



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC SUIT NO. 135 OF 2015

GATKIM ENTERPRISES LIMITED.....PLAINTIFF

VERSUS

COUNTY GOVERNMENT OF NAIROBI.....1ST DEFENDANT

GEORGE THEURI.....2ND DEFENDANT

ROBERT MBATIA.....3RD DEFENDANT

NICHOLAS MAINGI.....4TH DEFENDANT

RULING

1. This is the notice of motion dated 29th July 2019 brought under Article 10, 159 (2) (a)(b)(d)&€ of the Constitution of Kenya, 2010; Section 3(1) & 5 of the Judicature Act; Section 36 of the High Court (organization and administration) Act, section 1A, 1B, 3A, 40 and 63(c) and (e) of the Civil Procedure Act and order 40 rule 3(1) of the Civil Procedure Rules 2010 (Cap 21) Laws of Kenya and all other enabling provisions of law.

2. It seeks orders:-

1. Spent.

2. That the

(a) 1st defendant's county executive for lands, urban planning, urban renewal, housing and project management;

(b) The 1st defendant's county executive for roads, infrastructure and transport sector;

(c) The 1st defendant's county secretary and

(d) The 3rd defendant herein.

be summoned by this honourable court to show cause why they should each not be committed and detained in prison for a term not exceeding six (6) months for disobeying and/or breaching the orders made by this honourable court on the 17th February 2017.

3. That the failure to show cause:-

(a) 1st defendant's county executive for lands, urban planning, urban renewal, housing and project management;

(b) The 1st defendant's county executive for roads, infrastructure and transport sector;

(c) The 1st defendant's county secretary and

(d) The 3rd defendant herein.

each be committed and detained in prison for a term not exceeding six (6) months for disobeying and/or breaching the orders made by this honourable court on the 17th February 2017.

4. That the costs of this application be provided for.

3. The grounds are on the face of the application and are set out in paragraphs (1) to (11)
4. The application is supported by the affidavit of Lydia Muthoni, Wahome managing director of the plaintiff sworn on the 24th July 2019.
5. The application is opposed. There is a replying affidavit sworn by Hon. Robert Mbatia, the 3rd defendant/respondent herein sworn on the 17th December 2019. He has authority to swear an affidavit on behalf of the 2nd defendant/respondent.
6. The application was canvassed by way of oral submissions.
7. It is the plaintiff's case that the orders of 17th February 2017 were to effect that status quo be maintained pending the hearing and determination of the suit. The 1st defendant was not to subdivide the suit property. That in July 2019, the 1st defendant proceeded to the suit property and erected bill boards to show that construction was coming up. It shows the intention to construct a bus terminus which will change the status quo of the suit property. Photographs of the suit property were annexed. This will prejudice the plaintiff should the court determine in its favour. It prays that the application be allowed.
8. It is the 1st defendant's/respondent's case that there were no substantive officers holding the position of the officers being cited for contempt. It urged the court to take judicial notice of what was happening at the offices of the 1st defendant. There was no evidence that the alleged contemnors had been served with the said orders or that they had personal knowledge of the said orders. That the application has not met the requirements for grant of the orders sought and it ought to be dismissed.
9. It is the 2nd and 3rd defendants/respondents' case that the application is not merited. The 3rd defendant is the area MCA whose name only appears in the bill board by virtue of his position. There is no evidence that he has played any role. There is no evidence that the alleged contemnors have willfully disobeyed the court orders or that they were served with the said orders. They pray that the application be dismissed with costs.
10. I have considered the notice of motion the affidavit in support and the annexures. I have also considered the affidavit in response, the oral submissions and the authorities cited. The issue for determination is whether this application is merited.
11. It should be noted that this matter is part heard. The plaintiff representative testified on 20th June 2019 and sought an adjournment to file additional documents. It appears the plaintiff is not keen on the quick disposal of this matter as they filed this application in the intervening period.
12. I have gone through the court record. The orders alleged to have been disobeyed were granted by Honourable L. J. Gacheru on 17th February 2017. It states:

“This matter coming up for ruling on 17th February 2017, before Hon. Lady Justice Gacheru in the absence of counsel for the plaintiff, 1st defendant and in the absence of counsel for the plaintiff and counsel for the 2nd defendant:-

IT IS HEREBY ORDERED:-

- 1. That there be a status quo of the effect that pending the hearing and determination of the suit or until further orders of the court, the plaintiff shall not develop, dispose, charge or alienate the suit property.***
- 2. That the defendant shall also not subdivide for allocation any part of the property pending determination of the suit.***
- 3. That for the avoidance of doubt, the suit property can be utilized as a bus terminus.***
- 4. That mention on 10th May 2017.”***

13. I note that order no 3 allowed the 1st defendant to utilize the suit plot as a bus terminus pending the hearing and determination of this suit. It therefore follows that the 1st defendant has not done any act in contravention of this court order. The photographs annexed to the application do not show any construction.
14. I also agree with the 1st defendant's counsel submissions that the alleged contemnors were not served with the said orders. The plaintiff/applicant has failed to prove that the alleged contemnors were personally served with the said orders or had knowledge of the same.
15. It should also be noted that as at July 2019 there were no substantive holders of the officers being cited for contempt. The plaintiff/applicant has also failed to show what role the 2nd and 3rd defendants/respondents who are area Member of Parliament/Member of County Assembly respectively have played in the putting up of the billboard. It is their contention that their photographs are there by virtue of being the area Member of Parliament/Member of County Assembly respectively.

16. In the case of **Mutitika vs Baharini Farm Limited [1985] KLR 229, 234**, the Court of Appeal held that:

“In our view, the standard of proof in contempt proceedings 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 an offence which can be said to be quasi criminal in nature”.

17. I am not satisfied that the plaintiff/applicant’s application has met the threshold for grant of the orders sought. I find no merit in this application and the same is dismissed with costs to the defendants/respondents.

It is so ordered.

Dated, signed and delivered in Nairobi on this 18th day of June 2020.

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L. KOMINGOI

JUDGE

In the presence of:-

No appearance for the plaintiff

Mr. Mugoye for the 1st defendant

No appearance for the 2nd and 3rd defendants

Kajuju – Court Assistant