



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MALINDI
CIVIL APPEAL NO. 21 OF 2012

MARIAM MWADENA.....APPELLANT/APPLICANT

=VERSUS=

SAID SALIM SOBAN.....1ST RESPONDENT

JOHNSON MAZERA DANDU.....2ND RESPONDENT

R U L I N G

Introduction:

1. What is before me is the Applicant's Notice of Motion dated 5th June, 2014 and a Notice of Preliminary Objection by the Appellant dated 31st May 2014.
2. In the Preliminary Objection, the Appellant has asked this court to hold that the firm of Nyakoe Macharia & Company Advocates is not properly on record because of non-compliance with the provisions of Order 9 Rule 9 of the Civil Procedure Rules.
3. In the Notice of Motion dated 5th June 104, the Appellant is seeking for the following orders:
 - a. **THAT the court be pleased to order that the 1st Respondent, its servants and or agents and one Mohamed Swaleh are in contempt of court orders and or disobeyed the court orders dated 28th May 2014 and 25th July 2014.**
 - b. **THAT the costs of this Application be paid by the Respondents.**
4. The Application is premised on the grounds that there is a stay of Judgment dated 2nd November 2011; that the Appellant served on the 1st Respondent the orders of 12th July 2012 and 28th May, 2014 but the 1st Defendant has continued to disobey them and that the Respondent is in contempt of court orders.

The Appellant's case

5. The Appellant has deponed in his affidavits that on 4th April 2014, the Defendant's foreman, Mohamed Swaleh, was served with an order of this court dated 25th July 2012.

6. It is the Appellant's deposition that on 28th May 2014, the 1st Respondent was served with another order of the court; that despite the service of the said orders on the 1st Respondent, the Respondent's servants, foremen, agents and or employees continued with the construction works in breach of the court orders.

The Respondent's case

7. The 1st Respondent filed a Replying Affidavit and deponed that he appointed the firm of Nyakoe Macharia & Company Advocates to act for him for the purpose of the Appellant's Application dated 5th June 2014; that the firm of Omwancha & Company Advocates who was on record in the lower court had accordingly executed its instructions upon judgment and that the issue of the firm of Nyakoe Macharia & Co. Advocates not being properly on record is a technicality.
8. On the issue of contempt of court, the 1st Respondent deponed that there is no evidence that he was served with the alleged court order and that upon the sale of the property to one Abdul Waheb Addul Rehen, he ceased to have any interest in the suit property.
9. According to the 1st Respondent, he is not aware of the construction that is ongoing on the suit property and that he does not know the people on the ground.

Submissions:

10. The Applicant's advocate submitted that if it was true that the 1st Respondent had sold the suit property, he should have informed the new owner of the existence of the court order; that the Applicant has annexed photographs showing the different stages of the ongoing construction and that the said construction was done during the pendency of the Application.
11. The Respondent's Advocates did not file any submissions.

Analysis and findings:

12. The first issue that I am supposed to determine is whether the firm of Nyakoe Macharia & Co. Advocates is properly on record.
13. The Memorandum of Appeal challenging the decision of the Senior Resident Magistrate in Kilifi SRMCC No. 512 of 2004 was filed on 9th August 2012.
14. The said Memorandum of Appeal was filed after the court granted the Appellant leave to file the appeal out of time. The court also stayed the Judgment of the lower court dated 2nd November, 2012. It would appear that the firm of Omwancha & Co. Advocates represented the Respondents in the lower court because it is the said firm that was served with the Record of Appeal.
15. The Applicant then filed an Application dated 21st May 2014 seeking for an order of stay of execution of the Judgment of the lower court and an order of injunction.
16. The 1st Respondent appointed the firm of Nyakoe Macharia & Company Advocates on 13th June, 2014 to act for him in the appeal.
17. Order 9 Rule 9 of the Civil Procedure Rules provides that when there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court upon an application or upon a consent filed between the outgoing advocate and proposed incoming advocate.
18. Order 9 Rule 9 of the Civil Procedure Rules is only applicable where the change of advocate or the notice to act in person is effected in the same matter after judgment has been delivered.
19. If an appeal is filed in respect to the judgment, a party is at liberty to appoint another advocate at any stage of the appeal before judgment is delivered without the leave of the court. An appeal is a separate suit in an appellate court and one does not need the consent of the advocate in the lower court or to file an Application for leave to appoint another advocate to either represent himself or to appoint a different advocate.
20. The 1st Respondent was therefore entitled to appoint the firm of Nyakoe Macharia & Co. Advocate to act for him in this matter without the leave of the court or the consent of the previous

- advocate.
21. In the Application dated 5th June, 2014, the Applicant is seeking to cite the 1st Respondent and Mohamed Swale for contempt of the court orders. The Applicant is also seeking to have the structure constructed on the suit property demolished.
 22. The Applicant has annexed on the Supporting Affidavit two affidavits of service. The first Affidavit of Service shows that the process server served Mr. Mohamed Swaleh with the order of the court dated 25th July 2012.
 23. According to the process-server, the said Mr. Swaleh told him that he had purchased the suit property from the 1st Respondent.
 24. The second Affidavit of Service shows that the 1st Respondent was served with the order of the court dated 28th May 2014. The supervisor who was on the suit property was also served with the said order on site.
 25. The Applicant has annexed on the Supporting Affidavit and the Further Affidavit photographs of the alleged construction that was on going during the pendency of the court orders.
 26. It is true that the order of 27th May 2014 restrained the Respondents or their servants or any other person acting through them from continuing with the construction on plot numbers 84 and 85. The order of 25th July, 2012, on the other hand, only stayed the execution of the Judgment of the lower court. This is the order that was served personally on the 1st Respondent.
 27. The Judgment in the lower court prohibited the Appellant from trespassing on the suit property. The court also ordered that the Appellant's structures should be demolished within 30 days.
 28. The order staying the execution of the Judgment of the lower court dated 24th July 2014 did not stop the 1st Respondent from either selling the land or developing it.
 29. It therefore follows that although the Judgment of the lower court was stayed by this court, the 1st Respondent could still have sold the land or proceeded to develop the suit without demolishing the Appellant's structures.
 30. The subsequent order that was issued by this court on 27th May, 2014 stopped the construction or the erection of any structure for 14 days.
 31. According to the Affidavit of Service, the said order was only served on the 1st Respondent and the person who was supervising the construction.
 32. In his Affidavit, the 1st Respondent has stated that by 27th May, 2014, he had already sold the suit property and he was not aware of what was going on. That order was however not served on Mr. Swalehe, the purported purchaser.
 33. Mr. Swalehe, the named contemnor, cannot be cited for contempt because there is no evidence that he was served with the order dated 27th May, 2014 which stopped the construction of any buildings on the plot.
 34. On the other hand, no evidence was availed to the court to link the 1st Respondent with the development of the suit property as at 27th May 2014. In the circumstances, this court cannot, with certainty, state that it is the Respondent or his agents or employees who were developing the suit property as at the time the Respondent was served with the order of 27th May 2014.
 35. In any event, the photographs attached on the affidavit do not show the date that they were taken. It is not even clear the person who took them and whether indeed the people in the photographs are the 1st Respondent's employees.
 36. It would have helped if the photographs had dates and if the people who were on site could be identified by the person who was taking the photographs by way of an affidavit. In view of the denial by the 1st Respondent that he is the one who had authorized the said construction, this court cannot cite him for contempt for lack of evidence to the contrary.
 37. In the circumstances, I dismiss the Appellant's Application dated 5th June 2014 with no orders as to costs.

Dated and delivered in Malindi this 24th day of October, 2014.

O. A. Angote

Judge