



IN THE REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC NO. 104 OF 2018

CHURCH OF JESUS CHRIST OF LATTER DAY SAINTS

KENYA REGISTERED TRUSTEES.....PLAINTIFF

=VERSUS=

STEPHEN NJENGA.....DEFENDANT

RULING

1. This is a ruling in respect of three different applications. The first application is dated 7th March 2018. It is brought by the Plaintiff and it seeks injunctive orders against the defendant in respect of **LR No. Nairobi/Block 107/1125** (Suit property). The second application is dated 15th March 2018. It is brought by Magic Contractors Limited the proposed interested party. It seeks joinder of Magic Contractors Limited as an interested party to this suit. The third application is dated 7th June 2018. It is brought by the Plaintiff and it seeks committal of the defendant into civil jail for contempt of a court order which was issued by this court.

Application dated 7th March 2018

2. The Plaintiff/applicant is the registered owner of the suit property which it has occupied since 2004 when it purchased it from Plight International Limited. In or around 21st February 2018, it was brought to the attention of one of the trustees of the applicant that there was a construction going on in the suit property. The deponent of the supporting affidavit visited the suit property and found the Defendant/Respondent who was carrying out construction. The respondent claimed that he owned the plot where he was building. The deponent asked him to stop but the respondent proceeded with construction forcing the applicant to come to court where it obtained temporary injunction ex-parte. The applicant contends that the construction on the suit property is going on at an alarming speed and should be stopped.

3. The Defendant/Respondent has opposed the applicant's application through an affidavit which is neither signed by a commissioner for oaths nor dated. He contends that he was carrying out construction in one of his many plots and that he recalls a time when some unknown people went to the site and claimed that the plot belonged to them. He showed them the title documents and they went away. He denied that the photographs attached to the supporting affidavit of the applicant reflect the status of his property which he had started putting up a while back. He contends that his plots fall on block 106 and that he purchased his plots from Kiambu Dandora Farmers Co. Ltd. He states that if the injunction is granted, it will cause him a lot of damage given that the applicant has not given any undertaking as to damages.

4. I have considered the applicant's application as well as the opposition to the same by the respondent. This being an application for injunction the only issue for determination is whether the applicant has shown that it has a prima facie case with probability of success. The principles for grant of injunction were well set out in the case of **Giella –Vs- Cassman Brown & Co. [1973] EA 358**. One of the principles is demonstration of a prima facie case.

5. I have gone through the documents the applicant is relying on. There is no doubt that it is the registered owner of the suit property. It has been in occupation of the suit property since 2004 when it purchased the same. The boundaries of the property have been known to them. When in 2018, a party comes and starts putting up a building on it, this is clearly an infringement of the applicant's right which ought to be protected until the suit is heard and determined. The respondent may be having titles which may even be genuine but the issue is where is the building being put up?. At this interlocutory stage, the court is not expected to examine the documents in detail. The concern of the court is to determine whether a prima facie case has been made out. It is my finding that based on the document placed before me the applicant has made out a prima facie case. I therefore allow the applicant's application in terms of prayers (4) and (5) of the notice of motion dated 7th March 2018. The applicant shall file an undertaking as to damages in court within 7 days.

Application dated 15th May 2018

6. The proposed interested party Magic Contractors Limited contends that it is the registered owner of the suit property and has been in possession since 2014. When it wanted to develop the suit property, the plaintiff herein filed a suit against it in ELC 949 of 2015 claiming ownership of the same. It therefore contends that it should be enjoined in the suit as an interested party.

7. The plaintiff through its advocates indicated that they had no objection to joinder of the proposed interested party. It is only the defendant who opposed the joinder through a replying affidavit sworn on 26th June 2018. The defendant contends that as the proposed interested party is a party in another suit to which he is not a party, it should not be allowed into this suit, and that he should be left to litigate with the plaintiff herein as the proposed interested party litigates in the other suit.

8. I have considered the application by the proposed interested party as well as the opposition thereto by the defendant. The criteria for allowing a party to join a suit either as a defendant or an interested party is clear and has been stated in a number of decided cases like **Break Suhim Hamed –Vs- Constituency Development Fund Board & another (2014) eKLR, Yusuf Abdi Aden & another –Vs- Hussein Ahmed Frach & 3 others [2016] eKLR, and Judicial Service Commissioner –Vs- Speaker of the National Assembly & Another [2013] eKLR**. In all the above decisions the consideration for joinder is whether the party seeking to be enjoined has an identifiable stake or legal interest in the proceedings and whether the joinder will assist the court to effectually and completely adjudicate on the dispute in issue.

9. In the instant case, the proposed interested party is claiming ownership of the suit property. Already there is another case where the proposed interested party is sued by the plaintiff herein. The fact that the proposed interested party has another case cannot be a bar to it being enjoined in this case. I therefore find that the proposed interested party's application is well founded. I allow the same in terms of prayers (2) and (3) of the notice of motion dated 15th March 2018.

It is so ordered,

Application dated 7th June 2018

10. The Plaintiff/Applicant sought the following order:-

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2. That Stephen Njenga being the Contemnor herein is in contempt of court for disobedience of the court orders made on 7th March 2018 and issued on 13th March 2018.

3. That Stephen Njenga be committed to civil jail for such period as this Honourable Court shall deem necessary for being in disobedience of the orders of this Honourable Court made on 7th March 2018 and issued on 13th March 2018.

4. That the Officer Commanding Buruburu Police Station and/or the police officer in charge of the police station or police post nearest to the said property do forthwith ensure compliance with the orders of this Honourable Court made on 7th March 2018 and issued on 13th March 2018.

5. That such other or further orders as may be just be made to meet the ends of justice and to safeguard and protect the dignity of this Honourable Court.

6. That costs be provided for.

11. The applicant contends that despite this court's order given on 7th March 2018 being personally served upon the defendant/respondent, the respondent ignored the same and proceeded to carry on with the construction. It is on this basis that the applicant is seeking to have the respondent punished for disobedience of the court order.

12. The respondent has opposed the applicant's application based on a replying affidavit sworn on 26th June 2017. The respondent denies that he is in contempt of any court order; that he stopped construction upon being served and that he had sworn an affidavit in opposition to the application for injunction wherein he stated that the annexed photographs did not reflect the status of his properties. The respondent contends that there are about 15 plots and that he does not know the building which was captured in the photographs annexed to the applicant's application.

13. The court had directed parties to file written submissions in respect of this application as well as the others. In respect of this application, it is only the respondent who filed submissions. The applicant did not and if they filed, the submissions are not in the file. However be that as it may, I will proceed to determine the application. The only issue for determination is whether the applicant has proved that there was contempt of court orders by the respondent.

14. In an application for contempt the applicant has to prove the following:-

a. That there was a court order issued which required the contemnor to do or not to do a certain act.

b. That the said court order was served upon the contemnor or that the contemnor had knowledge of the same.

c. That the contemnor willfully disobeyed the order.

15. In the instance case, there is no doubt that there was a court order given on 8th March 2018 which required the contemnor and his servants, agent or assigns from entering, occupying, constructing, developing or in any other manner whatsoever interfering with the parcel of land known as **Nairobi/Block 107/1125** situated in Nairobi within the Republic of Kenya until inter-partes hearing of the application on 20th March 2018. The injunction orders were extended on 20th March 2018 and subsequently.

16. There is an affidavit of service by a process server called Samuel Njoroge Muchai which shows that the court order which was given on 8th March 2018 but erroneously indicated as 7th March 2018 was served upon the contemnor. The contemnor has not denied such service. I therefore find that there was proper service.

17. The critical issue now is to determine whether there was disobedience of the order. The applicant had annexed photographs to the application for injunction which photographs showed the stage at which the construction was. At that time, the building was at the foundation stage. However, in the photographs annexed to the application for contempt, the building has gone up and is on the second floor. It is therefore clear that the contemnor willfully disobeyed the court order stopping him from proceeding.

18. The contemnor in his submissions has tried to state that the court order was not clear and has relied on the case of **Alken Connections Limited – Vs- Safaricom Limited & 2 others [2013] eKLR** where Justice Musinga as he then was declined to punish for contempt on the ground that the order was ambiguous. That case is distinguishable from the present case. In the instant case, the order was very clear on what the contemnor ought not to do. In fact the contemnor claims that he stopped construction upon being served. The truth of the matter is that he did not stop. He proceeded with construction at a very fast speed. I find that the contemnor willfully disobeyed the court order. I therefore make the following orders:-

(a) The officer commanding Buruburu Police Station should ensure that there is compliance with the orders given herein to wit that no further construction by the defendant should be carried out on LR No. Nairobi/Block 107/1125 until this suit is heard and determined.

(b) The contemnor should appear in court on 6th November 2018 so that he can be dealt with in accordance with the law failing which the officer commanding Buruburu Police Station or any officer near the suit property should arrest the contemnor Stephen Njenga and bring him to court on any week day between 9.00a.m. to 5.00p.m.

(c) The costs of this application shall be paid by the contemnor.

It is so ordered.

Dated, Signed and delivered at Nairobi on this 18th day of October, 2018

E.O.OBAGA

JUDGE

In the presence of:

M/s Mueni for proposed interested party and Mr Njeru for Plaintiff

Court Assistant : Hilda

E.O. OBAGA

JUDGE