



**REPUBLIC OF KENYA**

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

**ELC CIVIL SUIT NO. 688 OF 2011**

**SAHIHI HOUSING LIMITED.....PLAINTIFF**

**VERSUS**

**HON. FERDINAND NDUNGU WAITITU.....1<sup>ST</sup> DEFENDANT**

**JOSEPH ONG'ETE.....2<sup>ND</sup> DEFENDANT**

**PETER OCHIENG.....3<sup>RD</sup> DEFENDANT**

**PHILEMON OLOO.....4<sup>TH</sup> DEFENDANT**

**NAFTAL OGOLLA.....5<sup>TH</sup> DEFENDANT**

**RULING**

**The Plaintiffs' Application**

Following the order of this court issued by Majanja J. on 6/9/2012 granting the Plaintiff leave to commence contempt of court proceedings, this application by way of a Notice of Motion dated 10<sup>th</sup> September 2012 was filed against the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants. The application is brought under section 5(1) of the Judicature Act, sections 3, 3A, 63(e) of the Civil Procedure Act, and Order 52 Rule 2(1) of the Supreme Court Practice of England 1999. The Plaintiff prays for an order that the said Defendants be committed to prison for such a period of time as the Court will deem fit.

The application is premised on grounds that this Court (Ang'awa J.) on 21/8/2012 made an order restraining the Defendants from entering upon, alienating, encumbering, developing, sub-dividing, selling and/or in any manner dealing with all that property known as L.R. No. 11531/13 (Original No. 11531/4/10) (hereinafter referred to as the suit property). Further, that the Defendants were on 28/8/2012 served with the said order endorsed with a Penal Notice. It is the Plaintiff's averment that the said Defendants have defied the Court orders and continue to trespass thereon by developing, sub-dividing and selling portions of the suit property. Consequently, that the authority and dignity of this court continues to be exposed to ridicule and put in disrepute.

The application is supported by a Statement and Verifying Affidavit sworn by Azim Virjee, the chairman of the Plaintiff, sworn on 31/8/2012 and filed in court on 3/9/2012. The Chairman deponed that despite being served with the court order, the said Defendants continued to waste and damage a portion of the property by using it as a quarry and selling other portions to unsuspecting members of the public. It is his deposition that the Plaintiff has invested Kshs. 37 Million on the property hence the need for the court to grant conservatory orders in order to protect its value. The deponent urged the court to grant the orders as

it is not only in the interest of justice but also to uphold the dignity of the court.

### **The Defendants' Response**

The 4<sup>th</sup> Defendant swore a Replying Affidavit on 31/10/2012 on his own behalf and on behalf of the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants, wherein he admitted to have been served with the order issued on 22/8/2012, but that the order was not accompanied by a Penal Notice. It was his deposition that section 5 of the Judicature Act is very specific that for contempt of court to be competent, the order must be accompanied by a notice of penal consequences informing the recipient that he will be liable to the process of execution in the event he disobeys the order. Consequently, that the application is incompetent and should be disallowed.

The 4<sup>th</sup> Defendant also deponed that Order 40 Rule 4(3) of the Civil Procedure Rules required that *ex-parte* orders of injunction shall be served within 3 days from the date of issue, or else the injunction will automatically lapse. He further deponed that the subject order was issued on 22/8/2012, but served on 28/8/2012 as opposed to being served within 3 days, and therefore that the order lapsed automatically on 25/8/2012. The deponent also stated that the Plaintiff had not provided any evidence to substantiate the claims that the Defendants are in breach of the court order. Hence, that the Plaintiff's application is incompetent, fatally defective and lacked merit, and that it did not warrant a conviction for committal.

The 5<sup>th</sup> Defendant swore a Replying Affidavit on 27/9/2012 in response to the Plaintiff's application. It was his deposition that contrary to the claim made by the Plaintiff, he was not served in person of the order made on 22/8/2012. Further, that the allegations that he had disobeyed the court orders were unsubstantiated. The 5<sup>th</sup> Defendant contended that the application before the court did not meet the threshold to warrant a conviction for committal as the same lacked merit and should therefore be dismissed.

### **The Submissions**

It was mutually agreed by all the parties that the application will be canvassed by way of written submissions. Kwanga Mboya & Co. Advocates for the Plaintiff filed submissions dated 10/6/2014. Counsel outlined the undisputed facts that the Plaintiff is the registered owner of the suit property, and that on 5/12/2011 the Defendants trespassed thereon without the consent and authority of the Plaintiff. Following the Defendants' action the Plaintiff moved the court on 5/12/2011 seeking orders of injunction to restrain the Defendants from further trespass on the property when after the court, on hearing the application *ex-parte*, granted the order and set matter for hearing *inter-partes* on 13/12/2011.

On hearing the application *inter-partes* hearing, this court (Ougo J.) dismissed the application. Subsequently, the Plaintiff filed an application dated 2/8/2012 for review of order dismissing the application for injunction. Counsel submitted that the application for review came up for hearing *ex-parte* before Ang'awa J. who on 22/8/2012 granted interim injunction orders pending *inter-partes* hearing before Ougo J. It is counsel's submission that the said order, together with other subsequent orders continues to be disobeyed by the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants.

It is submitted for the Plaintiff that the order dated 22/8/2012 and all the subsequent orders made by the Court accompanied by Notices of Penal Consequences were duly served upon the Defendants. Further, that the affidavits of service filed by the process server indicate that service was effected within the prescribed statutory period. It was counsel's submission that the order issued on 22/8/2012 was released to the Plaintiff's advocate on 24/8/2012 and was served on 28/8/2012. Notwithstanding personal service, counsel submitted that the Defendants had knowledge of the said orders as they were present when the rulings giving rise to the orders were read out in open court. Counsel submitted that the Plaintiff had established a case for contempt and urged the Court to grant the orders as prayed.

No submissions were filed for the 2<sup>nd</sup> to 4<sup>th</sup> Defendants.

Odera Obar & Company Advocates for the 5<sup>th</sup> Defendant filed submissions dated 18/6/2014. Counsel submitted that an order for committal cannot be enforced against a person unless a copy of the order said to be disobeyed is personally served upon him. In support of this submission, counsel cited the cases of **Mwangi H.C. Wang'onde v Nairobi City Commission, Civil Appeal No. 95 of 1988** and **Ochino & Another v Okombo & 4 Others, (1989) KLR 165**. Counsel referred the court to the depositions made by the process server in his affidavit of 28/8/2012, submitting that it is evident that the 5<sup>th</sup> Defendant was not served with the order and therefore it is untenable in law to punish the 5<sup>th</sup> Defendant for contempt of an order the terms of which are unknown to him. In respect to whether knowledge of the court order was sufficient to constitute service, counsel submitted that the said submission was a misconceived notion and cited the case of **Kariuki & 2 Others v Minister for Gender, Sports & Social Services, (2004) 1 KLR 588** where the court held that service is higher than knowledge and that without personal service of orders there can be no contempt.

On whether the Plaintiff had established the alleged contempt of court to the standard proof applicable in contempt proceedings, the counsel for the 5<sup>th</sup> Defendant submitted that the Plaintiff had failed to discharge the burden of proof, which is higher than the balance of probabilities but not beyond reasonable doubt. In support of the submission counsel cited the case of **Mutitika v Baharini Farm Ltd, (1985) KLR 227**. Counsel urged the court to dismiss the Plaintiff's application submitting that failed to discharge the burden of proof to substantiate the allegations that the 5<sup>th</sup> Defendant has caused the suit property to be sub-divided and transferred to 3<sup>rd</sup> parties.

### **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 issued by this court on 22/8/2012 and a notice of penal consequences on the 2<sup>nd</sup> to 5<sup>th</sup> Defendants. Secondly, if there was such service, whether the 2<sup>nd</sup> to 5<sup>th</sup> Defendants are culpable for contempt of court. The last issue is if the 2<sup>nd</sup> to 5<sup>th</sup> Defendant are found culpable, whether the Plaintiff 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 substantive law that applies 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.

Rule 81.9 (1) of the English Civil Procedure Rules of 1998 is also clear that a judgment or order to do or not do an act may not be enforced unless there is a prominently displayed a warning to the person that disobedience to the order would be a contempt of court punishable by imprisonment, a fine or

sequestration of assets. Under sub-rule (2) of the said Rule, it is only in the case of an undertaking to do or not to do an act which is contained in a judgment or order where the notice of penal consequences may be dispensed with.

This Court notes that Kenyan courts have also held that personal service of orders and a penal notice is 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.

Coming back to the facts of the present application, the order complained to have been defied by the Defendants was issued by the court on 22/8/2012. Counsel for the 2<sup>nd</sup> – 4<sup>th</sup> Defendants submitted that Order 40 Rule 4(3) of the Civil Procedure Rules is to the effect that where an order of injunction is issued *ex-parte*, the same must be served within 3 days, or else it lapses automatically. It was submitted that the order that is alleged to be disobeyed was issued *ex parte* and was not served until the 28/8/2012 as indicated by the process server in his affidavit of service. 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 pleading 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.**

I have perused the court order issued by Lady Justice Ang'awa on 22/8 2012, which states that the injunction order is granted for a period of 14 days only. In my view, the requirement for service within 3 days of an order granted *ex-parte* is a provision placed in the rules of procedure to safeguard the party against whom the order has been made from inconvenience or possible injustice occasioned from a restraining order, and to facilitate the parties to return to court within the shortest time possible to argue their cases.

Order 40 Rule 4(3) of the Civil Procedure Rules was not meant to defeat the ends of justice in service of court orders particularly where the validity of the *ex-parte* order has been specified by the court as well as prescribed in Rule 4(2) thereof to be 14 days. Additionally, it was not the intention of the drafters to have the court order defied merely because it was not served within the 3 days. All court orders once made are binding and must be obeyed unless and until they are varied or set aside. This was the holding in the cases of **Hadkinson v Hadkinson, [1952] 2 All ER 567** and in **Johnson Vs Walton,(1990) 1 FLR 350 at 352**, where Lord Donaldson M.R. stated:

**“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.”**

Angote J.in the case of **Global Real Estate v Simone Mancini & Sara Ferrar, [2014] eKLR** whilst discussing the import of Order 40 Rule 4(3) of the Civil Procedure Rules stated as follows:

**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. 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. 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.**

In view of the wording of the order issued by Ang'awa J. on 22/8/2012 that the same was to last for 14 days and the provisions of Order 40 Rule 4 (2) of the Civil Procedure Rules, it is my view that the order was valid notwithstanding that the same was served on 28/8/2012 after the lapse of 3 days from the date of its issue.

It was also submitted for the 2<sup>nd</sup> to 4<sup>th</sup> Defendants on the issue of service that the court order was served upon them but that the same did not contain a notice of penal consequences. The Plaintiff annexed a copy of the court order issued on 22/8/2012 accompanied by a notice of penal consequences. However, the affidavit of service sworn by the process server on 28<sup>th</sup> August 2012 that was also attached only attests to service of the court orders, but not of the penal notice which was contained in a separate document. The said process server, Willis Agayi, stated as follows at paragraph 2 of the said affidavit of service:

**“THAT on 28<sup>th</sup> August 2012 I received from M/S Kwanga Mboya & Company Advocates, Uganda House, 5<sup>th</sup> Floor Suite No. 24, Kenyatta Avenue, P.O. Box 8395-00100 Nairobi, an Order of this Honourable Court dated 21<sup>st</sup> August 2012 and issued on 22<sup>nd</sup> August 2012 original and several copies with instructions to serve the same upon the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants.”**

This is the document he proceeds to attest in the said affidavit that he served the 1<sup>st</sup> to 4<sup>th</sup> Defendants.

Thus, this court cannot in the circumstances find that the notice of penal consequence was served on the Defendants. The absence of service of a penal consequence notwithstanding, it is my view and it has been held in several judicial decisions that if personal awareness of the court orders by the alleged contemnors is demonstrated, they will be found culpable of contempt even though they had not been personally served with the penal notice. See in this regard the decisions in Kenya Tea Growers Association vs Francis Atwoli & Others, Nairobi High Court Constitutional Petition No 64 of 2010, Husson v Husson, (1962) 3 All E.R. 1056, Ronson Products Ltd v Ronson Furniture Ltd (1966) RPC 497, and Davy International Ltd vs Tazyman (1997) 1 WLR 1256 .

In the present application, the 2<sup>nd</sup> to 4<sup>th</sup> Defendants having conceded that they were served with the court order issued on 22<sup>nd</sup> August 2012 were therefore aware of the same, and it would be diminishing the dignity of Courts if parties who were aware of an order upon service, were to be exonerated in the event of its disobedience on account of non-service of the notice of penal consequences.

Lastly. On the issue of personal service of the order issued on 22/8/2012, the affidavit of service by the process server sworn on 28<sup>th</sup> August 2012 that was attached by the Plaintiff as evidence of the said personal service does not indicate that there was any service of the said order on the 5<sup>th</sup> Defendant. The 5<sup>th</sup> Defendant cannot therefore be found to have been aware of the said order, and consequently cannot also be culpable of its disobedience.

The second issue for determination is whether the 2<sup>nd</sup> to 4<sup>th</sup> Defendants, whom this Court has found were the ones aware of the orders issued on 22/8/2012, 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 acts of contempt alleged by the Plaintiff are captured in paragraph 6 of the verifying affidavit sworn by Azim Virjee on 31<sup>st</sup> August 2012, wherein he states as follows:

**“That notwithstanding the fact that the Defendant and their agents were served with and had knowledge of the Order, on the 28<sup>th</sup> day of August 2012, JOSEPH ONG'ETE, PETER OCHIENG, PHILEMON OLOO and NAFTALI OGOLA OGOLLA being the defendants herein, however I have been reliably informed by my agents and/or servants on ground**

**which information I verily believe to be true that the defendants herein have continued with the sub-division and sale of the portions of land parcel LR No. 11531/13 to the unsuspecting members of public purporting to be its lawful owners and have further continued to waste and damage portions thereof by using other portions as quarries, developing the suit property will consequently be very expensive.”**

No evidence of the alleged subdivision and sale of land parcel number LR No 11531/13 by the 2<sup>nd</sup> to 4<sup>th</sup> Defendants was provided by the Plaintiff. The only evidence provided by the Plaintiff was a photograph to show the developments and waste undertaken by the Defendants on the suit property. The said photograph upon perusal, has on its face has a date of 2<sup>nd</sup> August 2012.

Upon further perusal of the court record, the court also noted that the same photograph was attached to an affidavit sworn by the said Azim Virjee on 2<sup>nd</sup> August 2012 in support of the application for the injunction. This was before the orders alleged to have been disobeyed had even been issued. It is therefore evident that the said photograph is not credible evidence of the damage alleged to have been committed after the service of the court orders on the 2<sup>nd</sup> to 4<sup>th</sup> Defendant on 28<sup>th</sup> August 2012.

Arising from the foregoing findings, the Plaintiff is not entitled to the orders sought as they have not shown that the 5<sup>th</sup> Defendant was served or aware of the orders alleged to have been disobeyed, and they have also not brought any evidence of the disobedience by the 2<sup>nd</sup> to the 4<sup>th</sup> Defendants of the said orders. The Plaintiffs Notice of Motion dated 10<sup>th</sup> September 2012 is accordingly declined, and the Plaintiff shall pay the costs of the said Notice of Motion.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this \_\_\_\_9<sup>th</sup>\_\_\_\_ day of\_\_\_\_October\_\_\_\_, 2014.

**P. NYAMWEYA**

**JUDGE**