



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ELC CASE NO.342 OF 2016

1. ZEPHANIA GICHEHA WAWERU.....1ST PLANTIIF

2. THE BOARD OF GOVERNORS ST. MORRIS BISASE.....2ND PLAINTIFF

VERSUS

SAHAL AHMED DAHIR1ST DEFENDANT

SAMUEL MORRIS BISARE.....2ND DEFENDANT

RULING

1. The plaintiffs/applicants herein moved the court by their Notice of Motion dated 20th January 2017 in which the applicants are seeking five prayers as follows:

1. Spent

2. THAT pending the hearing and determination of prayer 3 below, the 1st defendant be ordered to comply with the court order of 18th November 2016 and be ordered to remove any fence he has erected around the school compound or the classrooms, restore the school painting and any writings, remove any structures constructed on the suit property and remove any form of debris or machinery brought on the suit property.

3. THAT the 1st defendant herein be committed to civil jail for a term of six months for contempt of court for having deliberately disobeyed orders of this court issued on 18th November 2016.

4. THAT the court issues any other or further orders of the court geared towards protecting the dignity and authority of the court and to ensure compliance of the court order of 18th November 2016.

5. THAT costs of this application be provided for.

2. The application is brought under Order 40 Rules 3 and 4 of the Civil Procedure Rules. The application is supported by the 14 grounds listed on the face of the application and the affidavits of Zephania Gecheha Waweru sworn on 23rd January 2017 and 28th February 2017. Briefly, the applicants aver that they obtained an interlocutory order on 18th November 2016 and which order was properly served upon both the defendants. That on 2nd January 2017, the 2nd defendant and his brother Osman Ahmed Dahir accompanied by rowdy youths descended on five classrooms standing on the suit land and demolished

them. The applicant further deposed that the fact that the 1st defendant filed an application dated 9th December 2016 confirms that the 1st defendant acknowledged receipt of the court order, now the subject of this application.

3. That application is opposed by the 1st defendant who filed a replying affidavit on 1st February 2017. The 1st defendant deposed that he was never served with the order alleged to have been disobeyed. He avers that on the material day, he was away in Malindi. He also denied having erected a fence or structure stating that the fence was erected much earlier. He otherwise denied all the accusations levelled against him. The 2nd defendant did not oppose the application and in his Replying Affidavit filed on 1st February 2017, he deposed that it is the 1st defendant who disobeyed the court order.

4. The advocates for the applicants and the 1st respondent filed written submissions. The applicants submit that the court order was extracted and endorsed with a Penal Notice in case of non-compliance and that the same was served by Philip Nzuki, a licensed court process server who in his affidavit of service explains the manner in which the order was served upon the defendants. It is submitted that despite service, and in full disregard of the court order, the 1st defendant descended on the plaintiffs property on 2nd January 2017 and demolished 5 classrooms and fenced off the playground. The applicants contend that the 1st defendant is guilty of contempt of court and should be punished. The applicants counsel relied on the case of **SAM NYAMWEYA & 3 OTHER –VS- KENYA PREMIER LEAGUE LTD & 2 OTHER – HCC NO.69 OF 2015** and emphasized that there was: -

i. Proper service of the court order,

ii. That the order was coached in clear and unambiguous terms

iii. That the order contained an endorsement

5. The 2nd defendant supported the application and it was submitted on his behalf that the Notice of Motion seeks prayers against this 1st defendant only and that the reference of the 2nd defendant in the Supporting Affidavit is an error. The 2nd defendant also filed a Notice of Motion dated 10th March 2017 in which he seeks orders to commit the 1st defendant to prison for failing to comply with orders of the court made on 18th November 2016. This ruling will cover both the application by the plaintiffs and the one by the 2nd defendant.

6. In his submissions, counsel for the 1st defendant submitted that there was no service upon the 1st defendant. He further submitted that ground 3 of the Notice of Motion acknowledges that the 1st defendant had already taken possession since the time he purchased the property. According to the 1st defendant's counsel, the application has not met the threshold of granting an application for contempt of court which must be proved beyond a balance of probability and below the standard of proof beyond a reasonable doubt. The 1st defendant's counsel cited as examples paragraph 4 of the applicants' Supporting Affidavit which expressly refers to the 2nd defendant as the person who carried out demolitions and not the 1st defendant. Another example given was paragraphs 2 and 4 of the affidavit of Alex Philip Nzuki, the process server which does not expressly state that the order of 18th November 2016 was actually served upon the 1st defendant and instead refers to an order issued on 22nd November 2016. Counsel further submitted that the order did not contain a penal notice as the words contained therein did not constitute a proper penal notice.

7. I have considered the application, the affidavits on record, the submissions of counsel and the authorities cited. There are three issues that stand out for determination:

i) Whether the order of 18th November 2016 was served upon the 1st respondent.

ii) Whether the 1st respondent is guilty of contempt of court order issued on 18th November 2016.

iii) What orders should this court make in relations to issue No.(ii) above in the circumstance.

8. The applicants in their supporting affidavit have stated the order of 18th November 2016 was property served upon both the defendants. In his affidavit of service which is annexed to the Supporting Affidavit, Alex Philip Nzuki, the process server who effected the service deposes in paragraph 2 as follows:-

“2. That on 22nd November 2016, I received copies of Notice of Motion under Certificate of Urgency dated 17th November 2017 and scheduled for hearing on 23rd January 2017, Supporting Affidavit of the application, pleadings being plaint, verifying affidavit, witness statement, plaintiff’s list of witnesses statement and plaintiffs list of documents and an order issued by the Deputy Registrar on 22nd November 2016 from the firm of MUNYITHYA, MUTUGI, UMARA and MUZNA CO. ADVOCATES to effect service upon the defendants named hereinabove”

Paragraph 4 of the said affidavit of service states:

“that from the 2nd defendant we proceeded to the 1st defendant’s office located just 50 metres and tendered to him the same copies which after perusing accepted the service by appending his signature at the back of my service copies which I return to this Honourable Court duly served”

9. The 1st defendant is being accused of having deliberately disobeyed the orders of this court issued on 18th November 2016. The said order is alleged to have been duly served upon the 1st defendant. However, I have keenly perused the affidavit of service filed by the Process Server and in particular the paragraphs alleging service was effected on the 1st defendant. The said affidavit of service refers to copies of various documents and an order issued by the Deputy Registrar on 22nd November 2016. There is nowhere in that affidavit that the Process Server has deposed that he served the 1st defendant with the order issued by this court on 18th November 2016.

This court is being asked to commit the 1st defendant for contempt of court for having deliberately disobeyed orders issued by the court on 18th November 2016. No evidence of service of the orders issued by the court on 18th November 2016 has been shown to this court. The 1st defendant has denied having been served with the said order and it was incumbent upon the applicants to show proof of service. I also note that whereas the application is seeking for prayers against the 1st defendant, the grounds and the supporting affidavit being relied on by the applicants refer to the 2nd defendant. This raises doubts as to who in particular is the alleged contemnor.

10. The matters of proof in matters of contempt of court are well settled. In the case **REFRIGERATOR & KITCHEN UTENSILS LTD – VS- GULABCHAND POPATIAL SHAH & OTHERS CIVIL APPLN.NO39/1990**, the Court of Appeal while approving the standard of proof in contempt cases as set out in the case of **GATHARIA MITIKA & OTHERS –VS- BAHARIN FARM LTD, CIV.APPLN.NO.24 OF 1995** held that in cases of alleged contempt, the breach for which the contemnor is cited must not only be precisely defined but proven to a standard which is higher than proof of a balance of probabilities but not as high as proof beyond a reasonable doubt. This is because the charge of contempt of court is an offence of criminal character and a party may lose his liberty.

I must therefore satisfy myself beyond any shadow of a doubt that the 1st defendant disobeyed the order of 18th November 2016 with full knowledge of the existence of the said order.

11. From the evidence on record, I cannot safely hold that the 1st defendant was served with the order of 18th November 2016. Since service was denied, it was incumbent upon the applicants to prove that indeed the 1st defendant was served. The evidence on record is clear that there was no such service and if

there was, it was service of an alleged order issued by the deputy registrar on 22nd November 2016. Consequently, I find that the personal service allegedly made on the 1st respondent has not been proved. In addition, it is not clear whom the applicants want cited for contempt as the Notice of Motion and the grounds and affidavit in support of the application give conflicting parties.

12. For the foregoing reasons, I do reach a finding that this application lacks merit and hereby dismiss it with costs to the 1st respondent.

Dated, signed and delivered at Mombasa this 15th day of June 2017.

C. YANO

JUDGE

.....for the applicant

.....for the respondent