



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MACHAKOS**

**ELC. CASE NO. 214 OF 2018**

**APEX STEEL LIMITED.....PLAINTIFF**

**VERSUS**

**WILLY NZUKI NDETI.....1<sup>ST</sup> DEFENDANT**

**SILVESTER NGUTA NDETI.....2<sup>ND</sup> DEFENDANT**

**WAVINYA NDETI.....3<sup>RD</sup> DEFENDANT**

**RULING**

1. In the Notice of Motion dated 21<sup>st</sup> March, 2018, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants (*the Applicants*) have prayed for the following orders:
  - a. That the Plaintiff and its Directors are in contempt of this Honourable Court and are hereby directed to purge the said contempt by restoring the suit properties absolutely to their status quo ante as at 22<sup>nd</sup> April, 2015.
  - b. That the Directors of the Plaintiff Company, Pankajroy Nandal Nathwani, Neil Pankaj Nathwani and Kush Pankaj Nathwani be committed to civil jail for a term of six months for contempt of court for having deliberately disobeyed orders of this Court issued on 22<sup>nd</sup> April, 2015.
  - c. That any other or further orders of the Court geared towards protecting the dignity of the Court.
  - d. That the costs of this Application be borne by the Plaintiff.
2. The Application is supported by the Affidavit of the 3<sup>rd</sup> Defendant who has deponed that on 23<sup>rd</sup> April, 2015, the court ordered, *inter alia*, for the maintenance of the Status quo in respect of properties known as L.R.No.337/4777 and 337/4775; that the Defendants were ordered not to interfere with the Plaintiff's possession of the suit properties and that neither the Plaintiff nor the Defendants were to undertake any further construction on the suit properties, save for the Plaintiff to complete the construction of the perimeter wall.
3. The 3<sup>rd</sup> Defendant averred that since the issuance of the court order, the Plaintiff has built go downs and houses on the suit property and that the Plaintiff is destabilizing the status quo, thus undermining the authority of the Court.
4. Other than developing the suit property, the 3<sup>rd</sup> Defendant deponed that the Plaintiff registered a further charge on the suit property with the Commercial Bank of Africa and NIC Bank; that the acts of the Plaintiff and its Directors are a deliberate violation of the orders of this court and that their actions are undermining the authority and dignity of the Court.
5. In the Further Affidavit, the 3<sup>rd</sup> Defendant averred that the Plaintiff disobeyed the Order of the Court by securing Kshs. 1,988,300,000 using the suit property as security; that the further charge was procured by the Plaintiff on 8<sup>th</sup> September, 2015, four months after the issuance of the court order and that the course of justice in these proceedings has been subverted by the Plaintiff.
6. In the Replying Affidavit, the Plaintiff's Director deponed that the Plaintiff is the sole proprietor of land known as L.R.No.337/4777 and 337/4775 in Mavoko Municipality, Machakos District; that the Plaintiff at all times adhered to the court's orders and that after the Ruling of 23<sup>rd</sup> April, 2015, the Plaintiff completed the construction of the perimeter wall to the suit property as directed by the Court.
7. According to the Plaintiff's Director, the construction of the wall around the suit property was to safeguard the Plaintiff's investments in

the suit property which had been erected prior to the issuance of the order of the court. It was the Plaintiff's Director's deposition that the structures on the land, including the go-downs, and houses and the road were erected way before the court gave its orders.

8. The Plaintiff's Director deponed that the charges to Commercial Bank of Africa and the NIC Bank Limited were created prior to the issuance of the court order; that the two banks have not been made parties in these proceedings and that the issue about the charges which were registered in favour of the two banks have been raised in ELC Petition No. 1028 of 2015 where the two banks are parties.

9. The Plaintiff's Director stated that the mere presence of a charge does not constitute use of land and is not in breach of the terms of the order and that the Application is improper because it seeks prayers against third parties who are not parties to these proceedings.

10. The Defendants' advocate submitted that status quo means that the property be taken as it is at the time when the order is made and that there should be no further action or developments in relation to the property. Counsel relied on the case of *Priscilla Wanja Kibui vs. James Kiongo Kibui & Another [2014] eKLR*.

11. Counsel submitted that the order of this court was issued on 23<sup>rd</sup> April, 2015; that the Plaintiff charged the suit property on 8<sup>th</sup> September, 2015 and that the said charge has not been disputed by the Plaintiff. It was submitted that a charge in its nature is an entry that automatically interferes with title to property and that the Plaintiff altered the character of the suit property when it charged it.

12. The Defendants'/Applicants' advocate submitted that after the issuance of the order by the court, the Plaintiff/Respondent did further developments on the suit property; that the Plaintiff/Respondent obtained building plan approvals in the year 2014-2016 and that the Plaintiff proceeded to put up structures upon obtaining the said approvals. Counsel submitted that once it has been established that one is in breach of a court order, the person should be punished for the said breach. Counsel relied on numerous authorities which I have considered.

13. The Plaintiff's advocate submitted that the Plaintiff's actions cannot qualify as an act of contempt; that as reiterated in the case of *Gatharia K. Mutikika vs. Baharini Farm Ltd [1985] KLR 227*, contempt proceedings are *quasi* - criminal in nature and that it is incumbent on the Applicant to prove that the Respondent's actions were deliberate in the sense that he/she deliberately or willfully acted in a manner that breached the order.

14. Counsel submitted that the order of the court was legally binding to both parties; that the Defendants were directed not to interfere with the Plaintiff's possession and occupation of the suit property and that the Plaintiff, in compliance with the orders of the court, lawfully remained in possession, occupation and use of the suit properties.

15. Counsel submitted that the charging of the suit property to Commercial Bank of Africa and NIC Bank Limited was prior to the issuance of the Court order; that a First Charge was registered in favour of Commercial Bank of Africa as security for Kshs.251, 000,000 advanced to the Plaintiff and that on 9<sup>th</sup> June, 2011, a second subsequent charge was created in favour of NIC as security for Kshs.300, 000,000 advanced to the Plaintiff.

16. The Plaintiff's counsel submitted that the photographs attached to the Defendant's Affidavit are neither dated nor meet the required standard of admitting photographic evidence under the law and that in any event, the impugned structures, including the go-downs, the houses and the road were done before the Defendants began their breach of the Plaintiff's right to property.

17. Upon reading the Application dated 21<sup>st</sup> March, 2018, the Affidavits of the Plaintiff's Director and the 3<sup>rd</sup> Defendant and the advocates' submissions, the only issue that arises for determination is whether the Plaintiff's Directors, Pankajroy Nandal Nathwani, Neil Pankaj Nathwani ad Kush Pankaj Nathwani, are in contempt of the order of the court dated 22<sup>nd</sup> April, 2015 and issued on 23<sup>rd</sup> April, 2015.

18. It is not in dispute that the Plaintiff's Directors and the Defendants entered into the consent order of 22<sup>nd</sup> April, 2015. The consent order, which was recorded in court settled the Plaintiff's Application for injunction. The consent order read as follows:

**IT IS HEREBY ORDERED BY CONSENT;**

**1. THAT the status quo be maintained with respect to the properties known as LR No.337/4777 and LR No.337/4775 shall be as follows;**

**a. THAT the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants or their agents or servants shall not interfere with the Plaintiff's possession and occupation of the said properties.**

**b. Neither the Plaintiff nor the Defendants shall undertake any further construction and/or development on the said properties save for the Plaintiff completing the construction of the perimeter wall on the properties.**

**2. THAT the Notice of Motion by the Plaintiff dated 25<sup>th</sup> July, 2013 be and is hereby disposed with on the terms of the status quo orders herein above and the costs of the said Notice of Motion shall be in the cause.**

**3. THAT the Defendants be and are hereby granted leave to file and serve their defence within 14 days of today, and the Plaintiff to file and serve their replies within 7 days of service by the Plaintiff.**

**4. THAT mention will be on 16<sup>th</sup> June, 2015 for further directions.**

19. The 3<sup>rd</sup> Defendant has deponed that while the said consent was in place, the Plaintiff's Directors continued with the construction on the suit properties and even charged the suit properties to Commercial Bank of Africa and NIC Bank. To support the assertion that the Plaintiff continued to develop the suit property, the 3<sup>rd</sup> Defendant annexed on her Affidavit photographs showing various activities by unidentified people.

20. In the Further Affidavit, the 3<sup>rd</sup> Defendant exhibited a charge dated 8<sup>th</sup> September, 2015 between the Plaintiff as chargor and Commercial Bank of Africa Limited as chargee. The Defendants'/Applicants' counsel submitted that while this court issued an order of maintaining the status quo on 23<sup>rd</sup> April, 2015, the Plaintiff charged the suit property on 8<sup>th</sup> September, 2015 contrary to the orders of the Court.

21. As was held in the case of *Katsuri Limited vs. Kapurchand Depar Shah [2016] eKLR*, where the liberty of the subject is or might be involved, the breach for which the alleged contemnor is cited must be precisely defined. The court went further to hold as follows;

**“A contempt of court is an offence of a criminal character. A man may be sent to prison. It must be satisfactory proved. It must be higher than proof on a 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 contempt.”**

22. The grounds to be proved in contempt proceedings, according to *G. Bonnie and N. Lowe, “The Law of Contempt” 4<sup>th</sup> Edition, London Butterworth's, 2010, P.129* are;

- a. The terms of the order (or injunction or undertaking) were clear and unambiguous and were binding in the Respondent;**
- b. The Respondent had knowledge of a proper notice of the terms of the order;**
- c. The Respondent has acted in breach of the terms of the order; and**
- d. The Respondent's conduct was deliberate.**

23. The consent order that was entered into by the parties herein was clear on two items: the Defendants and their agents or servants were not to interfere with the Plaintiff's possession and occupation of land known as L.R. No.337/4777 and 337/4775 and neither the Plaintiff nor the Defendants was to undertake any further construction and/or development on L.R.No.337/4777 and 337/4775 save for the Plaintiff completing the construction of the perimeter wall on the properties.

24. By using the words neither the Plaintiff nor the Defendants shall undertake any further construction, the order must have recognized that there were buildings already on the suit property. Therefore, other than the perimeter wall, whatever buildings that were on the suit properties were to remain *in situ*, and no new constructions was to be undertaken.

25. Although the Defendants have claimed that the Plaintiff put up Go-Downs, houses and roads on the suit land after the order of 22<sup>nd</sup> April, 2015, the photographic evidence does not show that.

26. Indeed, the photographs exhibited by the Defendants do not indicate the date that they were taken. In the absence of a date on the said photographs or an Affidavit by the person who took the photographs to depone on the dates he took the photographs, the court is unable to ascertain if indeed the photographs were taken after the order was granted on 22<sup>nd</sup> April, 2015 or before.

27. For those reasons, I find that the Defendants have not proved that the Plaintiff undertook further construction on the suit properties, other than the perimeter wall, after 22<sup>nd</sup> April, 2015.

28. The Defendants have accused the Plaintiff of encumbering the suit property by registering a further charge dated 8<sup>th</sup> September, 2015. I have perused the charge dated 8<sup>th</sup> September, 2015 between the Plaintiff and Commercial Bank of Africa Limited. The said charge was in respect of L.R. No.337/4775 which was to be used as security for the Plaintiff to secure a sum of Kshs.988, 300,000.

29. On the same date, another charge was signed by the Plaintiff and the NIC Bank Limited, in which the title to L.R. No.337/4777 was used to secure a sum of Kshs. 1,300,000,000.

30. On the face of the two charge documents dated 8<sup>th</sup> September, 2015. It is not clear if they were registered against the title documents, and if so, on which dates. Indeed, I have perused the copy of the Grant for L.R. No.337/4775 and L.R. No. 337/4777 annexed on the Defendants' Affidavit and have not come across an entry showing the registration of a charge or further charge after 22<sup>nd</sup> April, 2015, the date that the court order was granted.

31. That being the case, I find that the Defendants have not proved the allegations that the alleged contemnors disobeyed the order of this court dated 22<sup>nd</sup> August, 2015. The Application dated 21<sup>st</sup> March, 2018 is therefore dismissed with costs.

**DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 8<sup>TH</sup> DAY OF MAY, 2020.**

**O.A. ANGOTE**

JUDGE