



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CASE NO. E243 OF 2020

DYNAMIC SISTERS ENTERPRISES LIMITED.....PLAINTIFF

VERSUS

AMBOSELI COURT LIMITED.....1ST DEFENDANT

KIAMBU DANDORA FARMERS

COMPANY LIMITED.....2ND DEFENDANT

ABDILLAHI MUIGAI MUIRURI.....3RD DEFENDANT

JOSEPH MWANGI KARANJA.....4TH DEFENDANT

JOSEPH NDUATI.....5TH DEFENDANT

ERIC OTIENO HESBON.....6TH DEFENDANT

BASHIR ALI IBRAHIM.....7TH DEFENDANT

WILLY KARUNDA MWANGI.....8TH DEFENDANT

INSPECTOR GENERAL OF POLICE.....9TH DEFENDANT

CHIEF LAND REGISTRAR.....10TH DEFENDANT

NATIONAL LAND COMMISSION.....11TH DEFENDANT

HON. ATTORNEY GENERAL.....12TH DEFENDANT

RULING

This court issued an order on 26/11/2020 restraining the Defendants from further constructing on land reference numbers (L.R. No.) 15400/376, 15400/379, 15400/380, 15400/383, 15400/384 and 15400/387 until 7/12/2020. The orders were extended on 15/2/2021. The Plaintiff brought the application dated 21/1/2021 seeking to have the 3rd to the 8th Defendants committed to civil jail for 6 months for disobedience of a court order and for contempt of court. The Plaintiff sought similar orders against the Officer Commanding Kayole Police Station (OCS) and the Officer Commanding the Police Division (OCPD) as well as the Inspector General of Police.

The application was made on the grounds that the Defendants mentioned above had severally and jointly disregarded or disobeyed the orders issued by the court on 26/11/2020 and that the authority and dignity of the court must be protected at all times.

Nancy Wairimu Kiruga, a director of the Plaintiff swore the affidavit in support of the application. She averred that when this suit was filed and the court orders were issued, the construction work on the suit land were at the initial stages and no substantial development had taken place. She attached photographs showing structures at the foundation stage. She deponed that the Defendants were served on 26/11/2020 and exhibited the affidavit of service sworn by Lawrence Maanzo Mutua on 3/12/2020. Ms. Kiruga deponed that she visited Kayole Police Station and discussed the court order with the OCS and OCPD who assured her that no further development would be undertaken on the suit land. She averred that despite service of the court order on the 6th Defendant on behalf of the 2nd, 3rd, 4th, 5th, 7th and 8th Defendants,

construction continued undeterred. She annexed photographs of the construction which she believed was undertaken after the court order was served on the Defendants. Further, that the Plaintiff's advocates pointed out to the court that the order had not been complied with when the matter came up for *inter partes* hearing on 7/12/2020. She believed that the Defendants had deliberately disobeyed a court order despite being served.

Joseph Mwangi Karanja, the 4th Defendant and a director of the 2nd Defendant swore the replying affidavit on behalf of the 3rd, 5th, 6th, 7th and 8th Defendants in opposition to the application. He averred that the title over L.R. No. 11379/3 was issued to the 2nd Defendant in 1970 and that the land had never been subdivided. He swore that he did not know the land which the Plaintiff was claiming. He averred that the title which the Plaintiff claims was among the titles which the National Land Commission (NLC) mentioned in its public notice of 2/12/2015 while calling for evidence regarding the manner in which the titles were acquired. He maintained that there was need for verification of how the Plaintiff acquired the titles because NLC made a finding in favour of the 2nd Defendant. He urged that the allegations by the Plaintiff that it bought the suit land from the 1st Defendant could not be true because the 1st Defendant did not own L.R. No. 11379/3. He emphasised that the 2nd Defendant could not be a trespasser on its own land. He averred that the report made by the Plaintiff to Soweto Police Station was not done in good faith and complained that the police took sides with the Plaintiff without calling upon the 2nd Defendant to present its ownership documents. He maintained that they were in possession of the genuine documents relating to their land and added that they would be seeking security of costs based on the value of the land which is in the sum of Kshs. 170,000,000/=. Mr. Karanja pointed out that there were various cases pending before the court involving the same suit land which ought to be consolidated to save the court's time and to avoid a situation where conflicting decisions may be given by different judges.

Samuel Gichohi, the OCS of the Soweto Police Station swore the replying affidavit on behalf of the 9th Defendant. He deponed that he was aware that Kiambu Dandora Farmers Company Limited had had long standing disputes over ownership of several parcels of land with various individuals and companies. He denied that he had met the Plaintiff's director or that the police promised her that no further developments would be undertaken on the suit land. He averred that he was never personally served and added that the Plaintiff had not outlined the specific instances, actions or omissions done by the OCS or OCPD of Kayole Police Station to support its claim of disobedience of court orders. He maintained that neither the OCS Soweto Police Station nor the OCPD Kayole Police Station had disobeyed any court order to warrant the issuance of the orders sought in the Plaintiff's application.

Parties filed submissions which the court considered. The Plaintiff submitted that service of the court order was effected on the Defendants and relied on the affidavit of Nancy Wairimu Kiruga as well as the affidavit of service sworn by Lawrence Maanzo Mutua. It also submitted that the issue of service was corroborated by the appearance of an advocate on behalf of the 2nd to 8th Defendants when the matter came up on 7/12/2020. The Plaintiff submitted that the law on contempt of court had evolved and that where it was demonstrated that a respondent was made aware of an order of the court but chose to disobey it then he was deemed to be in contempt of court. The Plaintiff submitted that it had demonstrated through the photographs the stage which the construction on the suit land was when the court order was issued as well as the advanced stage that the construction had reached when the application for contempt was made. In any event, the Plaintiff maintained that there had been no denial that indeed construction continued on the suit land which it submitted constituted disobedience of the court order.

The 2nd to 8th Defendants submitted that a person alleging contempt must demonstrate wilful disregard of the court order by establishing beyond any reasonable doubt conclusive evidence to prove the allegation of contempt. They argued that what this court has to address is whether there is evidence to show that the 3rd to 8th Defendant have disregarded this court's order and whether there is any evidence linking those Defendants to the alleged contempt of court. The Defendants submitted that the Plaintiff had failed to prove proper service upon the 3rd to 8th Defendants. Further, that no link had been proved between the Defendants and the construction that it is alleged to be going on. The Defendants submitted that it was the duty of the Plaintiff to demonstrate which structure was being constructed by which Defendant because it could not be that any construction being undertaken in a disputed area was being done by the Defendants when it was clear that there were several cases in court relating to the construction and development of the place. The Defendants further contended that the Plaintiff had failed to show how they had breached or disobeyed the court orders since they could not show who exactly was carrying out the alleged construction on the suit premises. They relied on the decision in **Jacinta Njeru Kaitha v David K. Kanyiri [2015] eKLR** on the need for personal service and to give a notice warning the person not to do or to do any act in question. The Defendants concluded that if there was any construction going on on the suit premises then the Plaintiff needed to conduct due diligence to ascertain who was behind the construction and that the Defendants cannot be cited for contempt simply because there is construction going on. More so because ownership of the suit land is in dispute and there are other individuals who have an interest in the land and they could be the ones continuing with the construction.

The 9th Defendant submitted that the application was fatally defective because it was premised on Section 5 of the Contempt of Court Act which was invalidated by the High Court. The Inspector general of Police did not dispute the terms of the order but rather denied the allegation that he was served or that he disobeyed the court order. The 9th Defendant submitted that the photos which the Plaintiff relied on do not link the alleged contemnors to the alleged contempt. In addition, that it was not clear when those photos were taken and where they were taken. Further, that the Plaintiff had failed to demonstrate that any of the alleged contemnors were responsible for the continuing construction on the Suit Property. They contended that the Plaintiff had failed to prove that the alleged contemnors disobeyed court orders. The 9th Defendant relied on several decisions on what an applicant needs to prove in an application for contempt of court.

Looking at the affidavit of service of Lawrence Maanzo Mutua, he deponed that he effected service on 30/11/2020 while accompanied by a director of the Plaintiff. He does not give the name of the director. The process server does not state that the director identified and pointed out the Defendants to him for purposes of him effecting service. Rule 15 of Order 5 requires that the affidavit of service should indicate the name and address of the person identifying the persons served. It is doubtful whether proper service was effected on the 3rd to 8th Defendants.

The Plaintiff failed to prove any link between the Defendants and the construction that it is alleged to be taking place on the suit land. It may well be that the construction which the Plaintiff complains of is being undertaken by other parties who lay claim to the suit land and who may be involved in other litigation over the same land. It will be necessary to have the dispute over the specific suit land heard and determined by the same court to obviate a situation where conflicting decisions may be issued over the same parcel of land.

The Plaintiff failed to demonstrate that the contemnors it wished cited for contempt were responsible for the continuing construction on the Suit Property.

The court declines to grant the orders sought in the application dated 21/1/2021. The costs of that application shall be in the cause.

DELIVERED VIRTUALLY AT NAIROBI THIS 21ST DAY OF JULY 2021.

K. BOR

JUDGE

In the presence of: -

Ms. Irene Kalu holding brief for Mr. Eric Mutua for the Plaintiff

Mr. John Were for the 2nd to 8th Defendants

Mr. Cliff Menge for the 9th, 10th and 12th Defendants

Mr. V. Owuor- Court Assistant