



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO. 211 OF 2015

MBARAK TAISIR MBARAK

ALI HABSHY NASSIB

LEILA HABSHY NASSIB

ABDALLA HABSHY NASSIB.....PLAINTIFFS

VERSUS

COUNTY GOVERNMENT OF MOMBASA.....DEFENDANT

RULING

1. By Notice of Motion dated 23rd August, 2019 the plaintiff/applicants moved this court under Sections 1A, 1B of the Civil Procedure Act and Article 159 of the Constitution of Kenya, 2010 seeking the following orders:

1. Spent

2. That this honourable court be pleased to commit Said Gulleid, the Directory City Inspectorate and Jimmy Waliaula the County Legal Officer who are servants, agents and/or employees of the Respondent to civil jail for a period of not less than twenty four (24) months for contempt of court for having blatantly disobeyed the orders of this court that what issued on 20th March 2019.

3. That this Honourable Court be pleased to order Said Gulleid and Jimmy Waliaula to release forthwith the Applicant's two containers to the applicants.

4. That the contemnors be ordered to meet the costs of this application.

2. The motion is supported by the grounds on the face of it and the affidavit deposed to by the 1st plaintiff/applicant on 21st August, 2019. The applicants aver that pursuant to a Notice of Motion dated 20th March, 2019, the court restraining the defendant either by itself, its servants and/or agents from entering upon the suit land, and/or interfering with the suit land in any manner whatsoever pending the hearing and determination of the said application. That on 22nd March 2019, the court issued orders restraining the defendant by itself, its servants and/or agents from entering upon the suit land, and/or interfering with the suit land in any manner whatsoever pending the hearing and determination of the said application. That on 22nd March, 2019 the said order was personally served on the Assistant County Commissioner, the DCIO Mombasa, and head of Makupa Police Station all of whom acknowledged receipt of the same by signing and stamping on the face of the order. Relying on advice, the applicants state that on 20th March, 2019 the order was issued in the presence of the respondent's advocate, but nonetheless, the same was served upon the respondent's advocates on 17th April 2019.

3. The Applicants aver that on 20th May 2019 at about 12.00 p.m., the contemnors in blatant breach of the order that was issued on 20th March, 2019, illegally and maliciously entered upon the suit property and carried away the applicant containers which were placed on the suit property. That a demand issued to the contemnors to release the applicants' containers has not been complied with. It is therefore the applicants' contention that the said Mr. Said Gulleid and Mr. Jimmy Waliaula have defied the said court order and are in contempt of the same. Copies of the orders issued on 20th March, 2019 and 15th April, 2019, photographs and letter of demand dated 2nd July, 2019 have been annexed.

4. In opposing the application, the defendant filed a replying affidavit sworn by Jimmy Waliaula on 6th November 2019 in which he deposes

that he is a Director of Legal Services and all his work entails is to issue legal advisory services to the defendant/respondent. He deposed that under no circumstances is he in charge of effecting any orders of court by way of compliance and that he only renders legal services and advice to various county organs. That therefore he is not an appropriate candidate to be cited for contempt. It is stated that the applicants instituted this suit vide the plaint dated 10th September, 2015 accompanied with an application of even date seeking injunctive orders against the defendant. That on 29th October, 2015, the court allowed the plaintiff's application and confirmed the temporary injunctive orders until the hearing and determination of the suit. That consequently the said injunctive orders remained in force until 28th September, 2016 when the same lapsed by operation of law and was never extended. That the applicants consequently vide the application dated 20th March, 2019 sought further interim restraining orders which were granted pending the hearing and determination of the said application. The defendant denies acting in violation of the said orders of the court, and contends that it is the applicants that have at numerous times barricaded the adjacent road with their containers. That in enforcement of law and order and ensuring public decency and safety, the county askaris asked the respective owners, including the applicants to remove and/or shift them which orders the applicant declined, prompting the defendant/respondent to remove and confiscate the same. The respondent categorically denies invading the suit property in violation of the existing court orders. The respondent urged the court to dismiss the application with costs. Said Gulleid has not responded to the application.

5. The application was canvassed by way of written submissions. The applicants filed their submissions on 2nd December, 2019 while the respondent filed theirs on 17th December 2019.

6. I have considered the application and the submission filed. In contempt proceedings, proof must be made beyond the standard in civil cases as contempt is quasi-criminal. This is because the liberty of a person is at stake. In the case of **Gatharia K. Mutikika –v- Baharini Farm Ltd (1985)KLR 227**, it was held as follows:

“The courts take the view that where the liberty of the subject is, or might be involved in breach for which that alleged contemnor is cited must be precisely defined. A contempt of court is an offence of a criminal character. A man may be sent to prison. It must be satisfactorily proved..... it must be higher than proof on a balance of probabilities, almost, but not exactly, beyond reasonable doubt.”

7. It must be proved that one has actually disobeyed the court order before one is cited for contempt. Therefore, in an application for contempt, the applicant must prove beyond peradventure that the respondent is guilty of contempt.

8. In this case, the alleged contemnors are alleged to have blatantly disobeyed the order of this court that was issued on 20th March 2019. The respondent has not denied being aware of the existence of that order. The order issued restrained the defendant by itself, its servants and/or agents from entering upon the suit land, and/or interfering with the suit land in any manner whatsoever pending the hearing and determination of the application. The said orders were later extended in the presence of the advocates for both parties.

9. In his replying affidavit, Mr. Jimmy Waliaula has denied disobeying the said court order. Instead, he has deposed on oath that it is the applicants who have at numerous times partly barricaded an adjacent road with their containers. These allegations have not been controverted by the applicants. The photographs attached to the application herein do not indicate on which property the same were taken. The court cannot tell whether the containers shown are on the suit land or on an adjacent road as alleged by the respondent.

10. In the instant application, I am unconvinced that the allegation of contempt of court has been proved to the required standard. In as much as the respondent may have been aware of the existence of the order issued by the court on 20th March, 2019 and subsequently extended, I am not satisfied that the applicant has demonstrated satisfactorily that the contemnors have willfully disobeyed the said orders. The photographs exhibited are not helpful as they do not show the precise property on which they were taken.

11. It is my finding that the Notice of Motion dated 23rd August 2019 lacks merit and I hereby dismiss it with costs.

DATED, SIGNED AND DELIVERED AT MOMBASA ELECTRONICALLY BY EMAIL DUE TO THE COVID-19 PANDEMIC THIS 21ST DAY OF JULY 2020.

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C.K. YANO

JUDGE

IN THE PRESENCE OF:

Yumna Court Assistant

C.K. YANO

JUDGE