



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC SUIT NO. 1958 OF 2007

RIVERBANK PLAZA LIMITED.....PLAINTIFF

VERSUS

CITY COUNCIL OF NAIROBI.....DEFENDANT

AND

In the matter of an application for committal to civil jail for contempt of court

BETWEEN

RIVERBANK PLAZA LIMITED.....APPLICANT

AND

GREGORY MWAKANONGO.....RESPONDENT

RULING

1. This suit has been pending in court for the last 13 years. The dispute revolves around the ownership of all that parcel of land known as L.R No. 3734/843(hereinafter referred to as “the suit property”). From the material on record, the suit property was allocated to the defendant by the Commissioner of Lands in 1972 for use as a public library. The circumstances under which the special condition that restricted the user of the suit property to a public library was revoked by the Commissioner of Lands at the request of the defendant and the property thereafter transferred to the plaintiff to be used for offices, shops or a hotel will only be unraveled at the trial of the suit. For now, the plaintiff claims to be the registered proprietor of the suit property while the defendant claims that the plaintiff acquired the property irregularly.

2. In its plaint dated 27th July, 2006 filed herein on the same date, the plaintiff sought among others, an order of a permanent injunction restraining the defendant from trespassing upon, damaging, meddling with, alienating and/or in any other way interfering with or dealing with the suit property, and general damages for trespass. The plaintiff averred that it was the registered owner of the suit property and that from the year 2006, some people who claimed that the suit property had been leased to them by the defendant had trespassed on the suit property from time to time sometimes in the company of the defendant’s *Askaris* and threatened to arrest the plaintiff’s servants and agents on the property. The plaintiff claimed that the defendant had no right over the suit property and that it had suffered loss and damage as a result of the defendant’s acts aforesaid.

3. Together with the plaint, the plaintiff filed an application by way of Chamber Summons dated 27th July, 2006 under certificate of urgency seeking a temporary injunction restraining the defendant through itself, its servants, employees, agents or any other person or authority connected with the defendant from entering onto, alienating, trespassing, surveying, allocating, dealing in or in any other way interfering with its quiet possession of the suit property pending the hearing and determination of this suit.

4. The application was certified as urgent and interim orders granted ex parte on 27th July, 2006. The application was served and heard inter-partes before Aganyanya J. who allowed the same in a ruling delivered on 10th May, 2007. The orders made by Aganyanya J. on 10th May, 2007 which were extracted on 6th July, 2007 restrained the defendant through itself, its servants, employees, officers, agents or any other person or authority connected with the defendant from entering onto, alienating, trespassing, surveying, allocating, dealing in or in any other way interfering with the plaintiff’s quiet possession of the suit property pending the hearing and determination of this suit.

5. As I mentioned in my ruling of 24th January, 2017, after the plaintiff obtained the said order of interlocutory injunction against the defendant in 2007, the plaintiff did not take any steps with a view to setting down the main suit for hearing. What the plaintiff engaged itself in was to file one interlocutory application after the other against the successive officials of the defendant for alleged disobedience of the said order. The first of such applications was made on 29th July 2010 against the former town clerk of the defendant, Philip Kisia and the then director of City Planning, Tom Odongo. On 12th March 2015, the plaintiff filed another application dated 12th March, 2015 seeking among others, an order to commit to civil jail, Dr. Evans Kidero Governor, Nairobi City County, Tom Odongo Executive Committee Member in charge of land, Nairobi City County, John Barre Director of City Planning, Nairobi City County and Karisa Iha Director Legal Affairs, Nairobi City County for disobeying the said order of 10th May, 2007.

6. The plaintiff's application dated 12th March, 2015 was the subject of my ruling dated 24th January, 2017 aforesaid. While that application was pending, the plaintiff brought another application on 24th September, 2015 this time round seeking to commit to civil jail one, Gregory Mwanong'o, the then acting County Secretary, Nairobi City County for disobeying the same order. After the disposal of the plaintiff's said application dated 12th March, 2015 on 24th January, 2017, the plaintiff brought another application soon thereafter dated 4th May, 2017 to strike out the defendant's amended statement of defence that was filed out of time without leave of the court. The application was not opposed and the same was allowed by the court on 25th July, 2017.

7. After the plaintiff's application to strike out the amended defence was allowed as aforesaid, the court out of concern for the duration the case had taken in the system directed that the parties appear before the Deputy Registrar on 31st October, 2017 for pre-trial case conference. When the parties appeared before the Deputy Registrar on 11th December, 2017, they were not interested in preparing the suit for trial. Instead, they urged the Deputy Registrar to refer the matter to this court for the hearing of the plaintiff's other contempt application dated 24th September, 2015 that I have referred to above in which the plaintiff is seeking to commit Gregory Mwanong'o, who was the then acting County Secretary, Nairobi City County to civil jail for disobeying the order of interlocutory injunction made on 10th May, 2007.

8. It is this contempt of court application dated 24th September, 2015 which is the subject of this ruling. The application was filed 5 years ago and the same is not going to dispose of the suit. The application was brought on the grounds that Gregory Mwanong'o (hereinafter referred to only as "the respondent") as the then acting secretary of Nairobi City County was aware of the said orders of 10th May, 2007 together with the penal notice that was attached to the extracted order. The plaintiff averred that with the full knowledge of the said orders, the respondent disobeyed the same by writing to the plaintiff's sub-tenant on the suit property a letter dated 18th August, 2015 demanding that he vacates the property failure to which an action would be taken against him. The plaintiff averred that the said letter amounted to contempt of the said court order of 10th May, 2007. The plaintiff averred further that on 17th September, 2015, the defendant acting through the respondent entered the suit property and demolished a perimeter fence that the plaintiff had erected around the suit property thereby exposing the suit property to the risk of being vandalised. The plaintiff's application was supported by a statutory statement and an affidavit sworn by the plaintiff's director, Simon Ndungu both dated 24th September, 2015. In its affidavit in support of the application, the plaintiff averred that the said order of 10th May, 2007 together with a penal notice were served upon the defendant's director of legal affairs on 9th July, 2007 and again on 5th March, 2015. The plaintiff averred that despite service of the said order upon the defendant, the respondent still proceeded to disobey the same in the manner stated above.

9. The plaintiff annexed to the affidavit in support of the application among others, copies of the order said to have been disobeyed together with a penal notice and affidavit of service. The plaintiff also annexed copies of a letter said to have been written by the respondent to the plaintiff's sub-tenant on 18th August, 2015 and photographs said to have been taken on the suit property showing the extent to which the defendant had damaged the plaintiff's perimeter fence. On 8th May, 2018, the court directed that the application be served upon the defendant and the respondent. There is no evidence that the respondent was served with the plaintiff's application. The defendant was however served and was represented by an advocate at the hearing of the application. The defendant did not respond to the application.

10. The application was heard on 17th July, 2019 when Mr. Njenga advocate appeared for the plaintiff while Mr. Ngacha advocate appeared for the defendant. In his submission in support of the application, the plaintiff's advocate reiterated the grounds on the face of the application and the supporting affidavit. He submitted that the defendant's officials were not above the law and must obey court orders. Mr. Njenga urged the court to give out stiff punishment against the respondent to avoid recurrence of the said acts of contempt. In his submission in reply, the defendant's advocate submitted that the order upon which the plaintiff grounded its contempt application had lapsed and that the same had been overtaken by events. The defendant's advocate submitted that the defendant was not aware of the contempt complained of by the plaintiff.

11. I have considered the plaintiff's application together with the affidavit and statutory statement filed in support thereof. I have also considered the submissions of counsels who appeared in the matter. It is now settled that contempt of court proceedings are quasi criminal in nature since the alleged contemnor is bound to lose his liberty if found guilty of contempt. Due to that fact, the standard of proof of contempt is higher than a balance of probabilities. In *Mutitika v Baharini Farm Ltd. (1985) KLR 227*, the court stated that the standard of proof in contempt proceedings must be higher than proof on a balance of probabilities, and almost but not exactly beyond reasonable doubt. It follows therefore that for the plaintiff to succeed in the present application, it has to establish to a degree beyond a balance of probabilities that the respondent willfully disobeyed the order that was made herein on 10th May 2007. For one to be punished for contempt of a court order, it must be proved that he was aware of the court order either through service or any other means and proceeded to disobey the same.

12. Neither the respondent nor the defendant filed a response to the application. As I have stated above, there is no evidence that the respondent was served with the application. Even if there was no response to the application, the plaintiff still had the burden of proving the acts of contempt alleged against the respondent. The court order that was made on 10th May, 2007 restrained the defendant through itself, its servants, employees, agents or any other person or authority connected with the defendant from entering onto, alienating, trespassing, surveying, allocating, dealing in or in any other way interfering with the quiet possession of the suit property pending the hearing and determination of this suit.

13. The acts of contempt alleged against the respondent are that, on 18th August, 2015, he wrote a letter to the plaintiff's sub-tenant demanding that he vacates the suit property and that on 17th September, 2015 acting as an agent of the defendant he caused the plaintiff's perimeter wall around the suit property to be demolished. From the material before the court, I am satisfied that the respondent indeed wrote to the occupant of the suit property on 17th September, 2015 demanding that he vacates the suit property. What is not certain is whether the respondent was aware of the court order he is accused of disobeying and whether the said letter amounted to contempt of the said order. From the material before the court, there is no evidence that either the respondent or his office was served with the court order made on 10th May, 2007. There is also no evidence that the respondent became aware of the order from any other source prior to 18th August, 2015 when he wrote the letter complained of. I am also of the view that the writing of the said letter per se did not amount to disobedience of the said court order. There is no evidence that the plaintiff responded to the said letter and brought to the attention of the respondent the existence of the said court order of 10th May, 2007 and that despite that notice, the respondent still insisted on taking action to secure the suit property as he had threatened in his letter of 18th August, 2015.

14. In the absence of evidence that the respondent was aware of the order and that he willfully disobeyed the same by writing the letter aforesaid, the plaintiff's application must fail to the extent that it is based on the said letter. With regard to the alleged demolition of the plaintiff's wall on 17th September, 2015, the photographs annexed to the plaintiff's affidavit in support of the application are photocopies and the court is unable to appreciate the act or the extent of the said demolition. Secondly, even if the alleged demolition took place on the instructions of the respondent, in the absence of evidence that the respondent was served with the court order of 10th May, 2007 or was aware of the same, it cannot be said that he disobeyed the order. It is my finding therefore that the plaintiff has failed to prove the acts of contempt alleged against the respondent.

15. In conclusion, I find no merit in the plaintiff's Notice of Motion application dated 24th September, 2015. The application is accordingly dismissed. Since the respondent and the defendant did not respond to the application, the costs of the application shall be in the cause.

16. It is my hope that with the sentiments expressed earlier in this ruling, the plaintiff will not bring more or seek to prosecute the other interlocutory applications pending in this matter. The plaintiff shall take immediate steps to prepare this suit for hearing without any further delay.

Delivered and Dated at Nairobi this 6th day of February 2020.

S. OKONG'O,

JUDGE

Ruling read in open court in the presence of:

Mr. Njenga for Plaintiff

N/A for the Defendant

C. Nyokabi-Court Assistant