



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Case 341 of 2010

JAMES B. O. ANUNDA..... PLAINTIFF

VERSUS

ROSE NAMASAJA ANUNDA.....DEFENDANT

R U L I N G

1. By a considered ruling dated and delivered on 16th November 2010 (after *inter partes* hearing) the court herein (Dulu, J) granted prayers 4 and 5 of the Plaintiff's application for temporary injunction pending hearing and disposal of the suit (chamber summons dated 2nd July 2010). In other words the Defendant was restrained from

“dealing and/or handling any matter relating to the suit property, L.R. No. 9042/2/2, Jua Kali – Embakasi Village, Nairobi”.

The Defendant was also restrained from

“collecting and/or tampering (with) any rent or any monies accruing from the tenants on the suit property...”.

2. In granting these two orders the court noted that the parties were estranged husband and wife. The court also noted, *prima facie*, that the Defendant appeared not to have anywhere else to live. The court therefore expressly permitted the Defendant to continue occupying for her own and her children's living the two rooms in the suit premises that she was already occupying pending hearing and disposal of the suit.

In the plaint the Plaintiff seeks the main reliefs –

- (i) that the Defendant be evicted from the suit premises forthwith;
- (ii) an appropriate permanent injunction against her; and
- (iii) an account of all rents collected by her.

3. On 15th March 2011, the Plaintiff filed **notice of motion dated 8th March 2011** which is the subject of this ruling. He seeks three main orders as follows –

- (i) That the Defendant be detained in prison for a term not exceeding six (6) months for disobeying the order of this court of 16th December 2010 (formal order issued on 18th February 2011).

- (ii) That the Defendant's property be attached "for disobeying (the said) order..."
- (iii) That the order by which the Defendant was permitted to continue occupying two rooms in the suit premises be set aside and be replaced by an order requiring the Defendant to vacate the two rooms.
- 4.** The application is stated to be brought under **Order 40, rules 3 and 7 of the Civil Procedure Rules (the Rules)**. The grounds for the application as stated on the face thereof include –
- (i) That despite service upon her, the Defendant has willfully disobeyed the subject order granted on 16th December 2010.
- (ii) That the Defendant has "incited tenants in the suit property not to pay rent to the Plaintiff and has instead gone ahead in disobedience of the said order to collect rent from the said tenants".
- 5.** There is a supporting affidavit sworn by the Plaintiff. He depones, *inter alia*, -
- (i) That the Defendant was served in his presence with the subject order (with penal notice duly endorsed thereon) on 18th February 2011 by a court process-server, and that she duly accepted and acknowledged service.
- (ii) That the Defendant "went around inciting tenants in the suit property not to pay rent to (him) for the month of March 2011".
- (iii) That the Defendant "went ahead and collected rent amounting to KShs 125,000/00 from the tenants in the suit property".
- (iv) That the tenants have informed him that the Defendant "is openly boasting that neither me nor the court can do anything to her and that she will continue operating the suit premises just like before with or without the said court order. She has even repeated the same at the Chief's Office, Embakasi that if the court so wants, she is ready to be killed on the plot".
- 6.** The Defendant has opposed the application by replying affidavit sworn and filed on 21st March 2011. She depones as follows, *inter alia* –
- (i) That she has never incited any tenant not to pay rent to the Plaintiff or at all.
- (ii) That she has never collected any rent from the suit premises after she was served with the court order on 18th February 2011.
- (iii) That the last rent she collected was in December paid quarterly in advance, which she used to pay the Children's "fees" early 2012.
- 7.** The Defendant has further denied that she has uttered anything disrespectful towards the court, or done anything to undermine the dignity and authority of the court.
- 8.** I have considered the submissions of the learned counsels appearing. The Defendant has admitted service upon her of the order in question on 18th February 2011. So, the only issue to be determined is whether she was in contempt of the order as alleged by the Plaintiff.
- 9.** The Plaintiff has alleged of the Defendant -
- (i) That she "went around inciting tenants in the suit property not to pay rent to (him) for the month of March 2011".
- (ii) That the Defendant "went ahead and collected rent amounting to KShs 125,000/00 from the

tenants in the suit property”.

(iii) That the tenants informed him that the Defendant “is openly boasting that neither (the Plaintiff) nor the court can do anything to her and that she will continue operating the suit premises just like before with or without the said court order....”.

10. All these three are allegations of fact. Beyond the emotive language used by the Plaintiff in his affidavit, where is the evidence supporting the allegations? It should have been possible to get some of the tenants who were incited by the Defendant, or other independent persons, to swear affidavits in that regard.

11. Where are the tenants who paid the Defendant KShs 125,000/00 in rents? Why have they not sworn affidavits to that effect? The Plaintiff has not stated that he requested them to do so and that they refused.

12. Who heard the Defendant boast and utter unsavory words in respect of the court order, and why have they not sworn affidavits to that fact?

13. Disobedience of a court order is a matter of fact that must be proved to the required standard. In contempt proceedings that can elicit penal consequences, that standard is greater than a mere balance of probability, though lower than proof beyond reasonable doubt. The Plaintiff has not come anywhere near to proving the disobedience of the court order alleged against the Defendant. Prayers 1 and 2 of the application must therefore be refused. They are hereby dismissed.

13. Prayer 3 was hinged upon prayers 1 and 2 which have just been refused. In any case it is doubtful that the court would entertain eviction of the Defendant from what now appears to be her temporary matrimonial home in these interlocutory proceedings. Prayer 3 is therefore also refused.

14. In the event the Plaintiff’s application by notice of motion dated 8th March 2011 is dismissed with costs. It is so ordered.

15. Delay in preparation of this ruling is deeply regretted. It was caused by my poor state of health the last few years. But thank God I have now fully recovered my health.

DATED AT NAIROBI THIS 2ND DAY OF OCTOBER 2012

H.P.G. WAWERU
JUDGE

DELIVERED AT NAIROBI THIS 9TH DAY OF OCTOBER 2012