



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

CIVIL SUIT NO 326 OF 2014 (OS)

IN THE MATTER OF: - PLOT NO.137/I/MN

IN THE MATTER OF: - APPLICATION FOR DECLARATION THAT THE PLAINTIFFS/APPLICANTS OBTAINED OWNERSHIP OF THREE DECIMAL SIX ZERO (3.60) HECTARES OF THE ABOVE SAID LAND BY WAY OF ADVERSE POSSESSION

BETWEEN

- 1. SALIM SAID JUMA**
- 2. MOHAMED SALIM SAID**
- 3. JUMAA CHARO SALIM**
- 4. NASSIR SALIM SAID**
- 5. ABUBAKARI SALIM SAID**
- 6. SAUDA SALIM SAID**
- 7. REUBEN ATHMAN DXUYA**
- 8. RIZIKI CHARO KITSAO**
- 9. ASHA ABDALLA JUMA**
- 10. FATUMA CHARO**
- 11. MATI CHARO MATSERE.PLAINTIFFS/APPLICANTS**

VERSUS

- 1. RAFIQ MOHAMED WALI MOHAMED ASWARI**
- 2. LAWRENCE GACHARIA MAGU.....DEFENDANTS/RESPONDENTS**

RULING

1. The 2nd defendant/applicant herein moved the Court by his Notice of Motion dated 5th October 2016 in which he is seeking orders:

1. That this application be certified urgent and be given priority in determination.

2. That this Honourable Court be pleased to hold the plaintiffs and particularly KADZANO MOHAMED, SALIM SAID JUMA, REUBEN ATHUMAN and AGGREY MAGOMA to be in contempt of the Court ruling dated 16th December, 2015 and punish them accordingly.

3. That the costs of this application be provided for.

2. The application is brought under order 40 Rule 3 of the Civil Procedure Rules and is grounded on the grounds in the body of the application and the contents of the Supporting Affidavits of LAWRENCE GACHARA MAGU and MICHAEL GITONGA KITHAKA both sworn on 5th October 2016. The Applicant avers that by a ruling dated 16th December 2015, this Court gave orders of temporary injunction restraining the Plaintiffs/Applicants from entering, trespassing onto or committing acts of waste or interfering with the Applicant's possession of the Suit Premises in **PLOT NUMBER137/MN** pending the hearing and determination of the suit. That on 14th September 2016, while the Applicant was at the plot and in the company of his friend Michael Gitonga Kathara and three watchmen, the four named Plaintiffs and an unknown 5th person came to the Suit Plot claiming that the plot was theirs. They were however chased away by the Applicant with the assistance of his friend and watchmen. That the matter was reported to Bamburi Police Station and the police visited the scene. According to the Applicant, the named Plaintiffs were fully aware of the ruling of the Court of 16th December 2015 and have violated the same and therefore are in contempt of the orders of Court and ought to be punished for it.

3. The Respondents have opposed the application on the grounds of opposition dated 6th December 2016. It is the Respondent's contention that the application is misconceived, non-meritorious, frivolous, scandalous and or vexatious and an abuse of the process of Court. The Respondents further state that the application is bad in law and/or incompetent and ought to be dismissed.

4. The Advocates for the Applicant and the Respondents filed written submissions. In his submissions, the applicant's Counsel submitted that when the ruling was delivered, the Respondents were represented and a presumption should be made that their advocate informed them. He relied on the cases **OF SHIMMERS PLAZA LTD – V- NATIONAL BANK OF KENYA(2015)eKLR AND KENYA TEA GROWERS ASSOCIATION V- FRANCIS ATWOLI AND OTHER (2012) eLKR.**

5. On the part of the Respondents, it was submitted that an order should have been extracted and served personally on the Respondents. That the Respondents were not served hence are not in contempt. Counsel relied on the case of **SOO AND 3 OTHERS –V- DEREK OTIENO OLUOCH (2016) eKLR** and the case of **SIMON KIMANI – V- GEOFFREY GATHIGI AND ANOTHER (2014)eKLR.**

6. I have considered the application, the affidavit in support, the grounds of opposition as well as the submissions made and the authorities cited. The power of the Court to punish for contempt of Court is governed by the Contempt of Court Act, 2016. Under the said Act, contempt of Court includes willful disobedience of any judgment, decree, direction, order or other process of a Court. 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.

7. In this case, it is the Applicants' contention that the Respondents were aware of the existence of the order as the ruling was delivered in Court in the presence of their Advocate and a presumption should be made that the Advocate, being their agent, notified them. On their part, the respondents contend that the order was not served on them and that it should have been extracted and personally served on them.

8. There is no dispute that no formal order was extracted and personally served on the Respondents. In the case of **SHIMMERS PLAZA LIMITED –VS- NATIONAL BANK OF KENYA (2015) eKLR,** the Court of Appeal affirmed that knowledge of the judgment or order by the Advocate of the alleged contemnor would suffice for contempt proceedings, more so in a case where the advocate was in Court

representing the alleged contemnor when the order is made. In this case, the advocate for the alleged contemnors was in Court when the ruling was delivered in 16th December 2015. I have perused the said ruling. The learned Judge stated as follows:

“I am satisfied that the defendants’ Notice of Motion dated 30th June 2015 is merited and allow it in terms of prayer 3 and 4.”

9. In prayer 3 of the 2nd defendant’s Notice of Motion dated 30th June 2015, the 2nd defendant sought for an order;

“That the Honourable Court be pleased to grant an order of temporary injunction restraining the plaintiffs/respondents by themselves, agents, servants and/or anyone claiming under then (sic) from entering, trespassing onto, committing acts of waste, and/or in any manner interfering with the plaintiff’s (sic) quiet possession of the suit premises, that is, PLOT NO.137/MN pending the hearing and determination of this suit”

10. It is apparent that there was an error in the Notice of Motion where the applicant sought to stop interference with the plaintiff instead of the 2nd Defendant. The Court in its ruling, allowed the application in the terms drawn. In my view, there is an ambiguity that would have been avoided had the order been extracted and served. As it is the Application which was allowed implies that the Plaintiff was the one with quiet possession of the suit premises. In contempt cases, the breach for which the contemnor is cited must be precisely defined. This is because the charge of contempt of Court is an offence of criminal character and a party may lose his liberty. See the case of REFRIGERATOR AND KITCHEN UTENSILS LTD –V- GULABCHAND POPATLAL AND OTHERS and the case of GATHARIA MITIKA & OTHERS –V- BAHARIN FARM LTD. It follows therefore that I must satisfy myself beyond any shadow of doubt that the order of 16th December 2015 was precise and clear and that the respondents disobeyed the same.

11. In my considered view, and having taken into consideration the evidence on record, there was ambiguity in the prayer sought in the Notice of Motion dated 30th June 2015 and so to the order granted by the Court on 16th December 2015. I cannot safely hold that the plaintiffs are in contempt when such ambiguity was not clarified. Consequently, I do find that the application has no merit and hereby dismiss it with costs.

Delivered, dated and signed at Mombasa this 25th day of JULY 2017

C. YANO

JUDGE