

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KITALE

ELC CASE NO. 43 OF 2015

SAMMY KIPLIMO KOMEN.....PLAINTIFF

VERSUS

1. BHIMJI DHANJI VAKERIA

2. FARAH MOHAMMED ISSA

3. KOOVERJI PREMJI VEKRIYA

4. DARSHIL HARDWARE LT.....DEFENDANTS

5. PERPETUA WAKIO MWASARU

6. SAMUEL MUKORA T/A SAMMARY AGENCIES

RULING

1. The application dated 24/10/2019 and filed in court on the same date has been brought by the plaintiff who is seeking the following orders:

(1)spent

(2) That this court be pleased to find that the defendants/respondents are in contempt of court orders issued on 15/3/2018 and confirmed on 10/4/2018.

(3) That this court be pleased to commit the defendants/respondent to civil jail for such contempt or alternatively order them to pay a fine.

(4) Costs be provided for.

2. The application is brought under Sections 1A, 1B, 3 and 3A of the Civil Procedure Act, Order 40 Rule 1, 2,3,4,5 and 6 of the Civil Procedure Rules.

3. The grounds for the application are that this court issued orders stopping any construction of the suit premises pending hearing and determination of this matter; that the defendants were duly served with the order; that on 18/10/2019, the defendants commenced construction and that the defendants are in contempt of the court orders.

4. The application is supported by the affidavit of the plaintiff, sworn on 24/10/2019. In that affidavit the plaintiff depones that the defendants were duly served with the order and they appended their signature thereon; that on 10/4/2018 the defendants were in court when a consent order was entered into to the effect that there will be no further construction; that on 18/10/2019 the defendants sent construction workers to the suit land who commenced the construction work while being supervised by the 3rd defendant. photographs of the alleged goings on at the site are exhibited as SKK2D in the supporting affidavit

5. The 1st, 2nd 3rd 4th and 5th defendants opposed the application in their replying affidavits sworn on 3/12/2019. According to the respondents the application is premature and speculative; the application is ambiguous as it does not specify which respondent is guilty of contempt or on which plot the construction is ongoing; the photographs exhibited do not relate to any supervision of construction by the 3rd defendant and the application has no merit. The contents in the replying affidavits of the 1st, 2nd, 3rd, 4th and 5th respondents are similar.

6. The plaintiff's counsel expressed his preference not to file any submissions on the application. He relied on the affidavits filed. The defendants too did not file any submissions.

7. The issue that arises for determination in the instant application is whether the defendants are in contempt of the order of court issued on 15/3/2018 and whether the defendants should be committed to civil jail or alternatively be fined for such contempt.

8. The subject order stated as follows:

“Application dated 13/3/2018 certified urgent. No construction or any further development should be carried out on the suit land pending hearing of the application interpartes on 20/3/2018.”

9. The order was extended on 20/3/2018. On 10/4/18 the application giving rise to that order was marked as settled by consent of the parties in the terms that no further construction should be carried out on the suit land pending the determination of the suit.

10. Contempt of court is quasi-criminal in nature and proof of contempt on a standard higher than a balance of probabilities should be

provided as conviction may lead to loss of liberty of a subject or a fine. In *Woburn Estate Limited v Margaret Bashforth* [2016] eKLR the court stated as follows:

“We reiterate that contempt proceedings being of quasi –criminal in nature and since a person may lose his right to liberty, each stage and step of the procedure must be scrupulously followed and observed.”

11. In the case *Micheal Sistu Mwaura Kamau v Director of Public Prosecutions & 4 others* [2018] eKLR the Court stated as follows:

“It is trite that to commit a person for contempt of court, the court must be satisfied that he has willfully and deliberately disobeyed a court order that he was aware of.”

12. If he is to be punished, there must be an order and the alleged contemnor must be aware of it and in addition he must have wilfully and deliberately disobeyed the same.

13. I find that there was an order issued on the 15/3/2018 that required the defendants to cease any further development on the suit property. I also find that the defendants were aware of the said order as it was later extended in the presence of the 6th defendant and counsel for the 1st, 2nd, 4th and 5th defendants.

14. Having made the above findings the only task that remains is that of investigating whether the defendants wilfully and deliberately disobeyed that order. Proof of such disobedience is to be sought in the affidavit evidence of the applicant who is the plaintiff.

15. There are photographs of what is said by the plaintiff to be recent construction work on the suit premises. It is alleged that the works took place after 18/10/2018 and were supervised by the 3rd defendant.

16. In my view the photographs exhibited show recent works. However there is no proof that the photographs are in respect of the suit property. The only photograph that is said to demonstrate that the 3rd defendant supervised the alleged works is devoid of any evidence that it was taken at the construction scene.

17. In my view it is not for the court to engage in guesswork as to whether there has been any works on the premises carried out in contravention of the court order or not. The evidence provided in respect of a contempt application must be of such nature that the court is not left in doubt whether the photographs refer to the same premises or not.

18. In the instant case there is no possibility of comparison of the pictures annexed to the supporting affidavit with any other pictures showing an earlier stage of development of the structure on the suit land. It is for the plaintiff to avail all the said evidence in one affidavit, or in a series of affidavits as the may be necessary, in support of the application. Where no such comparison can be made based on the evidence in support of the application, the plaintiff can not be said to have discharged the burden of proof befitting an application for committal.

19. I must state here that this court is not saying that the defendants have not effected any further construction on the suit premises after the order was made. However, in order to convict the defendants for contempt and apply the appropriate sanctions against them, sufficient proof showing that they conducted the works and did so after the court issued its order has to be present. As sufficient proof has not been availed by the plaintiff in his application, I find that the application dated has no merit and the same is dismissed with costs.

Dated, signed and delivered at Nairobi on this 28th day of May, 2020.

MWANGI

NJOROGE

JUDGE