



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENT AND LAND COURT
ELC. CASE NO. 176 OF 2012

MUTUA KIHU.....APPLICANT

VERSUS

HOUSING FINANCE CO. OF KENYA.....1ST DEFENDANT

KENNEDY ONGUNY.....2ND RESPONDENT

RULING

Coming up before me for determination is the Notice of Motion dated 7th June 2013 in which the Plaintiff/Applicant seeks for the following orders:

1. Spent
2. Spent
3. Spent
4. Spent

5. That the Defendants, jointly and severally, be and are hereby cited for contempt of the orders of status quo being that the Plaintiff/Applicant is in possession be maintained given on 5th February 2013 and extended variously, latest on 21st May 2013;

6. That in addition and or alternative prayer 5, M/s Walker Kontos Advocates and M/s Issa & Co. Advocates, the advocates for the 1st and 2nd Defendants respectively be and are hereby cited for contempt of court orders given on 5th February 2013 and extended variously, latest on 21st May 2013, by default of advising the Defendants severally of the existence of interim orders till the 2nd July 2013 or by advising the Defendants to disobey the aforesaid orders or by colluding with the Defendants to defy the court order and further by abetting the Defendants' acts of contempt of court orders;

7. That alternatively and or in addition, the Defendants' property, jointly and or severally be and is attached and they be and are detained in prison for 6 months;

8. That in addition, the Defendants jointly and or severally be and are liable to the Plaintiff for aggravated, exemplary and general damages for illegal and unlawful eviction on the 7th June 2013 of the Plaintiff from the suit property Nairobi/Block 82/273 or on any other date whatsoever without a valid court order;

9. That the OCS Buruburu and or any senior police officer do hereby effect this order.

The Application is premised on the grounds appearing on its face together with the Supporting Affidavit of the Plaintiff, Mutua Kihu, sworn on 7th June 2013 in which he averred that being aggrieved by the intended threat by the 2nd Defendant to evict him from the suit property, he filed Notice of Motion dated 4th February 2013 in which he challenged the sale of the suit property by the 1st Defendant to the 2nd Defendant. He further averred that the aforesaid application was filed under certificate of urgency and the orders of status quo being that he remained in possession till the hearing and determination of that application inter-parties was given by this court on 5th February 2013. He annexed a copy of the order. He further averred that the said order was served upon the 1st Defendant's advocates M/s Walker Kontos Advocates on 8th February 2013. He annexed a copy of the affidavit of service. He further averred that the said application came up for hearing on several occasions. He added that on all those occasions, the interim orders of status quo conferring upon him the right to retain possession of the suit property were variously extended in the presence of all counsels for the Plaintiff and Defendants. He further averred that despite the existence of those interim orders, the Defendants whether jointly or severally directly or through agents invaded the suit property on 7th June 2013 at around 8.00 a.m. and in the presence of uniformed policemen purportedly from Buru Buru Police Station and in the company of hired goons, destroyed his property and evicted him and his family from the suit property. He added that an auctioneer, Wilson M. Kariuki t/a Wiskam Auctioneers carted away all his household goods, evicted him and his family from the suit property and placed a private security firm to bar them from regaining entry. He further added that his advocate, Mr. Andrew Ombwayo wrote a cease and desist letter to the Defendants' counsels which was received in their offices on 7th June 2013 at 10.52 am when the eviction was still going on and could have been prevented. He added that the Defendants' acts are acts of impunity against the orders and dignity of this court. On this basis, he sought for this Application to be allowed.

The Application is contested. The 1st Defendant filed its Grounds of Opposition dated 24th June 2013 stating that it was opposing the Application on the following grounds:

1. That the Application is incompetent, bad in law and an abuse of the court process as there is no evidence that the Applicant obtained leave to commence contempt proceedings.
2. That the Application is incompetent and bad in law as no notice to commence contempt proceedings has been served.
3. That the Application is incompetent as the order and penal notice was not personally served on the 1st Defendant as required by law.
4. That no contempt proceedings can issue against the 1st Defendant's advocates as the alleged order was not directed to the advocates.
5. That the 1st Defendant having sold the subject property by way of statutory power of sale it is no longer concerned with the suit property and has no knowledge of the matters alleged by the Applicant in this Application.

The Application is further contested by the 2nd Defendant, Kennedy Onguny, who filed his Replying Affidavit sworn on 12th November 2013 in which he averred that he is the registered proprietor of the suit property having purchased it through a public auction as an innocent purchaser for value. He further averred that the suit property has rental houses from which he should not be prevented from collecting rent as he is entitled to enjoy his property. He further stated that he has never been served with any orders

which he is said to be in contempt of. He further denied having forcefully evicted the Plaintiff from the suit property which he is still in occupation of. He added that the Plaintiff has no leave of court to institute contempt proceedings and therefore this court should not entertain this Application as it is.

The issue I am called upon to determine herein is whether or not to commit the Defendants to civil jail for contempt of this court's order. It is conceded that the court order being referred to by the Plaintiff/Applicant as having been disobeyed by the Defendants is the one issued by Justice Mutungi on 5th February 2013 to the following effect:

“That pending the hearing and determination of this application inter-partes (the Plaintiff's Notice of Motion dated 4th February 2013), the status quo being that the plaintiff/applicant is in possession be maintained”

Though none of the parties herein are disputing the validity of the above court order, the Defendants both deny having been personally served with the court order as is required by law. Personal service on the contemnor of the court order alleged to have been breached is a requirement in contempt of court proceedings, as held by the Court of Appeal in **Ochino & Another versus Okombo & 4 Others (1989) KLR 165**. The Court of Appeal in the said decision stated that as a general rule no order of a court requiring a person to do or to abstain from doing any act may be enforced by committing the said person for contempt unless a copy of the order has been served personally on that person. The Court of Appeal further held that a copy of the order must be endorsed with a notice informing the person on whom it is served that if he disobeys the order he is liable to the process of execution to compel him to obey it. Indeed, the Plaintiff relied on an annexed Affidavit of Service sworn by his advocate on 18th February 2013 as evidence of service of the said court order upon the 1st Defendant's advocates M/s Walker Kontos Advocates. No evidence of personal service upon the 2nd Defendant was given. The service upon the 1st Defendant's advocates and not the 1st Defendant itself opens it to challenge on the ground that it was not personal service upon the directors of the 1st Defendant. The failure to personally serve the 2nd Defendant is sufficient to defeat this motion. In the circumstances, this court cannot therefore make the finding as to the Defendants having been aware of the said court order and therefore in contempt of the same.

Further to the above, it is noteworthy that the court did issue subsequent orders reinstating the Plaintiff into the suit property and having his household goods returned pending the hearing and determination of his Notice of Motion dated 4th February 2013. This in effect purged the alleged contempt complained of by the Plaintiff.

In the circumstances, this Application is hereby dismissed. Costs shall be in the cause.

DELIVERED, SIGNED AND DATED AT NAIROBI THIS 9TH

DAY OF SEPTEMBER 2016.

MARY M. GITUMBI

JUDGE