



**REPUBLIC OF KENYA**

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

**ELC SUIT NO.320OF 2011**

**JOHN ELIAS KIRIMI.....PLAINTIFF**

**VERSUS**

**MARTIN MAINA NDERITU.....1<sup>ST</sup> DEFENDANT**

**NAIROBI CITY COUNCIL.....2<sup>ND</sup> DEFENDANT**

**MARGARET WANJIRU NGARACHU.....3<sup>RD</sup> DEFENDANT**

**COMMISSIONER OF LANDS.....4<sup>TH</sup> DEFENDANT**

**THE HONOURABLE ATTORNEY GENERAL.....5<sup>TH</sup> DEFENDANT**

**RULING**

Until 30<sup>th</sup> July 2015 when she was joined in these proceedings as 3<sup>rd</sup> defendant, Margaret Wanjiru Ngarachu was an interested party in the suit. On 27<sup>th</sup>February 2012,the court made an order restraining the plaintiff, the then two defendants and the then interested party, Margaret Wanjiru Ngarachu, now the 3<sup>rd</sup> defendant,from transferring, leasing, charging, or undertaking further construction on land parcel known as Nairobi Block/83/14/504 situated at Umoja Innercore (hereinafter referred to as “the suit property”)pending the hearing and determination of this suit or further orders by the court.

What I now have before me is an application by the plaintiff which was brought by way of Notice of Motion dated 16<sup>th</sup>October 2015 seeking an order that the 3<sup>rd</sup> defendant be cited for contempt, convicted and committed to civil jail for a period not exceeding 6 months or such other sentence as may be found fair and just in the circumstances for deliberately disobeying the said order which were issued on 27<sup>th</sup> February 2012.The application was supported by the plaintiff’s affidavit sworn on 16<sup>th</sup> October 2015 and was premised on grounds that in blatant and deliberate disobedience of the aforesaid orders, the 3<sup>rd</sup> defendant undertook further construction on the suit property by erecting approximately 8 floors of residential houses thereon. The plaintiff annexed to his affidavit, photographs said to have been taken on the suit property showing the further construction complained of. The plaintiff urged the court to take action against the 3<sup>rd</sup> defendant in order to restore the confidence of the public in the judiciary.

The application was opposed by the 3<sup>rd</sup> defendant through Notice of Preliminary Objection, Grounds of Objection and a replying affidavit all dated 4<sup>th</sup> February 2016. The 3<sup>rd</sup> defendant contended that the court order alleged to have been disobeyed lapsed on 27<sup>th</sup> February 2013 by operation of law pursuant to Order 40 Rule 6 of the Civil Procedure Rules. The 3<sup>rd</sup> defendant contended further that she was never served

with the order alleged to have been disobeyed together with a penal notice. The 3<sup>rd</sup> defendant contended that in any event, the alleged acts of contempt had not been set out with sufficient particularity so as to allow her to meet the charge against her.

The application was argued by way of written submissions. In his submissions dated 29<sup>th</sup> April 2016, the plaintiff argued that the orders made on 27<sup>th</sup> February 2012 were to last until the hearing and determination of the suit or further orders by the court. The plaintiff argued that the said orders were clear in their terms and as such the provisions of Order 40 Rule 6 of the Civil Procedure Rules were inapplicable. The plaintiff argued that the 3<sup>rd</sup> defendant was estopped from claiming that the said orders lapsed on 27<sup>th</sup> February 2013 while this suit has never been heard and determined and the court has not given any further orders discharging the said orders. The plaintiff argued that the 3<sup>rd</sup> defendant's contention that the said orders had lapsed was misconceived.

On the 3<sup>rd</sup> defendant's contention that she was not served with a copy of the order she is alleged to have disobeyed together with a penal notice, the plaintiff argued that personal service can now be dispensed with if it is shown that the alleged contemnor had knowledge of the order. In support of this submission, the plaintiff cited the cases of James H. Gitau Mwaru vs. Attorney General & another (2015)eKLR and Shimmers Plaza Ltd vs. National bank of Kenya Ltd (2015)eKLR. The plaintiff contended that although the 3<sup>rd</sup> defendant's advocate was absent when the ruling was delivered on 27<sup>th</sup> February 2012, the 3<sup>rd</sup> defendant was all along represented in the proceedings and her advocate was present in court on 13<sup>th</sup> December 2011 when the court reserved the ruling date.

The 3<sup>rd</sup> defendant filed her submission on 5<sup>th</sup> May 2016. The 3<sup>rd</sup> defendant reiterated that the orders given on 27<sup>th</sup> February 2013 which she is alleged to have disobeyed lapsed automatically by operation of law on 27<sup>th</sup> February 2013 pursuant to Order 40 Rule 6 of the Civil Procedure Rules. The 3<sup>rd</sup> defendant submitted that the plaintiff having failed to move the court for the extension of the said orders, there was no order after 27<sup>th</sup> February 2013 capable of being disobeyed. In support of this submission, the 3<sup>rd</sup> defendant relied on the case of Eunice Kavindu Kioko & another vs. Kenya Commercial Bank Ltd (2014)eKLR where it was held that Order 40 Rule 6 of the Civil Procedure is couched in mandatory terms and the effect thereof is that, interlocutory orders of injunction lapse automatically unless extended. The court was also referred to the case of Maria Lwande & others vs. Registered Trustees of Teleposta Pension Scheme (2015)eKLR where the court also made a finding that interlocutory injunction orders lapse by operation of law 12 months after their issuance pursuant to Order 40 Rule 6 of the Civil Procedure Rules.

On the merit of the application, the 3<sup>rd</sup> defendant argued that the plaintiff had not tendered evidence showing that the 3<sup>rd</sup> defendant had disobeyed the said orders of 27<sup>th</sup> February 2012. The 3<sup>rd</sup> defendant argued that the plaintiff's affidavit did not disclose which actions by the 3<sup>rd</sup> defendant were in violation of the orders of 27<sup>th</sup> February 2012 before its lapse as aforesaid and the dates when the 3<sup>rd</sup> defendant carried out the alleged contemptuous acts.

I have considered the plaintiff's application, the opposition thereto by the 3<sup>rd</sup> defendant and the rival submissions by the respective advocates for the parties. The only issue for determination by the court is whether the 3<sup>rd</sup> defendant disobeyed the orders which were made herein on 27<sup>th</sup> February 2012. Order 40 Rule 6 of the Civil Procedure Rules provides as follows:-

*“Where a suit in respect of which an interlocutory injunction has been granted is not determined within a period of twelve months (12) from the date of the grant, the injunction shall lapse unless for any sufficient reason the court orders otherwise.”*

This rule is clear that interlocutory injunctions lapse after twelve (12) months unless for any sufficient reason, the court orders otherwise. In the present case, the orders granted on 27<sup>th</sup> February 2012 were to last “pending the hearing and determination of this suit or until further orders”. I am in agreement with

the submission by the plaintiff that the said orders did not lapse after 12 months by operation of law pursuant to the provisions of Order 40 Rule 6 of the Civil Procedure Rules as the court had ordered that the same would last until the hearing and determination of the suit or further orders by the court. In the circumstances, the orders did not lapse automatically. I am not in agreement with the decisions which were cited by the 3<sup>rd</sup> defendant on this issue. It is my finding therefore that the orders which were made herein on 27<sup>th</sup> February 2012 did not lapse on 27<sup>th</sup> February 2013. The next issue which I need to consider is whether the said orders were disobeyed by the 3<sup>rd</sup> defendant as claimed by the plaintiff.

The terms of the orders said to have been disobeyed are not disputed. The said orders among others restrained the 3<sup>rd</sup> defendant from carrying out further construction on the suit property. It is common ground that the order of 27<sup>th</sup> February 2012 was not served upon the 3<sup>rd</sup> defendant and that although the 3<sup>rd</sup> defendant was represented when the application which gave rise to the order was argued, the said advocate was not present on 27<sup>th</sup> February 2012 when the ruling was delivered. In the case of Shimmers Plaza Limited vs. National Bank of Kenya Limited(2015) eKLR which was cited by the plaintiff, the Court of Appeal stated that the strict requirement for personal service of orders in contempt proceedings could be dispensed with where the court satisfies itself beyond any shadow of a doubt that the person alleged to be in contempt committed the act complained of with full knowledge or notice of the existence of the order of the court forbidding it.

The plaintiff has not placed any evidence before the court showing that although the 3<sup>rd</sup> defendant was not served with the order and her advocate was not present in court when the order in question was made, the 3<sup>rd</sup> defendant had knowledge or notice of the said order and the terms thereof. Service or knowledge of the order aside, the plaintiff was also under a duty to demonstrate to the court that indeed the 3<sup>rd</sup> defendant disobeyed the said order. I am in agreement with the 3<sup>rd</sup> defendant that the acts of contempt alleged against her in the application are in general terms. The orders in issue were made on 27<sup>th</sup> February 2012. The application herein was brought on 27<sup>th</sup> October 2015, three years later. The plaintiff's complaint is that the 3<sup>rd</sup> defendant continued with construction on the suit property by adding more floors to the building which was standing thereon. There is no evidence as to the stage where the initial construction had reached as at the time when the order stopping the same was issued and when the 3<sup>rd</sup> defendant carried out the further construction complained of. The photographs annexed to the plaintiff's affidavit are not helpful in this regard.

Due to the foregoing, I am not satisfied that the plaintiff has proved a charge of contempt against the 3<sup>rd</sup> defendant. As was stated in the case of Mutitika vs. Baharini Farm Ltd (1985) KLR 227, the standard of proof required in contempt proceedings is more than a balance of probabilities but not beyond reasonable doubt. The upshot of the foregoing is that the plaintiff's application dated 16<sup>th</sup> October 2015 has no merit. The same is accordingly dismissed with costs to the 3<sup>rd</sup> defendant.

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

**S. OKONG'O**

**JUDGE**

**In the presence of:-**

.....for the Plaintiff

.....for the 1<sup>st</sup> Defendant

.....for the 2<sup>nd</sup> Defendant

.....for the 3<sup>rd</sup> Defendant

.....for the 4<sup>th</sup> Defendant

.....for the 5<sup>th</sup> Defendant

.....Court Assistant