



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC SUIT NO. 1459 OF 2014

SHEET & METAL WORKS LIMITED.....PLAINTIFF/APPLICANT

VERSUS

NGIGI NJURU.....1ST DEFENDANT

NGINU POWERS ENGINEERING (E.A) LIMITED..... 2ND DEFENDANT

RULING

What I have before me is the plaintiff's Chamber Summons application dated 9th October 2015 brought under section 5(1) of the Judicature Act, Order 52 Rule 2(2) of the Rules of the Supreme Court of England and Section 3A of the Civil Procedure Act. The application seeks an order for the committal of the 1st defendant to prison for such period as the court may deem fit and just.

The application is supported by the affidavit of Antony Gitiche Mbau sworn on 9th October 2015. The application has been brought on the ground that on 2nd December 2014, the court made an order directing the parties herein to maintain status quo with respect to the suit property and not to undertake any dealings in relation thereto. The plaintiff has contended that the said order was extended by the court on 17th September 2015 and was duly served upon the defendants personally as well as on their advocate. The plaintiff has contended that the defendants have refused to comply with the said order and have persisted in blatant disregard thereof.

The application was opposed by the defendants. The 1st defendant filed a replying affidavit sworn on 23rd November 2015 where he stated that Antony Gitiche Mbau is not a valid director of the plaintiff as there is in existence a dispute as to the manner in which he became a director. The 1st defendant admitted that the orders for the maintenance of status quo were made by the court on 2nd December 2014. He contended however that the said orders lapsed on 11th March 2015 after the plaintiff failed to have them extended. The 1st defendant stated that the said orders were irregularly extended on 17th September 2015 more than six months after they had lapsed. He contended that the extension of the said orders without an application for the reinstatement of the same amounted to an error on the face of the record and that the respondents had filed an application challenging the illegal extension of the said orders. The 1st defendant contended that the present application for contempt is in the circumstances premature and should await the determination of the said application by the defendants.

The 1st defendant stated that prior to the filing of the instant suit by the plaintiff, the plaintiff had on 17th November 2014 filed CMCC No. 6802 of 2014 touching on the subject matter herein and that on 28th November 2014, the court in the aforesaid suit had directed the maintenance of status quo which was that

the defendants were to continue being in possession of the suit property. The 1st defendant contended that the said orders are still valid and that CMCC No. 6802 of 2014 has now been consolidated with the instant suit. He stated that the status quo was and had always been that the 2nd defendant was in occupation of the suit property as a tenant and later as a bonafide purchaser for value for the last 9 years. In proof of his assertion, the 1st defendant exhibited copies of the sale agreement dated 16th June 2008 between Grace Wangari Mwangi, Jackson Ndung'u Mwangi and the 2nd defendant, business permits from 2006 to 2014 and copies of utility bills.

The 1st defendant averred that the plaintiff's director Mr. Antony Mbau had been charged with a criminal offence in Milimani Cr. Case No. 1766 of 2014 for procuring the cancellation of the 2nd defendant's title to the suit property and further, that he was also charged with maliciously damaging the defendants' property as well as creating breach of peace by locking the suit property herein. The 1st defendant contended that the order made on 17th September 2015 was not capable of giving rise to contempt proceedings as it lacked a penal notice. He contended that no evidence had been availed to support the plaintiff's allegations and further, that there was need for the court to clarify the status quo orders to avert confusion brought by the consolidation of CMCC No. 6802 of 2014 with the instant suit.

The application was argued by way of written submissions. The plaintiff filed its submission on 16th December 2015 where he contended that the defendants were in breach of the orders which were issued herein on 2nd December 2014 and extended on 4th February 2015 and 17th September 2015. The plaintiff submitted that in breach of the said orders, the defendants had chased away the watchman that the plaintiff had placed on the property and had continued to occupy the suit property. The court was referred to the case of Hadkinson vs. Hadkinson (1952) 2 AllER 567 for the proposition that until an order is discharged, every person against whom an order is made has an obligation to obey it even where he believes it to be irregular or void. The plaintiff also relied on the case of Africa Management Communication International Ltd vs. Joseph Mathenge Mugo & another (2013) eKLR in support of its submission that courts punish for contempt in order to safeguard the rule of law which is fundamental in the administration of justice.

The defendants in their submissions filed on 15th January 2015 argued that the order made on 17th September 2015 contained no penal notice and can therefore not give rise to contempt proceedings. For this submission, the defendants relied on the case of Nyamogo & another vs. Kenya Posts and Telecommunications Corporation (1994) KLR 1 cited in Jackson Omwenga T/A Jackson Omwenga & Co. Advocates vs. Harambee Sacco Society & another (2014) eKLR. The defendants argued that proof of service of an order was a mandatory requirement in contempt proceedings and the court was urged to dismiss the application since the plaintiff had not adduced evidence of service of the order dated 17th September 2015 upon the defendants.

The defendants submitted that the orders issued in CMCC No. 6802 of 2014 that directed the maintenance of status quo which meant that the defendants who were in occupation of the suit property since 2006 would remain on the property had not been set aside, vacated or discharged. The defendants submitted further that the orders of 2nd December 2014 directing that status quo be maintained had been illegally extended on 17th September 2015 and that the said extension has been challenged in an application dated 22nd September 2015 pending hearing herein. The defendants submitted that the only orders which were properly in force were the orders in CMCC No. 6802 of 2014 and that from the annexures to the replying affidavit, the 2nd defendant had adduced evidence that it had been running its business on the suit property between 2006 and 2014 when this suit was instituted. The defendants argued that the plaintiff had not adduced evidence showing that it was in actual possession of the suit property. The defendants submitted that the grounds upon which the application has been brought are frivolous, vexatious and an abuse of the court process and further, that the plaintiff had not tendered evidence to show that the defendants were conducting business on the suit property.

I have considered the plaintiff's application together with the affidavit filed in support thereof. I have also considered the defendants' replying affidavit which was filed in opposition to the application. The

following is my view on the matter. It is 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 a balance of probabilities. See, the holding in the 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 plaintiff to succeed in the present application, it has to satisfy the court to a degree beyond a balance of probabilities that the 1st defendant disobeyed the orders which were issued herein on 2nd December 2014 and 17th September 2015.

On 2nd December 2014, the court issued an order that pending the mention of the matter on 4th February 2015 “the status quo in respect of the suit property shall be that neither the plaintiff nor the defendants shall occupy, develop or undertake any dealings with the same save for each party stationing one watchman each on the said property”. On 4th February 2015, the court extended the status quo order until 11th March 2015. On 11th March 2015, the parties informed the court that they were discussing the matter with a view to reach an out of court settlement. The matter was fixed for further mention on 13th May 2015 but the status quo order which had been extended to that date was not extended again. This means that the order of status quo which was granted on 2nd December 2014 expired on 11th March 2015. There was no other activity in the matter until 17th September 2015 when the plaintiffs application for the transfer of CMCC No. 6802 of 2014 to this court and its consolidation with this suit came up for hearing. From the proceedings of that day, the court allowed the application for transfer and consolidation of CMCC No.6802 of 2014. The court made a further order that “status quo to be maintained as earlier directed by the court”.

It is this order of 17th September 2015 which the 1st defendant has been accused of disobeying. I am in agreement with the defendant that this status quo order is not clear. The plaintiff had filed CMCC No. 6802 of 2014 in the lower court before filing this suit. It is common ground that in CMCC No.6802 of 2014, the court had made an order that “ the status quo be maintained until this application is heard and determined or until such further orders have been issued by the High Court that affect this matter”. On 4th December 2014, this court issued the orders of status quo which I have referred to earlier in this ruling. When this court made the said order of status quo, it also directed that the plaintiff do make an application for the transfer of CMCC No. 6802 of 2014 to this court for the purposes of consolidation with this suit. The court did not however say anything about the orders of status quo that had been issued on 21st November 2014 in CMCC No. 6802 of 2014.

It appears as if as at 4th December 2014, there were two distinct orders of status quo, one issued by the lower court and the other by this court. While I would take it that the orders which were issued by this court, superseded those of the lower court, I cannot fault the defendants for treating the situation differently. As I have stated above, the status quo orders given by this court on 4th December 2014 lapsed on 11th March 2015. I am in agreement with the defendants that as at 17th September 2015, the said orders were not in force. On 17th September 2015, the court ordered that, “the status quo to be maintained as earlier directed by the court.” As I have stated above, the last order of status quo was made on 4th February 2015 and was to last until 11th March 2011 when it was not extended.

It is not clear therefore whether the status quo referred to in the order of 17th September 2015 was intended to extend the order of 4th December 2014 which lapsed on 11th March 2015 or the status quo order which was made in CMCC No. 6802 of 2014. I am in agreement with the defendants that if the intention of the plaintiff was to have the interim orders that expired on 11th March 2015 revived, it should have applied for the reinstatement of the same before seeking extension. All the confusion that I have outlined above would have been avoided.

In view of what I have stated above, I am not satisfied that a case has been made out to warrant the committal of the 1st defendant to civil jail. As I have pointed out, it is not clear as to which order he

disobeyed and how. For one to be committed to civil jail for disobedience of a court order, the order must be clear in its terms. That is not the case here. For the foregoing reasons, I find no merit in the Chamber Summons dated 9th October 2015. The same is accordingly dismissed with costs to the defendants. To prevent further interlocutory applications in this matter which shall delay the hearing of the main suit, I make further order that pending the hearing and determination of this suit, all that parcel of land known as Plot No. 326 Kariobangi Light Industries shall not be sold, transferred, leased, charged or alienated in any manner whatsoever by any of the parties herein. It is my hope that the parties shall now take the necessary steps to set down the suit for pre-trial case conference and eventual hearing.

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

S. OKONG'O

JUDGE.

In the presence of:-

N/A for Plaintiff

Mr. Njuru for the Defendants

Kajuju Court Assistant