

JUMA.....PLAINTIFF

VS.

FRANCIS MAINA

KIBUCHI.....DEFENDANT

RULING

1. The common denominator in the suits HCCC No. 502 of 2011 and HCCC No. 603 of 2011 both of which have now been consolidated is a dispute over ownership of a parcel of land known as L.R. No. 330/506 Riara situate in Kilimani Estate in the City of Nairobi(hereinafter called “the suit property”) and registered in the name of Raska Investment Company Limited, the 4th Plaintiff in the former suit. Apart from the pleadings filed in both suits, the parties in the two suits have filed a series of applications all seeking interim reliefs on one nature or other.

2. In HCCC NO. 502 of 2011, the Complaint was filed on 10th November 2011. The prayers sought in the Complaint were a declaration that the transfer of shares of the 4th Plaintiff company by the Defendants was null and void *ab initio* and that the said shares should revert to the 1st, 2nd and 3rd Plaintiffs. The Plaintiff further sought orders of permanent injunction restraining the Defendants from selling, alienating, disposing or interfering with the Plaintiffs use of the suit property. Contemporaneous with the Complaint, the Plaintiffs filed a Notice of Motion dated 14th November 2011 seeking interim injunction orders against the Defendants. On 15th November 2011, the court granted temporary injunction orders pending *inter partes* hearing of the application. These have since been extended from time to time.

3. In HCCC No. 603 of 2011, the Complaint was filed on 3rd November 2011 in which a wide range of prayers were sought including injunction orders restraining the defendant and his servants from entering, possessing or otherwise interfering with the suit property. Contemporaneous with the Complaint, a Notice of Motion application was filed on 3rd November 2011 seeking interlocutory injunction orders which orders were issued on 11th November 2011.

4. On 18th January 2012, with the consent of the parties, the two suits HCCC No. 502 of 2011 and HCCC No. 603 of 2011 were consolidated. HCCC No. 502 of 2011 was made the henceforth primary file in the matter.

5. On 30th January 2012, during the mention of HCCC No. 502 of 2011, the court recorded the following consent order:

“That none of the parties shall waste the suit property either by subdivision, sale, transfer, mortgage or charge or erect permanent structures or remove any pending structures on the suit property pending the hearing and determination of the suit. That all parties to file and serve pleadings and documents within the next 30 days”

6. By a Notice of Motion dated 22nd February 2012, Nicholas OkwachuJuma, the Plaintiff in HCCC 603 of 2011 sought orders of committal to prison of AshishMagon for disobedience of the consent order of the court of 30th January 2012.

7. By a Notice of Motion dated 29th February 2012, the 2nd Plaintiff in HCCC No. 502 of 2011 GeetaMagon applied to be struck out and or be removed from the proceedings in this matter.

8. The applications presently before me for determination are therefore the Notice of Motion dated 22nd February 2012 and the Notice of Motion dated 29th February 2012.

9. The application dated 22nd February 2012 is premised on the grounds that Mr. AshishMagon has disobeyed the consent orders of the court issued on 30th January 2012. This order directed all the parties to maintain status quo over the suit property obtaining as of that date pending further directions of the court. The application is brought under Order 40 Rule 3 (1) of the Civil Procedure Rules, 2010 and is supported by the affidavit of the Applicant Nicholas OkwachuJuma sworn on 22nd February 2012. The facts in support of the application are that since the orders of 30th January 2012, the Respondent has on diverse dates visited the suit property using force and intimidation of security firms, gangs, and police officers outside the jurisdiction of the suit property in an attempt to wrestle possession of the property on claims that they are his premises. In that regard, a complaint had been recorded by the Applicant at Muthangari Police Station.

10. In reply to the application of 22nd February 2012, there is a replying affidavit by AshishMagon filed on 7th May 2012. In the affidavit, the deponent states that upon consolidation of the two suits, no orders issued in HCCC No. 603 of 2011 survived the consolidation. The orders issued in that case had lapsed and were never extended. Similarly, upon consolidation Mr. Nicholas OkwachuJuma became a defendant in HCCC No. 502 of 2011 and was subject to the consent orders of the court requiring all parties to keep off the suit property. He states that Mr. OkwachuJuma does not own the property and the Indenture he relies on is a forgery. He denies having entered the premises but admits having visited the premises with the police after neighbours to the property complained of nuisance caused by noise emanating from occupants of the premises being Mr. Okwachu's agents.

11. The Notice of Motion dated 29th February 2012 is brought by the 2nd Plaintiff in HCCC No. 502 of 2011 under Order 1 Rule 10(2) of the Civil Procedure Rules. The application is based on the grounds that the Plaintiff is improperly joined as a party to the suit. The suit itself was commenced without the 2nd Plaintiff's knowledge or authorization. The 2nd Plaintiff asserts further that she resigned as a director of the 4th Plaintiff in the year 2009 and had transferred all her shares therein. As the subject matter of the suit is a property registered in the name of a company capable of suing and being sued in its own name, she had been improperly impleaded. The 2nd Plaintiff states further that she has no claim against the Defendants, resides in the United Kingdom and her wrongful joinder would only force her to incur unnecessary costs. She pleads to be removed from the proceedings.

12. No replying affidavit was filed in respect of the application of 29th February 2012. However, at the *inter partes* hearing of the application on 7th May 2012, counsel made oral rival submissions in respect of the application. For the Applicant, Ms. Odari submitted that there was no relief that the 2nd Plaintiff sought against the defendants in HCCC No. 502 of 2011. She had resigned from the company and had no interest in the suit. The verifying affidavit to the suit was defective as the 2nd Plaintiff had given no authority for the affidavit to be sworn on her behalf. In any event, the property was registered in the name of a limited liability company which could sue in its own name. For the Plaintiffs in HCCC No. 502 of 2011, Mr. Gichovi challenged the foundation of the application under the Civil Procedure Rules stating that the application was not premised on any Order of the Rules. He submitted further that the dispute in this matter related to ownership of the company and its properties and therefore the persons named as directors of the company had to be made parties to the suit. He submitted further that Clause 2.6 of the settlement agreement between the plaintiffs required transfers to be made within 3 months of the agreement but that that this had not been effected. He urged the court to retain the 2nd Plaintiff as a party as her costs could always be provided for at the end of the litigation upon taxation.

13. I have carefully considered the two applications on the basis of the pleadings, the affidavit evidence placed before me, the submissions by counsel for the parties and the authorities cited by the parties.

14. With regard to the Notice of Motion dated 22nd February 2012, Order 43 Rule 3(1) of the Civil Procedure Rules provides:

“In cases of disobedience, or of breach of any such terms, the court granting an injunction may order

the property of the person guilty of such disobedience or breach to be attached and may also order such person to be detained in prison for a period not exceeding six months unless in the meantime the court directs his release”.

15. From the court record, the consent orders recorded by the parties on 30th January 2012 were as follows:

- (1) *None of the parties shall waste the suit property either by sub-division, sale, transfer, mortgage or charge or erect permanent structures or remove any pending structures on the suit property pending the hearing and determination of this suit.*
- (2) *All parties to file and exchange pleadings and documents within the next 30 days.*
- (3) *Matter to be mentioned on 5th March 2012 to review compliance.*
- (4) *Previous interim orders to remain in force until are extended until 5th March 2012.”*

16. The Applicant’s case is that Mr. Magon has severally visited the property with the police and attempted to forcefully regain possession of the property by force, contrary to the consent order of 30th January 2012. In reply, the Respondent Mr. Magon claims that he only visited the property in the company of the police to quell nuisance caused by the occupants of the property.

17. The parameters for the exercise of the jurisdiction of the court in punishing a party for disobedience of a court order or contempt of court are fairly well settled. The Wikipedia Encyclopedia captures the same in the following manner:

“Orders for committal (to prison) are the most draconian remedy. They can be used in extreme circumstances. You would apply to commit if your opponent fails to do something which he has undertaken to the court to do, disobeyed a judgment or order to pay money or failed to do an act within a specified time, made a false statement in a court document verified by a statement of truth, or in some way scandalised the court”.

18. The above approach was echoed in ***Civil Application No. NAI. 264 of 1993 (NAI/93 UR) Nyamodi Ochieng- Nyamogo & Another vs. Kenya Posts & Telecommunications Corporation*** the Court of Appeal observed as follows at page 13 of the ruling of the court:

“The consequences of a finding of disobedience being penal, the party who calls upon the court to make such a finding must show that he has himself complied strictly with the procedural requirements and his failure to so comply cannot be answered by merely saying that the other side was aware or ought to have been aware of what the order required him to do”.

19. Similarly, in the case of ***Mwangi H.C. Wang’ondu vs. Nairobi City Commission (Civil Appeal No. 95 of 1988 (UR)*** the Court of Appeal again held as follows:

“This requirement is important because the court will only punish as contempt a breach of injunction if satisfied that the terms of the injunction are clear and unambiguous, that the Defendant has proper notice of the terms and that breach of injunction has been proved beyond reasonable doubt”.

20. From the foregoing it does follow that since the consequences of a finding of disobedience are penal in nature, the jurisdiction to commit a disobeying party to prison must be exercised in extreme circumstances. The court must balance between the need to ensure strict obedience with its orders against the need to safeguard the fundamental rights and freedoms of the person under committal.

21. In the present case, my assessment of the affidavit evidence tendered by the Applicant in support of the orders of committal juxtaposed with the counter evidence of the Respondent leaves me not convinced

that Mr. AshishMagon is in disobedience of the consent orders of 30th January 2012. The Applicant complains that Mr. Magon has tried to obtain possession from him by force. Mr. Magon's counter position is that he merely went into the property to quell nuisance emerging from the property and for which he blames agents of the Applicant. The court orders of 30th January 2012 barred any party from interfering with the status of the property by erecting structures, removing movables, sub-dividing the land and other interference all of which have not been proved by the Applicant. On the threshold applicable to contempt proceedings, and even on a balance of probabilities, I am unable to grant the orders sought under the application of 22nd February 2012.

22. With regard to the application of 29th February 2012, I have perused the settlement agreement dated 3rd July 2009 entered into between the 2nd Plaintiff, GeetaMagon on the one hand and the 1st Plaintiff AshishMagon and other members of the Magon family on the other hand and established that under the terms of settlement of various assets of the estate of the late Ramesh Magon, the suit property in this matter L.R. No. 330/506 Riara Road Kilimani is listed in the schedule of properties that were allocated to the 1st Plaintiff and other beneficiaries of the estate. The 2nd Plaintiff was allocated other properties within the estate. Under Clause 2.2 (c) of the agreement, a transferees of the properties allocated to them were obligated to take possession and control of the properties with effect from the date of execution of the Agreement. Consequently, the conclusion is inescapable that from the date of the agreement viz. 3rd July 2009, the 1st Plaintiff and the family members with whom the suit property herein was allocated assumed possession and full control of the property to the exclusion of the 2nd Plaintiff. The 2nd Plaintiff therefore has no legal or other interest over the property. In any event, and as submitted by counsel for the 2nd Plaintiff Ms. Odari, the suit property is registered in a company name and the company being a distinct legal person can sue and be sued in its own right in relation to the property. Suit of individual directors of the company in that event is superfluous. Certainly, suit of a director of the company who has since resigned in relation to the suit property is a complete misjoinder. For these reasons, I find no basis as to why the 2nd Plaintiff should continue being saddled with the obligation to participate in these proceedings and to incur costs in that respect.

23. Finally, given the acrimony and competition surrounding possession of the suit property, and to obviate the parties inundating this court with applications for interim reliefs pending hearing and determination of the suit in this matter, I find it just and convenient that for purposes of preservation of the suit property, a receiver for the property should be appointed forthwith to take over possession of the suit property until final determination of the suit. This court has jurisdiction to appoint such a receiver under Order 41 Rule 1 of the Civil Procedure Rules.

24. For these reasons, the orders that commend themselves to me are as follows:

- 1) The Notice of Motion dated 22nd February 2012 is hereby dismissed with costs to the Respondent.**
- 2) The Notice of Motion dated 29th February 2012 is hereby allowed with no orders as to costs.**
- 3) The Plaintiffs in HCCC No. 502 of 2011 and the Plaintiff in HCCC No. 603 of 2011 are hereby directed to agree and nominate two reputable property management companies each within 7 days from today and to forward the names of the nominated companies to this court for appointment by the court of a receiver of the suit property pending hearing and determination of the suit.**
- 4) In default, this court to appoint the receiver.**
- 5) The terms of appointment of the receiver of the property to be settled by the court.**
- 6) Parties should finalise pre-trial documentation and procedures within 30 days from today and thereafter fix the matter for hearing within 14 days.**

IT IS SO ORDERED.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 19th DAY OF JULY 2012.

J.M. MUTAVA
JUDGE