



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT ATNAIROBI**

**ELC SUIT NO. 1111 OF 2013**

**TABITHA WANJIRU.....PLAINTIFF/APPLICANT**

**VERSUS**

**JOSEPH THEURI WAIGWA .....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**SAMUEL MUCHEMI MUNDIA .....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**RULING**

What is before me for determination is the plaintiff's Notice of Motion application dated 16<sup>th</sup> May, 2016 in which the plaintiff has sought an order for the committal of the defendants to civil jail for 6 months or such period as the court may deem fit for disobeying the order that was made herein on 17<sup>th</sup> October, 2014 by Gitumbi J. The application has been brought on grounds that on 17<sup>th</sup> October, 2014, the court made an order restraining the defendants from trespassing on and or interfering with the plaintiff's rights of occupation, ownership and use of the parcel of land known as Plot No. 41 (also known as Plot No. C 42) situated at Komarock Phase III (hereinafter referred to as "the suit property") pending the hearing and determination of the suit. The court also issued an order directing the Court Bailiff with the assistance of the Inspector General of Police and the Officer Commanding Kayole Police Division to evict and remove the defendants from the suit property and to demolish the structures they had unlawfully erected on the suit property. The plaintiff has contended that the said court order was extracted and served upon the defendants and their advocates on record. The defendants' advocates were served with the said court order on 10<sup>th</sup> October, 2015 while the 1<sup>st</sup> defendant was served on 18<sup>th</sup> November, 2015 and the 2<sup>nd</sup> defendant on 11<sup>th</sup> January, 2016.

The plaintiff has contended that the defendants, their agents, servants and/ or employees have continued with construction of structures on the suit property in violation of the said court order. The plaintiff has contended further that the defendants have also refused, failed and/or neglected to vacate the suit property in accordance with the terms of the said court order. The plaintiff has annexed to her affidavit in support of the application affidavits of service of the said order upon the defendants and their advocates on record and photographs showing structures said to have been put up by the defendants on the suit property. The Plaintiff has contended that the actions of the defendants aforesaid are in breach of the order of the court made on 17<sup>th</sup> October, 2014 and amount to contempt of court. The defendants did not respond to the application even after being given adequate opportunity to do so.

The application was argued before me on 20<sup>th</sup> April 2017 when Mr. Nderitu advocate appeared for the plaintiff. The advocates for the defendants did not attend court for the hearing of the application. Mr. Nderitu submitted that the order that was made by the court on 17<sup>th</sup> October, 2014 and issued on 29<sup>th</sup> September 2015 prohibited the defendants from trespassing on the suit property and directed the eviction

of the defendants from the said property. He submitted that the defendants were served with the said order and were also represented by an advocate when the order was made.

He submitted that in disobedience of the said order, the defendants had proceeded with construction of buildings on the suit property. Mr. Nderitu submitted that the plaintiff had proved that the defendants are in contempt of court.

I have considered the plaintiff's application together with the affidavit filed in support thereof. I have also considered the submissions of counsel. This is my view on the matter. It is now settled that contempt of court proceedings are quasi criminal in nature because the contemnor is bound to lose his liberty if found guilty. In view of this fact, the standard of proof of contempt is higher than proof on a balance of probabilities. See the case of, Mutitika-vs-Baharini Farm Ltd. (1985) KLR 227, where the court stated that the standard of proof in contempt proceedings must be higher than proof on a balance of probabilities, and almost but not exactly, beyond reasonable doubt.

It follows from the foregoing that for the plaintiff to succeed in the present application, the plaintiff has to satisfy the court to a degree beyond a balance of probabilities that the defendants disobeyed the order made herein on 17<sup>th</sup> October, 2014. It is not in dispute that on 17<sup>th</sup> October, 2014, the court made an order restraining the defendants from trespassing on the suit property. The court also made an order for the eviction of the defendants from the suit property and the removal of the structures they had put up thereon. The plaintiff has contended that in disobedience of the said order, the defendants have continued with construction on the suit property. The defendants have also refused to vacate the suit property as ordered by the court. All the averments contained in the plaintiff's affidavit regarding the terms of the order, service of the same upon the defendants and the disobedience thereof are not contested. I am satisfied from the material before the court that the plaintiff has established the acts of contempt alleged against the defendants in respect of the limb of the court order which prohibited the defendants from trespassing on the suit property.

The plaintiff has proved that the court issued an order restraining the defendants from trespassing on the suit property. The plaintiff has proved that the said order was served upon the defendants and their advocates on record. The plaintiff has also proved that the defendants continued with construction on the suit property even after being served with the said court order. The defendants are guilty of contempt of the order that barred them from trespassing on the suit property.

With regard to the limb of the court order which provided for the eviction of the defendants from the suit property, I am not satisfied that the same has been disobeyed. The order did not direct the defendants to vacate the suit property. The order directed that the defendants be evicted from the suit property by the court bailiff with the assistance of the Inspector General of Police and the Officer Commanding Kayole Police Division. The defendants cannot be held in contempt on account of inaction by other persons who were lawfully authorized by the court to carry out the eviction.

The upshot of the foregoing is that the plaintiff's application for committal of the defendants to civil jail for contempt succeeds on one ground only. Before passing a sentence for the contempt of court which has been established against the defendants, the Deputy Registrar shall issue summons to be served by the plaintiff's advocates upon the defendants for them to appear before this court on a date to be fixed to address the court in mitigation. The Plaintiff shall have the costs of the application.

**Delivered and signed at Nairobi this 10<sup>th</sup> day of November 2017.**

**S. OKONG'O,**

**JUDGE.**

**Ruling read in open court in the presence of:**

Mr. Nderitu for Plaintiff

No appearance for Defendants

Catherine Court Assistant