



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL CASE NO 160 OF 2013

CAROLINE WAIRIMU WANJIHIA.....1ST PLAINTIFF

WGK INVESTMENTS LTD.....2ND PLAINTIFF

Versus

I & M BANK LIMITED.....DEFENDANT

HACIENDA LTD.....NECESSARY PARTY

RULING

Contempt of court

[1] Before the Court is the application by the Plaintiffs dated 30th March 2015. The Plaintiff seeks for the following prayers inter alia;

1. **THAT this Court make an order for the eviction of the Necessary Party, her agents and/or servants, from the suit premises known as LR No 330/593 Apartment No 8 situate in Thomson's Estate Lavington, Nairobi and put the Plaintiffs, their agents and/or servants back into possession of the suit premises which was broken into today 30/3/2015 forthwith;**
2. **THAT the Necessary Party, her agents and/or servants be cited for contempt of Court and/or undermine the authority of this Hon. Court by threatening to proceed on with the transfer of the suit premises when there is an application pending in the Court for hearing to maintain the "status quo" as at 19/2/2015 praying that the transfer be put on hold and the current tenant to remain in possession until the final determination of the Plaintiffs' applications dated 3/2/2015 and 11/2/2015 in which the Court has given directions on the filing and service of the written submissions and fixed for mention on 30/4/2015;**
3. **THAT as at 18/3/2015 when the application came up for hearing the transfer of the suit premises had not been registered, and could not have been registered between 20/3/2015 and 30/3/2015 in view of the pending applications but if such transfer has been registered, this Hon. Court do make an order revoking the transfer for being contemptuous, null, void, illegal and unlawful and undermining the authority of the Court;**
4. **THAT this Hon. Court do make an order condemning the Necessary Party to exemplary substantial damages for their illegal contemptuous, illegal and/or unlawful acts;**
5. **THAT the Necessary Party be denied audience in this suit until they have purged the contempt and apologized to the Court;**
6. **THAT the Necessary Party be ordered to pay for damages to the doors of the suit premises and/or properties beddings, furniture and fittings and contents therein, broken in the course of the illegal break in into the premises today 30/3/2015;**

7. THAT the costs of this application be paid by the Necessary Party on the Higher Scale in any event;

[2] The application is expressed to be brought under Article 159 of the Constitution, Sections 1, 1A, 1B, 3, 3A and 63 of the Civil Procedure Act, Order 40 Rule 1 and Order 51 of the Civil Procedure Rules and Sections 96 & 97 of the Land Act. The application is supported by the affidavit of Caroline Wairimu Wanjihia and Elizabeth Mbaire Njoroge the 1st Plaintiff's Secretary. It is also predicated upon the grounds that on 18th March 2015, this Court gave directions that the three (3) applications that had been filed by the Plaintiffs were to be canvassed by way of submissions. The Court gave directions as to the timelines in which the parties were to file and serve their respective submissions and were to come before the Court for Mention on 30th April 2015. It was submitted that, during the pendency of the said applications, the Necessary Party illegally and unlawfully broke into and evicted the then occupants from the suit premises on 30th March 2015, and subsequently took possession thereof. The Plaintiffs contention was that the actions by the Necessary Party were in contempt of the Court, an abuse of its processes and undermining the authority of the Court, in light of the hearing and determination of the pending applications, and that as such they should be cited for contempt of court, penalized and condemned to pay substantial exemplary damages. Further, it was averred that the Necessary Party should be denied audience in this suit until they had purged the contempt and made an apology to the Court.

[3] In the affidavit sworn by the 1st Plaintiff on 30th March 2015, it was averred that despite the matter pending hearing before the Court, the Necessary Party on 30th March 2015 broke into the suit premises and took possession thereof, which was against the consent "*status quo*" entered into by the parties.

[4] The Applicant filed a affidavit sworn on 6th May 2015, where the deponent denied allegations that the tenant in occupancy of the suit premises had voluntarily vacated the premises. It was contended that there was no handing-over which was done as per the terms of the tenancy agreement, and that the tenant was forcefully evicted from the suit premises. The Plaintiffs further deposed that the Necessary Party had acted unlawfully and illegally, and having failed to maintain the "*status quo*" and preserving the subject matter of the instant suit, was culpable of contempt of Court and undermining its authority.

Application was opposed

[5] The Necessary Party opposed the application and filed a Replying Affidavit sworn on 28th April 2015. It contended that it was the owner of the suit premises, having purchased it by way of a public auction on 3rd February 2015. The Necessary Party further averred that the occupant in the suit premises had voluntarily vacated; therefore, they were not forcibly evicted as alleged by the Plaintiffs. The interested party submitted that they have never agreed by consent to any orders of "*status quo*". Hence, they can never be in contempt of the Court since no Court orders have been contravened. Further, it was asserted that this application was *malafides*, an abuse of the process of the Court, mischievous, frivolous and vexatious, and aimed at frustrating the Necessary Party from enjoying the premises.

DETERMINATION

[6] Contempt of court is serious matter which will need real prove to "**...the standard of proof higher than proof on a balance of probabilities, almost but not exactly beyond reasonable doubt.**" Given the nature of arguments which have been made in this case, a little enlightenment on contempt of court and the standard of proof is necessary. See a work of the Court in the case of **ELIUD MUTURI MWANGI (Practicing in the name and style of Muturi & Company Advocates) vs. LSG Lufthansa Services Europa/Africa GMBH and Another [2015] eKLR:-.**

Standard of proof in contempt proceedings

[19] ...the appropriate standard of proof...was set out in the case of OCHINO & OTHERS –VS- OKOMBO & OTHERS (1989) KLR 165, by the Court of Appeal that:-

“...the standard of proof in contempt proceedings must be higher than proof on a balance of probabilities, almost but not exactly beyond reasonable doubt.”

Civil and criminal contempt

[20] Good amount of energy was spent by counsel in making out the distinction between Civil and Criminal contempt. I too will not disappoint them. According to the Black's Law Dictionary, 9th Edition,

Civil Contempt is:

The failure to obey a court order that was issued for another party's benefit. A civil contempt proceeding is coercive or remedial in nature. The usual sanction is to confine the contemnor until he or she complies with the court order....Imprisonment for civil contempt is indefinite and for a term that lasts until the defendant complies with the court decree.

Criminal contempt is:-

An act that obstructs justice or attacks the integrity of the court. A criminal contempt proceeding is punitive in nature. The purpose of criminal contempt proceeding is to punish repeated or aggravated failure to comply with a court order. All the protections of criminal law and procedure apply, and commitment must be for a definite period. Also known as common law contempt.

[21] Therefore, there is a difference between civil and criminal contempt. There are other forms of contempt like ‘*direct contempt of court*’ which is committed in the immediate vicinity of the court, especially in the presence of the judge and is ordinarily referred to as contempt in the face of the court. Such contempt should be immediately punishable once the transgression occurs. And for the kind of contempt in the face of the court, there is no necessity to have had a formal order in existence and a violation thereof. Similarly, an outright abuse of court process, in extreme cases, may be a subject of contempt of court. But what should be carefully understood in this case is that the Applicant claims that the contemnors were aware of a pending suit or application but engaged in acts which were calculated at subverting the administration of justice in the suit. The arguments presented by Mr Nderitu were that the contemnors were aware of court proceedings which remind of the principle of *lis pendens* in a civil set-up as well as the broader concept of interference with due administration of justice. The former should be distinguished from contempt of court and the remedies which are available where the principle of *lis pendens* applies may be altogether different. Interference with due administration of justice is too wide a concept and should be strictly applied and construed in civil proceedings to only specific instances which have been proved to be outright interference with the due administration of justice. And it should be noted that acts which constitute contempt of court are acts of interference with the administration of justice. Invariably, for purposes of committal to jail for interference with due administration of justice, the Applicant must establish and prove existence of acts which are punishable in law, either under the law on contempt of court or

the general criminal law. Therefore, in a civil proceeding, it would be safe that the Applicant should be specific on the particular acts committed which constitute contempt of court, and applies as such for committal of the contemnor to jail, instead of coming under the general cover of interference with administration of justice. It is not surprising that the practice of contempt of court limits Committal for “*interference with the due administration of justice*” to criminal proceedings. And even though unwanted interference with administration of justice is to be prevented and nobody shall be permitted to pollute the stream of justice, the law on contempt based on interference with due administration of justice should accord to the constitutional objectives in fair adjudication of cases especially civil cases where no specific order has been issued and violated. See the recent amendment on 1st October, 2012 on the Civil Procedure (Amendment No. 2) Rules, 2012 of England in PART 81 (Applications and Proceedings in Relation to Contempt of Court) which in Rule 81.11- *Committal for “interference with the due administration of justice”* is applicable only in criminal proceedings. However, I should think, and I hope I am not wrong, since the offence of “interfering with the administration of justice” is also referred to as “perverting the course of justice” and as “obstructing the administration of justice”, within the practice of contempt of court and its wider connotation in law, there is nothing which would restrict liability for contempt of court in respect of conduct intended to impede or prejudice the administration of justice, whether in criminal or civil proceedings. But the acts must be specified and specifically proved to constitute “interfering with the administration of justice” within the sense of the law as opposed to general assertion that one was aware of proceedings to have been intended to restrain the act complained of. This test will be applied on the allegations made in this case.

[7] We are clear now on the kind of contempt which is being claimed to have occurred here. It is not in dispute also that the power of the court to punish for contempt of court is conferred under Section 5(1) of the Judicature Act, as read together with Sections 38 (d) and 63 (c) & (e) of the Civil Procedure Act. Therefore, the Court has the authority and jurisdiction to condemn a perpetrator who disobeys and abuses the processes of the Court or its authority as a contemnor. The penalty or punishment for contempt once proved may be civil jail or payment of a fine. However, before the Court can condemn one as a contemnor, it has to be established that there indeed was disobedience of a Court order or that there was an abuse of its processes. See a work of Havelock, J (as he then was) in the case of **Titus Musyoki Nzioka v John Kimathi Maingi & Another (2013) eKLR**, where he relied on the case of **Dean v Dean [1987] 1 FLR 517**, and stated as follows;

“An application for contempt of Court or its antecedent orders has to establish clearly and precisely exactly of what the Respondent was in contempt. The issue of contempt belittles and undermines the authority and powers of the Court that is why a party has to establish that the actual act of contempt took place in utter disregard and contempt of the Court and its Orders....in the case of Redwing Ltd v Redwing Forest Products Ltd [1947] 64 RPC 67 ...Jenkins, J held inter alia;

“...a defendant cannot be committed for contempt on the ground that upon one or two possible constructions of an undertaking being given he has broken that undertaking. For the purpose of relief of this character I think the undertaking must be clear and the breach must be clear beyond all question.”

[8] The Plaintiffs’ application for contempt emanates from the fact that, during the pendency of two (2) previous applications, the necessary party did certain actions which negated the purpose of those applications which was reversal of the sale herein as well maintaining status quo in the suit property until determination of the suit. These actions were; before the matters could be heard,

the Necessary Party proceeded to the suit premises, evicted the then tenant/occupant and took possession thereof. However, I note that pending the hearing of the aforementioned applications, no orders, interim or otherwise, had been issued by the Court to preserve the suit premises or maintain the “*status quo*”, save for the orders issued by Havelock, J on 24th April 2013 and which this Court had in its ruling dated 12th November 2014 made a rendering in that regard.

[9] The Plaintiffs further relied on the directions issued by this Court on 18th March 2015 as to the manner in which the applications were to be dispensed with. They also relied on the fact that, on 5th March 2015, the Necessary Party had intimated to the Court that it was not averse to the maintaining of the “*status quo*”. The Necessary Party denied having consented to any such order. One thing is clear, that, in none of the two pending applications, including the present one were orders issued to either maintain the “*status quo*” or preserve the suit premises. On 18th March 2015, the Court only gave directions on how the applications were to be dispensed with. Any intimation of *status quo* is vague and may not have had reference to any particular act especially given that the Necessary Party had already purchased the property in a public auction. The only issue the Applicant had sought was to sustaining the tenant in the suit property. In the letter marked as “**CWW-3**” annexed to the affidavit of the Plaintiffs, at paragraph 1 it shows that the Plaintiffs had written a letter to the Necessary Party dated 19th February 2015, the nature of which cannot be ascertained. However, it stated that they had filed an application on 26th February 2015 seeking to maintain the “*status quo*” pending the hearing and determination of the other applications. The paragraph that talked of “*status quo*” reads;

“To that extent therefore we can agree that the “status quo” will be maintained by not registering the transfer against the suit title No LR 330/593 until the final determination of the Plaintiffs’/Applicants’ applications dated 3/2/2015 and 11/2/2015 after 30/4/2015 when the matter will come up in Court for mention.”

[10] From the record, there was no formal and express consent on *status quo* which the contemnor could be said to have disobeyed. The nature of this case is that the Necessary Party is a purchaser of the charged property and has certain protections in law. Any alleged contempt of court must be seen within the law and the nature of the proceedings before me. In the premises, no particular acts of the magnitude of contempt of court were proved to have been committed by the Necessary party. The tenant is no longer in the premises, but his departure is not clearly demonstrated to be in violation of the court order. One party claims they left voluntarily whilst the other claims they were forcefully evicted. The matters thereto are crowded by conjecture and cannot found a contempt condemnation. I am concerned also that the nature of contempt herein would have required leave to institute contempt proceedings and such issues I am wrestling with would have been weighed before substantive application for contempt. In sum, the Plaintiffs have not proved contempt to the required standard; that the Necessary Party was in violation of any Court orders on *status quo* or on preservation of the suit premises. There are no interim or interlocutory orders presently in force, and as such, the Necessary Party cannot be said to have abused any processes of the Court, or its procedure or violated any of its orders as to be cited for contempt. The Applicant seems to be relying on the doctrine of *lis pendens* but did not quite meet the threshold for contempt of court.

[11] In light of the findings of the Court above, the following orders fall by the way side and are denied:

a) Eviction of the Necessary party, her agents and/or servants, from the suit premises known as LR No 330/593 Apartment No 8 situate in Thomson’s Estate Lavington, Nairobi and put the Plaintiffs, their agents and/or servants back into possession of the suit premises which was broken into on 30/3/2015 forthwith;

b) Putting the transfer on hold or revoking the transfer and the current tenant to remain in possession until the final determination of the Plaintiffs’ applications dated

3/2/2015 and 11/2/2015;

c) Condemning the Necessary Party to exemplary substantial damages for their contemptuous, illegal and/or unlawful acts;

d) Denying the Necessary Party audience in this suit;

e) Condemning the Necessary Party to pay for damages to the doors of the suit premises and/or properties beddings, furniture and fittings and contents therein, broken in the course of the illegal break in into the premises on 30/3/2015; and

f) Condemning the necessary Party to pay costs of the application.

[12] The upshot is that the application dated 30th March 2015 is dismissed with costs to the Respondent.

Dated, signed and delivered in court at Nairobi this 8th day of June 2015.

F. GIKONYO

JUDGE