



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC SUIT NO.754 OF 2016

BAYVIEW INVESTMENTS LIMITED.....PLAINTIFF

VERSUS

KENYA AIRPORTS AUTHORITY.....DEFENDANT

RULING

The Plaintiff brought this suit against the Defendant on 4th July, 2016 seeking among others a permanent injunction to restrain the Defendant from further encroachment onto, trespass upon and/or damage to the whole or part of the Plaintiff's parcel of land known as L.R No. 209/12324 (hereinafter referred to as "the suit property"). In its plaint, the Plaintiff averred that it was the registered proprietor of the suit property and that the Defendant had unlawfully and without its permission trespassed on the suit property and began excavation. The Plaintiff averred that it was suffering massive losses arising from the defendant's occupation of the suit property and that the Defendant had refused to vacate the property.

Together with the plaint, the Plaintiff filed an application by way of Notice of Motion dated 1st July, 2016 seeking a temporary injunction to restrain the Defendant from further encroachment, trespass and causing damage to the suit property pending the hearing and determination of the suit. The Plaintiff's application was heard ex parte by the duty judge on 5th July, 2016 who granted the injunction sought on a temporary basis pending the hearing of the application inter partes. The said interim orders were extended on 20th July, 2016 and 27th July, 2016 when the hearing of the said injunction application did not take off.

What I now have before me is the Plaintiff's application by way of Notice of Motion dated 9th August, 2016 seeking an order to commit to civil jail or impose appropriate sanctions against the Defendant's acting Managing Director, Mr. Nicholas Bodo and the Defendant's Corporation Secretary, Ms. Katherine Kisila for blatantly and intentionally disobeying the said order of injunction. The application is supported by the affidavit of the Plaintiff's Managing Director, Raphael Ole Seya and the affidavit of one, Chris Kimani both sworn on 9th August, 2016. In his affidavit, the Plaintiff's Managing Director has averred that the court did issue an order on 5th July, 2016 restraining the Defendant from encroaching, trespassing on or damaging the suit property which order was extended from time to time. He has averred that the order was duly served upon the alleged contemnors by a process server of this court. He has averred that despite having been served with the said court order, the Defendant's agents were seen in the wee hours of the morning on 29th July, 2016 carrying out construction on the suit property. He has averred that the Defendant had continued trespassing on and causing damage to the suit property despite the said court order. He has averred that it is necessary in order to preserve the dignity of the court and the inviolability of the judicial process to punish the alleged contemnors for their acts of impunity and disdain for the court.

In his affidavit in support of the said application, Chris Kimani has stated that he is the Managing Director of a company known as Dambuster E. A Limited which is operating a restaurant on a parcel of land adjacent to the suit property. He has stated that it was within his knowledge that the suit property belonged to the Plaintiff and that the Plaintiff had allowed his company to use the property for parking. He has stated that the Plaintiff's Managing Director had informed him that the Defendant had invaded the suit property and commenced construction of what appeared to be a parking facility a fact which he confirmed at the site. He has stated that the Plaintiff's said Managing Director informed him further that the Plaintiff had gone to court and had obtained an order of injunction on 5th July, 2016 restraining the Defendant from trespassing on the suit property.

He has stated that the defendant did not stop construction works on the suit property even after the said court order was issued. He has stated that on 29th July, 2016 while he was at his restaurant aforesaid, he saw and took photographs of the agents of the Defendant carrying out welding works on the suit property which photographs he shared with the Plaintiff's Managing Director. He has stated that the Defendants continued with construction works on the suit property even after the said date of 29th July 2016. He has annexed to his affidavit, the photographs he claims to have taken on 29th July, 2016.

The application was opposed by the Defendant through a replying affidavit sworn by the Defendant's Corporation Secretary Katherine N. Kisila on 5th December, 2016. Ms. Kisila has averred that the suit property forms part of the land that was reserved for Wilson Airport under L.R No. 209/13080, Grant No. 70522. She has averred that the Defendant did not sanction the excision of the suit property which is public

land from L.R No. 209/13080, Grant No. 70522 and the alienation of the same to the company which sold it to the Plaintiff. She has averred that the Defendant who had no knowledge of the Plaintiff's interest in the suit property has over the years been using the suit property which is situated at the entrance of Wilson Airport on Langata Road as a designated security screening and parking area for its staff and visitors.

Ms. Kisila has stated further that after the Defendant was served with the court order that was made herein on 5th July, 2016, it ceased construction on the suit property. She has stated that when its advocates on record received letters from the Plaintiff's advocates on 26th July, 2016 and 4th August, 2016 claiming that the Defendant had disobeyed the orders of 5th July, 2016 aforesaid, the representatives of the Defendant and its advocates on record conducted a joint visit to the suit property on 4th August, 2016 on which visit, they confirmed that the construction had stopped. She has stated that the application herein that was filed after the construction on the suit property had stopped was meant to harass the Defendant. She has averred further that by the time the Plaintiff sought and obtained the interim order of injunction which the Plaintiff claims to have been disobeyed, the Plaintiff had not even established the boundaries of the suit property.

The application was argued by way of written submissions. The plaintiff filed its submissions on 6th June, 2017 while the Defendant filed its submissions in reply on 30th June, 2017. 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 and the authorities that were cited in support thereof. The law on contempt of court is now settled. As was held in the case of Katsuri Limited vs. Kapurchand Depar Shah (2016) eKLR that was cited by the Defendant in its submissions, 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 that was also relied on by the Defendant, 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) LKR 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. It is not disputed that the court issued an order on 5th July, 2016 restraining the defendant from trespassing onto and/or causing damage to the suit property. The terms of the said order and knowledge of the same on the part of the Defendant and the alleged contemnors is also not disputed. What is disputed is the alleged breach of the said order by the Defendant.

The burden of proof of the alleged contempt was on the Plaintiff. What the Plaintiff has placed before the court as proof of the alleged contempt are photographs allegedly taken by one, Chris Kimani on 29th July, 2016 between 1:15 a.m. and 1:46a.m. The Plaintiff did not place before the court the original photographs. The photographs annexed to the affidavits of the Plaintiff's Managing Director, Raphael Ole Seya and Chris Kimani who is said to have taken the same are either photocopies of the original photographs or photographs printed from a computer without any form of processing. The photographs contain dark images which are difficult to comprehend. According to paragraph 6 of the affidavit of Raphael Ole Seya, the said photographs are supposed to show the construction works which were being undertaken by the Defendant on the suit property.

In paragraph 7 of the affidavit of Chris Kimani, he has stated that what he captured in the said photographs were welding works being undertaken by the Defendant. Due to the poor images in the said photographs, I am unable to see the alleged construction or welding works. There is also no evidence that the activities captured in the said photographs were taking place on the suit property. It is not clear why the photographs were taken at night. I wonder why the Plaintiff's Managing Director and the said Chris Kimani who claimed that the construction on the suit property was still continuing as at the time they swore the affidavits in support of the application herein on 9th August, 2016 did not take clear photographs of the alleged acts of contempt during the day. I am in agreement with the submission by the Defendant that the Plaintiff has not proved the contempt alleged against the alleged contemnors who are the Defendant's employees to the required standard.

The upshot of the foregoing is that the Plaintiff's application dated 9th August, 2016 has no merit. The same is dismissed with costs to the Defendant.

Delivered and Dated at Nairobi this 2nd day of March 2018

S. OKONG'O

JUDGE

Ruling delivered in open court in the presence of

No appearance for the Plaintiff

Mr. Karuga for the Defendant

Catherine Court Assistant