



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CIVIL CASE NO.428 OF 2012

(Consolidated with ELC NO. 202 OF 2012)

LILIAN MUTHONI NJOROGE.....1ST PLAINTIFF

ELIZABETH WANGARI NJOROGE.....2ND PLAINTIFF

=VERSUS=

NELSON MATHU NJOROGE.....1ST DEFENDANT

ELVIS MUIRURI NJOROGE.....2ND DEFENDANT

RULING

1. This is the notice of motion dated 15th April 2014 brought under order 40, rule 1, 3(1) of the Civil Procedure Rules, section 3 of the Civil Procedure Act, section 5(1) of the Judicature Act, and all the other enabling provisions of the law.
2. It seeks orders:-
 - (1) *Spent.*
 - (2) *That an order of committal to prison be made against Rose Wambui and Lilian Muthoni for period of six months for disobedience of an order of this honourable court given on 20th December 2013.*
 - (3) *That the costs of this application be provided for.*
3. The grounds are on the face of the application and are set out in paragraphs (a) to (i).
4. The application is supported by the affidavit of Nelson Mathu Njoroge, the plaintiff/applicant in ELC 202 of 2012 sworn on the 15th April 2014.
5. The application is opposed there is a replying affidavit sworn by Rose Wambui Wanjiru the 1st defendant/respondent in ELC 202 of 2012 sworn on the 18th June 2014.
6. On the 25th May 2016 the court directed that the application be canvassed by way of written submissions.
7. It is the applicant's submissions that this court issued a valid court order on 20th December 2013 restraining the respondents from remaining on or continuing in occupation or possession of or from entering, interfering with, alienating, dealing in LR No. Muguga/Muguga/1647 until the suit is heard and determined. The respondents were duly served with the order together with a notice of partial consequences attached.
8. The respondents have blatantly failed to comply with the said order. He prays that the respondents be found guilty of contempt of court order and be punished accordingly.
9. It is the 1st respondent's submissions that she was not served with the said court order. The court should first establish if they are

trespassers. She prays that the application be dismissed.

10. I have considered the notice of motion and the affidavit in support. I have also considered the replying affidavit, the written submissions of counsel and the authorities cited. The issue for determination is whether the applicant has demonstrated that the respondent is in contempt of the court order of 20th December 2013 and ought to be punished.

11. The applicant states that the 1st defendant/respondent has disobeyed the court orders granted on 20th December 2013. He relies on the affidavit of service sworn by Francis Kimuyu Nzangi, process server sworn on the 15th April 2014.

12. I have gone through the said affidavit. In paragraph 5 he depones:-

“that I proceeded to that woman and introduced myself and the purpose of my visit. I handed her copies of the said order and notice of penal consequences. She accepted the same but declined to sign in my copy saying that the matter is being handled by her counsel Ondabu Advocates. I proceeded to the said firm situated at Utalii house third floor and met Mr. Ondabu Advocate whom I tendered to him copies of the court order with penal notice annexed”.

13. From the foregoing it is clear that the 1st respondent Rose Wambui was not personally served with the copy of the court order and the penal notice.

14. With respect to Lilian Muthoni the process server said he served her at Githurai market but she declined to sign. I have gone through the pleadings and note that Rose Wambui alias Mary Wambui Wanjiru is the wife of the applicant herein. It is not clear under what circumstances she was supposed to leave the matrimonial home.

15. In her replying affidavit, the 1st respondent has explained why she was still on the suit property.

16. I find that the applicant has failed to demonstrate that the respondents have wilfully disobeyed the court orders of 20th December 2013. I find no merit in this application 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 17th day of October 2019.

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L. KOMINGOI

JUDGE

In the presence of:-

Ms A. Ngige for the Plaintiff

Mr. Kenga for Njogu for the Defendant

Kajuju - Court Assistant