



REPUBLIC OF KENYA

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IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO. 895 OF 2014

(CONSOLIDATED WITH ELC (OS) 47 OF 2014)

BLOSSOM HILL ESTATE AGENTS CO. LTD.....PLAINTIFF

=VERSUS=

NATIONAL LAND COMMISSION.....1 ST DEFENDANT

THE CHIEF LAND REGISTRAR.....2 ND DEFENDANT

GUDKA SUBHASH MEGHL.....3 RD DEFENDANT

RAMJI SHAH.....4 TH DEFENDANT

NAIROBI CITY COUNTY GOVERNMENT.....5 TH DEFENDANT

ZAVERCHAND RAMJI SHAH.....6 TH DEFENDANT

MANJULA ZAVERCHAND SHAH.....7 TH DEFENDANT

ALDERMAN LIMITED.....8 TH DEFENDANT

RULING

1. On 9/5/2019, Blossom Hills Estate Agents Co Ltd (**the applicant**) brought a notice of motion dated 8/5/2019, seeking the following orders;

1. Spent.

2. The 8th defendant/respondent/ contemnor, Alderma Limited, be summoned and be reprimanded for disobeying the orders of this Honourable Court given on 28th May 2015 in Constitutional Petition No 221 of 2015(Hon Mr Justice Lenaola), and the order of Hon Mr Justice Mutungi given in the instant suit on 19th June 2015 and extended to the present time.

3. This Honourable Court be pleased to lift the veil of limited liability cover from the 8th defendant Company and Bharat Ramji Manji, the Managing Director of the 8th defendant /respondent/ contemnor, Alderma Limited, be held personally answerable and punished for contempt of court in this suit.

4. Bharat Ramji Manji be committed to civil jail for six (6) months and be fined for contempt of court for disobeying the orders of Hon Mr Justice Lenaola given on 28th May 2015 and the orders of Hon Mr Justice Mutungi given on 19th June 2015 and extended to-date.

5. Costs be provided for.

2. The application was supported by an affidavit sworn on 8/5/2019 by Grace Watetu Waruru. She deposed that she was the plaintiff's General Manager. She added that on 28/5/2015, Lenaola J (as he then was) issued a conservatory order in High Court Petition No 221 of 2015 restraining M/s Alderma Limited against demolishing, building or erecting any structures on the suit property and against alienating,

meddling in, or dealing with the suit property. She further deposed that on 19/6/2015, Mutungi J issued a conservatory order in Nairobi ELC 493 of 2015 enjoining all parties to observe the then obtaining *status quo*. She contended that in flagrant disregard of the said orders, M/s Alderman Limited, the 8th defendant, entered into the suit property, demolished the permanent house which stood on the suit property, and commenced construction thereon. She did not however specify the precise time when the alleged contempt took place. It was her view that Mr Bharat Ramji Manji who was the Managing Director of the respondent was responsible for the alleged contemptuous conduct. She added that High Court Petition Number 221 of 2015, Nairobi ELC 493 of 2015, Nairobi ELC Misc Application No 47 of 2014, and this suit, Nairobi ELC No 895/2014, had been consolidated pursuant to orders made on adverse dates.

3. M/s Alderman Limited opposed the application through the following verbatim grounds of opposition;

i. That the application is made on a non-existent law and therefore jurisdiction of the court has not been properly invoked.

ii. That there is no order in place which the 8th defendant has breached and there is therefore no contempt that has been committed.

iii. That there is no evidence presented to the court to show that the 8th defendant has done anything on the suit land that can be described as being unlawful.

iv. That the 8th defendant has been in possession of the suit plot since the 8th defendant bought the said plot at a public auction pursuant to a decree in CMCC No 16 of 2013 and the allegation that the 8th defendant has moved onto the suit plot in disobedience of a court order is a lie.

v. That the application is meant to delay the expeditious hearing and disposal of the suit and force the 8th defendant to unlawfully settle the suit in favour of the plaintiff.

vi. That any interim order that may have been in place which is denied lapsed with the abandonment of the interlocutory applications.

vii. That any interim injunction that may have been in place in any of the cases, which is denied, automatically expired by effluxion of time pursuant to the operation of Order 40 Rule 6 of the Civil Procedure Rules.

viii. That the application is otherwise misconceived, untenable, and ought to be struck out or dismissed with costs.

ix. That having lost an application in CMCC No 16 of 2013 which suit had given the 8th defendant possession and title to the suit plot, the plaintiff is estopped from making the instant application.

4. The application was canvassed through written submissions. The applicant filed written submissions dated 25/9/2019 through Ms Z N Gathaara & Company Advocates. They submitted that the suit property was registered in the name of the applicant. They added that the court had ordered for maintenance of *status quo* until the matter is heard and determined. They contended that the respondent was impatient and did not want to allow the court space to hear and determine the matter. They further argued that by developing the suit property, the respondent wished to gain sympathy from the court. They submitted that on 7/8/2014, 18/11/2014, 28/5/2015 and 19/6/2015, the court granted conservatory orders restraining and prohibiting the 8th defendant against interfering with the suit property. They contended that the 8th defendant (respondent) had moved into the suit property, demolished the permanent stonehouse thereon, and commenced construction on the suit property.

5. The 8th defendant filed written submissions dated 21/11/2019 through M/s Masore Nyang'au & Co Advocates. They submitted that the 8th defendant was a purchaser for value who had purchased the suit property in a public auction conducted in enforcement of a judgment of the court, issued in 2013 under the framework of the Rating Act. They added that the order issued on 28/5/2015 by Hon Lenaola in Nairobi High Court Petition No 221 of 2015 was an interlocutory interim order which was to last pending the interpartes hearing of the application on 4/6/2015. They further argued that the order by Mutungi J was not directed against the 8th defendant because the 8th defendant was not a party to the suit then. They added that the 8th defendant had not been served with the order.

6. Counsel for the 8th defendant further argued that the Contempt of Court Act under which the application was brought had been declared unconstitutional and annulled by the High Court, hence the application was incompetent. They added that the order issued by Mutungi J on 19/6/2015 was to subsist pending interpartes hearing of the application dated 27/5/2015 but the application was abandoned and the court had since given directions on the interpartes hearing of the main suits. They argued that given that the interim order by Mutungi J was not extended, the 8th defendant cannot be found to have breached the said order. They further argued that in any event, any restraining order which subsisted lapsed by effluxion of time under the framework in Order 40 rule 6 of the Civil Procedure Rules. They urged the court to dismiss the application.

7. I have considered the application together with the supporting affidavit, grounds of opposition, and the parties' respective submissions. Four key issues fall for determination. The first issue is whether the notice of motion dated 8/5/2019 is incompetent by dint of the legal framework under which it was brought. The second issue is whether the order given by Lenaola J on 28/5/2015 in Nairobi High Court Petition Number 221 of 2015 subsisted at the time the plaintiff commenced contempt proceedings against the 8th defendant. The third issue is whether the order given by Mutungi J on 19/6/2015 subsisted at the time the plaintiff brought the present contempt proceedings. The fourth issue is whether the 8th defendant has acted in contempt of court.

8. The first issue is whether the present application is incompetent by dint of the legal framework under which it was brought. The application is dated 8/5/2019 and was filed on 9/5/2018. It was expressed as having been brought under Section 5 of the Judicature Act, and Rule 81 (4) of the Civil Procedure Rules 1999 of the Supreme Court of England. It is not contested that on 9/11/2018, the High Court (Mwita

J) in **Kenya Human Rights Commission v Attorney General & another**[2018] eKLR wholly annulled the Contempt of Court Act No 46 of 2016. The judgment annulling the Act has not been set aside. It therefore follows that this court's jurisdiction to punish for contempt is to be guided by the applicable law prior to the enactment of the annulled Act. The applicable legal framework was contained in Section 5 of the Judicature Act which provides thus:

Section 5(1): The High court and the Court of Appeal shall have the same power to punish for contempt of court as is for the time being possessed by the High Court of Justice in England, and such power shall extend to upholding the authority and dignity of subordinate courts.

Section 5(2): An order of the High court made by way of punishment for contempt of court shall be appealable as if it were a conviction and sentence made in the exercise of the ordinary original criminal jurisdiction of the High Court”.

9. In the present application, the applicant properly invoked Section 5 of the Judicature Act because the application was brought after the annulment of the Contempt of Court Act. Consequently, I do not agree with the 8th defendant's contention that the present application is incompetent on account of the legal framework under which it was brought. My finding on the first issue, therefore, is that the application is not incompetent as contended by the 8th defendant.

10. The second issue is whether the order given by Lenaola J (as he then was) in Nairobi High Court Constitutional Petition No 221 of 2015 subsisted at the time the present application was brought. The order of 28/5/2015 reads as follows:

“Having seen the application dated 27/5/2015 together with the supporting affidavit and annexures, I will exercise discretion and grant prayers (b) and (d) pending hearing interpartes on 4/6/2015.”

11. From the court record relating to Petition No 221 of 2015, the matter came before Lenaola J on 4/6/2015 when the Learned Judge made the following order:

“Let this matter be consolidated with ELC 895/2014 and to be determined at the ELC. Mention before Mutungi J of the ELC Division on 19/6/2015. Interim orders extended.”

12. On 19/6/2015, Mutungi J made the following order:

“The court directs that the matter pending before the Magistrate's Court CMCC No 2603 of 2015 be and is hereby directed to be transferred and consolidated with ELC 895 of 2014 for hearing and determination together. The court further directs that the file be mentioned together with file ELC No 895 of 2024 on 21st July 2015. In the meantime, a conservatory order is issued whereby the parties are to observe the existing and obtaining status quo and specifically no party will use, dispose and/ or sell the suit property until the application is heard interpartes.”

13. There are no proceedings on record in relation to Petition No 221 of 2015 from 19/6/2015 onwards.

14. The record relating to ELC No 895 of 2014 however shows that on 7/8/2014, Mutungi J granted an interim order which was to remain in force up to 14/10/2014. On 18/11/2014, Mutungi J granted an interim order in the following terms:

“Matter fixed for mention for directions on 9/2/2015 and in the meantime, the parties will observe and maintain the obtaining status quo where there shall be no sale and/or transfer of the suit property.

15. On 9/2/2015 Nyamweya J made an interim order in the following terms:

“Mention on 13/3/2015 before Hon J Mutungi for further directions. The plaintiff to serve the 3rd - 5th defendants with the mention notice and the status quo as ordered by Hon Mutungi J to be maintained until that date.”

16. On 13/3/2015 , Mutungi J made the following order:

“The plaintiff directed to serve the 1st and 2nd defendants within the next 3 days. The 1st and 2nd defendants to respond to the application within the next 21 days from today. Further mention on 15th April 2015 for further directions. The interim orders to remain.”

17. There is no record of any subsequent extension of the above order in ELC No 895 of 2014 beyond 15/4/2015.

18. I became seized of the consolidated suits in October 2017. On 21/11/2017, I directed parties to comply with pre- trial requirements and fixed a hearing date for the main suits. The plaintiff did not, however, attend court on 25/7/2018 when the suits came up for substantive hearing.

19. It is clear from the above background that the order issued by Lenaola J on 28/5/2015 was an interim order which was to remain in force pending hearing interpartes on 4/6/2015. Similarly, the order made by Mutungi J on 19/6/2015 was an interim order which was to remain in force pending mention and directions slated for 20/7/2015. There is no evidence of extension of the order made in Petition No 22 of 2015 beyond 21/7/2015. There is similarly no evidence of extension of the status quo order made in ELC No 895 of 2014 beyond 15/4/2015.

20. In light of the foregoing, I am not persuaded the orders which are alleged to have been violated subsisted at the time the applicant brought the application. It was the evidential burden of the applicant to prove subsistence of the two orders at all material times and specify the time when they were breached. The applicant has failed to discharge that burden.

21. The last issue is whether the 8th defendant has acted in contempt of the orders of the court. Having found that the plaintiff has failed to demonstrate that the orders made on 28/5/2015 and 19/6/2015 respectively subsisted at all material times, it follows that the 8th defendant cannot be held to have acted in contempt of court.

22. In light of the above findings, the plaintiff's notice of motion dated 8/5/2019 is dismissed for lack of merit. The 8th defendant shall have costs of the application, to be borne by the applicant.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 15TH DAY OF JANUARY 2020.

B M EBOSO

JUDGE

In the presence of:-

Ms Masome holding brief for Mr Osundwa for the 4th defendant

Ms Kayugira holding brief for Mr Nyangau for the 8th defendant

June Nafula - Court Clerk