



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC PETITION NO. 401 OF 2018

PRUDENTIAL CAPITAL LIMITED.....PLAINTIFF

VERSUS

NAIROBI CITY COUNTY.....1ST DEFENDANT

PATRICK MUNYAO2ND DEFENDANT

HILLARY CHUMO.....3RD DEFENDANT

RULING

1. There are two applications coming up for hearing. The Notice of Motion dated 24th January 2019 and 14th March 2018. The Notice of Motion dated 24th January 2019 is brought under order 40 rule 3 and 7, order 51 rules 1 and 3 of the Civil Procedure Rules 2010, Section 1A, 1B, 3, 3A and 100 of the Civil Procedure Act, and all other enabling provisions of the law.

2. It seeks:-

(1) *Spent.*

(2) *Spent.*

(3) *That this honourable court do order that following failure by the plaintiff to serve the ex-parte orders of injunction issued on 27th November 2018 within 3 days, the orders automatically lapsed in accordance with the provisions of order 40, rule 3 of the Civil Procedure Rules, 2010.*

(4) *That this honourable court do discharge, vary and/or set aside the ex-parte orders issued on 27th November 2018, pending hearing and determination of the suit.*

(5) *That the OCPD Buruburu Police Station be served with the court's orders to ensure that order is preserved on the suit property.*

(6) *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 (g).

4. The application is supported by the affidavit of Hon. Joseph Ndonji, member of County Assembly Umoja II Ward, within Nairobi County, sworn on the 23rd January 2019. There is also an affidavit sworn by Cecilia Wangari Koigu, Director of Survey and GIS with the 1st defendant sworn on the 24th January 2019.

5. The application is opposed. There is a replying affidavit sworn by David Chege Mworira a director of the plaintiff's company sworn on the 14th March 2019.

6. The notice of motion dated 14th March 2019 is brought under Section 4 of the Contempt of Court Act 2016, order 40 rule 2 (3) of the Civil Procedure Rules 2010 and all other enabling provisions of the law.

7. It seeks orders:-

1. Spent

2. That this honourable court do summon and hold one George Gachara, an employee of the 1st defendant/respondent as well as the Member of County Assembly of Umoja II Ward Hon. Joseph H. Ouma Ndonji in contempt of court.

3. That the court be pleased to commit to civil jail one George Gachara, an employee of the 1st defendant/respondent as well as the member of County Assembly of Umoja II Ward Hon. Joseph H. Ouma Ndonji for a period of not exceeding six (6) months for contempt of orders made on 27th November 2018 by this Honourable Court or in the alternative find them to have disobeyed lawful court orders contrary to section 29 of the Environment and Land Court Act of 2011 and sentence them appropriately.

4. That the 1st Defendant's/Respondent's agents, employees and or servants one George Gachara as well as the Member of County Assembly of Umoja II Ward Hon. Joseph H. Ouma Ndonji be condemned to pay costs of the damaged fence amounting to Kshs.725,665/- and of this application.

5. That the honourable court be pleased to make such further or other orders as it may deem just and expedient in the circumstances of this case.

8. The grounds are on the face of the application and are set out in paragraphs (i) to (vii).

9. The application is supported by the affidavit of David Chege Mworira, a director of the plaintiff/applicant sworn on the 14th March 2019 and a supplementary affidavit sworn on the 24th June 2019.

10. The application is opposed. There is a replying affidavit sworn by George Gachara the Sub county, Commander Embakasi West, of the 1st defendant, sworn on the 6th May 2019. There is also a replying affidavit sworn by Joseph H. Ouma Ndonji, Member of County Assembly, Umoja II ward, Embakasi West Constituency sworn on the 2nd April 2019. There are also grounds of opposition filed by the 2nd alleged contemnor dated 3rd April 2019.

11. On the 28th March 2019, the court directed that the two applications be heard together. The court further directed that the applications be canvassed by way of written submissions.

The plaintiff's/Applicant's submissions

12. The proceedings complained of that proceeded on 27th November 2018 were never exparte and even the orders issued by the court is very clear that there were no exparte proceedings only the fact that the 1st defendant was absent when the orders were issued. The orders issued were not required to be served within three days as alleged by the 1st defendant.

13. The plaintiff has not concealed any material facts to warrant the orders to be set aside. It has put forward the case of **Paul Gitonga Wanjau vs Gathuthi Tea Factory Company Ltd & 2 Others [2016] eKLR; Giella vs Cassman Brown & Co. Ltd: Lenkishon Kimirei Maika & 2 Others vs A. M. Kalio [2018] eKLR.**

14. The orders were served on the 1st defendant who has through its agents and or servants neglected and or refused to receive the same, a fact which is well within their knowledge. The application cannot stand as it has not demonstrated sufficient grounds upon which the court should grant the orders sought and ought to be dismissed.

15. With regards to the notice of motion dated 14th March 2019. The applicant is not required to prove personal service of the order on the respondent. The applicant is merely required to prove that the 1st respondent, the 1st and 2nd alleged contemnors were aware of the court orders at the time they disobeyed them.

It has put forward the case of **Republic vs Permanent Secretary Ministry of State for Provincial Administration and Internal Security & Another [2014] eKLR.**

16. The 1st defendant had given permission to its employees at the legal department to accept service of the court order and other processes on its behalf. The 2nd alleged contemnor therefore had knowledge of the court order as early as 29th November 2018 at 9.30 am. Proof that the 1st respondent had notice of the order is enough for purposes of these contempt proceedings.

17. The acts of the 1st respondent, 1st and 2nd alleged contemnors in disobeying the court orders are calculated to injure the dignity and authority of the court. It has also relied on the cases of **Econet Wireless Kenya Ltd vs the Minister of Information & 2 Others Nairobi Misc Application No. 1640 of 2003.** It prays that the application be allowed.

The 1st defendant's submissions

18. There is no affidavit of service filed by the plaintiff to enable the court to confirm that the order was served within three days from 27th November 2018 as required under order 40 rule 4(3) of the Civil Procedure Rules. The order was expert as it was issued based only on

submissions from one party, the plaintiff and made only for his benefit without arguments by or from the defendants. The same was not served within three days from 27th November 2018 hence it automatically lapsed in default of service. It has a put forward the case of **Immaculate Wambia Mungai vs Fredrick Mwai mwihia [2017] Eklr; Esther Kakonyo Wanjohi vs Julian Wambui Gakuru [2018] eKLR.**

19. Since the exparte order automatically lapsed for failure to serve within three days, the order had ceased to exist as at the time the application for contempt was filed and the same cannot be the basis upon which contempt proceedings would be founded. It has also put forward the case of **Jason Sore Shikuku vs Christopher Naibey Chemengu [2018] eKLR.**

20. The standard of proof in contempt proceedings must be higher than proof of a balance of probabilities, almost but not exactly beyond reasonable doubt, has not been met with regard to the allegations raised in the plaintiff's application. The claim that George Gachara went to the suit property with goons was disapproved by I P Koech who stated that no such incident occurred. The plaintiff's application ought to be fully dismissed with costs. It has also relied on the case of **Katsuri Limited vs Kapurchand Depar Shah [2016] eKLR.** It prays that the notice of motion dated 24th January 2019 be allowed.

The 2nd alleged contemnor's submissions

21. Order 5 rule 8 (1) of the Civil Procedure Rules, 2010 provides for service of pleadings on parties. The 2nd alleged contemnor had no knowledge of the existing orders granted on 27th November 2018. He has put forward the cases of **Central Bank of Kenya & Another vs Ratilal Automobiles Ltd & Others, Civil Application No. 247 of 2006; Awadh vs Marumbu [2004] eKLR.**

22. Service on the 2nd alleged contemnor is a mandatory requirement in a contempt of court proceedings. The applicant has failed to meet the threshold to warrant the issuance of orders for contempt or costs. He has put forward the cases of **Judicial Service Commission vs Speaker of the National Assembly & Another [2013] eKLR.** He prays that the notice of motion dated 14th March 2019 be dismissed with costs.

23. I have considered the two applications, the affidavits in support, the affidavits in reply, the respective written submissions made on behalf of parties and the authorities cited. The issues for determination are:-

- (i) *Whether service of the orders issued on 27th November 2018 were effected within the period stipulated by law.*
- (ii) *Whether the notice of motion dated 24th April 2019 is merited.*
- (iii) *Whether the 1st defendant and the 1st and 2nd alleged contemnor contemnors were served with the said orders.*
- (iv) *Whether the plaintiff has established contempt of the said orders.*
- (v) *Who should bear costs?*

24. **Order 40 rule 4(3)** of the Civil Procedure Rules, provides that:-

“In any case where the court grants an ex parte injunction the applicant shall within three days from the date of issue of the order serve the order, the application and pleading on the party sought to be restrained. In default of service of any of the documents specified under this rule, the injunction shall automatically lapse.”

25. According to Black's Law dictionary 10th Edition an ex parte means:-

“Done or made at the instance and for the benefit of one party only, and without notice to, or argument by anyone having an adverse interest; of relating to, or involving court action taken, or received by one party, without notice to the other, usually for temporary or emergency relief”.

26. The court record confirms that on the 27th November 2018, the matter came up for hearing of the notice of motion dated 19th September 2018. Mr. Thimba for the plaintiff/applicant was present. There was no appearance for the defendants. Mr. Thimba sought for orders in the interim which were granted as the 1st defendant had not filed any responses to the notice of motion dated 19th September 2019. The court granted the orders on this basis.

I agree with the counsel for the 1st defendant's submissions that the orders issued on 27th November 2018 were exparte. The same were not served on the 1st defendant within three (3) days contrary to order 40 rule 4(3) of the Civil Procedure Rules, 2010. The same orders therefore automatically lapsed. The plaintiff has not exhibited anything to prove that the orders were served within three days upon issue. The only confirmed and verifiable date of service is 23rd January 2019 as per the affidavit of Vincent Mambuga Sabatia. I rely on the case of **Immaculate Wambia Mungai vs Fredrick Mwai Mwihia [2017] eKLR.**

27. It is the 1st defendant's case that the plaintiff obtained the orders through deliberate concealment of material facts. That ownership of the suit property is in dispute. The plaintiff relied on a certificate of lease issued on 25th February 2014. It claims to have bought the suit property from Elite Elders Investments Limited through an agreement for sale dated 20th July 2012. The agreement for sale is exhibited. The

certificate of lease annexed to the application on the proprietorship section starts from transaction No. 7 which shows the plaintiff was registered as proprietor on 25th March 2014 and a certificate of lease issued on the same date (No 8) on the same date the suit property was charged to Cooperative Bank of Kenya Ltd for Kshs.10,850,000/-. There is no history of how Elite elders Investment Ltd acquired the suit property one wonders what was the intention of the plaintiff in omitting transactions on the suit property from NO. 1 to 6. Clearly there is something it did not want the court to see.

28. I have gone through the affidavit of Cecilia Wangari Koigu the director of survey and GIS of the 1st defendant. In paragraph 3 of the affidavit she deposes:

“that from our records, the suit property Title No. Nairobi/Block 107/383 is public property on which a health center is supposed to be constructed and the property has never been allocated to an individual. A copy of the approval scheme plan showing the suit property indicated as HC for Health Center, is annexed hereto and marked “CWK-2”.

She has also annexed a letter of allotment to the 1st defendant from the National Land Commission in respect of the suit property.

29. I have gone through the entire affidavit of Cecilia Wangari Koigu and am convinced that this could be public property of which evidence will be adduced during the hearing. The plaintiff cannot rely on the certificate of lease alone without any history of how the land was acquired by an entity called Elite Elders Investments Limited. I find merit in the notice of motion dated 24th January 2018 and the same is allowed.

30. As stated earlier the orders issued on 27th November 2018 automatically lapsed for lack of service within the stipulated period. The notice of motion dated 14th March 2019 therefore cannot stand. In the case of **Jason Sore Shikuku vs Christopher Naibey Chemengu [2018], eKLR**, the Court held that:-

“An order that has lapsed ceased to exist and cannot be the basis upon which any contempt proceedings can be founded”

31. Even if the orders had not lapsed the plaintiff still had to prove that the alleged contemnors were duly served. The plaintiff has failed to prove service. It has also failed to prove that the alleged contemnors are guilty of the acts complained of. In paragraph 16 of the replying affidavit of David Chege Mworira sworn on the 14th March 2019, he states:-

“That intend to file a contempt proceedings against Hon. Joseph H. Ouma Ndonji and one George Gachara who incited the youth, accompanying them to destroy the plaintiff’s mabati fence and evicted the plaintiff’s employees from the suit land and yet they were served with the court orders dated 27th November 2018”.

It is clear from the above averment that the alleged contemnors are not the ones who committed the acts complained of.

32. The upshot of the matter is that I find no merit in the notice of motion dated 14th March 2018 and the same is dismissed with costs to the respondents. Consequently, the notice motion dated 24th January 2019 is found to have merit and I grant the orders sought namely:-

(a) That the orders issued on 27th November 2018 are hereby discharged, and/or set aside.

(b) That the OCPD Buru Buru police station is hereby directed to ensure that order is preserved on the suit property being Nairobi/Block 107/383 pending the hearing and determination of this suit.

(c) The costs do abide the outcome of the main suit.

It is so ordered.

Dated, signed and delivered in Nairobi on this 5th day of December 2019.

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L. KOMINGOI

JUDGE

In the presence of:-

Mr. Wachira for Thimba for the Plaintiff

Ms Oloo for the 1st Defendants

Ms Martins for Faraji, 2nd alleged contemnor

Kajuju – court assistant