



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NUMBER 374 OF 2015

NJUWANGU HOLDINGS LIMITED.PLAINTIFF/APPLICANT

VERSUS

TANA MINING COMPANY LIMITED.DEFENDANT/RESPONDENT

R U L I N G

The application for determination is the Notice of Motion dated 2nd September, 2015 brought under Section 5(1) of the Judicature Act and Section 3A of the Civil Procedure Act.

The Applicant seeks for orders: -

1. That, the Honourable court be pleased to order for the arrest and detention of the Directors of Tana Mining Company Limited in prison for a term not exceeding six months for contempt of court.
2. That, in the alternative, the Honourable court be pleased to order the Respondent's moveable properties be attached forthwith for disobeying the court order made on 10th July, 2015.
3. That, the Respondent do pay the costs of this Application.

The Application is premised on the grounds set out on the body of the Application.

It is supported by the statement of facts dated 1st September, 2015, verifying Affidavit and Supporting Affidavit sworn on 1st September, 2015 by Wallace Mwaura Kamau, one of the directors of the Applicant Company. The Applicant is seeking for orders in terms of prayers 1 and 3 and/or an alternative Order in terms of prayer 2 of the Application.

The Summary of the Applicant's case for purposes of this Application is that on the 10th June, 2015, the Respondent obtained an ex parte order against a purported owner of its property one David Barno Some.

That on the 7th and 8th July, 2015, the Respondent used the said order to invade the Applicant's parcel of Land L.R. 209/13415 and committed acts of waste by demolishing the gate and erecting a new one to deny the Applicant access. The Applicant was not a party to those proceedings.

On 10th July, 2015, the Applicant moved to court under Certificate of Urgency seeking a stay of the said Order of the 10th June, 2015 which order the lower court granted pending the hearing of the Application.

On the 27th July, 2015, the Respondent filed an Application to reinstate the order granted on the 10th

June, 2015.

On the 29th August, 2015, the Respondent illegally and unlawfully and in defiance of the court order made on 10th July, 2015 invaded the Applicant's said piece of land and demolished a perimeter wall erected by the Applicant, pulled down the gate and dug trenches. When the Applicant went to court and obtained a stay order on 10th July, 2015, the perimeter wall was intact.

In its submissions, the Applicant submitted that the order of 10th July, 2015 was endorsed with a penal notice at the bottom as required under the established authorities of both the High Court and the Court of Appeal. The order was served on 13th July, 2015 and there is a stamp of the Respondent's Advocate affixed on the face of the order acknowledging service.

The Respondent and its Directors were fully aware of the order and that explains why it moved to court on the 27th July, 2015 to reinstate the order of 10th June, 2015.

On the standard of proof required in Applications for Contempt of Court, the Applicant relied on the case of **Lucas N. Nyangweso Vs Jackson Ntelele Surum & Another** HCCC No. 1253/2003 (unreported) where the Court of Appeal held: -

"... what is more disobedience to the court order is a phenomenon much more readily perceptible than the Commission of ordinary offence which may call for more detailed proof. On this account, a finding that a contempt of court has been committed would not require proof beyond reasonable doubt. All that is required is clear and dependable proof, going somewhat beyond the Civil litigation yardstick of the balance of probability"

The Applicant has also relied on the case of **Hadkinson Vs Hadkinson (1952) 1 ALL E.R. 567** where the court when dealing with an Application for contempt of court, held inter alia: -

"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 it being in contempt and punishable by committal or attachment....."

The Applicant urged the court to commit the Directors of the Respondent for a period of 6 months or in the alternative order for attachment of the Respondent's movable properties.

The Application is opposed by the Respondent vide a Replying Affidavit filed on the 17th November, 2015 sworn by Hussein Hassan Amin who has described himself as one of the Directors of the Respondent. In the said Affidavit he admits that the Respondent applied to court on the 10th June, 2015 and was granted orders against one David Barno who was trespassing on their land known as L.R. No. 209/14619. That David Barno sought a stay on the 10th July, 2015 staying the orders granted to the Respondent.

The Applications were slated for hearing inter partes when the Applicant applied to be enjoined as a party to the suit. The deponent depones that the Respondent does not own L.R. 13415 and at no time has it purported or alleged to own that particular parcel of land.

He further avers that at no time has the court given orders against the Respondent in dealing with its land which is L.R. 209/14619 and that the orders that had been given in favour of Plaintiff in the lower court were granted an entire month after the court had granted the demolition orders to the Respondent and that the Respondent in demolishing the wall erected on its parcel of land was assisted by the police officers who had been directed to keep peace and it is then that the Applicant rushed to court to get the stay orders. The stay orders did not in any way indicate that the respondent be restrained in dealing in its parcel of land L.R. 209/14619.

The deponent concluded by saying that at no point has the Respondent disrespected the court or due process of the court. The Respondent maintains that they obtained orders against the trespass occasioned on their property L.R. 209/14619 and effected the orders granted to them.

It is also deponed in the Affidavit of Hussein Hassan Amin that the Applicant has filed several suits in respect of the same property one of them being ELC 830/2015 which is still pending. In addition he has also filed CMCC 2537 of 2015 which is yet to be determined.

The Respondent filed its submissions on the 16th November, 2015 which reiterates the contents of the Replying Affidavit.

It is submitted that the Applicant's Application is misconceived, non meritorious and a fragrant disregard of the court process in that there are two title deeds which each party owning a separate parcel of land.

In his submission, Counsel for the Respondent has argued that for a party to make an Application seeking orders of committal to Civil Jail, such a party should meet the standard of proving such contempt. Firstly, the contempt proceedings by their nature are criminal hence the standard of proof is beyond reasonable doubt. In the case of **Kasembeli Sanane Vs Manhu Muli alias Fredrick Saname & 4 Others [2013] eKLR**, the judge held "***proof of contempt of court must be beyond reasonable doubt***".

I have carefully considered all the facts and the law together with the rival submissions filed by the parties herein. The power of the court to punish for contempt is derived from the provisions of Section 5(1) of the Judicature Act. The High Court is donated the same power as it is being practiced by the English courts and that power is meant to protect the rule of law and dignity of the courts and further to ensure that the administration of justice is maintained in good order and not brought into public ridicule. It is the power which is meant to assert the authority of the courts.

Having carefully gone through the Affidavits filed by the parties herein, it emerges that there are two parcels of land being L.R. no. 209/13415 and L.R. No. 209/14619. It is not clear to me which parcel belongs to the Applicant and which one belongs to the Respondent.

The order, the subject matter of these proceedings relates to L.R. 209/14619 which the Respondent claims to own. On the other hand, the Applicant alleges that the order related to parcel number L.R. 209/13415 which it allegedly owns. The ownership of these two parcels of land is the subject of a pending High Court Case ELC 830 of 2015. The Respondent maintains that in demolishing the wall, it did so with the assistance of the police who had been directed to keep peace and the said wall had been erected by a trespasser on their L.R. No. 209/14619.

In these circumstances, it is not possible for this court to grant the orders sought in the Application herein as it is not clear with the facts before it, if the Respondent's Directors are in contempt of the court or not.

In the premises aforesaid, the Application is dismissed with no orders as to costs.

Signed, Dated and Delivered in Nairobi this 17th day of December, 2015.

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L. NJUGUNA

JUDGE

In the Presence

..... *for the Applicant/Plaintiff*

..... *for the Respondent/Defendant*