



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

ELC CASE NO. 424 OF 1996

SAIFUDEEN ABDULLAH BHAI.....1ST PLAINTIFF

JUSSEIN MWINYI.....2ND PLAINTIFF

-VERSUS-

ZAINAB MWINYI.....DEFENDANT

RULING

1. The notice of motion dated 18.12.2013 and brought under Order 40 rule 3(1) and (3) of the Civil Procedure Rules and Section 3A of the Civil Procedure Act seeks the following :

- a) **The defendant be arrested and committed to prison for a term not exceeding six months**
- b) **That the Court do make further order under Order 40 rule 3 as may be necessary to meet the ends of justice**
- d) **Cost of the application be provided for.**

2. The motion is supported by the grounds on the face of it and the affidavit deposed to by the 1st Plaintiff/Applicant. The Applicants aver that the Court issued an order of injunction restraining the Defendant with continuing construction of the suit premises, either by putting additional storeys upwards or extending at the front or sideways. That this order was extended to 20th February 2014.

3. The Defendant in contravention of the order has since 15th December 2013 embarked on a blistering construction of the suit premises. The 1st Applicant annexed photographs showing on – going construction as “SAB 2”. Further that their advocates wrote to the Defendant's advocates which received no response. The 1st Applicant deposes that the contemptuous refusal to comply with the Court order is calculated to undermine the rule of law and defeat ends of justice. They urged the Court to order the Defendant to purge the contempt.

4. The Applicants filed further supporting affidavit reiterating the contents of the earlier affidavit. In it, he annexed more photographs showing construction work that has been going on since 17th December 2013 to 6th January 2014.

5. The Defendant filed a replying affidavit and in it she denied disobeying a Court order. According to her, all the photographs annexed were taken by the Applicant after injunction was lifted and that there was no additional construction after the order. It is her case that the Applicants have not been willing to proceed with this matter.

6. In contempt proceedings, proof must be made beyond the standard in civil cases as contempt is quasi – criminal. The burden of such proof lies on the Applicant. The Applicant stated that the order of injunction issued on 5th August 2013 remained in force until 20.2.2014. The Respondent has not denied being aware of the existence of that order. The order issued restrained the Respondent from continuing with further construction on the suit premises pending inter partes hearing of the injunction application.

7. In the affidavit of 18.12.13 one of the photos is marked as taken on 15.12.2013 shows two courses of block built that looks as fresh in comparison to the rest of the building. The photographs of 17th and 18th December appear to me to be similar. The photos dated 20.12.2013 shows workers on the building and newer courses added up. This is similar to photographs dated 25.12.2013. The photographs dated 26.12.2013, 27.12.2013 and 29.12.2013 clearly show workers undertaking construction work now with timber put on the upper floor presumable constructing the lintel level.

8. The construction indeed took place as can be visibly compared between the photographs of 15.12.2013 and the photographs of 26th – 29th December 2013. The Defendant in response said the photos were taken during the time the injunction was lifted. I have perused the file and got to see the photographs annexed to the application seeking the injunction orders. Those photographs show only the ground floor was under construction as at 11th June 2013 and 23rd – 31st July 2013.

9. Infact the photograph of 31st July 2013 taken at 12.04 pm shows what appears as the timber laid for the lintel support for the 1st floor. If the construction was done during the time the order was lifted then the photograph of the building date 15.12.123 would not be different with the photographs dated from 23rd December onwards which shows construction of the 1st floor almost complete.

10. The Applicant has satisfied me that there was disobedience of the order of the Court issued on 5th August 2013 and extended to 20.2.2013. Consequently I find the Respondent guilty of contempt. I hereby order her to pay a fine of Kshs 100,000 within 7 days of the delivery of this ruling in default she will serve a prison term of one month. To effect the order, I do issue a warrant of arrest directed to the OCS Central Police Station to arrest the Defendant and bring her to-serve the sentence. The costs of this application is awarded to the applicant.

Ruling dated and delivered at Mombasa on 11th day of May 2016

A. OMOLLO

JUDGE