



REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAIROBI

MILIMANI LAW COURTS

Environmental & Land Case 462 of 2011

NAFTALI RUTHI KINYUA..... PLAINTIFF

VERSUS

PATRICK THUITA GACHURE.....1ST DEFENDANT

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

RULING

The Plaintiffs application by way of Notice of Motion dated 3rd November 2011 is seeking orders that Mr. Patrick Thuita Gachure, the 1st Defendant herein, do stand committed to civil jail for such period as this Court may determine for contempt of Court, by willfully violating and/or disregarding the order issued by this Court on 9th September 2011. The application is brought under the provisions of Order 40 Rule 3 (1) and (3) of the Civil Procedure Rules of 2010, the inherent powers of the Court and all other enabling provisions of the law.

The grounds for the application are that by an application dated 6th September 2011, the Plaintiff sought injunctive orders that the 1st Defendant be restrained from interfering with the Plaintiff's quiet possession of the suit property known as L.R. No. 8285/1522 also known as plot No. 133 Kariobangi Light Industries (hereinafter referred to as the suit property). Further, that this Honourable court heard the Application *ex parte* on 6th September, certified the matter as urgent and granted temporary injunctive orders restraining the 1st Defendant, whether by himself, his servants, agents, employees or anyone claiming through him or on his behalf, from further trespassing on, encroaching, invading, occupying, developing, leasing, letting, selling or completing by conveyance or transfer of any sale or otherwise howsoever interfering with the Plaintiff's ownership of the suit property pending hearing and determination of the application.

It is also stated that a copy of the Order of the Court was duly served on the 1st Defendant through his local Chief on 14th September, 2011 and that this notwithstanding, the 1st Defendant has commenced development of the suit property, has acted without due regard to the law, and deliberately ignored orders duly given by this Court.

These grounds are deponed to in the supporting affidavit sworn by the Plaintiff on 3rd November 2011, to which is annexed photographs showing the alleged encroachments and developments by the 1st Defendant upon the suit property. The Plaintiff in addition states that he instructed his Advocates on record to write to the 1st Defendant's Advocates in relation to the unlawful acts of the 1st Defendant which they did, and despite receipt of the letter the 1st Defendant has continued to develop the property which action is a clear contempt of the order issued by this Court. A copy of the said letter by the Plaintiff's Advocates dated 24th October 2011 is also annexed as evidence.

The 1st Defendant's response is in Grounds of Opposition dated 17th January 2012, filed by his Advocate on the same date. The 1st Defendant opposes the Plaintiff's application on the grounds that the application is fatally defective due to non-compliance of the law of contempt of court as stated by the Judicature Act (Cap 8) and for non compliance with the procedural law prevailing in England, namely Rule 3(3) of Order 52 of the Rules of the Supreme Court of England. Further, that the Plaintiff has not furnished proof of the order that was allegedly disobeyed, and that the application and its Supporting Affidavit do not satisfy the standard of proof required in the proceedings of this nature.

The 1st Defendant also opposes the Plaintiff's application on the grounds that the process of extraction and alleged service of the court order which is the subject matter of these proceedings contravenes the provisions of Order 21 Rule 8 of the Civil Procedure Rules 2010, and that the application is an abuse of the Court process and the same should be dismissed with costs. I however note that the orders being extracted by the Plaintiff in this instance were *ex parte* orders, and Order 21 Rule 8 of the Civil Procedure Act therefore did not apply.

Both the Plaintiff's and 1st Defendant's Advocates filed written submissions, which submissions the said Advocates reiterated at the hearing of the application on 29th February 2012. The Plaintiff's Advocate written submissions are dated 30th January 2012, and those by the 1st Defendant's Advocate are dated 28th February 2012.

The Plaintiff's Advocate argued that there is an affidavit of service sworn on 3rd October 2011 by a process server by the name of George Mathenge and filed on the same day, wherein it is averred that the said process server called the 1st Defendant on his cell telephone Number 0722 557849 on 14th September 2011 and informed him of the suit papers, whereupon the 1st Defendant requested that the said suit papers be left with the Chief, Kariobangi Light Industries. The Plaintiff's Advocate submitted that even though the 1st Defendant was not served personally, he cannot feign ignorance of the existence of the court order as the same was served together with the other documents to which he has responded, and his Advocates were also notified of the existence of the Court order by the Plaintiff's Advocate in the letter dated 24th October 2011. The Advocate relied on the authorities of **George Sagala & Another vs Peter Kenneth & Another, H.C.C.C No 147 of 199** and **Dina Bhoke alias Mary Makumi vs Willis Wanjala & Others, H.C.C.C. No 608 of 2004** for the position that a contemnor cannot hide behind lack of personal service to disobey court orders.

The Plaintiff's Advocate also submitted that the breach of the order has been proved on a standard higher than a balance of probabilities as held in **Mutitika vs Baharini Farm Limited (1985) KLR 227**. The Advocate contended that the Plaintiff in his supporting affidavit sworn on 5th September 2011 had produced photographs of the suit property which showed trenches that had been dug in readiness for construction, and in the supporting affidavit sworn on 3rd November 2011 the Plaintiff has annexed photographs showing development on the suit property and labourers carrying on work on the same.

The 1st Defendant's Advocates in their submissions contended that the procedural requirements provided for under Order 52 of the Supreme Court of England and discussed in **R vs County Council of Nakuru Ex Parte Edward Alera T/A Genesis Reliable Equipment and 2 Others (2011)e KLR** had not been observed. The Advocate argued that in particular, notice of the application for permission and leave had not been given to the Attorney General as held in **Hon. Mwangi Kiunjuri vs Wangethi Mwangi H.C.C.C No. 1833 of 2003**, and that there had been no personal service of the substantive application on the contemnor as held in **Jacob Zedekiah Ochino vs George Aura Okombo and 4 others, Civil Appeal No 36 of 1989**.

The 1st Defendant's Advocate also argued that the Plaintiff did not annex a copy of the order that was allegedly disobeyed in the Supporting Affidavit to his application, the order was not drawn as required by Order 21 Rule 8(6) of the Civil Procedure Rules, and there was no proof tendered that the contemnor was called on his telephone number 0722 557849 on 14th September 2011. Further, that the photographs produced as evidence by the Plaintiff cannot be the basis of concluding that the 1st Defendant has carried out construction in violation of the court order, as they do not indicate the date and time they were taken, and cannot be admissible in evidence as they lack an accompanying certificate from an officer authorized to take photographs as provided for under the Evidence Act (Cap 80).

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 Defendant's Advocate alleged that the Plaintiff had not followed the correct procedure as no leave of the Attorney General was sought to file the application, and there was no personal service on the 1st Defendant of the court orders alleged to have been disobeyed.

The Plaintiff's application is brought under the provisions of Order 40 Rules 3(1) and (3) of the Civil Procedure Rules, the inherent powers of the court and all other enabling provisions of the law. I am of the view that the jurisdiction and procedures provided for in the Judicature Act and Civil Procedure Act are separate, and either can apply so long as the proceedings fall within the Act's ambit. The jurisdiction conferred by section 5 of the Judicature Act is wide, and encompasses all forms of contempt of court proceedings, and the section also provides that the High Court shall have the same power to punish for contempt of court as is for the time being possessed by the High Court of Justice in England.

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 under the said Order there is no requirement for leave to be sought from the Attorney General before a Notice of Motion is presented or filed. It is therefore my finding that the Plaintiff has not flouted any procedure in this respect in the presentation of their application.

On the requirement for personal service, this 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.

It is also specifically required under the Civil Procedure Rules Order 40 Rule 4(3) that *ex parte* orders for injunctions should be served on the party sought to be restrained within three days of its issue, failing

which the injunction automatically lapses. The Plaintiff alleges that there was such personal service through the Chief of Kariobangi Light Industries upon the Plaintiff's instruction given in a telephone conversation with the process server, and there is an affidavit of service on record to that effect sworn on 3rd October 2011 by a process server by the name of George Mathenge. The Defendant disputes this service and claims that there is no proof of the telephone call to the 1st Defendant having been made.

After perusal of the Court record, I found that there is an affidavit on record stating that such personal service was effected by the said Chief upon instructions by the 1st Defendant. In my view, proof of the telephone call having been made is irrelevant, as it was not the means by which the personal service is alleged to be effected. In the affidavit of service filed on 5th October 2011 and sworn on 3rd October 2011, the process server Mr. George Mathenge Kiambati states in paragraph 5 as follows with regard to the service of the court orders:

“That the Chief accepted service on behalf of Mr. Thuita but declined to sign my copies which I now return herewith duly served”

Two facts are relevant from that statement, the first is that the actual personal service was on the Chief and not the 1st Defendant, and secondly there is no acknowledgement or evidence of the Chief actually having been so served, or having thereafter effected personal service on the 1st Defendant. This Court cannot therefore make a finding of personal service in the absence of any evidence that the said Chief did subsequently serve the 1st Defendant with the suit papers, neither can this court make any finding as to the 1st Defendant having been aware of the said orders as the court proceedings on 6th September 2011 were *ex parte*. The Plaintiff's application dated 3rd November 2011 is therefore hereby denied.

This finding notwithstanding, I will make one observation on the evidence produced by the Plaintiff in this application. From a perusal of the said evidence it is apparent that there have been developments made on the suit property between 5th September 2011 when the Plaintiff produced photographs showing trenches dug on the suit property and a corrugated iron sheet wall on the same, and 3rd November 2011 when photographs were produced showing the same property, with stone walls in the process of construction, and workers and building materials thereon.

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 1st Defendant of this Court's orders granted by the Honourable Justice Mwera on 6th September 2011, together with a penal notice thereon. The Plaintiff is also at liberty to thereafter apply for committal for contempt of court in the event of continued disobedience of this Court's orders.

Orders accordingly.

The costs of the application shall be in the cause.

Dated, signed and delivered in open court at Nairobi this ____10th____ day of ____May____, 2012.

P. NYAMWEYA

JUDGE