



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CIVIL CASE NO. 1166 OF 2016

KIRARA KIIRU.....1ST PLAINTIFF/APPLICANT

PHILIP MIONKI M. MWERERIA.....2ND PLAINTIFF/APPLICANT

ABDULKADIR ALI.....3RD PLAINTIFF/APPLICANT

GODFREY KARURI GITHAE.....4TH PLAINTIFF/APPLICANT

FLORA WANJIRU NJORA.....5TH PLAINTIFF/APPLICANT

=VERSUS=

GEE TEE SONS LIMITED.....1ST DEFENDANT/RESPONDENT

CHADOR AUCTIONEERS.....2ND DEFENDANT/RESPONDENT

BEYOND VISION AUCTIONEERS.....3RD DEFENDANT/RESPONDENT

RULING

1. This is the notice of motion dated 5th December 2016 brought under Section 1A, 1B, 3 and 63 (c) of the Civil Procedure Act, Section 5(1) of the Judicature Act, Section 36 (1) (b) of the High Court (Organization and Administration) Act, order 30 rule 3 and 8 of the Civil Procedure Rules and all other enabling provisions of the law.

2. It seeks orders that:-

(1) Spent.

(2) An order for committal to civil jail for a period not exceeding six (6) months for contempt of court do issue against the directors of the 1st Respondent namely:-

(a) Agrippina Kiangari Thuo;

(b) Francis Njuguna Thuo;

(c) Mary Nyokabi Thuo;

(d) Mathew Mwaura;

(e) Nicodemus Gatoho Thuo and

(f) Jane Wambui Thuo;

for issuing Notices of Termination of Tenancy dated 19th October 2016 against the applicants in disobedience of the court order issued on 26th September 2016.

(3) An order be granted by this honourable court for the attachment and sale of the properties of the directors of the 1st respondent namely:-

(a) Agrippina Kiangari Thuo;

(b) Francis Njuguna Thuo;

(c) Mary Nyokabi Thuo;

(d) Mathew Mwaura;

(e) Nicodemus Gatoho Thuo and

(f) Jane Wambui Thuo

and the proceeds from the said sale be awarded as compensation to the applicants as this honourable court deems fit and just.

(4) The Notices to terminate the tenancies dated 19th October 2016 and served upon the applicants on the same date be struck out forthwith.

(5) The 1st Respondent do bear the costs of this application on a full indemnity basis.

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

4. The application is supported by the affidavit of Kirara Kiiru, the 1st plaintiff/applicant sworn on the 5th December 2016 and a supplementary affidavit sworn by Prestone Wawire on 29th May 2017.

5. The application is opposed. There is a replying affidavit sworn by Francis Njuguna Thuo, one of the directors of the 1st defendant herein, sworn on the 15th December 2016.

6. On the 10th July 2017, the court directed that the application be canvassed by way of written submissions.

7. It is the plaintiffs'/applicants' submissions that the interim orders were still in force when the 1st defendant issued notices to the plaintiffs purporting to terminate the tenancies. The order was served on the 1st defendant's directors and its advocates as demonstrated in the affidavit of service of Joseph Cedric Amulyoto. The directors of the 1st defendant were aware of the said court order. They have relied on the case of **Shimmers Plaza Ltd vs National Bank of Kenya Ltd [2015] eKLR; Justus Kariuki Mate & Another vs Martin Nyaga Wambora & Another [2014] eKLR; Christine Wangari Gachege vs Elizabeth Wanjiru Evans & 11 others [2014] eKLR**. They pray that the application be allowed.

8. It is the 1st defendant's/respondent's submission that the orders sought in this suit and the application were to stop further distress of rent and/or interference with the quiet possession of the plaintiffs in the premises pending the hearing of the application. The orders issued did not stay any further action as provided by the law such as the 1st defendant's right to terminate tenancy of the plaintiffs in the premises.

9. None of the directors of the 1st defendant were personally served with the order said to have been disobeyed. There is no affidavit of service sworn by a process server showing that each of the said directors of the 1st defendant were personally served with the said order. It has relied in the cases of **Katsuri Limited vs Kapurchand Depar Shah [2016] eKLR; Jacob Zedekiah Ochino & Another vs George Aura Okombo & 4 Others [1989] eKLR; Nyamodi Ochieng Nyamogo & Another vs Kenya Post & Telecommunication Corp [1994] eKLR**. It prays that the application be dismissed with costs.

10. I have considered the notice of motion dated 5th December 2016, the affidavit in support and the affidavits in response. I have considered the written submissions of counsel and the authorities cited. The issues for determination are:-

(i) Whether or not the alleged contemnors were served with the said court order?

(ii) Whether or not the alleged contemnors are guilty of disobeying the said orders?

(iii) Who should bear costs?

11. I have gone through the court record, on the 26th September 2016, Hon. Lady Justice Gacheru issued the orders:-

“That a temporary injunction be and is hereby issued for 14 days only restraining the defendants/respondents, their servants or agents or any other person or persons from interfering in any manner whatsoever with the quiet, peaceful and exclusive possession of the respective demised premises of the plaintiffs pending the hearing and determination of the application”

12. I have gone through the affidavit of service of Joseph Cedric Amulyoto sworn on the 5th October 2016. In paragraph 5 he states:-

“I proceeded to Gee Tee Sons offices as directed aforesaid situated at Stand View Apartments 1st floor, commercial street within Thika Town”.

Paragraph 6

“Upon arrival I introduced myself to the receptionist and informed her the purpose of my visit, whereupon she directed me to Jane Wambui Thuo’s office who is well known as a director of the company”.

Paragraph 8

“As a result of the receptionist seeing the director in due regard, Mrs Wambui called me and informed me that she could not receive the service of behalf of the company.”

13. It is clear from the above averments of the process server that the directors of the 1st defendant were not served with the court order. It is also clear from the above averments that the alleged contemnors were not served personally with the order of the court nor did they have knowledge of the court orders.

14. I am guided by the holding of Emukule Judge in **Mombasa HCCC Misc Application No. 20 of 2015 Republic Exparte Farid Mohamed Al Maary & 2 Others vs County Government of Mombasa** where the court observed that:-

“For purposes of contempt proceedings the responsibility attaches to an individual or individual official and not every official of the respondent”.

It was therefore important for the plaintiffs/applicants to ensure that the alleged contemnors were served personally. They have also not laid any grounds as to why the corporate veil needs to be removed.

15. In the case of **Justus Kariuki Mate & Another vs Martin Nyaga Wambora & Another CA Civil Appeal No. 24 of 2014**. The Court held that:-

“It is important that the court satisfies itself beyond any shadow of doubt that the person alleged to be in contempt committed the act complained of with full knowledge or notice of the existence of the order of the court forbidding it. The threshold is quite high as it involves possible deprivation of personal liberty.”

16. 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 Ltd vs Gulabchand Pupattal Shah & Others** in approving the standard of proof in contempt cases as set out in the case of **Gatheru Mutika & Others vs Bahari 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 proved in standard which is higher than proof 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 criminal character and a party may lose his liberty”.

It would therefore mean a court cites a contemnor for contempt, there must be sufficient evidence to prove that he/she had knowledge of the court order and has wilfully disobeyed it. It is incumbent upon the applicant to prove that the act complained of actually occurred and that the acts were committed by the contemnors herein.

17. All in all, I find that the plaintiffs/applicants have failed to discharge the burden as required by law. I find that the application lacks merit and the same is dismissed. The costs do abide the outcome of the main suit.

It is so ordered.

Dated, signed and delivered in Nairobi on this 19TH day of JUNE 2019.

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L. KOMINGOI

JUDGE

In the presence of:-

.....Advocate for the Plaintiffs

.....Advocate for the Defendants

.....Court Assistant