



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

ELC. NO. 65 OF 2010

MARY MUGECHI.....PLAINTIFF

VERSUS

CITY COUNCIL OF NAIROBI1ST DEFENDANT
ROSE M. KINYANJUI2ND DEFENDANT
BENSON N. MUCIRI.....3RD DEFENDANT

RULING

There is a dispute involving a parcel of land known as Umoja Innercore- plot no B. 59 - Sector 3. This property is being claimed by both the plaintiff and the 2nd and 3rd defendants and, it is the plaintiff's case that it is her property and that the 1st defendant has failed in its duty to protect the plaintiffs proprietary interest by failing to prevent trespass, and neglecting to process the plaintiff's title deed to the property. On the other hand, the 2nd and 3rd defendant are accused of trespassing onto the plaintiff's property demolishing the building she was erecting thereon and started constructing a commercial building.

Accordingly the plaintiff moved the court for a declaration that she has proprietary rights and is the lawful owner of the said plot. She also seeks a mandatory injunction directed at the 1st defendant to reaffirm and register her interest in the said property. A mandatory injunction was sought against the 2nd and 3rd defendants to restrain them their agents, servants or employees from dealing in, entering upon, excavating, fencing and erecting any structures on the said property. At the instance of the plaintiff this court issued interim restraining orders in line with the Notice of Motion dated 19th February, 2010 against the respondent which order was served according to the record.

It is the plaintiff's case that despite service, the respondents have disobeyed the said order and therefore, they should be cited for contempt and punished accordingly. The respondents have denied disobedience of the court order and have asked that this application be dismissed. The order extracted contains a penal

notice as required by law. The thrust of the 2nd and 3rd defendants' defence is that they live outside the jurisdiction of this court and therefore were not served with this order.

I have looked at the case of the plaintiff as against the 1st respondent in respect of its public duty and whether or not the 1st defendant was ever moved by the plaintiff to execute that duty. I have also looked at whether or not upon request, that duty was never executed by the 1st defendant. I have had to look at the wording of the order and, with respect have not been persuaded that the 1st defendant breached of the orders sought against it by the plaintiff.

Proof of breach of an injunction order is not on a balance of probability. The standard is much higher bordering on proof beyond doubt. The reason is clear because, anyone found to be in breach of a court order may easily lose his or her freedom in the circumstances and therefore, the court must be satisfied that the order was directed at the party being cited, that the order was served, that it contained a penal notice, that it was unambiguous and that that party had failed to comply therewith. In respect of the 1st respondent those requirements have not been achieved.

There is sufficient evidence that the 2nd and 3rd defendants reside beyond the jurisdiction of this court. There is no denial however that, the development on the land in dispute is theirs. That development cannot be conducted without their tacit approval and authority. By extension therefore, whoever is conducting or carrying out the said development was their agent, servant and or employee.

It is sufficient in law that those parties, once served with any court process, carry the responsibility of the principal. There is no way development would have taken place on this property without the knowledge of the 2nd and 3rd defendants. It follows that, there is no way an order could have been issued, served and brought to the knowledge of the said servants, agents or employees and fail to reach the notice of the 2nd and 3rd defendants. Circumstantial evidence will prove that they were aware of the said order and that it was within their authority to direct the employee's, agents or servants to obey the said order.

The authority of courts is anchored on the orders that they issue. In the event there is disobedience thereof, then the authority of the court is undermined. Law and order then may become a mirage. It is the duty of the court therefore to ensure that its orders are obeyed when properly served upon each party supposed to obey the same. In the instant case notwithstanding the fact that the 2nd and 3rd defendants reside in the U.S.A I am persuaded based on the material on record that the order was served upon a person or persons representing their interests in Kenya and in particular at the suit premises. There is evidence that despite that service, construction went on without any restraint by the principals. If the said employees, servants or employees did not notify the principals they are to blame. This is a case where disobedience of a court order by employees, servants or agents clearly attaches on the principals.

After assessing the contents of the material before me, I am satisfied that the 2nd and 3rd respondents are in contempt of court and should be punished accordingly. The court is mandated to send a clear message but I also note the circumstances in this are a bit peculiar in that there could have been a breakdown in communication.

I order in the circumstances that the 2nd and 3rd defendants shall each pay a fine of Kshs. 100,000/=. This shall be paid within 14 days of today and in default their properties shall be attached to satisfy a fine. The plaintiff shall have the costs, of this application.

Orders accordingly.

Dated, signed and delivered at Nairobi this 15th day of June, 2011

A. MBOGHOLI MSAGHA

JUDGE