



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT GARISSA

ELC CASE NO. 25 OF 2017

TABITHA NDUNGE MUTEMI.....PLAINTIFF

VERSUS

MUTEMI MUTIA.....DEFENDANT

RULING

The application before me is the Notice of Motion dated 7/9/2017 brought under Order 40 Rule 3 (1) and 3 CPR. The applicant is seeking the following orders:

- 1. Spent**
- 2. The respondent be detained in prison for a term not exceeding six (6) months for disobeying an order of this court, given and issued on 31st May, 2017 and served on 6th June 2017.**
- 3. Any other relief in favour of the applicant.**
- 4. Costs of this Notice of Motion be provided for.**

The application is supported by grounds apparent in the face of that application and the supporting affidavit of one Peter Musyoka who is the caretaker of the applicant herein.

The applicant also attached a copy of a consent order by the parties herein entered on 31st May 2017. That application is opposed by the respondent with a replying affidavit sworn on 22nd November, 2017. Both parties have attached documents in support of their respective positions.

The genesis of the application for contempt is a consent order entered by the parties on 30/5/2017 whose contents are as follows:

1. THAT the defendant shall not sell/or dispose the suit properties namely:

- (i) Mwingi/Mwingi/112**
- (ii) Mwingi/ Kanzanzu 1**
- (iii) Mwingi/Mwingi/ 298 and**
- (iv) Migwani/ Kyamboo/561**

Pending hearing and final determination of this suit.

- 2. THAT the plaintiff to be allowed unlimited access to the matrimonial home situated in Migwani/Kyamboo/561 pending hearing and final determination of this suit.**
- 3. THAT costs in the cause.**

According to the applicant the alleged acts committed by the respondent and which are alleged to constitute a contempt of the court order are as follows:

- (a) Bringing sand for renovation.**
- (b) Collecting rent from the tenants**
- (c) Disposing tenants dust bins**
- (d) Clearing flowers**
- (e) Installed a new pad lock for the corridor**
- (f) Replaced bulbs for the corridor**
- (g) After clearing the flowers on 4/9/2017 he replanted others on 5/9/2017**
- (h) Brought sand for renovation.**

According to the consent ordered entered by consent of the parties on 30/5/2017 the defendant was ordered not to sell/or dispose the suit properties named herein above. Whether the actions complained by the applicant such as bringing sand for renovation or collecting rent from tenants constitute a contempt of court in my view is negative. Bringing sand for renovation in my understanding is adding value to the properties in question. The issue of collecting rent from any of the properties was not a subject of the consent order entered by the parties. In any event there is no iota of evidence shown in the affidavit in support that the respondent was collecting rent from tenants. The applicant has raised other complaints purporting to constitute acts of contempt of court such as disposing tenants dust bins and clearing and planting new flowers. There is no affidavit by a single tenant who complained that her dust bin has been disposed by the respondent.

Suffice to say that an application for contempt is a weighty issue which if proved to the required standard deprive the respondent his constitutional right and freedom under the constitution and the Bill of Rights. The standard of proof in such cases is usually higher than the balance of probabilities but lower than beyond reasonable doubt.

Having weighed the application and the replying affidavit together with the submissions by the counsels, I return with a verdict that the application has not been proved on the required standard. In the result, the application has not been proved on the required standard. In the result, the application dated 5/5/2017 lack merit and the same is hereby dismissed with each party to bear her own costs.

Read and delivered in the open court this 2nd day of February, 2018

Hon. E.C Cheronno (Mr.)

ELC Judge

In the presence of:

1. Ijabo – Court clerk
2. In the absence of the parties.