



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC APPEAL NO. 13 OF 2020

NAOMI WANJIRU KAHORA.....APPELLANT

VERSUS

BENSON IRUNGU MBARIA.....1ST RESPONDENT

PROPERTY & BUSINESS OUTLOOK LTD.....2ND RESPONDENT

EPHANTUS MAINGL.....3RD RESPONDENT

TERESIA WAMBUI IRUNGU.....4TH RESPONDENT

RULING

The appellant filed this appeal on 18th March, 2020. Together with the Memorandum of Appeal, the appellant brought an application by way of Notice of Motion dated 16th March, 2020 seeking a temporary stay of execution of the judgment of the Business Premises Rent Tribunal (the tribunal) made on 13th March, 2020 pending the hearing and determination of the appeal.

On 19th March, 2020 the court granted the following orders on the appellant's application;

1. THAT an order is hereby issued on a temporary basis against the respondents, their agents, servants or any other person or entities acting on their behalf preventing them from harassing, evicting or in any other way dealing with the appellant(sic) in Umoja Innercore Magic B, Shop No. 1 pending the hearing and determination of this application inter partes on condition that the appellant pays to the 1st respondent all rent in arrears forthwith and continues to pay monthly rent as and when the same falls due.
2. THAT in the event that the appellant fails to comply with the conditions aforesaid, the restraining orders granted herein shall lapse automatically without any further reference to the court.
3. THAT the application shall be served for mention on 30th July, 2020 for directions.

What is now before the court is the appellant's application dated 28th May, 2020 seeking the following orders:

- 1) THAT the court does make a finding that the respondents and the directors of 2nd respondent are in contempt of the orders made by the court on 19th March, 2020 and issued on 20th March, 2020.
- 2) THAT the court be pleased to punish the contemnors and/or the directors of the 2nd respondent by imprisonment for 6 months or by attaching their assets to compensate the appellant for loss suffered as a result of the contempt or as the court may deem fit.
- 3) THAT the court does authorize the OCS Buruburu Police Station or any officers under his command of the rank of Inspector to oversee the implementation of the said order issued on 20th March, 2020 and investigate for the purpose of prosecution the breaking in and illegal carting away of the appellant's property, tools of trade and implements by the defendants in disobedience of the said order.
- 4) THAT any damages or loss incurred by the appellant be borne by the 1st respondent and the same be recovered from past rent arrears and future rent payments.
- 5) THAT the directors of the 2nd respondent be deregistered from the list of estate agents in Kenya.

6) THAT the costs of the application be provided for.

The grounds upon which the application was premised are set out in detail in the body of the application and in the affidavit of the appellant sworn on 28th May, 2020. The appellant's complaint against the respondents can be summarized as follows. On 19th March, 2020, the court issued temporary orders in the appellant's favour restraining the respondents from engaging in certain activities. The said orders were extracted and served upon the respondents on 25th March, 2020. The respondents acknowledged receipt of the same. Despite receipt of the said order, the 2nd respondent in breach of the terms of thereof took away the appellant's tools of trade. The incident was reported to the police. The respondent's disobedience of the said court order was willful and as such should be punished. The 2nd respondent's act of carting away the appellant's goods amounts to theft and conversion. The respondent had suffered loss and was continuing to suffer loss as a result of the said acts of the 2nd respondent. The application was opposed by the 1st, 2nd and 3rd respondents through a replying affidavit sworn by the 2nd respondent's General Manager, Pauline Wangari Ngugi sworn on 24th July, 2020. The 2nd respondent's said General Manager denied that the 1st, 2nd and 3rd respondents were served with the application dated 16th March, 2020 and the order that was made by the court in respect thereof on 19th March, 2020. She stated that in any event, the appellant concealed to the court material facts in the said application of 16th March, 2020. She stated that the appellant was not the 1st respondent's tenant in the suit property and that she took over the property from the 1st respondent's tenant without the 1st respondent's knowledge. She stated that the appellant failed to disclose that she had failed to pay rent and that the 1st respondent obtained an order from the tribunal to levy distress against her through an auctioneer.

The 2nd respondent's General Manager stated further that, following the orders made by the tribunal on 13th March, 2020, the appellant failed to collect her goods from the auctioneer where they had been kept following the distress aforesaid. The appellant also frustrated the 4th respondent's efforts to take over the suit property as had been directed by the tribunal. She stated that the appellant had no right to seek to enforce an order that she had not complied with. She stated that the appellant was in rent arrears to the tune of Kshs. 91,000/- and that the same remained outstanding even after this court had directed the appellant to clear the same. The 2nd respondent's General Manager termed the appellant's application an abuse of the process of the court.

The application was argued by way of written submissions. The appellant filed her written submissions dated 10th August, 2020 while the 1st, 2nd and 3rd respondents filed their submissions dated 31st August, 2020.

Determination:

I have considered the appellant's application together with the affidavit filed in support thereof. I have also considered the affidavit filed by the 1st, 2nd and 3rd respondents (the respondents) in opposition to the application. Finally, I have considered the submissions by the advocates for the parties. The main issues for determination in the application before me is whether the appellant has established that the respondents committed acts of contempt of the orders made herein on 19th March, 2020 and issued on 20th March, 2020 and, whether the appellant is entitled to the reliefs sought in the application.

In the case of Hardkinson v Hardkinson [1952] ALL ER 567, it was held that:

“It was the plain and unqualified obligation of every person against or in respect of whom an order was made by a court of competent jurisdiction to obey it unless and until it was discharged and disobedience of such order would as a general rule result in the person disobeying being in contempt and punishable by committal or attachment and in an application to the court by him not being entertained until he had purged his contempt.”

In the case of Mutitika v Baharini Farm Ltd [1985] KLR 227 it was held that:

(i) A person who knowing of an injunction, or an order of stay, willfully does something, or causes others to do something, to break the injunction, or interfere with the stay, is liable to be committed for contempt of court as such a person has by his conduct obstructed justice.

(ii) The standard of proof in contempt proceedings must be higher than proof on a balance of probabilities and almost but not exactly beyond reasonable doubt.

(iii) The principle must be borne in mind that the jurisdiction to commit for contempt should be carefully exercised with great reluctance and anxiety on the part of the court to see whether there is no other mode which can be brought to bear on the contemnor.

In the Court of Appeal case of Michael Sistu Mwaura Kamau v Director of Public Prosecutions & 4 others [2018] eKLR the court set out the law on contempt as follows:

“It is trite that to commit a person for contempt of court, the court must be satisfied that he has willfully and deliberately disobeyed a court order that he was aware of. That is made absolutely clear by section 4 of the Contempt of Court Act and the ruling of the Supreme Court in Republic v. Ahmad Abolfathi Mohammed & Another (supra). Secondly, as this Court emphasized in Jihan Freighters Ltd v. Hardware & General Stores Ltd and in A.B. & Another v. R. B. [2016] eKLR, to sustain committal for contempt of court, the order of the court that is alleged to have been deliberately disobeyed must be clear and precise so as to leave no doubt as to what a party was supposed to do or to refrain from doing. Lastly, the standard of proof in committal proceedings is higher than proof on a balance of probabilities, though not as high as proof beyond reasonable doubt. (See Mutitika v. Baharini Farm (supra) and Republic v. Ahmad Abolfathi Mohammed & Another (supra).”

It is on the foregoing principles that the appellant's application falls for consideration. The appellant alleged that the respondents committed an act of contempt of the court order aforesaid by removing the appellant's goods from the suit property and refusing to return the same. In response to this allegation, the respondents contended that the order said to have been disobeyed lapsed in accordance with the terms thereof when the appellant failed to comply with the condition on which it was made and as such there was no order capable of being complied with. The respondents contended further that even if the order was subsisting, the same was not served upon them and as such they could not comply with the same. The respondents contended further that even if the said order was served upon them, they were not capable of committing the acts of contempt alleged against them since the appellant's goods had been removed from the suit property much earlier by an auctioneer pursuant to a distress for rent that was levied against the appellant and that the appellant was directed by the tribunal to collect the said goods from the auctioneer which she declined to do.

It is common ground that the order made by the court on 19th March, 2020 was conditional upon the appellant paying forthwith all the rent for the suit property then in arrears and continuing to pay rent as and when it fell due. The second limb of the order was that if the appellant failed to pay rent as was ordered by the court, the injunctive orders that were issued in favour of the appellant were to stand discharged automatically without any further reference to the court. It is common ground that the appellant did not pay the rent that was in arrears as at the time the orders of the court were given. It is also common ground that the appellant did not thereafter continue to pay rent as and when it fell due. It follows therefore that the order that was made on 19th March, 2020 stood discharged as a result of the appellant's failure to comply with the condition on which it was given.

The order was therefore not in existence as at 4th June, 2020 when the appellant brought the present application for contempt. The order had lapsed and as such the same could not be enforced through contempt of court proceedings. The appellant claimed in the supporting affidavit that the respondents had refused to accept rent from her. The appellant placed no evidence before the court showing that she had made an attempt to pay rent as ordered by the court. I am in agreement with the respondents that if the appellant had any difficulty in complying with the court order, she had an obligation to come back to court for directions. Her inaction even if the respondents had indeed refused to accept rent could not stop the orders made on 19th March, 2020 from lapsing.

Due to the foregoing, I am in agreement with the respondents that the orders made by the court on 19th March, 2020 lapsed due to the appellant's failure to comply with the condition upon which it was issued and as such the respondents were not obliged to comply with the same.

I am also in agreement with the respondents that when the appellant came to court through the Notice of Motion dated 16th March, 2020, the appellant created the impression that she was in possession of the suit property and that she was threatened with eviction. It was on that basis that the court granted the orders of 19th March, 2020. The various orders placed before the court by the respondents show that the court was misled. There is no doubt from the said orders that the appellant was not in possession of the suit property. There is also no doubt that the appellant's goods were not on the suit property the same having been removed from the premises earlier by an auctioneer who had distrained for rent. The order made by the tribunal on 13th March, 2020 directed the 1st respondent to instruct the said auctioneers to release the appellant's properties to her not later than 5.00pm on 16th March, 2020. Such an order that was made in the presence of the appellant could not have been made if the said properties were in the suit property.

In the circumstances, I am not satisfied from the evidence before me that the respondents removed any of the appellant's goods or properties from the suit property after 19th March, 2020 when the court made the order the subject of the present application. That means that even of the orders of 19th March, 2020 had not lapsed, I am not satisfied that they were breached in the manner claimed by the appellant.

The burden was on the appellant to prove that the orders of 19th March, 2020 were either served upon the respondents or were within the respondents' knowledge when they are alleged to have disobeyed the same. The respondents contended that they were neither served with the application dated 16th March, 2020 nor the orders that were issued in respect thereof on 19th March, 2020. In the body of the application, the appellant claimed to have served the orders of 19th March, 2020 upon the respondents on 25th March, 2020 while in her supporting affidavit, the appellant claimed to have effected service on 20th March, 2020. The letter from the appellant's advocates on record annexed to the supporting affidavit under cover of which the court order is alleged to have been served is dated "20/20/2020" and there is a writing at the bottom that the same was received by the recipient on 25th March, 2020. From the foregoing, it is not clear as to when the court order made on 19th March, 2020 was served upon the respondents and when the same was disobeyed because the respondents are alleged to have carried away of the appellant's goods from the suit property on the same day they were served with the said court order.

In her submissions, the appellant referred to an affidavit of service that had been filed in court by the process server who effected service of the said court order. Such an affidavit should have been filed together with the application for contempt to give the respondents an opportunity to respond to the same. I have not seen the same on record. There is also no evidence that the court had granted leave to the appellant to file any further affidavit in this matter. Having not had the opportunity of perusing the said affidavit of service, I wish to say no more on the same. From the material on record, I am not satisfied that the respondents were served with the orders made on 19th March, 2020 or that they were aware of the same when they were alleged to have disobeyed the same.

I believe that I have said enough to show that the appellant's Notice of Motion application dated 28th May, 2020 is without merit. The appellant has failed to prove that the respondents disobeyed or breached the orders made herein on 19th March, 2020. The application dated 28th May, 2020 is dismissed with costs to the 1st, 2nd and 3rd respondents.

DELIVERED AND DATED AT NAIROBI THIS 15TH DAY OF APRIL 2021

S. OKONG'O

JUDGE

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

Mr. Pala for the Appellant

N/A for the 1st, 2nd and 3rd Respondents

N/A for the 4th Respondent

Ms. C. Nyokabi-Court Assistant