



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC. NO. 23 OF 2017

JOSEPH MUREITHI GICHU.....PLAINTIFF

VERSUS

OBUYA OTIENO RITZAU T/A

BAMBURI COMMUNITY HIGH SCHOOL.....1ST DEFENDANT

ERIC OTAMBO.....2ND DEFENDANT

COUNTY GOVERNMENT OF MOMBASA.....3RD DEFENDANT

NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY.....4TH DEFENDANT

RULING

1. By a Notice of Motion Application dated 30th October, 2018, the Plaintiff/Applicant moved this court under Order 40 Rule 3 (1), (2) and (3) of the Civil Procedure Rules and Section 1A, 1B and 3A of the Civil Procedure Act seeking for orders:

1. Spent

2. That the 1st and 2nd Defendants herein Obuya Otieno Ritzau t/a Bamburi Community High School and Eric Otambo are by themselves or through their agents, servants, employees, proxies or tenants continuing to perpetuate the throwing and/or disposing of waste that litters denigrates and is harmful to the environment on SUBDIVISION PLOT NO.9901/3/SECTION II MN MTOPANGA, BAMBURI contrary to and in violation of orders of injunction given by the court on 7th December, 2017 be committed for contempt of court and be detained in prison for a period of six months or such period as the court deems sufficient.

3. Costs.

2. The Application is premised on the grounds that:

i. The court issued an injunction against the Defendants on 7th December 2017.

ii. The court order with a penal notice was served on the Defendants on 17th January 2018.

iii. The Defendant has continued to wantonly breach the court order.

iv. The dignity and integrity of our justice system can only be sustained if court orders are respected.

3. The motion is supported by the affidavit of Joseph Mureithi Gichu, the Applicant sworn on 30th October, 2018, and the affidavit of Thomas Joshua Were, a process server sworn on 23rd January, 2018. The applicant avers that on 7th December, 2017 the court issued injunctive orders which were duly extracted on 11th January, 2018. That on 16th January, 2018 a court bailiff, Mr. Thomas Joshua Were called the applicant and informed him he had been given the said court orders to effect service upon the 1st and 2nd Defendants among others. That on 17th January, 2018, the process server called the applicant again and the applicant told the process server where to get the 1st and 2nd

Defendants among others who are well known to the applicant, and the applicant pointed them out and Mr. Thomas Joshua Were served them with the court orders in the applicant's presence. That the Applicant states that the 1st and 2nd Defendants received the order and signed. That despite the court order, the 1st and 2nd Defendants have continued to allow their agents, servants, proxies and people under their control to litter and throw garbage contrary to the court order. The applicant has attached photographs indicating continued littering. The applicant contends that the 1st and 2nd Defendants are in contempt of the said court orders and therefore prays to have them committed to prison for six months or such other period that the court deems fit.

4. In the affidavit of service sworn on 23rd January, 2018, Thomas Joshua Were, a court process server states that on 15th January 2018 he received from Jengo Associates Advocates copies of order dated 11th January, 2018 with instructions to serve the same upon Obuya Otieno Ritzau t/a Bamburi Community High School and Mr. Erick Otambo both of Bamburi Estate, Mombasa. That on 17th January, 2018, at about 10.30 a.m., he was directed to the home of Erick Otambo by the Plaintiff who also pointed out the said Mr. Erick Otambo. That he then served Erick Otambo with the said order which he voluntarily received, read through and signed acknowledging receipt of the same. The process server further states that on the same day, at about 11.30 a.m. he visited Bamburi Community High School. That he introduced himself to one of the staff members whom he first met and the same staff pointed out to him Mr. Obuya Otieno Ritzau (the principal) to whom the process server introduced himself and explained to him the purpose of his visit to the school. That he then served Obuya Otieno Ritzau t/a Bamburi Community High School with a copy of the said order which he voluntarily received, read through and acknowledge receipt by signing at the bottom.

5. The 1st Defendant did not file any response to the Application. In opposing the Application, the 2nd Defendant filed a replying affidavit sworn on 13th November, 2018. He depones inter alia, that he let out to the 1st Defendant his property being SUB DIVISIONS PLOT NO. 9905/SECTION II MN. That he is not in actual control and/or management of the premises as it is the 1st Defendant who operates the school in the name of Bamburi Community High School, a fact he states is known to the plaintiff. The 2nd Defendant states that the 1st Defendant is in fact a trespasser in the suit property having refused to give vacant possession as decreed in **Mombasa RMCC No.583 of 2013- Erick Opiyo –v- Obuya Otieno Ritzau t/a Bamburi Community High School**. The 2nd Defendant avers that he is desirous of having a clean and healthy environment and blames the 1st Defendant, adding that the 1st Defendant ought to be held personally liable for any contempt of court orders.

6. Both the plaintiff and the 2nd Defendant filed written submissions through their respective advocates. I have considered the Application the affidavits filed and the rival submissions. In contempt proceedings, proof must be made beyond the standard in civil cases as contempt is quasi – criminal. The burden of such proof lies on the Applicant. The Applicant stated that the order of injunction made on 7th December 2017 and issued on 11th January 2018 has been violated by the 1st and 2nd Defendants. The said order was to remain in force until the suit is heard and determined. The order issued restrained the Defendants themselves or through their agents, servants, employees, proxies or tenants from throwing and/or disposing of waste that litters the suit property.

7. In the affidavit in support of the Application the applicant has annexed photographs marked “JMG-3” showing garbage littering the suit property, allegedly shown or disposed of by the 1st and 2nd Defendants or through their agents, servants, employees, proxies or tenants. The respondents have not disputed the Applicant's averments. Indeed the 2nd Defendant admits that there was violation of the court order but attributes blame to the 1st Defendant who is his tenant. The 1st Defendant did not file any response to the Application. What was deponed in the affidavit in support of the Application was not rebutted by the 1st Respondent by way of a replying affidavit. In the absence of rebuttal of the averments in the supporting affidavit and also the replying affidavit by the 2nd Respondent, it means that the 1st Respondent has not plausible explanation for defying the order of this court.

8. As against the 2nd Respondent, it was admitted that the order was served. The 2nd Respondent has however explained that the premises were in the control and management of the 1st Respondent. Indeed the 2nd Respondent has produced judgment and decree in RMCC No.583 of 2013 in which the 1st Defendant was ordered to give vacant possession of the suit premises to the 2nd Defendant. The 2nd Defendant has however stated that the 1st Defendant has not complied with that decree. The averments by the 2nd Defendant have not been rebutted by the Applicant. As pointed out earlier, in an Application of this nature we are dealing with the liberty of a person and such an order ought to be granted in the clearest circumstances. In the instant Application, I am unconvinced that the allegation of contempt against the 2nd Respondent has been proved to the required standard. In as much as the 2nd Respondent may have been served with the court order issued on 11th January 2018, I am not satisfied that the applicant had demonstrated the 2nd Respondent has willfully disobeyed the said order. The Applicant has not satisfied me that there was disobedience of the order by the 2nd Respondent. It is therefore my finding that the 2nd Respondent is not in contempt of court.

9. As against the 1st Respondent, there is no denial that there was a court order and the same was served with a penal notice. The applicant has satisfied me that the 1st Defendant violated the said order. Contempt is thus proved and the 1st Defendant has not shown remorse or regret at all about defying the court order. In the case of B-v- Attorney General (2004) I KLR 431, Ojwang, J (as he then was) stated.

“The court does not, and ought not to be seen to, make orders in vain; otherwise the court would be exposed to ridicule, and no agency of the constitutional order would then be left in place to serve as a guarantee for legality, and for the rights of all people.”

10. The upshot is that I find the 1st Defendant guilty of contempt. I hereby order him to pay a fine of Kshs.100,000.00 within 14 days of the service of this order in default, he will serve a prison term of two (2) months. To effect the order, I do issue a warrant of arrest directed to the OCS Bamburi Police Station to arrest the 1st Defendant and bring him to serve the sentence. The costs of this Application to be borne by the 1st Defendant.

DATED, SIGNED and DELIVERED at MOMBASA this 26th day of September, 2019.

C. K. YANO

JUDGE

IN THE PRESENCE OF:

Jengo for Plaintiff/Applicant

Ratemo holding brief for Atancha for Defendant/Respondent Yumna Court Assistant

C.K. YANO

JUDGE