

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

ENVIRONMENT & LAND COURT

CIVIL CASE NO. 228 OF 2012

EDWARD NJOROGE MWANGI.....PLAINTIFF

VERSUS

FRANCIS MURIUKI MURAGURI & ANOTHER..... DEFENDANT

R U L I N G

The application dated 30/4/2013 seeks for orders that the 2nd respondent herein namely Ephantus Wachira Ngochi who has disobeyed the court order granted on 31st October 2012 and confirmed on the 19th March 2013 be detained in prison for a period not exceeding six (6) months. Moreover, that the 2nd respondent do refund all monies collected since October 2012 to date, pay damages and costs of this application. Lastly, that the O.C.S Karatina do enforce this order.

The same is based on grounds that the 2nd respondent was restrained by court order of 31st October 2012 from collecting rent on land parcel No. IRIAINI/KAIRIA/747/27. In defiance of the order, the 2nd respondent has continued to collect rent in the suit premises despite the orders being confirmed and served upon him. He argues that the court does not issue orders in vain.

The application is supported by the affidavit of Edward Njoroje Mwangi who swears that the respondents Francis Muriuki Muraguri and Ephantus Wachira Ngochi herein be committed to civil jail for disobeying a lawful court order. That on 31st October 2012 he made an application seeking temporary injunction restraining the respondents from collecting rent in the said premises, land parcel **No. IRIAINI/KAIRIA/747/27**. On 31/10/2012 his application was certified urgent and a temporary injunction was issued restraining the respondent from collecting rent from the suit premises. On /10/2012 an authorized court process server received copies of chamber summons, court order and penal notice all dated 31/10/2012 for service upon the respondent. That his advocate on record informed him that the process server had properly served the afore stated court documents on 7/11/2012 upon the respondent who refused to acknowledge receipt of all the court papers. The respondents went ahead to collect rent with total disregard of the court order. That he states that it is clear the respondents/defendants herein are in contempt of the order dated 31/10/2012 even when they knew of the consequences of disobeying a court order. The defendants/respondents had no right collecting rent on the suit land as they were aware of the injunction order dated 31/10/2012. It is only fair and just that the defendants/respondents herein be summoned to appear before this court and be committed to civil jail for six months for being in contempt of the court order.

In the replying affidavit filed on 17/6/2013, deponed on 17/6/2013, the 2nd defendant states that the application is a non-starter as he has never been personally served with the order dated 19th March, 2013. In any event, the court record will bear him witness that the said order had been stayed until the 14th May, 2013 vide his application dated 17th April, 2013. The application is thus incurably defective as it does not state which period the alleged contempt was committed and whether the order was in force. That there is no evidence that he has in anyway collected rent from any tenant. He has from the advise of his advocates on record, kept away from the premises despite the fact that he holds title to it. The tenants are not parties to this suit and therefore there is no order enjoining them to pay rent to the applicant and failure to collect rent should not therefore be blamed on him. That it is clear that the present application is a mere witch hunt and has no basis in fact or law. It is in the interest of justice that the application be dismissed with costs.

The **gravamen** of the plaintiffs submission is that on the 7/11/2012 the court process server served the defendant with the court order restraining them from collecting rent when the court order was in place. The order was issued on 31/10/2012 on interim basis and confirmed on the 19/3/2013. The orders were personally served upon the two defendants. Mr. Ephantus Wachira Ngochi, the 2nd defendant came back to court to review the orders but the same application was dismissed. He urges the court to punish the 2nd defendant for contempt.

The **gist** of the second defendant's submissions is that there is no evidence of proper or any service upon the 2nd defendant. This court does not agree with his submissions as there is an affidavit of service on record indicating that the 2nd defendant was served with the order accompanied with penal notice. Moreover, the 2nd defendant made an attempt to review the said order but the application was dismissed and therefore it is presumed that he was aware of the order.

The second ground is that there is no evidence that the order has been disobeyed. This argument is countered by the affidavit of Edward Njoroge Mwangi sworn on 30/4/2013 paragraphs 7 where he states that the applicants went ahead to collect rent despite a court order. Mr. Ephantus Wachira Ngochi in his replying affidavit is evasive and instead of denying the allegation he states that there is no evidence that he is collecting rent. This court believes the assertions by the applicant that the 2nd respondent is collecting rent.

The third ground by the 2nd respondent is that this court gave orders of status quo on 19/4/2013 upon application dated 17/4/2013 which was dismissed on 14/5/2013. The application herein was filed on 30/4/2013 when the application dated 17/4/2013 was pending. He argues that the application fails to answer the question as to when the court orders were disobeyed. This court finds that the orders made on 19/4/2013 that status quo be maintained did not reverse the order of the court made on the 27/3/2013 and therefore this submissions fails.

Court orders are not made in vain and ought to be obeyed when dissatisfied with court orders, parties should appeal and not treat the order with contempt. The power of the court over contempt proceedings is granted under **Section 5 of the Judicature Act that provides that the applicable law is order 52 Rule 3(3) of the Rules of Supreme court of England which makes it mandatory for personal service. Section 5 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. The proceedings are instituted against the party in breach of the court orders and directions. The proper party thus must be before the court and served with the order allegedly breached.

A case of contempt of court is usually a Quasi criminal proceedings in nature because liberty of people is at stake, a higher standard of proof is required though not as that in criminal cases but higher than the standard of proof in civil cases.

The applicant has demonstrated to this court that the 2nd respondent has deliberately disobeyed the court order issued on 27/3/2014 by collecting rent from the suit premises and therefor to maintain the dignity of the courts, the 2nd respondent Ephantus Wachira Ngochi is hereby sentenced to one month imprisonment. Moreover, the 2nd respondent is hereby ordered to refund to the plaintiff all monies collected since 27th March 2013.

Warrant of arrest is hereby issued against the 2nd respondent. The O.C.S Karatina to enforce the order.

Dated, signed and delivered at Nyeri this 20th day of June 2014.

A. OMBWAYO

JUDGE