



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MACHAKOS

ELC CASE NO. E 064 OF 2021

VULPINE INVESTMENTS LIMITED.....PLAINTIFF

VERSUS

POSTONE LIMITED.....1ST DEFENDANT

GEORGE MUNENE.....2ND DEFENDANT

R U L I N G

What is before Court for determination is the Plaintiff's Chamber Summons application dated 14th July, 2021 where it seeks the following orders:

1. Spent
2. Spent
3. That pending the mention of this matter on 28th July, 2021 or further directions under (ii) above, this Honourable Court be pleased to issue an order of eviction from the suit property known as Land Reference Number 15050/16 against the Defendants, their agents, servants, workers and/or employees and the Officer Commanding Police Station (OCS) Athi River Station be ordered to effect the Court Order to ensure peaceful compliance.
4. That summons be issued against George Munene, the 2nd Defendant herein and any other director or official of Posstone Limited, the 1st Defendant to appear before this Court and show cause why contempt of court proceedings cannot be commenced against them for blatant disobedience of the orders of the Court issued on 18th June, 2021 and in default they be committed to jail for a maximum of 6 months for contempt of the said Court Order.
5. That the costs of this application be provided for.

The application is premised on the grounds on the face of it and the supporting affidavit of BHUPINDER SINGH DOGRA and NICHOLAS MWENGA KIMWELE where they explain that the Court granted an order of injunction on 17th June, 2021 restraining the Defendants from interfering with land reference number 15050/16 which order was served upon them on 21st June, 2021. They claim on 30th June, 2021, the interim orders of injunction were extended upto 28th July, 2021 in the presence of the Defendants' Counsel. Further, they state that the Defendants' Counsel failed to file and serve documents as had been directed by the court. They aver that the Defendants have continued to interfere with the suit land by mining and excavating stones. Further, that on 13th July, 2021, the process server Nicholas Mwenga Kimwele took a video including photographic evidence confirming this position. They reiterate that the actions of the Defendants are prejudicial to the Plaintiff and it would be in the interest of justice if eviction orders were issued.

The Defendants opposed the application and filed a replying affidavit sworn by GEORGE MUNENE where he denies the averments in the supporting affidavit. He insists that save for the fact that their equipment is on site, they are not carrying out any mining at all as the court order did not direct them to move out of the suit land. Further, the Plaintiff is using unorthodox means to evict them from the suit land before the matter is heard and determined. He explains that the Plaintiff has not sought for orders of interim mandatory injunction which would have allowed them to be granted final orders at the interim stage of the proceedings. Further, it has not satisfied the criteria in the grant of interim mandatory injunction. He reiterates that the instant application is an abuse of the court process, as well as repugnant to good administration of justice. Further, that the Applicant is cunningly using the interim injunctive orders to evict them from the suit land under the guise of disobedience of court order.

The Application was canvassed by way of written submissions.

Analysis and Determination:

Upon consideration of the Chamber Summons application dated the 14th July, 2021 including the respective affidavits and rivaling submissions, the following are the issues for determination:

- Whether the Defendants are in contempt of court order.
- Whether the Court should issue eviction orders against the Defendants from the suit land.

The Plaintiff in its submissions reiterated its claim and contended that the Defence by the Defendants that they are not in occupation of the suit land but are in a different parcel of land are diversionary tactics to deceive the court. It insists the Defendants have blatantly disobeyed the court order and continued with their activities on the suit land. Further, that eviction is mandatory in nature and should be granted at an interlocutory stage. To buttress its averments, it has relied on the following decisions: ***Hadkinson V Hadkinson (1952) ALL ER; EAM v PAA (2017) eKLR and Kenya Breweries Limited & Another v Washington O. Okeyo (2002) eKLR.***

The Defendants in their submissions insist they are not in contempt of court order and dispute the photographs annexed to the supporting affidavit insisting it does not prove they are interfering with the suit land. Further, that the Applicant has not qualified his allegations of contempt. To support their arguments, they have relied on the case of ***Eliud Muturi Mwangi (practicing in the name and style of Muturi & Company Advocates) V LSG Lufthansa Services Europa / Africa GMBH & Another (2015) eKLR.***

As to whether the Defendants are in contempt of the court order and if they should be evicted from suit land. The Plaintiff claims the Defendants are in contempt of the court order. They have confirmed they were served with the said order. I note the impugned order for interim injunction was granted ex parte on 17th June, 2021. I note to date the application for injunction that was filed on 17th June, 2021, has not been heard inter partes. The Plaintiff contends that the Defendants were indeed served with the Order of the Court dated 17th June, 2021 but continue to perform acts which are contrary to the said order and have persisted to do so. The Plaintiff has even annexed photographs to prove the Defendants are interfering with the suit land. The Defendants on the other hand deny interfering with the suit land, disputes the photographs and insists the Plaintiff has not met the threshold set for contempt of court.

Order 40 rule 4 (2) of the **Civil Procedure Rules** provides as follows:

“(2) An ex parte injunction may be granted only once for not more than fourteen days and shall not be extended thereafter except once by consent of parties or by the order of the court for a period not exceeding fourteen days”.

In the case of ***Maisha Nishike Ltd vs. Commissioner of Lands & 3 others (2011) eKLR*** the court while citing the holding in ***Kalyasoi Farmers Cooperative Society & others Vs County Council of Narok*** held that:-

“It is the plain and unqualified obligation of every person against, or in respect of, whom an order is made by a Court of competent jurisdiction to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or even void”.

In the case of ***North Tetu Farmers Co. Ltd v. Joseph Nderitu Wanjohi (2016) eKLR*** where Justice Mativo stated that:-

“writing on proving the elements of civil contempt, learned authors of the book Contempt in Modern New Zealand have authoritatively stated as follows:-

“There are essentially four elements that must be proved to make the case for civil contempt. The applicant must prove to the required standard (in civil contempt cases which is higher than civil cases –

- a) the terms of the order (or injunction or undertaking) were clear and unambiguous and were binding on the defendant;**
- b) the defendant had knowledge of or proper notice of the terms of the order;**
- c) the defendant has acted in breach of the terms of the order; and (d) the defendant's conduct was deliberate.’**

I note there are three elements that must be proved in contempt proceedings:

- a) Applicant must demonstrate terms of orders
- b) Applicant must demonstrate knowledge of terms by respondent
- c) Applicant must demonstrate failure of respondent to comply with court order

In the instant case, I note that the Order that was purportedly disobeyed was granted *ex parte*. Further, the application for injunction has

never been heard *inter partes* and determined. The Defendants insist they have not been undertaking quarrying but confirm their equipment are still on the suit land as there is no order directing them to move therefrom. I note Contempt proceedings are criminal in nature and hence the burden of proof should be on the Plaintiff to prove that the same is ongoing. From a perusal of the instant Chamber Summons application including the supporting affidavit as well as the annexures thereon, I note the Plaintiff has not indicated when the alleged acts were committed or proof to demonstrate that the said acts were committed by the aforementioned parties for them to be cited for contempt. Further, I note there is no Penal Notice that was attached to the Court Order served upon the Defendants.

In *Civil Appeal, No 95/1988 Mwangi H C Wang'ondu v Nairobi City Commission (UR)* the Court of Appeal held as follows:-

“In the present case, according to the affidavit of the appellant sworn on 26th January, 1988, in support of his application, the order alleged to have been disobeyed by the respondent was served on the respondent on 31st August, 1987, and a copy of that order which was annexed to the affidavit did not carry a notice of the penal consequences of disobedience as required by the Rules. It is clear from this that the appellant did not comply with the mandatory provisions of section 5(1) of the Judicature Act with the result that his application was incompetent. It must follow that there was no valid application for contempt of court before the judge.”

Based on the facts as presented while relying on the legal provisions cited above while associating myself with the quoted decision, I find that the Plaintiff has failed to tender adequate evidence to prove how the Defendants are in contempt of an order of the court. Further, it failed to attach a Penal Notice to the said Court Order. I opine that it is in the interest of justice for the 2nd Defendant to be granted an opportunity to be heard before he can be cited for contempt. It is my considered view that the Plaintiff's allegations herein have not met the threshold required in contempt proceedings as envisaged by the law as the standard of proof in the said proceedings is higher than the balance of probabilities and almost beyond reasonable doubt, which position is well articulated in the case of *Africa Management Communication International Limited Vs Joseph Mathenge Mugo & Anor (2013) eKLR*.

On the issue of a mandatory injunction seeking eviction of the Defendants from the suit land, I wish to make reference to the case of *Kenya Breweries Limited vs. Washington Okeyo (2002) EA 109* where the Court of Appeal held that:-'

“a mandatory injunction can be granted on an interlocutory application as well as at the hearing, but in the absence of special circumstances, it will not normally, be granted. However, if the case is clear and one which the court thinks it ought to be decided at once, or if the act done is simple and summary one which can be easily remedied, or if the defendant attempted to steal a march on the plaintiff, a mandatory injunction will be granted on an interlocutory application.”

In the current scenario, the Plaintiff seeks a mandatory injunction to evict the Defendants from the suit land. From the evidence presented by the Plaintiff, there is no conclusive proof that the Defendants are interfering with the suit land. Further, the photographs presented only show people in a quarry and machines. It is my considered view that it would be pertinent for viva voce evidence to be adduced to enable the Court arrive at a proper determination of the dispute at hand. Further, there are no special circumstances to warrant the orders sought. From the facts as presented by the Plaintiff, this is not a clear case to meet the threshold set in granting a mandatory injunction and while relying on the above cited judicial authority, I decline to grant the same.

It is against the foregoing that I find the Chamber Summons application dated the 14th July, 2021 unmerited and will proceed to **dismiss** it. Costs will be in the cause

DATED, AND DELIVERED VIRTUALLY AT MACHAKOS THIS 24TH DAY OF NOVEMBER, 2021.

CHRISTINE OCHIENG

JUDGE