



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA

CIVIL SUIT NO. 266 OF 2009

ALFRED NDERITU.....1ST PLAINTIFF

FAITH WANJERI.....2ND PLAINTIFF

-V E R S U S-

WILSON WAITHAKA GITAU.....1ST DEFENDANT

NANCY WAMBUI KASINGA.....2ND DEFENDANT

RULING

ON PRAYER NO. 2 OF NOTICE OF MOTION DATED 29TH FEBRUARY 2012

BACKGROUND

1. Plaintiffs are tenants of the Defendants in two shops on **Plot No. MSA/BLOCK XXI/M.I** along Moi Avenue Mombasa. The Plaintiffs are protected tenants within the meaning of Landlord & Tenant (Shop, Hotel and Catering Establishment) Act, Cap 301.

2. The Defendants attempted to illegally evict the Plaintiffs whereupon Plaintiffs filed **Mombasa CMCC No. 973 of 2009** which was withdrawn when appropriate complaint was filed before the Business Premises Rent Tribunal (BPRT) being **Case No. 54 of 2009**. That BPRT matter was concluded in favour of Plaintiff. The Defendant thereafter served the Plaintiffs with Notice to Vacate the premises in accordance with the provisions of Cap 301. Plaintiffs in accordance with Cap 301 filed their references No. 142/143 of 2009 at BPRT having intimate their intention not to comply with the Notice to Vacate the premises. That notwithstanding, Plaintiffs pleaded in their Plaint, herein, that Defendant had proceeded to unlawfully put up a fence and lock out the Plaintiffs from their business premises. Plaintiffs by this action seek a declaration that they are protected tenants; issuance of mandatory and restraining injunction; and damages for lost business.

3. Plaintiffs simultaneously filed a Notice of Motion dated 5th August 2009 together with their Plaint. That Notice of Motion was heard ex-parte on 5th August 2009 when mandatory orders were issued against both Defendants for them to pull down the fence around Plaintiffs' business premises and for them to reinstate the Plaintiffs back to their businesses. Defendants did not obey that order which disobedience was the subject of this Court's Ruling of 6th October 2011. The Court by that Ruling issued the following orders-

- a. **THAT the 2nd Respondent NANCY WAMBUI KASINGA is in contempt of Court Orders of 5th August, 2009 and she will pay a fine of Kshs. 100,000/- in default will serve three [3] months in Civil jail.**
- b. **THAT this Court will not consider and/or rule on the Respondent's application dated 10.8.2009 until the contempt is fully purged by full adherence to the Court Orders of 5.8.2009.**

NOTICE OF MOTION

4. Plaintiffs by their Notice of Motion under consideration, dated 29th February 2012, seek the following orders-

- i. **The 2nd Defendant be ordered to be in Court attendance throughout the Court proceedings before a Judge.**
- ii. **That the 2nd Defendant be committed to jail for the continued disobedience of Court Orders.**
- iii. **That the 1st Plaintiff be permitted to take possession of the suit premises with assistance of the Court Bailiff.**

5. Plaintiff however when they appeared through their Counsel on 11th June 2014 only sought the first prayer above, that is for the attendance of 2nd Defendant in all Court proceedings. Learned Counsel for Plaintiff Mr. Mogaka indicated that the other prayers would be urged in the presence of Plaintiff. Mr. Mkhani for Defendants did not oppose that prayer and indeed by the time it was urged he was not present having left the Court. That prayer will indeed be granted.

COURT INVOKING ITS INHERENT POWER

6. This Court as far back as 5th August 2009 issued an order which was in two limbs. The first was that the Defendants do pull down the wall around Plaintiffs' business premises; and the second that Defendant do reinstate Plaintiffs into those premises.

7. By the time the Court made its Ruling dated 6th October 2011 the Defendants had only obeyed the first limb but not the second limb. The Court by that Ruling proceeded to find the 2nd Defendant, who had been served with the Court order, to be in contempt of the order of 5th August, 2009. 2nd Defendant as it can be seen from the Ruling of 6th October 2011 was ordered to pay a fine of Kshs. 100,000/- and in default to serve three (3) months in Civil jail.

8. I have perused this file and I have not found a receipt of payment of the fine ordered to be paid by 2nd Defendant. It does seem that the 2nd Defendant, as much as the first Defendant, have continued to heap contempt upon contempt on this Court by continually failing to obey the orders of this Court. The more the pity is that the Defendants are represented by an Advocate who ought to know the obligation placed upon him by the provisions of Section 1A(3) of the Civil Procedure Act, Cap 21, where he, as well as his clients, ought to assist the Court to achieve the overriding objective in Section 1A(1). Section 1A(3) provides-

“(3) A party to Civil proceedings or an Advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court.”
(underlining mine)

9. As consequence of Defendants' failure to obey the Order of 5th August 2009 the Court's proceedings in

this matter have not progressed since the Court has continually been engaged in applications relating to Defendants' disobedience. That is not prudent use of the Court time.

10. The Defendants, incase they are still in doubt, are obligated to obey an Order of the Court whether or not they consider the Order to be correct or reasonable. This was discussed by Justice A. Mabeya in the case **AFRICA MANAGEMENT COMMUNICATION INTERNATIONAL LIMITED –Vs- JOSEPH MATHENGE MUGO & ANOTHER [2013]eKLR** where he stated-

“The explanation given by the Defendants for non-compliance thereof is that they think that the same was irregular as the Plaintiff was undeserving of the same. In my view, this is a strange argument. To answer the Defendants, I will reiterate the sentiments of Romer LJ in Hadkinson –Vs- Hadkinson (1952) P 285 at 288 that:-

‘It is plain and unqualified obligation of every person against or in respect of whom an order is made by a Court of competent jurisdiction to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or even void.’

Further, Lord Donaldson MR said in Johnson –Vs- Walton (1990)I FLR350 at 352 stated:-

‘It cannot be too clearly stated that, when an injunctive order is made or when an undertaking is given, it operates until it is revoked on appeal or by the Court itself, and it has to be obeyed whether or not it should have been granted in the first place.’”

CONCLUSION

11. In view of what is stated above I grant the following Orders-

a. An order is hereby issued for the arrest of the 2nd Defendant, NANCY WAMBUI KASINGA forthwith for the said Defendant to be brought to Court to show cause why she should not be committed to Civil Jail as ordered on 6th October 2011.

b. Until further orders of the Court an Order is hereby issued for the attendance of 2nd Defendant NANCY WAMBUI KASINGA in Court whenever this case is fixed for hearing of either applications or full hearing.

c. Costs of Notice of Motion dated 29th February 2012 shall be determined when the prayer No. 3 thereof is heard and determined.

DATED and delivered at MOMBASA this 18TH day of SEPTEMBER, 2014.

MARY KASANGO

JUDGE