



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CASE NO. E218 OF 2020

WARSAME OMAR FARAH.....PLAINTIFF

VERSUS

HATHAR HAJI ABDI.....1ST DEFENDANT

NORTH EASTERN IMPEXICO

AGENCIES LIMITED.....2ND DEFENDANT

NAIROBI CITY COUNTY.....3RD DEFENDANT

DIRECTOR GENERAL, NAIROBI

METROPOLITAN SERVICES.....4TH DEFENDANT

ATTORNEY GENERAL.....5TH DEFENDANT

RULING

The Plaintiff filed the application dated 18/1/2021 seeking to have Hathar Haji Abdi, Abdirahim Haithar Abdi alias Abdirahim Haithar Haji who is the 1st Defendant's son acting as a director of the 2nd Defendant, and Major General Mohammed Badi on behalf of the 4th Defendant found to be in contempt of the orders this court gave on 8/1/2020 and committed to prison for six months. The Plaintiff further sought to have these persons ordered to purge the contempt by removing the bulldozer from the suit property and any other restrictions impeding the Plaintiff's access and use of the suit property and for the suit property to be returned to the status it was in prior to the contempt.

The application was made on the grounds that this court gave an order for temporary injunction on 25/11/2020 restraining the Defendants from evicting the Plaintiff from the portion he occupies on land reference number (L.R. No.) 37/714 until 8/12/2020. The court subsequently ordered on 8/12/2020 in the presence of the advocates for all parties save for the 3rd Defendant, that the *status quo* obtaining on the land as at 25/11/2020 would be maintained until 15/2/2021. The Plaintiff averred that he was in possession of the suit land and was using one acre of L.R No. 37/714 for his businesses and had let out some portions of that land to other tenants who were running their businesses on it.

He averred that in willful disobedience of the court order directing preservation of the *status quo*, the 1st Defendant and his son Abdirahim Haithar Haji purporting to act for the 2nd Defendant with the authority of the 4th Defendant forcefully entered the suit land and caused a bulldozer to be parked there blocking the frontage of the Plaintiff's property and depriving him access or use of the property and his tenants. The Plaintiff urged that through their conduct, the Defendants intended to demolish or destroy his structures and possession on the suit land in order to steal a match on the Plaintiff. The Plaintiff contended that the Defendants had unlawfully and contemptuously disturbed his possession and use of suit land with the aim of upsetting the *status quo* ordered by the court. The Plaintiff expressed concern that unless the court intervened the Defendants may evict him from the suit land with the aim of defeating the application or rendering the suit futile. The Plaintiff contended that that would not only occasion loss to him but would cause a public scandal to the court and diminish the court's authority and sanctity of its process.

The Plaintiff swore the affidavit in support of that application. He averred that the 1st, 2nd and 4th Defendants were represented by their advocates when the court gave the orders on 8/12/2020 and that they therefore had notice of the orders. He averred that on 15/1/2021 the 1st Defendant and his son purporting to act with the authority of the 4th Defendant forcefully entered the suit land and caused the bulldozer to be parked there blocking the frontage of his land and impeding access to the land by his tenant's trucks and other motor vehicles.

The Plaintiff annexed photographs showing a bulldozer and other motor vehicles. The photographs are not clear because they were printed in

black and white. The Plaintiff averred that the 1st Defendant and his son were planning to charge the suit land to secure a bank loan and relied on a notice to vacate the suit land dated 30/10/2020 written by McKay Advocates.

Abdirahin Haithar Haji swore the 2nd Defendant's replying affidavit in opposition to the Plaintiff's application. He denied being aware of the bulldozer referred to by the Plaintiff. He averred that he had not authorised or instructed any agents to park any such bulldozer on the suit property. He averred that there was no attempt or intention by the 2nd Defendant to evict the Plaintiff from the portion of land which he occupies.

The 1st Defendant swore the affidavit in opposition to the Plaintiff's application on 29/1/2021. He averred that the application dated 18/1/2021 was based on a non-existent law because the Contempt of Court Act number 46 of 2016 was declared to be invalid by Mwita J on 29/11/2018. He denied entering the suit land and causing a bulldozer to be parked there. He was aware of orders for *status quo* which the court issued on 8/12/2020 and averred that as a law abiding citizen he had continued to abide by those orders. He urged the court not to issue the orders sought because he did not participate in the alleged contemptuous act.

Dominic Mutegi, the acting Deputy Director in charge of Urban Planning and Development at the Nairobi Metropolitan Services swore the replying affidavit on behalf of the 4th and 5th Defendants. He averred that sufficient evidence had not been adduced by the Plaintiff to link the 4th Defendant to the contemptuous acts alleged by the Plaintiff. Further, that the Plaintiff had failed to demonstrate that the 4th Respondent authorised the 1st and 2nd Defendants to forcefully enter the suit land and cause a bulldozer to be parked there blocking the frontage of the Plaintiff's Property. He denied that the 4th Defendant had deployed or ordered any caterpillar to be parked at the Plaintiff's entrance and added that the Plaintiff had not disclosed the registration number of the caterpillar which he alleged was parked at the entrance to the suit property. He pointed out that the fear by the Plaintiff that he would be evicted from the suit land before 15/2/2021 was neither here nor there because that date had passed and nothing had taken place. Finally, that the Plaintiff had not demonstrated how the 4th Defendant had willfully disobeyed any court order directing the parties to observe or maintain the status quo. He urged the court to dismiss the application.

Parties filed submissions which the court considered. The Plaintiff submitted that in willful disobedience of the orders given by this court on 25/11/2020 and extended on 8/12/2020 restraining the Defendant from evicting the Plaintiff, the 2nd Defendant issued a notice of eviction followed by the forcible entry on the suit property by the 1st, 2nd and 4th Defendants who caused a bulldozer to be parked there. The Plaintiff did not dispute that the Contempt of Court Act was declared to be unconstitutional and urged the court not to dismiss his application which he submitted would be based on the law that was in force before the Contempt of Court Act was enacted.

He submitted that the test for proving whether contempt of court had been committed had been settled through judicial pronouncements. He gave the ingredients as firstly, the terms of the order were clear and unambiguous and were binding on the Defendant; secondly, that the defendant had proper knowledge or notice of the terms of the order; thirdly, that the defendant had acted in breach of the terms of the order; and lastly, that his conduct was deliberate. The Plaintiff averred that the orders issued on 25/11/2020 and 8/12/2020 were extracted and served upon the Defendants. That in blatant disregard of those orders, the 2nd Defendant through its advocates issued a notice dated 30/11/2020 requiring the occupants of the suit property to vacate the land within two days. The Plaintiff relied on the photographs of the bulldozer which he claimed was parked on the suit land on 15/1/2021 at the instance of the 1st, 2nd and 4th Defendants. The Plaintiff relied on Section 63 of the Civil Procedure Act and urged the court to commit the Defendants to civil jail.

The 1st Defendant submitted that the application was fatally defective and that the Plaintiff had not met the threshold to sustain a conviction for contempt of court. The 1st Defendant urged that the burden of proving contempt lay on the Plaintiff and that the standard of proof required was higher than on a balance of a probability. He denied that he had disobeyed the court order. Further, that there was no shred of evidence linking the 1st Defendant to the alleged contemptuous acts. He added that looking at the photographs exhibited by the Plaintiff, one could not tell where they were taken or what exactly was happening at that place. The 1st defendant submitted that it was obvious that the Plaintiff had not shown any change in the *status quo* from the time when the orders were issued by the court on 8/12/2020 and added that the Plaintiff had not suffered any harm or prejudice.

The 2nd Defendant submitted that the application was defective because it was based on a non-existent law. The 2nd Defendant submitted that the photographs which the Plaintiff relied on did not link the alleged contemnor to the alleged contempt. It added that it was not clear where the photos were taken and when they were taken and that the Plaintiff had failed to demonstrate that the alleged contemnor was in any way responsible or parking the bulldozer in the suit land. Regarding the notice from McKay and Company Advocates, the 2nd Defendant submitted that that letter was not addressed to the Plaintiff and that there were other occupants on the suit land besides the fact that the order in question was limited to the portion which the Plaintiff occupies. The 2nd Defendant submitted that the Plaintiff had failed to prove beyond doubt that there was disobedience of the court orders.

The 4th Defendant submitted that the Plaintiff's application was defective since it was based on the Contempt of Court Act which the court declared to be unconstitutional. It added that the photographs which the Plaintiff relied on do not show where they were taken, what was happening and when they were taken. It submitted that the Plaintiff had failed to prove that it was guilty of contempt of this court's orders.

The issue for determination is whether the Plaintiff has proved that the persons he seeks to be committed to prison for 6 months were in contempt of the orders made by this court. The court orders of 25th November and 8th December 2020 restrain the Defendants from evicting the Plaintiff from the portion he occupied on L.R. No. 37/714. The court also made an order for the *status quo* obtaining as at 25/11/2020 to be maintained until 15/2/2021. The Plaintiff has not demonstrated that the Defendants evicted him from the portion of the suit property that he occupied. He did not establish any nexus between the Defendants and bulldozer which he claimed had been parked by the Defendants on the suit land in order to obstruct his access and use of the portion of the suit land as directed by the court. The application dated 18/1/2021 is dismissed with costs being in the cause.

DELIVERED VIRTUALLY AT NAIROBI THIS 9TH DAY OF JUNE 2021.

K. BOR

JUDGE

In the presence of: -

Mr. Munene Nkanata for the Plaintiff

Mr. Ondati Mogaka for the 1st Defendant

Ms. N. Muriranja holding brief for Mr. P. Nyaosi for the 2nd Defendant

Mr. Cliff Menge for the 4th and 5th Defendants

Mr. V. Owuor- Court Assistant

No appearance for the 3rd Defendant