



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC SUIT NO. 1581 OF 2016

KINGORANI INVETMENTS LIMITED.....PLAINTIFF

VERSUS

SIGMA LIMITED.....1ST DEFENDANT

JAMES GICHUKI WAMBUGU.....2ND DEFENDANT

SAMUEL MWANGLI.....3RD DEFENDANT

GARANCO FIVE LIMITED.....4TH DEFENDANT

SAADIA OMAR SHURIE.....5TH DEFENDANT

NURU SAID AHMED.....6TH DEFENDANT

ABBAS IBRAHIM KHALIF.....7TH DEFENDANT

NAIROBI COUNTY GOVERNMENT.....8TH DEFENDANT

CHIEF LAND REGISTRAR.....9TH DEFENDANT

WHITE LOTUS PROJECTS.....10TH DEFENDANT

IN THE MATTER OF AN APPLICATION FOR COMMITTAL FOR CONTEMPT OF COURT

BY

KINGORANI INVETMENTS LIMITED.....PLAINTIFF/APPLICANT

VERSUS

WHITE LOTUS PROJECTS.....1ST RESPONDENT

ABBAS IBRAHIM KHALIF.....2ND RESPONDENT

POOSAPATI SITA RAMACHANDRA RAJU.....3RD RESPONDENT

MOHAMUD MAHAT NOOR.....4TH RESPONDENT

IOTA EXCAVATIONS AND RENTALS LTD.....5TH RESPONDENT

CHINA STATE CONSTRUCTION

CORPORATION.....6TH RESPONDENT

SKETCH STUDIO LIMITED.....7TH RESPONDENT

MATRIX INTEGRATED CONSULATANCY.....8TH RESPONDENT

TERRA CONSULT KENYA LTD.....9TH RESPONDENT

BECS CONSULTANCY.....10TH RESPONDENT

RULING

The plaintiff brought this suit against the defendants through a plaint dated 14th December, 2016 in which the plaintiff sought among other reliefs, a permanent injunction restraining the defendants from entering upon, or trespassing, constructing or continuing with the construction of structures, offering for sale, selling, disposing of, charging, sub-dividing, dealing, alienating, occupying, managing, letting or otherwise using, residing and remaining or in any other way interfering with the plaintiff's proprietary rights including the right to quiet possession and enjoyment of all that piece of land known as to L.R. No. 209/11142(I.R No. 48067), Nairobi (hereinafter referred to as "the suit property").

The plaintiff averred that it was at all material times the registered owner of the suit property and that on 10th December, 1998 the suit property was fraudulently transferred from its name to that of the 1st defendant and subsequently by the 1st defendant to the 4th defendant. The plaintiff averred that the 10th defendant who was developing the adjacent parcel of land had in collusion with the 8th defendant been permitted to store building materials on the suit property thereby interfering with the plaintiff's possession and use of the suit property.

Together with the plaint, the plaintiff filed an application by way of Notice of Motion dated 14th December, 2016 seeking a temporary injunction restraining the defendants by themselves and/or through their principals, agents, employees, servants and any other persons acting under their authority from trespassing, remaining in occupation, entering, occupying, dealing and or in any manner howsoever interfering with its ownership, occupation, possession and use of the suit property pending the hearing if the suit.

On 9th January, 2017, the court granted the injunctive orders that were sought by the plaintiff on a temporary basis pending the hearing of the application inter partes. On 16th October, 2017, the court confirmed and extended the said orders until the hearing and determination of the suit. What is now before the court is the plaintiff's application dated 20th November, 2017 seeking the following orders:

- 1) Pending the hearing and determination of this suit, the respondents and or their contractors, agents, directors, associates, partners or employees be ordered to vacate and be restrained from entering, occupying and or using the suit property and the said parties to vacate the suit property within 24 hours of being served with the order failing which eviction to issue forthwith with the assistance of the Officer Commanding Station, Upper Hill Police Post/Station.
- 2) The respondents herein or so many of them as may be found to have been directly responsible for the excavations and works on the suit property be ordered to refill the same and restore the suit property to the position it was before such excavations and works within such time as may be ordered and in default, the applicant be at liberty to secure due compliance at the personal costs of such respondents.
- 3) The court be pleased to find that the 1st to 10th respondents are jointly and severally in contempt of court for disobeying and or disregarding the orders given on 11th January, 2017 and 18th October, 2017.
- 4) Leave be granted for the committal to jail for a period of 6 months of Poosapati Sita Ramchandra Raju, Mohamud Mahat Noor and Abbas Ibrahim Noor and additionally, each of the said persons be required to pay such amount as may be ordered by the court for the said contempt.
- 5) Sequestration and/ or attachment do issue for the properties of the 1st to 10 respondents or each and all of them and the same be attached for the amount to be determined pending the purging of their contempt.
- 6) The court be pleased to issue other or further reliefs as it may seem just and expedient.
- 7) The costs of and occasioned by the contempt of court proceedings herein be taxed and met by each of the respondents herein jointly and/or severally and in default thereof, execution to issue forthwith.

The grounds upon which the application was premised are set out in detail on the body of the application and in the affidavit of James Abiam Mugoya Isabirye sworn on 20th November, 2017. The plaintiff's complaint against the respondents can be summarised as follows. On 11th January, 2017, the court issued a temporary injunction restraining the defendants from trespassing, remaining in occupation, entering, occupying, dealing and/ or in any other manner howsoever interfering with the plaintiff's ownership, occupation, possession and use of the suit property. The said orders were confirmed by the court on 16th October, 2017 in the presence of the advocates for the 2nd, 4th, 5th, 6th and 8th defendants. The said orders were duly served upon the parties to the suit and were also publicly displayed on the wall erected around the suit property. In blatant disobedience of the said orders, the respondents forcibly moved into the suit property and cut all the grass and trees thereon in readiness for excavation. The plaintiff contended that the 5th to 10th respondents were contractors of the 1st to 4th respondents and were employed to undertake the construction of a high rise building on L.R 31/219. The plaintiff contended that while in the course of undertaking the said duties, the 5th to 10th respondents encroached on the suit property. The plaintiff averred that the 3rd and 4th respondents were the directors of the 1st respondent.

The application was opposed by the respondents. The 4th defendant's director, Pitchi Surendra Naithi Reddy swore a replying affidavit on 21st February, 2018 in opposition to the application. He averred that he swore the said affidavit on behalf of the 1st, 4th, 5th, 6th, 7th, 8th, 9th and 10th respondents. He averred that the 4th defendant was the owner of the suit property. He averred that the 4th defendant purchased the suit property for value and had it registered in its name on 8th July, 2016. He averred further that from the time the 4th defendant purchased the suit property, the 4th defendant had exercised rights accruing to it in respect thereof including but not limited to possession of the property.

He averred that on 5th December, 2016, the 4th defendant entered into a tenancy agreement in respect of the suit property with the 1st respondent/10th defendant for the purposes of temporary parking and storage. He averred further that the court had directed the parties to maintain the prevailing status quo which at the time was that the 4th defendant was the owner and in possession of the suit property which was being used as set out in the tenancy agreement. He denied that the 4th defendant was in breach of the said court orders. He denied that the 4th defendant was clearing and excavating the suit property in readiness for construction. He averred that the debris on the suit property was soil that was excavated from the adjacent site which the 1st respondent/10th defendant was clearing to various approved dumpsites.

The 4th defendant's said director averred that a perimeter wall had been erected around the suit property prior to the issuance of the orders said to have been disobeyed and that unknown persons invaded the premises at night and brought down part of the said wall and that it was incumbent upon the 4th defendant to restore the wall so that the property could be in the same state it was when the court issued the said injunctive orders. He contended that the 4th defendant's act of restoring the wall that was demolished by unknown persons could not be deemed to be contemptuous.

The 4th defendant's said director averred further that the 4th defendant had not made any alterations to the title or condition of the suit property. He contended that the plaintiff had not told the court as to when the alleged invasion of the suit property occurred and, the state of the property prior to and during the subsistence of the court order. He averred further that the plaintiff had not demonstrated how the court orders issued herein had been disobeyed, when they were disobeyed and by whom. He contended that the 1st and the 4th to 9th respondents were service providers contracted to provide various services in the adjacent land which was not the subject of this suit. He contended further, that the said respondents had never been on the suit property and were never served with the court orders in question.

He averred that the said respondents were innocent third parties who had no role in these proceedings and could not be punished for acts they were not aware of. He contended that contempt of court proceedings are suits in *personam* which can only be brought against a specific individual. He contended that a generalised condemnation like the one levelled against all respondents herein could not be entertained. He contended that the plaintiff's application was based on speculation, assumption and conjecture and did not meet the required standard of proof.

The 5th defendant filed grounds of opposition dated 15th December, 2017 in which she denied being in contempt of the court orders in question. The 5th defendant contended that the application did not disclose any cause of action against her as a former director of the 4th defendant. The 5th respondent filed a replying affidavit sworn on 21st January, 2018 by its director, Cecilia Mweru. Cecilia Mweru denied that the 5th respondent was in contempt of court. She deposed that the 5th respondent learnt of the court orders in question through an advert that was placed in the newspaper on 11th December, 2017. She contended that the 5th respondent had been engaged by the 10th respondent to carry out excavation works on L.R No. 31/219. She denied that the 5th respondent carried out any works or trespassed on the suit property contending that it would have been illogical for it to carry out work which was outside its contract.

Cecilia Mweru averred that at the time of filing the instant application, the 5th respondent had completed excavation works on L.R No. 31/219 and vacated the premises and as such could not have trespassed on the suit property as alleged. She contended further that if there were any excavation works on the suit property as alleged, the same would have been resisted by the applicant, the Nairobi City County and the National Environmental Management Authority (NEMA) which was not the case herein.

The 5th respondent's director contended further that the 5th respondent was not a party to the main suit and the application dated 14th December, 2017 which gave rise to the subject orders. She stated that the 5th respondent was not served with any pleadings or any orders prior to the newspaper advert aforesaid. She contended that it was unfair to accuse the 5th respondent for being in contempt of orders which were not directed at it and which the plaintiff made no attempt to notify it about. Lastly, she contended that the plaintiff had not demonstrated the specific ways in which the 5th respondent breached the court orders in question. She stated that general statements made by the plaintiff which did not relate to it could not suffice to prove a charge of contempt against it.

The 10th respondent filed a replying affidavit sworn by its director, Ahmad Alkizim on 26th January, 2016. The 10th respondent contended that prior to the instant application, it had no knowledge of the dispute relating to the suit property and the injunctive orders issued by the court in relation thereto. The 10th respondent averred that it was contracted by the 1st respondent to provide quantity surveying services on L.R No. 209/11617 which was different from the suit property. The 10th respondent averred that it was not a party to the suit herein and as such was erroneously joined as a party to the present application. The 10th respondent averred that the orders in question were not served upon it and for that reason, it could not have breached the same. The 10th respondent denied invading, trespassing on or clearing the suit property for excavation. The 10th respondent contended that it had never been on the suit property physically and that it had no proprietary interest in the property.

The application was argued orally. Mr. Ochieng Oduol advocate for the plaintiff submitted that the court issued injunctive orders against the defendants on 9th January, 2017 which were confirmed on 16th October, 2017. He submitted that the respondents disobeyed the said orders by continuing with excavation on the suit property. He submitted that the replying affidavit sworn by the 4th defendant's director, Pitchi Surendra Naithi Reddy on behalf of the 1st, 4th, 5th, 6th, 7th, 8th, 9th and 10th respondents was defective in that there was no authority given

to the deponent to swear the affidavit on behalf of the said respondents. Counsel submitted further that in the said affidavit it was admitted that there was dumping taking place on the suit property and construction of a wall which amounted to trespass and a breach of the court orders aforesaid. Counsel contended that the alleged tenancy agreement dated 5th December, 2016 between the 4th defendant and the 1st respondent was inadmissible for want of stamping and was a deliberate attempt to hoodwink the court. Mr. Ochieng argued that if there was a tenancy agreement between the two, they should have sought a variation of the said court orders if they were in conflict with the said agreement.

Counsel submitted that the terms of the court orders in question were clear and that the plaintiff had discharged its burden of proof. Mr. Ochieng submitted that the respondents could not feign ignorance of the court orders in question which were advertised in the newspapers and further, that Mr. Muganda advocate who appeared for most of the respondents was present in court when the orders were granted.

In response to the respondents' replying affidavits, grounds of opposition and submissions, counsel for the plaintiff submitted that the terms of the orders issued on 16th October, 2017 were clear and that there was no order for maintenance of status quo. Counsel submitted that the said orders had not been varied or set aside. He submitted that the respondents were represented by advocates who were present when the orders in question were made and as such the issue of service could not arise. He submitted further that knowledge of the order by an advocate representing a party is sufficient service upon such party. Counsel argued that the orders which were issued by the court covered the principals and their agents and that the contractors who were the agents of the 4th and 10th defendant were therefore bound by the said orders. Finally, Mr. Ochieng submitted that in paragraphs 7, 8, 9 and 14 of the affidavit sworn by the 4th defendant's director, Pitchi Surendra Naithi Reddy, he admitted the contempt complained of as the acts mentioned therein had been prohibited by the order.

In his reply to the submissions by the plaintiff's advocate, Mr. Muganda for the 4th defendant and the 1st, 3rd, 4th and 6th to 10th respondents submitted that the plaintiff had not specified when the trespass occurred and who committed the same. He submitted that the photographs exhibited in the affidavit of Pitchi Surendra Naithi Reddy show that no excavation had been carried out on the suit property. He argued that whereas the orders in question were directed to parties to the main suit, the application before the court was directed to non-parties who were not served with the said orders. He contended that personal service is a condition precedent to an application for contempt. He argued that the plaintiff had failed to demonstrate that there was a breach of the said orders or specific limbs thereof after substituted service was effected. He submitted further, that the plaintiff had failed to show how each of the respondents had disobeyed the said court orders.

Counsel submitted that the respondents' only fault was that of being developers of the adjacent property whose development was lawful and authorised. He submitted that the 4th defendant was in possession of the suit property as at August, 2016, before this suit was filed on 16th December, 2016 and the orders in question issued. He contended that the court orders aforesaid were intended to preserve the suit property and not to evict any party. He submitted that no eviction orders had been issued by the court. Counsel submitted that the plaintiff had failed to prove beyond reasonable doubt that the court orders in question had been willfully disobeyed. He submitted that some of the orders sought by the plaintiff in the application were mandatory in nature and that the court could not issue eviction orders in a contempt application.

In his submissions in reply, Mr. Wathuta for the 5th respondent associated himself with the submissions by Mr. Muganda. He submitted that the contents of the 5th respondent's replying affidavit had not been controverted. He made reference to part 7 of the Evidence Act, Chapter 80 Laws of Kenya on the production of electronic evidence and submitted that the photographs attached to the affidavit in support of the plaintiff's application were inadmissible as it had not been stated when the photographs were taken and by whom. Counsel submitted that the particulars of the 5th respondent's alleged acts of contempt had not been set out in the application which merely stated that the respondents were getting ready to carry out excavation.

Mr. Wathuta submitted further that there was no basis for alleging that the 5th respondent had carried out excavation on the suit property. He submitted that there was no evidence that the court orders in question had been brought to the 5th respondent's attention and that it had willfully disobeyed the same. Counsel submitted that the standard of proof for contempt was beyond reasonable doubt and that sufficient material had not been placed before the court to warrant the grant of the prayers sought.

Determination:

I have considered the plaintiff's application together with the affidavit filed in support thereof. I have also considered the affidavits and grounds of opposition filed by the respondents in opposition to the application. Finally, I have considered the submissions by the advocates for the parties. The main issues for determination in the application before me is whether the plaintiff has established that the respondents breached the orders issued herein on 9th January, 2017 and confirmed on 16th October 2017 and whether the plaintiff is entitled to the reliefs sought in the application.

In the case of Hardkinson v Hardkinson [1952] ALL ER 567, it was held that:

“It was the plain and unqualified obligation of every person against or in respect of whom an order was made by a court of competent jurisdiction to obey it unless and until it was discharged and disobedience of such order would as a general rule result in the person disobeying being in contempt and punishable by committal or attachment and in an application to the court by him not being entertained until he had purged his contempt.”

In the case of Mutitika v Baharini Farm Ltd [1985] KLR 227 it was held that:

(i) A person who knowing of an injunction, or an order of stay, willfully does something, or causes others to do something, to break the injunction, or interfere with the stay, is liable to be committed for contempt of court as such a person has by his conduct obstructed justice.

(ii) The standard of proof in contempt proceedings must be higher than proof on a balance of probabilities and almost but not exactly beyond reasonable doubt.

(iii) The principle must be borne in mind that the jurisdiction to commit for contempt should be carefully exercised with great reluctance and anxiety on the part of the court to see whether there is no other mode which can be brought to bear on the contemnor.

In the recent Court of Appeal case of Micheal Sistu Mwaaura Kamau v Director of Public Prosecutions & 4 others (2018) eKLR the court set out the law on contempt as follows:

“It is trite that to commit a person for contempt of court, the court must be satisfied that he has willfully and deliberately disobeyed a court order that he was aware of. That is made absolutely clear by section 4 of the Contempt of Court Act and the ruling of the Supreme Court in Republic v. Ahmad Abolfathi Mohammed & Another (supra). Secondly, as this Court emphasized in Jihan Freighters Ltd v. Hardware & General Stores Ltd and in A.B. & Another v. R. B. [2016] eKLR, to sustain committal for contempt of court, the order of the court that is alleged to have been deliberately disobeyed must be clear and precise so as to leave no doubt as to what a party was supposed to do or to refrain from doing. Lastly, the standard of proof in committal proceedings is higher than proof on a balance of probabilities, though not as high as proof beyond reasonable doubt. (See Mutitika v. Baharini Farm (supra) and Republic v. Ahmad Abolfathi Mohammed & Another (supra).”

It is on the foregoing principles that the plaintiff's application falls for consideration. The plaintiff alleged that the respondents committed the following acts which constitute contempt of the court orders aforesaid namely; that having moved out of the suit property, the respondents forcibly invaded the property and cut all the grass and trees on the suit property in readiness to carry out excavation. The respondents are also said to have encroached on the suit property while undertaking construction on the adjacent property. In response to these allegations, the 4th defendant's director who claimed to have been authorised by the 1st, 5th, 6th, 7th, 8th, 9th and 10th respondents to swear a replying affidavit on their behalf averred that the 4th defendant was the registered owner of the suit property and was in possession of the property before and after the filing of this suit and issuance of the said court orders. The said director of the 4th defendant claimed that it had entered into a tenancy agreement with the 1st respondent in respect of the suit property for purposes of temporary parking and storage. The 4th defendant contended that the orders of 9th January, 2017 and 16th October, 2017 meant that the status quo which was that the 4th defendant was in possession and that the property was being used as per the tenancy agreement aforesaid was to be maintained. The 4th defendant's said director denied that the 4th defendant had cleared and excavated the suit property in readiness for construction. He admitted however that there was debris on the suit property from the adjacent construction site which the 1st respondent was in the process of clearing to approved dumping sites. He also admitted further that part of a wall that was existing around the suit property was brought down by unknown persons and that the 4th defendant undertook the reconstruction of the same so as to preserve the property in the same state it was when the orders of the court in question were issued.

The orders made on 9th January, 2017 which were confirmed on 16th December, 2017 provided in part as follows:

“...That until then a temporary injunction is hereby issued restraining the defendants by themselves and or by their undisclosed principals, agents, employees, servants and any other person acting under their authority from trespassing, remaining in occupation, entering, occupying, dealing and or in any manner howsoever interfering with the plaintiff's ownership, occupation, possession and use of all that parcel of land known as L.R No. 209/11142 CR 48067 situated at Nairobi Upper Hill area”

I am in agreement with the plaintiff that the terms of the orders issued on 9th January, 2017 and confirmed on 16th December, 2017 were clear. The said orders did not call for the maintenance of status quo as claimed by the 4th defendant. The orders in question prohibited the defendants by themselves or through their agents or principals from “trespassing, remaining in occupation, entering, occupying, dealing and or in any manner howsoever interfering with the plaintiff's ownership, occupation, possession and use of” the suit property.

The photographs annexed to the affidavit that was filed in support of the plaintiff's application for injunction dated 14th December, 2016 show that the suit property had some vegetation, felled trees and tree stumps. The photographs annexed to the affidavit filed in support of the present application show that the suit property has been cleared off vegetation and some form of excavation of the top soil has been undertaken. These photographs demonstrate that the suit property had been interfered with during the pendency of the court orders in question which restrained the defendants from entering, remaining in occupation or in any manner interfering with the suit property.

The 4th defendant which claims ownership of the suit property contended that the 1st respondent/10th defendant was in occupation of the suit property pursuant to a tenancy agreement dated 5th December, 2016 entered between the 4th and 10th defendants and that the court had allowed that arrangement to continue. As I have stated earlier in this ruling, the orders of the court were clear. All the defendants were restrained from entering or remaining on the suit property under whatever circumstance. The 4th and 10th defendants were prohibited from entering, remaining or doing anything else on the suit property. Neither the 4th defendant nor the 10th defendant had a right to enter or to remain on the suit property during the existence of the said court orders. According to paragraph 6 of the affidavit of Pitchi Surendra Naithi Reddy in reply to the present application, the status of the suit property as at the time of swearing the affidavit on 21st February, 2018 was that *“...the 4th defendant was the owner and in possession of the suit (property)”* and *“it was being used for the function set out in the tenancy agreement attached hereto above which is still the position to date”*.

There is no doubt from this statement that the 4th and 10th defendants continued to be in possession and to use the suit property after the orders of 9th January, 2017 and 16th October, 2017 were issued and in contravention thereof. It has not been contested that the 4th and 10th

defendants were represented by an advocate when the said orders were made and that the orders were subsequently advertised in the daily newspapers. I am in agreement with the submission by the plaintiff that the respondents particularly those whose advocates were present in court when the said orders were made were aware of the orders. The courts have since moved from the position that the order alleged to have been breached must be personally served on a person sought to be punished together with the penal notice before contempt can be proved. Knowledge of a court order has been held to be sufficient thereby dispensing with personal service for the purposes of contempt proceedings. See, Shimmers Plaza Limited vs. National Bank of Kenya Limited[2015]eKLR.

For reasons which are not clear, neither the 4th defendant nor its directors have been made respondents in the contempt application. It is my finding that the 1st respondent and the 3rd and 4th respondents who are its directors are in contempt of the orders which were made herein on 9th January, 2017 and 16th October, 2017. They have continued to enter and use the suit property despite express court orders prohibiting them from doing so. There is no evidence however that the 1st, 3rd and 4th respondents carried out excavation on the suit property.

The plaintiff did not place any materials before the court showing how the other respondents breached the court orders in question. The plaintiff had sought a number of reliefs in its application. I do not think that the plaintiff is entitled to a mandatory injunction sought in payer 2 of the application. The plaintiff is already having injunctive orders prohibiting the defendants from entering or remaining in possession of the suit property. That order is sufficient to preserve the suit property pending the hearing of the suit. I have found herein above that the plaintiff did not establish that any of the respondents excavated the suit property. For that reason prayer 4 of the application cannot be granted. Prayers 5 and 6 have been established in relation to the 1st, 3rd and 4th respondents only.

In the final analysis, the plaintiff's application dated 20th November, 2017 succeeds in part. The application is allowed on the following terms:

1. I find the 1st, 3rd and 4th respondents, White Lotus Projects Limited, Poosapati Sita Ramachandra Raju and Mohamud Mahat Noor, the 1st, 3rd and 4th respondents in the application jointly and severally in contempt of court.
2. The Deputy Registrar of this court shall issue summons for service upon Poosapati Sita Ramachandra Raju and Mohamud Mahat Noor who are the directors of White Lotus Projects Limited to appear before this court on a date to be fixed to address the court in mitigation before a sentence is passed against them and White Lotus Projects Limited.
3. The plaintiff shall have the costs of the application to be paid by the 4th and 10th defendants jointly and severally.

Delivered and Dated at Nairobi this 20th day of December 2018

S. OKONG'O

JUDGE

Ruling read in open court in the presence of:

Ms. Bor h/b for Mr. Ochieng for the Plaintiff/Applicant

Mr. Muganda for the 1st, 3rd, 4th, 6th, 7th, 8th, 9th and 10th Respondents

N/A for the 2nd Respondent

Mr. Muganda h/b for Mr. Wathuta for the 5th Respondent

Mr. Kamau for the 9th defendant

Catherine-Court Assistant