



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC SUIT NO. 374 OF 2016**

**PAUL JUVE NGEI MAINGI.....PLAINTIFF**

**VERSUS**

**STEVE MATATA.....DEFENDANT**

**RULING**

On 22<sup>nd</sup> November, 2016 this court issued an order on the following terms:

- 1. That a temporary injunction is hereby issued restraining the defendant by himself, his agents, employees and/or servants from building on trespassing, cultivating, alienating and dealing in any way with the land parcel known as Plot No. 2 Block 26 on L.R No. 1504/7 Kathangaita Owners Association (“the suit property”) pending the hearing and determination of this suit.**
- 2. That the O.C.S Mlolongo Police Station does ensure that security prevails.**

The defendant was not present when the order was made. He was served with the application in which the order was sought but he did not appear for the hearing thereof. The orders of 22<sup>nd</sup> November, 2016 have neither been varied nor set aside and there is no application pending for that purpose.

What is now before me is the plaintiff’s Notice of Motion application dated 22<sup>nd</sup> June, 2017 in which the plaintiff has sought the committal of the defendant to civil jail for a term not exceeding six (6) months for disobeying the said court order. The plaintiff has averred that despite service of the order upon the defendant, the defendant continued with construction of a building on the suit property. The plaintiff has annexed to his affidavit in support of the application a copy of the order the defendant is said to have disobeyed and the affidavit of service thereof upon the defendant. The contempt application was served upon the defendant and when it came up for hearing on 27<sup>th</sup> July, 2017, the defendant’s advocate asked for time to respond to the same which request the court granted and adjourned the matter. On 19<sup>th</sup> September, 2017, the defendant’s advocates filed grounds of opposition in response to the application in which the defendant contended that the application is frivolous and amounts to an abuse of the process of the court. The defendant contended that he has no interest in the suit property and that the suit discloses no cause of action against him. The defendant contended further that the application is defective the same having been brought without leave of the court.

When the application came up for hearing on 6<sup>th</sup> November, 2017, the plaintiff’s advocate relied entirely on the contents of the affidavit in support of the application. In response to the defendant’s contention that the application is defective, the plaintiff’s advocate submitted that the plaintiff did not require leave before instituting contempt of court proceedings. The plaintiff’s advocate submitted that the defendant did not controvert the averments in the affidavit in support of the application as to service of the order upon him and the fact that he was continuing with construction on the suit property despite such service.

In response, the defendant’s advocates reiterated the contents of the ground of opposition dated 6<sup>th</sup> September, 2017 and submitted that the plaintiff’s claim discloses no cause of action against the defendant. The defendant’s advocate submitted that the defendant is neither the owner nor in possession of the suit property. The defendant’s advocate submitted further that the plaintiff had not demonstrated that the defendant was in contempt of the court order that was made on 22<sup>nd</sup> November, 2016.

I have considered the application and the grounds of opposition filed in response thereto by the defendant. The following is my view on the matter. The plaintiff filed this suit against the defendant claiming that he is the owner of the suit property and that the defendant had trespassed on the suit property and commenced construction of a building thereon. There is uncontroverted evidence on record that the defendant was served on 8<sup>th</sup> August, 2016 with the plaint, witness statements and list of documents that were filed herein by the plaintiff together with a Notice of Motion application for injunction dated 15<sup>th</sup> June, 2016. There is also uncontroverted evidence that the defendant was served with a hearing notice in respect of the said application for injunction when it was fixed for hearing on 22<sup>nd</sup> November, 2016 and

was allowed. The defendant did not file a replying affidavit in response to the contempt application. The averments of fact contained in the affidavit in support of the application are uncontroverted. The defendant did not deny that the court issued an order on 22<sup>nd</sup> November, 2016 restraining him from trespassing on the suit property. The defendant did not deny that the order was served upon him. The affidavit of service annexed to the affidavit in support of the application was not challenged. The defendant did not also controvert the averment that he continued with construction on the suit property even after being served with the court order. The defendant's opposition to the application was limited to the form of the application and the merit of the suit. With regard to the form of the application, I am in agreement with the plaintiff that leave is not necessary before commencing contempt proceedings for breach of a court order. With regard to the issue as to whether or not the suit discloses a cause of action against the defendant, my view is that this is an issue that can only be determined after the close of the pleadings. At the moment, the defendant has not placed any material before the court regarding his connection to the suit property on the basis of which the court can determine whether or not the suit discloses a cause of action against him. Although the defendant has claimed that he has no interest in the suit property that statement has not been made on oath. The process server found the defendant on the suit property on the two occasions he went to serve him with the court process. The defendant has not explained what business he was undertaking on the suit property on those occasions. I have found the averments in the defendant's grounds of opposition evasive as concerns the issues before the court. I am satisfied that the plaintiff has proved that the defendant breached the order that was made herein on 22<sup>nd</sup> November, 2016.

Consequently, I find the defendant in contempt of the said orders and hereby order that summons do issue for service upon him if he is not in court to appear before this court on a date to be fixed to address the court in mitigation before a sentence is passed against him. The plaintiff shall have the costs of the application dated 22<sup>nd</sup> June, 2017.

**Dated and delivered at Nairobi this 28<sup>th</sup> day of June 2018**

**S. OKONG'O**

**JUDGE**

**Ruling read in open court in the presence of:**

Mr. Kariuki holding brief for Mr. Maina for the Plaintiff

No appearance for the Defendant

Catherine Court Assistant