



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ELC NO. 396 OF 2016

MOHAMED SWALEH KARAMA HANTOSH.....PLAINTIFF

VERSUS

KHALID SWALEH KARAMA

HASSAN ABDULKADIR.....DEFENDANTS

RULING

1. The plaintiff/applicant herein moved the court by his Notice of Motion dated 17th January 2017 in which the applicant is seeking five prayers as follows:

- 1) That this application be certified as urgent and service of the same be dispensed with in the first instance.**
- 2) That this Honourable Court be pleased to order the OCS Central Police Station to stop the 1st respondent, Mr. Khalid Swaleh Karama from entering, trespassing on plot NO.MOMBASA/BLOCK XVII/1323 pending the hearing and determination of this application.**
- 3) That the 1st defendant/respondent, Mr. Khalid Swaleh Karama be cited for contempt of court orders issued on 15th December 2016 for his act of having unlawfully, illegally and contemptuously doing nothing about the court order served on him on the 16th day of December 2016.**
- 4) That the 1st defendant/respondent herein Mr. Khalid Swaleh Karama be committed to civil jail for a period of six months for being in contempt of court orders issued on the 15th day of December 2016.**
- 5) That costs of this application be provided for.**

2. The application is brought under the provisions of Order 40 Rule 3 of the Civil Procedure Rules, Sections 1A, 1B, and 3A of the Civil Procedure Act and all other enabling provisions of the law. The application is supported by the grounds on the face of the application and the affidavit of Mohamed Swaleh Karama Hantosh, the applicant sworn on 17th January 2017 and a Further Affidavit sworn on 27th March 2017. The applicant deposes that he obtained a temporary injunction order on 15th December 2016 restraining the defendant from trespassing, entering, constructing, dumping building materials or excavating on plot NO. MOMBASA/BLOCK XVII/1323 pending the hearing and determination of the

application dated 14th December 2016. That the order was served on the 2nd defendant on 16th December 2016. The applicant deposes that he changed the locks on his doors to deny the defendants access of his property. The applicant further deposes that after two days, the 1st defendant moved in with metal bars and cut all his locks and entered into the said premises at night and left very early in the morning. He deposes that the 1st defendant has continued to trespass on his premises in disobedience of the said court order he reported the matter to Central Police Station. The applicant has attached copies of the order, affidavit of service and OB report to his supporting affidavit.

3. The application is opposed by the 1st defendant who filed a replying affidavit sworn on 23rd February 2017 in which he admits service of the court order. The 1st defendant deposes that upon receipt of the court order, he stopped further construction but left the construction materials at the site and which have now gone to waste. He attached copies of photographs showing various building material such as sand, wooded planks and metal bars for works which were going on before the order was served. He denied disobeying the court order and accused the plaintiff of maliciously filing this application to delay the determination of the main matters.

4. In his submission, Mr. Nyamboye, counsel for the applicant reiterated the contents of the affidavits in support of the application and urged the court to allow the application.

5. On his part, Mr. Oduor, learned counsel for the respondents submitted that the applicant has not shown photographs of the alleged broken locks or of the position before and after the order was served for the court to appreciate his argument. He submitted that the applicant had not proved his application for contempt to the required standard.

6. I have considered the application, the affidavits in support and against and the submissions made. There is no dispute that the order of 14th December, 2016 was served on the respondent. The only issue for determination is whether the respondent disobeyed the said order and is therefore guilty of contempt.

7. In paragraph 3 of the motion, the applicant seeks to have the 1st defendant/respondent cited for contempt of the court order issued on 15th December, 2016 for his act of having unlawfully, illegally and contemptuously doing nothing about the said order served on him on 16th December, 2016. There are two issues that arise from the prayer sought as framed. Firstly, the applicant alleges the respondent did nothing about the order, but nonetheless wants him cited. If it is true that the respondent, upon being served did nothing, then I do not understand why he should be cited for contempt yet the order sought to restrain him from doing certain things. Secondly, and more importantly, the applicant alleges that the 1st defendant has been trespassing into the said plot at night and has broken locks put by the applicant. To me, these allegations are too general. The applicant has not given specific dates when the respondent trespassed into the suit premise and carried out the acts complained of. I also concur with the respondent's submissions that the applicant ought to have availed photographic evidence of the alleged broken locks. As it is, there is no evidence that locks were broken as alleged. Moreover, the applicant states that these actions were done during the night. The court has not been told how the applicant came to know that it was the respondent who did it.

8. In his application for an injunction dated 14th December 2016 the applicant admits that the defendants herein had carried out some construction and even attached photographs of the building as well as material on the plot. The respondent herein has stated that it is that same construction that the applicant is complaining about in the application for contempt. It is clear from the applicant's own evidence that the defendants had started some constructions before the order of 15th December 2016 was issued by the court.

9. The standard of proof in matters of contempt of court is well settled. It must be higher than proof on a balance of probabilities but not exactly beyond reasonable doubt. See the case of **MUTIKA -V- BAHARIN FARM LTS (1985)KLR 227.**

10. In my considered view, and having taken into consideration the evidence on record and the submissions made, I am not satisfied that the applicant has proved the alleged contempt on the part of the 1st defendant. Consequently, I do find that the application lacks merit and hereby dismiss it with costs to the 1st defendant.

Dated, signed and delivered at Mombasa this 14th day of JUNE 2017.

.....for the applicant

.....for the respondent

C. YANO

JUDGE