



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MOMBASA
LAND CASE NO. 64 OF 2013

WARE TRANSPORT LTD.....PLAINTIFF

-VERSUS-

KHALILI HUD AHMED.....1ST DEFENDANT

ESMAIL IBRAHIM.....2ND DEFENDANT

OSMAN FARAH.....3RD DEFENDANT

ABDI ELMI.....4TH DEFENDANT

TIBA FREIGHT FORWARDERS LTD.....5TH DEFENDANT

RULING

1. The plaintiff moved the Court under the provisions of Order 40 of the Civil Procedure Rules and Section 1B & 3A of the Civil Procedure Act vide his application dated 9th May 2018 seeking the following orders:

1. Spent

2. That the 5th defendant's director and/or agents namely:- Hassan Hirsi Hassan and Hirsi Tiba be punished for contempt by committal to civil jail for a period not exceeding six months for blatant contempt of the Court orders issued by this Court on the 16th July 2013.

3. That the Court issues any other or further orders geared towards protecting the dignity and authority of the Court and ensure compliance of the Court orders of 16th July 2013.

4. That the costs of this application be provided for.

2. The application is supported by the grounds on the face of it and the affidavit sworn by Bob Weyn. In brief the applicant deposes that the 5th Respondent has disobeyed the injunctive order issued by the Court on 16th July 2013. That the said order was served upon all three Respondents but instead the 5th Respondent has blatantly and deliberately disobeyed the order by doing the opposite. The applicant proceeded to annex the order together with some photographs (*annex BW – 1 & BW -3*)

3. The application is opposed by the replying affidavit of Hirsi Hassan Gulale who described himself as a director of the 5th Respondent. He admitted knowledge of the order of 16th June 2013 but said it was in respect of plot no MN/V/2407. That the 5th Respondent has restricted his dealings on their plot No MN/V/1902. He also stated that the said order had lapsed on the expiry of the 12th month. He urged the Court to dismiss the present application.

4. The plaintiff filed written submissions which he wholly relied on while the defendant relied on the contents of the replying affidavit. Since knowledge of the order is admitted by the 5th Respondent, my work is cut out in determining whether there is proof that there has been disobedience of the same. The standard of proof required in contempt proceedings is above that of civil process as it is accepted that contempt is closer to criminal process since the punishment may result in interference with the liberty of a contemnor.

5. I have perused the application dated 16th April 2013 from which the order of 16th July 2013 was issued. The plot under reference in that application is MN/V/2407. In his ruling of 16th July 2013, the trial Judge noted that the application was not opposed it was therefore allowed as presented. The 5th Respondent in his reply to the present motion at paragraph 5 said that the rights leased out to a road construction are only within plot No 1902/V/MN. From the affidavit in support of the application there is nothing to corroborate the averment by the plaintiff that the structures shown in the annexed photographs are on plot No MN/V/2407. In the submissions filed, the plaintiff's counsel only addressed this Court on the issue of knowledge of the order. On proof of contempt, the applicant submitted that the two plots share a common boundary as a result of which the 5th defendant has trespassed on to the plaintiff's plot and commenced excavation.

6. The burden was on the applicant to show that indeed the 5th Respondent has exceeded the boundaries of plot No 1902/V/MN and was carrying out excavation works on a portion of plot No 2407. There was no explanatory note accompanying the photographs to support such submissions. I am therefore not persuaded by the applicant that the complaints of trespass amounting to disobedience of the order of 16th July 2013 have been proved. Consequently I find the motion dated 9th May 2018 as unmerited and hereby dismiss it with costs to the 5th Respondent.

Dated, signed & delivered at Mombasa this 7th March 2019

A. OMOLLO

JUDGE