



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC SUIT NO. 309 OF 2016**

**WESTERN SEED COMPANY LTD.....PLAINTIFF**

**VERSUS**

**ABSALOM NGALO.....DEFENDANT**

**RULING**

On 17<sup>th</sup> February, 2017, the court granted orders on the following terms:

1. That the defendant's preliminary objection dated 11th April, 2016 is dismissed.
2. That an interlocutory order is hereby issued restraining the defendant either by himself or through his agents, employees, servants and/or proxies from entering and remaining on, trespassing, encroaching, dealing with, alienating and/or interfering with the plaintiff's peaceful enjoyment of the suit premises known as Land Reference No. 209/11935(hereinafter "the suit property") pending the hearing and determination of this suit.
3. That the OCS Kayole Police Station assists in the enforcement of the order.
4. That the plaintiff shall have the costs of the application and the preliminary objection.

In the ruling that gave rise to that order, the court made a finding that the plaintiff had satisfied the conditions for granting a temporary injunction that were enunciated in the case of *Giella vs. Cassman Brown and Co. Ltd. (1973) E.A 358*. The court was satisfied on a prima facie basis that the plaintiff was the owner of the suit property. The court found no evidence that the defendant had a valid claim over the suit property. The court was also satisfied that the plaintiff stood to suffer irreparable harm which could not be compensated in damages if the injunction it had sought was not granted. The court also noted that the plaintiff was in possession of the suit property and that the defendant had made attempts to dispossess the plaintiff of the property.

The defendant was dissatisfied with the said orders of 17<sup>th</sup> February, 2017 and lodged a notice on 23<sup>rd</sup> February, 2017 of his intention to appeal against the same to the Court of Appeal. What is now before me are two (2) applications one by the defendant and the other by the plaintiff. The defendant's application was brought by way of Notice of Motion dated 23<sup>rd</sup> February, 2017. In the application the defendant has sought a stay of execution of the said orders that were made on 17<sup>th</sup> February, 2017 pending the hearing and determination of his appeal to the Court of Appeal.

The plaintiff's application on the other hand was brought by way of Notice of Motion dated 12<sup>th</sup> June, 2017. In the application, the plaintiff has sought the setting aside of the orders of status quo that the court had granted to the defendant on 6<sup>th</sup> March, 2017, an order that the defendant be committed to jail for six (6) months for contempt of court and an order that the defendant do pull down the buildings and other developments that he had undertaken on the suit property and to remove the debris and other material from the suit property failing which the exercise be undertaken by the plaintiff at the expense of the defendant.

The defendant's application being the first in time will be considered first. The defendant's application was brought on the grounds that the defendant was dissatisfied with the decision of the court made on 17<sup>th</sup> February, 2017 and had preferred an appeal against the same to the Court of Appeal. The defendant contended that his appeal has high chances of success and that unless the stay is granted, he will suffer irreparable harm. The application was supported by the affidavit and further affidavit sworn by the defendant on 23<sup>rd</sup> February, 2017 and 18<sup>th</sup> July, 2017 respectively. In the two affidavits, the defendant maintained that he is the owner of the suit property and that he is not a trespasser.

The application was opposed by the plaintiff through a replying affidavit sworn by Albert Ayiro on 22<sup>nd</sup> March, 2017 and grounds of opposition of the same date. The plaintiff contended that the defendant is a trespasser on the suit property and that the orders sought if granted would be tantamount to legalizing the defendant's continued acts of trespass on the suit property. The plaintiff contended further that the defendant had not demonstrated what loss he was likely to suffer if the stay sought is not granted. The plaintiff contended that if the court is inclined to grant the stay sought, the defendant should be compelled to provide security in the sum of Kshs. 1,000,000/- per month payable in a joint account in the names of the advocates on record on the 5<sup>th</sup> day of the month until the intended appeal is heard and determined being the rent that the plaintiff would lose by the defendant's continued occupation of the suit property.

The application was argued orally before me on 25<sup>th</sup> July, 2017. I have considered the defendant's application together with the affidavits filed in support thereof. I have also considered the plaintiff's affidavit and grounds of opposition that were filed in opposition to the application. As was stated in the case of Halai & Another –vs- Thornton & Turpin (1963) Ltd [1990] KLR 365, this court's discretion to order stay of execution of its order or decree is fettered by three conditions. The first condition is that the applicant must establish sufficient cause to warrant the granting of the stay sought. Secondly, the applicant must satisfy the court that substantial loss would ensue if the stay sought is not granted and lastly, the application must be brought without unreasonable delay and the applicant must furnish security.

On the material before me, I am not satisfied that the defendant has met the conditions for granting the orders sought. As I observed earlier in this ruling, the court had made a preliminary finding that the plaintiff is the owner of the suit property and that the defendant was a trespasser. The court had also reached a conclusion that the plaintiff would suffer irreparable loss if the injunction was not granted. The defendant's case has not changed. The defendant has maintained in the application for stay that he is the owner of the suit property. The defendant has not placed any new material before me that can persuade me to depart from my earlier findings. I am not satisfied that the defendant has established sufficient cause to warrant the stay sought. In her submission, the defendant's advocate had submitted that the defendant was unwilling to furnish security as a condition for the stay sought because he was paying land rates for the suit property. This court is barred under Order 42 rule (6) of the Civil Procedure Rules from granting a stay unless the applicant furnishes security. The defendant who is unwilling to furnish security cannot therefore be granted an order for stay of execution. For the foregoing reasons, I find no merit in the defendant's application dated 23<sup>rd</sup> February, 2017.

The plaintiff's application on the other hand was brought on the grounds that on 17<sup>th</sup> February, 2017, the court made an order restraining the defendant from among others trespassing on or interfering with the plaintiff's peaceful enjoyment of the suit property pending the hearing and determination of the suit. The plaintiff has averred that the defendant was aware of the said order and had moved the court for a stay of the same. The plaintiff has averred that when the defendant's application came up for hearing ex parte, the court issued an order for the status quo to be maintained. The plaintiff has averred that the defendant intentionally misrepresented the said orders of the court and proceeded to demolish the plaintiff's perimeter wall and commenced construction on the suit property in violation of the orders that had been granted earlier by the court. The plaintiff's contempt application was supported by the affidavit of the plaintiff's Manager, Albert Ayiro sworn on 12<sup>th</sup> June, 2017.

The contempt application was opposed by the defendant through a replying affidavit sworn on 18<sup>th</sup> July, 2017. The defendant denied that he was in contempt of the orders that were issued by the court on 17<sup>th</sup> February, 2017. The defendant has contended that he was at all material times in possession of the suit property and that the order of status quo that was granted in his favour on 6<sup>th</sup> March, 2017 restrained the plaintiff from interfering with his possession of the suit property. The defendant has denied that he was involved in the destruction of the plaintiff's wall. The defendant has contended that the said wall was demolished in the year 2016 and in fact it was the subject of a criminal case in which the defendant was the accused. The defendant has denied carrying out any construction on the suit property and has termed the contempt application frivolous, vexatious and an abuse of the court process.

The contempt application was argued orally together with the defendant's application for stay. I have considered the application and the affidavit in reply that was filed by the defendant in opposition thereto. I have also considered the submissions by the parties' respective advocates. The law on contempt of court is now settled. In the case of Katsuri Limited vs. Kapurchand Depar Shah (2016) eKLR, it was held that in order to succeed in civil contempt proceedings, the applicant has to prove:

- (i) The terms of the order alleged to have been disobeyed.
- (ii) Knowledge of these terms by the respondent; and
- (iii) Failure by the Respondent to comply with the terms of the order.

In the book, Contempt in Modern New Zealand, the author has stated as follows:-

*“There are essentially four elements that must be proved to make a case for civil contempt. The applicant must prove to the required standard.....that:-*

- (a) the terms of the order (or injunction or undertaking) were clear and unambiguous and were binding on the Defendant;*
- (b) the defendant had knowledge of or proper notice of the terms of the order;*
- (c) the defendant has acted in breach of the terms of the order;*

*and,*

- (d) the defendant's conduct was deliberate.*

In the case of Mutitika vs. Baharini Farm Ltd. (1985) KLR 227, the court held that the standard of proof of contempt of court must be beyond a balance of probabilities but not beyond reasonable doubt. The burden of proof of the contempt alleged against the defendant was on the plaintiff. I am not satisfied that the plaintiff has discharged this burden of proof. The plaintiff has placed no evidence before the court showing that the defendant had demolished the perimeter wall it had constructed around the suit property after the order of 17<sup>th</sup> February, 2017. The evidence before the court shows that the demolition of the said wall was carried out in the year 2016. There is also no evidence that the structures that are shown in the photographs annexed to the plaintiff's affidavit in support of the application were put up by the defendant. For the foregoing reasons, I find no merit in the plaintiff's application dated 12<sup>th</sup> June, 2017.

The upshot of the foregoing is that the defendant's Notice of Motion application dated 23<sup>rd</sup> February, 2016 and the Plaintiff's Notice of Motion application dated 12<sup>th</sup> June, 2017 both fails. The same are dismissed with each party bearing its own costs.

**Delivered and Signed at Nairobi this 8<sup>th</sup> day of March, 2018**

**S. OKONG'O**

**JUDGE**

**Ruling read in open court in the presence:**

Mr. Akwabi holding brief for Mr. Lutta for the Plaintiff

Ms. Omwakwe for the Defendant

Catherine Court Assistant