

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

E.L.C CASE NO. 1206 OF 2014

ATHANAS MWANIKI NJERU.....PLAINTIFF

VERSUS

JAIRO ASITIBA ATENYA.....DEFENDANT

RULING

On 10th September, 2014 the plaintiff filed this suit seeking general damages for conversion, mesne profits and an order for vacant possession against the defendant. The plaintiff avers that the defendant has trespassed on his land being L.R No. 209/11062 situated at Imara Daima within Embakasi in Nairobi (“the Suit Property”). Further, the plaintiff contends that the defendant unlawfully commenced construction of a structure on the Suit Property.

Contemporaneously with the filing of the suit, the plaintiff brought a Notice of Motion under Order 40 Rule 2, 3, 4 & 5 of the Civil Procedure Rules and Sections 1A and 3A of the Civil Procedure Act seeking injunctive orders to restrain the defendant from dealing with the Suit Property. The application was supported by the plaintiff’s affidavit in which he deponed that as at 25th August 2014, the defendant’s workmen had built the foundation, about three courses of the wall and the ground floor slab of the structure on the Suit Property. The Court granted injunctive orders on 10th September, 2014 restraining the defendant from undertaking any further construction on the Suit Property. These orders were extended on 24th September, 2014. On 25th November, 2014 the Court granted an order for injunction against the defendant enjoining the defendant not to deal with the Suit Property until the case is heard and determined.

Through his defence filed on 26th May, 2015, the defendant stated that he had not ordered any works to be carried out on the Suit Property. The defendant averred that this suit and the allegations being made by the plaintiff were only calculated to damage the defendants standing in society. The defendant is an elected Member of the County Assembly in Nairobi.

In the present application dated 3rd February, 2015, the plaintiff seeks to have the defendant held to be in contempt of court for disobeying the orders of injunction issued by the Court and served on him. The plaintiff avers that the defendant is on the verge of completing construction on the Suit Property despite being served with the court orders stopping any further construction. The plaintiff annexed photos showing an almost complete structure on the Suit Property.

The court notes from the file that the plaintiff also served the court order on the Deputy County Commissioner of Embakasi Sub- County, the Assistant Deputy County Commissioner and the County Administrator, presumably to assist in the enforcement of that court order. The plaintiff’s advocate did write to the defendant’s advocate warning them of dire consequences for disobeying court orders.

The court has considered the application, supporting affidavit and the submissions made. At the time the suit was filed, only the foundation slab for the ground floor and three courses of the wall had been constructed on the Suit Property. By the time the present application was filed in February, 2015 the structure was complete. Even though the defendant did not file a replying affidavit despite being granted leave to do so, the court is bound to take into consideration the averment in the defence in which the defendant states that he did not order any works to be carried out in the Suit Property and invites the plaintiff to prove that he did. The defence was filed three months after this application for contempt had

been filed in court.

The Court held in the case of **Mutitika –vs- Baharini Farm Ltd. [1985] KLR 227** that the standard of proof in contempt proceedings must be higher than proof on a balance of probabilities. The court also held that the principle must be borne in mind that the jurisdiction to commit for contempt should be carefully exercised with the greatest reluctance and anxiety on the court's part to see whether no other mode can be brought to bear on the contemnor.

After carefully considering this matter, the court is not persuaded that the best recourse that can be brought to bear on the defendant, if indeed he is in contempt of the court order, is committal for contempt. In the court's view, there is another mode of doing justice which will be achieved through the trial. The plaintiff is to set down his suit for hearing and if he proves his claim, the trial court can grant the order of eviction sought in the plaint together with an order for the demolition of the structure erected on the Suit Property. The plaintiff has not proved on a standard higher than proof on a balance of probabilities that the defendant ought to be committed for contempt of court as prayed. The application is dismissed with no orders as to costs.

Dated and delivered at Nairobi this 16th day of March, 2017.

K. BOR

JUDGE

In the presence of: -

Mr. Bibiu for the Plaintiff/Applicant

Mr. Agwara for the Defendant/Respondent

Mr. Vincent Owuor- Court Assistant