



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC SUIT NO. 1243 OF 2016

EASTEND DEVELOPMENT PROPERTIES LIMITED.....PLAINTIFF

VERSUS

THE CABINET SECRETARY FOR INTERIOR AND CO-ORDINATION OF

NATIONAL GOVERNMENT.....1ST DEFENDANT

THE NAIROBI CITY COUNTY POLICE COMMANDANT.....2ND DEFENDANT

THE INSPECTOR GENERAL OF POLICE.....3RD DEFENDANT

NAIROBI CITY COUNTY GOVERNMENT.....4TH DEFENDANT

NAIROBI WATER & SEWERAGE SERVICES LTD.....5TH DEFENDANT

MAJOR GENERAL MOHAMED BADI

DIRECTOR GENERAL NAIROBI METROPOLITAN SERVICE...6TH DEFENDANT

JOSEPH W. IRUNGU THE PRINCIPAL SECRETARY,

WATER SANITATION AND IRRIGATION.....7TH DEFENDANT

HON. SICILY K. KARIUKI THE CABINET SECRETARY,

WATER, SANITATION AND IRRIGATION.....8TH DEFENDANT

DR. NICHOLAS MURAGURI THE PRINCIPAL SECRETARY

LANDS AND PHYSICAL PLANNING.....9TH DEFENDANT

HON. FARIDA C. KARONEY THE CABINET SECRETARY

LANDS AND PHYSICAL PLANNING.....10TH DEFENDANT

IN THE MATTER OF AN APPLICATION FOR COMMITTAL FOR CONTEMPT OF COURT

BETWEEN

EASTEND DEVELOPMENT PROPERTIES LIMITED.....APPLICANT

AND

THE CABINET SECRETARY MINISTRY OF INTERIOR AND
CO-ORDINATION OF NATIONAL GOVERNMENT.....1ST RESPONDENT

THE NAIROBI CITY COUNTY POLICE COMMANDANT.....2ND RESPONDENT

THE INSPECTOR GENERAL OF POLICE.....3RD RESPONDENT

NAIROBI CITY COUNTY GOVERNMENT.....4TH RESPONDENT

NAIROBI WATER & SEWERAGE SERVICES LTD.....5TH RESPONDENT

MAJOR GENERAL MOHAMED BADI DIRECTOR GENERAL
NAIROBI METROPOLITAN SERVICE.....6TH RESPONDENT

JOSEPH W. IRUNGU THE PRINCIPAL SECRETARY,
WATER SANITATION AND IRRIGATION.....7TH RESPONDENT

HON. SICILY K. KARIUKI THE CABINET SECRETARY,
WATER, SANITATION AND IRRIGATION.....8TH RESPONDENT

DR. NICHOLAS MURAGURI THE PRINCIPAL SECRETARY
LANDS AND PHYSICAL PLANNING.....9TH RESPONDENT

HON. FARIDA C. KARONEY THE CABINET SECRETARY
LANDS AND PHYSICAL PLANNING.....10TH RESPONDENT

RULING

Background:

This suit was initially brought against the 1st to 5th defendants only. On 28th April, 2020, the court on application by the plaintiff added the 6th to 10th defendants as parties to the suit and directed the plaintiff to amend the plaint to effect the joinder. There is no evidence that the plaint was amended as directed by the court. On 11th October, 2016, the court issued an interim order of injunction in the plaintiff’s application of the same date restraining the 1st to 5th defendants from evicting the plaintiff, demolishing its structures and/or interfering with its members’ quiet possession of all that parcel of land known as L.R No. 12979/I/R (hereinafter referred to only as “the suit property”). On 6th December, 2016, the court extended the said interim order until the hearing and determination of the application dated 11th October, 2016 in which the order was given. The said application is pending hearing.

In its application dated 23rd April, 2020 in which it had sought the joinder of the 6th to 10th defendants to the suit, the plaintiff had also sought an order that the said interim order of 11th October, 2016 be extended so that it could bind the 6th to 10th defendants. In the order made on 28th April, 2020 through which the 6th to 10th defendants were added to the suit, the court directed that the other prayers in the said application dated 23rd April, 2020 including that which sought the extension of the said order of 11th October, 2016 to the 6th to 10th respondents be argued by way of written submissions. The said application dated 23rd April, 2020 is also pending hearing.

The present application:

What is now before the court is the plaintiff’s application brought by way of Notice of Motion dated 3rd June, 2020. In the application the plaintiff has sought the following orders;

1. A declaration that Dr. Fred Matiang’i, the Cabinet Secretary Ministry of Interior and Coordination of National Government, Alfred K. Cheruiyot, the Principal Secretary, Ministry of Interior and Coordination of National Government, Philip Ndolo, the Nairobi City County Police Commandant, Hilary Mutyambai, the Inspector General, National Police Service, Justus N. Kathenge, the Acting County Secretary, Nairobi City County Government, Eng. Nahason Muguna, the Managing Director, Nairobi Water & Sewerage Services Limited, Joseph W. Irungu, the Principal Secretary, Water, Sanitation and Irrigation, Hon. Sicily K. Kariuki, the Cabinet Secretary, Water, Sanitation and Irrigation, Dr. Nicholas Muraguri, the Principal Secretary Lands and Physical Planning, and Hon. Farida C. Karoney, the Cabinet Secretary, Lands and Physical Planning are guilty of contempt of court by failing, neglecting to direct and/or ordering their agents, employees, assigns to honour the orders of this Honourable Court and/or wilfully ordering the eviction of the applicant membership, demolishing the applicant’s membership buildings and structures, ordering the

interference of the applicant's membership quiet possession of all that parcel of land known as L.R No. 12979/1/R contrary to the order by this Honourable Court.

2. Dr. Fred Matiang'I, the Cabinet Secretary Ministry of Interior and Coordination of National Government, Alfred K. Cheruiyot, the Principal Secretary, Ministry of Interior and Coordination of National Government, Philip Ndolo, the Nairobi City County Police Commandant, Hilary Mutyambai, the Inspector General, National Police Service, Justus N. Kathenge, the Acting County Secretary, Nairobi City County Government, Eng. Nahason Muguna, the Managing Director, Nairobi Water and Sewerage Services Limited, Joseph W. Irungu, the Principal Secretary, Water, Sanitation and Irrigation, Hon. Sicily K. Kariuki, the Cabinet Secretary, Water, Sanitation and Irrigation, Dr. Nicholas Muraguri, the Principal Secretary, Lands and Physical Planning, and Hon. Farida C. Karoney, the Cabinet Secretary Lands and Physical Planning be jointly condemned to pay a sum of Kenya Shillings Two Hundred and Forty Six Million, Nine Hundred and Forty Four Thousand, Seven Hundred and Eleven (Kshs.246,944,711/-) to purge the said contempt, being the sum total of the value of the demolished houses and/or structures of the membership of the applicant as valued by Capital Quantity Surveyors Limited and Adept Realtors Limited within twenty one (21) days from the date of the order herein failure to which the said contemnors be committed to civil jail for a term not exceeding six (6) months or for such period as the court may deem fit for deliberate disobedience of the order of this Honourable Court made on 11th October, 2016 by Hon. Justice Okong'o.

3. An order of sequestration, attachment and sale of personal properties be issued against Dr. Fred Matiang'i, the Cabinet Secretary Ministry of Interior and Coordination of National Government, Alfred K. Cheruiyot, the Principal Secretary, Ministry of Interior and Coordination of National Government, Philip Ndolo, the Nairobi City County Police Commandant, Hilary Mutyambai, the Inspector General, National Police Service, Justus N. Kathenge, the Acting County Secretary, Nairobi City County Government, Eng. Nahason Muguna, the Managing Director, Nairobi Water and Sewerage Services Limited, Joseph W. Irungu, the Principal Secretary, Water, Sanitation and Irrigation, Hon. Sicily K. Kariuki, the Cabinet Secretary, Water, Sanitation and Irrigation, Dr. Nicholas Muraguri, the Principal Secretary, Lands and Physical Planning, and Hon. Farida C. Karoney, the Cabinet Secretary Lands and Physical Planning to settle the sum of Kenya Shillings Two Hundred and Forty Six Million, Nine Hundred and Forty Four Thousand, Seven Hundred and Eleven(Kshs.246,944,711/=) being the sum total of the value of the demolished houses and/or structures of the membership of the applicant as valued by Capital Quantity Surveyors Limited and Adept Realtors Limited within twenty one(21) days from the date of the orders herein.

4. The Honourable Court directs the OCPD Nairobi Area to provide the applicant membership with the necessary security to enforce the order of this court.

5. Costs of this Application be borne by the Respondents

6. Such other orders and directions as this Honourable Court may deem just and convenient.

The application has been brought on the grounds set out on the face thereof and on the supporting affidavit of the chairman of the plaintiff's board of directors, Reuben Bius Ojwang sworn on 3rd June, 2020. The plaintiff (hereinafter referred to only as "the applicant") has averred that on 11th October, 2016 the court issued an order restraining the defendants (hereinafter referred to only as "the respondents") from evicting or demolishing the structures belonging to the applicant's members on the suit property or interfering with their quiet possession of the property. The applicant has contended that on 15th May, 2020 in breach of the said interim order, the respondents proceeded to demolish the structures that the plaintiff's members had on the suit property and to evict the said members from the suit property thereby leaving them without habitation. The applicant has averred that the order of the court made on 11th October, 2016 was clear and unambiguous and that unless the respondents are punished, they will persist in their acts of contempt thereby exposing the court to ridicule and disrepute. In his affidavit in support of the application, the chairman of the plaintiffs' board of directors, Reuben Bius Ojwang has stated that the applicant had allocated the land comprised in the suit property to a total of 1,628 families. He has stated that some of the applicant's members had constructed houses on the suit property on which they were residing while others had structures which were at various levels of development. He has reiterated that on 11th October, 2016, the court granted an order restraining the respondents from demolishing the structures on the suit property which belonged to the members of the applicant and from evicting the members of the applicant from the property. He has stated that on 15th May, 2020, the respondents in breach of the said order proceeded to demolish the structures on the suit property and to evict the plaintiff's members from the property. He has stated that as a result of the said unlawful eviction, 59 of the applicant's members suffered loss ranging from Kshs. 161,500/- to Kshs. 22,000,000/-. He has stated that the total loss suffered by the applicant's said members amounted to Kshs. 246,944,711/-. He has stated that the respondents had knowledge of the said order. He has averred that the disobedience of the said order by the respondents was deliberate. He has stated that the respondents should be punished for their contempt by being condemned to pay the said sum of Kshs. 246,944,711/- being the value of the demolished houses in default of which they should be committed to civil jail for a term of 6 months. He has stated that a further order should be made for the attachment and sale of the respondents' personal properties. He has stated that unless the respondents are punished, they will continue to disregard and disobey the said court order thereby encouraging the culture of impunity. He has stated that the respondent's behaviour was calculated to lower the authority and dignity of the court.

From the orders sought by the applicant, the persons sought to be cited for contempt of court are Dr. Fred Matiangi, Alfred K. Cheruiyot, Philip Ndolo, Hilary Mutyambai, Justus N. Kathenge, Eng. Nahason Muguna, Joseph W. Irungu, Hon. Sicily K. Kariuki, Dr. Nicholas Muraguri and Hon. Farida C. Karoney (hereinafter together referred to only as "the alleged contemnors"). It is not clear from the material on record whether these persons were personally served with the application for contempt before the court. As I stated earlier in the ruling, Major General Mohamed Badi, Joseph W. Irungu, Hon. Sicily K. Kariuki, Dr. Nicholas Muraguri and Hon. Farida C. Karoney were joined as parties to the suit on 28th April, 2020 but there is no indication that the plaint was amended to effect the joinder. It is not clear therefore whether summons were taken out and served upon them having been sued in their personal capacities. I have not seen any response by the alleged contemnors to the contempt application before the court.

The 1st, 2nd, 3rd, 6th, 7th, 8th, 9th and 10th respondents opposed the application through notice of preliminary objection dated 10th September, 2020. The 1st, 2nd, 3rd, 6th, 7th, 8th, 9th and 10th respondents have contended that the order made by the court on 11th October, 2016 lapsed

after the expiry of 12 months from the date when it was issued in accordance with the provisions of Order 40 Rule 6 of the Civil Procedure Rules. The 1st, 2nd, 3rd, 6th, 7th, 8th, 9th and 10th respondents have contended that said order was not in existence as at the time it is alleged to have been disobeyed. The 1st, 2nd, 3rd, 6th, 7th, 8th, 9th and 10th respondents have urged the court to dismiss the contempt application as it has no merit.

The 4th respondent opposed the application through grounds of opposition dated 12th January, 2021. The 4th respondent has contended that the application is premature, misconceived, frivolous and amounts to an abuse of the process of the court. The 4th respondent has averred that committal proceedings cannot be instituted against a person who had not been made a party to a suit. The 4th respondent has averred that the application does not disclose a prima facie case against the 4th respondent's acting County Secretary to warrant the grant of the orders sought. The 4th respondent has urged the court to dismiss the application with costs.

The 5th respondent opposed the application through a replying affidavit sworn on 25th September, 2020 by the 5th respondent's acting Technical Director, Ms. Lucy Njambi. The 5th respondent has denied that it was involved in the acts of contempt complained of by the applicant. The 5th respondent has averred that it was not involved in the eviction of the plaintiff's members from the suit property or in the demolition of their structures. The 5th respondent has averred that no evidence has been placed before the court to demonstrate the role if any that was played by the 5th respondent in the demolition and eviction complained of.

Submissions:

The applicant filed submissions dated 18th January, 2021. In response to the 1st, 2nd, 3rd, 6th, 7th, 8th, 9th and 10th respondents' preliminary objection, the applicant has submitted that the issues raised by the said respondents do not fit the description of a preliminary objection since the same require facts to ascertain. In support of this submission the applicant has relied on Mukisha Biscuit Company v Westend Distributors Limited [1969] E. A 701. On the said respondents' contention that the order made on 11th October, 2016 which is the basis of the contempt of court application had lapsed pursuant to Order 40 Rule 6 of the Civil Procedure Rules, the applicant has submitted that it cannot be blamed for not fixing the suit for hearing within one year of the order. The applicant has submitted that it made several attempts to fix both the application in which the order was given and the suit for hearing but the attempts were frustrated by the respondents who failed to respond to the application. The applicant has submitted that as at the time the contempt of court application was filed, the order of 11th October, 2016 was still in force. The applicant has submitted also on the Notice of Motion dated 23rd April, 2020 which is not before the court. The applicant has urged the court to find that the order made on 11th October, 2016 was in force as at the time the plaintiff's members were evicted from the suit property and to allow the contempt application as prayed.

In their submissions dated 13th April, 2021, the 1st, 2nd, 3rd, 6th, 7th, 8th, 9th and 10th respondents have submitted that the order issued by the court on 11th October, 2016 lapsed within one (1) year of the issuance thereof in accordance with order 40 Rule 6 of the Civil Procedure Rules and as such the same was not capable of being breached on 15th May, 2020 when the respondents are alleged to have disobeyed the same. The 1st, 2nd, 3rd, 6th, 7th, 8th, 9th and 10th respondents have cited several authorities from the High Court and the Court of Appeal in support of this submission. The 1st, 2nd, 3rd, 6th, 7th, 8th, 9th and 10th respondents have submitted further that the applicant has no legal interest in the suit property in respect of which it can seek the protection of the court. The 1st, 2nd, 3rd, 6th, 7th, 8th, 9th and 10th respondents have urged the court to dismiss the applicant's applications dated 23rd April, 2020 and 3rd June, 2020.

The 4th respondent did not file submissions. In its submissions dated 24th May, 2020, the 5th respondent has reiterated the contents of its replying affidavit. The 5th respondent has maintained that it was not involved in the eviction of the plaintiff's members from the suit property and the demolition of their structures. The 5th respondent has cited Caroline Wairimu Wanjihia & Another v I & M Bank Ltd. & Another [2015] eKLR and has submitted that the applicant has not proved the acts of contempt alleged against the 5th respondent to the required standard which is higher than proof on a balance of probabilities and almost but not exactly beyond reasonable doubt. The 5th respondent has submitted that having failed to prove that the 5th respondent is guilty of contempt of court; the applicant is not entitled to the orders sought. The 5th respondent has submitted further that the order made on 11th October, 2016 in respect of which the contempt application is based lapsed after one year pursuant to Order 40 Rule 6 of the Civil Procedure Rules and as such the same was not in existence when it is alleged to have been disobeyed. The 5th respondent has submitted that the applicant's application has not met the threshold for committal for contempt and as such the same should be dismissed.

Determination:

I have considered the applicant's application together with the affidavit filed in support thereof. I have also considered the affidavits, notice of preliminary objection and grounds of opposition filed by the respondents in opposition to the application. Finally, I have considered the submissions on record. The main issues for determination in the application before me are; whether the order made on 11th October, 2016 lapsed after 12 months pursuant to the provisions of Order 40 Rule 6 of the Civil Procedure Rules, whether the plaintiff has proved that the respondents breached the said order and whether the plaintiff is entitled to the reliefs sought in the application.

Order 40 Rule 6 of the Civil Procedure Rules provides as follows:

“Where a suit in respect of which an interlocutory injunction has been granted is not determined within a period of twelve months (12) from the date of the grant, the injunction shall lapse unless for any sufficient reason the court orders otherwise.”

In Erick Kimingichi Wapang'ana & another v Equity Bank Limited & another [2015] eKLR, the Court of Appeal stated as follows on Order 40 Rule 6 of the Civil Procedure Rules:

7. “Even if the appeal was competent, we agree with counsel for the appellants that the same is unmeritorious. Temporary injunctions are issued under Order 40 Rules 1 to 5. Rule 6 of that Order provides that:

“Where a suit in respect of which an interlocutory injunction has been granted is not determined within a period of twelve months from the date of the grant, the injunction shall lapse unless for any sufficient reason the court orders otherwise.”

8. Rule 6 of Order 40 was made in clear cognizance of the preceding Rules in that order. It therefore follows that notwithstanding the wording of any order of interlocutory injunction, the same lapses if the suit in which it was made is not determined within twelve months “unless,” as the Rule further provides, “for any sufficient reason the court orders otherwise.”

9. In this case there was no subsequent order extending the injunction. Having been issued on 11th October 2011, the injunction order therefore lapsed on 12th October 2012. We agree with counsel for the appellants that Mukunya, J’s order of 16th December 2014 declaring that the injunction of 11th October 2011 had lapsed was inevitable.”

In Barclays Bank of Kenya Limited v Henry Ndungu Kinuthia & another [2018] eKLR, the Court of Appeal restated its position on Order 40 Rule 6 of the Civil Procedure Rules as follows:

“[16] The appellant asserted that the Orders issued on 22nd February 2011 automatically lapsed after 12 months by effluxion of the law, as per the provision of Order 40 rule 6. That Rule states as follows:

“Where a suit in respect of which an interlocutory injunction has been granted is not determined within a period of twelve months from the date of the grant, the injunction shall lapse unless for any sufficient reason the court orders otherwise.”

[17] A plain reading of Order 40 Rule 6 shows that the Rule is couched in mandatory terms, and that the only situation in which an interlocutory injunction will not automatically lapse after 12 months by operation of the law is where the court has given a sufficient reason why the interlocutory injunction should not so lapse. Therefore, the question we address is whether the words “pending the hearing and determination of this suit” created a sufficient reason within the Rule so that the interlocutory injunction does not automatically lapse after 12 months.

[18] We have perused the ruling made by the High Court on 22nd February 2011. In the first place we note that the 1st respondent’s notice of motion dated 26th August, 2008 that was subject of that ruling was brought under Order 39 Rules 1, 3, 5 and 9. Rule 1 of that Order specifically gave the court power to:

“grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.”

[19] Under the 2010 edition of the Civil Procedure Rules, Order 39 rule 1 became Order 40 Rule 1 in exactly the same terms, but there was the introduction of Order 40 Rule 6 limiting the order of interlocutory injunction for a period of 12 months. Thus, the order granted by the court issuing the interlocutory injunction “pending the hearing and determination of this suit” can only be read within the context of Order 40 Rule 1. In other words, the court was not addressing itself to Order 40 Rule 6 and providing sufficient reason for the order of injunction to remain in force for more than 12 months, but was merely issuing an order of temporary injunction to preserve the suit property during the pendency of the suit.

[20] The order made by the court on 22nd February 2011 remained subject to Order 40 Rule 6 that required that such an interlocutory order remain in force for a period of 12 months only, but subject to the court having the power to extend the interlocutory order beyond the 12 months, if there is sufficient reason for it to do so. In our view, such an extension cannot be done by way of a blanket order at the time the interlocutory order is issued. The need for the extension must be addressed by the court and justified at the opportune time.

[21] We take note of the fact that in applying the Civil Procedure Rules the High Court was obligated under Section 1A and 1B of the Civil Procedure Act, to be guided by and to further the overriding objective of the civil Procedure Act and Rules which includes to facilitate the just determination of the proceedings; the efficient disposal of the business of the court; and the timely disposal of the proceedings, and all other proceedings in the court, at a cost affordable by the respective parties. The importance of Order 40 Rule 6 of the Civil Procedure Rules in furthering the overriding objective was underscored by the High Court (Gikonyo J) in David Wambua Ngii v Abed Silas Alembi & 6 others [2014] eKLR:

“It is important to first deal with the scope and purpose of order 40 Rule 6 of the Civil Procedure Rules on lapse of an injunction. Order 40 rule 6 of the Civil Procedure Rules could be said to be the enabler of the overriding objective in real practical sense. The rule is intended to prevent a situation where an unscrupulous Applicant goes to slumber on the suit after obtaining an injunction. I say this because it is not uncommon for a party who is enjoying an injunction to temporize in a case for as long as possible without making serious efforts to conclude it. That is the mischief it was intended to cure.”

[22] This court expressed similar sentiments in Nguruman Limited v Jan Bonde Nielsen & 2 others 2014 eKLR:

“Without going into the details we, with respect, agree with the submissions of all learned counsel that the object of introducing rule 6 aforesaid in the 2010 Rules was to deal with the mischief where a party at whose instance a temporary injunction is granted employs various machinations to delay the disposal of the suit. Rule 6 of order 40 was therefore a necessary and reasonable safeguard against such machinations. It is a condition that many jurisdictions have imposed in dealing with abuses of injunctive orders.”

In Hardkinson v Hardkinson [1952] ALL ER 567, it was held that:

“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 order would as a general rule result in the person disobeying being in contempt and punishable by committal or attachment and in an application to the court by him not being entertained until he had purged his contempt.”

In Mutitika v Baharini Farm Ltd [1985] KLR 227 it was held that:

(i) A person who knowing of an injunction, or 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 a person has by his conduct obstructed justice.

(ii) The standard of proof in contempt proceedings must be higher than proof on a balance of probabilities and almost but not exactly beyond reasonable doubt.

(iii) The principle must be borne in mind that the jurisdiction to commit for contempt should be carefully exercised with great reluctance and anxiety on the part of the court to see whether there is no other mode which can be brought to bear on the contemnor.

In Micheal Sistu Mwaura Kamau v Director of Public Prosecutions & 4 others (2018) eKLR the court set out the law on contempt as follows:

“It is trite that to commit a person for contempt of court, the court must be satisfied that he has willfully and deliberately disobeyed a court order that he was aware of. That is made absolutely clear by section 4 of the Contempt of Court Act and the ruling of the Supreme Court in Republic v. Ahmad Abolfathi Mohammed & Another (supra). Secondly, as this Court emphasized in Jihan Freighters Ltd v. Hardware & General Stores Ltd and in A.B. & Another v. R. B. [2016] eKLR, to sustain committal for contempt of court, the order of the court that is alleged to have been deliberately disobeyed must be clear and precise so as to leave no doubt as to what a party was supposed to do or to refrain from doing. Lastly, the standard of proof in committal proceedings is higher than proof on a balance of probabilities, though not as high as proof beyond reasonable doubt. (See Mutitika v. Baharini Farm (supra) and Republic v. Ahmad Abolfathi Mohammed & Another (supra).)”

It is on the foregoing principles that the applicant’s application falls for consideration. The order that is the subject of the contempt application before the court was made on 11th October, 2016 ex parte on the applicant’s application of the same date. The order was extended on 25th October, 2016 to 6th December, 2016. On 6th December, 2016, the Order was extended generally until the hearing and determination of the applicant’s said application dated 11th October, 2016. On the same date namely, 6th December, 2016, the court directed the applicant to fix its application dated 11th October, 2016 in which the said order was given for hearing at the registry. The applicant did not fix the application dated 11th October, 2016 for hearing as had been directed by the court. From the record, it appears as if the applicant abandoned the application. The next time, the parties appeared before the court was on 18th October, 2018 when the applicant’s advocate told the court that the applicant wanted a hearing date for the main suit. Since the other parties had not complied with the provisions of Order 11 of the Civil Procedure Rules, the court gave them time to do so. On 30th October, 2019, the court fixed the main suit for hearing on 17th November, 2020. There is no dispute that the order that was given on 11th October, 2016 was an interlocutory order. For that reason, the order was subject to the provisions of Order 40 Rule 6 of the Civil Procedure Rules. The validity of the order was limited to 12 months from the time the order was made unless the order was extended. The last time the order was extended was on 6th December, 2016. The said order was not extended again. From the decisions of the Court of Appeal that I have cited above, I am in agreement with the respondents that the order of 11th October, 2016 lapsed on 6th December, 2017; that is, 12 months after they were last extended. I acknowledge the fact that the order made on 11th October, 2016 was an ex parte order and that the same was made pending the hearing of the applicant’s application dated 11th October, 2016 inter-partes and not pending the hearing of the main suit. That explains why I am reckoning the 12 months’ period from the last time the order was extended. I am of the view that it would not have been the intention of the legislature that ex parte injunction orders remain in force for indefinite period. That in my view would defeat the mischief that was intended to be cured by Order 40 Rule 6 of the Civil Procedure Rules. I am of the view that an ex parte order caught up with the 12-month time limit for the validity of interlocutory injunctive orders should suffer the same fate as an order of injunction granted after an inter-partes hearing unless the validity of the order is extended by the court. Since the applicant took no action to prosecute its application dated 11th October, 2016 in which the ex parte order was given and both the application and the suit remained unprosecuted for more than 12 months from the date the order was last extended by the court, the order lapsed. In my view, Order 40 Rule 6 of the Civil Procedure Rules does not differentiate between ex parte and inter-partes orders.

Due to the foregoing, I am in agreement with the respondents that as at 15th May, 2020 when the order of 11th October 2016 is said to have been disobeyed by the respondents, the said order had long lapsed and as such the same was not in existence. The said order could not therefore have been breached in the circumstances.

The second issue is whether the said order was disobeyed by the respondents. As I have found above, the order of 11th October, 2016 was not

in existence as at 15th May, 2020 when it is alleged to have been disobeyed. A non-existent order cannot be disobeyed. Even if it is assumed that I am wrong on my finding that the said order had lapsed, I am also not satisfied that the applicant has proved that the said order was disobeyed by the respondents. The applicant had the burden of proving that the said order and the orders extending the same were extracted and served upon the respondents and the alleged contemnors. In its application, the applicant made no effort to discharge this burden. The applicant did not place any evidence before the court showing that the order of 11th October, 2016 and the orders that extended the same were served upon the respondents and the alleged contemnors or that the respondents and the alleged contemnors had knowledge of the order. The applicant did not file in court any affidavit of service of the said order upon the respondents and the alleged contemnors. The applicant claimed that the respondents and the alleged contemnors were aware of the said orders. No acceptable evidence was however placed before the court in proof of that fact. What the applicant placed before the court were correspondence that its advocates addressed to some of the respondents and the alleged contemnors. There is no evidence that the respondents and the alleged contemnors acknowledged receipt of or knowledge of the said orders. The said correspondence could also not take the place of an affidavit of service. In the absence of evidence that the respondents and the alleged contemnors were served with the court order they are alleged to have disobeyed or that they had knowledge of the same, the applicant's application is left without foundation or basis. The alleged contemnors can only be convicted of disobedience of an order that was either served on them or was within their knowledge. It should also be noted that as at the time the order of 11th October, 2016 was made, the 6th to 10th respondents were not parties to the suit and although the court made an order on 28th April, 2020 for the plaint to be amended so that they may be added as parties to the suit, the applicant is yet to do that. The applicant's application seeking the extension of the order of 11th October, 2016 to the 6th to 10th respondents is also yet to be heard. What this means is that the 6th to 10th respondents/alleged contemnors were at all material times not bound by the order of 11th October, 2016 and could not therefore breach the same.

I wish to add that the applicant has made general allegations of breach of the order of 11th October, 2016. The applicant has not set out clearly in its affidavit in support of the application the roles played by each of the respondents and the alleged contemnors in the demolition of the structures that the applicant's members had on the suit property and their eviction therefrom. From the evidence before the court, it is not disputed that the applicant's members' houses on the suit property were demolished and that they were evicted from the property. The applicant has singled out particular individuals for punishment for their alleged role in the said demolition and eviction exercise. I am of the view that on account of the higher threshold for proof of contempt of court, the applicant had a duty to clearly state and prove the roles which the persons sought to be punished for contempt played in the said exercise which make them culpable. General allegations made by the applicant are not sufficient. Due to the foregoing, it is my finding that the applicant has not proved the acts of contempt of court alleged against the respondents and the alleged contemnors.

On whether the applicant is entitled to the orders sought, my answer is in the negative in view of the findings that I have made above. The only thing I wish to add is that even if I had found the alleged contemnors guilty of contempt, I would not have awarded the applicant a sum of Kshs. 246, 944,711/- which it has claimed as compensation for the losses that its members suffered as a result of the demolition of their houses. The applicant did not cite any authority in support of its claim for compensation in contempt of court proceedings. I am of the view that even if the court had power to award compensation in contempt of court proceedings, the claim brought by the applicant is in the nature of special damages that need to be pleaded and strictly proved. I do not think that the claim can be brought through an application for determination through affidavit evidence. I am of the view that the claim should be formally pleaded with the necessary particulars and proved at the trial.

The upshot of the foregoing is that the application dated 3rd June, 2020 has no merit. The application is accordingly dismissed. Each party shall bear its own costs.

DELIVERED AND DATED AT NAIROBI THIS 20TH DAY OF JANUARY 2022

S. OKONG'O

JUDGE

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Mr. S. Wanyanga, Mr. S. Kariuki and Mr. K. Wanyanga for the Plaintiff

Ms. Nyawira h/b for Ms. Ndundu for the 1st, 2nd, 3rd and 6th to 10th Defendants

Ms. Waceke h/b for Mr. Mugoye for the 4th Defendant

Ms. Muturi h/b for Mr. Macharia for the 5th Defendant

Ms. C. Nyokabi - Court Assistant