



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CIVIL SUIT NO. 662 OF 2009

BOOKER MBUGUA GACHERU T/A VAS DISTRIBUTORS.....PLAINTIFF

=VERSUS=

RUNDA WATER LIMITED.....1ST DEFENDANT

PETER GACHUHI.....2ND DEFENDANT

KITHAKA MBERIA.....3RD DEFENDANT

WACHIRA KARITE.....4TH DEFENDANT

RULING

1. On 23/9/2016, Gitumbi J rendered a judgment in this suit. Consequent to that judgment, a formal decree was extracted in the following verbatim terms:-

“This matter coming up for hearing of the main suit on the 19th and 20th June 2013 upon reading submissions by the counsels and whereas this matter coming up for judgment this 23rd September 2016 before Lady Justice Gitumbi

IT IS HEREBY ORDERED AND DECREED

- 1. That plaintiff’s title deed is prima facie evidence that the plaintiff is indeed the absolute and indefeasible owner of the suit property.**
- 2. That the plaintiff’s title is valid and that the court shall not issue an order to cancel the same or rectify entries in the register.**
- 3. That the decision of the Director of Planning to change the user of the suit property stands.**
- 4. That the plaintiff is entitled to enjoy all the rights and privileges appurtenant to the suit property and is at liberty to develop the suit property in the manner that he deems fit.**
- 5. That the defendants are hereby directed to grant access to the plaintiff to the suit property.**
- 6. That claim for special damages amounting to Kshs 28,800,000 is not awarded as the same was not specifically pleaded or proved.**
- 7. That each part shall bear their own costs.**

2. Subsequently, on 24/1/2017, the plaintiff brought a notice of motion of even date seeking the following enforcement orders:-

- 1. This application be certified as urgent and service thereof be dispensed with in the first instance**
- 2. The Officer Commanding Police Division (Gigiri Police Station) be and is hereby ordered to give such assistance as shall be necessary to enable the plaintiff access to the property known as Land Reference Number 7785/1303.**
- 3. Costs of this application be provided for.**

3. Further on 14/12/2017, the plaintiff brought a second notice of motion dated 14/12/2017 seeking contempt orders in the following terms:-

1. Peter Mwangi of P O Box 613-00621, Nairobi being the Chairperson of the 1st^t defendant, Helga Schroeder of P O Box 613-00621, Nairobi being the Secretary of the 1st Defendant and Shabbir Barthi P O Box 613-00621, Nairobi being the Treasurer of the 1st Defendant do stand committed to jail for such a period as this honourable court may determine for contempt of court by knowingly disregarding the decree given by Hon Lady Justice Mary M Gitumbi on 23rd September 2016.

2. Peter Mwangi, Helga Schroeder and Shabbir Barthi being the Chairperson, Secretary and Treasurer respectively of the 1st Defendant be ordered to pay an appropriate fine for knowingly disregarding the decree given by Hon Lady Justice Mary M Gitumbi on 23rd September 2016.

3. Any other relief this honourable court may deem just and fit to grant

4. The two applications are the subject of this ruling. Both applications are opposed by the defendants.

5. The application dated 24/11/2017 (the **1st application**) was supported by an affidavit sworn on 24/11/2017 by Vijay Morjaria. He contended that he was a director of La-Terro Limited which is the beneficiary of a general power of attorney donated by the plaintiff to manage and transact all affairs of the plaintiff in relation to this suit. He contended that since the delivery of the judgment herein, the defendants and their agents had prevented the plaintiff from accessing the suit property and they had physically interfered with the plaintiff's access to the suit property. He further deposed that his complaint to the local police station had not elicited any assistance. He contended that the defendants' conduct had deprived the plaintiff of the value of its investment in the suit property and the plaintiff was unable to make any return on its investment which was obtained through a commercial facility. He urged the court to grant the orders.

6. The application dated 14/12/2017 was similarly supported by an affidavit sworn on even date by Vijay Morjaria. He reiterated that he was a director of La-Terro Limited which holds a general power of attorney donated by the plaintiff to manage and transact all affairs of the plaintiff in relation to this suit. He deposed that since the extraction of the decree herein, Peter Mwangi, Helga Schroeder and Shabbir Barthi, being the Chairperson, Secretary and Treasurer, respectively, of the 1st defendant had ignored, failed, connived and otherwise neglected to comply with the obligations placed upon them by the court, hence they were in contempt of the decree of the court. He further deposed that he believed that the alleged contempt was as a result of the consent, connivance or neglect of Peter Mwangi, Helga Schroeder and Shabbir Barthi hence they should be equally held liable for the contempt.

7. The respondents raised a preliminary objection to the 1st application contending that the application was misconceived, fatally defective and baseless in law because Vijay Morjaria and La-Terro Limited did not have any proprietary interest in the suit property.

8. The 2nd application was opposed through a replying affidavit sworn on 26/3/2018 by Peter Mwangi. He deposed that he had the authority of Helga Schroeder and Shabbir Barthi to swear the affidavit on their behalf and on his own behalf. He deposed that Vijay Morjaria was not a party to the suit in his personal capacity and did not have the locus to move the court in any way or seek to enforce any orders against the respondents. He further deposed that the alleged contempt was statute-barred under Section 34 of the Contempt of Court Act. He added that the 1st defendant is a separate legal entity and the parties against whom the applicant sought contempt orders were not directors officials or agents of the 1st defendant. He further deposed that the applicant had failed to tender evidence to link the subjects to the 1st defendant and demonstrate that the 1st defendant was served with the decree. Lastly, he deposed that he had never been served with any decree and he was not aware that the plaintiff had attempted to gain access to the suit property. He urged the court to dismiss the application.

9. The two applications were canvassed through written and oral submissions. Mr. Mogere submitted on behalf of the applicant. On the issue of Mr Vijay Morjaria's locus, counsel submitted that the material power of attorney had been on record since 5/3/2012 and it was on that basis that Vijay Morjaria testified at the trial of this suit. On service of the decree, Mr Mogere submitted that the subjects were aware of the decree because the defendants brought an application for stay of execution and they also filed an appeal against the judgment of the court.

10. In response, Mr Muthee, counsel for the defendants submitted that Vijay Morjaria was a stranger to this suit. He added that the power of attorney granted to La-Terro Limited did not confer ownership rights to the piece of land. He further submitted that Vijay Morjaria had brought the applications for his own benefit and not for the benefit of the plaintiff. Secondly, he argued that the contempt proceedings offended Section 34 of the Contempt of Court Act in that they had been brought outside the limitation period of 12 months.

11. I have considered the two applications. I have also considered the responses thereto and the rival submissions. I have similarly considered the relevant legal framework and jurisprudence.

12. Two issues fall for determination in the 1st application. The first issue is whether Vijay Morjaria had locus to swear an affidavit in support of the application. The second issue is whether a basis has been laid for police assistance. Ordinarily, an application seeking police assistance can properly be disposed by the Deputy Registrar of the Court.

13. This matter came to me after judgment had been rendered. A perusal of the court record reveals that the plaintiff produced a power of attorney registered under the Registration of Documents Act on 20/2/2012. Under the said power of attorney, the plaintiff donated powers to La-Terro Limited to manage and transact all his affairs in the present suit. Mr Vijay Morjaria contends that he is a director of the said La-Terro Limited and it is in that capacity that he swore the affidavit in support of the first application. He adds that it is in the same capacity that he prosecuted this suit, leading to the judgment in this suit.

14. In my view, as a witness, Vijay Morjaria has the locus to swear the affidavit to depose to matters that are within his personal knowledge. In that capacity, he can properly depose to acts which constitute contempt of court. The plaintiff in the suit remains Booker Mbugua Gacheru.

15. The second issue relates to the necessity for police assistance. Judgment in this matter was rendered and a formal decree issued. The plaintiff contends that he has been denied access to the property which was adjudged to be his. He seeks police assistance to gain access to the property. The judgment has neither been stayed nor overturned. In the circumstances, it would be proper and in the interest of law and order that the plaintiff is accorded police assistance by the Officer Commanding Gigiri Police Station to access the suit property. The envisaged police assistance does not include aiding commission of any breach of the law in any way or breach or suspension of neighbourhood bylaws that bind residents and property owners within the neighbourhood.

16. The second application seeks contempt orders against persons who are not parties to this suit. That application is deficient on a number of fronts. First, a contempt motion of this nature is a suit within a suit. The present application seeks orders against subjects who are not parties to the suit. The motion ought to have identified those subjects as respondents in the motion. Secondly, the motion ought to have been served on each of the alleged contemnors inviting them to respond. Thirdly, there ought to have been evidence of service of the decree/order on each of the contemnors or evidence that each of the contemnors was personally aware of the decree/order but personally engaged in contemptuous conduct.

17. In the present motion, none of the persons against whom the orders are sought was named as a respondent in the motion and invited to respond to the motion. Secondly, there is no evidence of service of the decree on any of the person. Neither is there evidence that any of them was privy to the decree hence they were aware of the decree. Thirdly, there is no evidence that any of them obstructed the plaintiff from accessing the suit property on a specified day and time. Similarly, there is no evidence that any of them personally committed acts that constitute contempt of court

18. In my view, the court will not be properly exercising its residual powers to punish for contempt if it were to find the said persons guilty of contempt in the circumstances of the present motion. The motion is, without saying much, without evidential foundation against the specific persons against whom the contempt orders are sought.

19. The issue of limitation was raised. Because the motion does not specify the exact date when the alleged contempt was committed, I will not make a pronouncement on the subject of limitation

20. In light of the above findings, I make the following orders in disposing the plaintiff's notice of motion applications dated 24/1/2017 and 14/12/2017 respectively:

a. The application dated 14/12/17 is dismissed for lack of merit. The 1st defendant and the three persons against whom the contempt orders were sought shall have costs of the application, to be borne by the applicant.

b. The notice of motion application dated 24/1/2017 is allowed in the following terms:-

i. In the interest of law and order, the Officer Commanding Gigiri Police Station shall ensure maintenance of law and order in the plaintiff's enforcement of the 5th limb of the decree herein.

ii. There shall be no order as to costs of the application dated 24/1/2017

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 31ST DAY OF OCTOBER 2018.

B. M. EBOSO

JUDGE

In the presence of:-

Mr Mungai holding brief for Mr Mogere Advocate for the Plaintiff

Mr Muthee Advocate for the 1st, 2nd and 4th the Defendant

June Nafula - Court clerk