



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT NYERI
Nyeri ELC Petition No. 2 of 2016
(Formerly Nairobi HC Petition No. 53 of 2016)

STUART RICHARD CUNNINGHAM.....PETITIONER

-VERSUS-

INSPECTOR GENERAL OF POLICE.....1ST RESPONDENT

TE HON. ATTORNEY GENERAL.....2ND RESPONDENT

DIRECTOR OF PUBLIC PROSECUTION.....3RD DEFENDANT

ANTHONY KIMARU MUTAHI.....4TH RESPONDENT

INDEPENDENT POLICING OVERSIGHT

AUTHORITY.....INTERESTED PARTY

RULING

Application dated 4th October, 2016

1. The application dated **4th October, 2016** *inter alia* seeks reinstatement of the orders issued by **Lenaola J.**, (as he then was) on 4th March, 2016 in ELC Pet No. 2 of 2006. The application is premised on the ground that when the matter came up for directions before **Ngaah J.** on 25th February, 2016 owing to failure by counsel for the applicant to apply for extension of the orders, the orders were not extended.
2. It is the applicant's case that owing to the none extension of the orders, the 4th respondent has committed acts of waste on the suit property and as a result has greatly prejudiced the applicant.
3. The applicant is apprehensive that unless the orders are reinstated, the petition and the application for interim orders brought under it dated, 12th February, 2016, will be rendered nugatory.
4. The application is opposed on the grounds that the orders extracted were wrong (did not reflect the orders issued by the court), thus incapable of being extended.
5. It is contended that **Ngaah J.** refused to extend the orders because he had given orders of maintenance of status quo in ELC 36 of 2010 and submitted that rather than applying for reinstatement of the orders, the applicant should have applied for review of the orders of **Ngaah J.**

6. The applicant is accused of having concealed from the court in Nairobi about the existence of the orders issued in ELC 36 of 2010. For that reason, it is submitted that the orders were issued in ignorance of the existing orders. The orders are also said to have had the effect of reviewing **Ngaah J's** orders.

7. Concerning the authorities cited by the applicant, it is submitted that none of them supports the applicant's case. The circumstances which obtained in those cases are said to be different.

8. Counsel for the 1st and 2nd respondent, **Ms Masaka** associated herself with counsel for the 4th respondent and added that no new evidence has been adduced to show that the petitioner has been threatened since the orders for maintenance of *status quo* were issued.

9. It is pointed out that the petitioner wrote a letter requiring the 1st respondent to evict the 4th respondent from the suit property and explained that the 1st respondent refused to evict the 4th respondent because there existed orders of maintenance of *status quo*.

10. Pointing out that the 1st respondent has provided security as required of him, it is contended that no evidence has been adduced to show that the order of maintenance of *status quo* has failed to preserve the suit property.

11. Arguing that on the ground, there is peaceful co-existence, counsel for the 1st and 2nd defendants accused the petitioner for delaying the hearing and determination of the suit by filing a multiplicity of applications.

12. According to counsel for the 1st and 2nd respondents, the orders sought to be reinstated have been overtaken by events as there are fresh orders in place.

13. In a rejoinder, counsel for the petitioner applicant maintained that the orders of **Lenaola J.** (as he then was) and those of **Onguto J.** are clear. She denied the contention that they have come to court with unclean hands.

14. Concerning the contention that the petition should be struck out for offending **Section 6** of the Civil Procedure Rules, counsel for the petitioner submitted that the suits are different.

15. With regard to delay in prosecution of the suit, she blames it on the 4th respondent.

Analysis and determination

16. It is not in dispute that on 12th February, 2016 **Lenaola J.** (as he then was) issued orders against the 4th respondent. From the court record, the orders restrained the 4th respondent together with his family, employees, agents from interfering with the petitioner's possession of L.R No.10422/13 Nanyuki pending hearing inter partes on 17th February, 2017 before **Onguto J.**

17. The orders issued were to be executed by the OCS Nanyuki Municipality.

18. On 17th February, 2016 when the matter came up for hearing, **Onguto J.** extended the orders of **Lenaola J.** (as he then was) until 19th February, 2016.

19. On 19th February, 2016 upon considering the rival arguments of the parties concerning the orders issued by **Lenaola J.** (as he then was) in this matter and those issues in the other suit pending at Nyeri High Court to wit Nyeri HCCC No. 36 of 2016, **Onguto J.** observed:

“...It is also clear that this court as it made the injunctive orders as against the 4th respondent on 12/2/16 was aware of the existence of the court case.

Proportionate justice would not invite a striking out of the petition just because of the existence of the court case No.36 of 2010 in Nyeri when orders are made by either court. In

the circumstances, I would deem it fit that pursuant to Rule 8(2) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013, I act *suo moto* and order the transfer of this file to the High Court in Nyeri for final determination.

With regard to this court's order of 12/2/2016 they are symmetrical to the court orders of 8/10/2015 issued by the High Court in Nyeri. They far do not appear to be in conflict save for contested version that there is yet another order for status quo.

I would consequently not interfere with the court orders of 12/2/2016. I will leave that for the good judgment of the court in Nyeri soon to be seized with this matter alongside the on going HCC No. 36 of 2010. I shall therefore make the following orders:

1. This petition be transferred to Nyeri High Court for ultimate determination and disposal;
2. The Deputy Registrar (CHR Division) to forthwith ensure that this file is shipped to Nyeri;
3. The interim orders herein issued on 12/2/2016 (by Hon. Lenaola judge) are extended until 25/2/2016 when this matter will be mentioned before the presiding judge Nyeri Court (Hon. Jairus Ngaah Judge) for his further order and directions.”

20. When the matter came up for mention on 25th February 2016, upon considering the submissions by counsels for the parties concerning the matter, **Ngaah J.** ordered that directions concerning the manner and form in which the petition shall proceed, would be made on 4th March, 2016 when the court would deliver a pending ruling in ELC 36 of 2010.

21. On 4th March, 2016 the judge directed that the two matters be transferred to the Environment and Land Court for hearing and determination.

22. On 7th March, 2016 this court observed:

“Regarding the issue of status quo, I reiterate that the orders issued by Ngaah J. and my orders extending the earlier orders are clear (see order extended on 8/3/2016). However, the petitioner been in occupation of some portion of the suit property and using the same access as the 4th respondent, should not be inconvenienced in any way to gain access to his residence. He is at liberty to post his own security at the gate that gives him equal access as the 4th respondent.”

23. While extending the orders of maintenance of status quo issued by **Ngaah J.** this court observed:

“From the court recording, both parties (Mr. Ng’ang’a & Mr. Mahan) on 19/10/2015 agreed that both parties are in occupation of the suit property. Changing the order issued by Ngaah J., at this stage will amount to evicting one of the parties, whether they are in the land legally or not. It is not the intention of this court to do so. I will therefore maintain the status quo as directed on 19/10/2015.”

24. It is noteworthy that while making the above determination, this court was privy to the orders issued in ELC petition No. 2 of 2016 and which orders are sought to be reinstated. The court directed that the application be heard alongside the application for contempt.

25. The court record shows that before the orders issued by **Lenaola J.** (as he then was), there existed orders of maintenance of status quo. According to the directions issued by **Onguto J.**, it was the Nyeri court that would give directions concerning how to proceed with the matter transferred from Nairobi.

26. Admittedly, when the matter was placed before the Nyeri Court for directions, the interim orders issued in the Nairobi matter (ELC Petition No. 2 of 2016) were not extended. The orders automatically lapsed by effluxion of time.

27. It is for that reason, that the petitioner urges the court to reinstate the orders.

28. This court finds the sole issue for determination to be whether the petitioner/applicant has made up a case for reinstatement of those orders.

29. In answering this question, it is important to revisit the history of the two cases, as captured herein above.

30. From the history of the cases herein, it is clear that before the Nairobi matter (ELC Petition 2 of 2016) was filed, the Nyeri court had issued orders in ELC 36 of 2016, for maintenance of status quo which obtained in the suit property; that order was in my view not affected and/or could not have been affected by the Nairobi matter unless, through an application for setting aside of the orders for maintenance of the status quo. In that regard, I agree with the 4th respondent's submission that the orders were issued owing to failure by the petitioner to disclose to the court all material facts concerning the suit property. Moreover, the order as extracted was different from the order issued by the court as it sought to restrain the 4th respondent from entering, interfering and/or entering or remaining in the property pending the hearing and determination of the application when in actual fact the order issued by the court only restrained the respondent, his family, employees from interfering with the petitioners possession of L.R No.10422/13 pending *inter partes* hearing of the application on 17th February, 2016.

31. It is clear from the order of **Lenaola J.** (as he then was) that the court did not order eviction of the 4th respondent from the suit property. Cognisant of the order of maintenance of status quo issued before the petition herein was filed, this court has for the reasons stated herein above, stated that it is not ready to interfere with the orders of maintenance of status quo.

32. No material has been presented before this court that can warrant this court to resile from its previous view on the matter. This is so because, I entertain doubt whether Lenaola J. (as he then was) would have issued the orders in question if he had been appraised about the orders of the status quo. If anything, the orders sought to be reinstated are misleading as they are not a true reflection of the orders issued by the court.

33. For the foregoing reasons, I find the application for reinstatement of the orders of **Lenaola J.** (as he then was) issued on 12th February, 2016 to be lacking in merits and I dismiss it with costs to the respondents.

Application dated 12th October, 2015

34. With regard to the application dated 12th October, 2015 which seeks to punish the 4th respondent for alleged disobedience of the orders of **Ngaah J.**, issued on 7th October 2015, claiming that the 4th respondent (hereinafter called the contemnor) blatantly disobeyed the said order, despite having been served, the applicant brought the application herein urging the court to commit the contemnor to civil jail for alleged disobedience of the order of the court.

35. The application is premised on the affidavit of the petitioner/applicant sworn in support of the application and on the grounds on its face.

36. The application is opposed on the grounds that it is bad in law, frivolous and a gross abuse of the process of the court. In this regard, it is contended that the order was not served on the contemnor personally; that the orders are not binding on the contemnor because they were issued before he became a party to the suit; that the applicant's has no *locus standi* on the matter; that the orders had been overtaken by events (he is in possession of 18 acres of the suit property); that the applicant failed to disclose to the court that the 1st defendant/respondent in ELC 36 of 2010 had passed on and that the suit property had been administered in accordance with his wishes.

37. Whilst the applicant claims that he was served on 10th October 2015, the contemnor contends that he became aware of the orders on the day the current application was filed.

38. When the matter came up for hearing, counsel for the applicant **Mr. Amalemba**, informed the court that the orders were extracted and served together with a penal notice upon the contemnor who disregarded the order making it necessary for the applicant to file the current application.

39. Concerning the contention by the contemnor that he was not personally served, Mr. Amalemba referred to the case of **Faza Holdings Ltd T/A Downtoen Hotel vs John Kagonye Ngururi & another**, 2014, eKLR and submitted that the most important consideration in contempt proceedings is knowledge of the order.

40. Maintaining that the contemnor was aware of the order issued against him, he urged the court to accordingly find him guilty of contempt of court.

41. Counsel for the contemnor, **Mr. Nganga**, reiterated the contention that the application is bad in law on the grounds cited herein above. He further submitted that the applicant has not adduced evidence capable of showing that the contemnor was either served with the order or was aware of the order as at the time the application for contempt was filed. In this regard, he pointed out that the affidavit of service of Mr. Onditi indicates that he served the orders on 15th October, 2015 on the day the applicant filed the application for contempt.

42. It is contended that the affidavit of service indicates that the orders were served on the gateman as opposed to the contemnor.

43. Arguing that the authorities cited by the applicant's counsel are distinguishable, Mr. Ng'ang'a contended that whereas the contemnors in those cases had knowledge of the order, it has not been demonstrated that the contemnor in this matter had knowledge of the order.

44. He further submitted that the applicant has failed to demonstrate the manner in which the order was disobeyed.

45. Pointing out that parties later on recorded a consent on maintenance of status quo, counsel for the contemnor submitted that the order for contempt cannot issue because there is an order allowing the contemnor to stay on the portion of the suit property he occupies.

46. In a rejoinder, counsel for the applicant submitted that the issue of status quo is yet to be addressed. Referring to paragraph 4 of J.M Gatheru's affidavit sworn on 12th October, 2015, she stated that the contemnor was personally served.

Analysis and determination

47. The order that was allegedly disobeyed, *inter alia*, restrained the 4th respondent by himself, his agents, servants or assignees from constructing, erecting any structures and/or in any other way interfering with the suit property pending the inter parties hearing of the application on 21st October, 2015.

48. According to the affidavit of service of the process server, J.M. Gatheru, service of the order was effected on the 4th respondent personally on 10th October, 2015 at 8.20 a.m.

49. The foregoing notwithstanding, from annexure **SRC 3** (newspaper report) it is clear that the respondent was aware of the orders. That notwithstanding, that newspaper report also shows that the respondent was already in occupation and possession of the suit property.

50. As pointed out herein above, the order allegedly disobeyed did not order the respondent or his agents to vacate the suit property. That being the case, it was incumbent on the applicant to demonstrate the manner in which the order was disobeyed, which he failed to prove.

51. The upshot of the foregoing is that the applicant has not made up a case for issuance of the orders

sought. Consequently, I dismiss the application with costs to the respondent.

Dated, signed and delivered at Nyeri this 30th day of March, 2017

L N WAITHAKA

JUDGE

In the presence of:

Margaret Shava for petitioner in ELC No. 2 of 2016

Mr. Kimunya h/b for Mr. Mahan for plaintiff in ELC No. 36 of 2016

Mr. Nganga for 4th respondent in Petition No. 2 of 2016 and 2nd defendant in ELC No. 36 of 2016

Court clerk - Esther