



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**ENVIRONMENT AND LAND DIVISION**  
**ELC CASE NO. 456 OF 2012**

SIMON N KARIUKI .....PLAINTIFF

=VERSUS=

THE CITY COUNCIL OF NAIROBI & 4 OTHERS.....DEFENDANTS

**RULING**

By a Notice of Motion dated 22/10/2012, the applicant herein **Simon Njuguna Kariuki** has sought for various orders. The application is brought under **Section 3A and 63 of the Civil Procedure Act Order 40 Rules 3(1), (2) and (3), Order 51 (1) & (2) of the Civil Procedure Rules 2010 and all enabling provisions of the Law.**

The applicant sought for these orders:-

- a. That pending further proceedings herein, this Court be pleased to hold Mr. P Tom Odongo liable for contempt of Court and to order his immediate arrest and imprisonment and or to make such orders as the Court may deem just.
- b. That pending further proceedings herein, the Court be pleased to hold Mr. P. Tom Odongo liable to contempt of Court and to order his immediate arrest and imprisonment and or to make such orders as the Court may deem just.
- c. Cost of the application.

*The application was premised on these grounds:-*

- i. That the Court gave orders on 30<sup>th</sup> July, 2012 restraining the 1<sup>st</sup> Defendant by itself, its agents, Servants or any other person acting under it from stopping , curtailing, or in any other way interfering with the Plaintiff development and construction on **Parcel No. LR 2327/152 along Koitobos Road, Hardy** area in Karen.
- ii. Further on 19/9/2012, the Court gave orders directing the Plaintiff to remain in possession of the suit property but to stop further construction.
- iii. That on 19<sup>th</sup> day of October, 2012 at about 8.30 am during the pendency of the two (2) Court Orders the 1<sup>st</sup> Defendant through its employees accompanied by armed Police Officers and a bull dozer descended on the suit property and demolished the Plaintiff's development in open defiance and breach of the two (2) Court Orders and further that the two Court Orders are still in force.

The application was supported by the Affidavit of **Simon Njuguna Kariuki** the applicant herein. In the said affidavit, the applicant averred that on 30/5/2012, he moved to Court under a Certificate of Urgency

seeking for an order restraining the 1<sup>st</sup> Defendant by itself, its agents, servants or any other person acting under it from stopping, curtailing or in any other way interfering with his development and construction on parcel of land **LR No. 2327/152** along **Koitobos Road, Hardy Area Karen**. He further averred that, upon his hearing of the application, the Court issued Orders as per the annexed copy which was marked **SNK1**.

It was the contention of the applicant that the said order was served upon the 1<sup>st</sup> Defendant on 7/8/2012 and it was received by the 1<sup>st</sup> Defendant Legal Director on the 7<sup>th</sup> day of August 2012. He further contended that the Court gave further Orders on 19/9/2012 for him to remain on possession but to stop further construction. Applicant averred that the Court Order given on 30<sup>th</sup> July, 2012 has never been varied, revised and or vacated and the same remains in place. He further alleged that on 19<sup>th</sup> October, 2012 at about 8.30 am a group of men from the Nairobi City Council accompanied by armed police officers descended on the site and demolished the building as detailed by the Affidavit of John Mwangi Waweru the Managing Director of the construction Company .

That it was evident that 1<sup>st</sup> Defendant openly and publicly defied both the Court orders given on the 19<sup>th</sup> day of September, 2012 and 19<sup>th</sup> October, 2012 despite being aware of its existence. Therefore the action of 1<sup>st</sup> Defendant was directly in contempt of the two Court Orders and the Court should punish the 1<sup>st</sup> Defendant for defying lawful orders.

On his part, John Mwangi Waweru the Managing Director of Bothexi Construction Company which had been engaged by Simon Njuguna Kariuki told the Court that on 22/9/2012 he was served with a court order and he stopped the construction . However, on 19/10/2013 he was telephoned and informed that a group of men from Nairobi City Council accompanied by armed policemen and bull dozers had descended on the site and proceeded to demolish the house . That he rushed to Karen, Hardy Police Station but could not get assistance. He went to the site and showed the Nairobi City Council demolition squad the Court order, but they were hostile and determined and disregarded the Court Order.

The application was opposed by the 5<sup>th</sup> Defendant who averred that he is employed by 1<sup>st</sup> Defendant as the Town Clerk and that the application dated 22/10/2012 was served upon their advocates on record on 24/10/2012 and he was not personally served as required by the law. He further averred that on 27/7/2012, applicant obtained Interim orders curtailing any development on LR No. 2327/152 at Karen. That further the matter came before Court on 19/9/2012 and Justice Ougo did not extend the Interim Orders but vacated the Order of 31<sup>st</sup> July, 2012 and ordered applicant to stop further construction but remain in possession thereof. 5<sup>th</sup> Defendant averred that the Applicant breached the Court Order of 19/9/2012 as he remained in possession and continued to construct at night. He also denied having been served personally with the said order which he is being held in contempt of. He also denied ever authorizing any officer from their office to demolish the structures on the suit property since he is not the one in charge of the demolition department. That in the Affidavit of John Mwangi Waweru, he did not disclose the identity of the officers who demolished the said site as there are other Defendants who are also interested in the suit property.

The application was also opposed by **Winfred Nyambura Karugu** , the 2<sup>nd</sup> Defendant who contended that indeed on 31<sup>st</sup> July, 2012, the Plaintiff obtained an-exparte injunction Order restraining the 1<sup>st</sup> Defendant from interfering with the construction of LR No. 2327/152 Nairobi. That on 19.9.2012 when the said application came up for inter-parties hearing. Hon. Justice Ougo declined to extend the exparte Orders and issued another order of the same day. Though the Applicant was allowed possession, he was not to construct but applicant herein continued with construction. 2<sup>nd</sup> Defendant prayed for dismissal of the applicant's application.

The parties herein canvassed the application through written Submissions.

I have now carefully read and considered the pleadings herein and the written Submission and I make the following findings:-

It is the applicant's application that the 5<sup>th</sup> Defendant herein P. Tom Odongo be cited for contempt of Court and penal consequences be ordered upon him. It was alleged that on 19/10/2012, he breached the Court orders issued on 31<sup>st</sup> July, 2012 and 19/9/2012. However, the 5<sup>th</sup> Defendant denied breaching the said Court orders and also stated that on 19/9/2012 Interim orders were extended and so on 19/10/2012, the Court order of 31/7/2012 had been vacated. The issue for determination is whether on 19/10/2012, there existed a court order. Whether the said Court order was breached and it was breached by the 5<sup>th</sup> Defendant. The applicant herein is seeking penal consequences against the 5<sup>th</sup> Defendant. This application is therefore Quasi – Criminal in nature and the guilt of the condemn or has to be proved with such strictness of proof as is consistent with the gravity of the charge. This was a finding in the case of **Mutitika Vs Baharini Farm Ltd, Civil Application No. 24 of 1985**, where it was also held that:-

*“The standard of proof in contempt, proceedings must be higher than proof on a balance of probabilities”.*

An application for contempt involves the peril of loss of personal liberty and court should exercise due care and diligence while invoking such orders.

It was alleged that the 5<sup>th</sup> Respondent herein breached the Court Orders issued on 31<sup>st</sup> July, 2012 and 19/9/2012.

I have perused the court file and noted that indeed on 30/7/2012, Justice Mwilu granted Interim Orders against the Defendants. However, when the matter was canvassed before Justice Ougo on 19/9/2012, the Judge declined to extend the Interim Orders issued on 31/7/2013. However, Justice Ougo ordered that the Plaintiff to be in possession but not to construct. Therefore on 19/10/2012 when the alleged demolition took place there was no Interim Order of injunction as it had not been extended on 19/9/2012, by Judge Ougo.

The applicant had a duty to prove that there existed a court order which was breached. This was the findings in the case of **Margret Ogweno Okoth Vs Gabriel Onyango Wade and another , Kisumu High Court Civil Case No. 44 of 2003** where the court held that:-

*“ It is the Responsibility of the person seeking the order of contempt to show there had been wilful disobedience of the order and the jurisdiction is practically arbitrary and unlimited and should be most jealously and carefully invoked and exercised to avoid cases of overzealous applicants abusing the process of the Court “*

In the Instant case, there is evidence that on 19/9/2012, the interim Orders were not extended and so court cannot hold that on 19/10/2012, Order of injunction were breached. On 19/9/2012, Judge Ougo ordered the Plaintiff to remain in possession but not construct. However, it was not indicated that demolition was one of the enjoined or barred Act. It was held in the case of **William Sapuro Kimaana Vs National Bank of Kenya Ltd and Another , Nairobi High Court Civil Case No. 1933 of 1999** that

*“ For the purpose of contempt what is required is the existence of the injunctive order, the Defendant being aware of it and proof of disobedient or violation “.*

It was also alleged that the breach was done by the employees of the 5<sup>th</sup> Defendant and he was aware of the existence of the Court Order. However, the return of service by Edward Gacau Kariuki Advocate, shows that the Court Order was served on the Legal Department but not on the 5<sup>th</sup> Defendant personally. The applicant ought to have served the 5<sup>th</sup> Defendant personally so that he would have been aware of the alleged court order and the penal consequences.

It was also held in the case of **Nyamondi Ochieng Nyamogo & Another Vs Kenya Posts and Telecommunication Company, civil application No. Nairobi 264 of 1993** that:-

*“ An order for injunction must be served personally and not on the advocate and mere knowledge of all*

*terms and directions of the Court is not enough for the purpose of the contempt”.*

There is no evidence that applicant was served personally with the Court orders of 30/7/2012 and 19/9/2012 and he later violated them.

Though there is evidence that the said construction was demolished, no evidence that it is the 5<sup>th</sup> Defendant herein who gave those orders of demolition.

Having now carefully considered the Notice of Motion dated 22/10/2012, the Court finds that the applicant has not met the threshold required to prove contempt. For the above reasons, the Court dismisses the said Notice of Motion. Each party to bear its own costs.

It is so ordered.

Dated, Signed and delivered this **21<sup>st</sup> day of June, 2013.**

**L N GACHERU**

Coram

Before Gacheru Judge

Court Clerk Anne

Mutinda for 5<sup>th</sup> Defendant.

Kariuki for the Plaintiff / Applicant

**L N GACHERU**

In the Presence of:-

Mr Kariuki for the Plaintiff/Applicant

Mr Mutinda for the 5<sup>th</sup> Defendant

**L N GACHERU**