



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ELC NO.35 OF 2009**

**1. RAJENDRA SANGHANI**

**2. JAYANT RACH.....PLAINTIFFS**

**VERSUS**

**1. FAIRMILE INVESTMENTS LIMITED**

**2. KANTILAL MAGHANBHAI PATEL..... DEFENDANT**

**RULING**

1. The plaintiff brought this suit against the defendants on 29<sup>th</sup> January 2009 seeking among others, a declaration that the transfer of L.R No. 209/73/12, Nairobi (hereinafter “the suit property”) by the 2<sup>nd</sup> defendant to the 1<sup>st</sup> defendant is null and void the same having been made fraudulently and, a permanent injunction to restrain the defendants from interfering with the plaintiffs’ right and quiet possession and enjoyment of the suit property. Together with the plaint, the plaintiffs filed an application by way of Chamber Summons dated 28<sup>th</sup> January 2009 seeking a temporary injunction to restrain the defendants from selling, taking over possession, disposing of, alienating, transferring and/or otherwise howsoever interfering with the plaintiffs’ interest in the suit property. The plaintiffs’ application was heard by Nambuye J. (as she then was). In her ruling dated 5<sup>th</sup> February 2010, Nambuye J. allowed the plaintiffs’ application for injunction with costs. The judge stated at page 38 of her ruling as follows, “*In conclusion, for the reasons given in the assessment, the court is inclined to grant prayers 1 and 2 of the Plaintiffs/Applicants application dated 28<sup>th</sup> January 2009...*”. Prayers 1 and 2 of the plaintiff’s application dated 28<sup>th</sup> January 2009 which were granted by Nambuye J. were on the following terms;

*“1. This application be heard ex parte in the first instance on the ground that the Defendants/Respondents and/or their servants, agents or otherwise, intend unless restrained by this Honourable Court, to adversely take over possession of the suit property known as L.R. No.209/73/12 and or otherwise interfere with the Plaintiffs/Applicants’ interest in the said property, pending the hearing and determination of this suit.”*

*“2. Pending the hearing and determination of this application and suit, the Defendants/Respondents by themselves, their officers, servants, agents or otherwise howsoever be restrained from selling, taking over possession of the property known as L.R. No.209/73/12 Nairobi and from disposing of, alienating, transferring and/or otherwise howsoever interfering with the Plaintiffs/Applicants’ interest in the said property”*

2. The effect and purport of the order that was granted by Nambuye J. on 5<sup>th</sup> February 2010 in favour of

the plaintiffs is clear from what I have set out above. The defendants did not prefer any appeal against the said ruling by Nambuye J. On 9<sup>th</sup> November 2009, the 1<sup>st</sup> defendant filed an application seeking, injunction to restrain the plaintiffs from receiving, collecting, expending or keeping rental income from the suit property pending the hearing and determination of the suit and an order that the plaintiffs do deposit all rental income from the suit property with the plaintiffs and the 1<sup>st</sup> defendants' advocates pending the hearing of the application or further orders by the court. The 1<sup>st</sup> defendant's application was heard by Okwengu J. who dismissed the same on 30<sup>th</sup> July 2010.

3. The matter has since then come up for full hearing on several occasions but for one reason or the other, the hearing has never taken off. The matter was listed for hearing last on 16<sup>th</sup> March 2016 when it could not be reached. What I now have before me is the 1<sup>st</sup> defendant's application dated 1<sup>st</sup> July 2016 which was brought under certificate of urgency seeking an order that the plaintiffs, Nairobi City County and Aquarium Guest Homes have disobeyed the orders which were granted by Nambuye J. on 5<sup>th</sup> February 2010 and that the plaintiffs be committed to civil jail for disobedience of the said orders for a period of 6 months. The 1<sup>st</sup> defendant has also sought orders that Nairobi City County and Aquarium Guest Homes be fined a sum of Kshs. 10,000,000 in default of payment of which their movable and immovable assets be attached and sold for the recovery of the same. The other prayers sought by the 1<sup>st</sup> defendant are that the plaintiffs be prohibited from renting out the suit property and that all rents collected from the suit property be deposited in an interest earning joint account pending the hearing and determination of the suit. In the alternative, the 1<sup>st</sup> defendant has prayed that a receiver be appointed to collect rent accruing from the suit property pending the hearing and determination of the suit.

4. The application was brought on the grounds that on 5<sup>th</sup> February 2015 Nambuye J. gave orders to the effect that pending the hearing and determination of this suit, the suit premises be preserved which meant that the status quo in respect of the suit property be maintained and that the order was duly served upon the plaintiffs and the other respondents in the application. The 1<sup>st</sup> defendant has contended that in defiance of the said order, the plaintiffs have leased the suit property to Aquarium Guest Homes, the 4<sup>th</sup> respondent in the application in collusion with the Nairobi City County, the 3<sup>rd</sup> respondent while the suit herein is still pending. The 1<sup>st</sup> defendant has contended that this court should preserve its dignity and honour by committing the plaintiffs to civil jail and imposing a fine of Kshs. 10,000/- on the 3<sup>rd</sup> and 4<sup>th</sup> respondents. The 1<sup>st</sup> defendant has contended further that it is unfair for the plaintiffs to continue receiving and using the rental income from the suit property in defiance of the said court order.

5. On 21<sup>st</sup> July 2016, the 1<sup>st</sup> defendant withdrew the application as against the 3<sup>rd</sup> Respondent, Nairobi City County and the 4<sup>th</sup> respondent, Aquarium Guest Homes. The application was opposed by the plaintiffs through a replying affidavit sworn by the 1<sup>st</sup> plaintiff on 12<sup>th</sup> August 2016. In their affidavit, the plaintiffs averred that they have not in any way breached the orders made by Nambuye J. on 5<sup>th</sup> February 2009 by continuing to receive and use the rental income from the suit property. The plaintiffs denied that they are in contempt of court and termed the 1<sup>st</sup> defendant's application as misconceived and an abuse of the process of the court meant to delay the hearing and determination of the main suit.

6. When the application came up for hearing before me on 17<sup>th</sup> August 2016, Mr. Cohen appeared for the applicant/1<sup>st</sup> defendant while Mr. Kibera appeared for the respondents/plaintiffs. In his submission in support of the application Mr. Cohen submitted that the plaintiffs had breached the orders that were issued by Nambuye J. on 5<sup>th</sup> February 2010. Counsel submitted that the said orders by Nambuye J. had a limb which directed all the parties to preserve the suit property. Mr. Cohen submitted that, in her ruling made on 30<sup>th</sup> July 2010, Okwengu J. (as she then was) interpreted the said order by Nambuye J. to mean that all the parties were supposed to maintain the status quo in respect of the suit property. Counsel submitted that in breach of the said order by Nambuye J. the plaintiffs proceeded to change the user of the suit property from residential to commercial thereby changing the value of the suit property and the rent realized therefrom. Mr. Cohen submitted that in changing the user of the suit property from residential to commercial, the plaintiffs had disturbed the status quo and as such are in contempt of court for which they

are liable to be punished. Counsel cited a number of authorities in support of his submissions.

7. In his submission in reply, Mr. Kibera relied on the replying affidavit of the 1<sup>st</sup> plaintiff which was filed in opposition to the application. Mr. Kibera submitted that the orders made by Nambuye J. on 5<sup>th</sup> February 2010 which are alleged to have been disobeyed were in favour of the plaintiffs and as such, there was no way the plaintiffs could disobey the same. As regards the ruling by Okwengu J., Mr. Kibera submitted that the 1<sup>st</sup> defendant had misapprehended the same. Mr. Kibera submitted that Okwengu J. was very categorical that the court could not stop the plaintiffs from collecting rent from the suit property in view of the orders of Nambuye J. aforesaid. Counsel submitted further that the status quo that the judge alluded to was that which was brought about by the orders of Nambuye J. which orders had not been varied or set aside.

8. I have considered the 1<sup>st</sup> defendant's application and the opposition thereto by the plaintiffs. What I need to determine is whether the plaintiffs have disobeyed the orders that were made herein by Nambuye J. on 5<sup>th</sup> February 2010 and as such should be punished. All the prayers sought by the 1<sup>st</sup> defendant are dependent on the determination of this issue. It is now well settled that contempt of court proceedings are quasi criminal in nature because the contemnor may lose his liberty if found guilty of the contempt complained of. In view of this fact, the standard of proof of contempt is higher than proof on a balance of probabilities. See, the holding in the Court of Appeal case of, Mutitika-vs-Baharini Farm Ltd. (1985) KLR 227, where the court stated that 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. It follows therefore that for the 1<sup>st</sup> defendant to succeed in the present application, it must satisfy the court to a degree beyond a balance of probabilities that the plaintiffs have disobeyed the order of 5<sup>th</sup> February 2010 aforesaid. I have set out earlier in this ruling the application which gave rise to the order in contention. I have also set out the orders that were granted by the court.

9. I am not satisfied that the plaintiffs have disobeyed the said orders. The plaintiffs had sought injunction to restrain the defendants from interfering with their possession and quiet enjoyment of the suit property. The court after hearing both parties allowed the plaintiffs' application and restrained the defendants from in any manner interfering with the plaintiffs' enjoyment of the suit property. The said order which was made by Nambuye J. has not been varied or set aside. The order did not command the plaintiffs to do or refrain from doing anything. I am in agreement with the submission by the plaintiffs that there is no way they could have disobeyed an order which was not directed at them. It is not clear to me where the limb of the extracted order that talked about the preservation of the suit property came from. Nambuye J. did not give such order in her ruling of 5<sup>th</sup> February 2010 neither did Okwengu J. do so in her ruling of 30<sup>th</sup> July 2010. I am in agreement with the submission by the plaintiffs that the 1<sup>st</sup> defendant misapprehended the ruling by Okwengu J. aforesaid. Okwengu J. did not at all make an order that the status quo in respect of the suit property be maintained. What the judge stated in my view is that Nambuye J. having restrained the defendants from interfering with the plaintiff's possession and enjoyment of the suit property, she could not disturb that status quo by restraining the plaintiffs from collecting rent from the suit property. In any event, Okwengu J. dismissed the 1<sup>st</sup> defendant's application and did not grant any order which can be enforced.

10. Even if it is assumed for argument sake that Nambuye J. had made an order that the suit property be preserved, I am not convinced that the plaintiffs have interfered with the property. I do not think that the change of user of the property from residential to commercial which the 1<sup>st</sup> defendant has submitted to have enhanced the value of the suit property can be said to amount to interference with the property. The same applies to the collection of rent from the suit property an activity which the plaintiffs seem to have been undertaking since the year 2010 when the 1<sup>st</sup> defendant made the first attempt to stop them from doing so.

11. Due to the foregoing, it is my finding that the 1<sup>st</sup> defendant has failed to establish that the plaintiffs have disobeyed the orders which were made by this court on 5<sup>th</sup> February 2010. There is no basis therefore for granting the orders sought in the 1<sup>st</sup> defendant's Notice of Motion application dated 1<sup>st</sup> July

2016. The application lacks merit and the same is hereby dismissed with costs to the plaintiffs. It is my hope that with the disposal of this application, the parties shall take necessary steps to set down this old case for hearing.

**Delivered and Signed at Nairobi this 24<sup>th</sup> day of January, 2017.**

**S. OKONG'O**

**JUDGE.**

**In the presence of:-**

Mr. Kibera for Plaintiffs

Mr. Cohen for 1<sup>st</sup> Defendant

N/A for 2<sup>nd</sup> Defendant

Kajuju Court Assistant