



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT NAIROBI

ELC MISC. APPLICATION NO. 12 OF 2014

HENRY WAINAINA KIHORO.....1ST PLAINTIFF/APPLICANT

ELIJAH NGUGI NJOROGE.....2ND PLAINTIFF/APPLICANT

GITHUNGURI CONSTITUENCY RANCHING

CO. LIMITED- RUIRU.....3RD PLAINTIFF/APPLICANT

VERSUS

JOHN MAINA MBURU.....1ST DEFENDANT/RESPONDENT

BOARD OF DIRECTORS GITHUNGURI

CONSTITUENCY RANCHING CO.

LIMITED – RUIRU.....2ND DEFENDANT/RESPONDENT

RULING

On 14th January, 2015 the defendants filed an application by way of Notice of Motion dated 12th January, 2015 seeking the following orders:

- a) That the court does find the 1st plaintiff, Henry Wainaina Kihoro in contempt of court for willful disobedience of the orders made on 6th November, 2014.
- b) That the court does commit the 1st plaintiff, Henry Wainaina Kihoro to civil jail for a period of not less than 6 months or for such term as the court may deem just in the circumstances.
- c) That the court does otherwise impose such punishment against the 1st plaintiff, Henry Wainaina Kihoro as would be appropriate in the circumstances.
- d) That the court does make such other directions as may be necessary in the circumstances.

On 3rd March 2015 the defendants filed another application by way of Notice of Motion dated 3rd March, 2015 seeking the following orders:

- (i) That pending the hearing and determination of the application the plaintiffs be restrained from running a parallel office of Githunguri Constituency Ranching Company Limited on the building erected on L.R No. Ruiru/Ruiru East Block 1/2405 or in any other place.
- (ii) That pending the hearing and determination of the application, the 1st and 2nd plaintiffs be restrained from in any way acting, representing themselves and/or holding themselves out as directors of Githunguri Constituency Ranching Company Limited.
- (iii) That the court does give directions on the hearing and determination of the contempt of court proceedings taken out against the 1st plaintiff, Henry Wainaina Kihoro.

On 17th March, 2015, the court directed that the two applications be heard together by way of written submissions. The plaintiffs opposed the

two applications through a replying affidavit sworn by the 1st plaintiff on 29th April, 2015. The defendants filed their submissions on 4th May, 2015 while the plaintiffs filed their submissions on 29th April, 2015.

The court delivered a ruling on the two applications on 11th December, 2015. In its ruling the court stated as follows:

“12. After evaluating the material and facts placed before the court, I have come to the conclusion that the plaintiffs were well aware of the orders given by this court on 6th November, 2014 and that notwithstanding decided to open a parallel office trading in the same name as the company herein. The 1st and 2nd plaintiffs/respondents had absolutely no right to set up, operate and run a parallel office in the name of Githunguri Constituency Ranching Company Limited as they purported to do. The court in the premises directs and orders the closure of any such office or offices that may have been opened by the 1st and 2nd plaintiffs on the building erected on land parcel Ruiru/Ruiru East Block 1/2405 or at any other place. While the 1st plaintiff, Henry Wainaina Kihoro, is shown as having been elected as a director of the company and his name appears in the list of directors of the company as per the registrar of companies letter dated 28th January, 2014, he cannot properly act alone without the sanction of the board of directors. Thus his action of orchestrating the opening of a parallel office of the company was without authority and therefore invalid as was his action of purporting to convene an annual general meeting of the company.

13. The 1st plaintiff, Henry Wainaina Kihoro, clearly in breach of the court order of 6th November, 2014 went ahead and purported to convene the annual general meeting of the company when he knew, he had no authority and mandate to do so. He was fully aware of the court order of 6th November, 2014 and deliberately chose to act in defiance and contravention of the order. I hold that he acted in contempt of court in deliberately disobeying the court order and is accordingly liable to be punished for contravening the court order. I order that the 1st plaintiff, Henry Wainaina Kihoro pays a fine of Kshs.50,000/= within 15 days from the date of delivery of this ruling failing which the said 1st plaintiff is to be arrested and committed to civil jail for a period of 30 days from the date of such committal for contempt of court.”

While the matter was pending ruling, the plaintiffs purported to withdraw this suit through notices of withdrawal of suit dated 20th May, 2015 filed in court on the same date. After the said ruling, the plaintiffs brought an application by way of Notice of Motion dated 14th December, 2015 seeking the following orders:

(i) That this honourable court be pleased to set aside the ruling and orders that were granted by Mutungi J. on 11th December, 2015.

(ii) That this honourable court does issue such further orders and/or direction as it may deem just.

This is the application which is the subject of this ruling. While the plaintiffs' application was pending hearing, a warrant of arrest was issued against the 1st plaintiff. He was brought to court on 13th July, 2017 under arrest and paid a fine of Kshs.50,000/- that was ordered by Mutungi J. after which he was discharged. Even after paying the fine and being discharged, the 1st plaintiff and the other plaintiffs insisted on prosecuting their application dated 14th December, 2015. The application was brought on the grounds that the ruling of Mutungi J. that was delivered on 11th December, 2015 was made in error in that as at the time the said ruling was delivered, the plaintiffs had withdrawn the suit and served notices of withdrawal upon all the parties. The plaintiffs averred that a ruling cannot be made in a suit which has been withdrawn. The plaintiffs averred that if the said notices of withdrawal of the suit had been brought to the attention of the court, the court would not have written and delivered the said ruling. The plaintiffs averred in the alternative that the contempt application was supposed to come up for hearing on 17th June, 2015 and the same was not heard consequently no ruling was expected to be delivered.

The plaintiffs' application was opposed by the defendants through grounds of opposition dated 12th April, 2018. The defendants contended that the application was bad in law and incompetent. The defendants averred further that withdrawal of a suit cannot be a basis for avoiding compliance with a court order. The defendants averred further that the purported notices of withdrawal of suit were unlawful in that the same were filed without leave of the court.

The application was argued on 5th November, 2018 when Mr. Wangai appeared for the plaintiffs while Mr. Njenga appeared for the defendants. In his submission, Mr. Wangai gave the history of the dispute between the parties and the circumstances leading to the application for contempt against the 1st plaintiff. He submitted that the plaintiffs withdrew the suit after the High Court in Misc. Application No. 479 of 2016 ordered that the 1st and 2nd plaintiffs be registered as officials of the 3rd plaintiff. He submitted that after that order, this suit became superfluous as it had been brought due to leadership wrangles in the 3rd plaintiff. Mr. Wangai faulted Mutungi J. for holding the 1st plaintiff in contempt of court for running a parallel office. Mr. Wangai argued that the judge did not appreciate the fact that the plaintiffs and the defendants were running parallel offices when this suit was filed. Mr. Wangai argued further that there was no order requiring the plaintiffs to close their parallel office and as such the 1st plaintiff was found in contempt of a nonexistent order. He submitted further that the order which the 1st plaintiff was found to have disobeyed had no penal notice. Mr. Wangai submitted further that the 1st plaintiff had already been punished by the court and that the present application was brought because the defendants had filed another contempt application against the plaintiffs whose aim was to close the office which the plaintiffs were running. He submitted that Mutungi J. made in error in his ruling and as such the plaintiffs' application should be allowed.

In his submission in reply, Mr. Njenga submitted that the plaintiffs' application had no merit. He submitted that the application was brought in bad faith for the purposes of circumventing a court order. Mr. Njenga submitted that a court order must be obeyed by all and that a party aggrieved with a court order has only one remedy which is to seek the review of the order or to appeal against the same. He submitted that a party has no option of disobeying an order even if he feels that the order is made in error. He submitted that this court cannot set aside Mutungi J's order which was made after hearing both parties. He submitted that the plaintiffs could not withdraw the suit without leave of

the court while the ruling on contempt application was pending. Mr. Njenga submitted that the plaintiffs could not avoid the orders that were made by the court on 6th November, 2014 by withdrawing the suit. Mr. Njenga submitted that the judgment by the High Court in Misc. Application No. 479 of 2016 did not ratify the plaintiffs' acts of contempt.

I have considered the plaintiffs' application and the response thereto by the defendants. I have also considered the submissions of counsel. The plaintiffs have sought a review and setting aside of the orders that were made by Mutungi J. on 11th December, 2015. The law on review is now settled. Order 45 rule 1 of the Civil Procedure Rules provides that, a person considering himself aggrieved by a decree or order from which an appeal is allowed but from which no appeal has been preferred or by a decree or order from which no appeal is allowed and who from the discovery of new and important matter or evidence which after the exercise of due diligence was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made or an account of some mistake or error apparent on the face of the record or for any other sufficient reason desires to obtain a review of the decree or order may apply for a review of such decree or order without unreasonable delay. In the case of National Bank of Kenya Ltd v Ndungu Njau, Court of Appeal at Nairobi, Civil Appeal No. 211 of 1996 the Court of Appeal stated that:

“A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review.”

In the case of, Nairobi City Council v Thabiti Enterprises Ltd, Court of Appeal at Nairobi, Civil Appeal No. 264 of 1996, it was stated that:

“The current position would then, appear to be that the court has unfettered discretion to review its own decree or orders for any sufficient reason.”

The plaintiffs have sought a review of Mutungi J's orders aforesaid on the ground that there is an error on the face thereof. The onus was upon the plaintiffs to demonstrate the existence of the said error. I am not satisfied that the plaintiffs have discharged this burden. The alleged errors which the plaintiffs' counsel highlighted in his submission were that when the orders sought to be reviewed were made, the suit had already been withdrawn. I am in agreement with the defendants that when a matter is pending hearing or ruling before a court, the same can only be withdrawn with leave of the court. In this particular case, no such leave was obtained. In any event, the notices of withdrawal were filed while the file was with the judge awaiting ruling and as such the purported withdrawal was not endorsed by the Deputy Registrar as an order of the court. This means that there was no order withdrawing the suit as at the time of the ruling that was delivered on 11th December, 2015. Mutungi J. cannot therefore be said to have committed an error by delivering a ruling and making orders in a withdrawn suit. I wish to add that what was before Mutungi J. was an application for contempt. The contempt was committed before the purported withdrawal of the suit. Even if the suit had been withdrawn, that could not stop the court from making a determination on the application otherwise a party can easily defeat contempt application by withdrawing a suit.

The other ground upon which the decision of Mutungi J. was attacked was that he wrongly found the 1st plaintiff in contempt on account of his opening of a parallel office for the 3rd plaintiff while there was no order barring the plaintiffs from opening such office. This in my view is not a ground for review. This court cannot sit on appeal against the decision of Mutungi J. The ground goes to the merit of the decision and as such should have been taken up on appeal. The finding by the judge that the 1st plaintiff was in contempt of court for opening a parallel office was not an error on the face of the record which calls for review of his ruling or orders.

The plaintiffs had also contended that the order in respect of which the 1st plaintiff was found in contempt had no penal notice. This is an issue which the plaintiffs should have raised before Mutungi J. when the application for contempt was being argued. If it was raised and the judge overruled the same or if it was not raised at all, it cannot form a ground for review of the orders made by the judge on 11th December, 2015.

The upshot of the foregoing is that I find no merit in the plaintiffs' Notice of Motion application dated 14th December, 2015. The application is dismissed with costs.

Delivered and Dated at Nairobi this 7th day of February 2019

S. OKONG'O

JUDGE

Ruling read in open court in the presence of:

N/A for the Plaintiffs

Mr.Chege h/b for Mr. Njenga for the Defendants

Roselyne - Court Assistant