



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MOMBASA**

**ELC NO 252 OF 2016**

**VITALIS OTIENO WANGA & 7 OTHERS.....APPLICANTS**

**VERSES**

**BOLLORE TRANSPORT & LOGISTICE KENYA.....RESPONDENT**

**RULING**

1. The Applications under consideration are the Applicants Notice of Motion dated 16<sup>th</sup> September 2016 in which the Applicants are seeking mainly for Orders that the Respondent's Legal Advisor, Mr. Mwangi Gitau and Contractor, Mr. Bosco Aketch be committed to civil jail for a period of six (6) months due to wilful disobedience of the Court Orders issued on 9<sup>th</sup> September 2016; and that the Court initiates other intelligent mechanisms and means available to ensure that the criminal who disobeyed the Court Order are arrested and charged for contempt. The Applicants also moved the Court by their Notice of Motion dated 6<sup>th</sup> July 2017 in which they want the Court to cite Bollore Transport & Logistics Kenya Ltd (Mombasa), its servants, workers, employees, contractors, proxies, tenants, relatives and/or any other person however acting on its behalf for contempt of Court having contravened the orders issued by the Court on 9<sup>th</sup> September 2016 in the presence of all parties and duly served; that the Court be pleased to summon Legal Advisor, Mr. Mwangi Gitau of Bollore Transport Logistics Kenya Ltd (Mombasa) to explain his actions and/or issue such other orders it deems just and convenient to meet the ends of justice; that the Defendant be ordered to remove fences made by Bollore Transport & Logistics K Ltd proxies after the order restraining them not to erect or do any activities on plot **LR.NO.MN/V/682 and 722 Chagamwe** on 9<sup>th</sup> September 2016.

Also under consideration is the Defendant's Notice of Motion dated 31<sup>st</sup> January 2017 in which it seeks the Orders of Injunction and/or maintenance of status quo made by the Court on 9<sup>th</sup> September 2016 and 9<sup>th</sup> November 2016 set aside or discharged.

2. Both the Applicants Applications are brought under Order 40 Rules 1, 2, 3 and 4 of the Civil Procedure Rules among others and are supported by the grounds listed on the face of the Applications and the Affidavits of Vitalis Otiemo Wanga sworn on 16<sup>th</sup> September 2016 and 6<sup>th</sup> July 2017. Briefly, the Applicants aver that on 9<sup>th</sup> September 2016, the Court issued on interim basis an order of a Temporary Injunction restraining the respondents by themselves, their representatives, agents, goons, employees and servants from further evicting, destroying trees, crops, vegetables and demolishing all the structures currently on **Plot No. MN/V/682 and 722** pending hearing of the Application date 8<sup>th</sup> September 2016 inter parties. That on 10<sup>th</sup> September 2016, the said Order was served upon the Respondent but the Respondent went ahead and demolished the Applicants houses and destroyed other property on the Suit Property and commenced constructions thereon.

3. The two Applications were opposed by the Defendant who filed Replying Affidavits sworn by Mwangi Gitau on 31<sup>st</sup> January 2017 and 19<sup>th</sup> January 2017 and another sworn by Justus Mwangangi on 14<sup>th</sup> February 2017. The Defendant admitted being the registered proprietor of **LR.No.MN/V/722** which it acquired in 2008/9 but denied ownership of **LR. No. MN/V/682** which is adjacent to its plot. It is the Defendant's contention that when it acquired plot **LR.NO. MN/V/722**, the same was not occupied but one Pastor Ezra Awimbo Odemba was undertaking subsistence farming in 2009. That the plot remained vacant until sometime in December 2012 when the Defendant permitted Joycot General Contractors Ltd to temporarily occupy it for purposes of parking construction machines, vehicles and equipment, but vacated in August 2016 when the Defendant made a decision to erect a boundary wall. That around the same time, the 1<sup>st</sup> Plaintiff together with others had trespassed onto the Suit Property and constructed a temporary structure and planted some crops which were however demolished and the crops uprooted on 7<sup>th</sup> September 2016. It is the Defendant's contention that by the time the Plaintiffs filed these proceedings in Court on 8<sup>th</sup> September 2016, there were no structure standing or crops on the Suit Property. They denied violating the Court Order of 9<sup>th</sup> September 2016 as the same was served after the demolitions had been undertaken. Mr. Gitau also denied receiving the Court Order from the Court Process Server and states that he only got a copy of the Order on 12<sup>th</sup> September 2016 from Mr. Bosco Aketch of Classic Building Works Limited.

4. The Defendant's Application dated 31<sup>st</sup> January 2017 seeks to have the Orders of Injunction and/or maintenance of status quo made by the Court on 9<sup>th</sup> September 2016 and 9<sup>th</sup> November 2016 set aside or discharged and is based on the grounds, *inter alia*, that the Plaintiffs have not properly served the Orders or pleadings on the Defendant; that after obtaining the ex-parte Injunction, the Plaintiffs did not serve the Order, the Application and Pleadings on the Defendant within the stipulated time and same has lapsed; that the Plaintiffs obtained the Orders of Injunction and their extension by misrepresentation and/or concealment of or failure to disclose material facts; that there is no purpose served by continuing the Injunction as neither the Plaintiffs nor any other person other than the defendant are in occupation of the Suit Property and that the Defendant is suffering immense losses by reason of the Injunction continuing. The Application is also supported by the Affidavit of Mwangi Gitau sworn on 31<sup>st</sup> January 2017. The Application is opposed by the Plaintiffs who filed a Supporting Affidavit (sic) dated 6<sup>th</sup> March 2017.

5. I have duly considered the three Applications, the responses thereto and the Submissions by both the Applicants and the Respondent. I will deal firstly with the Plaintiffs' Applications for contempt. The power of the Court to punish for Contempt of Court is now governed by the Contempt of Court Act, 2016 which came into operation on 13<sup>th</sup> January 2017. Under the said Act, Contempt of Court includes wilful 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. This is because the charge of contempt of Court is an offence of criminal character and a party may lose his liberty.

6. On 9<sup>th</sup> September 2016, the Court (Omollo, J) granted an Ex-parte Order "***that pending the hearing of this Application inter parties this Honourable Court be and is hereby pleased to issue on interim basis a temporary injunction restraining the Respondents by themselves, their representatives, agents, goons, employees and servants from further evicting, destroying trees, crops, vegetables and demolishing all the structures currently on Plot LR.NO. MN/V/682 and 722***"

7. It is the Plaintiffs case that the Order was served on the Defendant's Legal Advisor, Mr. Mwangi Gitau on 10<sup>th</sup> September 2016, but that the Defendant went against the said Order by demolishing their structures and destroying their crops. On their part, the Defendant contends that the Order was served on them after the demolitions of the structures and destruction of the Plaintiffs' crops had been carried out.

8. I have perused the Plaintiffs Application dated 8<sup>th</sup> September 2016 together with the Supporting Affidavit as well as the Order issued by the Court on 9<sup>th</sup> September 2016. The Applicants in their Application and in the Supporting Affidavit admit that eviction and demolitions had taken place and the Plaintiffs have even annexed photographs of demolished houses. The Order issued by the Court on 9<sup>th</sup>

September 2016 was to restrain the Defendants from “further” evicting, destroying trees, crops, vegetables and demolishing all the structures on the Suit Property. If the Plaintiffs acknowledge in their Application that the Respondent had already destroyed their crops, trees and vegetables and had demolished their structures, what then was the Order meant to achieve? From the Application and the Supporting Affidavit, there was no indication of some structures or crops that were still standing. The Plaintiffs accuse the Defendant for disobeying the Court Order by demolishing structures and destroying their crops and yet at the time they approached the Court, they admit that the demolition and destruction had taken place. To me, these are contradictory statements. The Court has not been told what actions the Defendant did before and after service of the Court Order. The Defendant herein has stated that the demolition and destruction took place before they were served. This position is supported by the Plaintiffs’ own pleadings. The Court is being asked to commit the Defendant and its employee for Contempt of Court for having deliberately disobeyed Orders issued by the Court on 9<sup>th</sup> September 2016.

9. In the case of **Refrigerator & Kitchen Utensils Ltd –Vs- Gulabchand Poptial Shah & Others Civil Appln. No. 39 Of 1990**, the Court of Appeal while approving the standard of proof in contempt cases as set out in the case of **Gatharia Mitika & Others –Vs- Bahrain Farm Ltd, Civ. Appln.No.24 of 1995** held that in cases of alleged contempt, the breach for which the contemnor is cited must not only be precisely defined but proven to a standard which is higher than proof of a balance of probabilities but not as high as proof beyond a reasonable doubt. This is because, as already stated, the charge of contempt of Court is an offence of criminal character and a party may lose his liberty. I must therefore satisfy myself beyond any shadow of a doubt that the Defendant and/or its employees or agents disobeyed the order of 9<sup>th</sup> September 2016.

10. From the evidence on record, I cannot safely hold that the Respondents disobeyed the Court Order issued on 9<sup>th</sup> September 2016. In my considered view, and having taken into consideration the evidence and all the materials on record, I am not satisfied that the Applicants have proved the alleged contempt on the part of the Defendants and/or its employees or agents. Consequently, I do find that both the Plaintiffs Applications dated 16<sup>th</sup> September 2016 and 6<sup>th</sup> July 2017 lack merit and I hereby dismiss them.

11. I now turn to the Defendant’s Application dated 31<sup>st</sup> January 2017. The same seeks to have the Orders of Injunction and/or maintenance of status quo made by the Court on 9<sup>th</sup> September 2016 and 9<sup>th</sup> November 2016 set aside or discharged. The main ground the Defendant relies on is that the ex-parte Order of Injunction was not served within the stipulated time. It is also the Defendant’s contention that the Plaintiffs have obtained the Order of Injunction and their extension or continuation by misrepresentation and/or concealment of or failure to disclose material facts; that there is no purpose served by continuing the Injunction as neither the Plaintiffs nor any other person other than the Defendant are in occupation of the Suit Property and that the Defendant is suffering immense losses by reason of the Injunction continuing. The Application is supported by the Affidavit of Mwangi Gitau sworn on 31<sup>st</sup> January 2017 in which he has deposed, *inter alia*, that the ex-parte Orders of Injunction were made and issued by the Court on 9<sup>th</sup> September 2016 but the Defendant was not served with the pleadings and the Application within 3 days of the date of issue of the Order. That though the 1<sup>st</sup> Plaintiff had indicated to the Court that he was negotiating settlement with the Defendant, which he later renounced the consent reached, despite having received part payment. It is deposed that all temporary and permanent structures erected and crops planted on the Suit Property were demolished, uprooted and cleared by the Defendant’s Contractor, Classic Building Works Limited on 7<sup>th</sup> September 2016, before this Suit was filed in Court, and by the time the Suit was filed in Court, neither the Plaintiffs nor any other person was in actual occupation of the Suit Property. It is further deposed that the Defendant is merely erecting a boundary wall on the Suit Property the continuation and completion of which will not in any way prejudice the case of the Plaintiff.

12. The Application was opposed by the Plaintiffs who filed a strongly worded documents dated 6<sup>th</sup> March 2017.

13. I have considered the Application, the Affidavits on record, the Submissions filed and the Authorities

cited. Order 40 Rule 4(3) of Civil Procedure Rules provides as follows: -

***“In any case where the Court grants an Ex-parte Injunction, the Applicant shall within three days from the date of the issue of the Order serve the Order, the Application and pleading on the party sought to be restrained. In default of service of any of the documents specified under this rules, the Injunction shall automatically lapse.”***

On 8<sup>th</sup> September 2016, the Plaintiffs filed the Originating Summons herein and on the same date moved the Court by way of a Notice of Motion under Order 40 Rules 2 and 4 seeking among others an Order for a Temporary Injunction. The Application was placed before the Court (Omollo, J) on 9<sup>th</sup> September 2016 and the Court certified the matter urgent and issued on interim basis an order of a Temporary Injunction restraining the Respondents by themselves, their representatives, agents, goons, employees and servant from further evicting, destroying trees, crops, vegetables and demolishing all the structures currently on Plot No. MN/V/682 and 722, and ordered the application to be served upon the Respondents for inter parties hearing on a date given on priority from the Registry.

14. In his Affidavit of service sworn on 14<sup>th</sup> September 2016, Shem O. Abudho, the licensed Process Server states that he received from the 1<sup>st</sup> Plaintiff a copy of the Notice of Motion dated 8<sup>th</sup> September 2016 together with the Supporting Affidavit, Originating Summons and copy of Order issued on 9<sup>th</sup> September 2016 with instructions to serve them upon Bollore Transport Logistics Kenya Limited at Mombasa. The Process Server goes on to state that on 10<sup>th</sup> September 2016, he was accompanied by the 1<sup>st</sup> Plaintiff to the Defendant’s offices and site known as Bollore Transport Logistics, formerly Transami at Changamwe within Mombasa County for purposes of serving the said Order and Application. That on arrival at about 8.30 a.m. he met a group of about four (4) security guards from a private security firm one of who identified herself as Nancy Wairimu. The Process Server states that he introduced himself and explained to the guards the purpose of his visit and the guards called one of their bosses by the name Mwangangi who informed them not to allow the Process Server access to the Company to effect the service, and that he tendered the Original copy of the Order and Application on top of the table at the gate. He further states that they moved to the Suit Property which is about 200 meters from the Company and effected service of the Order upon the guard who called their boss Mr. Mwangangi and the Legal Officer by the name Mr. Gitau who arrived shortly thereafter and he also served them with the Order.

15. The Plaintiffs filed the Notice of Motion dated 16<sup>th</sup> September 2016 on 16<sup>th</sup> September 2016 seeking to commit the said Mr. Mwangi Gitau and a Contractor by the name Bosco Aketch. When the matter came up in Court on 6<sup>th</sup> October 2016, the proceedings show that the Defendant’s Counsel informed the Court that the Defendant had not been served with the Application and the Originating Summons. On 31<sup>st</sup> January 2017, the Defendant filed this Application seeking to set aside or discharge the Order of 8<sup>th</sup> September 2016. In their response, the Plaintiffs admit having served the Order issued by the Court within 3 days but did not serve the Application and the Originating Summons within the 3 days.

16. It is clear from the Affidavit of service by the Process Server and the response by the Plaintiffs that the Defendant was only served with the Order issued by the Court on 8<sup>th</sup> September 2016. There is no evidence that the pleading referred to in Order 40 Rule 4(3) of the Civil Procedure Rules and which is primarily the Originating Summons dated and filed on 8<sup>th</sup> September 2016 was served on the Defendant as required. No explanation has been given by the Plaintiffs as to why the Originating Summons was not served upon the Defendant. It follows therefore that the Order for Injunction issued on 8<sup>th</sup> September 2016 automatically lapsed on 11<sup>th</sup> September 2016. In the circumstances and taking into account all that I have stated above, I find merit in the Defendant’s Notice of Motion dated 31<sup>st</sup> January 2017 and set aside or discharge the Ex-parte Order of Injunction issued on 8<sup>th</sup> September 2016.

Each party shall bear their own costs.

**Ruling dated, signed and delivered at Mombasa this 16<sup>th</sup> day of November 2017**

**C. YANO**

**JUDGE**