



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

HCCC NO. 694 OF 2012

AFRICA TELCOM SOLUTIONS LIMITEDPLAINTIFF

VERSUS

KWAKA GENERAL MERCHANTS LIMITED1ST DEFENDANT

MUGANDA WASULWA

T/A KEYSIAN AUCTIONEERS.....2ND DEFENDANT

RULING

1. Through the application dated 18th December 2017, the plaintiff/applicant seeks the following orders:

1. Spent

2. That the 1st defendant/respondent including Stephen Kimani Kamau and the 2nd defendant and all its Directors be held in contempt of this Honourable court.

3. That the 1st defendant /respondent and all its Directors including Stephen Kimani Kamau and the 2nd defendant and all its Directors be committed to civil jail for a term of period of six(6) months, in accordance to Section 28(6) and Section 29(2) of the Contempt of Court Act 46 of 2016.

4. That a warrant of arrest be issued upon the 1st defendant/respondent and all its directors including STEPHEN KIMANI KAMAU and the defendants and all its directors immediately.

5. That this Honourable court be pleased to order that the OCS Kilimani police station, do assist the plaintiff/applicant in enforcing the said order, to the effect that the plaintiff/applicant retains possession of the suit property, Land Reference number 1/115(Original number 1158/2/7 situated along Lenana road, Kilimani area within Nairobi County, and the 1st defendant/respondent do forthwith move out from the said suit property immediately.

6. That the 1st and 2nd defendant /respondent, be denied audience before this Honourable court until such time as they shall have purged their contempt.

7. That this honourable court be pleased to issue any other orders for contempt of court as it may well deem to be fit.

2. The application is brought under Order 40 Rule 3(1) and Section 5 of the judicature among other statutory provisions. It is supported by the affidavit of the applicant's director, **Mr. Francis Ngirabatware** and is premised on the grounds that the defendants have willfully declined to obey the specific court orders issued by Justice Fred Ochieng, on 7th April 2017, directing the 1st defendant to vacate the suit property being LR No. 1/115 (original Number 1158/2/7) situated along Lenana Road, Kilimani area within Nairobi County.

3. The applicant contends that the said order was extracted and served upon the defendants' lawyers on 4th August 2017 but that the said advocates have been reluctant to ensure that their clients adhere to the order thereby causing great loss to the plaintiff. It is the applicant's case that all its efforts to ensure that the 1st defendant vacates the suit property have been futile.

4. The 1st defendant opposed the application through the replying affidavit of its director **Mr. Stephen Kimani Kamau** who denies the claim

that the defendants have disobeyed any court order and avers that the applicant has intentionally, willfully and continuously frustrated the 1st defendant's ownership and quiet enjoyment of the suit property.

5. He states that the suit property was the subject of attachment in respect to Miscellaneous Application No. 949 of 2007 in satisfaction of the taxed costs owed by one **Pasteur Dukuzumuremyi** to the firm of **Lubulellah & Associates Advocates** in respect to fees for representing the said **Pasteur Dukuzumuremyi** in Nairobi HCCC 230 of 2005 and HCCC402 of 2005.

6. He adds that this court, in the said cause, attached the said suit property vide a prohibitory order issued by **Waweru J.** on 21st October 2009 which order was lodged with the Registrar of Government Lands against the suit property.

7. He avers that the sale of the suit property was sanctioned by this court's order after which the sale was conducted by public auction where the 1st defendant emerged the highest bidder for the sum of Kshs 10 million. He explains that the 1st defendant was then duly issued with a memorandum of sale and a certificate of sale after which the sale was declared absolute on 24th November 2010 and the property vested in the 1st defendant.

8. It is the 1st defendant's case that following the registration of vesting orders in its favour, it sought vacant possession of the suit property through HCCC 486 of 2011. He adds that on 14th November 2011, **Mwera J.** granted the 1st defendant orders for vacant possession of the suit property after which the previous occupants therein were evicted and the 1st defendant then gained its occupation.

9. He further avers that the said **Pasteur Dukuzumuremyi** challenged the sale of the suit property to the 1st defendant in HCCC 949 of 2007 but that in a ruling delivered in 18th October 2013, the application to set aside the sale was dismissed.

10. He states that the said **Dukuzumuremyi** then made an application to the Court of Appeal in Civil Application No. 325 of 2013 challenging the 1st defendant's occupation and ownership of the suit property which application was dismissed on 6th June 2014.

11. It is further averred that the issues relating to the validity of the sale and ownership of the suit property were also pending before the Court of Appeal in Nairobi Civil Appeal No. 176 of 2015 until 13th December 2017 when the said appeal was withdrawn with costs to the 1st defendant.

12. He contends that the 1st defendant is undoubtedly the rightful owner of the suit property and cannot therefore be in contempt of the court orders of 7th April 2017. He further states that the plaintiff has employed numerous tactics to dispose the 1st defendant of its legally acquired property including the instant application.

13. He states that it would be a mockery of the court's process for one judge to make orders confirming the sale of the suit property to the 1st defendant and for another judge to restrain the same 1st defendant from the suit property. It is the 1st defendant's case that his ownership and occupation of the suit property has been duly sanctioned by this court's order.

14. Parties canvassed the application by way of written submissions which I have carefully considered. The main issue for determination is whether the respondents/defendants are in contempt of court.

15. According to *Black's Law Dictionary*; [14] 9th Edition, page 360

"Contempt is a disregard of, disobedience to, the rules, or orders of a legislative or judicial body, or an interruption of its proceedings by disorderly behavior or insolent language, in its presence or so near thereto as to disturb the proceedings or to impair the respect due to such a body."

16. In *Halsbury's Laws of England* it is stated:-

"It was the plain and unqualified obligation of every person against or in respect of whom an order was made by a court of competent jurisdiction to obey it unless and until it was discharged and disobedience of such an order would as a general rule result in the person disobeying it being in contempt and punishable by committal or attachmentan application to court by him not being entertained until he had purged his contempt"

17. In *Econet Wireless Kenya Ltd vs Minister for Information & Communication of Kenya & Another* {2005} 1KLR 828 **Ibrahim J** (as he then was) stated as follows:-

"It is essential for the maintenance of the Rule of Law and order that the authority and the dignity of our Courts are upheld at all times. The Court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors. It is the plain and unqualified obligation of every person against or in respect of whom, an order is made by 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 void."

18. From the above definition of contempt of court and the cited authorities, it is clear that contempt of court is the willful disobedience of court orders that brings the court into disrepute.

19. By their very nature contempt of court proceedings are quasi criminal in nature since the liberty of a person is at stake as they can culminate in the jail sentence should a contemnor be found to be guilty of contempt. For this reason, the standard of proof in contempt cases is higher than proof in ordinary civil cases. This is the position that was reiterated in the case of *Gatharia K. Mutikika v Baharini Farm Ltd* (1985) KLR 227 where it was held as follows:-

"The Courts take the view that where the liberty of the subject is, or might be involved, the breach for which the alleged contemnor is cited must be precisely defined. A contempt of court is an offence of a criminal character. A man may be sent to prison. It must be satisfactorily proved... I must be higher than proof on a balance of probabilities, almost, but not exactly, beyond reasonable doubt. The standard of proof beyond reasonable doubt ought to be left where it belongs, to wit, in criminal cases. It is not safe to extend it to offence, which can be said to be quasi-criminal in nature. However, the guilt has to be proved with such strictness of proof as is consistent with the gravity of the charge... Recourse ought not be had to process of contempt of court in aid of a civil remedy where there is any other method 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 judges to see whether there is no other mode which is not open to the objection of arbitrariness, and which can be brought to bear upon the subject. A judge must be careful to see that the cause cannot be mode of dealing with persons brought before him. Necessary though the jurisdiction may be, it is necessary only in the sense in which extreme measures are sometimes necessary to preserve men's rights, that is, if no other pertinent remedy can be found... Applying the test that the standard of proof should be consistent with the gravity of the alleged contempt..... it is competent for the court where a contempt is threatened or has been committed, and on an application to commit, to take the lenient course of granting an injunction instead of making an order for committal or sequestration, whether the offender is a party to the proceedings or not."

20. In *Peter K. Yego & Others v Pauline Nekesa Kode* Nakuru HCCC No. 194 of 2004 the court recognizing that contempt of court is criminal, held that it must be proved that one has actually disobeyed the court order before one is cited for contempt. The applicant in an application for contempt must prove beyond peradventure that the respondent is guilty of contempt. (See *G. V. Odunga J* in Misc. App No 268 of 2014 (J.R.)

21. In the present case, I note that the impugned court order dated 10th March 2015 that the 1st defendant is alleged to have disobeyed was as follows:

"That until further orders of the court, the plaintiff will retain possession of the suit property.

That means that if the 1st respondent had obtained possession through the use of the order dated 10th June, 2014, he must move out forthwith or else he will be compelled to move out."

22. The applicant's case was that the 1st defendant did not obey the above order while on its part, the 1st defendant argued that not only was the applicant not in possession of the suit property as at the time that the impugned order was issued, but that the 1st defendant did not obtain possession of the suit property through an order dated 10th June 2014.

23. The 1st defendant did not deny that it was in possession of the suit property despite the existence of the impugned but justified its acquisition and its occupation of the suit property through the following sequence of events that were not disputed by the applicant:

- *That the suit property herein was subject of attachment by the honourable court in Miscellaneous Application No. 949 of 2007 in satisfaction of the taxed costs owed by one Pasteur Dukuzumuremyi to the firm of Lubullellah & Associates Advocate in respect to fees for representing the said Pasteur Dukuzumuremyi in Nairobi Civil suits HCCC NO. 230 of 2005 and HCCC NO. 402 of 2005 as shown in the copy of the Ruling marked as 'SK1' in the respondents' replying affidavit.*
- *That this court attached the said property vide a prohibitory order issued by Justice Waweru on 21st October 2009 as shown in the prohibitory order marked as 'SK2' in the respondent's replying affidavit.*
- *That after the property was cleared for sale and subsequently the sale sanctioned by court the respondents assiduously conducted due diligence which revealed that the said Pasteur Dukuzumuremyi was indeed the registered proprietor of the suit property as shown in the search and an application for copy marked and 'SK3' in the respondent' replying affidavit.*
- *That the property was advertized for sale and the sale conducted by way of public auction by Galaxy Auctioneers Limited at Pangani Auction Centre. (* See a copy of notification of sale and the Daily Nation Newspaper excerpts marked as 'SK4' in the respondent's replying affidavit).*
- *That the sale proceeded and the 1st respondent/defendant herein emerged as the highest bidder for the sum of Kshs 10,000,000/= which sum was paid to the Honourable Court as shown in the letter from the Auctioneers confirming the sale, schedule of bidders, copies of RTGS, deposit receipt and a letter dated 4th October 2010 marked as 'SK5 and 'SK6' in the respondent's replying affidavit.*
- *That the 1st respondent was duly issued with a Memorandum of sale and a certificate of sale as exhibited in copies of certificate of sale and memorandum of sale marked 'SK7' in the respondent's replying affidavit.*
- *That the sale was confirmed and declared absolute on 24th November 2010 and the property vested to the 1st respondent herein and the same was affirmed by the order issued on 22nd December 2010 and rectified on 17th May 2011 as indicated in the copies of the said orders declaring the sale absolute and vesting the same upon the 1st respondent marked as 'SK8' in the respondent's replying affidavit sworn by Stephen Kimani Kamau on 6th February 2019.*
- *That after the 1st respondent had registered the said orders Justice Mwera in Nairobi HCCC 486 of 2011 issued orders for the delivery of vacant possession of the suit property to the 1st respondent with the result that the occupants of the suit property be evicted therefrom as shown in the eviction order marked as 'SK11' in the respondent's replying affidavit.*
- *That the 1st respondent herein gained possession of the suit property herein being L.R. No. 1/1151 (Original number 1158/2/7)*

on the strength of the court orders aforesaid and the same have not been impeached, discharged, varied and/or set aside to date.

24. The four main elements that must be satisfied for an application for contempt of the court to succeed were discussed in *Ochino & Another v Okombo & 4 Others* [1989] eKLR as follows:

i. The terms of the order (or injunction or undertaking) were clear and unambiguous and were binding on the defendant;

ii. The defendant had knowledge of a proper notice of the terms of the order;

iii. The defendant has acted in breach of the terms of the order; and

iv. The defendant's conduct was deliberate.

25. Similarly, the High Court of South Africa in the case of *Kristen Carla Burchell v Barry Grant Burchell* Eastern Cape Division Case No. 364 of 2005 held that in order to succeed in civil contempt proceedings, the applicant has to prove **(i) the terms of the order, (ii) Knowledge of these terms by the Respondent, (iii). Failure by the Respondent to comply with the terms of the order.** Upon proof of these requirements the presence of willfulness and bad faith on the part of the Respondent would normally be inferred, but the Respondent could rebut this inference by contrary proof on a balance of probabilities.

26. As I have already stated in this ruling, it is not in dispute that the impugned order was issued and that the 1st defendant had knowledge or proper notice of the terms of the said order. The question which begs an answer in this application is whether the 1st defendant has acted in breach of the terms of the order and if such breach is deliberate.

27. I find that the answer to the above question is to the negative. My take is that in the circumstances of this case, the 1st defendant cannot be said to be in deliberate breach of a court order when he has explained, which explanation has not been dislodged, that the court sanctioned his ownership and occupation of the suit property.

28. I note that the scenario presented in this matter is one where parties have competing court orders emanating from different courts over the same subject matter. It was not disputed that the 1st defendant acquired ownership and occupation of the suit premises through a court order which has not been overturned or set aside.

29. Having regard to the findings and observations that I have made in this ruling, I find that the application dated 18th December is not merited and I therefore dismiss it with orders that costs shall abide the outcome of the main suit.

Dated, signed and delivered via skype at Nairobi this 23rd day of April 2020 in view of the declaration of measures restricting court operations due to Covid -19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on the 17th April 2020.

W. A. OKWANY

JUDGE

In the presence of:

Miss Nyanchoka for the plaintiff

C/A & DR – Hon Tanui