



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO. 766 OF 2016

FRANCIS NYAGA NJERU.....PLAINTIFF

- VERSUS -

CHINA ROAD & BRIDGE CORPORATION.....1ST DEFENDANT

SIESTA INVESTMENT LIMITED.....2ND DEFENDANT

TAJ MALL LIMITED.....3RD DEFENDANT

ATTORNEY GENERAL.....4TH DEFENDANT

RULING

What is before me is a Notice of Motion application dated 12th February, 2020 brought by the plaintiff seeking the following prayers;

1. Spent
2. That the directors of the defendants (contemnors) be committed to civil jail for disobeying the orders of the court for a period of six (6) months or for such period as the court may deem just.
3. That the costs of the application be borne by the contemnors.

The application has been brought on the grounds that, the 1st, 2nd and 3rd defendants (hereinafter jointly referred to only as “the defendants”) disobeyed an order that was made herein by Gitumbi J. on 6th July, 2016 and extended from time to time. The order is said to have restrained the defendants from constructing on, trespassing or in any other way dealing with all that parcel of land known as L.R No. 20273 situated at Embakasi, Nairobi (hereinafter referred to only as “the suit property”). The plaintiff has averred that with the full knowledge of the existence of the said order, the defendants and their agents disobeyed the same on 7th February, 2020 when people who introduced themselves as contractors of the defendants forcefully entered the suit property. The plaintiff has averred that the defendants also disobeyed the said order by; causing to be parked on the suit property assorted construction equipment and vehicles, erecting and continuing to erect illegal structures on the suit property and excavating the surface of the suit property for unknown reasons. The application is supported by the affidavit of the plaintiff sworn on 12th February, 2020 in which he has annexed among others, a copy of the order that was made by the court on 6th July, 2016 and extended on 7th September, 2016 which is said to have been disobeyed by the defendants and photographs showing the activities the defendants are alleged to have undertaken in disobedience of the said court order.

The application is opposed by the 1st and 2nd defendants. The 1st defendant opposed the application through grounds of opposition dated 21st February, 2020. The 1st defendant has averred that there is no basis for the eviction order sought by the plaintiff pending the hearing of the application. The 1st defendant has averred further that the court order on which the plaintiff’s application for contempt is premised had lapsed and as such cannot not be a basis for a contempt application. The 1st defendant has contended further that the alleged acts of contempt enumerated in the plaintiff’s application could not have taken place on a single day. The 1st defendant has urged the court to dismiss the application with costs.

In its replying affidavit sworn by Jayesh Patel on 1st February, 2020, the 2nd defendant has averred that it was not a party to this suit until 11th December, 2019 when the court directed the plaintiff to amend the plaint and add it as a party to the suit. The 2nd defendant has averred that it has not been served with the amended plaint. The 2nd defendant has averred further that the order made on 6th July, 2016 which is alleged to have been disobeyed was directed at the 1st defendant and that in any event, the order was neither served upon the 2nd defendant

nor its directors. The 2nd defendant has averred that it has never entered the suit property neither has its employees or agents carried out any excavations or construction of structures on the suit property. The 2nd defendant has also denied assembling construction equipment and parking motor vehicles on the suit property. The 2nd defendant has denied being in contempt of the said order of 6th July, 2016. The 2nd defendant has averred further that there is no basis for the eviction order sought by the plaintiff.

The plaintiff's application was heard by way of written submissions. The 2nd defendant filed its submissions on 22nd June, 2020. The other parties including the plaintiff did not file submissions. I have considered the plaintiff's application together with the affidavit filed in support thereof. I have also considered the replying affidavit and grounds of opposition filed by the 1st and 2nd defendants in response to the application. I have also considered the submissions on record. In his application, the plaintiff had sought two (2) substantive prayers. The first prayer was for eviction of the defendants from the suit property. The order of eviction was sought on an interim basis pending the hearing of the application inter-partes. After the hearing of the application inter-partes, the prayer for an eviction order was spent and it does not require further consideration by the court. The prayer that is left is that seeking the committal of the directors of the defendants to civil jail.

It is not in dispute that the 2nd and 3rd defendants were added to this suit on 9th March, 2020 through amended plaint dated 6th March, 2020 that was filed pursuant to the orders that were made by the court on 11th December, 2019. It follows therefore that when the orders of 6th July, 2016 said to have been disobeyed by the defendants were made, the 2nd and 3rd defendants were not parties to the suit. The said orders were therefore not directed at them. In addition, the plaintiff has not placed any evidence before the court showing that the 2nd and 3rd defendants were served with the said orders. Since the orders of the court said to have been disobeyed were not directed at the 2nd and 3rd defendants who were not parties to the suit when the said orders were made and the same were not served upon them, there is no basis upon which the court can make a finding that the 2nd and 3rd defendants disobeyed the said orders. The plaintiff has contended that all the defendants were aware of the existence of the said orders prior to 7th February, 2020 when they are alleged to have disobeyed the same. The plaintiff did not place any evidence before the court in proof of this knowledge having regard to the fact that the 2nd and 3rd defendants were not parties to the suit until 9th March, 2020 when they were added to the suit through amendment of the plaint.

I wish to add that even if the plaintiff had proved that the 2nd and 3rd defendant had knowledge of the said order, I would still not have found the 2nd and 3rd defendants in contempt. This is because, the plaintiff did not prove that the 2nd and 3rd defendants committed the acts of contempt alleged against the defendants.

With regard to the 1st defendant, there is no dispute that it has been a party to this suit from the time the suit was filed and that the orders of 6th July, 2016 were made against it. The 1st defendant has neither denied the existence of the said orders nor the acts of contempt alleged against it. The 1st defendant's contention is that the acts alleged to constitute contempt of court were not committed on 7th February, 2020 as claimed by the plaintiff. The 1st defendant has contended that it has been on the suit property since 2016 as a tenant and has invested heavily thereon. The 1st defendant has contended that the acts alleged to constitute contempt committed on 7th February, 2020 were the subject of an earlier contempt application by the plaintiff filed on 4th August, 2016. The 1st defendant has denied that it committed the acts complained of on 7th February, 2020. The 1st defendant has also contended that the orders that were issued on 6th July, 2016 lapsed on 6th July, 2017 pursuant to the provisions of Order 40 Rule 6 of the Civil Procedure Rules. The 1st defendant has contended that since the said orders had lapsed on 6th July, 2017 as aforesaid, they were not capable of being disobeyed on 7th February, 2020 when the acts of contempt the subject of the present application are said to have been committed. In support of this submission, the 1st defendant relied on the decision of the Court of Appeal in Barclays Bank of Kenya Ltd. v. Henry Ndung'u Kinuthia & Another [2018] eKLR and the decision of this court in Jason Sore Shikuku v. Christopher Naibey Chemengu [2018] eKLR.

I am in agreement with the 1st defendant that the acts complained of by the plaintiff were not committed by the 1st defendant on 7th February, 2020 as claimed by the plaintiff. The earlier application for contempt filed by the plaintiff on 4th August, 2016 shows that the 1st defendant was in occupation of the suit property as at August, 2016 and was carrying out the activities complained of herein by the plaintiff. It is not true therefore that the 1st defendant forcefully entered the suit property on 7th February, 2020 and started committing the acts enumerated in the application before the court. With regard to the validity of the order alleged to have been disobeyed on 7th February, 2020, I have noted that the order was extended for the last time by Gitumbi J. on 2nd November, 2016 until "the next court appearance". The next time the matter came up in court was on 5th March, 2018 ex-parte before Eboso J. when he confirmed the existence of the said orders. Eboso J. did not however extend the said orders. The parties appeared before Eboso J. on 28th June, 2018 but again the said orders were not extended. The said orders in my view expired on 28th June, 2018 when both parties appeared in court and the same were not extended. The said orders were therefore not in existence on 7th February, 2020 when they are said to have been disobeyed.

Due to the foregoing, it is my finding that the plaintiff has not established the charge of contempt of court against the defendants. The plaintiff's application dated 12th February, 2020 is in the circumstances without merit. The application is dismissed with costs to the 1st and 2nd defendants.

Delivered and Dated at Nairobi this 21st Day of January, 2021

S. OKONG'O

JUDGE

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Mr. Osundwa for the Plaintiff

Mr. Masila for the 1st Defendant

Mr. Wagara for the 2nd Defendant

Ms. Nyaga h/b for Mr. Ngatia for the 3rd Defendant

Mr. Kamau for the 4th Defendant

Ms. C. Nyokabi-Court Assistant