



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO.E131 OF 2021

HUSSEIN AHMED FARAH.....1ST PLAINTIFF

HUSSEIN UNSUR MOHAMMED.....2ND PLAINTIFF

MOHAMMED ABADIKADIR ADAN.....3RD PLAINTIFF

-VERSUS-

YUSUF ABDI ADAN.....DEFENDANT

RULING

1. This a notice of motion application dated 25th June 2021 brought under Section 5(1) of the Judicature Act Cap 8 Laws of Kenya, Civil Procedure (Amendment No 2) Rules of England Rule 81.4, Articles 201 and 251 of the Constitution of Kenya, Section 1A, 1B and 3A of the Civil Procedure Act, Cap 21 Laws of Kenya.

2. It seeks orders:-

a. Spent.

b. That this Honourable court be pleased to make an order of committal to civil jail against Yusuf Abdi Adan for a period of 6 months or for such period as the court may direct.

c. That this Honourable court be pleased to order Yusuf Abdi Adan to pay a fine equivalent to 6 months monthly rent of the suit property.

d. That an order for sequestration and/or attachment do issue for the properties of Yusuf Abdi Adan pending the purging of his contempt of this Honorable Court in disobeying and/ or willfully disregarding the orders of Court given on 21st April 2021.

e. That the costs and incidental to this application be borne by the contemnors.

3. The application is based on ground on the face of the application and the supporting affidavit sworn on 25th June 2021 by the 1st Plaintiff, Hussein Ahmed Farah.

4. He deponed that the Plaintiffs' Notice of Motion filed herein dated 19th April 2021 was heard and determined and Hon. Komingoi L.J issued orders on 21st April 2021.He further deponed that the Defendant is in contempt of the following specific orders;

a. That in the interim, an order is issued that the status quo ante be restored at the premises commonly known as "Bangkok Shopping Mall." Erected on Land Reference No.36/VII/405 situate in Eastleigh within Nairobi area, more specifically that possession, control and management over the said property be reinstated to both the Plaintiffs and the Defendant.

b. That the regional police commander, Nairobi County to ensure compliance with of the orders herein."

5. He further deponed that the Defendant/Respondent was served with the orders and the Regional police commander vide his letter of 17th May 2021 invited the parties to the suit premises on 18th May 2021 for the purpose of implementing the court order.

6. He deponed that the Defendant/Respondent did not attend the said meeting and in blatant disregard and contempt of the orders of 21st April 2021, still continues to deny the Plaintiffs/Applicants access, possession, control and management of the suit premises.

7. He also deponed that in further defiance and frustration of the court order, the Defendant/Respondent has placed partisan and armed police officers (said to be instructed by senior police officer) and goons inside and outside the suit premises to stop the Plaintiffs/Applicants joint or any possession, control and management over the suit property.

8. In addition, he deponed that the Defendant/Respondent has for over 6 years and even after the order of 21st April 2021, not accounted for a single shilling from the proceeds of the suit property that he co-owns with the Plaintiffs jointly and equally.

9. He deponed that it is not true that the Plaintiffs and the Defendant have any arrangement that vests the property to the Defendant to their exclusion in terms of ownership, possession, control, management, the profits or any aspect of their proprietary rights.

10. He prayed that the Court holds the Respondent in contempt in order to uphold the dignity and authority of this Honourable court.

The Respondent's response to the application.

11. The Respondent swore a replying affidavit on 15th July 2021 in opposition to the application. He deponed that neither the order nor the application subject of the contempt proceedings was ever personally served on him and the Plaintiffs/Applicants have not proved that the said order and application were served.

12. He also denied service of the letter dated 17th May 2021 and denied knowledge of a meeting of the 18th day of May 2018. He deponed that the Applicants have not demonstrated that he has failed or refused to comply with the orders of this court as the allegations by the Plaintiff are bare without proof.

13. He deponed that having obtained an ex parte order, the Plaintiffs were duty bound to serve the orders on him within 3 days failure to which the ex parte orders automatically lapsed. He further deponed that since the orders were extracted on 27 April 2021, they ought to have been served by 30th of April 2021.

14. He deponed that the orders having lapsed by operation of law, by dint of Order 40 Rule 4(3) of the Civil Procedure Rules, 2010, there is no order before this Honourable Court which the Respondent can be said to be in contempt of.

15. He also deponed that that the application is incurable, and defective since an application for contempt must set out fully the grounds on which the committal application is made and must identify separately and numerically, each alleged act of contempt and be supported by affidavits containing all the evidence relied upon and the said application notice and affidavits must be served personally on the Respondent unless the court dispenses with the service if it considers it just to do so or the court authorizes an alternative method of service.

16. The 3rd Plaintiff/Applicant filed the affidavit sworn on 1st October 2021 in reply to the Respondent's replying affidavit.

17. On the 29th September 2021, the court with the consent of parties directed that the application be canvassed by way of written submissions.

The Plaintiffs/Applicants submissions.

18. They are dated 7th October 2021. The Plaintiffs/Applicants submitted that the order subject of these proceedings was extracted on 27th April 2017 and immediately served upon the Defendant/Respondent who immediately instructed counsel to file the Notice of motion dated 3rd May 2021 seeking to set the orders instead of obeying the orders. They added that the order was granted until 28th June and has been extended to date.

19. They also submitted that the current jurisprudence is that knowledge of a court order is sufficient and supersedes personal service. They cited the cases of **Shimmers Plaza Limited v National Bank of Kenya Limited [2015] eKLR** and **Basil Criticos v Attorney General & 8 others [2012] e KLR** in that regard.

20. They submitted that the court order directed the Regional Police Commander Nairobi to ensure compliance of the Court order and the Regional police commander wrote the letter dated 17th May 2021 inviting the parties to a meeting on 18th May 2021 at the subject property which was served upon the Respondent and his counsel who wrote a reply on the same day asserting that his client the Respondent would not be able to attend the meeting.

21. They submitted that court orders must be obeyed as they are the hallmark of the rule of law in a civilized society. They cited the court of Appeal decision in **Justus Kariuki Mate & Another v. Martin Nyaga Wambora & Another [2014] e KLR**, **Kenya Human Rights Commission v Attorney General & Another [2018] e KLR** and this court's decisions in **Tribe Hotel Ltd v Josephat Cosmas Onyango [2018] e KLR**.

The Defendant's/Respondent's submissions

22. They are dated 12th October 2021. The Respondent submitted on the following issues;

a. Whether there is any valid order on which contempt can be founded.

b. Whether the applicants have proven contempt

23. The Respondent submitted that there is no valid order on which contempt can be founded as the orders issued on 21st April 2021 lapsed for failure to be served within 3 days as provided under Order 40 Rule 4(3) of the Civil Procedure Rules which is couched in mandatory terms. He cited the cases of **Jane Waithera v Joseph Kariuki Mbuthia & 3 Others [2013] e KLR** and **Immaculate Wambia Mungai v Fredrick Mwai Mwihi [2017]** where the court found that the timeline under Order 40 Rule 4(3) is mandatory.

24. He also cited the Court of Appeal's decision in **Director of Public Prosecutions v Justus Mwendwa Kathenge & 2 Others [2016] e KLR** where the court emphasized service of Exparte injunctions is within 3 days.

25. On the Plaintiffs/Applicants contention that the orders of 21st April 2021 were extended by the court, he submitted that the extensions were done on material non-disclosure as the Applicants intentionally failed to disclose to this Honourable court that there were no orders that could be extended as the ex-parte orders had automatically lapsed by operation of law.

26. He also submitted that the Plaintiffs/Applicants had a duty to prove to this Honourable Court that the Defendant/Respondent was in contempt to the standard required in contempt proceedings, where the burden of proof is higher than the balance of probability but lower than beyond reasonable doubt as held in **Mutitika v Baharini Farm Limited [1985] KLR 229** and **Alken Connections Limited v Safaricom Limited & 2 Others [2013] e KLR**.

27. He submitted that there was no attempt by the Plaintiffs/Applicants to demonstrate how the Respondent has denied them access to the suit property and no evidence at all has been placed before the court to prove that indeed the Defendant/Respondent has prevented the Applicants from accessing the suit property.

28. While making reference to the police report dated 24th May 2021 addressed to the Deputy Registrar of this court and produced in evidence, he submitted that nowhere does the regional commander state that the Respondent has refused to obey the orders of this court. He added that the report indicated that there was difficulty in enforcement of the order as it was ambiguous and difficult to enforce. He cited the court of Appeal's decision in **Michael Sistu Mwaura Kamau v Director of Public Prosecutions & 4 others [2018] e KLR** to submit that a contempt application cannot be sustained if terms of the order of the court are ambiguous and incapable of enforcement.

29. I have considered the Notice of Motion and the affidavit in support. I have also considered the replying affidavit, the submissions filed on behalf of the parties and the authorities cited. The issues for determination are:-

i. Whether the orders issued on 21st April 2021 were served on the Defendants/Respondent.

ii. Whether the Defendant/Respondent is in contempt of the said orders.

iii. Who should bear costs of this application?

30. In the case of **Mutitika vs Baharini Farm Ltd [1985] KLR 229, 234**, it was stated that:-

“.....the standard of proof in contempt proceedings must be higher than proof on a balance of probabilities almost, but not exactly, beyond reasonable doubt.....The standard of proof beyond reasonable doubt ought to be left where it belongs, to wit, in criminal cases. It is not safe to extend it to an offence which can be said to be quasi criminal in nature”

I am also guided by the case of **Alken Communications Ltd vs Safaricom Ltd & 2 Others [2013] eKLR** where it was stated that where committal for contempt is sought for breach of an injunction it must be made clear what each defendant is alleged to have done and whether it was in breach of the injunctive order.

31. On the 21st April 2021 this court granted the following orders:-

“1. That the matter is certified urgent.

2. That in the interim, an order is issued that the status quo ante be restored at the premises commonly known as “Bankok Shopping Mall” erected on Land Reference No 36/VII/405 situate in Eastleigh within the Nairobi area; more specifically that possession, control and management over the said property be reinstated to both the plaintiffs and defendant.

3. That the Regional Police Commander, Nairobi County to ensure compliance of the orders herein.

4. That application be served on the defendant/respondent.

5. That the defendant/respondent do file a response twenty one (21) days from the date hereon.

6. That the matter be mentioned for directions on 28th of June 2021”

It should be noted that the said orders were granted ex parte.

32. **Order 40 rule 4(3)** of the Civil Procedure Rules provides that:-

“In any case where the court grants an ex parte injunction the applicant shall within three days from the date of issue of the order serve the order, the application and pleading on the party sought to be restrained. In default of service of any of the documents specified under this rule, the injunction shall automatically lapse.”

33. It is the Plaintiffs'/Applicants' case that they served the orders on the Defendant/Respondent immediately who then instructed counsel to act for him. The Defendant/Respondent on the other hand contends that he was not served immediately.

34. There is evidence on record that the orders were served on counsel for the Defendant/Respondent on 6th May 2021 as per the Advocates stamp. The Plaintiffs/Applicants did not lead any evidence to show that the Defendant/Respondent was served before the three (3) days period lapsed. In the case of **Immaculate Wambia Mungai vs Fredrick Mwai Mwhia [2017] eKLR** it was stated thus:-

“Secondly, under Order 40 Rule 4 (3) of the Civil Procedure Rules, once the Court grants an ex-parte injunction, the order shall be served upon the other party “within three days from the date of issue of the order”. Order 50 Rule 8 of the Civil Procedure Rules which deals with computation of time reads as follows:-

.....Similarly, it is clear that under Order 50 Rule 2 of the Civil Procedure Rules, only Sundays, Christmas Day, Good Friday and any other public holiday are excluded in computation of time where the period for doing anything is less than six days. The injunction herein was granted Ex-parte on 8th February 2016 and the order issued by Deputy Registrar on 11th February 2016. When 14th February 2016 which is a Sunday is excluded, it is clear that the three days within which the order should have been served upon the defendant expired on 15th February 2016 which was the third day. That order, as is clear from the affidavit of the process server was served upon the defendant on 16th February 2016 one day after the day on which it ought to have been served as provided by the Rules.....it follows therefore that the order for injunction issued on 11th February 2016 “automatically” lapsed on 15th February 2016.”

I find that there is no affidavit by a process server to confirm that the Defendant/Respondent was served within three (3) days from 27th April 2021.

35. It is the Plaintiffs'/Applicants' case that the Defendant/Respondent was aware of the said orders by virtue of the letter by the Regional Police Commander Nairobi inviting the parties for a meeting on 18th May 2021. It is my view that this was way after the orders had lapsed.

36. There is no proof that the Defendant/Respondent was served within three (3) days after issuance of the orders. I find that there is no order upon which an application for contempt can be based on. The fact that the Defendant's/Respondent's counsel filed the Notice of Motion dated 3rd May 2021 seeking to set aside the orders of 21st April 2021 still does not mean the Defendant/Respondent was served within three (3) days from 27th April 2021.

In the case of Esther **Kakonyo Wanjohi vs Julian Wambui Gakuru [2018] eKLR** it was held that:-

“In this case, the interim orders herein were granted pending inter-partes hearing on 19/07/2018 but was issued by the Deputy Registrar on 27/07/2018. According to Order 40, rule 4 (3) of the Civil Procedure Rules the order is to be served within 3 days of date of issue, therefore the same ought to be served on 01/08/2018 excluding Sunday. The affidavit of service indicates it was served on 02/08/2018 and which is 4 days after being issued. The applicant herein did not give any explanation for the delay in serving the order. The order had lapsed at the time it was served and a party failing to obey such an order cannot be held in contempt of court order”

37. I agree with the Defendant's/Respondent's counsel's submissions that this court on several occasions extended the orders granted on 21st April 2021 on the belief that the same had been served on the Defendant/Respondent as required by law. In the case of **Auni Bhajji & 4 Others vs Chief Magistrate, Milimani Law Courts & 2 Others [2017] eKLR** the court stated as follows:-

“There is every evidence that the court process was abused by the plaintiffs with the aid of the trial magistrate who was expeditiously granting them ex parte orders of injunction oblivious of the conditions for such grant as stipulated in Order 40 Rules 1, 2, 3 and 4 of the Civil Procedure Rules. Those ex parte orders more often than not as listed, were given beyond the 14 days stipulated, were never served upon the defendants counsel, and were always extended even after they had automatically lapsed such that the court was extending nothing from time to time”

38. I disagree with the Defendant's/Respondent's counsel that the order was not clear. However, it was incumbent upon the Plaintiffs/Applicants to demonstrate that they have been unable to access the suit property owing to the “partisan police officers from Starehe Police Station and hired goons”. Whoever alleges must prove.

39. I find that the Plaintiffs/Applicants have failed to demonstrate that the Defendant/Respondent is guilty of disobeying the orders issued on 27th April 2021.

40. I find no merit in this application and the same is dismissed. The costs do abide the outcome of the main suit.

41. In the meantime, the Defendant is directed to render accounts of all rents proceeds/income collected for the last six (6) years within thirty (30) days.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 25TH DAY OF NOVEMBER, 2021

.....

L. KOMINGOI

JUDGE

In the presence of:-

Mr. Sagana for the Plaintiffs/Applicants

Mr. Ongoro holding brief for Mr. Wakwaya for the Defendant/Respondent

Steve

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Court

Clerk