



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT & LAND COURT OF KENYA**  
**AT MILIMANI**

**ELC CASE NO. 1372 OF 2014**

**DERRICK FRANCIS OUMA.....1<sup>ST</sup> PLAINTIFF**

**PATRICK NYAMEMBA TUMBO.....2<sup>ND</sup> PLAINTIFF/APPLICANT**

**JENIFER NDUNGU.....3<sup>RD</sup> PLAINTIFF**

**- VERSUS -**

**RASHID MOHAMMED.....DEFENDANT/RESPONDENT**

**RULING**

1. This is a Ruling in respect of a Notice of Motion dated 17<sup>th</sup> February 2017, brought by the second Plaintiff/Applicant seeking committal of the Defendant/Respondent to Civil Jail for Contempt of Court. The applicant and two others had brought a suit against the respondent in which they sought a permanent and mandatory injunction restraining the respondent from interfering with common facilities serving the plaintiffs and the defendants like *roads, drainage, walkways lighting and common gate*.

2. The first, second and third plaintiffs are owners of properties on **LR No.209/8707/1, 209/8707/2, and LR No. 209/8707/5** respectively. The defendants is owner of **LR No.209/8707/3 and LR 209/8707/4**. All these properties are in the same court and share a common gate and other facilities. The defendants who bought his properties later demolished buildings which were there and put up new buildings. In the process, the defendant also sought the upgrading of the common facilities at his own cost. The plaintiffs were not agreeable to this as this caused inconvenience to them. The plaintiffs then moved to court and filed an application for injunction seeking to restrain the defendant from interfering with facilities in the common area.

3. The Plaintiffs were granted injunctive orders against the defendant on 29<sup>th</sup> May 2015. It is apparent that the other two plaintiffs lost interest in the suit leaving the applicant herein who is now seeking to have the respondent committed to civil jail for contempt of court. The applicant contends that the respondent has in blatant contempt of the court order gone ahead to deposit construction materials on the common areas like walkways and parking and has started excavation works. This has inconvenienced the applicant. The respondent has declined to stop his activities despite being served with notice of commencement of contempt proceedings.

4. The respondent has opposed the applicant's application based on a replying affidavit sworn on 20<sup>th</sup> March 2017 in which he contends that he has not disobeyed the court order of 29<sup>th</sup> May 2015. The respondent denies depositing any construction material on the common areas as alleged. The respondent

contends that the applicant's application was brought merely to delay the determination of an application he had filed seeking to have the applicant's suit dismissed for want of prosecution.

5. In a further affidavit, the applicant contends that the respondent pulled down a common gate and put up a new one which has reduced parking space as it has encroached on to the common areas. The applicant further contends that the five properties were initially served by one perimeter fence but that the respondent has constructed a perimeter fence secluding his properties from the rest and that there is an electric fence which is a danger to the applicant because it is next to trees he had planted. That the result of the developments, by the respondent has caused inconvenience to the occupants of the other properties.

6. I have carefully considered the applicant's application as well as the opposition to the same by the respondent. The only issue for determination in this matter is whether the respondent has committed any contempt. In an application for contempt of a court order, an applicant is expected to prove the following:-

*i. That there was a court order requiring the respondent to do or not to do a certain activity.*

*ii. That the said order was served upon the respondent or that the respondent was aware of the order.*

*iii. That the order contained a penal clause warning the respondent of consequences of disobeying the order.*

*iv. That the respondent deliberately went against the said order.*

7. In the instant case, there is no doubt that there was a court order given on 29<sup>th</sup> May 2015. The order was extracted and issued by the Deputy Registrar on 23<sup>rd</sup> June 2015, as per the attached copy to the application for contempt. The order was given in the presence of counsel for the respondent and the respondent gave his counsel instructions to appeal against the order. A notice of appeal was subsequently filed. This therefore shows that the respondent knew of the order.

8. I have looked at the order which was issued on 23<sup>rd</sup> June 2015. The same did not contain a penal clause. However this notwithstanding the practice currently is that failure to include a penal clause on an order is not fatal to an application for contempt of court. The applicant was aware of the need to have a penal clause on the order. The applicant sought to include the penal clause in a notice to institute contempt proceedings dated 15<sup>th</sup> February 2017, two days before he filed the application for contempt. There is no requirement for issuing a notice to institute contempt proceedings before any application for contempt is filed. This notice was apparently issued to cure the failure to include a penal notice in the order issued on 23<sup>rd</sup> June 2015.

9. When an application for contempt is filed, the applicant is seeking to have the respondent punished for breach of the order. Breach of an order can only be established by evidence. In the case of **Bramblevale Ltd (1970) CH 128 at 137, Lord Denning** stated as follows:-

*“ A contempt of court is an offence of a criminal character. A man may be sent to prison for it. It must be satisfactorily proved.....There must be some further evidence to incriminate him”.*

10. In establishing whether the respondent disobeyed the court order, one must look at the order to see what the respondent was restrained from doing. Then this has to be weighed against what the applicant is saying to be disobedience of the order. In the order of 29<sup>th</sup> May 2015, the respondent had been restrained from doing the following activities.

*i) Excavation on the common area*

*ii) Wiring in the common area*

*iii) Piping in the common area*

*iv) Dealing with roads, drainage, walkways, lighting and working on the common gate.*

In the alternative, the order directed the respondent to return the property in the common areas into a position it was before the excavation on the storm water drainage.

11. There are two major complaints in the application by the applicant. The first is that on 15<sup>th</sup> February 2017, the respondent deposited construction materials and that he started excavation works. The other complaint is that on the same day that is 15<sup>th</sup> February 2017, the respondent demolished the main gate and put up another gate. This construction of the new gate reduced the parking space which in turn encroached on the common areas. In support of the allegations of breach of the court order, the applicant annexed photographs of a gate.

12. The photographs provided by the applicant do not show any accumulated construction materials on either the parking space or walkways. The photographs also show a gate but one cannot tell whether it is a new or old gate. In any case it is not practically possible that a person can knock down a gate and put up a new one on the same day. This is because according to the applicant, the respondent demolished the old gate and put up a new gate on 15<sup>th</sup> February 2017.

13. The injunction order did not stop the respondent from building a perimeter wall round his two properties or put an electric fence round his perimeter fence. If the applicant's trees grow and come into contact with the respondent's electric fence, it is the responsibility of the applicant to trim the branches to avoid them getting into contact with the respondent's electric fence. There is no evidence that the respondent's perimeter fence has encroached on to the common areas. I therefore find that the applicant has failed to prove that the respondent is in contempt of the order given on 29<sup>th</sup> May 2015. The applicant's application is hereby dismissed with cost to the respondent. It is so ordered.

Dated, Signed and delivered at **Nairobi** on this **9<sup>th</sup>** day of **October, 2017**.

**E.O.OBAGA**

**JUDGE**

In the absence of parties who were aware of the time and date for delivery of ruling.

Court Assistant: Hilda

**E.O.OBAGA**

**JUDGE**