



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

THIKA ELC CASE NO.132 OF 2017

ISAAC KABIRU.....PLAINTIFF/APPLICANT

-VERSUS-

JAMES NGUGI GITHAHU.....DEFENDANT/RESPONDENT

RULING

This Court on **27th July 2017** delivered a **Ruling** and allowed the Plaintiff/Applicant's **Notice of Motion** application dated **4th December 2015** on the following terms:-

- 1. That a temporary injunction be issued restraining the Defendant whether by himself, his agents, servants and/or employees from trespassing, alienating, dealing with, selling and/or committing acts of waste in LR.No.76/373 Thindigua measuring 40ft x 83ft or thereabout within Kiambu County pending the hearing and determination of the Plaintiff herein.**
- 2. That a temporary injunction be issued restraining the Defendant whether by himself, his agents, servants and/or employees from continuing with the illegal sale and transfer of the suit property pending the hearing and determination of the suit herein.**

The Plaintiff had alleged that he bought a plot measuring **40ft x 83 ft** from the Defendant/Respondent which is a portion of **LR.No.76/373 Thindigua**.

However, on **7th December 2017**, the Plaintiff/Applicant filed the instant **Notice of Motion** application which is even dated and alleged that the Defendant/Respondent is in **Contempt of Court Order** issued on **27th July 2017** as he continues to receive rental income from the tenants of the suit property against the **Court Order** which restrained him from dealing with the suit property till the hearing and determination of the suit.

Further, that the **OCS Kiambu Police Station** be directed to provide security and to oversee the service and compliance of the **Court Order** issued on **27th July 2017**, and that costs be in the cause.

The application is supported by the **affidavit** of **Isaack Kabiru**, the Plaintiff/Applicant herein. He alleged that the Defendant herein who is a beneficiary of the **Estate of Sospeter Githahu Njoroge** sold to him a plot measuring **40ft x 83ft**, but he continues to interfere with it. However the Court issued an **Order** on **27th July 2017**, restraining the Defendant and his agents or servants from **trespassing, alienating** and/or **dealing** with the said suit property until the suit is heard and determined. He averred that the Defendant is in **Contempt** of the said **Court Order** and is still in possession of the suit property and continues to illegally receive rental income from the tenants. He urged the Court to direct the tenants to pay rent directly to him and not the Defendant and that **OCS Kiambu Police Station** should assist in enforcement of the said **Order**. He urged the Court to allow his application.

The Defendant filed his **Replying Affidavit** together with the submissions and denied that he has been in **Contempt of the Court Order**. He denied that he was ever served with the alleged **Court Order**, and therefore the allegation of **Contempt** is **baseless** and **cannot support the ingredients** of what amount to **Contempt of Court**. He urged the Court to direct the Plaintiff to set the suit down for hearing and dismiss the instant application with costs.

The application was canvassed by way of written submissions, which this Court has carefully read and considered.

In the instant application, the Plaintiff/Applicant has alleged that the Defendant is in **Contempt of Court Order** issued on **27th July 2017** as he continues to receive rental income from the tenants. However the Plaintiff/Applicant has not sought for citing of the said Defendant/Respondent for such **Contempt**. He has only alleged that the Defendant is in **Contempt** but has not asked the court to deal with the Defendant/Respondent as a consequence of such **Contempt**. It is trite that parties are bound by their pleadings and this Court cannot give what has not been sought in the pleadings.

The Applicant has sought for committal of the Defendant to prison for such **Contempt** in the submissions. However prayers or orders are not sought for in the submissions but in the pleadings as parties are bound by their pleadings. See the case of **Independent Electoral & Boundaries Commission & Another...Vs...Stephen Mutinda Mule & 3 Others (2014) eKLR**, where the Court cited with approval the case of **Adeloun Oladeji (Nig) Ltd...Vs...Nigeria Breweries PLC S.C 91/2002**, and held that:-

“It is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings or put in another way which is at variance with the averments of the pleadings, goes to no issue and must be disregarded”.

Be that as it may, the application is contested and the Defendant/Respondent has alleged that he was not served with the **Court Order** and that the extracted **Order** did not have the **Penal Notice**. However, the Defendant was represented by the **Law Firm of Ngugi Mwaniki & Co. Advocate** and from the annexures attached to the instant application, it is clear that **Ngugi Mwaniki Advocates** received the **Court Order** on **9th November 2017**.

Further, the **Law Firm of Ngugi Mwaniki & Co. Advocates** sought to be supplied with the **Court Ruling** vide a letter dated **16th August 2017** and the said **Ruling** was issued to **Mr. David Mwaniki** of **Ngugi Mwaniki & Co. Advocates** on **22nd August 2017**.

Having been represented by an advocate and the said advocate having received a copy of the **Ruling**, the Defendant cannot allege that he was not **‘personally’** served with the **Court Order**. The Defendant’s advocate having received a copy of the said **Ruling**, then the Defendant who had duly instructed the said advocate was aware of the said **Ruling** and **Order** of the Court. The Court will concur with the **Ruling** of the Court in the case of **Basil Criticos...Vs...Attorney General & 8 Others (2012)eKLR**, where it was held that:-

“...the law has changed and as it stand today, knowledge supercedes 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”.

Equally, in this case, the defendant’s advocate having sought for the Court **Ruling** and **Order** and given that the said advocate was duly acting for the Defendant and is still acting for him even now, then the Defendant had knowledge of the said **Court Order** and the requirement of personal service was not necessary.

However, the extracted **Order** did not have the **Penal Notice** as required by the law. The Applicant has alleged that the Defendant is in **Contempt of Court and Contempt** of court is *quasi-criminal* proceedings and if the contemnor is found guilty of **Contempt**, then his freedom can be curtailed. Due to the nature of **Contempt** proceedings being *quasi-criminal*, the standard of proof is higher than on any other Civil matter. See the case of **Mutitika...Vs...Baharini Farm Ltd, Civil Appeal No.24 of 1985**, where the Court held:-

“The standard of proof in contempt proceedings must be higher than proof on the balance of probabilities, almost but not exactly beyond reasonable doubt...”

Recourse ought not be heard through process of contempt in aid of a civil remedy where there is other methods of doing justice. The jurisdiction of committing for contempt being practically arbitrary and unlimited should be most jealously and carefully watched and exercised with the greatest reluctance and the greatest anxiety on the part of Judge to see whether there is no other mode which is open to the objectives of arbitrariness, and which can be brought to bear upon the subject.”

The Applicant has alleged that though the Defendant was restrained from dealing with the suit property, he continues to collect rental income from the tenants. The Defendant has denied any interference as alleged by the Applicant. The Applicant has made allegations but has not attached any evidence to the effect that indeed the Defendant/Respondent herein has been collecting rent from the tenants and continues to do so. Failure to avail such evidence renders the Applicant’s allegations mere allegations and this Court cannot find and hold that indeed the Defendant has been collecting rent from the tenants on the suit property.

Therefore the Court finds that the Applicant has failed to proof on the required standard that the Defendant herein is in **Contempt of the Court Order**.

Further, the Court finds that the **Order** of **27th July 2017**, was not clear on the issue of the rental income from the tenants. For the above reasons, the Court finds that it is imperative to emphasize that the Defendant/Respondent is restrained from dealing whatsoever with the suit premises and this dealing include collection of rental income. The Defendant is therefore restrained from collecting rental income from the tenants of the suit property and the said tenants are directed to pay rent directly to the Plaintiff/Applicant herein.

Further, the said **Order** of the Court to be served upon the said tenants and the **OCS Kiambu Police Station** to ensure that the Court Order herein has been complied with.

The Court also directs the Plaintiff to cease filing numerous interlocutory applications but to prepare the man suit for hearing.

For the above reasons, the Court directs the parties to comply with Order 11 within the next 45 days from the date hereof and thereafter set the matter down for Pre-trial directions.

Having now carefully considered the instant **Notice of Motion** dated **7th December 2017**, the **Court finds it merited only on the issue of the tenants paying rent directly to the Plaintiff/Applicant and the Defendant is restrained from collecting rental income from the said tenants and the tenants in the suit premises to be served with the instant Court Order and **OCS Kiambu Police Station** to ensure the Court Order is complied with.**

However, the *Court dismisses the prayer for Contempt of Court.*

It is so ordered.

Dated, Signed and Delivered at Thika this 16th day of November 2018.

L. GACHERU

JUDGE

In the presence of

No appearance for Plaintiff/Applicant

Mr. Githui holding brief for Mr. Ngugi Mwaniki for Defendant/Respondent

Lucy - Court clerk.

Court – Ruling read in open court in the presence of the above advocate and absence of the Plaintiff/Applicant.

L. GACHERU

JUDGE

16/11/2018