



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CIVIL SUIT NO. 382 OF 2015

JAMES KAMAU MWAURA.....PLAINTIFF

=VERSUS=

MARY NJERI.....1ST DEFENDANT

EMBAKASI RANCHI NG COMPANY LTD.....2ND DEFENDANT

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1. On 3/10/2017, the 1st defendant brought a Notice of Motion dated 3/10/2017 seeking the following orders:

(a) This application be certified urgent.

(b) That leave do issue to cite JAMES KAMAU MWAURA for contempt of court.

(c) That an order requesting James Kamau Mwaura the plaintiff/respondent herein to show cause why he should not be cited for contempt of court and jailed for a period not exceeding six months having deliberately disobeyed the order of this court issued on 22nd June, 2017.

(d) An order do issue to restrain the plaintiff/respondent from further interfering/developing on plots number P2172B, P387B, P1719B and P1720B being subdivision of Land Reference Number 10904/2.

(e) Costs of this application be provide for.

2. The application was expressed to be brought under Sections 3 and 3A of the Civil Procedure Act, Section 5(1) of the Judicature Act and Order 40 rule 3 of the Civil Procedure Rules 2010. It was supported by an affidavit sworn on 3/10/2017 by the 1st defendant. The application was opposed by the plaintiff through a replying affidavit sworn on 27/11/2017.

3. The applicant contends that the plaintiff has deliberately disobeyed the orders issued by this court on 22/6/2017 by continuing with construction on the suit premise despite having been personally served with the said order and a penal notice. She further contends that the dignity and authority of the court ought to be protected through sanctions.

4. In response, the plaintiff contends that the structures which the applicant alleges constitute evidence of contempt had already been constructed as at 29/6/2017 when the court orders were affixed on the suit property. He contends that the structures were erected in May 2017 prior to the issuance of the court orders. He adds that since the day he was served with the court order, no further development has taken place on the suit property.

5. I have considered the application together with the parties' rival affidavits and submissions. I have also considered the relevant legal framework and jurisprudence on the subject of contempt of court. The application under consideration seeks leave of the court to initiate contempt proceedings. It also seeks issuance of notice against the plaintiff to show cause why he should not be cited for contempt of court. Thirdly, it seeks an injunctive order.

6. The first question to be determined in this application is the question as to whether this court has jurisdiction to punish for contempt under the legal framework in the Judicature Act, Cap 8. Prior to the year 2016, the superior courts' jurisdiction to punish for contempt was derived from Section 5 of the Judicature Act (Cap 8) which provided as follows:

5(1) The High Court and the Court of Appeal shall have the same power to punish for contempt of court as is for the time being possessed by the High Court of Justice in England, and that power shall extend to upholding the authority and dignity of

subordinate courts.

(2) An order of the High Court made by way of punishment for contempt of court shall be appealable as if it was a conviction and sentence made in the exercise of the ordinary original criminal jurisdiction of the High Court.

7. To be noted in the above framework was the requirement that the superior courts' jurisdiction to punish for contempt was to be exercised in accordance with the legal framework and jurisprudential principles governing exercise of that jurisdiction by the High Court of Justice in England. Invariably, the statutory framework on contempt of court proceedings in the Court of Justice in England applied to contempt of court proceedings in Kenya by dint of the provisions of Section 5(2) of the Judicature Act. This is the jurisdiction which the applicant has invited this court to exercise.

8. The legal framework in Section 5 of the Judicature Act was repealed by the Contempt of Court Act, No 46 of 2016. Through this new legislation, parliament promulgated an elaborate substantive and procedural framework on contempt of court proceedings. Notable in the new framework is the departure from the requirement that Kenya's superior courts rely on the prevailing legal framework in England.

9. With the enactment of the Contempt of Court Act and the resultant repeal of Section 5 of the Judicature Act, the requirement for leave and notice to show cause prior to the commencement of contempt motion is no longer necessary. For the above reasons, prayers 2 and 3 of the application are, in my view, unnecessary. If the applicant has evidence that contempt has been committed, she is at liberty to bring a motion seeking contempt orders. She neither requires leave nor a notice to show cause.

10. Prayer 4 of the application seeks a restraining order against the plaintiff. On 17/5/2017 this court rendered a ruling in which it issued the following orders, among others:

(a) The Plaintiff will continue to occupy the plots he occupies pending hearing and final determination of this suit.

(b) The disputed plots which are currently occupied by the Plaintiff shall not be developed further nor disposed by any of the parties herein or their agents pending hearing and final determination of this suit.

(c) Similarly, the plots designated as P2172B, P387B, P1719B and P1720B shall not be disposed or developed pending hearing and final determination of this suit.

11. The above orders have not been discharged. They are binding on all the parties. In my view, the plea for a duplicate conservatory or injunctive order is an abuse of the process of the court. The court will not issue a conservatory order when there is a subsisting conservatory order. What the applicant requires is enforcement of the existing order. The court will hasten to caution the parties that development of property in disobedience of a court order attracts severe sanctions. Secondly, the developments do not enhance the title of the developer. To the contrary, it exposes the developer to possible loss in the event that the court ultimately comes to a finding that the property does not belong to the developer.

12. In the light of the foregoing, I have come to the finding that the Notice of Motion dated 3/10/2017 is unmerited. The same is dismissed.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 12TH DAY OF OCTOBER 2018.

B. M. EBOSO

JUDGE

In the presence of:-

Mr Mworira Advocate for the Plaintiff

No appearance for the Defendant

June Nafula - Court clerk