



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC SUIT NO. 168 OF 2016

NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY.....PLAINTIFF

VERSUS

PATRICK MACHARIA.....1ST DEFENDANT

ANNA NJERI GITANYU.....2ND DEFENDANT

C.I STEPHEN EKIRAPA.....ALLEGED CONTEMNOR

RULING

The Plaintiff (hereinafter “NEMA”) filed an application by way of Notice of Motion dated 25th February 2016 seeking an environmental restoration order stopping the defendants from carrying out any construction works on LR No. 209/8000/28 adjacent to Thigiri River and requiring them to demolish a wall which they had constructed along the said river within 14 days of the order pending the hearing and determination of this suit. NEMA sought a further order that the Westlands Sub County Commissioner be ordered to provide security during the enforcement of the order.

The application was heard *ex parte* on 25th February 2016 by Gacheru J. who granted the orders sought on an interim basis pending the hearing of the application *inter-partes* on 14th March 2016. On 14th March 2016, the defendants did not appear in court and the said application was allowed. The defendants were ordered to demolish the boundary wall bordering Thigiri River which they had put up on LR No. 209/8000/28 within 14 days of the order, failure to which NEMA was given the liberty to demolish the said wall and recover the costs incurred from the defendants.

The defendants did not demolish the boundary wall as directed by the court and NEMA proceeded to demolish the wall on 29th April 2016. NEMA has claimed that the demolition of the said wall was stopped midway by the O.C.S Gigiri Police Station, C.I Stephen Ekirapa, the alleged contemnor herein without any lawful cause and in disregard of the orders which were issued by the court on 14th March 2016. On 20th June 2016, NEMA brought an application of the same date seeking an order that the alleged contemnor be summoned to appear before the court to explain the reasons for stopping the implementation of the orders issued on 14th March 2016. NEMA also sought any other consequent order and or/directions as the court would deem just and appropriate to grant in the circumstances.

NEMA’s application of 20th June 2016 was allowed by the court on 28th June 2016 and summons were duly issued and served upon the alleged contemnor who appeared in court on 19th July 2016 in answer

thereto. The alleged contemnor responded to the allegations which were made against him by NEMA by testifying on oath and was examined by the advocate for NEMA Ms. Karani and Mr. Mariaria who appeared for a party who is yet to be joined in the suit, James Mwangi Keru. The alleged contemnor, C. I. Stephen Ekirapa told the court that he was not aware of the orders which were issued by this court on 14th March 2016. He stated that, the 1st defendant herein had earlier approached him with an order issued on 10th December 2015 in CMCC No.7236 of 2015 allowing the said defendant to demolish the disputed wall. The order directed him to provide the 1st defendant with security during the demolition exercise. He complied and the wall was brought down. Thereafter he was served by yet another order by the same 1st defendant issued in CMCC No. 348 of 2016 on 12th February 2016 restraining the demolition of the said wall which order he was directed again to ensure compliance. He stated that when NEMA came to the suit property to demolish what remained of the said wall pursuant to the order which was issued herein, the 1st defendant called him enquiring whether he was aware of activities which were going on in the suit property. Following this call, he went to the site accompanied by other officers from his station and found the wall already demolished.

He stated that he was not aware that the persons who were carrying out the demolition were from NEMA. He had some verbal exchange with the person who was in charge of the demolition squad and upon informing the OCPD of what had transpired, the OCPD directed him to leave the site. He stated that he was accompanied to the site by the regular police while NEMA's demolition team were under the protection of the Administration Police. The alleged contemnor informed the court that he acted in good faith and had no interest in the disputed wall. He stated that if he had committed any error, the same was inadvertent and he regretted the same.

In cross examination, he denied having stopped the execution of the order issued herein and averred that he was not served with the said order. He stated that he learnt of that order when he visited the site as aforesaid and did not read the same owing to his earlier verbal exchange with the person who was leading the NEMA team. He stated that prior to 29th April 2016, he had no knowledge of security meetings which had taken place concerning the operation which was being undertaken by NEMA. He denied threatening the officers from NEMA and maintained that he had no knowledge that the demolition in dispute was scheduled to take place.

In her submissions, Ms. Karani learned Counsel for NEMA stated that the order from the Chief Magistrate's Court referred to above was not served upon them despite NEMA having been named therein as the 2nd defendant. Counsel submitted that the alleged contemnor had not given sufficient reason why he stopped the implementation of the order from this court. She argued that the alleged contemnor should have enquired from the Administration Police officers who were at the site as to why the demolition was going on.

In response, learned Counsel for the proposed 3rd defendant, Mr. Mariaria submitted that the alleged contemnor had stated that he was served with an order to stop NEMA from demolishing the disputed wall and could not have known whether the orders served upon him had lapsed. He argued that the order of 14th March 2016 was not served upon the alleged contemnor who was also not informed by the OCPD of the security meetings which were held prior to the demolition of the said wall.

The issue arising for determination by the court is whether the alleged contemnor C. I. Stephen Ekirapa has shown sufficient cause why he allegedly stopped the implementation of the orders which were issued by this court on 14th March 2016. From the statement which was given by the alleged contemnor on oath, I am of the view that the alleged contemnor cannot be blamed for what transpired on 29th April 2016. The confusion and the misunderstanding which arose during the implementation of the order which was issued herein on 14th March 2016 should be blamed entirely of a myriad of confusing court orders which were issued by the lower court at the behest of the defendants herein. The alleged contemnor gave a chronology of events which took place on 29th April 2016 and his involvement in the same. The defendants herein were the plaintiffs in CMCC No. 7236 of 2015 and CMCC No. 348 of 2016 where contradictory orders touching on the subject matter of this suit were issued on 10th December 2015 and

12th February 2016 respectively. In CMCC No.7236 of 2015, the defendants herein obtained orders allowing them inter alia to demolish the wall of Kaviti-Handa and Kishor Ramji on the suit property, LR No. 209/8000/28 and the alleged contemnor was directed by the court to provide security during the demolition. The alleged contemnor was again served with an order issued in CMCC No. 348 of 2016 where the defendants herein obtained orders restraining the Nairobi City Council and NEMA from destroying/pulling down a perimeter wall and/ or in any other way interfering with the plaintiff's quiet possession of LR No. 209/8000/28. This order also directed the alleged contemnor to ensure compliance therewith. The order which was issued by this court on 14th March 2016 was the third order touching on the disputed wall and the suit property. The order from this court had also directed the Westlands Sub County Commissioner to provide security during the demolition of the disputed wall by NEMA. The alleged contemnor told the court that he was never served with the order of this court which was issued on 14th March 2016.

To be fair to the alleged contemnor, even if he was served with the said order, he would not have known which way to go. There was already an order served upon him stopping the demolition of the disputed wall. NEMA had also obtained another order from this court allowing demolition. Prior to the two orders, there was another order allowing demolition which was also issued by the lower court. From the foregoing, I am not satisfied that the alleged contemnor wilfully stopped the demolition of the disputed wall with the intention of undermining the authority of this court. The fact that the order of 14th March 2016 was not served upon the alleged contemnor was not been disputed. The fact that that the alleged contemnor had been served with two other orders from the lower court was also not disputed. In fact, it is the alleged contemnor who supplied the court with copies of the said orders. On the material before me, I am not satisfied that the alleged contemnor stopped the demolition that was being undertaken by NEMA. Even if I had found that he had indeed stopped the same, I would have given him the benefit of doubt that he had honestly believed that in doing so, he was enforcing a lawful court order from the lower court.

For the foregoing reasons, it is my finding that the alleged contemnor did not defy the orders which were given herein on 14th March 2016. I therefore discharge him. The costs of the Notice of Motion dated 20th June 2016 shall be in the cause.

Delivered and Signed at Nairobi this 17th day of February, 2017.

S. OKONG'O,

JUDGE.

In the presence of:-

N/A for the plaintiff

N/A for the 1st and 2nd defendants

N/A for the proposed 3rd defendant

Kajuju Court Assistant