



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

MILIMANI LAW COURTS

ELC NO. 932 OF 2016

THE TRUSTEES, KENYA PORTS AUTHORITY

PENSION SCHEME.....APPLICANT

VERSUS

THE NAIROBI CITY COUNTY & ANOTHER.....RESPONDENT

AS CONSOLIDATED WITH MISC.APPLICATION NO.334 OF 2016

THE TRUSTEES, KENYA PORTS AUTHORITY

PENSION SCHEME.....APPLICANT

=VERSUS=

THE NAIROBI CITY COUNTY & ANOTHER.....RESPONDENT

RULING

1. The plaintiff/applicants filed a notice of motion dated 28th November 2016 in which they sought orders of the court to punish the respondents for being in contempt of a court order. The applicants had filed an application for injunction against the respondents restraining the respondents from constructing structures on an area they contend is set aside as a turning point into Bellevue Estate which is situated on LR No.209/10477/2 and LR No.LR No.209/10216/2.

2. The applicants appeared before court on 2nd August 2016 where they obtained an ex-parte injunction. The injunction orders which were obtained on 2nd August 2016 were subsequently extended in the presence of counsel for the respondents. The applicants now contend that the respondents have disobeyed the said court order in that the structures which the respondents were stopped from constructing have been constructed and they have been leased out.

3. The second respondent opposed the applicants' application based on a replying affidavit sworn on 5th April 2017. The second respondent contends that she was not served with any court order and that she has not disobeyed any court order. The second respondent further states that she has never participated in beautification of the contested kiosks or has never had interest in any of those kiosks. The second respondent further contends that there is no evidence which has been placed before the court to show that she has contravened any court order.

4. The first respondent did not file any response to the application. I have considered the applicants' application as well as the opposition to the same by the second respondent. I have also considered the submissions by the applicants. The only issue for determination in this application is whether the respondents are guilty of contempt of court order.

5. In an application for contempt of court, the applicant has to prove the following :-

1. That there was a court order which was issued.

2. That the said order was served on the contemnor or that the contemnor had knowledge of the court order.

3. That the contemnor wilfully disobeyed the court order.

6. There is no doubt that there was a court order given on 2nd August 2016. This order was issued on 8th August 2016. There is evidence that the order was served upon the first respondent on 8th August 2016. This is clear from the stamp of the first respondent's litigation section. There is also evidence that the second respondent's advocates were aware of the order as they were served when the order was extended.

7. The only issue which remains to be determined is whether there was disobedience of the court order. The second respondent is a member of county assembly (MCA) where the disputed kiosks have been put up. The first respondent had granted a Temporary Occupation Licence (TOL) to a company called Possible Limited to put up kiosks on the disputed area. When the Kiosks were being put up, the applicants through a company which manages Bellevue Estate complained to the first respondent. The first respondent cancelled the TOL.

8. A surveyor went to the ground and found out that the kiosks were being put up on a road reserve and that there was no encroachment on to the applicants' property. The first respondent restored the TOL. These are facts which were raised in the second applicant's replying affidavit. There was no further affidavit to controvert these averments. The position therefore remains that the area where the kiosks are put up is a road reserve.

9. The issue which emerges for determination in the circumstances is whether a contemnor can be punished for disobeying an order when it is clear that such an order was given based on erroneous facts. The answer is simple, there can be no punishment meted on a contemnor when it is clear that the order which is alleged to have been disobeyed was based on wrong information. The applicants do not own the road reserve where the kiosks are built. It is the first respondent which is mandated to give TOL on such road reserve. I therefore find that the applicants application lacks merit. The same is hereby dismissed with costs to the respondents.

It is so ordered.

Dated, Signed and delivered at Nairobi on this 28th day of June 2018.

E.O.OBAGA

JUDGE

In the presence of :-

M/s Suna for M/s Nasimiyu for applicant

Court Clerk: Hilda

E.O.OBAGA

JUDGE