



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC. CASE NO. 105 OF 2017

REDEEMED GOSPEL CHURCH.....PLAINTIFF

VERSUS

GRACE WANJIRU.....DEFENDANT

RULING

The Plaintiff filed the application dated 21st March, 2017 seeking to have the Defendant committed to civil jail for a period of 6 months and her property attached for disobedience of the court order made on 15th March, 2017. The application is brought under Order 40 Rule 2(3), Order 8 Rules 3 and 8 of the Civil Procedure Rules and Sections 1A, 1B, 2A and 3A of the Civil Procedure Rules.

The court made an order on 15th March, 2017 restraining both the Defendant and the Plaintiff together with their agents and servants from selling, transferring or constructing further or in any other way dealing with Plot no. Ruai V 10522 Jet View Estate and Plot no. P 118 (LR 105/5640) (“the Suit Property”) until the suit is heard and determined. The Plaintiff alleges that in spite of this order, on diverse dates between 15th and 20th March, 2017 the Defendant’s agents or employees continued with the construction on the Suit Property and brought in a family to occupy the structure erected by the Defendant. The Plaintiff alleges that the Defendant has blocked its access to the Suit Property in breach of the court order and also claims that its church members are unable to access the Suit Property. The Plaintiff is a church organisation.

It is important to set out the order that the Plaintiff alleges the Defendant is in breach of. On 15/3/17 when counsels for both the Plaintiff and the Defendant appeared before me, they could not agree as to what the *status quo* of the Suit Property was, that is, who was in occupation of the Suit Property. Both parties insisted they were in possession of the land. The Defendant attended court on that day and told the court that she would comply with the court orders made. To preserve the Suit Property, the court made the following orders;

1. Both the Defendant and Plaintiff were restrained from selling, transferring, constructing further or in any other way dealing with the Suit Property;
2. The Defendant was restrained from continuing construction on the Suit Property;
3. The Defendant was to remove the mound of soil from the Suit Property within 7 days.
4. The Defendant was to station a guard at the Suit Property to safeguard her building materials and other items on the Suit Property. The guard was not to interfere with the Plaintiff’s access to the

school and the worshippers' access to the church.

5. Other orders were made setting out time lines for filing documents and the matter was to be mentioned on 9th May, 2017 to fix a hearing date for the suit.

Before a week had elapsed, the Plaintiff filed the instant application seeking orders firstly, that the Officer Commanding Police Division (OCPD) Kayole and the Officer Commanding the Station (OCS) Ruai police stations assist in enforcing and ensuring compliance with the court orders made on 15th March, 2017 and secondly, seeking to have the Defendant committed to civil jail. The court granted the prayer that sought police assistance in enforcing the court order and directed the Plaintiff to serve the Defendant.

The Defendant was served with instant application and arguments were taken on 4/4/17. Mr. Gakaria for the Plaintiff argued that as at 15th March, 2017 when the court orders were made, the Defendant's structure on the Suit Property had only reached the lental stage but that subsequently the Defendant had continued with the construction and completed that structure. The Plaintiff relied on photos which showed that there were tenants staying in the *mabati* structure and that electricity had been connected to this structure.

Mr. Onyango opposed the application and argued that the Defendant is not in contempt of the court order as alleged by the Plaintiff. He relied on the Defendant's replying affidavit filed in court on 31st March, 2017 together with the photos annexed to the affidavit. Counsel urged that the Defendant had ensured she complied with the court orders which were issued in her presence. The Defendant stated on oath that the Plaintiff and the members of its congregation had access to the Suit Property. She averred that the worshippers had carried out their worship services in the Suit Property for the last two Sundays freely. The Defendant maintains that the situation on the ground is as it was on 15th March, 2017 when the court order was made. The Defendant avers that an occurrence did take place in which the Defendant's guard on the Suit Property was harassed by the Plaintiff's agents. The Defendant relied on a photo showing a gun wielding man on the Suit Property. This incident was reported in *The Nairobiian* of 15th March, 2017, a cutting of which was annexed to the Defendant's replying affidavit. After the gun incident, the Defendant's guard fled from the premises forcing the Defendant to move into the premises to protect her building materials and other assets on the Suit Property. Further, the Defendant avers that there are no school or nursery children on the Suit Property.

On the issue of the photos annexed to the Defendant's Replying Affidavit, the Plaintiff's Advocate stated from the bar that those photos related to a different parcel of land and not the Suit Property.

The dispute over the land herein has elicited a lot of emotion. This is why the court was of the view on 15th March, 2017 that it will be in the interest of justice to hear the matter expeditiously and determine the suit to avoid the escalation of tempers over the Suit Property.

The Plaintiff relied on the case of **Shimmers Plaza Ltd V National Bank of Kenya Ltd (2015) eKLR** in which the court reiterated that court orders must be obeyed. Parties against whom such orders are made cannot be allowed to trash them with impunity. The Court also stated that obedience of court orders is not optional. The Court concurs with this view.

After considering the application, the affidavits and the submissions of both counsels, the question for determination is whether there has been deliberate and intentional noncompliance with the court order of 15th March, 2017 by the Defendant. That order enjoined both the Defendant and the Plaintiff not to interfere with the Suit Property.

It is admitted that the Defendant removed the mound of soil from the Suit Property. The court believes the Defendant's evidence that the Plaintiff's congregation had access to the Suit Property on Sundays to conduct their church services. The Defendant states in her affidavit that members of the Plaintiff's church had a "*kesha*" (the court presumes this an overnight vigil) at the Suit Property on 25th March,

2017.

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. Further, 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.

In the case of **Africa Management Communication International Ltd Vs Joseph Mathenge Mugo and another (2013) eKLR**. Justice Mabeya at Paragraph 19 of his ruling had this to say;

*“When a party is faced with an application for committal for alleged contempt and it is alleged that there is in existence an order which he has disobeyed, it is incumbent upon him to defend his position. **He has to show either that he was not aware of the order or his actions did not amount to breach of the order**”.*

In the instant case the Defendant was aware of the court order and has sought to demonstrate in her replying affidavit that the action she took did not amount to breach of the order.

The facts in the replying affidavit are uncontroverted. The Plaintiff argued that the man wielding a gun in the photo annexed to the replying affidavit was on a different parcel of land and not the Suit Property. The Plaintiff did not deny that it had not sent its agents to interfere with the Suit Property and yet the court order of 15th March, 2017 also enjoined the Plaintiff not to interfere with the Suit Property.

From the foregoing, the court is of the view that the Defendant has complied with the orders made on 15th March, 2017. It has not been demonstrated to the court on a standard higher than a balance of probability that the Defendant is in contempt of the court orders. The court declines to grant the order sought in application and makes no orders as to costs.

The parties are to comply with the directions given on 15th March, 2017 and ensure that this case is heard and determined without further delay.

Dated and delivered at Nairobi this 24th day of April 2017.

K. BOR

JUDGE

In the presence of: -

Mr. Mogoi holding brief for Mr. Gakaria for the Plaintiff

Mr. Mburu holding brief for Mr. Onyango for the Defendant

Mr. V. Owuor- Court Assistant