



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT ELDORET

ELC NO. 239 OF 2016

STEPHEN KIMANI GITAU.....PLAINTIFF/APPLICANT

VERSUS

JOSEPH MOMANYI SURE.....1ST DEFENDANT/RESPONDENT

PATRICK NYAUNDI OBUTU.....2ND DEFENDANT/RESPONDENT

RULING

This ruling is in respect of an application dated 24th June 2020 by the plaintiff applicant seeking for the following orders:

a) Spent

b) That the 2nd Respondent be committed to civil jail for a period not exceeding six months for disobeying the orders issued on 19th March 2020.

c) That the monthly rental income arising from the rental units on land parcel No. Eldoret Municipality Block 14/323 be deposited in court until this suit is heard and determined.

d) In the alternative the 2nd defendant, his agents or servants be restrained from occupying the rental premises constructed on land parcel No. Eldoret Municipality Block 14/323.

e) Costs of this application be provided for.

Counsel agreed to canvas the application vide written submissions which were duly filed

PLAINTIFF/APPLICANT'S SUBMISSIONS

Counsel relied on the grounds on the face of the application together with the applicant's supporting affidavit where he deponed that the orders of status quo to be maintained were served on the 2nd Defendant/respondent on 2nd April 2020 but he has since proceeded to build rental units on the suit land in deliberate disobedience of court orders.

Counsel relied on the case of *KIMANJA KAMAU (Suing as the personal representative of the representative of the estate of GIDEON GITUNDU KIMERE-deceased v Francis Mwangi Mwaura & another [2018] eKLR* where the court held that: -

In order to succeed in civil contempt proceedings, the Applicant is duty bound to prove the following 4 elements; -

a. The terms of the Order (or injunction or undertaking) were clear and unambiguous and were binding on the Defendant;

b. The Defendant had knowledge of or proper notice of the terms of the Order;

c. The Defendant has acted in breach of the terms of the Order; and

d. The Defendant's conduct was deliberate.

Counsel identified two issues for determination by the court as, whether the terms of the order issued on 19th March 2020 were clear and unambiguous and were binding on the defendant and whether the contemnor had knowledge of or proper notice of the terms of the order.

On the first issue, it was counsel's submission that the orders issued were clear and unambiguous and relied on the case of ***IN THE MATTER OF AN APPLICATION BY SAIFUDEEN ABDULLABHAI & 4 OTHERS FOR LEAVE TO APPLY FOR JUDICIAL REVIEW AND FOR ORDERS OF CERTIORARI AND PROHIBITION [2013]eKLR*** where the court cited with approval the case of ***Mombasa Misc. Civil Application (JR) No.26 of 2010 Republic –vs- The Chairperson Business Premises Rent Tribunal at Mombasa (Bench Mochache) Exparte Baobab Beach Resort (Mombasa Limited) & Monica Clara Schriel*** where the court held that:

“In my view, an order to Status quo to be maintained is different from an order of injunction both in terms of the principles for grant and the practical effect of each. While the latter is a substantive equitable remedy granted upon establishment of right, or at interlocutory stage, a prima facie case, among other principles to be considered, the former is simply an ancillary order for the preservation of the situation as it exists in relation to pending proceedings before the hearing and determination thereof. It does not depend on proof of right or prima facie case. In its effect, an injunction may compel the doing or restrain the doing of a certain act, such as, respectively, the reinstatement of an evicted tenant or the eviction of the tenant in possession. An order for status quo merely leaves the situation or things as they stand pending the hearing of the reference or complaint. In its negative form, however, an injunction may have the same effect as an order for status quo. I find that the Tribunal has among the orders that it may make on a complaint under section 12(4) of the Landlord and Tenant Act an order for status quo to hold the situation in the controlled tenancy until the determination of the proceedings filed thereon.”

Counsel urged the court to find that the respondent is in contempt of court as the respondent in total disregard of the court order went ahead and constructed permanent building structures.

On the 2nd issue whether the contemnor had knowledge of or proper notice of the terms of the order, counsel submitted that the application dated 18th March 2020 and the orders dated 19th March 2020 were served upon the 2nd Defendant/respondent who refused to accept service and directed the process server to his advocates on record who duly accepted service.

Counsel cited the cases of ***Teachers Service Commission v Kenya National Union of Teachers & 2 others [2013] eKLR*** and ***Kenya Tea Growers Association v Francis Atwoli & 5 others [2012] eKLR*** where the case of ***Clarke & others v Chadburn & others [1985] ALL ER (PC) 211*** to buttress the point and urged the court to allow the application as prayed.

DEFENDANT'S SUBMISSIONS

Counsel relied on the replying affidavit by the defendant and submitted that the alleged construction were mere renovations on already existing structures to stop rain leakages and in compliance with the aforementioned orders issued on 21st July 2017. That the prayers sought by the plaintiff applicant contravened the said orders of 21st July 2017.

Mr. Omusundi submitted that the applicant has not met the threshold for grant of the orders sought for contempt of court and relied on the cases of ***Econet Wireless Kenya Ltd v Minister for Information & Communication of Kenya & another [2005] KLR*** which was cited in ***Bob Collymore & another v Cyprian Nyakundi [2016] eKLR***; ***Petition No. 3 of 2014 Hon Martin Nyaga Wambora & 4 others v Speaker of the Senate & others [2014] eKLR***; ***Housing Finance Company of Kenya Ltd v Ngige Kitson Mondo [2006] eKLR*** ; and ***Baobab Beach Resort*** as quoted in ***Saifudeen Abdullahi & 4 others in Mombasa High Court Misc. Civil Cause No. 11 of 2012.***

Counsel therefore urged the court to dismiss the application with costs to the respondent.

ANALYSIS AND DETERMINATION

The Black's Law Dictionary (9th Edition) defines contempt of Court as: -

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

Order 40 Rule 3(1) of the Civil Procedure Rules also provides as follows: -

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.

Further, section 29 of the Environment and Land Court Act, 2011 is clear that;

Any person who refuses, fails or neglects to obey an order or direction of the Court given under this Act, commits an offence, and shall, on conviction, be liable to a fine not exceeding twenty million shillings or to imprisonment for a term not exceeding two years, or to both.

It is trite that for an applicant to succeed in an application for contempt of court in civil proceedings, he or she must establish that the terms of the order or decree, knowledge of such terms by the respondent and failure by the respondent to comply with the terms. If the above is established, then the court can find a party to be in contempt of court to safeguard the dignity and integrity of the court.

In the present case, the court has to determine whether the respondent was served with an order dated 19th March 2020, whether the order was clear and unambiguous and whether the respondent willfully disobeyed the said order.

From the court record, the court granted interlocutory orders of injunction for a period of 30 days from 19th March 2020 and the matter was to be mentioned on 22nd April 2020. This means that the orders lapsed on 18th April 2020 and the same were not extended. It is not in dispute that the orders were served on the respondent.

The applicant filed the application for contempt on 25th June 2020 two months after the temporary orders had expired. It follows that at the time of filing the application there was no valid injunctive order to hinge the application for contempt on. There was no evidence that the activities complained of were carried out during the time when the order was subsisting.

I have considered the application and the submission by counsel and find that the application lacks merit and is therefore dismissed with costs to the respondent.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 21ST DAY OF JANUARY, 2022.

M.A. ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.