



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI

ELC. 313 OF 2008

EDWARD MUNGAI MBURU1ST PLAINTIFF/APPLICANT
RABOY SIMON MWANGI2ND PLAINTIFF/APPLICANT
JOSEPH MWANGI KIMANI3RD PLAINTIFF/APPLICANT
TERESIA KINYWA4TH PLAINTIFF/APPLICANT
(Suing in their capacity as officials of Alfajiri Self Help Group)

V E R S U S

SAUTI SACCO LIMITED1ST DEFENDANT/RESPONDENT
DISTRICT COMMISSIONER MAKADARA2ND/RESPONDENT
DISTRICT OFFICER EMBAKAS.....3RD DEFENDANT/RESPONDENT
CITY COUNCIL OF NAIROBI4TH DEFENDANT/RESPONDENT

R U L I N G

On 3rd July, 2008 the Plaintiffs filed this suit alleging that on 25th May, 2007 the City Council of Nairobi had allocated their Group all that property known as Nairobi Block No. 82/4264 Savannah (hereinafter referred to as “the suit property”) but that beginning 23rd June, 2008 the Defendants, its servants and or agents had illegally and without any colour of right trespassed upon it and proceeded to demolish the perimeter fence. It was further alleged that the Defendants had deposited various building materials on the suit property with the intention of commencing development thereon. Lastly, that the Defendants had refused, failed and neglected to obey notice to cease the trespass. The suit was brought for a permanent injunction, a mandatory injunction, a declaration that the Plaintiffs were the lawful owners of the suit property and general damages for trespass.

With the suit was filed a chamber application under **Order 39 rules 1, 2 and 9** of the **Civil Procedure Rules** and **section 3A** of the **Civil Procedure Act** for an interlocutory injunction to restrain the Defendant either by itself or its servants, agents, assigns, employees and any one claiming under it from interfering, trespassing or otherwise dealing with the suit property. On 4th July, 2008 the application went before Justice Osiemo who certified it as urgent but asked that it be served for *inter parte* hearing on 16th July, 2008.

On 11th July, 2008 the Plaintiffs filed an amended plaint in which the 2nd, 3rd and 4th Defendants were added to the claim. Against the 2nd and 3rd Defendants it was alleged they had, in abuse of the powers of their offices, intermeddled and interfered with the Plaintiff’s ownership and quiet enjoyment of the suit property. The 4th Defendant was said to have permitted the 1st to 3rd Defendants to interfere with the suit property, and all the Defendants had jointly and severally perpetrated acts of trespass on the property as alleged in the earlier plaint and had not heeded notice to stop. Filed with it was an amended chamber application seeking a temporary order of injunction against the Defendants. Also sought was a mandatory injunction. On 14th July, 2008 the application went before Justice Osiemo who granted *ex parte* orders in terms of prayers 2 and 5. Prayer 2 sought:-

“THAT pending the hearing and determination of this application *inter partes* or until further

orders of this court, this Honourable Court be pleased to issue a temporary order of injunction restraining the Defendants jointly and severally either by themselves or their servants, agents, assigns, employees and or anyone claiming under them from interfering, trespassing or otherwise dealing with the Plaintiffs' property known as Nairobi Block 82/4264."

Prayer 5 sought:-

"THAT the officer commanding Embakasi Police Divison, the station of jurisdiction do help in the Enforcement of any Orders of this Honourable Court."

On 16th July, 2008 when the amended summons came for hearing, the matter was adjourned to enable the 1st Defendant to file a response. The interim orders were extended to 17th September, 2008 by consent. On 17th September, 2008 Mr. Odera for the Plaintiffs and Mr. Rao for the 1st Defendant were present when a consent order in the following terms was recorded:-

"By consent both parties to keep away from the suit land pending the hearing and determination of this application or until further orders from this court."

On 25th September, 2008 the Plaintiffs filed the present application under **Order section 3A** of the **Civil Procedure Rules** and **Order 39 rules 2A (2)** of the **Civil Procedure Rules** seeking that a warrant of arrest issues against the director of the 1st Defendant to be brought to court to show cause why they should not be committed for contempt. It was further sought that the directors be committed to civil jail for 6 months for being in contempt of the orders of the court or that the assets of the 1st Defendant be attached. In the affidavit sworn by the 1st Plaintiff to support the motion, he stated that the orders of 17th September, 2008 had been extracted and served on the following day on the 1st Defendant whose officials had defied and or refused to obey them. It was alleged that the officials, agents, and or servants had trespassed upon the suit property and demolished and or caused to be demolished the perimeter fence around the suit property. This was alleged in paragraph 5 of the affidavit.

The replying affidavit by the 1st Defendant was sworn by David Elly Ndwigah who is the Chairman. He stated that they were aware of the orders issued by the court but that they had not disobeyed or defied them. He swore that the 1st Defendant was not aware of and was not a party to anyone in the company having entered the suit premises since the issuance of the order having demolished or caused to be demolished the perimeter fence around the suit property. It was further stated that by the time of the suit and order the 1st Defendant had sold 50 acres of the disputed property to Greenspan Ltd who had taken possession. That left the 1st Defendant with 30 days in respect of which no activity had been taken by its members to disobey or defy the court order.

The application was prosecuted by M/s Migiro for the Plaintiffs and defended by Mr. Rao for the 1st Defendant. Counsel relied on several authorities during their submissions.

A lot of time was spent arguing whether or not the order had been served, but I find that is not an issue as the replying affidavit of David Elly Ndwigah of the 1st Defendant states as follows:-

"3. The 1st Defendant is aware of the orders passed by this Honourable Court and has duly complied with it by staying away from the subject property."

Secondly, it was not alleged by the 1st Defendant that the order in question was either unclear or ambiguous. The affidavit shows that the 1st Defendant knew what the order commanded them to do.

It is now settled that a person who, knowing of an order of court, willfully does something, or causes others to do something, to break or disobey the order or interfere with it, is liable to be committed for contempt of court as such a person has by his conduct obstructed justice (**Mutitika –Vs- Baharini Farm Ltd. [1985] KLR 227**). The offence of contempt court is quasi-criminal in nature and therefore the standard of proof in contempt proceedings is higher than proof on balance of probabilities, and almost, but not exactly, beyond reasonable doubt. The question to be determined is whether the Plaintiffs have established that the 1st Defendant was in contempt of the court order.

In paragraph 5 of the supporting affidavit it was deposed as follows:-

"5. THAT I am aware that despite being duly served with the aforesaid Order of this Honourable Court the 1st Defendant's officials, agents and/or servants have trespassed upon the suit property and demolished and or cause to be demolished the perimeter fence around the suit property."

Mr. Rao submitted that the allegation was bare without any particulars and could not be relied on as proof that there was contempt. Paragraph 7 of the supporting affidavit annexed letter ("EMM3") dated 19th September, 2008 by the Plaintiffs' advocates to Mr. Rao in which it was complained as follows:-

“ Contrary to your assertions, we are made to understand that it is your clients who have continuously undermined the Orders of the High Court (Osiero J) by insisting on erecting a perimeter wall on the suit property.”

Mr. Rao’s argument was that the allegation of erecting a perimeter fence contradicted paragraph 5 of the affidavit which alleged the demolition of the same. M/s Migiro’s response was that whether the allegation was about demolition or erection they both amount to interference with the suit property. It is noted that both demolition and interference would be acts in interference with the suit property, but the two are not the same. Whoever went to the suit property saw the perimeter fence either erected or demolished. The 1st Defendant was entitled to know what case it was meeting as its officials risked going to jail for contempt. I find that the allegations in paragraphs 5 and 7 of the supporting affidavit are materially contradictory and cannot therefore be the basis for the finding that the 1st Defendant was in contempt of the court order.

Further, the 1st Defendant was described by the plaint and amended plaint as a Cooperative Society. Such a society can only act through its officials, employees or agents. When it is alleged that the 1st Defendant either demolished or erected a perimeter wall, the Plaintiffs have to provide particulars as to who perpetrated the complained action. Paragraph 5 alleged that the 1st Defendant’s

“ officials, agents and/or servants have trespassed upon the suit property and demolished and or caused to be demolished the perimeter fence.....”

It is clear that the deponent does not know whether the perpetrators were officials, agents or servants of the 1st Defendant. In any case, and that is crucial, no names were given and it was not indicated when the actions complained of were committed or who witnessed them.

In conclusion, I do find that the Plaintiffs have not proved that the 1st Defendant was in contempt of the Order of the court issued on 17th September, 2008. The motion dated 24th September, 2008 and filed on 25th September, 2008 is consequently dismissed with costs.

**DATED AND DELIVERED AT NAIROBI
THIS 28TH DAY OF OCTOBER 2010**

**A. O. MUCHELULE
J U D G E**