



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELC NO. 91 OF 2016**

**FRED KINYALA MAUTA T/A THE PLACE PLACE**

**BAR & RESTAURANT.....PLAINTIFF/RESPONDENT**

**VERSUS**

**ATHMAN MAVINDA GIDEON.....DEFENDANT/APPLICANT**

**RULING**

1. By a Notice of Motion dated 5<sup>th</sup> December, 2018, the Defendant/Applicant moved this court under Sections 13 and 14 of Environment and Land Court Act, Sections 1A, 1B, 3A and 63(e) of the Civil Procedure Act and Order 40 Rule 3(1) of the Civil Procedure Rules seeking for orders that Fred Kinyala Mauta, the Plaintiff/Respondent be ordered to purge the contempt of court orders or be committed to civil jail for contempt of this Honourable Court's Orders for a period of six (6) months. The application is premised on the grounds that the respondent was served with an order of this court on 19<sup>th</sup> October, 2018 and that he has disobeyed the said court order by proceeding to renovate construct or build the suit property against the orders of the court. That the respondent is in blatant disobedience of the said court with impunity and that it is in the interest of justice that the court do grant the orders prayed for in the application.

2. The motion is supported by the affidavit of Athman Mavinda Gideon the Applicant sworn on 5<sup>th</sup> December 2018. The applicant avers that he is the owner of plot at Mwembelegeza area known as PLOT NO.113/I/MN located opposite Vescon Estate, Bamburi. The applicant states that he filed the notice of motion application dated 18<sup>th</sup> October, 2018 and the court issued an order on 29<sup>th</sup> October 2018. The order is annexed and marked "AMG-1". That the said order was served upon the Respondent on 29<sup>th</sup> October 2018 at 11.00 a.m. The applicant has annexed a copy of the affidavit of service sworn by Michael Otieno a process server on 29<sup>th</sup> November 2018. It is the Applicant's contention that despite the said service having been effected upon the Respondent the respondent has failed, neglected and or refused to obey the same. The applicant avers that the respondent has continued to construct and/or renovate the said premises and has exhibited photographs allegedly showing the current and previous state of the building marked "AMG - 3" and "AMG-4" respectively. It is the applicant's contention that the respondent has deliberately and/or willfully disobeyed this Honourable Court's Order with impunity and that unless the court stamps its authority the respondent's action may cause anarchy where all people may disobey orders of court with impunity. The Applicant avers that it is in the interest of justice that the respondent be ordered to purge the contempt or in the alternative be jailed for a period not exceeding six (6) months.

3. In opposing the application, the respondent filed a replying affidavit sworn on 10<sup>th</sup> December 2018 in which he denies being served with the order issued by the court on 26<sup>th</sup> October 2018. The Respondent further states that even though the firm of M/s Gikandi & Co Advocates act for him in this matter, no attempt has ever been made to serve them with the said court order. The Respondent avers that the applicant has also failed to prove the particulars of the breach of this said court order that occurred on 29<sup>th</sup> October 2018. The Respondent states that he completed the construction works of the suit property way back in the year 2002. The respondent however, states that sometime in July 2018, personnel from Kenya Power and Lighting Company Limited visited the suit premises and indicated that there was a portion of the building that was very close to the electric power lines and that, that portion required to be hived off. The Respondent avers that he complied as he could not have risked his building to suffer an outbreak of fire from the said electric power lines. He states that the said works were completed before 20<sup>th</sup> October 2018 and is surprised that the applicant filed an application on 18<sup>th</sup> October 2018 when almost all the remedial works had been completed. The respondent states that he has not been served with the said application filed on 18<sup>th</sup> October 2018. The respondent further states whereas the applicant has always been represented by the firm of M/s Ojode Udoto & Onjoro Advocates, the current application has been filed by M/s Obara & Obara Advocates for the applicant yet no notice of change of advocate has been served upon Gikandi & Co. Advocates for the respondent. It is the Respondent's contention that the application is totally misconceived. The respondent notes that the photographs attached to the supporting affidavit and marked "AMG-3" and "AMG-4" are quite confusing with little or no bearing to the issues herein. That the applicant has not indicated who took the photographs and when they were shot, adding that they merely indicate the date and time which is not helpful as electronic devices may be configured to bring out a desired result and hence the need for a certificate regarding how the photographs were shot. The respondent prays that the said annexures be expunged as they are inadmissible as evidence in a court of law. The respondent reiterated the contents of his supporting affidavit filed on 24<sup>th</sup> April, 2016 and

states that the applicant is being driven by ill motives so as to get the respondent out of the suit property which, according to the respondent, the applicant wrongly assumes that he has a stake in. The Respondent wants the application dismissed with costs.

4. Both the Applicant and the Respondent filed written submissions through their respective advocates. M/s Obara & Obara Advocated for the applicant in their submissions filed on 4/3/19 submitted that the court order was served upon the Respondent by a duly appointed process server of the court as indicated in the affidavit of service and that the respondent disobeyed the order and urged the court to take action against the Respondent as a deterrent to other persons who may disobey court orders. It was submitted that the Respondent has been continuously disobeying the court order by continuing to build on the suit premises.

5. M/s Gikandi & Co. Advocates for the Respondent in their submissions filed on 9<sup>th</sup> July 2019 submitted inter alia, that the respondent was never served with the court order issued on 26<sup>th</sup> October 2018. They relied on the case of **Josephine Muthinja –v- Lilian Muthamia and 2 Others** where the court observed that a court will only punish as contempt a breach of injunction if satisfied that the terms of the injunction are clear and unambiguous, that the defendant has proper notice of terms and that breach of the injunction has been proved beyond reasonable doubt. It was further submitted that proper notice is paramount when citing contempt. Counsel cited Order 48 Rule 2 of the Civil Procedure Rules and relied on the case of **Ochino & Another – v- Okombo & 4 Others (1989)KLR**. The Respondent’s advocates further submitted that the applicant has also failed to prove the particulars of the breach of the court order and relied on the case of **Sam Nyamwea & 3 Others –v- Kenya Premier League Limited & 2 Others**. In addition, it was submitted that no reliable evidence that proves the particular breach of the said order has been tendered by the Applicant as the photographs relied on are defective and inadmissible pursuant to the provisions of Sections 78 and 78A of the Evidence Act. The Respondent’s counsel reiterated the contents of the replying affidavit and urged the court to dismiss the application with costs.

6. 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 proof lies on the applicant. The applicant stated that the interim order of injunction made on 18<sup>th</sup> October 2018 and issued on 26<sup>th</sup> October 2018 has been violated by the Respondent. I have perused the said order. The said order marked “AMG-2” restrained the “defendant” from renovating, demolishing parts of the building or destroying plumbing works in the suit premises. I note that the defendant is the applicant herein. I have also perused the photographs that are alleged to indicate the previous building and the current state of the building. I note that the said photographs are identical.

7. In the case of **Gatharia K. Mutikika –v- Baharini Farm Ltd (1985)KLR 227**, it was held as follows:

***“The courts take the view that where the liberty of the subject is, or might be involved in breach for which the alleged contemnor is cited must be precisely defined. A contempt of court is an offence of a criminal character. A man may be sent to prison. It must be satisfactorily proved..... it must be higher than proof on a balance of probabilities, almost, but not exactly, beyond reasonable doubt.”***

8. The applicant in an application for contempt must prove beyond peradventure that the respondent is guilty of contempt. The prayers sought is for contempt. The power to commit for contempt is one to be exercised with great care. An order committing a person to prison for contempt is to be adopted only as last resort and in clearest of cases.

9. In the present application, the respondent has denied having been served with the said court order. Whereas the applicant has exhibited an affidavit of service by Michael Otieno, a court process server, and stated that the Respondent was served, it should be noted that the said affidavit states that it was the defendant who was allegedly served. The defendant is the applicant herein. And as pointed out earlier, the order that has been exhibited by the applicant and which was allegedly served upon the Respondent, restrained the defendant (who is the applicant herein). The order as extracted or drawn did not restraint the respondent who is the plaintiff in this case. As matters stand, it is clear that the order as extracted is ambiguous and even if it was served, it was not clear which party was to be restrained. It is apparent that it was directed at the defendant, not the plaintiff. Even prayer 2 of the of motion itself describes Fred Kinyala Mauta as the defendant, whereas from the pleadings he is the plaintiff in the suit and not the defendant.

10. In the instant application, I am unconvinced that the allegation of contempt of court has been proved to required standard. In as much as the respondent may have been served with the court order issued on 26<sup>th</sup> October, 2018, I am not satisfied that the applicant has demonstrated that the respondent has willfully disobeyed the said order as the said order was directed to a wrong party, the defendant. Moreover, the acts allegedly committed by the Respondent are not precise. The photographs exhibited are not helpful as they all look-alike yet they are stated to indicated the previous and the current state of the building.

11. It is my finding that the Notice of Motion dated 5<sup>th</sup> December 2018 lacks merit and I hereby dismiss it with costs.

**DATED, SIGNED and DELIVERED at MOMBASA this 18<sup>th</sup> day of October 2019.**

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**C.K. YANO**

**JUDGE**

**IN THE PRESENCE OF:**

Obara holding brief for Mkan for the applicant/defendant

Mathare holding brief for Gikandi for Plaintiff/respondent

Yumna Court Assistant

**C.K. YANO**

**JUDGE**