



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CIVIL CASE NO. 1517 OF 1998

JOB OKUNA OYUGI.....1ST PLAINTIFF

DOUGHLAS ODHIAMBO OYUGI.....2ND PLAINTIFF

JOSHUA ONYANGO.....3RD PLAINTIFF

(Suing as the administrators of the Estate Hezekiah Nelson Oyugi –deceased)

VERSUS

TIMDAR SAID SHERMAN.....1ST DEFENDANT

THE COMMISSIONER OF LANDS.....2ND DEFENDANT

RULING

1. This is the notice of motion dated 3rd May 2017 brought under Section 5, 27 (b) and 28 of the Contempt of Court Act, 2016 and under all enabling provisions of law and under inherent jurisdiction of the honourable court.

2. It seeks orders:-

(i) Spent.

(ii) The honourable court be and is hereby pleased to find the 1st defendant Timdar Said Sherman, guilty of contempt of court and to punish her by issuing an order of committal to civil jail for wilful disobedience of the court order issued on 4th July 2016 as varied with the consent of the parties on 9th September 2017.

(iii) Spent.

(iv) The court orders made on 4th July 2016 requiring the status quo to be maintained be and are hereby discharged forthwith and the plaintiffs be at liberty to execute the decree against the 1st defendant.

(v) The costs of this application be paid by the 1st defendant.

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

4. The application is supported by the affidavit of Douglas Odhiambo Oyugi the 2nd plaintiff/applicant sworn on the 3rd May 2017 and a further affidavit sworn on the 15th March 2018.

5. The application is opposed. There is a replying affidavit sworn by Timdar Said Sherman, the 1st defendant/respondent herein sworn on the 8th November 2018.

6. On the 15th October 2018 the court directed that the notice of motion be canvassed by way of written submissions.

The plaintiff's/applicant's submissions

7. On the 9th September 2016, the parties entered into the following consent:-

“That the order made on 4th July 2016 be and is hereby varied in the following terms:-

(a) That the requirement on the 1st defendant to deposit the original title in court within 7 days be and is hereby extended to six (6) months from today.

(b) That the requirement that the tenant of the suit property to deposit the rent of Kshs.200,000 as from 1st August 2016 be and is hereby varied so that the tenant shall now be required to deposit the said rent as from 1st January 2017 in the joint account of plaintiffs and the 1st defendant's account”

8. The rent for January to May 2017 amounting to a total of Kshs.1,000,000/- was collected by the 1st defendant and deposited into the joint account. From June 2017 to October 2018 the 1st defendant collected the monthly rent of Kshs.200,000 and retained the same for her own use in contravention of the court orders of 4th July 2016 and 9th September 2016 and to the detriment of the plaintiffs who will be unable to recover the same from the 1st defendant in the event that she is unsuccessful in setting aside the judgment against her. The plaintiffs have notified the 1st defendant of her contempt but she has ignored all correspondence and persisted in her disobedience of the court orders. The 1st defendant has also failed to deposit the original title deed in court despite recording a consent order to that effect on 9th September 2016 which consent was adopted as the order of the court. The 1st defendant has had several opportunities to purge her contempt. The parties appeared before court on 9th September 2017 and 6th October 2017. The 1st defendant has remained defiant.

9. The court order was made in the presence of all parties and by consent. The 1st defendant has admitted as much in her replying affidavit. The high court has jurisdiction to punish for contempt of court. The powers stem from both statute and under the inherent jurisdiction of the court. They have relied on the cases of **Katsuri Limited vs Kapurchand Depar Shah HCCC No. 25 of 2013; Sam Nyamweya & Others vs Kenya Premier League Limited and Others, HCCC 69 OF 2015**. The 1st defendant has wilfully and flagrantly disobeyed the court orders by collecting rent from the suit premises and converting it into her own use contrary to the court orders. She has also failed to deposit the original title deed in court despite a consent order to that effect.

10. The 1st defendant is clearly in contempt of court and should be given a maximum punishment of 6 months and attachment of her property for showing utter disrespect to the court as her conduct is a threat to the administration of justice. The 1st defendant should also be ordered to purge the contempt by depositing the sum of Kshs.3,400,000 into the account, failure to which she be denied any further audience. The order of status quo made on 4th July 2016 ought to be discharged so that the 1st defendant does not continue to abuse it to her advantage.

The 1st defendant's/respondent's submissions

11. The plaintiffs'/applicants' in their application dated 3rd May 2017 seek to rely on Section 5, 27(b) and 28 of the Contempt of Court Act, 2016. The application is therefore fatally defective as they are relying on an Act which has been declared a nullity by Hon. Justice E. C. Mwita in the case of **Kenya Human Rights Commission vs Attorney General & Another [2015] eKLR**.

12. The tenant moved out of the premises in October 2018. The parties were not in a position to refund the deposit of three months amounting to Kshs.600,000, then the tenant utilized the premises for a period of three months without paying rent and moved out of the premises. No rent was received by the 1st defendant for the premises from that period.

13. The 1st defendant has not willingly refused to deposit the title deed for the suit property. She has filed an application dated 27th April 2017, seeking the court to compel the Chief Land Registrar to issue her with a provisional title so as to deposit the same before this court. It is imperative that the 1st defendant's application dated 27th April 2017 be heard and the orders granted to enable the 1st defendant obtain a provisional title which can be surrendered to this court.

14. The plaintiffs have failed and/or refused to personally serve the 1st defendant with the application for contempt of court, as required by law. Failure to personally serve the 1st defendant is fatal and the application must fail on this ground. She has put forward the case of **Republic vs Principal Secretary, Ministry of Defence Ex parte George Kariuki Waithaka [2018] eKLR; Christine Wangari Gachege vs Elizabeth Wanjiru Evans & 11 others [2014] eKLR**. She prays that the application be dismissed with costs.

15. I have considered the notice of motion dated 3rd May 2017, the affidavit in support and the annexures. I have also considered the replying affidavit, the written submissions of counsel and the authorities cited. The issues for determination are:-

(i) Whether or not the alleged contemnor was served with the said contempt order.

(ii) Whether or not the alleged contemnor is guilty of disobeying the said orders.

(iii) Who should bear costs?

16. I have gone through the court record. The court orders of 9th September 2016 were issued in the presence of all parties and by consent.

The 1st defendant/respondent has admitted so in her replying affidavit. There was therefore no requirement for the plaintiffs to serve her personally. She had knowledge of the terms of the order. The court of Appeal in the case of **Simmers Plaza Limited vs National Bank of Kenya [2015] eKLR** reiterated that *knowledge of court order suffices to prove of service and dispenses with personal service for the purposes of contempt proceedings.*

17. It is the plaintiffs/applicants claim that the 1st defendant/respondent has failed to deposit the rent in the joint account from June 2017 to October 2018. She has also failed to deposit the original title deed in court as per the consent order of 9th September 2016. I have looked at the 1st defendant's replying affidavit sworn on 8th November 2018. The 1st defendant has failed to give a reasonable explanation as to why she has not complied with the orders.

18. In the case **Hadkinson vs Hadkinson [1952] All ER 567 at 569**. It was held that *"court orders whether irregular or not have to be obeyed unless they are varied or set aside"*

In the instant case the 1st defendant has not explained what difficult she is having in complying with the court order. In the absence of any reasonable explanation I find that she has wilfully disobeyed the court orders.

19. In the case of Justus **Kariuki Mate & another vs Martin Nyaga Wambora Civil Appeal No. 24 of 2015**, the Court of Appeal 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 to the existence of the order of the court forbidding it. The threshold is quite high as it involves possible deprivation of a persons liberty".

I am satisfied that the 1st defendant herein wilfully disobeyed the court order by failing to remit the rent in the joint account and failing to deposit the original title deed in court.

20. In the case of **Econet Wireless Kenya Ltd vs Minister for Information & Communication of Kenya & Another [2005] eKLR** Ibrahim J (as he then was) stated as follows:-

"It is essential for the maintenance of the rule of law and order that the authority and the dignity of our courts are upheld at all times. The court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors. It is the plain and unqualified obligation of every person against or in respect of whom an order is made by a court of competent jurisdiction to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends, even to cases where the person affected by an order believes it to be irregular or void"

I am guided by the above authority.

21. I have gone through the annexures to the 2nd plaintiff's supporting affidavit. It is clear that the 1st defendant has had several opportunities to purge her contempt. The plaintiff's advocates wrote to the 1st defendant severally on the issue of disobedience of the court orders but there was no response. It is also clear that parties have appeared before court severally. I agree with the plaintiff's counsel submission that the 1st defendant has remained defiant.

22. I find that the 1st defendant is clearly in contempt of the court. She has failed to comply with the orders and such failure is deliberate.

23. In conclusion, I find merit in the application and the same is allowed in the following terms:-

(a) That the 1st defendant Timdar Said Sherman is found guilty of contempt for wilfully disobeying the court order issued on 4th July 2016 as varied with the consent of the parties on 9th September 2017.

(b) That is the 1st defendant Timdar Said Sherman is hereby fined Kshs.200,000/- to be paid within twenty one (21) days from the date hereon in default to serve twelve (12) months imprisonment.

(c) That the court orders made on 4th July 2016 requiring the status quo to be maintained be and are hereby discharged forthwith and the plaintiff be at liberty to execute the decree against the 1st defendant.

(d) The costs of this application be borne by the 1st defendant.

It is so ordered.

Dated, signed and delivered in Nairobi on this 18TH day of July 2019.

L. KOMINGOI

JUDGE

In the presence of:-

Mr. Ochwo for the Plaintiff

Mrs. Olembo for the 1st Defendant

Kajuju - Court Assistant