



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

CASE No. 346 OF 2016

DOROTHY WANJIKU WAWERU.....PLAINTIFF

VERSUS

SAM KANYINGI MACHARIA.....DEFENDANT

RULING

1. By Notice of Motion dated 23rd May 2017, the plaintiff sought the following orders:

1. Spent.

2. The defendant herein Sam Kanyingi Macharia be held in and be punished for Contempt of Court, and he be fined, imprisoned, and/or have his property attached and sold as the court may order.

3. The defendant to forthwith provide an account of, and to remit to court and/or to the court-ordered loan account at HFCK Bank, all and any rent money collected or received by the defendant from the suit premises from 1st September 2016 to date.

4. The defendant do henceforth strictly abide by the court order dated 10th November 2016, and all/any subsequent orders of the court herein.

5. That costs of this application be borne by the defendant in any event.

2. The application was brought under Order 40 rules 1, 2, 3 of the Civil Procedure Rules and Sections 4, 5 and 28 of the Contempt of Court Act 2016 among other provisions. The application was supported by an affidavit sworn by the plaintiff. She deposed that despite being party to a consent order made on 10th November 2016 and despite being served with a copy of the order, the defendant had consistently acted in breach of the order by collecting rent from the suit premises and frustrating the appointed agents. When the plaintiff appointed an auctioneer to levy distress for rent against defaulting tenants, the auctioneers were denied access to the premises on the instructions of the defendant. Owing to the defendant's conduct, an outstanding loan at HFCK could not be properly serviced leading to the bank issuing statutory notices.

3. The defendant opposed the application through a replying affidavit filed on 6th June 2017. He denied collecting rent from any tenant and added that M/s Jojean Properties Ltd had not provided any report or accounts to him.

4. In addition to the supporting affidavit, the plaintiff filed further affidavits on 12th March 2018, 11th May 2018 and 16th May 2018. All these affidavits generally reiterate the position that the defendant had disobeyed the orders of the court.

5. The battle of affidavits did not end there. The defendant filed a replying affidavit on 16th May 2018 and a further affidavit on 24th May 2018. He reiterated that the plaintiff had chosen to deal with M/s Jojean Properties Ltd to his exclusion and further that the plaintiff had unilaterally instructed an auctioneer to levy distress for rent.

6. Pursuant to an order of the court made by consent on 25th May 2018, M/s Muigai Commercial Agencies were appointed to take over management of the property and were required to file monthly reports in court. In that regard, the said company filed an affidavit on 4th July 2018 and on 21st September 2018, both sworn by Benson Maina, an employee of the Company. He deposed that the defendant had frustrated their management by among others stopping them from putting signage on the property and by collecting rent from 4 tenants.

7. The application was heard orally on 25th September 2018. Although the date was taken in court by consent of all parties, counsel for the defendant did not attend court at the hearing. Consequently, counsel for the plaintiff urged the court to allow the application.

8. I have considered the application and the various affidavits filed. The plaintiff and the defendant are wife and husband. The dispute concern properties which the plaintiff refers to as matrimonial property.

9. Despite the accusations and counter accusations flying about, I note that the parties jointly appointed M/s Muigai Commercial Agencies pursuant to consent recorded in court on 22nd May 2018 to manage the property. The consent specifically stated that the agent should carry out its mandate without any interference by the parties. Muigai Commercial Agencies have stated in an affidavit filed on 4th July 2018 and in another filed on 21st September 2018 that the defendant has interfered with and frustrated their work as agents. The defendant has not responded to these specific affidavits. Considering that Muigai Commercial Agencies were jointly appointed by the parties, I do not think there would be any motivation for them to mislead the court. I therefore accept as true, their position that the defendant had frustrated and interfered with their work as agents by among others collecting rent from some 4 tenants in June 2018.

10. The orders of 10th November 2016 pursuant to which the initial agents were appointed stated:

1. That the management and collecting of rent over the property title number Nakuru/Municipality Block 2/242 be in the hands of Jojean Properties Limited with immediate effect and the said agents do collect the rent from all the tenants in the said premises.

2. That all the rent collected save for reasonable agent's commission be paid into the parties' joint loan account at HFCK being account No. xxxxxxxxxx.

11. It follows therefore that just like Jojean Properties Ltd, M/s Muigai Commercial Agencies were mandated by the court to manage the premises and to collect rent. Any conduct by any person that stops the agent from doing that which they were mandated to do by the court is a serious affront to the dignity and authority of the court. It amounts to contempt of court.

12. The duty to obey court orders is a clear one. The only avenue available for a party who is not satisfied with an order of the court is to approach the court seeking variation or setting aside. The Court of Appeal recently rendered itself in **Fred Matiang'i the Cabinet Secretary, Ministry of Interior and Co-ordination of National Government v Miguna Miguna & 4 others [2018] eKLR** as follows:

When courts issue orders, they do so not as suggestions or pleas to the persons at whom they are directed. Court orders issue ex cathedra, are compulsive, peremptory and expressly binding. It is not for any party; be he high or low, weak or mighty and quite regardless of his status or standing in society, to decide whether or not to obey; to choose which to obey and which to ignore or to negotiate the manner of his compliance. This Court, as must all courts, will deal firmly and decisively with any party who deigns to disobey court orders and will do so not only to preserve its own authority and dignity but the more to ensure and demonstrate that the constitutional edicts of equality under the law, and the upholding of the rule of law are not mere platitudes but present realities.

13. When a person chooses willingly and deliberately to disobey a court order, worse still an order that he consented to, he is understood to be ready to face the consequences as spelt out by the law. In that regard, **Section 28(1) of the Contempt of Court Act No. 46 of 2016** provides:

28. Punishment for contempt of court

(1) Save as otherwise expressly provided in this Act or in any other written law, a person who is convicted of contempt of court is liable to a fine not exceeding two hundred thousand shillings or to imprisonment for a term not exceeding six months, or to both.

14. It is unfortunate that the defendant disregarded orders of the court even after the present application was filed and was pending hearing. I find that his amounts to contempt of court. I will mete out an appropriate punishment. This being a matter in which the parties have close family connections, I will give the defendant a chance to pay a fine before any committal.

15. In view of the foregoing, I order that the defendant pays a fine of KShs 200,000 (two hundred thousand) within 14 (fourteen) days from the date of delivery of this ruling. In default, the defendant shall be imprisoned for a period of three (3) months. Costs of the application are awarded to the plaintiff.

16. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 27th day of November 2018.

D. O. OHUNGO

JUDGE

In the presence of:

Ms Langat holding brief for Prof Wabwile for the plaintiff/applicant

No appearance for the defendant/respondent

