



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI LAW COURTS)
ENVIRONMENTAL & LAND CASE 585 OF 2011

DUPOTO GROUP
LIMITED.....PLAINTIFF

VERSUS

KENYA AIRPORTS AUTHORITY.....1ST
DEFENDANT

THE CITY COUNCIL OF NAIROBI.....2ND
DEFENDANT

RULING

The Plaintiffs application by way of Notice of Motion dated 11th January 2012 is seeking the following orders:

1. That this Honourable court be pleased to order that the Chief legal officer of the 1st Defendant and/or any other person holding such position in the 1st Defendant at the time of the hearing and determination of this application, and one Karisa Iha, the legal Deputy Director of the 2nd Defendant and /or any other person holding such position in the 2nd Defendant at the time of the hearing and determination of this application be committed to civil jail for a term of six (6) months and/or for such a term as the Court may deem fit be attached for disobedience of the this Honourable Court’s orders made on 27/10/2011.
2. That this Honourable Court be pleased to summon the Provincial Commissioner, Nairobi area and the D.O. II, Langata West Division one Joel Mwangara to show cause why they should not be committed to civil for a term of six (6) months or for such a term as the court may determine for blatant and continued disregard and/or disobedience of the this Honourable Court’s order’s made on 27/10/2011.

The application is brought under the provisions of Order 40 Rule 3 of the Civil Procedure Rules of 2010, and sections 63(c), 1A,1B and 3A of the Civil Procedure Act (Cap 21).

The grounds for the application are that orders issued by this Court on 27/10/2010 and a penal notice

thereto were personally served upon the 1st Defendant, and one Karisa Iha, a Deputy Director of the 2nd Defendant on 31/10/2010, and upon the Provincial Commissioner, Nairobi area on 28/10/2011. However, that that on or about 7/1/2012 and despite being so served, the Provincial Commissioner, Nairobi area through District Officer (D.O) II, Nairobi West Division one Joel Mwangara, under instructions and/or with tacit approval of the Defendants herein in complete and blatant disregard and/or disobedience of the aforesaid orders, entered into the suit land accompanied by armed administration police officers and demolished structures erected thereat.

Further, that the said District Officer (D.O) II, Nairobi West Division with tacit approval of the Provincial Commissioner, Nairobi area have further incited hooligans to invade the suit land and started erecting structures thereat. The Plaintiff states that the foregoing acts of the Defendants and the Provincial Commissioner, Nairobi area through District Officer D.O. II, Nairobi West Division and/or the continued disobedience of the court orders aforesaid is an open contempt and direct defiance of this Court.

These grounds are deponed to in the supporting affidavit sworn by the Odinga Letole, a Director of the Plaintiff on 11th January 2012, to which is annexed the said order given on 27th October 2012 granting a temporary injunction restraining the Defendants from interfering with the subdivision and/or the Plaintiff's possession, title to, use, occupation and/or ownership of all that property situated at and known as L.R. NO. 209/1206 for 14 days. The Deponent stated that the said orders have further been extended by consent of the parties herein from time to time. Also attached to the affidavit were a penal notice, an affidavit of service sworn by one Felix M. Munuve on 10th November 2011, and photographs and newspaper cuttings on the said demolitions.

The 1st Defendant's response is in a Replying Affidavit sworn by Joy Nyaga, its Acting Corporation Secretary /Chief Legal Officer on 18th January 2012, wherein she admitted to having been served with the said Court order and stated that since the 1st Defendant has no interest whatsoever over the suit property and therefore had no reason therefore to disobey the same. Further, that the Plaintiff should pursue the correct contemnors of the court order, as the 1st Defendant has not been party to the demolition of structures at the suit premises either before or after the issuance of the court order.

The 2nd Defendant responded by filing a Replying Affidavit sworn by Karisa Iha, its Deputy Director of Legal Affairs on 19th January 2012, wherein he denies that he, nor any officer of the 2nd Defendant had disobeyed the orders of this Court, and that he was a stranger to the allegations of eviction. Further, that the Plaintiff's affidavit does not show the 2nd Defendant's officers participation in the alleged eviction, and as deponed by the Plaintiff itself, the eviction, if any, was by Provincial Administration personnel, who are not under the 2nd Defendant's control.

There was no response filed by the Provincial Commissioner, Nairobi area and/or the D.O. II, Langata West Division, Joel Mwangara.

Both the Plaintiff's and Defendant's Advocates made oral submissions at the hearing of the application on 20th February 2012 in which the averments in the foregoing were reiterated. The Plaintiff's Advocate, Mr. Kamwendwa submitted that none of the Defendants had disputed that the demolitions were carried out or that they had knowledge of the court orders, and had passed the blame to the Provincial Administration. The 1st Defendant's Advocate, Mr. Sankale, submitted that the 1st Defendant is a statutory body, created under the Kenya Airports Authority Act (Cap 395), wherein there is no provision that Provincial Commissioners or District Officers are agents of the 1st Defendant, or answerable to the 1st Defendant, and furthermore the 1st Defendant has no power to instruct the said officers.

Further, that the Plaintiff has not provided any evidence of the approvals or instructions on the said demolitions by the 1st Defendant because there were none, and that the 1st Defendant had no interest in the suit property or said demolitions and this application was therefore directed at the wrong person. The 2nd Defendant's Advocate, Mr. Wati, associated himself with the submissions made by Mr. Sankale, and

submitted that the Nairobi City Council is governed by the Local Government Act (Cap 265), and any instructions to demolish a structure must always be in writing by way of an enforcement notice as required by section 38(1) of the Physical Planning Act (Cap 286). He also reiterated that the Provincial Administration does not act under the 2nd Defendant's instructions or command.

I have carefully considered the pleadings, evidence and submissions made with regard to the application before this Court. The first issue to determine is whether the correct procedure has been followed in bringing this application. The application is brought under the provisions of Order 40 Rules 3 of the Civil Procedure Rules, The jurisdiction under the Civil Procedure Act and Rules is limited to instances where the civil contempt that is alleged is the breach of an injunction. Section 63(c) of the Civil Procedure Act is the substantive provision giving jurisdiction to the Court to punish civil contempt in cases of breach of injunction orders.

Order 40 Rule 3 of the Civil Procedure Rules of 2010 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. Order 51 of the Civil Procedure Rules provides the more detailed procedures on how Notices of Motion are presented to the Court, and it is my finding that the Plaintiff has followed the required procedure in the presentation of their application.

The second limb of procedure that needs to be followed is personal service of the orders and penal notice which 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 a copy 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 Court record, I found that the affidavit of service sworn by a process server by the name of Felix M. Munuve on 10th November 2011 is on record stating that such personal service was effected on the 1st and 2nd Defendants.

The said affidavit of service does not attest to service on the Provincial Commissioner, Nairobi Area or on the D.O. II, Langata West Division, Joel Mwangara, neither is there any other affidavit of service on record attesting to such service. As this procedure was not followed with regard to these two alleged contemnors, prayer 3 of the Plaintiff's application dated 11th January 2012 cannot lie.

The second issue before the court is whether with the officers of the 1st and 2nd Defendant's having been properly served, are culpable of contempt of court. The threshold of proof required is also higher than that in normal civil cases, and one can only be committed to jail or otherwise penalized on the basis of evidence that leaves no doubt as to the contemnor's culpability. The Plaintiff has stated that it was the District Officer (D.O) II, Nairobi West Division who entered into the suit land accompanied by armed administration police officers and demolished the structures thereon with the tacit approval of the 1st and 2nd Defendants. The officers of the 1st and 2nd Defendants have denied having taken part in or approving the said demolitions, and the burden is upon the Plaintiff to prove such participation. The Plaintiff has however not provided any evidence to show the said participation and/or approval by the 1st and 2nd Defendant.

For the reasons given in the foregoing, I find that the Plaintiff have not proved the culpability of the 1st and 2nd Defendants, and Prayer 2 of the application dated 11th January 2012 is hereby also denied.

Orders accordingly.

The Plaintiff shall meet the costs of the application.

Dated, signed and delivered in open court at Nairobi this 28th day of May, 2012.

P. NYAMWEYA

JUDGE