



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Environmental & Land Case 493 of 2008

KURIA THARAO.....1ST PLAINTIFF

JAMES WAIGANJO GITUNGO (DECEASED).....2ND PLAINTIFF

VERSUS

JOSEPH KINYANJUI MWAI.....1ST DEFENDANT

JOSEPH WARARI GATHOGA.....2ND DEFENDANT

THE LAND REGISTRAR KIAMBU.....3RD DEFENDANT

THE HON. ATTORNEY GENERAL.....4TH DEFENDANT

RULING

1. The application before me is one dated 17/5/2009 brought under Order 40, Rule 3(1, 2, 3 & 4) of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. The application is filed by the Plaintiffs/Applicants and they seek orders that this Honorable Court be pleased to find and declare that the 2nd Defendant is guilty of disobedience of Court Orders and an order that the 2nd Defendant be arrested and detained in prison for a period of 6 months. Further that the Court be pleased to order that the 2nd Defendant's property be attached.

2. The application is premised on the grounds that this Court (Hon. Justice Kubo, as he then was) on 26/3/2009, issued injunctive orders against the 2nd Defendant restraining him from constructing, building or erecting any structure committing acts of waste or in any adverse manner interfering with Plot No. LIMURU TOWN/T.196 (*hereinafter the suit plot*) until hearing and determination of the suit. That on 27/3/2009 the 2nd Defendant was served with the said Court Orders together with the penal notice when after he ceased construction. That sometimes in the month of May and in particular 7/5/2012, in disobedience of the Court orders, the 2nd Defendant entered into the suit plot and resumed construction therein, erected metal doors and windows, a metal gate and to date have continued to build and plaster the building in the suit premises. The 1st Plaintiff avers that despite his request to the 2nd Defendant to cease the construction, he has adamantly refused to withdraw his workers and has continued to violate the said orders.

3. The application is supported by an affidavit sworn on 17/5/2012 by the 1st Plaintiff. The 1st Plaintiff reiterated the contents of the application and further deponed that as at the time of service of the Court

order upon the 2nd Defendant, the construction had reached the 3 floors of a building. He deponed further that the 2nd Defendant filed an application seeking to discharge the orders granted by the Court on 26/3/2009 which application is pending before this Court. That in the said application, the 2nd Defendant acknowledges the existence of the Court order but proceeds to violate the same even before the application for discharge is heard and determined. The Plaintiffs prayed that their application be allowed as prayed.

4. The 2nd Defendant opposed this application by filing a Replying Affidavit sworn on 20/9/2012. The 2nd Defendant deponed the Plaintiffs have enjoyed the interlocutory injunction for over 3 years and that from advise of his counsel he is advised that the injunction orders issued on 19/3/2009 have since lapsed in lieu of the provisions of the Civil Procedure Rules 2010. The 2nd Defendant further deponed that he has and continues to suffer substantial loss as the developments on the suit property which is valued at Kshs. 56,000,000/- has been wasting away since 19/3/2009 and the costs of completing the development keeps increasing due to the inflation and passage of time. The 2nd Defendant deponed finally that he has utmost respect for Courts and the Court process and that he cannot disobey or be privy to disobedience of Court Orders.

5. The genesis of this application is a Court Order granted by Kubo J. on 19/3/2009 pursuant to an application filed by the Plaintiffs dated 13/10/2008. The said orders are as follows:

i. THAT status quo order as the suit land is concerned be and is hereby preserved.

ii. THAT temporary injunction be and is hereby issued restraining the 2nd Defendant his servants and or agents from constructing, building or erecting any structure or committing any Acts of waste or in any adverse manner interfering with Plot No. LIMURU/TOWN/196 until hearing and determination of this suit.

iii. THAT OCS Tigoni Police Station do assist in service and enforcing this orders.

iv. THAT costs be in the cause.

6. The Plaintiffs' in their application dated 13/10/2008 averred that the 2nd Defendant's Certificate of Lease to the suit plot was obtained fraudulently by the 1st Defendant and as such the 1st Defendant did not have a good title to be able to transfer to the 2nd Defendant. The 1st and 2nd Defendants on their part averred that the matters raised herein were canvassed in the Chief Magistrate's Court through Civil Suit No. 8038/1998 wherein the Judgment was entered in favour of the 2nd Defendant herein who was the Plaintiff in the said suit. The Defendants averred further that this matter is *res judicata* as the same was determined by the lower Court, which decree he maintains has not been set aside or appealed against. Kubo J. in his ruling dated 19/3/2009 addressed himself to the issue as to the whether the matter herein is *res judicata* and the Judge ruled that there are issues that are pertinent to this case which were not directly and substantially in issue in the suit at the Magistrate's Court and accordingly *res judicata* does not apply in the present application.

7. Subsequently, the 1st and 2nd Defendant filed chamber summons applications dated 6/10/2009 and 30/10/2009 respectively, seeking that the Plaintiff's suit be struck out. These applications are yet to be determined. There is also an application filed by the 2nd Defendant dated 12/4/2012 seeking orders that the Court orders granted on 19/3/2009 be discharged, which application is yet to be heard. Consequently, the said orders granted by Kubo J. are unchallenged and therefore remain in force.

8. Counsels made submissions in Court Mrs. Muhuhu for the applicant reiterated what is deponed that the 2nd defendant has violated the orders dated 19/3/09 of Justice Kubo that the status quo as to the property be preserved and that the 2nd defendant was enjoined from construction until the hearing. She submitted further that the 2nd defendant in his application for discharge of the orders has annexed

photographs of construction that in the 2nd defendant replying affidavit there is no dispute of the knowledge of service of the Court order and lastly that in Justice Kubo's ruling he ruled that the matter is not resjudicata. On the issue raised that orders granted by Justice Kubo have lapsed now that the provisions the Civil Procedure Rules 2010 are in force, Counsel argued that the said provisions came into operation on the 17th of December 2010 and the same does not operate in retrospect. The 2nd defendant in reply submitted that there is no disobedience of the Court orders and that this being an application for Contempt of Court proceedings it is akin to criminal proceedings and therefore the act must be proved beyond reasonable doubt that there was contempt of the order of 27/3/2009. He argued further that the orders being interlocutory injunctive orders by virtue of order 40 rule 6 the said orders have lapsed as they were granted on the 23rd March 2009 and that Order 54 of the Civil Procedure Rule creates a transitional provision in relation to all matters that are ongoing before the Courts. He argued that the applicant ought to have come for extension of the said orders before they lapsed. Counsel relied on the case of **National Bank of Kenya Vs. Mohamed 2005 eKLR** where Justice Kimaru held that there can be no estoppel against the law and that since this is what the law has provided it cannot be stopped from being applicable. He submitted further that if the Court finds otherwise then there is the issue of the 2nd defendant being served with the penal notice which the applicant has to prove. Counsel submitted that the applicant has failed demonstrate that they served a penal notice against the 2nd defendant and that this is contrary to the holding of the Court of Appeal that a penal notice must be served. The 1st defendant supported the submissions of the 2nd defendant. Mrs. Muhuhu in reply stated that Order 40 rule 3 of the Civil Procedure Rule does not liken a breach or disobedience to a criminal proceeding and neither has the Attorney General brought a bill to criminalize contempt of Court orders. On order 40 rule 6 Counsel argued that the order states that it is from the date of the grant of the order and it is not submitted when or the date the order lapsed. On order 54 Counsel reiterated that the law does not operate on retrospect and on the penal notice she argued the 2nd defendant does not deny the service of the order.

9. The issue for determination is whether the 2nd Defendant is in contempt of the orders of this Court granted on 19/3/2009. As noted hereinabove, the application is brought under Order 40 Rule 3 of the Civil Procedure Rules which provides for Consequence of breach. It reads,

“3. (1) 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 term not exceeding six months unless in the meantime the court directs his release.”

Two issues that I must deal with are;

- i. Has the injunction order granted by Justice Kubo on the 19/3/2009 lapsed.
- ii. If it has not, is the 2nd defendant in contempt as alleged?

Under Order 40 rule (6) of the Civil Procedure Rule 2010 the life of an injunction order granted at interlocutory stage is one year. The applicants argue that this rule does not apply in their case. Order 54 of the Civil Procedure Rule which is the transition clause provides that:

2. In all proceedings pending whether preparatory or incidental or consequential upon any proceedings in Court at the time of the coming into force of these rules, the provisions of these rules shall thereafter apply, but without prejudice to the validity of anything previously done.

Provided That:

- a) *If, and in so far it is impracticable in any such proceedings to apply the provisions of these rules, the practice and procedure heretofore obtaining shall be followed.*
- b) *In any case of difficulty or doubt the Chief Justice may issue practice notes or discretions as to the*

procedure to be adopted.

My understanding is that the new Civil Procedure Rules will apply to any proceedings which were pending before hence the provisions of order 40 rule (6)) applies in this case and therefore the applicant ought to have had the orders extended before the expiry of the one year, in year 2010. I do not agree with the applicant's counsel that the provisions of the said order do not apply to their situation. Secondly I find that the applicant has failed to demonstrate that they served a penal notice on the 2nd defendant. In the case of **Ochina & another Vs. Okombo & 4 others C. A No. 36 of 1989**. The Court of appeal held that:

The copy of the order served must be indorsed with a notice informing the person on whom the 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 not sufficient to say that the applicant was aware of the order as the correct procedure must be followed in contempt proceeding. I therefore find no merit in the application and dismiss it. Cost shall be in the cause.

Orders accordingly.

Dated, signed and delivered this 30th day of November 2012

R. OUGO

JUDGE

In the Presence of:-

.....For 1ST the Plaintiff
.....For the 2nd Plaintiff
.....For the 1st Defendant
.....For the 2nd Defendant
..... For the 3rd Defendant
.....For the 4th Defendant
.....Court Clerk