



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CIVIL CASE NO. 81 OF 2015

LAKHANA LALJI.....PLAINTIFF/APPLICANT

=VERSUS=

ABSONS LIMITED (K).....DEFENDANT/RESPONDENT

RULING

1. This is the Notice of Motion dated 12th May 2017 brought under Section 5(1) of the Judicature Act, Cap 8 Laws of Kenya, Order 51 rule 3 of the Supreme Court of England 1965, the inherent jurisdiction of the court and all other enabling provisions of the law.

2. It seeks order:-

1. Spent

2. That this honourable court be pleased to order the respondent be committed to civil jail for contempt for disobedience of the orders issued on 27th May 2016 by Hon. Lady Justice Gitumbi sitting in the High Court of Kenya at Nairobi, for such a reasonable period as this honourable court may deem fit.

3. That the respondent do pay costs of this application.

3. The grounds are on the face of the application and are set out in paragraphs a to i

4. The application is supported by the affidavit of Lakhman Lalji, the plaintiff/applicant herein sworn on the 12th May 2017.

5. The application is opposed. There is a replying affidavit sworn by Pravin Maru, a director of the defendant/respondent sworn on the 30th June 2017.

6. On the 26th September 2017, the court directed that the application be canvassed by way of written submissions. I have gone through the court record and find that it is only the applicant's submissions which are on record.

7. It is the plaintiff's/applicant's submissions that the defendant/respondent has blatantly disobeyed the court order issued on 27th May 2016. He has relied on the case of **Charity Mpano Ntiyieone vs China Communications Construction Company Limited & Another**. Further that the defendant/respondent has replaced old gates with electric gates which the plaintiff/applicant cannot use or operate as the gates are only operated by the defendant/respondent or his agents at their convenience. He has also put forward the case of **Maisha Nishike Ltd vs Commissioner of Lands & Others [2011] e KLR** where the court cited the holding in **Kalyaso Farmers Cooperative Society & Others vs County Council of Narok**. He prays that the application be allowed.

8. I have gone through the replying affidavit sworn by Pravin Maru, on the 30th June 2017. In paragraph 7 he deposes:

“That it is not true that the electric gate has blocked access as it has a bell which can be rung by anyone who wishes to access the property using the said gate.”

In paragraph 9 he deposes:

“That I have even offered the applicant the remotes to control the gate but they have flatly refused to accept them only insisting that the gates have to be demolished.”

9. I note that the applicant/plaintiff did not swear a further affidavit to rebut the above averments. Nothing has been placed before this court to show that the above averments by Provin Maru, are false. In my view I find that Provin Maru has given a reasonable explanation as to why he replaced the old gates with an electric gate.

10. I have considered the notice of motion dated 12th May 2017 and the affidavit in support, I have considered the replying affidavit. I have considered the written submissions of counsel and taken into account the relevant provisions of the law. The issue for determination is whether the respondent is guilty of contempt of the court order and what orders should this court make in the circumstances.

11. As I stated earlier, Mr. Provin Maru has given a reasonable explanation as to why he replaced the old gates with an electric gate. In my view this does not amount to disobeying of the court orders issued on 27th May 2016. The plaintiff/applicant has not demonstrated to the court that he is unable to access his house as a result of the electric gate.

The standard of proof in matters of contempt is well settled. The Court of Appeal in **Civil Appeal No 39 of 1990 Refrigeration & Kitchen Utensils Limited vs Gulbachand Porpatal Shah & Others** in approving the standard of proof in contempt cases as set out in the case of **Gatharu Mitika & Others vs Baharini Farm Limited Civil Appeal No 24 of 1995** held:

“that in case of alleged contempt, the breach for which the contemnor is cited must not only be precisely defined but proven on standard which is higher than proof of a balance of probabilities but not as high as proof beyond reasonable doubt. This is because the charge of contempt of court is an offence of a criminal character and a party may lose his liberty.”

12. I find that the plaintiff/applicant has failed to prove that the act of installing and electric gate amounts to contempt of court order.

13. In the circumstances I find that the plaintiff/applicant has failed to discharge the burden as required by law. I find that the application herein lacks merit and the same is dismissed. The costs of this application do abide the outcome of the main suit. The plaintiff/applicant should set down the suit for hearing so that the issues herein can be solved once and for all.

It is so ordered.

Dated, signed and delivered in Nairobi on this 24TH day of JANUARY 2019.

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L. KOMINGOI

JUDGE

In the presence of:-

.....Advocate for the Plaintiff

.....Advocate for the Defendant

.....Court Assistant