



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MILIMANI

ELC NO. 1378 OF 2013

HENRY GITONGA

HOMEBOYS STORE & ANOTHERPLAINTIFF

=VERSUS=

ASHA RAMADHANI.....DEFENDANT

RULING

The Plaintiffs herein filed a Notice of Motion dated 12th November, 2013 under Certificate of Urgency. The Plaintiffs/applicants had sought for a temporary injunction to restrain the Defendant, her employees, appointees, servants and/or agents from evicting or interfering with the Plaintiffs peaceful enjoyment of their Tenancy on land Reference **No. LR No. 36/11/15** or in any other way dealing with the Plaintiffs properties and tenancy on the aforesaid property pending the hearing and determination of the application.

On 15th November, 2013, the Court granted the Plaintiffs interim Orders for 14 days and restrained the Defendant from evicting or interfering with the Plaintiffs tenancy on the premises known as LR No. 36/11/15 pending interparties hearing on 28th November, 2013. On 28/11/2013 when the matter came up for hearing in Court, Mr Naragwi for the Plaintiff's informed the Court that the Defendant had disobeyed the Court Orders that were issued on 15/11/2013. The Plaintiffs had therefore filed another Notice of Motion dated 27/11/2013 for contempt of Court Order.

The Plaintiffs chose to prosecute that application first (Notice of Motion dated 27/11/2012). The said **Notice of Motion** dated 27th November, 2013 is the subject of this Ruling.

The Plaintiffs brought the said application under **Order 40 Rule 3** of the **Civil Procedure Rules and Section 3A of the Civil Procedure Act, Cap 21 of the laws of Kenya**. The Plaintiffs asked the Court to detain the Defendant herein, **Asha Ramadhan**, in prison for a term of **6 months** for disobeying the lawful orders of this court. In the alternatives, the Plaintiffs sought for the Defendant's properties to be attached and cost be provided for.

The Plaintiffs stated that the Defendant/Respondent disregarded the express Orders of this court issued on 15/11/2013 and went ahead and removed the roof, windows and the doors of the premises subject matter herein and has further constructed a fence around the premises. The Plaintiffs further stated that the Court Orders are solemn pronouncements and are not granted in vain. They asked the court to take stern warning against the Defendant herein in terms of the provisions of the law for disobedience of the Court

Orders.

The application was supported by the annexed affidavit of **Henry Gitonga**, the 1st Plaintiff who averred that the Defendant was served with the Court Order on 15/11/2013 at 4.30 p m by one **Gilbert Kinyua** a process server. However, on 16/11/2013, at 10.00 am, the Defendant in the presence of around 20 young men went and descended on the building and forcefully removed the doors, windows and the roof from the premises. The Defendant carted away the doors, windows and iron sheets and erected an iron sheet scaffold around the building and thus the Defendant is guilty of contempt of Court Order and ought to be punished for that.

The process server, one **Gilbert Kinyua** filed an affidavit of service. He deponed that on 15th November, 2013, he received copies of *certificate of urgency, Notice of Motion supporting affidavit, Plaint, verifying affidavit, Court Order and Penal Notice* from the Law firm of **Naragwi & Co. Advocates** to effect upon the Defendant herein.

He further deponed that on the same date at around 4.30 pm he went to Eastleigh in the company of **Henry Gitonga** and proceeded to the home of the Defendant. That he found the Defendant and he served her with the documents which she acknowledged but refused to sign his copy. The Deponent further averred that he knew the Defendant at the time of service.

The Defendant opposed the application. She filed her Replying Affidavit and averred the Plaintiffs have filed several causes related to this premises. She also denied that she was served personally by the process server. She further averred that she saw documents lying at the gate i.e. court documents but with no Penal Notice attached to them. The Respondent alleged that since there was no Penal Notice, and she was never served personally, the application is incompetent and should be struck out.

The Defendant herein filed her written submissions but the plaintiffs relied on their pleadings and filed no written submissions.

I have considered the pleadings in totality and the submissions herein. I have also considered the provisions of **Order 40 Rule 3 of Civil Procedure Rules** which states as follows:-

3. (1) "In cases of disobedience or of breach of any such terms, the Court granting an injunction may Order the property of the person guilty of such disobedience or breach to be attached, and may also Order such person to be detained in prison for a term not exceeding six months unless in the meantime the Court directs his release".

I have also considered the cases quoted by the Defendant, *Kariuki & 2 others Vs Minister for Gender, Sports, Culture and Social Services & 2 others(20004) 1KLR,458 and CMC Holdings Ltd & another Vs Jaguar Land Rover Exports Ltd (2013) eKLR.*

In the instant application, it is alleged that the Defendant was in contempt of a Court Order. The Defendant has denied that allegation and contended that after receiving the Court Order which was not served on her personally and which had no Penal Notice she heeded the Court Order and she has stopped the works on the premises and has thus maintained the **Status Quo**.

There is no doubt that it is the duty of every person against whom an order is issued against to respect the said court order. This was the findings in the case of *Hardkinson Vs Hardkinson (1952) 2 ALL ER 567*, where it was held:-

" It is plain and unqualified obligation of every person against or in respect of whom an order is made by court of competent jurisdiction to obey it unless and until that order is discharged The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or even void".

In the cases referred to by the Defendant the issue of service or personal service of the order was well

emphasized. It was held in the case of Kariuki & 2 others (Supra) that “*without personal service, there cannot be contempt*”. Further in the case of Awadh Vs Marumbu (Supra) it was stated that:-

“ a copy of the order requiring a person to do or abstain from doing any act must be endorsed with a notice informing the person whom the copy is served that if he disobeys the order he is liable to process of execution to compel rather than him to obey it”.

The defendant alleged that she was not served personally with the court order. The 1st plaintiff and process server deponed that the Defendant did receive the court documents and personally but she refused to sign on it.

I have seen the court order dated 15/11/2013 and the Penal Notice attached to the return of service dated 15th November, 2013. The process server has not endorsed at the back of the **Penal Notice** to confirm that he indeed served it on the Defendant. The contempt Court proceedings are criminal in nature and specifically in the instant Notice of Motion.

the applicants have asked the court to detain the Defendant in prison for 6 months. The burden of proof is beyond a reasonable doubt rather than on a balance of probability.

Though the applicants stated that the Defendant was personally served, that fact is disputed and without any other prove apart from the affidavit filed herein, I would find it difficult to hold that indeed the Defendant was personally served.

The Defendant has alluded that she received the court order and she therefore had knowledge of the Court Order. She further stated that she heeded the court order and has maintained the **Status Quo** . The plaintiffs are still in possession of the premises. There was no tangible evidence to prove that the applicants have been evicted from the premises. The photographs attached to the Affidavit in support just show the wall but not missing doors, missing windows, or missing roof. I find that the applicants have not discharged their duty of proof beyond a reasonable doubt.

Consequently, I find that the applicants Notice of Motion dated 27/11/2013 is not merited. The same is dismissed with costs in the cause.

However, I have noted that there are serious issues herein that need to be determined by the court for the sake of law and order. I would urge the Plaintiffs/ Applicants to set the Notice of Motion dated 12/11/2013 down for hearing the soonest possible so that the

Underlying issues can be resolved. I will extend the interim orders that were issued on 15/11/2013 until the Notice of Motion dated 12/11/2013 is heard and determined. Notice of Motion dated 27/11/2013 is hereby dismissed.

Costs in the cause.

Orders accordingly.

Dated, Signed and Delivered this **3rd day of March, 2014.**

L.N .GACHERU

JUDGE

In the Presence of:-

Mr.Kariuki holding brief Ndaragwi for the Plaintiff/ Applicant

Mr. Mwangi for Defendant/Applicant

Muna: Court Clerk

L.N. GACHERU

JUDGE