



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

MILIMANI LAW COURTS

ELC APPEAL NO.6 OF 2018

HABIBA ALI MURSAL & 4 OTHERS.....APPELLANTS

=VERSUS=

MARIAM NOOR ABDI.....RESPONDENT

RULING

Background

1. This is a ruling in respect of two applications. The first application is dated 11th October 2018. It seeks the following orders:-

1. Spent

2. Spent

3. Pending the hearing and determination of this Appeal, the Appellants be granted leave to deposit the monthly rent into this Honourable Court at the Respondent's cost.

4. Spent

5. Pending the hearing and determination of the instant Appeal, this Honourable Court be pleased to issue an interim injunction against the respondent restraining the Respondent, her employees, agents and any other person acting under her authority from demolishing the suit property or interfering in any way whatsoever with the Appellants' quiet possession of the suit property namely Nur Plaza located on L.R 36/11/2017 at 1st Avenue Eastleigh on the 2nd street.

6. The OCS, Pangani Police Station does ensure compliance of the orders issued herein.

7. The cost of this application be borne by the Respondent.

2. The second application is dated 30th October 2018. It seeks the following orders:

1. Spent

2. That this Honourable Court be pleased to find one Mariam Noor Abdi, the Respondent herein, to be in contempt of court for wilful and callous disobedience of the order of this Honourable Court issued on 19th October 2018.

3. That upon grant of prayer (2) above this Honourable Court be pleased to issue an order that the said Mariam Noor Abdi, the Respondent herein, be committed to civil jail for a period of 6 months, coupled with the payment of a fine of Kshs.200,000/= for the wilful disobedience of the orders of this Honourable Court issued on 19th October 2018.

4. That this Honourable Court be pleased to issue summons to both the OCPD, Starehe and OCS, Pangani, to appear before this court and give reasons why the orders issued on the 19th October 2018 were not complied with and disregarded in their presence.

5. That this Honourable Court be pleased to issue a mandatory order compelling the Respondent to compensate the Appellants for all the damages incurred for the demolition of their shops at Nur Plaza Mall, Eastleigh on the 29th October 2018.

6. That this Honourable Court be pleased to issue a mandatory order compelling the Respondent herein to unconditionally and immediately restore the Appellants shops at Nur Plaza, Eastleigh, back to their original condition at her own cost.

7. That the Respondent meets the costs of this application.

3. The two applications were filed by the appellants/applicants. The applicants were tenants in the respondents' premises known as Nur Plaza on LR No.36/11/2017 at 1st Avenue Eastleigh. In or around 2016, the respondent issued notice to terminate the appellants' tenancy. The appellants moved to the Business premises Rent Tribunal and filed a reference contesting the notice to terminate their tenancy. The dispute was heard and the Tribunal ordered the tenants to vacate the respondent's premises. The applicants were aggrieved with part of the judgement of the Tribunal. They moved to this court where they filed an appeal. The applicants contemporaneously filed an application for stay pending appeal. After the application for stay was heard, the court issued stay of execution orders pending hearing and determination of the appeal. Though the court had ordered the five appellants to deposit a combined security of costs of Kshs.500,000/= to be paid in equal amounts, it would appear that part of the ruling was misunderstood because each of the applicants made a deposit of Kshs.500,000/=.

4. After the stay orders were granted, the respondent proceeded to evict all the other tenants from the building except the applicants. The respondent however threatened to have the entire building demolished. This is what prompted the applicants to move to court seeking to restrain the respondent from demolishing the building. The respondent had also blocked the electricity metre boxes such that the applicants could not access the metres for purchase of tokens for their use.

5. On 19th October 2018, the court issued orders of temporary injunction in terms of prayer (4) of the application. This restrained the respondent from demolishing the building or interfering in any manner with the occupation of the applicants' business premises. The OCS Pangani Police Station was directed to ensure compliance with the court orders.

Application dated 11th October 2018.

6. The applicants contend that following the grant of stay of execution, their relationship with the respondent became strained to an extent of the respondent refusing to accept rent from them and whenever she accepted rent, she never acknowledged the same. The applicants therefore sought an order of this court directing payment of rent in court. The applicants contend that unless the court granted the orders prayed for, the pending appeal will be rendered nugatory.

7. The respondent opposed the applicants' application through a replying affidavit sworn on 8th November 2018 in which she conceded that indeed she had demolished the 1st to 5th floor of the building. The respondent states that as she was demolishing the upper floors of the building, the applicants whose shops were on the ground floor vacated voluntarily from the shops and carried away their goods in the presence of the police. The respondent argues that she started demolishing the upper floors of the building following a consent order obtained from Milimani Chief Magistrates Court Civil Suit No.8798 of 2018.

8. I have considered the applicants' application as well as the opposition to the same by the respondent. I have also considered the oral submissions by counsel for the parties herein during the hearing of this application. There are two issues which are for determination in this application. The first is whether an order should issue directing the applicants to deposit their monthly rent in court. The second issue is whether an injunction should be granted in favour of the applicants.

9. It is generally agreed that the respondent has already demolished the building. There can be no order to pay rent for premises which have already been demolished. Even if the premises had not been demolished, the court would not have given an order for deposit of rent in court as already, the court in a ruling delivered on 19th September 2018 had granted the applicant liberty to deposit rent in court if the respondent declined to receive the same.

10. On the issue as to whether an injunction should be issued, there is nothing to restrain as the respondent has already demolished the walls of the building. According to the photographs annexed to the application for contempt which I shall shortly herein after deal with, the walls of the building have already been demolished and all windows removed. The entire building has been fenced and sealed using iron sheets. The applicants are not in the premises. The purpose of an injunction is to restrain that which is threatened to occur or is in the process of being undertaken in breach of one's right. It is never meant to prevent what has already occurred. It will therefore be futile to grant injunctive orders. I will therefore decline to grant any orders in the notice of motion dated 11th October 2018 save for an order that the respondent shall meet the costs of this application.

It is so ordered.

Application dated 30th October 2018.

11. The applicants contend that the respondent disobeyed the court orders which were given on 19th October 2018 despite the orders having been served upon her. The same orders were served upon the OCS Pangani Police Station. The respondent went ahead to demolish the building including the applicants' shops. The applicants therefore want the court to punish the respondent for contempt of court and summon the OCS Pangani and the OCPD Starehe to come to court and explain why the court orders were disobeyed in their presence.

12. The respondent opposed the applicants' application through a replying affidavit sworn on 8th November 2018. Whereas the respondent admits that she demolished the building which housed the businesses of the applicants, she states that she did so following a consent order which was signed between her and tenants who were occupying shops on the 1st to 5th floor of the building. The consent was recorded in Milimani Chief Magistrates Civil Suit No.8798 of 2018.

13. The respondent further states that the applicants voluntarily vacated the premises after they saw that the contractor had started demolishing the upper floors and that the applicants removed all their goods from the premises in the presence of police officers. The respondent denies that she is in contempt of court and that there was no personal service of the order given on 19th October 2018.

14. I have considered the application by the applicants and the opposition to the same by the respondent. The issues which emerge for determination in this application are firstly whether the respondent is in contempt of the court order, secondly whether the court can order for compensation for the applicants' damaged goods and whether the OCS Pangani and OCPD Starehe should be summoned to court to explain why the orders of court were disobeyed as they watched.

15. In an application for contempt, the person seeking to have another punished for contempt has to prove that there was a valid court order issued; that the order required the contemnor to do or refrain from doing a particular activity; that the order was not ambiguous; that the order was served upon the contemnor or that the contemnor had knowledge of the order and that the contemnor wilfully disobeyed the court order.

16. In the instant case, there was a valid order given by the court on 19th October 2018. This Court order restrained the respondent, her employees, agents or any other person acting under her authority from demolishing the suit property or interfering in any way with the applicant's quiet possession of the suit property. This order was not ambiguous. Its terms were clear. The order was served upon the respondent on 24th October 2018 as per the affidavit of Martin Mutua sworn on 24th October 2018.

17. There is evidence that despite the respondent being served with the court order, she went ahead to demolish the building. The respondent's reason for demolition is that she had a consent order from Milimani Chief Magistrates' Court in Civil Suit No.8798 of 2018. I have looked at the order given on 17th October 2018. The order did not authorise the respondent to demolish the building. The order only allowed some of the defendants named in that suit to vacate the premises within 7 days or they be evicted. The applicants were not parties to the case filed at the Chief Magistrates Court and the order therefore was not directed at them.

18. Though the respondent denies that she was served, she has admitted in her replying affidavit that the order of 19th October 2018 was left with her daughter in her house. This therefore means that she was aware of the court order. In the case of **Basil Criticos Vs Ala & 8 Others (2012) eKLR**, Justice Lenaola as he then was held as follows:-

“... the law has changed and as it stands today knowledge supersedes personal service....where a party clearly acts and shows that he had knowledge of a court order; the strict requirement that personal service must be proved is rendered unnecessary”.

19. The respondent was aware of the court orders because this is a matter which was already in court and the respondent was aware that the applicants had stay of execution orders in their favour and had court orders restraining her from demolishing the building and interfering with the applicants' quiet enjoyment of the premises. Despite service of the order and with full knowledge of the existence of the order, the respondent proceeded to demolish the building. The photographs exhibited by the applicants show the demolished building which has been ring fenced with iron sheets. Even if the respondent claims that the applicants vacated the premises on their own volition, it is clear that the respondent's action of demolishing the upper floors was away of forcing them out. The applicants could not enjoy quiet possession of a building which was being demolished from the top and had been fenced with iron sheets.

20. The respondent's actions were in utter contempt of the court order. The respondent has in her replying affidavit stated that her actions were informed by the huge losses which she was incurring. She had allegedly obtained building plans a year earlier and therefore her monetary concerns were considered to be higher than the court order. A court order whether made ex-parte or interpartes must be obeyed. In the case of **Wildlife Lodges Ltd vs County Council of Narok and Another (2015) 2 EA 344**, it was held as follows:-

“ It was a plain and unqualified obligation of every person against or in respect of whom an order was made by the court of competent jurisdiction to obey it until that order was discharged and that where a party considers an ex-parte order to cause him undue hardships ,simple application will create an opportunity for an appropriate variation to be effected thereto; and therefore there will be no excuse for a party to disobey a court order merely on the ground that it had been made ex-parte”.

21. The respondent was under obligation to obey the court order and not merely say that the order was causing her financial loss. The Court of Appeal in **Econet Wireless Kenya Ltd Vs Minister for Information and Communication of Kenya & another (2005) eKLR 828**, held that it is essential for the maintenance of the rule of law and good order that the authority and dignity of the court be upheld at all times and that the court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors.

22. The respondent is arguing that the order was given through misrepresentation by the applicants and that as a result, it affected the entire building. This argument cannot justify disobedience of the order. In the case of **Hadkinson Vs Hadkinson (1952)ALL ER 567 Ronmer LJ at page 569** stated as follows:-

“ It is the plain and unqualified obligation of every person against or in respect of whom, an order is made against 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 the order believes it to be irregular or void”.

23. The manner in which the respondent acted was deliberate and in utter contempt of the court order. The contempt is evident in her replying affidavit which confirms that she had indeed decided that notwithstanding the court orders, she was going to demolish the building anyway. I therefore find that the respondent is in contempt of the order given on 19th October 2018.

24. The applicants have sought that the court issues an order compelling the respondent to compensate them for the damages which they

incurred as a result of the demolition of their shops. This order cannot be granted in this application for the reason that the damages if any are not quantifiable or assessable. The applicants can pursue any damages they may have suffered through another forum but not in these proceedings.

25. The applicants are also asking the court to order that the respondents do restore the shops which the applicants held. This order cannot be granted. Already the building has been demolished and such order would not be viable. If the applicants have suffered any damages, that can be pursued through a claim for damages and certainly not by ordering restoration of their shops.

26. On the issue of whether the OCS Pangani should be summoned to explain why he failed to comply with the order of the court, I notice that the OCS Pangani was served with the court order. The court order directed the OCS to ensure compliance with the court order. It is not uncommon for the court to seek police assistance in enforcing compliance because protection of property is part of their core mandate. There is evidence that police were present when demolition was undertaken and the applicants were forced out. It is in order to summon the OCS Pangani to explain why he had failed to comply with the court order which had been served upon him.

Conclusion.

27. In summary thereof the applicants' application dated 11th October 2018 is not allowed as it has been overtaken by events but the respondent shall pay the applicant the costs of that application. As for the notice of motion dated 30th October 2018, I find that the respondent is guilty of contempt of court. The respondent/contemnor is directed to appear in court on 19th December 2019 at 2.30 pm for mitigation failing which the contemnor should be arrested and brought to court during working hours for necessary action. Summons shall be issued to the OCS Pangani Police Station to appear in Court on 19th December 2018 at 2.30 pm to explain why there was no compliance with court order given on 19th October 2018. The costs of this application shall be paid by the respondent.

It is so ordered.

Dated, Signed and Delivered at *Nairobi* on this 29th day of **November 2018**.

E.O.OBAGA

JUDGE

In the presence of;-

Mr Tebino for Applicant

Mr Shimenga for Respondent

Court Clerk : Hilda

E.O.OBAGA

JUDGE