



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL SUIT 3000 OF 1993
**THE PUBLIC SERVICE CLUB REGISTERED
TRUSTEE.....PLAINTIFF**
VERSUS
GEOFFREY KAREKIA
KARIITHI.....DEFENDANT

RULING

The Defendant's application dated 30th November 2011 is brought under the provisions of Order 40 Rule 3 of the Civil Procedure Rules, section 3A of the Civil Procedure Act, section 52 of the Indian Transfer of Property Act and Article 159(2) of the Constitution of Kenya. The Defendant is seeking the following orders:

1. That this Honourable court be pleased to commit the Plaintiff's Chairman, Vice Chairman and the Treasurer, Mr. Njoroge Ndirangu, Mr. Samuel K. Mosop and Mr. Mundia N. Geteria, respectively, to prison for a period of six (6) months for contempt of court.
2. That the Honourable Court be pleased to grant liberty to the Defendant to retake possession, fence and secure the suit property, L.R. No. 209/9629 Nairobi.
3. That the Honourable Court be pleased to order that the plaintiff do bear all the costs of fencing and restoration of the plot back into its state prior to the plaintiff's interference on 2nd November 2011. In default of the Plaintiff meeting the costs, the defendants be and is hereby granted liberty to attach the assets of the Plaintiff.
4. That in order to preserve peace and public order the Honourable Court be pleased to direct that the OCS Kilimani Police Station to provide security to the Defendant's agent, servants and workmen as they fence the restore the Plaintiff's property to its former condition before the Plaintiff's contemptuous actions.

The Court was referred to the supporting affidavit sworn on 30th November 2011 by Kibuga Kariithi , for the grounds for the application. The Deponent is the son of the Defendant, and holder of a registered Power of Attorney a copy of which is annexed. The Deponent states that the Defendant was allocated L.R. No. 209/9629 Nairobi (hereinafter the suit property) by the Commissioner of Lands and issued with a title deed, and that in 1993 he went on the ground to fence the said land upon which the Plaintiff filed the suit herein seeking, *inter alia*, to nullify the Defendant's title and also filed an application for injunction.

The parties' advocates subsequently recorded a consent order on 13th October 1993 committing to the maintenance of the *status quo* of the suit property, pending the hearing and determination of the suit. The Deponent has annexed a copy of the court order issued on 14th November 2011. The Deponent averred that since then the Defendant has never interfered with the plot and has maintained total respect for the order as had the Plaintiff until 2nd November 2011. However, that on 3rd November, 2011 the Deponent received information from his lawyer that there were trucks, caterpillars and workmen on the Defendant's plot mowing and flattening the ground, and cutting down the trees on the suit property.

The Deponent stated that he then visited the suit property on 3rd November 2011, in the company of other persons, and that he witnessed the following:

- a) The Plaintiff's agents had cut the main fence just after the turning to Kenyatta National Hospital.
- b) There were people cutting down trees on the plot.
- c) The green grass, vegetation and soil had been mowed and flattened in preparation for a parking.
- d) The fence separating the Defendant's plot from the neighbouring plot, LR No. 209/9627 which Ms Judith Njenga claims had been brought down by the workmen, caterpillars and trucks.
- e) The entire topology was interfered with by the actions of the plaintiff's said officers and the plaintiff's new tenant, Real Insurance Company Limited.

The Deponent annexed a bundle of coloured photographs taken on 2nd November, 2011 to support his deposition.

Further, that while at the site, Mr. Marete of GIMCO Limited, the Plaintiff's estate agent informed the Deponent that the Plaintiff's officials, namely the Chairman, Mr. Njoroge Ndirangu, the Vice Chairman, Mr. Samuel K. Kimosop and the Treasurer, Mr. Mundia N. Gateria, had entered into a tenancy agreement with M/S Real Insurance Company Limited, allowing the said insurance company to use the suit property as a parking. The Deponent further stated that the Defendant's advocates on record subsequently wrote a demand letter dated 4/11/2011 addressed to Real Insurance Company Limited and copied to the Plaintiff. The Plaintiff's officials subsequently replied to the said letter and asked the said tenant to treat the Defendant's demands with the contempt it deserved. Copies of the demand letter dated 4/11/2011 from the Defendant's advocates and the reply dated 7/11/2011 from the Plaintiff are annexed. Also annexed is a copy of their survey report by the Defendant's surveyors Messrs Geomatics Services dated 4/11/2011 on the grading is taking place within the Defendant's plot.

Finally, the Defendant avers that a formal order of the court orders made on 13th October 1993 was extracted and served upon the Plaintiff's chairman who is also the Provincial Commissioner of Nairobi Mr. Njoroge Ndirangu, the Plaintiff's Vice Chairman, Mr. Samuel K. Kimosop and the Plaintiff's Treasurer, Mr. Mundia N. Geteria on 17th November 2011. Copies of the stamped court order and the affidavit of service are annexed. The Deponent averred that he subsequently visited the site and established that the Plaintiff's tenant or agents were still leveling up the site and preparing it for parking, and that in the weekend of 26th/27th November 2011, they cut open another fence hence creating another access to the suit plot in breach of the court order made by consent on 13th October 1993.

The Plaintiff responded by filing Grounds of opposition dated 13th December 2011 and a Replying Affidavit sworn on 2nd February 2012 by Njoroge Ndirangu, the Plaintiff's Chairman. I will confine myself to the averments relevant to the alleged contempt of court. The Plaintiff avers that the application herein is incurably defective, null and void, and highly incompetent for reasons that:-

- a) The said Court Order was only extracted on 14th November, 2011.

- b) The said Court Order was only served on the said Mundia N. Geteria belatedly on 17th November 2011, whereas it was never personally served on Njoroge Ndirangu and Samuel K. Mosop as mandatorily required under the Provisions of law.
- c) The said application is vague.
- d) The said Consent Order, made on or about 13th October, 1993 has already lapsed and/or expired and the same cannot form the basis for the Application now before the Court.
- e) The said Court order was not properly extracted as mandatorily required under the Provisions of Law.

Further, that the said Consent Order did not give the Defendant any right of possession of any of the suit premises and hence the prayers sought are incompetent and beyond the scope of the jurisdiction of this Court.

The Plaintiff also states that the Defendant is not only guilty of inordinate delay in asserting his rights, if any, in respect of the suit property, but he is also guilty of acquiescence of the *status quo*. It is also averred that the individuals to be committed to prison for contempt of Court, i.e. Messrs Njoroge Ndirangu, Samuel K. Mosop and Mundia N. Geteria, are neither Trustees of the Plaintiff Club and nor were they present at the material time, when the Consent Order was entered on 13th October 1993. Hence the said individuals cannot be guilty of the alleged contempt.

The Plaintiff's Chairman, Mr Njoroge Ndirangu stated that he was never personally been served with the said Court Order but found a copy when he went to his Office on 9th December 2011, and came to know about the said Court Order when discussing this matter with the Plaintiff's Advocate in record, Mr. J. P. Machira. Further, that that Mr. Mundia N. Geteria only came to know about the said Court Order on 17th November 2011, when he was personally served with a copy thereof, and that Mr. Kimosop was out of the Country and came back on 9th December 2011, and that he has never been served with a copy of the said Court Order.

The Plaintiff denied that it had attempted to sell and/or dispose of the suit premises, save using the same to generate income for the Club, and averred that being in possession of the suit property, the said Consent Order did not prevent the Plaintiff from using the entire Club premises. The Plaintiff admitted that had entered into a tenancy agreement with Messrs Real Insurance Co. Ltd, for the latter to use a portion of the suit property as a Parking area.

The Defendant's Advocate filed written submissions dated 16th February 2012, wherein he submitted that the Defendant had satisfied the legal requirements for contempt of court, namely that there was a court order issued requiring the contemnors to do or refrain from doing a certain act; that the formal order was drawn up, extracted and served upon the alleged contemnors; and that the contemnors violated the said court order. The Advocate submitted that the Plaintiff does not dispute that a court order was issued on 13th October 1993, and that the said formal order containing a penal notice was signed by the Court on 14th November 2011 and served on Mr. Njoroge Ndirangu on 17/11/2011.

The Advocate also argued that there had been violation of the court orders and the Plaintiff has admitted to the creation of a tenancy with Real Insurance Company Ltd for the use of the suit property as a parking space. Further, that the photographs and surveyor's report produced by the Defendant show the extent of the Plaintiff's official's contempt. The Defendant's Advocate relied on the decision in **Donholm Rahisi Stores v East Africa Portland Cement Ltd, H.C.C.C NO. 18 of 2004** for the argument that under Order 40 Rule of the Civil Procedure Rules leave to commence contempt of court proceedings is not required, and on the decision in **Julius Wanjala Kisiangani and 2 others vs City Council of Nairobi and others H.C.M.A. (Nairobi) No 1299 of 2007** for the position that knowledge of the existence of court orders by a party's advocate is binding on the party.

The Plaintiff's Advocate on his part filed written submissions dated 24th February 2012 and contended that the Defendant's application is defective as it does not have any general grounds upon which it is based contrary to Order 51 Rule 4 of the Civil Procedure Rules. The Advocate relied on the decisions of this Court in **Consolidated Bank of Kenya v Tripec Builders Ltd & 3 Others (2007) eKLR** (Kasango J.) and **Agnes Kwamboka vs Eradion Ochenge Mokuia (2008) eKLR** (Kubo J.) in this respect.

The Plaintiff submitted that the application was also defective as no leave was obtained to file the Notice of Motion. The Plaintiff argued that we have adopted the law and procedure applicable in the United Kingdom, which has been incorporated in our law and by various decisions which he cited, including **Republic vs County Council of Nakuru ex Parte Edward Alera T/A Genesis Reliable Equipment & 2 Others (2011) eKLR**. The Plaintiff further submitted relying on additional judicial authorities that the alleged contemnors were not personally served with the court order, which was issued on 13th October 1993 when they were not officials of the Plaintiff, and only came to know of the court order after 17th November 2011.

It was also the Plaintiff's submissions that there is no genuine contempt of court application before the court, and that the same was being used by the Defendant to gain possession of the suit property. Further, that the application does not set the precise date of contempt, nor the precise court order being disobeyed.

I have carefully considered the pleadings, evidence and submissions made with regard to the application before this Court. There are three issues for determination. The first issue is whether this application is competently before this Court for reasons of non-compliance with the procedure. The second issue is whether the Plaintiff's officials are culpable of contempt of court, if it is found that the application is competently before the court. The final issue is whether the mandatory injunctions sought by the Defendant in his prayers can be granted by this court.

The first issue of procedure has three limbs to it. Firstly, it is alleged that that the application offends Order 51 Rule 4 for non-specification of grounds, Secondly, that there was no leave given by the Court to bring the application. Finally, that there was no personal service of the court orders on the alleged contemnors.

Order 51 Rule 4 of the Civil Procedure Rules provides that every notice of motion shall state in general terms the grounds of the application, and where any motion is grounded on evidence by affidavit, a copy of any affidavit intended to be used shall be served. The Defendant's application dated 30th November 2011 states that the grounds are to be found in the annexed supporting affidavit. In my opinion this is a statement in general enough terms to comply with the provisions of Order 51 Rule 4.

In addition Rule 10(2) of Order 51 also provides that no application shall be defeated on a technicality or for want of form that does not affect the substance of the application. This Court is also enjoined by Article 159 of the Constitution not to pay undue regard to procedural technicalities at the expense of justice. I find that the substance of the grounds for the application can be identified from the Defendant's supporting affidavit, and have in fact been responded to by the Plaintiff, and failure to state them with particularity in the application is not fatal.

On the second limb of procedure raised on the requirement of leave, 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

Defendant has not flouted any procedure in this respect in the presentation of their application.

Lastly, on the limb of 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.

The service of the court orders on the alleged contemnors was effected on 17th November 2011 as attested to by the affidavit of service produced by the Defendant as evidence and sworn on 29th November 2011 by a process server of this court by the name of Francis Mwaura Kamau. The alleged contemnors also admit to having either having been served with the court orders on that date or becoming aware of the said orders thereafter. It is therefore the finding of this Court that there was personal service of the court orders and/or that at some point in time the alleged contemnors did become aware of the court orders. The Defendant's application is therefore properly before this Court.

This Court will therefore proceed with the determination of the second issue of culpability. The threshold of proof required in contempt of court applications is 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. According to the facts presented to the court, the alleged contempt of court was perpetrated on or about 3rd November 2011. The photographs that were produced by the Defendant of the interference with the suit property were stated to have been taken on 2nd December 2012. Service of the court order was however effected on 17th November 2012.

The averments by the alleged contemnors that they were not officials of the Plaintiff when the consent was entered, and were not aware of the same until service of the said court order were not controverted by the Defendant. It is therefore the finding of this Court that the alleged contemnors cannot be culpable of willful contempt at the time the alleged acts of disobedience commenced as they were not aware of the said court orders. They could only have been culpable of contempt after 17th November 2011 after they were made aware of the court orders, and the Defendant did not bring any evidence to show the acts of contempt committed after the said date. Prayer 2 of the Defendant's application dated 30th November 2011 is therefore hereby denied.

This finding notwithstanding, I will reiterate the directions given by Hon. Lady Justice Koome (as then was) on 14th December 2011, now that the Plaintiff and its officials are aware of the consent order entered into on 13th October, 1993, that they shall continue to obey the said Court Order pending the determination of the suit filed herein. For the avoidance of doubt such obedience shall include not dealing with the suit property in any manner. The Defendant is also at liberty to apply in the event of disobedience of the said orders by the Plaintiff or its officials.

On the remaining prayers in the application that were seeking various mandatory injunctions, It was held by the Court of Appeal in **Kenya Breweries Ltd and another v Washington Okeyo (2002) 1 E.A. 109** that there must be special circumstances over and above the establishment of a *prima facie* case for a mandatory injunction to issue, and even then only in clear cases where the court thinks that the matter ought to be decided at once. In my opinion this is not one of such clear cases as the issue of the ownership of the suit property is yet to be determined.

In addition, the said prayers are no longer viable as they were consequential in the event of the contemnors liability, and if granted would also conflict with the consent entered into by the parties as regards the *status quo*, and which was adopted as, and still is an order of this court. It is for these reasons that prayers 3, 4 and 5 of the Defendant's application dated 30th November 2011 are also denied.

The costs of the application shall be in the cause.

Orders accordingly.

1. Dated, signed and delivered in open court at Nairobi this ____19th____ day of ____July____, 2012.

P. NYAMWEYA

JUDGE