



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT NYAHURURU

ELC CASE NO 236 OF 2017

KITIRI FARMERS CO-OPERATIVE SOCIETY.....PLAINTIFF/APPLICANT

VERSUS

CHIEF LAND REGISTRAR.....1st DEFENDANT/RESPONDENT

SETTLEMENT FUND TRUSTEES.....2nd DEFENDANT/RESPONDENT

WILSON MAINA MUTAHL.....3rd DEFENDANT/RESPONDENT

JOSEPH MBURU MIHANGO.....4th DEFENDANT/RESPONDENT

RULING

1. Before me for determination is the Notice of Motion dated 21st April 2017 brought under *Order 40 Rule 3(1)(2) and (3), of the Civil Procedure Rules, Section 3A of the Civil Procedure Act, and all other enabling provisions of the Law* where the Applicant seeks

a) That the 3rd and 4th Respondents herein be detained in prison for a term not exceeding six months for disobeying the court orders granted on 20th February 2017, barring them for interfering with the plaintiff's ownership, quiet possession and use of use of land parcel No. Nyandarua/Kitiri/419 pending the hearing inter partes of the plaintiffs' application dated the 18th May 2016.

b) That costs of this application be paid by the 3rd and 4th Defendants/Respondents.

2. The Application was premised on the grounds that:

i. The 3rd and 4th Respondents were served with the court's orders, barring them for interfering with the plaintiff's ownership, quiet possession and use of use of land parcel No. Nyandarua/Kitiri/419 pending the hearing inter partes of the plaintiffs' application dated the 18th May 2016.

ii. A penal Notice that contempt of court proceedings would be instituted against them if they failed, refused or neglected to comply with the terms of the order dated the 20th February 2017 was also attached to the order.

iii. The Defendant/ Respondents forcibly entered into the suit premises, forcibly removed the plaintiff's tenant's thereon and proceeded to commence construction therein in blatant violation of the court order.

3. The Application was further supported by an affidavit sworn by Mr. Simeon Kamau Ngugi the chairman of the Plaintiff/Applicant.

4. The application was argued by Mr Kibera, Counsel for the Applicants who while relying on the affidavit sworn by Mr. Simeon Kamau Ngugi submitted that their application dated 21st April 2017 sought orders for the committal of the 3rd and 4th Respondents to civil jail for a term not exceeding six months for disobeying the court orders granted on 20th February 2017 which was premised on an application dated the 16th May 2017 that sought for interim orders against the defendants pending the hearing and determination of the application inter partes and/ or determination of the suit.

5. Counsel for the Applicant submitted that pursuant to the above captioned orders having been issued by the court, he caused the same to be served upon counsel for the Defendants and a further copy fixed on the containers on the suit land.

6. On the 7th March 2017, when parties, including the 3rd and 4th Respondents appeared in court to take directions on their application dated

the 18th May 2016, the defendants confirmed to having received copies of the interim orders issued by the court on the 20th February 2017 and promised to comply.

7. However in blatant disregard of the interim orders in force, the 3rd and 4th Respondents not only proceeded to complete the construction on the suit premises, but went ahead to install tenants thereon.

8. Counsel submitted that although the Respondents deposed in their replying affidavit that what was on the suit land were containers placed there in November 2016, and that the construction had been completed by February 2017, yet at paragraph 19 of their affidavit they had deposed that what was remaining was the paint work.

9. Further that on the 17th February 2017 through their own admission, they had promised to cease with the construction.

10. It was further submitted that once an order has been issued, and has not been varied, or set aside, the same remains valid and must be obeyed.

11. The Application was opposed by counsel for the Defendants who, while relying on the sworn affidavit of the 29th May 2017 by Mr. Wilson Maina Mutahi, the 3rd Respondent here submitted that the application did not meet the criteria for grant of the orders sought and went ahead to list the 3 ingredients that must be proved for one to be in contempt of court and to be committed to civil jail thereafter.

12. The ingredients include;

i. Valid order

ii. The order must be sired

iii. There must be prove of the disobedience of the terms of the orders.

13. On the first issue there was no dispute however on the second issue counsel submitted that the order was served upon the defendant's counsel and not on the contemnor, who up to date did not know the contents/terms of the order.

14. It was counsel's contention that service through an agent was not sufficient to sustain an application for contempt especially if one was to loose his/her freedom.

15. The only attempt made to notify the respondents of the contents of the order was the suggestion made in the Applicants affidavit the Respondents were present in court on the 7th March 2017 when they asked to comply with the said orders.

16. The Respondents therefore became aware of the orders on the 7th March 2017 and can therefore not be held accountable for events that took place prior to the 7th March 2017.

17. The said submission was inter twined with the 3rd ingredient hence, that there must be prove of the disobedience of the terms of the orders. So far counsel submitted, the Defendants herein have been on the suit premises which had tenants and business was being conducted prior to the filing of the present application.

18. No tangible evidence had been adduced to the effect that there were new constructions on the suit land otherwise to show that there had been change of status after the 7th March 2017.

19. Counsel relied on paragraphs 17-19 of their replying affidavit which in effect averred that there were containers placed on the suit land and business had been running prior to the issuance of the orders, and secondly that no construction had taken place Photographs presented in court by the Applicant/plaintiff were misleading as construction had been complete but the only remaining issue was the painting of the containers. No further affidavit was filed by the plaintiff to counter the averments.

20. The unsigned letter by the chief could not be relied on as it was addressed to the Deputy Registrar by someone who was not called to testify.

21. It was counsel's submission that there was material non-disclosure by the applicants in their application where they sought to evict the Defendants using back door technique.

22. Counsel reiterated that there was no order for eviction keeping in mind that the defendants were already in possession of the suit land and that the standard of proof before jailing the defendants was much higher.

23. In rejoinder counsel for the applicant, submitted that since parties were in agreement that there was a valid order, the same had not been varied and having been served on the parties, their application ought to be upheld.

24. In the case of **ECONET Wireless Ltd vs Minister for Information & Communication of Kenya & Another [2005] eKLR** it was held that:

“Where an application for committal for contempt of court orders is made the court will treat the same with a lot of seriousness and urgency and more often will suspend any other proceedings until the matter is dealt with and if the contempt is proven to punish the contemnor or demand that it is purged or both. For instance an alleged contemnor will not be allowed to prosecute any application to set aside orders or take any other step until the application for contempt is heard. The reasons for this approach are obvious- a contemnor would have no right of audience in any court of law unless he is punished or purges the contempt.”

25. On the basis of the above holding in the **ECONET** case supra, this court directed that the contempt of court proceedings herein as commenced must be determined before the substantive motion and other preliminary objections raised, including objections as to jurisdiction of this court to hear and determine the dispute and or the locus standi or necessity of other parties to the suit could be determined.

26. I have heard submissions by both counsel for the Applicant and the Defendants. The law guiding the present application is Order 40 Rule 3(1) of the Civil Procedure Rules which stipulates that:-

In cases of disobedience, or of breach of any such terms, the court granting an injunction may order the property of the person guilty of such disobedience or breach to be attached, and may also order such person to be detained in prison for a term not exceeding six months unless in the meantime the court directs his release.

27. From the affidavit evidence, submissions by the respective parties' counsels on record the applicable law and decided cases, the following issues stand out for determination:-

i. **Whether there was any valid court order issued by this court on 20th February, 2017**

ii. **Whether the order of 20th February, 2017 was served upon the Respondents or whether the Respondents were aware of the orders of 20th February, 2017**

iii. **Whether the respondents are guilty of contempt of court order issued on 20th February, 2017**

28. On the first issue as to whether **there was any valid court order issued by this court on 20th February, 2017**

29. Indeed on the 20th February 2017 this court issued ex-parte interim orders restraining the 3rd and 4th defendants from interfering with the plaintiff's ownership, quiet possession and use of use of land parcel No. Nyandarua/Kitiri/419 pending the hearing inter partes of the plaintiffs' application dated the 18th May 2016. Parties have not disputed that there was a valid order issued by this court. This issue thus rests.

30. On the second issue of service of the **order of 20th February, 2017** alleged to have been disobeyed, the applicant maintains that the affidavit of George Rasugu proves service of the order upon Counsel of the Defendants.

31. The Court of Appeal in the case of **Shimmers Plaza Ltd Vs NBK (2015) Eklr** approved the growing jurisprudence right from the High Court that has reiterated that knowledge of a court order suffices to prove service and dispenses with personal service for the purposes of contempt proceedings. The Court of Appeal in the above Shimmers Plaza case cited with approval Hon **Lenaola J in Basil Criticos Vs Attorney General & 8 Others (2012) eKLR** where the learned Judge pronounced himself thus:-

“...the law has changed and as it stands today knowledge supersedes, personal service.....where a party clearly acts and shows that he had knowledge of a court order, the strict requirement that personal service must be proved is rendered unnecessary.”

32. On the 7th March 2017, all parties were present in court when they recorded a consent to the effect that the 3rd and 4th Respondents, who were present in court (the court took notice of their presence) cease further construction on the suit land as ordered by the court on the 29th February 2017. Parties then agreed to file written submissions to the application dated 18th May 2016 pending which, this application was filed. Based on the **Basil Criticos supra, this court finds that the defendants had knowledge of the court's orders and therefore personal service was therefore unnecessary.**

33. On the third issue as to **whether the Respondents are guilty of contempt of court order issued on 20th February, 2017, the court is guided** the Scottish case of **Stewart Robertson vs. Her Majesty's Advocate, 2007 HCAC63**, Lord Justice Clerk stated that:

“ contempt of court is constituted by conduct that denotes willful defiance of or disrespect towards the court or that willfully challenges or affronts the authority of the court or the supremacy of the law, whether in civil or criminal proceedings”

34. Further, Romer L.J in **Hadkinson vs. Hadkinson(1952) ALL ER 567** stated that:

“It is the plain and unqualified obligation of every person, against, or in respect of, whom an order is made by a court of competent jurisdiction to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or even void”

35. From the foregoing, it is trite that contempt of court proceedings and applications are subtle and criminal in nature and would impose criminal sanctions if a conviction followed.

36. In the instant case, I find that although the 3rd and 4th Respondents were served with the court order of 20th February 2017, however there was no tangible evidence placed before me to make a finding that 3rd and 4th Respondents disobeyed and disregarded the same willfully and deliberately.

37. On the contrary, it is neither here nor there that the defendants constructed upon the suit land after the orders were issued. The photos submitted as exhibits do not show any constructions going on but rather business premises in containers which tends to cast doubt into the Plaintiff's submission in favour of the Defendants.

38. This motion is accordingly dismissed with costs to the Respondents who are hereby acquitted of the charge of being in contempt of court.

Dated and delivered at Nyahururu this 4th day of October 2017.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE