



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT ELDORET

E & L CASE NO. 227 OF 2014

JEDROM BUILDING AND CIVIL ENGINEERING LIMITED.....PLAINTIFF

VERSUS

COUNTY GOVERNMENT OF UASIN GISHU.....DEFENDANT

RULING

Jedrom Building and Civil Engineering Limited, (hereinafter referred to as the applicant) have come to court against **County Government of Uasin Gishu, (hereinafter referred to as the respondent)** for summary judgment for the liquidated sum of Kshs.4,000,000/= and loss of income of Kshs.56,000 per month till payment in full together with interest and cost of the suit. The application is based on grounds that the defendant/applicant has failed to file defence within the requisite period provided by law. The defendant/respondent has no viable defence and that is the reason they have failed to file any defence having entered appearance on 16th July, 2014. The defendant/respondent occasioned damage to the plaintiff/applicant valued at Kshs.4,000,000/=. The defendant/respondent caused loss of income from demolished premises amounting at Kshs.56,000/= per month and the plaintiff/applicant continues to incur further loss.

The application is supported by the affidavit of William Kipkorir Kipkurui who states that he is the director of the plaintiff company duly authorized to swear this affidavit on its behalf. That the plaintiff/applicant filed this suit on 30th June, 2014 and served the defendant/respondent with the summons to enter appearance, plaint, application dated 30th June, 2014 and order dated 1st July, 2014 on the 2nd day of July, 2014.

The defendant/respondent filed a memorandum of appearance on 16th July, 2014 through M/s Arap Mitei & Company Advocates. The defendant/respondent has never filed statement of defence since then and have never offered any cogent reason for failing to do so. That subsequently on 20th day of August, 2014, despite an Order injunction restraining them being in place the defendant/respondent trespassed into the plaintiff/applicant's parcel of land registration number Eldoret Municipality/Block 10/2052 and caused destruction of property valued at Kshs.4,000,000.00 and occasioned a loss of monthly income of Kshs.56,000.00.

The plaintiff states that due to the above and in accordance with the legal provisions the plaintiff/applicant amended its plaint on 29th September, 2014. That on 30th September 2014, the amended plaint was then served upon the defendant's advocate, M/s Arap Mitei and Company Advocates. The defendant/respondent was required to file a defence to the amended plaint within fourteen days that is

by the 15th day of October, 2014. The defendant/respondent has since failed to comply with the law consequently and he is advised by his counsel on record which advice he verily believe to be true that summary judgment ought to be entered as provided under 36 Rule 1(a)(2). That he therefore prays for summary judgment for Kshs.4,000,000.00 being the value of the destroyed plaintiff's property and Kshs.56,000.00 being loss of income from the property.

That the fact that the defendant/respondent has failed to comply with law means that the plaintiff/applicant is justified and in the interest of justice the claim as contained in the plaint ought to be allowed.

The gist of the plaintiff's submissions is that the plaint in this matter was filed on 30th June, 2014. That the defendant filed a memorandum of appearance on 6th day of July, 2014 and that in reply the defendant filed a defence and counterclaim on 3rd December, 2014. That before the filing of defence and counterclaim some things transpired that is during pendency of interim orders for injunction the defendant without any justifications proceeded in contempt of court orders earlier issued to demolish the plaintiff's property. The plaintiff as a consequence was forced to move to court vide an application dated 29th September, 2014 and seek further orders. The plaintiff sought to have the defendant punished for contempt of court and causing destruction of his property valued at Kshs.4,000,000/= inter alia loss of rental income of Kshs.56,000 per month. The application was successful in that the defendant was found in contempt of court and ordered to pay a fine of Kshs.500,000/= in default of which its property was to be attached and sold to recover the fine. That it is unfortunate to date the defendant has not bothered to pay the fine with impunity. That in lights of the foregoing and since the plaintiff had suffered further damages occasioned by the defendant after filing suit, it was imperative that he amend his plaint to seek relief for the destruction of his property. That since the defendant had not filed the defence, no leave was required in order for the plaintiff to amend his plaint.

The plaint was amended on 29th September, 2014 and served upon the defendant's advocates on 30th September, 2014.

That the amended plaint brought in the claim for the destructions of the plaintiff's property and loss of rental income. That the defendant upto now has failed to file defence to the amended plaint and therefore challenge the cause of action introduced by the amended plaint. That in the circumstances of the failure to file defence to the amended plaint, the plaintiff had no alternative other than file an application for summary judgment on 5th November, 2014.

That the current position is therefore is that no defence to amended plaint has even been filed. No replying affidavit or grounds of opposition to application for summary judgment dated 3rd November, 2014 has ever been filed. That in the circumstances, the law is very clear and supports the application. He refers to Order 51, Rule 14(i) Civil Procedure Rules.

“Any respondent who wishes to oppose an application may file any one or combination of the following documents.”

(a) Notice of preliminary objection and/or;

(b) Replying affidavit and/or;

(c) A statement of grounds of opposition.

That the defendant has not complied with the above and therefore it should be rightly concluded that he does not wish to oppose the application.

That under 36 rule; 1(i) Civil Procedure rules –

(i) In all suits where the plaintiff seeks judgment for;

(a) Liquidated demand with or without interest or

(b)

“where the defendant has appeared but not filed defence, the plaintiff may apply for judgment the amount claimed or part thereof.....”

The plaintiff therefore submits that the application is properly before court and should be allowed. The defendant having failed to seek leave to file defence out of time or reply to the application out of time then the application should be definitely allowed. The defendant should have attempted to persuade the court to grant him leave to defend but the granting of leave would occasion a miscarriage for the reason that there is no viable defence in the first place. He submits further that this honourable court on 19th day of August 2016 found the defendant guilty of contempt by destroying the plaintiff building whereas there were interim orders existing against them at the time. That the plaintiff to justify the prayer for Kshs.4,000,000/= had the destruction valued and valuation report is on record which valuation has not been challenged at all.

That further the finding of this honourable court that the defendant was responsible for the destruction of the plaintiff's property which is valued at Kshs.4,000,000/= has also not been challenged or appealed against and they therefore pray that the application succeeds.

The 1st defendant was ordered to pay a fine of Kshs.500,000/= but failed to do so and therefore the court ordered that he could not be heard until he paid the sum. The defendant continues to be in contempt of court and has persistently refused to pay the money. Ultimately, the defendant was not heard and therefore, the application went unopposed.

In *Hadkinson v. Hadkinson*, [1952] 2 All ER 567; the eminent Law Lord stated:

"I am of the opinion that the fact that a party to a cause has disobeyed an order of the court is not of itself a bar to his being heard, but if his disobedience is such that, so long as it continues, it impedes the course of justice in the cause by making it more difficult for the court to ascertain the truth or to enforce the orders which it may make, then the court may in its discretion refuse to hear him until the impediment is removed or good reason is shown why it should not be removed".

In this jurisdiction, the Court of Appeal has emphasized the sacrosanct nature of the right to be heard in the context of contempt of court applications. Speaking for the majority, *Githinji, JA* expressed himself as follows in *Rose Detho v. Ratilal Automobiles Ltd & 6 Others*, CA No. 304 of 2006 (171/2006 UR):

“Thus, there is no absolute legal bar to hear a contemnor who has not purged the contempt...and whether the court will hear the contemnor is a matter for the discretion of the court depending on the circumstances of each case.”

The reason why, depending on the circumstances of each case, the court must retain the discretion, albeit to be exercised sparingly, to decline to hear a contemnor is because our entire constitutional dispensation is predicated on respect for the rule of law. The moment a party hacks at that foundation, the entire system is threatened.

The Constitutional Court of South Africa, in *Burchell v. Burchell Case No 364/2005* underlined the importance to the rule of law, of compliance with court orders in the following terms:

“Compliance with court orders is an issue of fundamental concern for a society that seeks to base itself on the rule of law. The Constitution states that the rule of law and supremacy of the Constitution are foundational values of our society. It vests the judicial authority of the state in the courts and requires other organs of state to assist and protect the courts. It gives everyone the right to have legal disputes resolved in the courts or other independent and impartial tribunals.

Failure to enforce court orders effectively has the potential to undermine confidence in recourse to law as an instrument to resolve civil disputes and may thus impact negatively on the rule of law.”

In the application before me, there are orders issued the court more than one year ago, which were disobeyed by the respondent. He was cited for contempt heard and found to be in contempt and fined Ksh.500,000/= but refused to pay.

In application for summary judgment, the court considers the pleadings on record and whether a defendant has complied with the rules of procedure by filing defence after entering appearance. In my view, the provisions of **Order 36 rule 1** of the *Civil Procedure Rules, 2010* in relation to Summary Judgement apply once Appearance has been entered but no Defence has been filed. This court finds that no defence to amended plaint has been filed and that no replying affidavit or grounds of opposition to the application for summary judgment dated 3.1.2014 has been filed in compliance with Order 51, rule 14(1). Order 36, Rule 1(I) provides for Summary judgment thus; -

1. (1) In all suits where a plaintiff seeks judgment for –

(a) a liquidated demand with or without interest; or

(b) the recovery of land, with or without a claim for rent or mesne profits, by a landlord from a tenant whose term has expired or been determined by notice to quit or been forfeited for non-payment of rent or for breach of covenant, or against persons claiming under such tenant or against a trespasser,

where the defendant has appeared but not filed a defence the plaintiff may apply for judgment for the amount claimed, or part thereof, and interest, or for recovery of the land and rent or mesne profits.

(2) The application shall be supported by an affidavit either of the plaintiff or of some other person who can swear positively to the facts verifying the cause of action and any amount claimed.

(3) Sufficient notice of the application shall be given to the defendant which notice shall in no case be less than seven days.

There being no defence to amended plaint and no explanation for the same, I do find that the application is merited and summary judgment is hereby entered for the liquidated sum of Kshs.4,000,000 and loss of income of Kshs.56,000 per month till payment in full together with interest and cost of the suit.

DATED AND DELIVERED AT ELDORET THIS 24TH DAY OF JULY, 2017.

A.OMBWAYO

JUDGE