



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

ENVIRONMENT AND LAND COURT

ELC.NO.614 OF 2012

DAVID NGATI & OTHERS.....PLAINTIFFS/APPLICANTS

-VERSUS-

EMBAKASI VILLAGE CRAFT CURIOS & JUA KALI

ASSOCIATION & OTHERS.....DEFENDANTS/RESPONDENTS

**RULING**

The matter for determination is **Notice of Motion** application dated **28<sup>th</sup> October 2015**, brought by the Plaintiffs/Applicants under Order 40 Rules 3(1) of the Civil Procedure Rules 2010 and Sections 1A, 1B, and 63(e) of the Civil Procedure Act, Cap 21, Laws of Kenya and Section 5 of the Judicature Act seeking for orders, inter alia, that:-

*i. Spent.*

*ii. That the Deputy Registrar of Societies, Mr. Joseph Onyango, be arrested and committed to Civil Jail for a term not exceeding 6 months or to a fine of at least Kshs.2,000,000/= for disobedience of Court Order or both.*

This application is premised on the **Supporting Affidavit** of **David Ngati** ('the 1<sup>st</sup> Plaintiff'), who avers that this Honourable court issued an Order on **14<sup>th</sup> August 2015**, to wit the **Registrar of Societies** was directed to hear and determine the dispute herein which entailed leadership wrangles of the Society.

That subsequently, the orders were served on the **Deputy Registrar of Societies** on **31<sup>st</sup> August 2015**, who undertook to act on the same. The Applicant contended that despite numerous visits and reminders to the Registrar to call for a meeting to resolve the leadership issued marring the Society, he has failed, declined and/or neglected to do the same. The Applicant urged this Court to hold the **Deputy Registrar of Societies** in **contempt of Court** and order for his **arrest** and **Committal to Civil Jail** for a term not exceeding **six months** or to a **fine** of at least **Kshs.2,000,000/=** or **both** for disobedience of Court Orders.

The application is **opposed** and **Joseph L. Onyango**, a **Senior Principal State Counsel** at the

**Attorney General's Chambers** swore a **Replying Affidavit**. He averred that the whole **application is fatally defective, incurably incompetent, worthless and liable to be struck out**. He also averred that some of the officials of the Society have been changed from time to time. However, the 3<sup>rd</sup> to 6<sup>th</sup> Defendants have been officials from inception of this society. It was his allegation that the Society has had leadership wrangles and disputes as to the membership of the Society ad land matter. Further, that the Deputy Registrar of Societies tried to mediate the disputes but he has been frustrated by the officials of the Society with regard to mediation of the issues affecting the Society. It was his contention that the issues affecting the Society revolved around ownership of land by members of the two Societies herein. It was his further contention that ownership of the land cannot be determined without the knowledge of the members of the two Societies. He also contended that for the elections to be valid, there is need for establishment of genuine members of each Society.

It was his disposition that the Court did direct that their office mediates on the issues affecting the Society within 6 months upon a claim made by the Plaintiff to the Registrar of Societies within 14 days. It was his contention that the Registrar of Societies was not a party to this suit and hence it purely depended on the parties to inform the Registrar of Societies on the orders. He alleged that he was never served with the said Court Order.

The deponent further alleged that he only received the letter of the claim on **7<sup>th</sup> January 2016**. That the said letter had been received at their main Registry but it was misfiled by the their Registry staff. It was his contention, that their office convened a meeting vide a letter dated **4<sup>th</sup> March 2016**, with the aim of mediation directed by the Court. However, on **14<sup>th</sup> March 2016**, the parties frustrated the said mediation meeting as the Defendants and their advocates stormed out of the said meeting without discussing any agenda. He further contended that the Registrar of Societies has been frustrated in all efforts made to resolve the issues as all the parties to the dispute are not willing to resolve the dispute and there cannot be mediation without co-operation from the parties. It was his further contention that the dispute herein can be resolved if the Society would convene an Annual General Meeting wherein all issues would be discussed and that the Registrar of Societies always carry out its administrative duties relying on good faith. He also contended that his office has made numerous attempts towards resolving the disputes to no avail. Further that due diligence was applied by the Registrar of Societies in dealing with the issues. However, parties still filed this suit, and he therefore contended that the current application is devoid of any merit, is vindictive, malicious and full of falsehoods and an abuse of the Court process. He urged the Court to dismiss the same.

The Applicant filed a further Affidavit and averred that the **Replying Affidavit** by **Joseph Onyango** is **evasive, inaccurate and misleading**.

The application was **canvassed by way of Written Submissions**. The Plaintiffs/Applicants filed their submissions on **16<sup>th</sup> June 2016**, and the Registrar of Societies filed his Written Submissions on **1<sup>st</sup> September 2016**.

This Court has now carefully considered the instant **Notice of Motion**, the general Court records and the annexes thereto. The Court has also considered the relevant provisions of law and makes the following findings;

The application herein is anchored under Order 40 Rule 3(1) which states as follows:-

**"In cases of disobedience or 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.”***

Clearly, the above provisions of law is applicable when there is disobedience of an order of injunction. However, the Plaintiffs/Applicants are complaining about disobedience of a Court Order that was issued on **14<sup>th</sup> August 2015**, which Order stated that:-

***“The Plaintiffs shall within 14 days of the date hereof initiate a claim before the Registrar of Societies and file the outcome thereof within 7 days of delivery of the decision.”***

Clearly, the above order has nothing to do with injunction and therefore Order 40 Rule 3(1) is not applicable at all. However, the application is also anchored under Sections 1A, 1B, 3, 3A and 63(e) of the Civil Procedure Act which deals with overriding objective of the Act.

Further, the application is also brought under Section 5 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 if the same being possessed by the High Court of Justice in England, and that power shall extend to upholding the authority and dignity of Subordinate Court.”***

This Court therefore, having the equal **Status** as the High Court can therefore apply the provisions of Section 5 of the Judicature Act, to punish a person who is in Contempt of a Court Order.

The applicant has alleged that the Registrar of Societies is in Contempt of the Court Order issued on **14<sup>th</sup> August 2015**, and this Court should punish him accordingly. The Registrar of Societies has denied that he is in such Contempt and he has urged the Court to dismiss the instant application. The Court is called upon to determine whether the said Registrar of Societies is in Contempt of the said Court Order and if so what orders should attach"

**Contempt of Court** is defined by Black Law dictionary as:-

***“Conduct that defies the authority or dignity of a Court. Because such conduct interfere with the administration of justice, it is punishable usually by a fine or imprisonment.”***

Therefore, from the above description, it is clear that Contempt of Court is a serious conduct as it undermines the authority of the Court. Indeed Courts do frown on cases of Contempt of Court because such actions do undermine the authority and dignity of the Court. In the case of **Teachers Service Commission...Vs...Kenya National Union of Teachers & 2 Others (2013) eKLR**, the Court held that:-

***“A Court Order is not a mere suggestion or an opinion or a point of view. It is a directive that is issued after much thought and with circumspection. It must therefore be complied with and it is in the interest of any person that this remains the case. To see it in any other way is to open the door to chaos and anarchy ....”***

Therefore Courts do not take it lightly when a party fails to comply with a Court Order. In the case of **Hadkinson...Vs...Hadkinson, (1952) ALL ER 567**, the Court held that:-

***“It is the plain and unqualified obligation of every person against, or in respect of whom an order is made by a Court of competent jurisdiction to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or even void. Lord Cottenham,***

**L.C. said in Chuch..Vs..Cremer (1) (1 Coop, temp,Cott 342):-**

***“A party, who knows of an order, whether null or valid, regular or irregular, cannot be permitted to disobey it... It would be most dangerous to hold that the suitors, or their solicitors, could themselves judge whether an order was null and valid- whether it was regular or irregular. That they should come to the court and not take upon themselves to determine such a question. That the course of a party knowing of an order, which was null or irregular, and who might be affected by it, was plain. He should apply to the court that it might be discharged. As long as it exists it must not be disobeyed.”***

Further, this Court in **Refrigeration and Kitchen Utensils Ltd ...Vs**

**..Gulabchand Popatlal Shal & Another, Civil Application No.39 of 1990** held:

***“It is essential for the maintenance of the rule of law and good order that the authority and dignity of our courts is upheld at all times.”***

From the above findings of the Court, it is clear that for a person to be held in Contempt of a Court Order, he/she must be aware of the existence of the Court Order.

It is evident that in this case, the Registrar of Societies was not party to this suit. The Court had on **14<sup>th</sup> August 2015**, directed that **‘The Plaintiff shall within 14 days of the date hereof, initiate a claim before the Registrar of Societies....’** The Registrar of Societies having not been a party to the suit depended on the initiative of the Plaintiff herein. The Plaintiffs/Applicants were therefore supposed to have served the Registrar of Societies by **28<sup>th</sup> August 2015**. The Registrar of Societies alleged that he was not personally served with the Court Order. That the said Order was served together with the letter or Statement of Claim and their Registry staff filed it away.

The Court has indeed seen the said Court Order which was allegedly served on the Registrar of Societies. The Receiving Stamp shows that it was received by the Office of the Attorney General, Registrar General. The stamp does not show that the Order was served on **Joseph L. Onyango**, the Registrar of Societies, whom the applicants have cited for Contempt of Court Order. Though it is trite that a Court Order is binding to all parties as a Judgement or Order pronounced by the Court, such parties should have knowledge of the said Court Order or Judgement see the case of **Edokpolo Osamwonyi ..Vs..John Patrick Machira & Another (2009) eKLR**.

Further, in the case of **Mutitika...Vs... Baharini Farm Ltd, Civil appeal No.24 of 1985**, the Court held:-

***“A person who knowing of an injunction or of an order of stay, willfully does something or causes others to do something to break the injunction or interfere with the stay is liable to be committed for contempt of Court as such person has by his conduct obstructed justice.”***

It is evident that the contemnor herein was not a party to this suit. How was he to know of the Court Order" The Plaintiffs/Applicants were the ones mandated to initiate a claim. The contemnor ought to have known of the Court Order herein by been served personally. The deponent of the **Replying Affidavit, Joseph L. Onyango**, has alleged that he was not served with the Court Order that was served on the office of the Attorney General on **31<sup>st</sup> August 2015**. Indeed, there is no evidence of such service to the said **Joseph Onyango** who has been cited for contempt of Court Order by the Applicants herein. In the case of **Kiwi Ltd..Vs...Reef Hotels Ltd, Mombasa HCMA No.616 of 2006**, the Court held that:-

***“As a general rule, no order of Court requiring a person to do or abstain from doing any act maybe enforced unless a copy of the order has been served personally on the person required to do or abstain from doing the act in question.”***

The Applicants have alleged that they served **Joseph Onyango**, the **Registrar of Societies**, with the Court Order which he failed to comply with and therefore he should be cited for contempt of Court. However, there is no evidence that the said alleged contemnor was served personally with the Court Order given that he is cited personally. The alleged contemnor stated that the Court Order was mistakenly filed away by their Registry Staff. If that was the case, then he would not have had knowledge of existence of the said Court Order. See the case of **Kariuki & Others..Vs...Minister for Gender, Sports Culture and Social Services & Others (2004) 1KLR**, where the Court stated that:-

***“Service on the alleged contemnor’s advocates did not constitute personal service and even if the alleged contemnor had knowledge of the Order through the advocate, he would not be liable for Contempt.”***

Further, it was not just enough to state that the Registrar of Societies was in Contempt of the Court Order. The Plaintiffs herein were supposed to initiate a claim. It is not clear whether the Plaintiffs did initiate the said claim because the letter attached to the Court Order served on **31<sup>st</sup> August 2015**, is dated **4<sup>th</sup> May 2015**. The said letter was allegedly written before the Court issued the Order on **14<sup>th</sup> August 2015**.

It is evident that the proof of Contempt of Court allegation is on a higher standard. See the case **of Mary Wamaita Makumi ..Vs..Phylis Nduta Ngugi, civil App. No.62 of 1988**, where the Court held that:

***“Therefore Contempt of Court being a kin to criminal offence leading to penal consequences, ie committal to Civil Jail or Imprisonment, wherein the person loses his personal liberty then the standard of proof is beyond reasonable doubt.... The individual must have knowledge and the intention to disobey the Court Order and proceeds wantonly, recklessly and deliberately to do so.”***

Further, in the case of **Mutitika..Vs..Baharini Farm Ltd (Supra)**, the Court held that:-

***“The standard of proof in contempt proceedings must be higher than proof on the balance of probabilities, almost but not exactly beyond reasonable doubt...”***

***Recourse ought not be had through process of contempt in aid of a civil remedy where there is other methods of doing justice. The jurisdiction of committing for contempt being practically arbitrary and unlimited should be most jealously and carefully watched and exercised with the greatest reluctance and the greatest anxiety on the part of Judge to see whether there is no other mode which is open to the objectives of arbitrariness, and which can be brought to bear upon the subject.”***

Bearing in mind the above stated decisions from other Courts and the circumstances of this Court and the available evidence, the Court finds that the Applicants herein have failed to establish or proof that the cited contemnor, **Joseph Onyango**, the Registrar of Societies was in contempt of the Court Order issued on **14<sup>th</sup> August 2015**. His explanation that he was not served personally with the said Court Order and had no knowledge of the same is plausible. Consequently, the Court finds that the **Plaintiffs/Applicants Notice of Motion** application dated **28<sup>th</sup> October 2015**, is **not merited**. The said application is hereby **dismissed entirely with costs to the alleged contemnor, Joseph Onyango**.

It is so ordered.

Dated, Signed and Delivered at Nairobi this 7<sup>th</sup> day of **September, 2017**.

**L. GACHERU**

**JUDGE**

**7/9/2017**

In the presence of

No appearance for Plaintiffs/Applicants though served with Notice

No appearance for Defendants/Respondents though served with Notice

No appearance for contemnor

Philis - Court clerk.

**L. GACHERU**

**JUDGE**

**7/9/2017**



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