



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL & ADMIRALTY DIVISION
HIGH COURT CIVIL CASE NO. 101 OF 2012

NYOSIANAI MANAGEMENT CO. LTD. : 1ST PLAINTIFF

CHRISTOPHER ORINA KENYARIRI : 2ND PLAINTIFF

- VERSUS -

STARWOOD APARTMENTS MANAGEMENT LTD. : 1ST DEFENDANT

JOHN NJENGA : 2ND DEFENDANT

GREG NGUTA MUTINDA : 3RD DEFENDANT

MATHEW KIRAGU MWANGI : 4TH DEFENDANT

R U L I N G

1. The application before the court is a **Notice of Motion** dated **4th June 2012**. It is brought under **Section 5** of the **Judicature Act and Order 51 (1)** of the **Civil Procedure Rules**. The application seeks the following orders:-
 - a. This application be certified urgent and be heard *ex-parte* in the first instance.
 - b. John Njenga, Miriam Gaituri Njenga, Mathew Kiragu Mwangi, Regina Mwangeli, Betty Achieng, Ann Gathumbi, Faduma Yassin Aden, and Suban Abdi be directed to return the Tent belonging to the 1st Plaintiff and bear the cost of the repairs effected to the damage they caused on the properties they vandalized at the premises of the 1st Plaintiff situate at Hurlingham Land Reference Number 1/500.
 - c. John Njenga, Miriam Gaituri Njenga, Mathew Kiragu Mwangi, Regina Mwangeli, Betty Achieng, Ann Gathumbi, Faduma Yassin Aden, and Suban Abdi be committed to civil jail and detained in prison for a term of 6 months or such period as the Honourable Court would deem just for contempt of the Order of the Court issued at Nairobi on the 20th day of February 2012.
 - d. The Plaintiffs/Applicants be awarded the costs of this application.
2. The application is premised on the several grounds set out therein and is supported by the affidavit sworn by **CHRISTOPHER OKINA KENYARIRI** (for the 2nd Plaintiff herein) dated **4th June**

2012 with annexures.

3. The application is opposed. The alleged contemnors have not filed an affidavit in specific reply to the application but they rely on the affidavit sworn by **JOHN NJENGA** filed on **28th August 2012** with the Notice of Motion to enjoin the suit.
4. The background of the application as alleged by the Applicant is that on the **20th February 2012**, this Honourable Court gave an order of injunction restraining the 1st, 2nd, 3rd and 4th Defendants/Respondents jointly and severally whether by themselves, their agents, employees and/or servants from harassing and attempting to prematurely terminate the 1st Applicant's/Plaintiff's contractual services with the 1st Respondent's/Defendant's being the back filling of the swimming pool area on **Plot No 1/500** and construction of an eating area/restaurant on the said swimming pool and to run and manage the same for a period of **ten (10) years**. An order was issued as follows:-

“Pending the hearing and final determination of this application a temporary injunction be and is hereby granted prohibiting the 1st, 2nd, 3rd and 4th Respondents/Defendants jointly and severally whether by themselves, their agents, employees and/or servants from harassing the 2nd Applicant/Plaintiff and circulating malicious e-mail messages demanding his removal from office as chairperson of the 1st Respondent/Defendant unprocedurally.”

It is alleged that the said order was duly served upon the Defendants as directed whereupon the Defendants appointed various advocates to represent them during the proceedings.

On the **2nd** day of **June 2012**, it is alleged that the cited persons illegally entered upon the premises the subject of the interim orders, and in flagrant disobedience of the orders aforesaid, disrupted business therein and maliciously damaged and carried away goods of worth value.

The Applicant avers that the actions of the contemnors are contemptuous of the said court order and the court's due process and are intended to undermine the fair, just and prompt determination of the suit herein.

5. Mr. Moibi for the Applicants submitted that on **2nd June 2012** the 4 Defendants went to the premises where the Plaintiff is putting a construction and disturbed the premises. This was reported to the police. He submitted that the said court order restrains also the agents of the Defendants. The Starwood apartments are owned by individuals who are shareholders of the Defendant company, and that these individuals must have sat together and agreed to disobey the court order. Mr. Moibi also submitted that the Defendants and their agents also wrote a letter dated 31st May 2012 addressed to the Director of City Planning Department, and that this was in further contempt of the said court order. Mr. Moibi however affirmed that the alleged acts of contempt have since ceased.
6. In response to these submissions Mr. Namada for the contemnors submitted that Starwood Apartments is an apartment of 16 units purchased by different persons who then formed themselves into a management company – the 1st Defendant. That management company retains control of the common facilities which included a swimming pool. The day to day management is for the directors who are currently the 2nd, 3rd and 4th Defendants. The rest of the parties being cited as contemnors are either the house owners or their legal representatives who do not participate in the daily management of the property. The Applicant is one of the said flat owners. The counsel submitted that the main issue revolves around a dispute between the management company and the Plaintiff/Applicant. A dispute arose as to whether the contract granted to the 1st Plaintiff which is a company in which the 2nd Plaintiff is a director; to fill up the swimming pool and to put up over it a restaurant was valid or not. The 2nd, 3rd and 4th Defendants contend that

they have never authorized that process, while the 2nd Plaintiff contends that he has a contract to construct a restaurant on the swimming pool and to operate it. When the 2nd, 3rd and 4th Defendants sought to block the 2nd Plaintiff from doing that the Plaintiffs then came to court and secured the aforesaid court order.

Mr. Namada submitted that it is true the Plaintiffs were granted orders to stop the harassment of the Plaintiffs and to stop the breach of contract. However, the counsel submitted that there is no evidence before the court that the said court order has been breached. The counsel's allegation is that some goods were stolen and a report made to the police in **June 2012**.

7. I have carefully considered the application and the opposing submissions. From the outset I must state that contempt of court proceedings are serious affair and nobody should move the court in that respect without good reasons on the face of the application. To my mind the orders which were granted by this court were against the Defendants and their servants. The other alleged contemnors are not servants or agents of the Defendant. They are apartment owners in their own right and cannot be held liable for orders which were not served upon them. That order did not bar the apartment owners individually or jointly from visiting the property. In reference to the letter written to the City Council, which is also alleged to be evidence of the alleged contempt, it is worth to note that the court order did not authorize the Plaintiffs to carry out the construction without following the laid down procedures and laws of the City Council. The apartment owners were not gagged from raising complaints with respect to the ongoing construction. There is no evidence that the said court order was ever breached or held in contempt. The Applicants allege that a canopy was stolen and a report was made to the police. The Applicants are at liberty to follow up the matter with the police.

8. I have also noted that the complaint here concerns a group of people who share a common interest. One of them, the 2nd Plaintiff, alleges they have a contract to do certain things related to common interest. It is in the interest of all the parties to stop all side shows and to concentrate in developing the common interest. Rushing unnecessarily to court will not promote that interest.

9. I think this application for contempt was not well thought out. Its particulars and borders are not clearly spelt out, and appears to me to have been intended to delay any process which is now in court with respect to that common interest and also to scare the Defendants in one way or the other. If that is correct, as I hold it is, then this application is frivolous and vexatious and is indeed an abuse of the process of this court.

10. For the foregoing reasons I dismiss the **Notice of Motion** application dated **4th June 2012**. Parties shall bear their own costs

It is so ordered.

DATED, READ AND DELIVERED AT NAIROBI

THIS 30TH DAY OF JANUARY 2013

E. K. O. OGOLA

JUDGE

PRESENT:

Moibi for the Plaintiff

N/A for the Defendants

N/A for the Contemnors

Teresia – Court Clerk