot and claimed that the plot belonged to him. Further, that from November 2012, he got a Mr. Churchill to reside and continue farming in the said premises, and has since done nothing in the said property. The 1<sup>st</sup> Defendant further stated that he was served with the court order in court on the 13<sup>th</sup> March 2013, and has done nothing to contravene the Court Order from that date.

Florence Kavulani in her affidavit corroborated the 1<sup>st</sup> Defendant's statements, and stated that she is the owner of the Plot known as Plot No. P1653 and that as soon as the said property was allocated to her in 1982, she together with her husband, the 1<sup>st</sup> Defendant herein, fenced off the said land and have been cultivating the same. Further, that the 1<sup>st</sup> Defendant has been checking on the said property and undertaken developments thereon for the benefit of the family.

Churchill Nanjero Andago in his affidavit stated that he was an employee of the 1<sup>st</sup> Defendant and has been residing on the suit property from November 2012, and has been doing some farming on the property. Further, that the Plaintiff has never been in possession of the said premises, and that there is no construction of a septic tank and/or foundation in the said property.

### **The Submissions**

The Plaintiff's counsel filed submissions dated 19th June 2013 and supplementary submissions dated 17<sup>th</sup> July 2013, wherein he reiterated the facts leading to the contempt of court application. The Plaintiff relied on section 5 of the Judicature Act and Order 40 Rule 3 of the Civil Procedure Rules on the power of this court to punish for disobedience of an injunction and contempt of court. He submitted that the Plaintiff had demonstrated that the court orders herein were served on the 1<sup>st</sup> Defendant as required.

He contended that the first personal service was effected on 3<sup>rd</sup> November 2013 but that the 1<sup>st</sup> Defendant

did not acknowledge service, prompting the Plaintiffs to ask for leave to serve through advertisement, which advertisement was published on 7<sup>th</sup> December 2012. Further, that the said Defendant was personally served with the orders and penal notice on 13<sup>th</sup> March 2013 when he attended court.

However, that the 1<sup>st</sup> Defendant still continues to disobey the Court's orders and offering excuses to justify his refusal to obey the orders by claiming that he is occupying plot P1653B in Map 10, yet the documents he has produced in evidence show that it is in Map 40 and was allocated in 1999 and not 1988. The Plaintiffs also stated that the 2<sup>nd</sup> Defendant had confirmed in a letter produced as evidence dated 28<sup>th</sup> February 2013 that the suit premises are plot V10735, and that the same belong to the Plaintiffs.

The Plaintiff submitted that the location of the plot notwithstanding, a person cannot disobey a court order for reasons that he does not agree with it or thinks it was issued wrongly, and that a court order must be obeyed until and unless set aside. The Plaintiffs also submitted in this respect that Churchill Andago admitted in his affidavit that he was brought to the suit premises by the 1<sup>st</sup> Defendant in November 2012 and has been farming thereon.

The 1<sup>st</sup> Defendant's counsel filed submissions dated 15<sup>th</sup> July 2013, wherein he argued that the orders dated 30<sup>th</sup> October 2012 and the one dated 16<sup>th</sup> January 2013 are different, and that the order personally served on him on 13<sup>th</sup> March 2013 was the order granted on 16<sup>th</sup> January 2013, which should be the reference in determining whether the conduct of the 1<sup>st</sup> Defendant is in contempt of court. Further, that the said order did not compel the 1<sup>st</sup> Defendant to put the Plaintiffs in possession or order the eviction of the 1<sup>st</sup> Defendant who was already in possession.

The 1<sup>st</sup> Defendant's counsel submitted that from a perusal of the Plaintiff, all the acts complained of happened before institution of the suit, and that there was no evidence tendered to show what was done before the alleged orders were obtained, and what the 1<sup>st</sup> Defendant has subsequently done. He also submitted that the beacons to the suit property were identified to the Plaintiffs on 23<sup>rd</sup> February 2013 after the orders of the court were issued. Lastly, he submitted that there was no evidence that the 1<sup>st</sup> Defendant was personally served with the court orders and that it is the court that ordered that the 1<sup>st</sup> Defendant be personally served on 13<sup>th</sup> March 2013, and there is no evidence that he had disobeyed the court orders after the said service.

### **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 given by the court on 30<sup>th</sup> October 2012 and 16<sup>th</sup> January 2013 on the 1<sup>st</sup> Defendant. Secondly, if so, whether the 1<sup>st</sup> Defendant is culpable for contempt of court. The last issue is if the 1<sup>st</sup> Defendant is found culpable, whether the Plaintiffs 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 procedure to be followed in making such an application is provided under order 51 of the Civil Procedure Rules that provides for the mode of filing, serving and hearing of applications brought under the Civil Procedure Rules. The substantive law that applies to contempt of court 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. 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.

Similar provisions were also provided by Order 45 Rule 7 (2) and (3) of the Rules of the Supreme Court that was repealed by Part 81 of the English Civil Procedure Rules of 1998.

Personal service of the orders alleged to have been disobeyed, and of a penal notice is a requirement in proceedings for committal for contempt of court as a result of the application of English law, which has traditionally insisted on compliance with certain procedural safeguards before courts could exercise their jurisdiction to punish for contempt of court. This insistence arose from the arbitrary nature of contempt of court proceedings as courts essentially apply a summary jurisdiction, and also because of the threat that is presented by such proceedings to the liberty of the alleged contemnors.

This Court notes that Kenyan courts have also as a result held personal service of orders and a penal notice to be 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.

The Plaintiffs rely on two affidavits of service sworn on 9<sup>th</sup> November 2012 and 11<sup>th</sup> December 2012 by a process server of the High Court, one Sylvester Kitheka, as evidence of personal service of the orders of 30<sup>th</sup> October 2012 on the 1<sup>st</sup> Defendant. I have perused the said affidavits of service sworn by the said process server, and he states therein that he personally served the 1<sup>st</sup> Defendant with the said court order on 1<sup>st</sup> November 2012 and 15<sup>th</sup> November 2012, but that the 1<sup>st</sup> Defendant refused to acknowledge service.

The Plaintiffs also state that they served the 1<sup>st</sup> Defendant by way of advertisement in **The Star** newspaper on 7<sup>th</sup> December 2013. However, the law is clear that the service of orders and a penal notice must be personal service for a person to be found liable for contempt of court. Of more concern to this court in this regard is the affidavit sworn in support of the application for substituted service which was made by a Notice of Motion dated 30<sup>th</sup> November 2012. The 2<sup>nd</sup> Plaintiff in the said supporting affidavit sworn on 30<sup>th</sup> November 2012, states as follows at paragraphs 3-5:

1. **“That on 15<sup>th</sup> November, 2012, I spoke to the 1<sup>st</sup> Defendant on phone at about 10:30 am when I formed him that I am with a Court process server who has instructions to serve him with Court process. The 1<sup>st</sup> Defendant informed me to meet him at Ruai with the process server.**
2. **That I immediately left for Ruai in the company of the process server, Sylvester Kitheka, and upon reaching Ruai at about 11:30 am. I called the 1<sup>st</sup> Defendant who informed me to meet him at the suit premises and he further informed me that he is with police men who are looking for me for an offence he did not disclose.**
3. **That not knowing the role of the police men, we decided not to reach the suit premises.”**

This statement contradicts that made by the process server in his affidavit of service sworn on 11<sup>th</sup> December 2012 and filed in court on 13<sup>th</sup> December 2012 wherein he states thus at paragraph 3-5:

1. "That on 15<sup>th</sup> November I went to the 2<sup>nd</sup> Defendant's offices located at Ruai at about 10:30am where I have previously effected service and served the Hearing Notice upon the office administrator, Mwaura, who acknowledged service by signing and stamping my copy.
2. That on the same day, I went to the suit premises located at Ruai in the Company of the 2<sup>nd</sup> Plaintiff to identify the 1<sup>st</sup> Defendant for me. Upon reaching the suit premises, we found four men and the 2<sup>nd</sup> Plaintiff identified one to them as the 1<sup>st</sup> Defendant.
3. That I tendered copies of the Notice of Motion under a certificate of urgency, Court Order, Plaint, List of Witnesses, Witness Statement and List of Documents all dated 30<sup>th</sup> October 2012 and a Hearing Notice and he said he would not sign as he had urgent police matters to deal with and that he was already aware of the suit."

Similar averments were made by the same process server in his affidavit of service sworn on 9<sup>th</sup> November 2012 and filed in court on 12<sup>th</sup> November 2012. This personal service is denied by the 1<sup>st</sup> Defendant.

It is the finding of this court after examining the evidence produced by the Plaintiff that there is inconsistency in the evidence produced of the personal service on the 1<sup>st</sup> Defendant of the orders of this court given on 30<sup>th</sup> October 2012. The court (Kimondo J.) also did note on 12<sup>th</sup> November 2012 that it was not satisfied with the service effected upon the 1<sup>st</sup> Defendant and directed that he be served as required by Order 5 of the Civil Procedure Rules. It is however not disputed that there was personal service on the 1<sup>st</sup> Defendant on 13<sup>th</sup> March 2013 of the orders granted herein on 16<sup>th</sup> January 2013.

On the second issue as to whether the Defendants are culpable for contempt of court, the applicable law as stated in **Mwangi H.C. Wangonde vs Nairobi City Commission , Nairobi Civil Appeal No. 95 of 1998** is that the threshold of proof required in contempt of Court is higher than that in normal civil cases, and one can only be committed to civil jail or otherwise penalized on the basis of evidence that leaves no doubt as to the contemnor's culpability. In the present case the question to be answered is whether the Plaintiffs have brought any such evidence, particularly of acts contempt on the part of the 1<sup>st</sup> Defendant after the personal service of the orders and penal notice effected on him on 13<sup>th</sup> March 2013.

In this regard, other than averments made in their affidavit, no other evidence was tendered by the Plaintiffs on the status of the suit property at the time of the issuance of the orders of 30<sup>th</sup> October 2012 and 16<sup>th</sup> January 2013, and after service of the orders on the 1<sup>st</sup> Defendant on 13<sup>th</sup> March 2013 to show the alleged acts of contempt. The Plaintiffs have therefore clearly not discharged the onus of proof required of them in contempt of court applications. This court cannot therefore commit the 1<sup>st</sup> Defendant for contempt of court as it has no evidence of the alleged acts of contempt. Likewise, this Court cannot for the same reason therefore consider the last issue as to whether the Plaintiffs can be granted the relief sought. The Plaintiffs Notice of Motion dated 9<sup>th</sup> February 2013 accordingly fails.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this \_\_\_\_2<sup>nd</sup>\_\_\_\_ day of \_\_\_\_July\_\_\_\_, 2014.

**P. NYAMWEYA**

**JUDGE**