



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC SUIT NO. 823 OF 2013**

**JANE MUTHONI NDERITU.....PLAINTIFF**

**=VERSUS=**

**GODFREY HINGA GATIRO.....1<sup>ST</sup> DEFENDANT**

**GEOFFREY KARIUKI MURIITHI.....2<sup>ND</sup> DEFENDANT**

**JOYCE NYAMBURA MACHARIA.....3<sup>RD</sup> DEFENDANT**

**NAIROBI COUNTY GOVERNMENT.....4<sup>TH</sup> DEFENDANT**

**RULING**

What is before me is the plaintiff's Notice of Motion application dated 7<sup>th</sup> July, 2017 seeking orders that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants be cited for contempt of court for their continued disobedience of the orders given herein on 9<sup>th</sup> July, 2013 and 18<sup>th</sup> March 2014 and be committed to civil jail for a period of six (6) months. The application was supported by the affidavit sworn by the plaintiff on 7<sup>th</sup> July, 2017. The application was brought on the grounds that, Gitumbi J. issued an order herein on 9<sup>th</sup> July, 2013 restraining the 1<sup>st</sup> to 3<sup>rd</sup> defendants from trespassing on, wasting, alienating, selling, transferring and/or in any other manner dealing with or interfering with all that parcel of land known as plot No. A1/02 Komarock Estate Market ("the suit property"). The plaintiff averred that the said order that was given ex-parte was extended from time to time and on 18<sup>th</sup> March, 2014, Mutungi J. extended the same until the hearing and determination of the suit.

The plaintiff averred that the said orders by Gitumbi J. and Mutungi J. were served upon the 1<sup>st</sup> to 3<sup>rd</sup> defendants. The plaintiff averred that despite service of the said orders upon the 1<sup>st</sup> to 3<sup>rd</sup> defendants, the 1<sup>st</sup> to 3<sup>rd</sup> defendants deliberately and willfully disobeyed the same. The plaintiff averred that on 29<sup>th</sup> June, 2017, the 1<sup>st</sup> to 3<sup>rd</sup> defendants hired goons who descended on the suit property with a bulldozer tractor and demolished a two storey commercial building that had been erected thereon by the plaintiff. In her affidavit in support of the application, the plaintiff annexed copies of the said orders of 9<sup>th</sup> July, 2013 and 18<sup>th</sup> March, 2014 and photographs said to have been taken on the suit property showing the demolition that was undertaken by the 1<sup>st</sup> to 3<sup>rd</sup> defendants.

The 1<sup>st</sup> to 3<sup>rd</sup> defendants did not enter appearance. The application before the court was served upon them by substituted service and they did not respond to the same. When the application came up for hearing on 16<sup>th</sup> December, 2019, the plaintiff's advocate Mr. Gekaria relied entirely on the plaintiff's affidavit in support of the application and urged the court to allow the same. I have considered the application together with the affidavit filed in support thereof. It is now settled that for an order of committal to issue, the applicant must establish that an order was issued and served upon the respondent or that the respondent had knowledge of the same and that the respondent willfully disobeyed the same. In Republic v Nairobi City County Ex-Parte, David Peter Ndambuki [2015] eKLR the court stated as follows:

**"It is trite law that where committal is sought for breach of an order, it must be made clear what the defendant is alleged to have done. The notice of motion must state exactly what the alleged contemnor has done or omitted to do which constitutes a contempt of court with sufficient particularity to enable him to meet the charge. The necessary information must be given in the notice itself. The slightest ambiguity to the order can invalidate an application for committal as ambiguity can in turn lead to the standard of proof, which is higher than the standard in civil cases but lower than criminal standard, not being attained especially on affidavit evidence. Therefore, the law is that no order requiring a person to do or abstain from doing any act may be enforced by contempt unless a copy of the order has been served personally and endorsed with a notice informing him that if he disobeys the order he is liable to the process of execution."**

The courts have since moved from the position that the order alleged to have been breached must have been personally served on the person

sought to be punished together with a penal notice before contempt can be proved. Knowledge of a court order has been held to be sufficient thereby dispensing with personal service for the purposes of contempt proceedings. See, Shimmers Plaza Limited v National Bank of Kenya Limited [2015] eKLR.

For the standard of proof of contempt, I will refer to Mutitika v Baharini Farm Ltd [1985] KLR 227 in which the court held that:

- 1. A person who knowing of an injunction, or an order of stay, willfully does something, or causes others to do something, to break the injunction, or interfere with the stay, is liable to be committed for contempt of court as such a person has by his conduct obstructed justice.**
- 2. 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.**
- 3. The principle must be borne in mind that the jurisdiction to commit for contempt should be carefully exercised with great reluctance and anxiety on the part of the court to see whether there is no other mode which can be brought to bear on the contemnor.**

Although the application was not opposed, the plaintiff still had the burden of proving the acts of contempt alleged against the 1<sup>st</sup> to 3<sup>rd</sup> defendants. I am not satisfied that the plaintiff has discharged this burden of proof. I am satisfied that this court issued orders in clear terms restraining the 1<sup>st</sup> to 3<sup>rd</sup> defendants from trespassing on, wasting, alienating, selling, transferring and/or in any other manner whatsoever dealing with or interfering or staking any claim to the suit property pending the hearing and determination of this suit. I am however not satisfied that the said orders were either served upon the 1<sup>st</sup> to 3<sup>rd</sup> defendants or that they had knowledge of the same and that the 1<sup>st</sup> to 3<sup>rd</sup> defendants disobeyed the same.

The plaintiff did not place any evidence before the court showing that she served the orders that were made by Gitumbi J. and Mutungi J. upon the 1<sup>st</sup> to 3<sup>rd</sup> defendants. I have noted from the record that the plaintiff was granted leave to serve the order that was made by Mutungi J. upon the 1<sup>st</sup> to 3<sup>rd</sup> defendants by way of substituted service through newspaper advertisement. I have noted from the advertisement that was made by plaintiff in the Daily Nation of 10<sup>th</sup> April, 2017 that the terms of the said order by Mutungi J. were not set out in the said advertisement. What was mentioned in the advertisement was the fact that an order had been issued. I have not seen from the record any evidence that the order that was made by Gitumbi J. was served upon the 1<sup>st</sup> to 3<sup>rd</sup> defendants.

With regard to the disobedience of the said orders, the plaintiff claimed that the 1<sup>st</sup> to 3<sup>rd</sup> defendants brought down a two storey building that was standing on the suit property using a bull dozer tractor on 29<sup>th</sup> June, 2017. From the material on record, it is difficult to believe this allegation. When the plaintiff filed this suit on 9<sup>th</sup> July, 2013, the plaintiff claimed that the 1<sup>st</sup> to 3<sup>rd</sup> defendants had entered the suit property on 5<sup>th</sup> July, 2013 and demolished a two storey commercial building that was standing thereon. In her affidavit in support of the application for injunction that was filed together with the plaint, the plaintiff annexed photographs showing the demolished building.

The plaintiff obtained leave of the court and amended the plaint on 21<sup>st</sup> May, 2014. In paragraph 13 of the amended plaint, the plaintiff stated that on 28<sup>th</sup> March, 2014, the defendants again descended on the suit property and demolished the structures that remained standing thereon. In the reliefs sought in the amended plaint, the plaintiff claimed Kshs. 7,644,000/= being the replacement cost of the demolished two storey building. If the two storey building that was on the suit property was demolished completely by the 1<sup>st</sup> to 3<sup>rd</sup> defendants on 28<sup>th</sup> March, 2014 and full replacement cost claimed by the plaintiff in the amended plaint filed on 21<sup>st</sup> May, 2014, what other building remained on the suit property that could have been demolished by the 1<sup>st</sup> to 3<sup>rd</sup> defendants again on 29<sup>th</sup> June, 2017 to warrant the present application for contempt. Due to the foregoing, I am not satisfied that the plaintiff has proved that the 1<sup>st</sup> to 3<sup>rd</sup> defendants carried out further demolitions on the suit property on 29<sup>th</sup> June, 2017.

The upshot of the foregoing is that the plaintiff has failed to prove service of the orders said to have been disobeyed upon the 1<sup>st</sup> to 3<sup>rd</sup> defendants or that the 1<sup>st</sup> to 3<sup>rd</sup> defendants had knowledge of the same. The plaintiff has also failed to prove that the said orders were disobeyed. In the circumstances, the plaintiff has not met the threshold for grant of a committal order. I therefore find no merit in the plaintiff's application dated 7<sup>th</sup> July, 2017. The application is dismissed with costs to be in the cause.

**Delivered and Dated this 25<sup>th</sup> Day of June 2020**

**S. OKONG'O**

**JUDGE**

**Ruling delivered through Microsoft Teams Video Conferencing Platform in the presence of:**

Mr. Gekaria for the Plaintiff

N/A for the Defendants

Ms. C. Nyokabi-Court Assistant