



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 9 OF 2019

ERDERMANN PROPERTY LIMITED.....PLAINTIFF

VERSUS

SAFARICOM STAFF PENSION

SCHEME REGISTERED TRUSTEESDEFENDANT

RULING

1. There are two Applications before me. In the Notice of Motion dated 8th February, 2019, the Plaintiff is seeking for the following orders:
 - a. That a Notice to issue on the Trustees of Safaricom Staff Pension Scheme Registered Trustees, the Directors of Defendant/Respondent's main Contractor, Landmark Holdings Limited and the Directors of the Defendant's Development Manager, Amazon Consultants Limited (hereinafter "the Defendant's Contemnors"), to personally appear in court on such date as the court may direct to show cause why the said Contemnors should not be punished for disobedience and or deliberate breach of the order of this Honourable Court issued on 31st January, 2019.*
 - b. That costs of this Application be provided for.*
2. In the Notice of Motion dated 26th April, 2019, the Plaintiff has sought for the following reliefs:
 - a. That this Honourable Court do find and hold that the registered trustees of Safaricom Staff Pension Scheme, the Directors of Defendant/Respondent's main contractor, Landmark Holdings Limited and the Directors of the Defendant's Development Manager, Amazon Consultants Limited (hereafter "the Contemnors") are severally and jointly personally in further aggravated contempt of court orders by continuing to disobey and defy the orders made by this Honourable Court variously including on 31st January, 2019 and extended until 23rd May, 2019 and do direct that;*
 - i. The Contemnors be arrested and committed to and/or detained in prison for a term of six (6) months for further contempt and/or the Defendant's Contemnors' property be sequestered, attached and sold for such value as the Honourable Court may direct for the said disobedience of the court order issued on 31st January, 2019 and extended until 23rd May, 2019; and,*
 - ii. The Contemnors be fined each in their individual and personal capacities such sums of money this Honourable Court may direct and the same be paid into this court forthwith.*
 - b. That cost of this Application be provided for.*
3. According to the Affidavit of the Plaintiff's Planning Manager, this court issued an order of 31st January, 2019 restraining the Defendant, its contractors, subcontractors, servants, agents, representatives, employees and anyone claiming under their name or title from excavating and or demolishing the Plaintiff's sewer line constructed along Quarry Road and old Mombasa Road for its Great Wall Gardens Estate Project pending the inter-partes hearing on 12th February, 2019.
4. According to the Plaintiff's Manager, on 1st February, 2019, the said court order and pleadings were served on the Plaintiff's agents, Amazon Consultants Limited.
5. It is the Plaintiff's Manager's deposition that on 1st February, 2019; 2nd February, 2019 and 4th and 5th February, 2019, upon visiting the site, he found the Defendant's agents demolishing its sewer line contrary to the orders of the court; that he recorded a complaint in the nature of malicious damage to property at Athi River Police Station and that the Defendant's conduct of willful and deliberate disobedience and

defiance of the court order has brought the court into ridicule, odium and disrepute to the great prejudice of the Applicant.

6. Three Affidavits were filed in response to the Application. In the first Replying Affidavit, the Defendant's Trustee and Secretary deponed that the Defendant is the registered owner of land known as L.R. 337/5183, on which land it is undertaking mixed use development which comprises both residential and a Mall known as "Crystal Rivers Mall".

7. According to the Defendant's Secretary, the Defendant was never served with the order that was issued by the court on 31st January, 2019; that the order was only served upon the Defendant through a cover letter dated 13th February, 2019 and that the Defendant instructed all its consultants in the Crystal Rivers Project to comply with the express terms of the court order.

8. The Defendant's Secretary deponed that the Defendant has never demolished or excavated the Plaintiff's sewer line along Quarry Road and old Mombasa Road; that the photographs exhibited by the Plaintiff are with respect to the old Mombasa Road side and not Quarry Road and that none of the photographs demonstrate the excavation, demolition or destruction of the Plaintiff's sewer line.

9. It is the Defendant's case that the Defendant received approvals from Kenya National Highways Authority (*KeNHA*) to perform certain works along the old Mombasa Road; that none of the works envisaged in the approvals granted by Kenya National Highways Authority (*KeNHA*) will lead to the excavation of the Plaintiff's sewer line and that in any event, the photographs exhibited are inadmissible as evidence because they do not comply with the provisions of Section 65 and 78A of the Evidence Act.

10. In the second Replying Affidavit, the Director of Landmark Holdings Limited ("*Landmark*") deponed that Landmark was contracted as the main contractor for the Crystal Rivers Project by the Defendant; that Landmark was never served with the orders of 31st January, 2019; that Landmark became aware of the order of the court vide a cover letter of 13th February, 2019 and that Landmark instructed all its consultants and employees of Crystal Rivers Project to comply with the express terms of the order.

11. The Director of Amazon Limited deponed that Amazon is the Development Manager of the Crystal Rivers Project; that it is true that the order of 31st January, 2019 was served upon Amazon on 1st February, 2019; that at no time has Amazon either excavated, demolished, destroyed or interfered with the Plaintiff's sewer line along Quarry Road and old Mombasa Road and that none of the photographs annexed on the Plaintiff's Affidavit demonstrated any excavation, demolition, destruction or interference with the Plaintiff's sewer line.

12. The Director of Amazon Limited deponed that all the photographs exhibited by the Plaintiff are with respect to the old Mombasa Road side and not Quarry Road; that none of the photographs demonstrated any breach by Amazon of the court order issued on the 31st January, 2019 and that the photographs are marked 25th April, 2019 whilst the alleged breach of the court order occurred between the 15th and 18th April, 2019.

13. In his Further Affidavit, the Plaintiff's Planning Manager (*the Manager*) deponed that the orders granted by the court on 31st January, 2019 and variously extended in the presence of the advocate appearing for the Contemnors have never been vacated or set aside; that the Defendant declined service of the court process on 1st February, 2019 and directed the process-server to serve the order on Amazon, their Development Manager and that Amazon Consultants received service on 1st February, 2019.

14. The Plaintiff's advocate submitted that the orders that were granted by the court on 31st January, 2019 were duly extracted and served upon Amazon Consultants Limited on 1st February, 2019; that the orders were extended on 12th February, 2019 in the presence of counsel for the Defendant and that the Contemnors had knowledge of the existence of the court order.

15. Counsel submitted that court orders must be obeyed, notwithstanding any misplaced notion of invincibility harbored by the Defendant and the Contemnors; that the rule of law dictate that obedience of court orders is not optional, rather, it is mandatory and that the Plaintiff has demonstrated by way of photographs the ongoing works on its sewer line between 2nd February, 2019 and 5th February, 2019. Counsel relied on several authorities which I have considered.

16. The Defendant's counsel submitted that the procedure for contempt requires that leave ought to have been sought and granted by the court in order to institute contempt proceedings; that Order 40 Rule 3(1) of the Civil Procedure Rules is not applicable in the present circumstances and that contempt of court is punished to safeguard the rule of law which is fundamental in the administration of justice.

17. The Defendant's counsel submitted that the process-server's Affidavits of Service show material change in facts; have contradictory statements and that having purged himself, appropriate action ought to be taken against him.

18. Counsel submitted that the Defendant and the Directors of Landmark Holdings Limited were never served with the order dated 31st January, 2019 and that it is true that all consultants of the Crystal Rivers Project had knowledge of the existence of the order dated 31st January, 2019 by notice of being informed by the Development Manager, Amazon Consultant.

19. The Defendant's advocate submitted that at no time has the Defendant or its agents excavated, demolished, destroyed or interfered with the Plaintiff's sewer line along Quarry Road and the old Mombasa Road; that none of the photographs demonstrate the alleged actions of excavation, demolition, destruction or interference with the Plaintiff's sewer line and that the annexed photographs do not demonstrate any breach of the court order by the Defendant.

20. The Defendant's counsel finally submitted that as a result of the Petition by the Defendant in Machakos ELC Petition Number 4 of 2017, the Plaintiff did not complete the works on its sewer line hence the visible impression created from the photographs indicating the sewer tunnels appearing "*unfinished*".

21. The record shows that on 31st January, 2019, this court issued an order in the following terms:

“a. That the Notice of Motion dated 31st January, 2019 be and is hereby certified as urgent.

b. That a temporary injunction be and is hereby issued restraining the Defendant/Respondent whether by themselves, contractors, subcontractors, servants, agents, representatives, employees and/or anyone claiming under their name or title howsoever from excavating and or demolishing, destroying whether temporary or permanent or otherwise thereon and/or in any manner howsoever interfering with the Plaintiff/Applicant’s sewer line constructed along Quarry road and old Mombasa Road for its Great Wall Gardens Estate Project, situate in Mavoko Municipality pending inter-partes hearing and determination of the Application herein.

c. That the Application to be heard inter-partes on 12th February, 2019.”

22. According to the Affidavit of Service of Johnstone Kioko Nzivu, who is a process-server, he served Ms. Wanjiru, a Secretary of Amazon Consultants Limited, with the order of the court on 1st February, 2019.

23. According to the Affidavit of Service of Isaiah Lemerketo, he served Amazon Consultants Limited with another order dated 8th February, 2019.

24. It is not in dispute that the Defendant is the registered owner of land known as L.R. No. 337/5183. On the said land, the Defendant is undertaking a substantial mixed-use development christened “Crystal Rivers” which comprises both residential units and a Mall. The Crystal Rivers Project is bordered on the Western side by Quarry Road and on the Southern side by an access road adjacent to the old Mombasa Road.

25. Amazon Consultants Limited is the Development Manager of the Crystal Rivers Project. In his Affidavit, the Director of Amazon admitted that Amazon was served with the order of 31st January, 2019 on 1st February, 2019; that Amazon informed all the consultants in the Crystal Rivers Project of the existence of the court order and “advised full compliance with the terms of the court order” and that to the best of his knowledge, none of the consultants of the Defendant are in contempt of the order of the court.

26. The Director of Amazon deponed that at no time has Amazon either excavated, demolished, destroyed or interfered with the Plaintiff’s sewer line along Quarry Road and old Mombasa Road, and that none of the photographs demonstrated any excavation, demolition, destruction or interference with the Plaintiff’s sewer line.

27. The Plaintiff’s two Applications are premised on the ground that the Contemnors have in blatant violation, disobedience, and defiance of the injunctive orders made by the court on 31st January, 2019 continued with the acts of excavating, destroying and depositing marram on the Plaintiff’s sewer line constructed along Quarry Road and the old Mombasa Road notwithstanding the orders of injunction.

28. Contempt of court consists of conduct which interferes with the administration of justice or impedes or perverts the course of justice. Civil contempt consists of a failure to comply with a Judgment or order of a court or breach of an undertaking of court. – Osborne’s Concise Law Dictionary, P. 102.

29. In the case of *Sam Nyamweya & Others vs. Kenya Premier League Ltd and Others (2015) eKLR*, Justice Aburili stated that:

“Contempt of court is constituted by conduct that denotes wilful defiance of or disrespect towards the court or that wilfully challenges or affronts the authority of the court or the supremacy of the law, whether in civil or criminal proceedings.”

30. It is trite that for an Applicant to succeed in an Application for contempt, the Applicant must prove that the terms of the order were clear and unambiguous; the Defendant had knowledge of or proper notice of the terms of the order; the Defendant has acted in breach of the terms of the order; and the Defendant’s conduct was deliberate.

31. In the case of *Sam Nyamweya & 3 Others vs. Kenya Premier League Limited & 2 Others (2015) eKLR*, the court held as follows:

“It is important however that the court satisfies itself beyond any shadow of doubt that the person alleged to be in contempt committed the act complained of with the full knowledge or notice of the existence of the order of the court forbidding it. The threshold is quite high as it involves possible deprivation of a person’s liberty.”

32. The orders of this court dated 31st January, 2019 were duly extracted and served upon Amazon Consultants Limited on 1st February, 2019. Indeed, Amazon Consultants Limited’s Director has admitted in his Affidavit that the existence of the order of 31st January, 2019 was brought to the attention of all consultants in the Crystal Rivers Project.

33. The record shows that the orders of 31st January, 2019 were extended by the court on 12th February, 2019 in the presence of counsel for the Defendant. The alleged Contemnors therefore had knowledge of the existence of the court order, which is as good as personal service of the order. This position was reinstated by the Court of Appeal in the case of *Shimmers Plaza Limited vs. National Bank of Kenya Limited (2015) eKLR, Civil Appeal No. 33 of 2012* as follows:

“On the other hand however, this Court has slowly and gradually moved from the position that service of the order along with

the penal notice must be personally served on a person before contempt can be proved. This is in line with the dispensations covered under 81.8 (1) (supra).

Kenya's growing jurisprudence right from the High court has reiterated that knowledge of a court order suffices to prove service and dispense with personal service for the purposes of contempt proceedings."

34. The above holding by the Court of Appeal was a follow-up of the decision of Lenaola J. (as he was then) in the case of **Basil Criticos vs. Attorney General & 8 Others (2012) eKLR** where the Judge held as follows:

"...the law has changed and as it stands today knowledge supersedes personal service...where a party clearly acts and shows that he had knowledge of a Court Order; the strict requirement that personal service must be proved is rendered unnecessary"

35. Considering that by the time the Application of 29th April, 2019 was filed, all the alleged Contemnors were aware of the court orders of 31st January, 2019, it follows that service of the orders of this court was effected. Indeed, all the alleged Contemnors were notified of the orders of the court by Amazon Limited, and by the Defendant's advocate when he appeared before this court on 12th February, 2019 and on the subsequent days.

36. The next issue that I should determine is whether indeed the alleged Contemnors acted in breach of the terms of the order of 31st January, 2019 and 29th April, 2019. The standard of proof in contempt proceedings was pronounced by the Court of Appeal in the case of **Mutiika vs. Baharini Farm Limited (1985) KLR, 229, 234** as follows:

"In our view, the standard of proof in contempt proceedings must be higher than proof on the 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."

37. The order that this court granted on 31st January, 2019 and 29th April, 2019 enjoined the Defendant and its agents/servants from: Excavating, demolishing and or destroying the Plaintiff's sewer line constructed along Quarry Road and old Mombasa Road; and interfering with the Plaintiff's sewer line constructed along Quarry Road and old Mombasa Road.

38. The alleged Contemnors have denied being in breach of the orders of the court. The alleged Contemnors further deponed that none of the photographs demonstrate any excavation, demolition, destruction or interference with the Plaintiff's sewer line and that none of the vehicles and construction equipment identified in the photographs have been identified nor the owners disclosed.

39. I have perused the photographs annexed on the Plaintiff's Affidavits in support of the two Applications. The photographs annexed on the Application dated 8th February, 2019 shows excavations on a road. The said photographs were taken on 1st, 2nd, 4th and 5th February, 2019.

40. The order of this court of 31st January, 2019 did not restrain the Defendant and its agents from excavating any road. I have perused the photographs carefully and I have not seen the excavation, demolition, destruction or interference with the Plaintiff's sewer line.

41. Indeed, when the Plaintiff filed its Application dated 31st January, 2019, it alleged that the Plaintiff had commenced the process of demolishing its sewer line. A few photographs were annexed on the Affidavit.

42. In the current two Applications, the Plaintiff has not attempted to demonstrate, by way of photographs, the state of its sewer line as at the date of filing the Application dated 31st January, 2019 and when it filed the Applications for contempt dated 8th February, 2019 and 26th April, 2019.

43. Having not demonstrated the damage or demolition of the sewer line between 31st January, 2019 and 8th February, 2019, this court is unable to arrive at a decision that indeed there was excavation, demolition or destruction of the Plaintiff's sewer line between those dates, or even thereafter.

44. Furthermore, the registration number of the excavators, and the evidence to show that the said excavators belong to the alleged Contemnors, or people hired by the alleged Contemnors, has not been provided. That being the case, I find that the Plaintiff has not proved to the required standards, that the Defendant and its agents or employees did excavate, demolish, destroy or interfere with its sewer line.

45. Considering that Crystal Rivers Project is an ongoing project, the mere existence of an excavation machine within the vicinity of the Plaintiff's sewer line is not conclusive of the fact that the said excavator is excavating or demolishing the sewer line. Cogent evidence has to be led by the Plaintiff to prove that indeed the alleged Contemnors excavated, demolished and interfered with its existing sewer line.

46. Having failed to prove on the required standards that the alleged Contemnors excavated, demolished, damaged, or interfered with its sewer line after the orders of 31st January, 2019 and 29th April, 2019 were issued, I decline to allow the Plaintiff's Applications.

47. For those reasons, I dismiss the Applications dated 8th February, 2019 and 26th April, 2019 with costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 7TH DAY OF FEBRUARY, 2020.

O.A. ANGOTE

JUDGE