



REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT AT NAIROBI

ELC SUIT NO. 713 OF 2012

TOMAJOK LIMITEDPLAINTIFF

VERSUS

NICHOLAS GEORGE MWAI MWANGIDEFENDANT

RULING

This court on 11th March 2013 gave orders upon an application by the Plaintiff restraining the Defendant from undertaking any further construction on the suit property, namely Plot No. L.R. 209/4401/709 situated at Hamza, Makadara Nairobi, pending the hearing and determination of the suit herein. The Plaintiff has now filed another Notice of Motion dated 26th April 2013 seeking the following orders:

1. That the Defendant be personally summoned this Court to show Cause why he should not be punished for contempt of the court order of 11th March 2013.
2. That the Defendant be detained in prison for a term not exceeding six (6) months for disobeying the Court orders of 11th March 2013.

The main ground for the application is that the Defendant has ignored and is in contempt of the said court order and has proceeded with construction and he is now inviting tenants to lease the premises in an attempt to defeat the orders of the court. The Plaintiff has attested to these facts in a supporting affidavit sworn on 26th April 2013 by its Director, one Alphan Njeru, to which he has attached photographs of the construction on the suit property and correspondence by way of email between the parties' Advocates dated 24th April 2013 on the said construction.

The application is opposed. The Defendant filed a replying affidavit sworn on 10th May 2013 wherein he stated that no court order of Penal Notice had ever been served on him in relation to this suit. Further, that the Plaintiff has never been in occupation of the suit property and that he has kept his workers on site to maintain the property and also prevent loss of the materials that are on site. The Defendant also stated that his understanding of the orders of the Court was for the *status quo* to be maintained, and that the Plaintiff shall not suffer any prejudice in this regard.

The parties' Advocates sought to rely on written submissions during the hearing of the Notice of Motion on 10th June 2013. The Plaintiff's Counsel in submissions dated 20th May 2013 argued that the Defendant had not submitted any sufficient response to the Plaintiff's allegations, and instead given a self-serving interpretation to the court's orders. The counsel relied on the decision in **Andrew Nyarindo v Republic (2009)e KLR** for the position that the administration of justice should not be ridiculed by having court orders not being obeyed.

The Defendant's Counsel in submissions dated 30th May 2013 urged the court to apply the principles set out in the case of **Emma Wanjiku Ndungu vs Francis Njoroge Kamau & 4 Others (2012) e KLR** that it must be shown that the alleged contemnor had been served with copies of the court orders. The counsel also relied on various other decisions in this regard and distinguished the application of **Andrew Nyarindo v Republic (2009)e KLR** on the ground that it involved proceedings in a criminal court.

I have carefully considered the pleadings, evidence and submissions made with regard to the application before this Court. The Plaintiff's application is brought under the provisions of Order 40 Rules 3(1) of the Civil Procedure Rules, and section 3A of the Civil Procedure Act. The jurisdiction of this court under these provisions is limited to instances where the civil contempt that is alleged is the breach of an injunction granted by the court.

In addition, section 63(c) of the Civil Procedure Act is the substantive provision giving jurisdiction to the Court to punish for civil contempt in cases of breach of injunction orders. Order 40 Rule 3 of the Civil Procedure Rules is more specific as to the conditions that will apply for such a breach to be punished by way of contempt of court proceedings, which are that the application should be brought in the Court granting the injunction, and that an application for contempt of court proceedings should be by way of Notice of Motion.

Personal service on the contemnor of the court order alleged to have been breached is a requirement in contempt of court proceedings, as held by the Court of Appeal in **Ochino & Another v Okombo & 4 others (1989) KLR 165**. The Court of Appeal in the said decision stated that as a general rule no order of a court requiring a person to do or to abstain from doing any act may be enforced by committing the said person for contempt, unless a copy of the order has been served personally on that person. The Court of Appeal further held that a copy of the order must be endorsed with a notice informing the person on whom it is served that if he disobeys the order he is liable to the process of execution to compel him to obey it.

After perusal of the pleadings and court record, I find that there is no affidavit of service on record stating that such personal service of the court orders granted on 11th March 2013 was affected by the Plaintiff upon the Defendant. This Court cannot therefore make a finding as to the Defendant having been aware of the said orders and therefore in contempt of the same. The Plaintiff's Notice of Motion is therefore hereby denied for this reason.

This finding notwithstanding, I will make one observation on the evidence produced by the Plaintiff in this application. From a perusal of the photographs attached to the Plaintiff's Notice of Motion for an injunction dated 27th November 2012, and the photographs attached to the current Notice of Motion dated 26th April 2013 it is apparent that there has been further construction on the building on the suit property, with windows and doors having been added to the said building.

In exercise of the inherent powers given to this Court pursuant to section 3A of the Civil Procedure Act, I direct that the Plaintiff extracts and effects proper personal service on the Defendant of this Court's orders granted by on 13th March 2013, together with a penal notice. The Plaintiff shall be at liberty to thereafter apply for committal of the Defendant for contempt of court in the event of continued disobedience of this Court's orders.

The costs of the Plaintiff's Notice of Motion dated 26th April 2013 shall be in the cause.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this ____26th____ day of
____September____, 2013.

P. NYAMWEYAJUDGE