



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT EMBU

E.L.C. CASE NO. 333 OF 2015 (ORIGINATING SUMMONS)

IN THE MATTER OF SECTION 38 OF THE LIMITATION OF ACTIONS ACT

AND

IN THE MATTER OF ADVERSE POSSESSION OF LAND PARCELS NUMBERS GATERI/WERU/10398, 10399 AND 10404

BETWEEN

MARGARET RWAMBA NJAGI.....PLAINTIFF

VERSUS

JOSEPH MUGO NGAI.....1ST DEFENDANT

DAVID KIONGO WACHIRA.....2ND DEFENDANT

LAWRENCE P.K. NYAGA.....3RD DEFENDANT

RULING

1. By a notice of motion dated 24th September 2018 brought under the provisions of **section 63 (e) of the Civil Procedure Act (Cap 21)** and **Order 40 Rules 1, 2 and 3 of the Civil Procedure Rules** filed under certificate of urgency, the 2nd Defendant sought an order for the Plaintiff to be restrained from entering and erecting new structures on *Title No. Gaturi/Weru/10399* (hereinafter called the *suit property*) and from interfering with his use of the same pending the hearing and determination of the suit.
2. The said application was supported by an affidavit sworn by the 2nd Defendant on 24th September 2018. It was stated in the said affidavit that the Plaintiff had leased out a portion of the suit property and had excavated a pit latrine thereon. The 2nd Defendant also exhibited photographs showing that some building materials including sand and ballast had been deposited on the suit property.
3. The Plaintiff filed a replying affidavit sworn on 28th September 2018 in opposition to the said application. It was contended that the Plaintiff was occupying and utilizing the suit property pursuant to an earlier court order of injunction dated 1st February 2016. It was further contended that since the 2nd Defendant had no counterclaim in the suit, there was no legal basis for granting the injunctive orders sought. It was further contended that the Plaintiff was merely constructing a pit latrine and that it was the 2nd Defendant who was harassing her into vacating the suit property.
4. When the said application came up for hearing *ex-parte* under certificate of urgency on 24th September 2018, the court certified it as urgent and issued an interim injunction restraining the Plaintiff from erecting any new structures on the suit property pending *inter-partes* hearing on 1st October 2018.
5. When the said application came up for *inter-partes* hearing on 1st October 2018, Ms Ndorongo, counsel for the 2nd Defendant sought leave to file a further affidavit on the basis that she had just been served with a replying affidavit in court. Mr Okwaro, counsel for the Plaintiff, opposed extension of the interim orders stating that the Plaintiffs was merely constructing a pit latrine since the one she had been using was full.
6. The court granted the 2nd Defendant leave to file and serve a further affidavit within 5 days and directed the parties to file and exchange written submissions within 21 days. The court thereupon fixed the matter for ruling on 13th December 2018 and extended the interim injunction until delivery of the ruling.

7. On 4th October, 2018, the 2nd Defendant filed a notice of motion dated 4th October 2018 under certificate of urgency under the provisions of **section 4 (1) (a), 5, 27 (b) and 28 (1) (6) of the Contempt of Court Act 2011, Order 40 Rule 3 (1) and 4 of the Civil Procedure Rules** seeking the following orders;

- a. *The Plaintiff/Respondent herein be committed to civil jail for being in disobedience and contempt of the orders issued by this honourable court on the 24th September 2018 and extended to 13th December 2018.*
- b. *The Officer Commanding Itabua Police Station (OCS) be ordered to effect the orders herein.*
- c. *Costs be provided for.*

8. The said application was based on the grounds that the Plaintiff had in blatant disobedience of the interim injunction in place continued erecting new structures on the suit property. The said application was supported by an affidavit sworn by the 2nd Defendant on the date of filing in which he exhibited photographs of the ongoing construction. The photographs were dated 2nd October 2018. They showed images of two upcoming buildings with a complete foundation slab and a first course of building blocks in place.

9. The 2nd Defendant, therefore, urged the court to punish the Plaintiff for contempt of court in order to uphold and maintain the integrity and authority of the court. He wanted the Plaintiff to be committed to civil jail.

10. The court upon perusal of the said application certified it urgent and directed that the same be served for *inter-partes* hearing on 9th October 2018.

11. When the said application was listed for hearing on 9th October 2018, the Plaintiff's advocate sought an adjournment to enable her respond to the contempt application. She requested for 14 days to file a response. The 2nd Defendant's counsel opposed the said application for adjournment arguing that it was merely a delaying tactic to enable the Plaintiff complete construction of the new structures. She also contended that construction was actually going on as the parties were addressing the court. The 2nd Defendant's counsel showed the court and the Plaintiff's counsel photographs indicating that further construction had taken place since the last court appearance. The photographs indicated that roofing timber had been fixed and some iron sheets had been fitted on part of the new structures.

12. The court, nevertheless, granted the Plaintiff's advocate one day to file a replying affidavit since the Plaintiff was present in court. The said application was consequently stood over to 11th October 2018 for hearing.

13. The Plaintiff filed a replying affidavit sworn by her on 11th September 2018. She stated that the two houses in issue were being constructed by members of the Voice of the Gospel Church since they were concerned that her current houses were old and dilapidated. They simply wanted to assist her to better her living conditions. She further stated that she notified the said church members of the existence of the court order dated 9th March 2016 but they assured her that the said order allowed her to continue "occupying and utilizing" the land hence there was no problem in building a new house. She was also advised by the church members that building a new house was a necessity since the rainy season was around the corner.

14. The Plaintiff further stated that although the church members were asked to stop construction upon service of the order dated 24th September 2018, they apparently continued with construction since the Plaintiff was away visiting her ailing mother. She contended that the new houses are not permanent in nature save for the foundation.

15. The Plaintiff further stated that if the said construction was in contravention of any court order, then she was willing to pull down the new structures on the suit property. She stated that any violation was not wilful or intentional. She then asked the court to dismiss the 2nd Defendant's application dated 4th October 2018.

16. When the said application was listed for hearing on 11th October 2018, Ms Ndorongo for the 2nd Defendant prosecuted the same orally whilst Ms Nzekele for the Plaintiff opposed the same on the basis of the Plaintiff's replying affidavit sworn on 11th October 2018. Ms Nzekele submitted that the Plaintiff was apologetic and that she was willing to pull down the new structures.

17. The court has considered the 2nd Defendant's notice of motion dated 4th October 2018, the Plaintiff's replying affidavit in opposition thereto as well as the oral submissions of the parties. The court has also considered the photographs which were shown to the court on 9th October 2018.

18. The Plaintiff has clearly admitted knowledge of the *ex-parte* interim injunction dated 24th September 2018 even though she stated that it was served upon her son whilst she was away from home. She confirmed that it was brought to the attention of the church workers on site. The Plaintiff is clearly the one who was at all material times in possession of the suit property or at least the portion of the suit property under construction. She cannot be heard to say that she had no control over the persons who were constructing a house for her benefit on a portion of land of which she is in possession.

19. The court shall, however, base its decision on the construction which appears to have taken place with effect from 1st October 2018 when the 2nd Defendant's earlier notice of motion dated 24th September 2018 was slated *inter-partes* for hearing. The record indicates that on 1st October 2018 the concerned parties were represented by advocates. The court made an order for the parties to file and exchange written submissions within 21 days and then extended the interim orders pending delivery of ruling on 13th December 2018. The interim orders were extended in the presence of the parties' advocates despite opposition by the Plaintiff's advocate.

20. The court is gravely concerned by the Plaintiff's conduct in two respects. First, the Plaintiff deliberately and knowingly misled the court through her replying affidavit dated 28th September 2018 and through her advocate from the bar that she was merely constructing a pit latrine and nothing more. The photographic evidence showed otherwise. That conduct was undoubtedly intentional and wilful. It was intended to mislead the court, obscure the issues and undermine the course of justice.

21. Second, the Plaintiff appears to have continued with, and accelerated the pace of, construction after the court appearance for *inter-partes* hearing on 1st October 2018. That was confirmed by the photographic evidence on record and the photographs which were shown to the court and the Plaintiff's counsel on 9th October 2018. The interim orders were extended in the presence of the advocates on record. The Plaintiff did not allege that she was unaware of the extension of the interim orders. The court finds that such conduct was deliberate and mischievous. It would appear that when the Plaintiff sought 14 days to file a response to the contempt application, it was merely a delaying tactic and a scheme designed to buy her more time to complete the construction in violation of a court order.

22. The court has considered the legal position in handling applications for contempt of court. In **Ochino & Another Vs Okombo & 4 Others [1989] KLR 165**, the Court of Appeal held, *inter alia*, that;

a. As a general rule, no order of court requiring a person to do or abstain from doing any act may be enforced (by committing him for contempt) unless a copy of the order has been served personally on the person required to do or abstain from doing the act in question.

b. The copy of the order served must be indorsed with a notice informing the person on whom the copy is served that if he disobeys the order he is liable to the process of execution to compel him to obey it.

c. The court will only punish as a contempt a breach of injunction if it is satisfied that the terms of the injunction are clear and unambiguous.

23. The service of the *ex-parte* interim order dated 24th September 2018 was not disputed by the Plaintiff. The qualification she added was that it was served upon her son because she was away from home even though she became aware of the order afterwards. As indicated earlier, the court shall deal with the alleged contempt as from 1st October 2018 when the matter was slated for *inter partes* hearing. The interim orders were extended on 1st October 2018 in the presence of the parties' advocates pending delivery of the ruling on 13th December 2018. The Plaintiff did not contend that she was not aware of the extension of those orders.

24. So, was it necessary to extract and serve the interim injunction on 1st October 2018 after the court appearance? In the case of **Shimmers Plaza Limited Vs National Bank of Kenya Ltd [2015] eKLR**, the Court of Appeal stated that;

“As per rule 81 (8), dispensation of service on the bases of notice or knowledge of the terms of an order will only apply to a court judgement or order requiring a person not to do an act, that is, a prohibitory order. The dispensation of service under rule 81 (8) (1) is subject to whether the person can be said to have had notice of the terms of the judgement or order. The notice of the order is satisfied if the person or his agent can be said to either have been present when the judgement or order was given or made; or was notified of its terms by telephone, email or otherwise. In our view, ‘otherwise’ would mean any other action that can be proved to have facilitated the person having come into knowledge of the terms of the judgement and an order. This would definitely include a situation where a person is represented in court by counsel...”

25. The court is, therefore, satisfied that the Plaintiff was aware of the interim orders in place. In those circumstances, it was not necessary to extract the order and effect personal service thereof upon the Plaintiff. The court is of the opinion that the legal requirements on service have been met.

26. The next issue for consideration is whether the terms of the interim injunction were clear and unambiguous. This is an important safeguard because contempt of court proceedings are quasi-criminal in nature. Contempt of court is a serious matter which, if proved, may lead to deprivation of the liberty of the contemnor. In the instant case, it was never alleged that the terms of the interim injunction were ambiguous or unclear in any respect. Even if there was anything unclear or ambiguous about the interim injunction, the Plaintiff had the option of seeking clarification from court. No application to that effect was filed. The Plaintiff, instead, contended that there was an earlier court order dated 1st February 2016 which allowed her to continue in occupation of the suit property. The Plaintiff left it to her church members to interpret the earlier order to mean that she could disregard the instant interim orders which clearly restrained her from constructing any new structures on the suit property. She did not even appear to have sought any legal advice from her advocates on record.

27. The court is satisfied that the terms of the interim injunction which restrained the Plaintiff from constructing any new structures on the suit property were clear beyond peradventure. The Plaintiff did not seek any clarification or variation of those orders. She cannot be heard to say that she acted on the advice or opinion of her church members in order to disobey a court order. She cannot also be said to have acted out of necessity since there was no emergency involved in the circumstances.

28. The court is aware that the standard of proof in contempt of court proceedings is quite high. In the case of **Ochino & Another Vs Okombo (supra)**, it was held that alleged contempt of court must be proved beyond reasonable doubt. However, in **Wildlife Lodges Ltd Vs County Council of Narok and Another [2005] 2 EA 344 (HCK)**, it was held that the standard of proof is higher than a balance of probabilities but not as high as beyond reasonable doubt. It would be sufficient if the court is safely *satisfied* that the alleged breach has been proved.

29. In the circumstances of this case, the court is satisfied beyond reasonable doubt that the alleged contempt has been proved. The court is further satisfied that the disobedience was deliberate and blatant. It was calculated to defeat the course of justice. The Plaintiff went to the extent of misleading the court on 1st October 2018 that she was merely putting up a pit latrine in order to complete her contemptuous acts.

30. The need for parties to abide by court orders cannot be overemphasized. In the case of **Econet Wireless Kenya Ltd Vs Minister for Information and Communication and Another [2005] 1 KLR 828** Ibrahim J (as he then was) stated as follows;

“To demonstrate the importance and seriousness with which the courts will deal with any conduct that may be deemed or found to be in contempt of court or judicial process, it may be necessary to look at some decisions on the subject.

In **Gulabch and Popatlal Shah & another Civil Application No. 39 of 1990, (unreported)**, the Court of Appeal said;

“...It is essential for the maintenance of the rule of law and good order that the authority and dignity of our courts are upheld at all times. This court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors...

In **Hadkinson Vs Hadkinson [1952] 2 All 567**, it was held that;

“It is the plain and unqualified obligation of every person against or in respect of, who an order is made by a court of competent jurisdiction, to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or even void.”

31. In the case of **B. Vs Attorney General [2004] 1 KLR 431** Ojwang J (as he then was) expressed the importance of compliance with court orders as follows;

“The court does not, and ought not to be seen to, make orders in vain; otherwise the court would be exposed to ridicule, and no agency of the constitutional order would then be left in place to serve as a guarantee for legality, and for the rights of all people.”

32. In the case of **Miguna Miguna Vs Dr. Fred Matiangi Cabinet Secretary Ministry of Interior & Co-ordination of National Government & 6 Others, Constitutional Petition No. 51 of 2018 [2018] eKLR**, Odunga J, held, *inter alia*, that;

“42. Having considered the issues raised herein, it is my view and I hold that quite apart from the contempt of court proceedings, this court must ensure that its orders are complied with....This court cannot just fold its arms while the Respondents cat-walk on its orders.”

33. The upshot of the foregoing is that the court is satisfied that the contempt alleged against the Plaintiff has been proved to the required standard. The Plaintiff is accordingly convicted of wilful disobedience of the interim injunction extended with effect from 1st October 2018. However, before the sentence is meted out, the Plaintiff shall be accorded an opportunity to offer mitigation, if any, upon delivery of the ruling.

34. What, then, shall become of the structures which have been erected in wilful disobedience of a court order? The court has noted that in her replying affidavit the Plaintiff offered to pull down the structures. The court cannot agree more with the Plaintiff that a contemnor should, indeed, be deprived of the fruits of her criminal actions. The court shall, therefore, make an order for the Plaintiff to demolish the structures within a specified period from the date of the ruling. In default of compliance, the 2nd Defendant shall cause them to be demolished under the supervision of the Officer Commanding Station, Itabua Police Station and at the Plaintiff's cost.

35. It is so decided.

RULING DATED, SIGNED and DELIVERED in open court at **EMBU** this **18th** day of **OCTOBER, 2018**.

In the presence of Mr Okwaro for the Plaintiff and Mr Murithi holding brief for Ms Ndorongo for the Defendants.

Court clerk Muinde.

Y.M. ANGIMA

JUDGE

18.10.18