



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO. 119 OF 2012

MOUNT ROBIN LTD.....PLAINTIFF

AND

ZED HOLDINGS LTD.....DEFENDANT

RULING

1. By a notice of Motion dated 31st May, 2019, the Plaintiff/Applicant moved this court under Section 1A, 1B and 3A of the Civil Procedure Act Order 40 Rule 3 and Order 51 of the Civil Procedure Rules. The Applicant seeks the following orders:

a. Spent

b. The defendants directors be cited for contempt of this Honourable court and be committed to civil jail for a period of 6 months for willfully and blatantly defying a valid court order issued on 22nd June, 2012.

c. This Honourable court does issue a warrant of arrest to produce before this court the directors of the defendant company to show cause why they should not be punished by way of committal to civil jail.

d. This Honourable Court do direct the defendants to immediately purge or undo the illegal and contempt action.

e. The defendants be compelled to compensate the plaintiff/applicant for damages suffered as a result of the defendants contempt.

f. Costs of this application be borne by defendants.

2. The application is supported by the affidavit of Mr. Nagib Tadjin sworn on 31st May, 2019 and is premised on the grounds on the face of the motion. It is averred that the plaintiff is the registered owner of the parcel of land known as LR. NO.13441KWALE CR NO.19516 situated at Tiwi area within Kwale County. That the plaintiff instituted legal proceedings against the defendants on grounds of trespass and thereafter applied for injunctive orders vide its notice of motion dated 19th June, 2012. That the application was heard by Tuiyott J who gave injunctive orders against the defendants restraining them from carrying out any new developments or further or fresh excavations of coral blocks from the suit land. That the said order was later signed by the Deputy Registrar on 22nd June 2012 and subsequently served upon the defendants. The plaintiff avers that upon service of the said order on the defendants, the excavations immediately stopped until September 2018 when the excavations resumed. That before the issuance of the injunctive orders, the defendants conducted the excavations in a small scale but presently, they have upgraded their activities and are now excavating on an industrial scale by use of specialized machinery.

3. It is the plaintiff's contention that the defendants have blatantly and knowingly conducted the excavation activities in the total disregard of the court orders. That the defendants are making huge economic gains from the sale of the illegally excavated coral blocks to the detriment of the plaintiff. That the activities by the defendants have highly degraded the plaintiff's land and consequently depreciated in value and the land is currently not in usable state due to the injury occasioned by the defendants contemptuous actions. The plaintiff has attached the copy of the said order, the Affidavit of Service sworn on 25th June 2012, copy of a valuation report on the extent of damage, photographs and copy of a letter dated 2nd May, 2019 sent to Kaplan & Stratton Advocates.0

4. In opposing the Application, the Respondent filed a replying affidavit sworn on 23rd October, 2019 by Zephaniah Gitau Mbugua a Director of the defendant company in which he avers that the application is an abuse of the court process as the Applicant has a similar application for contempt filed on 26th July 2012 but failed to prosecute it. He states that it is not true that the Respondent resumed quarrying works as alleged by the Applicant and states that the respondent has never carried out any quarry works on the Applicant's property. That

this position has been communicated to the Applicant in the Replying Affidavit sworn on 10th July 2012 and 26th March 2014 as well as the Respondent's defence of 9th July 2012. That the Applicant has been aware since 2012 that one Mr. Ali Salim Toza has been the one encroaching on the Applicant's property and carrying out the excavations and that this was confirmed by the Kwale County Council Engineer in his site visit report of 21st December 2012. That the respondent purchased its property which borders the Applicant's property and took vacant possession of it in or about May 2007.

5. Mr. Mbugua states that from time to time he would visit the Defendant's property to check on it and to make sure that the property was intact, but with time, such trips became fewer and far apart as there was no reason to suggest that anyone would trespass on the property. He avers that on or about 15th May 2012, he was shocked to receive a copy of a letter dated 15th May 2012 written by the plaintiff to the commissioner of lands in which letter the plaintiff made allegations that the defendant had trespassed onto the plaintiff's property LR. NO. 13441 KWALE CR NO.19516. That the plaintiff also alleged that the defendant had built a permanent stone structure inside the plaintiff's property which building was allegedly occupied by one Mr. Salim Toza and one Mr. Ali Toza and his spouse. He states that Mr. Salim Toza are complete strangers to the defendant and have no relationship with the defendant whatsoever.

6. He further states that upon receiving a copy of the plaintiff's letter dated 15th May 2012, he went to the defendant's property LR. NO. 13440 Kwale CR. NO.23256 in order to inspect the same keenly to establish the position on the ground in relation to the allegations the plaintiff had made, and that upon inspecting the defendant's property, he discovered that some unknown persons had encroached upon it and had made excavations thereon. That upon inquiries, he discovered that the persons who had encroached on the Defendant's property are the same persons that had also encroached onto the plaintiff's property. He avers that on or about 2nd June, 2012, he held a meeting with the plaintiff with an aim of discussing the issue of the trespassers and agreeing on a joint strategy and to also synergize their efforts in order to evict the persons who had trespassed onto both the plaintiff's and the defendant's properties. That in the meeting which was attended by one of the plaintiff's directors who had travelled from Canada, the Plaintiff's advocate Mr. Khaminwa and Mr. Mbugua himself, it was generally agreed that the plaintiff and the defendant would take a joint action to seek the eviction of the persons who had trespassed onto both the plaintiff's and the defendant's properties. Mr. Mbugua states that the plaintiff's managing director had no evidence whatsoever to show that the Defendant is the party conducting the excavations, adding that he is ready to take the stand and confirm his testimony that the defendant has not conducted any excavation on the plaintiff's property. That all along, the defendant has encouraged the plaintiff to pursue orders against the correct party. It is the Respondent's contention that the application is only meant to delay the hearing and conclusion of his long running case. The defendant denies all the allegations of breach of his court's orders as alleged. The Respondent has annexed a letter dated 13th May 2019 from their advocates to the plaintiff's advocates reiterating that they are not conducting the excavation as alleged.

7. Both the Applicant and the Respondent filed written submissions through their respective advocates who also made brief oral submissions. Messrs Khaminwa & Khaminwa Advocates for the Applicant filed their submissions on 11th November, 2019 while Messrs Kaplan and Stratton Advocates for the Respondent filed theirs on 27th November 2019. Dr. Khaminwa submitted that although the Respondent argues that they are not responsible for the excavation, and that another party is responsible, the respondent must accept responsibility of the individuals operating on their plot. That they could have joined that individual to the Application but have not. Dr. Khaminwa further submitted that since the respondent has failed to take steps to evict the individual carrying out the excavation that shows there is a relationship and that Mr. Ali Salim Toza should be deemed an agent of the Respondent.

8. Mr. Kahura for the respondent submitted that there is no dispute that the orders were issued. However, he submitted that the Respondent has consistently stated that he does not know Ali Salim Toza. That the Applicant has all along known who has encroached on their property but has only chosen to sue the defendant. That a similar application was filed in 2012 and the present one has been filed when the matter was due for hearing and submitted that the plaintiff is out to delay the hearing of the matter. Mr. Kahura submitted that contempt has not been proved as it is based on presumption only. That the plaintiff could have joined Ali Salim Toza to the suit.

9. I have considered the application, the affidavits filed and the rival submissions as well as the authorities cited. In contempt proceedings proof must be made beyond the standard in civil cases as contempt is quasi-criminal. The burden of proof lies on the applicant.

10. In the case of **Gatharia K. Mutikika –v- Baharini Farm Ltd (1985) KLR**, it was held as follows:

“The courts take the view that where the liberty of the subject is or might be involved in breach for which the alleged contemnor is cited must be precisely defined. A contempt of court is an offence of a criminal character. A man may be sent to prison. It must be satisfactorily proved.....it must be higher than proof on a balance of probabilities, almost, but not exactly, beyond reasonable doubt.”

11. It is clear therefore an applicant in an application for contempt must prove beyond peradventure that the Respondent is guilty of contempt. The power to commit for contempt is one to be exercised with great care and can only be granted in clearest of cases.

12. In the present application, it is not in dispute that the orders of 22nd June 2012 were issued. The Respondent does not deny the existence of the said orders. However, the Respondent denies being in breach of the court orders. From the evidence on record, it is clear that from way back in 2012, the Respondent has continuously denied carrying out any activities on the suit property. As a matter of fact, the respondent has disclosed the names of the persons who are undertaking the impugned actions, both on the plaintiff's land as well as on the defendants' plot. The applicant nonetheless want the respondent cited for contempt, and not the named individuals. It is not clear why the applicant is insisting on pursuing contempt orders against the respondent when there is evidence indicating that one Mr. Ali Salim Toza is the one who has been undertaking the activities complained of in the applicant's property. Whereas the Applicant insists that there is a relationship between the respondent and the said Mr. Ali Salim Toza and that Mr. Toza is the Respondent's agent, no evidence has been availed before this court to support that allegation. The Applicant simply made a general statement that Mr. Toza is an agent and has some relationship with the Respondent. In my view, the applicant should have proceeded further and show evidence of that relationship. The court certainly cannot act on presumptions.

13. In the instant application, I am unconvinced that the allegation of contempt of court has been proved against the respondent. In as much

as the respondent may have been served with the court order issued on 22nd June, 2012, I am not satisfied that the applicant has demonstrated that the respondent has willfully disobeyed the said order.

14. It is my finding that the notice of Motion dated 31st May, 2019 lacks merit and I hereby dismiss it with costs.

DATED, SIGNED and DELIVERED at MOMBASA this 4th day of March 2020.

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Dr. Khaminwa for Plaintiff

Gitahi Kahura for Defendant

Yumna Court Assistant

C.K. YANO

JUDGE