



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC CASE NO 751 OF 2016**

**RIRUTA STALLS OPERATIONS GROUP..... PLAINTIFF/APPLICANT**

**Suing through**

**THE CHAIRMAN – GEORGE MBUGUA**

**VICE CHAIRMAN-SILVANO NJAGI MBUGUA**

**MEMBER – SIMON MUYA MWANGI**

**MEMBER – DORCAS BONARERI OBARE**

**MEMBER – EVA NYOKABI MUTHONDU**

**=VERSUS=**

**SAMUEL NDUNG’U NJOROGE.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**NAIROBI CITY COUNTY.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**RULING**

1. This is the notice of motion dated 28<sup>th</sup> July 2016. It is brought under Order 40 Rule 3(1), 4 and 8 of the Civil Procedure Rules Section 3A of the Civil Procedure Act (Cap 21) Laws of Kenya all other enabling provisions of the law.

2. It seeks order:-

**1. Spent**

**2. That the 1<sup>st</sup> defendant/respondent be and is hereby committed to prison for breach and disobedience of the honourable court’s order dated 22<sup>nd</sup> July 2016.**

**3. That the Nairobi City County Secretary Dr. Ayisi being the concerned officer of the 2<sup>nd</sup> Defendant/Respondent be and is hereby committed to prison for breach and disobedience of the honourable court’s orders dated 22<sup>nd</sup> July 2016.**

**4. That costs of this application be in the cause.**

3. The grounds are on the face of the application and are listed as in paragraph a-i.

4. The application is supported by the affidavit of Silvano Njagi Njeru, the vice Chairman of the plaintiff/applicant sworn on the 28<sup>th</sup> July 2016.

5. I have gone through the court record it appears the 1<sup>st</sup> and 2<sup>nd</sup> defendants/respondents did not file responses to the notice of motion dated 28<sup>th</sup> July 2016. Written submissions were however filed on behalf of the 2<sup>nd</sup> defendant/respondent. They are dated 28<sup>th</sup> November 2016.

6. It is the plaintiff's/applicant's submissions that on 20<sup>th</sup> July 2016 the Hon. Justice S. Okong'o issued a temporary injunction restraining the defendants from building, developing in or in any manner dealing with the suit land until the application and the main suit are heard. The orders were served on the respondents but they disobeyed and started laying stones and foundation for some intended construction.

7. The applicant claims for committal to civil jail of the respondents.

8. That the orders were duly served on the 1<sup>st</sup> respondent and the legal department of the 2<sup>nd</sup> respondent. The respondents were represented by advocates in court. Though they were not personally served they were aware of the existence of the orders. There are clear photographs of the work ongoing at the site.

9. They have put forward the case of **Africa Management Communication International vs Joseph Mathenge Mugo & Ano. HCCC No242 of 2013**. They pray that the application be allowed.

10. It is the 2<sup>nd</sup> defendant's/respondent's case that this application seeks orders that the city county secretary Dr. Ayisi be committed to prison for breach and disobedience of this honourable's court orders dated 22<sup>nd</sup> July 2016.

11. There is no record showing that the Contemnor was served with the court orders nor were they brought to his attention. The said orders were only served on the Assistant Director of Legal Affairs for the County who is not a party to this suit.

12. That the plaintiff/applicant has not proved service upon the County Secretary Dr. Ayisi. There is no concrete affidavit of service indicating how the said orders were served. Further that the plaintiff/applicant has not adduced any evidence of ownership or any approval for occupation and/or to operate/trade within the suit property. That Dagoretti/Riruta/667 has never been allocated to the applicant.

13. The 2<sup>nd</sup> respondent holds the suit property in trust as a public utility in accordance with Article 62(2) of the Constitution of Kenya and would be a nullity in law to transfer the same to anybody. That the alleged contemnor is not an officer in charge of development and/or demolition.

14. There is no record indicating service upon the county government secretary Dr. Ayisi hence the sought orders cannot issue. That the plaintiff/applicant is not entitled to the orders sought and prays that the applicant's case be dismissed.

15. I have considered the notice of motion dated 28<sup>th</sup> July 2016, the affidavit in support, the submissions of counsels and the authorities cited. The issue for determination are:-

**i. Whether or not the alleged contemnors were served with the said court order.**

**ii. Whether or not the alleged contemnors are the officers in charge of carrying out the development and/or demolitions.**

**iii. Whether or not the alleged contemnors should be committed to jail.**

16. It is the plaintiff's/applicant's case that the orders by Honourable Justice S. Okong'o issued on 22<sup>nd</sup> July 2016 was served on the respondents but they disobeyed. They annexed photographs showing the works being undertaken at the site at the time. It is also their case that though the contemnors were not personally served, they were aware of the existence of the order.

17. The 2<sup>nd</sup> respondent on the other hand states that Dr. Ayisi the City County Secretary was not served with the said order nor was it brought to his attention. That the same order was served on the Assistant Director of Legal Affairs in the County who is not a party to the suit.

18. I have gone through the court record. On the 21<sup>st</sup> July 2016 the Notice of Motion dated 20<sup>th</sup> July 2016 was brought before Hon. Justice S. Okong'o who upon considering the same granted the following order:-

**“ That the defendants by themselves, their servants or agents or anyone acting on their behalf be and are hereby restrained by way of a temporary injunction from interfering with buildings, or developing or in any other manner dealing with the suit property Dagoretti Riruta/677”.**

The said order was issued on 22<sup>nd</sup> July 2016.

19. By an application, dated 3<sup>rd</sup> November 2016, the plaintiff/applicant sought to amend the notice of motion dated 20<sup>th</sup> July 2016 to reflect the correct suit property as Dagoretti/Riruta/667. The said application was allowed on 4<sup>th</sup> November 2016. I have gone through the affidavit of service by George Oluoch Rathing, process server sworn on the 25<sup>th</sup> July 2016.

It states:

**3. “That on 25<sup>th</sup> July 2016 armed with two sets of order dated 22<sup>nd</sup> July 2016 and notice of motion dated 20<sup>th</sup> July 2016 from the firm of M/S L. N Muchira & Co. Advocates, I proceeded to serve the same on the 2<sup>nd</sup> defendant**

4. “ That I proceeded to their offices located at City Hall Annex, 12<sup>th</sup> floor, at the legal department”

5. “That I introduced myself to the counsel one Abwao Erick and served him with the said order and notice of motion which he received and acknowledged on my copy”

6. “That I return herewith the order and notice of motion duly served and signed to this honourable court.”

Another affidavit.

2. “That I proceeded to his office located at K-rep Bank building at Kawangware.

3. “that I introduced myself to the secretary one Eva Githainga and served her with the said order and notice of motion which she received and acknowledged on my copy”.

20. There is no doubt that, the said order was not served on the alleged contemnor Dr. Ayisi the County Secretary. There is no evidence that he was aware of the said order. I also note that he was not the one in charge of development and demolition in the County. Similarly the order was not served upon the 1<sup>st</sup> defendant/respondent.

21. There is no evidence to prove that the said Githaiga was under the 1<sup>st</sup> respondent secretary. It is not clear what role he played on the demolition as he does not work for in the Nairobi City County. As to the answer to issue no (i) the answer is no. The alleged contemnors were not served with the said court order. There is no evidence to suggest that they had knowledge of the said court order. I am guided by the holding of Court of Appeal in **Justus Kariuki Mate & Another vs Martin Nyaga Wambora Civil Appeal No 24/2014** that:

**“it is important that the court satisfies itself beyond any shadow of doubt that the person alleged to be in notice of the existence of the order of the court for bidding it. The threshold is quite high as it involves possible deprivation of a person’s liberty.”**

22. I am also persuaded by the holding of **Emukule J in Msa HC. Misc App NO 20 of 2015 Rep –Ex parte Farid Mohammed Almaary & 2 Others vs County Government of Mombasa** where the court observed that:

**“For purposes of contempt proceedings, the responsibility attaches to an individual or individual officials and not every official of the respondent”.**

It was therefore necessary for the plaintiff/applicant to serve the two contemnors. I find that the two contemnors were not aware of the court orders. As to the issue No. (ii) the answer is no. Dr. Ayisi the County Secretary was not the officer of carrying out the developments and/or demolitions.

Another issue is whether or not the contemnors are guilty of disobeying a court order. The standard of proof in matters of contempt is well settled. The Court of **Appeal in Civil Appeal No 39 of 1990 Refrigeration & Kitchen Utensils Ltd vs Gulabchand Popattal Shah & Others** in approving the standard of proof in contempt cases as set out in the case of **Gathara Mitika & Others vs Baharini Farm Ltd Civil Appeal No 24 of 1995** held:-

**“that in case of alleged contempt the breach for which the contemnor is cited must not only be precisely defined but proven on standard which is higher than proof on a balance of probabilities but not as high as proof beyond reasonable doubt. This is because the charge of contempt of court is an offence of criminal character and a party may lose his liberty”.**

23. It would therefore mean before a court cites a contemnor for contempt there must be sufficient evidence to prove that he/she has knowledge of the court order and has willfully disobeyed it. It was incumbent upon the plaintiff/applicant to prove that the acts were committed by the contemnor herein. As to the answer to issue no. (iii) the answer is no.

24. All in all I find that the plaintiff/applicant has failed to discharge its burden as required by law. I find that the application herein lacks merit and the same is dismissed with costs to the 2<sup>nd</sup> defendant/respondent.

It is so ordered.

Dated, signed and delivered in Nairobi on this 16<sup>TH</sup> day of OCTOBER 2018

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L. KOMINGOI

JUDGE