



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO. 83 OF 2020

MURIKA INVESTMENTS LIMITED.....PLAINTIFF

-VS-

OMAR SHEIKH.....DEFENDANT

RULING

1. By a notice of motion dated 20th August 2020 the Plaintiff/Applicant moved this court under Section 1A, 1B, 3A and 63(e) of the Civil Procedure Act Section 36 of High Court (Organization and Administration) Act No.27 of 2015 Order 40 Rule (3) & (4) and Order 51 of the Civil Procedure Rules. The Applicant seeks the following orders:

1. Spent

2. Court is pleased to stop by injunction further construction activities on PLOT NUMBERS 7081 and 7082, both of SECTION 1 MAINLAND NORTH, which is abutting on and neighbouring PLOT 7083/I/MN, the property of the Plaintiff. Alternatively, and should the Defendant complete the structure on plot 7081 and 7082/I/MN before the hearing of this application, the court stop by injunction the occupation of the structure by the Defendant or his tenants, until the hearing and determination of this application and earlier application of 15.7.2020.

3. At the risk of imprisonment for six months, the Defendant is ordered to atone for the contempt by pulling down the structure to the ground and erect a perimeter wall and hoarding with netting, to prevent further damage to the structures on the Plaintiff's land.

4. The court is pleased to punish by custodial sentence, the Defendant for contempt and brazen disregard of court order.

5. Directions on service are given.

2. The application is supported by the affidavit of Simon Mureithi Karitu sworn on 20th August, 2020. He has deposed that he is the Director of the Plaintiff in this matter. That the Plaintiff filed this suit on 16th July 2020 and this court on 20th July 2020 ordered cessation of construction works to facilitate, *inter alia* the inspection of the structure on PLOT 7083/I/MN to assess the extent of damage on the Plaintiff's structures on the plot aforesaid. That the pleadings and order of court issued on 20th July 2020 were served on the Defendant. A copy of affidavit of service by Mr. Titus Munyao Nyenge a licensed process server sworn on 27.7.2020 has been annexed. That in response, the Defendant entered appearance on 28.7.2020.

3. It is averred that the Defendant has not stopped construction activities and instead has accelerated it day and night. The Plaintiff has exhibited videos in support of the said contention. It is further averred that damage to the Plaintiff's house has continued unabated due to the Defendant's failure to erect a hoarding and/or scaffolding and netting around his development to contain debris, cement dust and other material generated from his site. It is the Plaintiff's contention that the Defendant has brazenly disregarded and disobeyed the court order herein and that the court cannot make orders in vain. The Plaintiff avers that the Defendant is in contempt of the orders issued by this court on 20th July 2020 and that unless a warrant of arrest and an order of contempt of court orders is issued by this court, the Defendant will complete the house and render this action nugatory thereby causing an irreparable damage to the Plaintiff's house on PLOT NO.7083/I/MN.

4. In opposing the application, the Defendant filed a replying affidavit sworn on 17th September, 2020. The Defendant has deposed that at the time he was served with the order given on 26th August 2020, he had completed construction of the portion bordering the Plaintiff's plot. He has annexed a photograph of the completed building. The Defendant contends that the application has been overtaken by events. The Defendant further contends that the order given on 20th July, 2020 did not stop the Defendant from proceeding with construction activities on the suit property. The Defendant avers that the Plaintiff's application is based on malice for reasons that the Plaintiff seeks to stop

construction on a plot that does not belong to him and has not shown any damage to his property. That in any event, the Plaintiff's claim can be compensated by damages, adding that the Plaintiff has not given any undertaking as to damages notwithstanding the fact that he has stopped the construction of multimillion projects. The Defendant avers that the Plaintiff is not entitled to the reliefs sought.

5. I have considered the application the affidavits filed and the rival submissions made as well as the authorities cited. In this application, the Plaintiff is seeking three prayers; first an injunction, secondly, an atonement for what the Plaintiff contends is contempt of court by bringing down to the ground the structure constructed on the Defendant's property, and lastly, the punishment of the Defendant for alleged contempt.

6. The conditions for the grant of temporary injunction were laid in the case of **Giella –v- Cassman Brown & Company Ltd (1973)EA 358** as follows:

“First, an Applicant must show a prima facie case with a probability of success; secondly, an interlocutory injunction will not be normally granted unless the Applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages; and, thirdly, if the court is in doubt, it will decide an application on the balance of convenience.

7. In this case there is no dispute that the building constructed by the Defendant is on PLOT NOS. 7081/I/MN and 7082/I/MN, the properties of the Defendant. The Plaintiff's complaint is that the construction was causing damage to his buildings on PLOT NO.7083/I/MN. The Plaintiff is also seeking an alternative prayer that should the Defendant have completed the structure, the court should by injunction stop the occupation of the said structure by the Defendant or his tenant until the hearing and determination of this application and earlier application dated 15th July 2020.

8. The Defendant has averred that the construction was completed even before he was served with the order given on 26th August 2020. The Plaintiff has not challenged this averment by the Defendant. Indeed, in the alternative prayer, the Plaintiff's confirms that the construction may have been completed. In my considered view the injury that the Plaintiff may have suffered can be adequately compensated by an award of damages. I say so because whatever injury the Plaintiff may have suffered can be assessed and quantified. I am therefore not persuaded that an injunction can issue. In any event the injunction order may as well be in vain if the construction is complete. I have also noted that one of the reliefs sought by the Plaintiff in the plaint dated 15th July 2020 is an order directed at the Defendant to bear the costs of the damage caused to the Plaintiff's structures. Accordingly, in the circumstances of this case, even the prayer for an order to bring down the structure constructed by the Defendant cannot also be granted and I decline to grant the same.

9. The next issue for determination is whether the Defendant is in contempt of court. In contempt proceedings, proof must be made beyond the standard in civil cases as contempt is quasi-criminal. The burden of proof lies on the Applicant. In the case of **Gatharia K. Mutikika –v- Bahirini 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 the 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.”

10. It is clear therefore an Applicant in an application for contempt must prove beyond peradventure that the respondent is guilty of contempt. The power to commit for contempt is one to be exercised with great care and can only be granted in clearest of cases.

11. In this case, the respondent is alleged to have disobeyed the orders issued by the court on 20th July, 2020. It is the Plaintiff's contention that the court ordered cessation of construction works to facilitate inter alia the inspection of the structure on PLOT 7083/I/MN to assess the extent of damage on the Plaintiff's structures on the plot aforesaid. The plaintiff further contends that the Defendant has not stopped construction activities and instead has accelerated day and night.

12. The order issued by the court on 20th July 2020 states as follows:

“ IN OPEN COURT, BEFORE HON. JUSTICE C. YANO ON 20TH JULY 2020”

Matter coming for hearing of the Notice of Motion dated 15th July 2020 (brought under certificate of urgency).

IT IS HEREBY ORDERED AS FOLLOWS:

1. THAT the application be and is hereby certified at first instance service on the Defendant of this matter is dispensed with to prevent mischief which may ensue due to delay.

2. THAT an order of preservation of the Plaintiff's land and development now being thereon be and is hereby issued, to prevent waste damage ensuring from debris, waste and pollutant flowing from PLOT NO.7081 and 7082/I/MN, the property of the Defendant, so that an inspection and report can safely be made by professionals for use in this matter.

3. THAT the Applicant is directed to serve the application for inter-partes hearing on 24th September 2020.

GIVEN under my hand and the seal of this Honourable Court this 20th day of July 2020.

DEPUTY REGISTRAR

ENVIRONMENT AND LAND COURT AT MOMBASA

ISSUED by the court this 21st day of July 2020.

PENAL NOTICE: "Take notice that any party served with this order and fails to comply shall be liable for contempt of court proceedings and the court may jail the defaulting party for a jail term not exceeding six (6) months."

13. The Plaintiff avers that the said order was served on the Defendant but the Defendant disobeyed the orders by not stopping the construction activities. The Defendant on its part, has denied disobeying the said orders.

14. Contrary to the Plaintiff's averments, the order given by the court on 20th July, 2020 simply directed preservation of the Plaintiff's land and development to prevent waste and damage ensuing from debris, waste and pollutant flowing from the Defendant's properties PLOT NO.7081/I/MN and 7082/I/MN. The preservation would entail for example, erection of a wall or hoarding with requisite netting to prevent debris falling on the Plaintiff's property. It is clear that the orders did not order cessation of construction works as argued by the Plaintiff. It is not clear why the Plaintiff is insisting on pursuing contempt on alleged construction that were never stopped including demolition of the building, and not failure to apply the preservation measures as ordered by the court.

15. In the instant application, I am unconvinced that the allegation of contempt of court has been proved against the Defendant. As pointed out earlier, in an application of this nature, the court is dealing with the liberty of a person and such an order ought to be granted in the clearest circumstances. In this case, I am not satisfied that the Plaintiff has demonstrated that the Defendant has wilfully disobeyed the order of court issued on 20th July, 2020

16. In the result, it is my finding that the Notice of Motion dated 20th August, 2020 lacks merit and the same is dismissed with costs.

17. It is so ordered.

DATED, SIGNED and DELIVERED at MOMBASA virtually due to COVID-19 Pandemic this 16th day of December 2020

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Yumna Court Assistant

C.K. YANO

JUDGE