

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ELC NO. 388 OF 2016

JOSEPH MUTWIRI MAINGI.....PLAINTIFF

-VERSUS-

SALIM MRUCHE.....DEFENDANT

RULING

1. By a Notice of Motion dated 16th January 2018, the plaintiff/applicant is seeking an order that the defendant /respondent, Salim Mruche be committed to civil jail for contempt of court. The application is based on the grounds on the face of the motion and supported by the affidavit of Joseph Mutwiri Maingi, the applicant sworn on 16th January 2018. Briefly, the applicant avers that on 15th June 2017 this court made an order restraining the defendant by himself, his servants, agents or employees from erecting or causing to be erected structures whether permanent or temporary, undertaking or causing to be undertaken any building or construction works, or otherwise from entering, alienating or interfering in any way with the suit land LR.MN/V/1990 pending the hearing of this suit. That the orders are still in force and the suit is yet to be determined as it is scheduled for hearing on 10th May 2018. That the order was personally served upon the defendant on 13th July 2017 but on 5th January 2018, in total disregard of the said order and in blatant contempt of the court, the defendant commenced construction and purported to sell portions of the suit land to a third party who likewise commenced construction of a house.

2. The application is opposed by the defendant who filed replying affidavit sworn by himself on 13th March 2018 in which he denies having been served with the said order or any other documents. He states that the house shown in the photograph attached to the plaintiff's affidavit is a house which was completed in the year 2006 and was initially a mud house and belongs to his son, one Yusuf Salim Mruche and is located about 2 kilometres from the defendant's house. He further states that on 28th September 2015 he was served with an order in ELC Case No. 238 of 2015 in reference to Plot No. 622, 628,629,721 and 734.

3. The plaintiff's counsel made oral submissions reiterating the facts in the supporting affidavit and urged the court to grant the order and commit the defendant to civil jail.

4. I have considered the application, the affidavit in support and against and the submissions made. The application is said to be brought under Section 3 and 3A of the Civil Procedure Act and Section 5 of the Judicature Act. However, Section 5 of the Judicature Act was repealed by Act No. 46 of 2016. Nonetheless, I have to consider the application on its merits.

5. The standard of proof in matters of contempt of court is well settled. It must be higher than proof on a balance of probabilities but not exactly beyond reasonable doubt. See the case of *Mutika –vs- Baharin Farm Ltd [1985] KLR 227* and the case of *Refrigerator & Kitchen Utensils Ltd –vs- Gulabchand Popatlial Shah & Others, Civil Appeal No. 39 of 1990*. This is because the charge of contempt of court is an offence of Criminal character and a party may lose his liberty. I must therefore satisfy myself beyond any shadow of a doubt that the defendant disobeyed the Order of 27th June 2017.

6. The applicant seeks to have the defendant cited for contempt of the court order made on 15th June 2017 and issued on 27th June 2017 for commencing construction and purporting to sell portions of the suit property to a third party who has likewise commenced construction of a house on the suit property. The defendant has not only denied service of the said order on him but has stated that the houses shown in the photographs annexed to the plaintiff's affidavit are his son's houses on a different Plot and which were completed in 2006. The plaintiff did not refute these allegations.

7. In the plaint dated 8th December 2016 and filed herein, on the same day, one of the reliefs sought by the plaintiff is an order directing the defendant to vacate the plaintiff's plot and to demolish his structure standing thereon. The photographs annexed to the plaintiff's affidavits shows houses that already are complete. The plaint as already noted sought an order for demolition of those structures. Indeed in paragraphs 5, 6 and 7 of the plaint, the plaintiff has pleaded that in the month of June and July 2016, the defendant carried out construction on the suit property. There is no evidence of the kind of structures that were there in 2016 and those alleged to have been constructed after the order of 15th June 2017 was issued. This raises doubts on the part of the plaintiff's allegations. It is not clear to this court which construction was undertaken before and which one was made after the issuance of the court order. As already stated above, the defendant has denied service of the order. He has also stated that the constructions shown are on a different plot and were completed in the year 2006. The plaintiff did not file response challenging the defendant's allegations.

8. From the evidence on record, I cannot safely hold that the defendant disobeyed the orders of the court issued on 27th June 2017. I am therefor not satisfied that the applicant has proved the alleged contempt on the part of the defendant/respondent. Consequently, I do find that the Notice of Motion dated 16th January 2018 lacks merit and hereby dismiss it with costs.

Delivered signed and dated at Mombasa this 10th day of May 2018.

C. YANO

JUDGE