



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ENVIRONMENT AND LAND COURT CASE NO. 1468 OF 2014

JAMES B. O ANUNDA PLAINTIFF

VERSUS

ROSE NAMASAYA ANUNDA DEFENDANT

RULING

1. The plaintiff/applicant's application dated 30th September 2014 is the subject of this ruling. The application is brought under sections 1A, 1B, 3, 3A and 63 (e) of the Civil Procedure Act and orders 40 and 51 of the Civil Procedure Rules. The application seeks the following orders:-
 1. **That the court be pleased to direct the following officers to assist in the enforcement of the court order of the 16th December 2010 issued on 8th February 2011.**
 - a. **The OCPD (Officer Commanding Police Division) – Embakasi Nairobi County.**
 - b. **The OCS (Station Commanding Officer) – Embakasi, Nairobi County.**
 - c. **The county commissioner, Nairobi.**
 2. **The defendant/respondent be condemned to pay the costs of the application.**
2. The application is based on the grounds set out on the body of the application and inter alia include:-
 - a. The defendant has despite being served with the order adamantly refused to comply with the same.
 - b. The subject property is being wasted by the defendant.
 - c. The plaintiff is unable to service the loan used to develop the property as the defendant is not remitting my rental income to the bank.
 - d. Court orders ought to be complied with for the protection of the dignity of the court.
3. The plaintiff/applicant has further sworn an affidavit in support of the application dated 30th September 2014 where he reiterates the grounds set out in support of the application. The plaintiff avers that the defendant has despite being served with the court order granted on 16th December, 2010 continued to collect rent from the suit premises and has refused to allow the plaintiff/applicant access to the suit premises to collect rent and to maintain the property. The plaintiff states the defendant has vowed not to stop collecting rent and that despite the plaintiff making efforts to enforce the court order, the defendant has forcefully resisted such overtures and the plaintiff thus is apprehensive that violence could ensue if he decided to make a forceful entry to take control of the premises and hence the justification for the instant application.
4. The defendant/respondent Rose Namasaya Anunda, swore a replying affidavit dated 30th October

- 2014 in which she denies willfully disobeying any court order as alleged by the plaintiff. The defendant denies she is in any manner wasting the suit property and in fact deposes that the applicant has failed to disclose that following the issuance of the court order on 8th February 2011, the parties attempted to settle the matter out of court whereby it was agreed that the defendant would collect rent from one of the business shops in the sum of Kshs. 25,000/= per month whereas the plaintiff was to collect rent from the other units which was to be utilized towards the children's upkeep and payment of their school fees. The defendant states the plaintiff reneged from this arrangement and that despite requests to abide by the agreement the plaintiff has refused to do so.
5. The defendant avers that being a housewife and the property being matrimonial property, the acquisition of which she contributed to, the applicant cannot be entitled to exclusive rights over the suit property to the exclusion of the defendant. The defendant states that the orders sought by the plaintiff if granted would amount to rendering the defendant and the children destitute and homeless as the suit premises is the only place they call home. The plaintiff filed a supplementary affidavit sworn on 8th June 2015 in which he denies the averments by the defendant and reiterates his averments as per the supporting affidavit.
 6. The parties filed written submissions as directed by the court. The plaintiff/applicant filed his submissions on 11th June 2015 while the defendant/respondent filed her submissions on 6th July 2015 with the plaintiff/applicant filing supplementary submissions on 28th July 2015. I have reviewed the application, the affidavits in support and in opposition together with the parties written submissions and the issue for determination is whether the defendant has disobeyed and/or failed to comply with the court's order of 16th December 2010 to necessitate the court to grant the orders sought by the plaintiff in the instant application which in effect are to aid or assist the plaintiff in having the order complied with by the defendant.
 7. The terms of the order of 16th December 2010 that the defendant is alleged to have failed to comply with was as follows:-
 - i. **The defendant/respondent is restrained either by herself, servants and/or agents or any person whatsoever working on her behalf, are restrained from dealing or handling any matter relating to the suit property land reference No. 9042/2/2 Jua Kali Embakasi, Nairobi pending the hearing and determination of the suit.**
 - ii. **The defendant/respondent is restrained either by herself, servants and/or agents and any person howsoever working on her behalf from collecting and/or tampering with any rent or monies accruing from the tenancies of the suit property Land Reference No. 9042/2/2 Jua Kali Embakasi, Nairobi, the same being a commercial property belonging to the plaintiff.**

Honourable Justice Dulu in addition while appreciating the plaintiff and defendant (though estranged) were husband and wife made an order to the effect that **“the defendant/respondent was in the meantime at liberty to stay in the two rooms she had been using and at no cost to her pending the hearing and determination of the suit.”**

8. The plaintiff by a notice of motion dated 11th March 2011 applied for the defendant to be committed to prison for allegedly disobeying the court's order given on 16th December 2010 and issued on the 8th February 2011 and further for the setting aside of the order allowing the defendant/respondent to remain in the two (2) rooms she was occupying on the suit property and hence to be evicted from therefrom. Hon. Justice Waweru in a reasoned ruling dated 2nd October 2012 dismissed the application for contempt of court holding that disobedience of the court order had not been proved to the required standard. The judge in dismissing the application stated:

“Disobedience of a court order is a matter of fact that must be proved to the required standard. In contempt proceedings that can elicit penal consequences, that standard is greater than a mere balance of probability, though lower than proof beyond reasonable doubt. The plaintiff has not come anywhere near to proving the disobedience of the court order alleged against the defendant. Prayer 1 and 2 of the application must therefore be refused. They are hereby dismissed. Prayer 3 was hinged also upon prayers 1 and 2 which have just been refused. In any case it is

doubtful that the court would entertain eviction of the defendant from what now appears to be her temporary matrimonial home in these interlocutory proceedings. Prayer 3 is therefore also refused.”

9. Having failed to satisfy the court that the defendant was in disobedience of the court order of 16th December 2010 to warrant the court to punish the defendant for contempt of the court, the plaintiff has brought the present application yet again claiming the defendant was in disobedience of the court order. Perusing the application for contempt that was presented before **Waweru J.** and the instant application one cannot fail to notice that the plaintiff is basically relying on the same facts to allege disobedience of the court order on the part of the defendant. As **Waweru J.** stated evidence of disobedience must be clearly established for the court to hold a party to be in contempt. I am not satisfied such evidence of disobedience has been tendered and what the plaintiff relies upon as evidence of disobedience are mere unsupported allegations which the defendant has denied. Where for instance is the evidence that the defendant has been collecting rent from the tenants or that the defendant has threatened the plaintiff with violence and/or has used violence to prevent the plaintiff from accessing the suit property?
10. To my mind the plaintiff has brought the instant application to try to obtain what he failed to obtain before **Waweru, J.** My view is that the plaintiff has not established a basis upon which the security agencies ought to be called upon to ensure observance of law and order. Security agencies ordinarily have no role to play in civil disputes involving litigants and they ought not to be involved by being enjoined as parties. The participation of the security agencies ought to be limited to instances where there could be a breach of the peace necessitating their being called upon to ensure the observance and the maintenance of law and order. They ought not to be sued to execute civil court orders which the Civil Procedure Rules provides an elaborate procedure for executing. Indeed there is no provision in the Civil Procedure Rules; for use of the security agencies for execution of court orders.
11. Hon. Justice Waweru delivered his ruling on 9th October 2012 and until 1st October 2014 when the plaintiff filed the instant application the file record shows that no party took any action towards the prosecution of the suit. It is unclear why no party took any proactive steps to prosecute the suit yet the issues in dispute in the suit, given the special relationship of the parties as husband and wife, can only be finally resolved by having the suit tried on merits. The submissions by the parties largely deal with whether or not the defendant has disobeyed the court order. This issue in my view was conclusively dealt with by **Waweru, J.** in the contempt application and he held there was no evidence that the defendant had disobeyed the order. There is no fresh evidence that has been presented that was not placed before the learned judge when he dealt with the contempt application. To deal with the issue afresh would be like seeking to review the order by Hon. Justice Waweru and/or sit on appeal on the same. This court cannot properly do that and I decline to make any finding on whether or not the defendant has disobeyed the order of 16th December 2010.
12. In the premises therefore I find and hold that the plaintiff's application dated 30th September 2014 lacks any merit and the same is ordered dismissed with costs to the defendant.

Ruling dated and signed at Kisii this 6th day of October, 2015.

J. M MUTUNGI

JUDGE

Ruling delivered at Nairobi this 23rd day of October 2015.

L.GACHERU

JUDGE

In the presence of:

N/A for the Plaintiff

M/s Keya for the Respondent

L.GACHERU

JUDGE