



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL SUIT NO. 20 OF 2014 (O.S)

BRIGITTE ANNA HILLEN-OGUTU APPLICANT

AND

AGGREY CHRISTOPHER ACKELLO-OGUTU.....RESPONDENT

RULING

1. The Motion dated 1st December 2014 seeks two principal orders:-
 - a. ***That the respondent be cited for contempt of court for disobedience of an order made in this matter on 30th October 2014; and***
 - b. ***That the said respondent be committed to jail for a period of not less than six (6) months for the said disobedience.***
2. The applicant's case is that the order in question was made on 30th October 2014 and subsequently extended on diverse dates. It was made in the presence of the respondent and he was subsequently served with a formal copy of the order through his advocates. He was aware of the said order, but he ignored it and proceeded to lease out the property or parted with possession thereof. The property in question being the premises standing on LR Nos. 21/1/104, 105 Roselynn Lone Tree Estate. The lessee took possession of the property on 21st November 2014.
3. The applicant has attached a number of documents to her affidavit in support of the application. There is the formal order extracted on 3rd November 2014 of the order I had made on 30th October 2014. There is also an affidavit of service, sworn by a process server, to the effect that on 5th October 2004 he did serve the formal order issued on 3rd November 2014 on the advocates for the respondent, Messrs. Agina & Associates, Advocates of Ongata Rongai, Kajiado County. There is too copy of the formal order extracted on 11th November 2004 from the order made on 5th November 2014 by Achode J. There is an affidavit of service filed on 20th November 2014, sworn by a process server, to the effect that he served the order issued on 11th November 2014 on the respondent on the same date.
4. Upon being served, the respondent filed grounds of opposition and an affidavit in reply. He denied breaching the *status quo* order and asserted that no evidence had been tendered by way of affidavit evidence. He argued that the contempt proceedings were motivated by mere hatred. He explained that he entered into a lease agreement with a tenant on 1st October 2014, and the

applicant should have sought to know of the situation on the ground as at 30th October 2014 before she went to court. He stated that the tenancy agreement predated the order in question. He attached to the affidavit a copy of the agreement allegedly signed on 1st October 2014 by him and the tenants.

5. The Motion dated 1st December 2014 was argued on 18th December 2014. Mrs. Esonga argued the case for the applicant, while Mr. Ojwang Agina argued for the respondent.
6. Mrs. Esonga submitted that the *status quo* orders of 30th October 2014, which were extended several times thereafter, were made in the presence of both parties and their advocates. That then meant that the respondent had personal knowledge of the orders. There was service of the order on counsel for the respondent on 5th November 2014, who acknowledged service by embossing their stamp on the documents. It was submitted that the tenant to whom the respondent leased the property, took possession on 21st November 2014. She stated that the reply to the injunction application was silent as to whether there was a tenant in occupation, arguing that if there was a tenant to take up possession then the respondent would no doubt have stated so. It was suggested that the tenancy agreement placed before the court was back-dated to suit the respondent's case. She concluded by urging me to go through the authorities which appeared to say that knowledge supercedes personal service, submitting that the respondent had knowledge of the order but chose to disobey it.
7. Mr. Agina submitted that the application dated 1st December 2014 did not disclose a cause of action against the respondent. He stated that a person alleging breaches of a court order must state precisely the breaches committed and when they were committed. It was his case that the application did not pinpoint the violation of *status quo*, when it happened and specifically that it was the respondent who violated it. It was asserted that at the time the orders were made a tenancy agreement for two years had already been entered into on 1st October 2014. It was asserted that once the agreement was signed, it was left to the discretion of the tenant to decide when to move in. He submitted that the photographs attached to the affidavit in support of the application did not have a date and there was no explanation as to what each of the pictures depicted. He argued that the order was made on 30th October 2014 and was to subsist till 6th November 2014. There was nothing to show that there was a violation of the order over that period. The respondent's position was stated to be that he knew of this order, but by the time the order was made there was a tenant already in occupation and that he had not done anything after service of the order that would amount to a violation. On the matters deposed to in the respondent's earlier affidavits, the respondent submitted that they ought not be taken into account in the contempt proceedings. He submitted that the issue of the tenancy did not come up then because it was not necessary, adding that there was no assertion that the premises were unoccupied.
8. The law on contempt of court, so far as it relates to the High Court, is Section 5 of the Judicature Act and Section 63(c) of the Civil Procedure Act. Section 5(1) of the Judicature Act provides that-

“The High Court and the Court of Appeal shall have the same power to punish for contempt of court as is for the time being possessed by the High Court of Justice in England, and that power shall extend to upholding the authority and dignity of subordinate courts.”

Section 68(c) of the Civil Procedure Act provides that-

“In order to prevent the ends of justice from being defeated, the court may, if it is so prescribed – grant a temporary injunction and in case of disobedience commit the person guilty thereof to prison and order that his property be attached and sold.”

9. It was pointed out by the Court of Appeal in *Christine Wangari Gachage vs. Elizabeth Wanjiru*

Evans and 11 others Civil Application No. 233 of 2007 and *Justus Kariuki Mate & another vs. Martin Nyaga Wambora & another* (2014)eKLR that the law of contempt in England was amended in 2002 and it no longer requires notice to the Attorney General prior to the filing of an application for contempt of court as earlier required under Order 52. I do not think that the competence of the application before me can be faulted.

10. The key considerations in an application of this nature are whether the order said to have been disobeyed had been served on the respondent and whether there was breach of the said order despite the service or knowledge of the contents of the order.
11. I will examine the evidence to determine whether or not the formal orders extracted from the order of 30th October 2014, and later extended, were indeed served on the respondent. According to the applicant the order of 30th October 2014 was extracted on 5th November 2014, and the formal order dated 6th November 2014 was served on the respondent's advocates on 5th November 2014 according to the affidavit sworn on 5th November 2014 by one Harrison Muia Makuthi. Apparently, the formal order dated 5th November 2014 was not served on the respondent personally.
12. The applicant further deponed that after the order was extended on 5th November 2014 for a further fourteen (14) days, the formal order extracted from the said order dated 11th November 2014 was served personally on the respondent and on his advocates on 11th November 2014. That is according to the affidavits of service sworn on 11th November 2014 and 13th November 2014, respectively, by Harrison Muia Makuthi, process server.
13. I have gone through the affidavit in reply sworn on 11th December 2014 by the respondent and noted that he did not contest the service on both himself nor on his advocates. Instead, he stated that the disputed lease was entered into prior to the orders of 30th October 2014 being made.
14. Regarding, the first consideration in the matter, it is my finding that the order complained of was served on both the respondent and his counsel. Indeed, it is not disputed that the order was made on 30th October 2014 in the presence of both the respondent and his counsel. The respondent therefore had knowledge of the order made on 30th October 2014 and extended on 5th November 2014.
15. Was there breach of the order. The applicant's case is that the respondent put in a tenant in the premises on 21st November 2014, while the orders for maintenance of *status quo* were still in force. That therefore constituted a breach of the said orders, according to the applicant. The respondent's rejoinder to that is that by the time the orders of 30th October 2014 were being made he had entered into the tenancy on 1st October 2014 and the tenant moved in on 1st October 2014 and not 21st November 2014 as pleaded by the applicant.
16. I have seen the tenancy agreement allegedly entered into on 1st October 2014 between the respondent and the tenant, John Allert. I note that the alleged tenant did not swear an affidavit to corroborate the allegation by the respondent that the agreement was entered into on that date and that he moved in on the same date. The persons who also allegedly signed the document as witnesses to the tenancy agreement did not likewise swear and file affidavits to that effect.
17. To support her assertion that the tenant moved in on 21st November 2014, the applicant has attached photographs to her affidavit. The said photographs are meant to demonstrate that the tenant moved in. The applicant herself, according to her affidavit, took the photographs. However, there is nothing to show that the photographs were taken on 21st November 2014 as alleged. I cannot therefore from that evidence deduce whether the tenant moved in on 21st November 2014 or not.

18. At the oral hearing it was submitted that the issue of a tenancy agreement being executed on 1st October 2014 was an afterthought as the respondent did not allude to any such tenancy in his affidavit in reply sworn on 31st October 2014. To that it was submitted in reply, that the contents of the respondent's earlier affidavits ought not be taken into account as the issue of the tenancy did not arise at the time the alleged averments were made.

19. The applicant had averred at paragraph 24 of the affidavit sworn on 22nd October 2014, in support of the application dated 22nd October 2014, as follows:-

“That upon my return to Kenya at the beginning of October in an effort to attend the hearing of this case, which was scheduled for 9th October 2014, I visited the subject property to establish the position or state of the house for myself, whereupon I was informed by the foreman supervising the repair works, and I believe the information to be true, that the respondent is hurriedly carrying out the repair works with a view of leasing out the house to some Americans who are set to move into the main house and the guest wing at the beginning of November 2014.”

20. In his reply comprised in the affidavit sworn on 31st October 2014, the respondent did not reply to the very specific matters in paragraph 24 of the applicant's affidavit, in particular the allegation that he intended to lease out the premises to some Americans who were set to move in at the beginning of November 2014. He should have indicated in his reply whether there was such a lease or intended lease to the alleged Americans.

21. The averments in the applicant's affidavit of 22nd October 2014, in my view, give credence to the allegation that she subsequently makes in her affidavit of 1st December 2014 that the tenant moved in sometime in November 2014 and that the claim that the tenancy agreement was conceived on 1st October 2014 before the orders of 30th October 2014 was an afterthought.

22. The orders sought in the application dated 22nd October 2014 specifically targeted LR Nos. 21/1/104 and 105 Rosslyn Lone Lane Tree Estate. If indeed the property had been leased out by 1st October 2014, then that was a material fact that ought to have been disclosed to the court on 30th October 2014 before the order for maintenance of *status quo* was made, to obviate a situation where the court granted orders that were not capable of enforcement. The application in question was for injunction and the respondent was entitled to make a full and frank disclosure of the state of affairs as at 31st October 2014 when he swore the affidavit.

23. The order said to have been breached was made on the application dated 22nd October 2014. Prayer 2 of that application formed the background to the order of 30th October 2014. The said prayer stated:-

“THAT pending the hearing and determination of this application a restraining order be issued against the respondent herein, and/or the respondent herein be restrained from, in any way interfering with the applicant's rights and interests to the subject property, by leasing out, mortgaging, selling, gifting or in any other way alienating the subject property herein, namely; the matrimonial house at Rosslyn Lone Tree Estate situated at LR Nairobi 21/1/104 and LR Number 21/1/105 until further orders of this Honourable Court.”

24. The order for maintenance of *status quo* targetted, among others, the leasing out of the suit property. When the order was recorded on 30th October 2014, counsel for the respondent was in court and did not indicate at the making of the order that the property had in fact been leased out, and that the *status quo* then prevailing was that the property had a tenant inside even as the order was being made.

25.I believe the applicant when he says that the tenant moved in on 21st November 2014. At that time the order made on 30th October 2014 was still in force, after it was extended on 6th November 2014 and 20th November 2014. He moved at a time when the respondent had been directed to maintain *status quo*, which meant, among others, that the property was not to be leased out.

26.After taking due consideration of all the circumstances of the case, I have come to the conclusion that the respondent knowingly and willfully disobeyed the orders of this court made on 30th October 2014 and extended severally thereafter. I accordingly allow the application by Notice of Motion dated 1st December 2014 and cite the respondent for contempt of court. He shall appear before this court on a date to be agreed upon by the parties when an appropriate sentence or penalty shall be meted out on him.

27.It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI this 30TH DAY OF OCTOBER, 2015.

W. MUSYOKA

JUDGE