



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC NO. 734 OF 2014

DUNCAN HIRAM KIMANI.....1ST PLAINTIFF

LEAH WANJIKU KIMANI.....2ND PLAINTIFF

VERSUS

DOMINIC GATHECA KINYANJUI.....1ST DEFENDANT

PETER NGACHA KINUTHIA.....2ND DEFENDANT

RULING

The Plaintiffs brought this suit against the Defendants on 11th June 2014. Together with the plaint, the Plaintiffs filed an application by way of Notice of Motion dated 10th June 2014 seeking a temporary injunction to restrain the Defendants from interfering with or constructing on all those parcels of land known as Plot No. 449 (R 459) and Plot No. 472 (496) situated at Lucky Summer Estate, Phase II pending the hearing and determination of this suit. The Plaintiffs' application which was brought under certificate of Urgency was heard exparte on 11th June 2014 by Kamau J. who granted the injunction sought on the same day on a temporary basis pending the hearing of the application interpartes on 25th June 2014. The order that was made by Kamau J. was extracted with a penal notice and sealed with the seal of the court on 12th June, 2014.

What is now before me is the Plaintiffs' application by way of Notice of Motion dated 16th June 2014 seeking assistance of the County Commissioner of Police, Nairobi to enforce the said court order that was made on 11th June 2014 and an order to commit the 2nd Defendant to civil jail for a period of six (6) months for disobeying the said court order. The application is supported by the Affidavit of the 1st Plaintiff Duncan Hiram Kimani and a process server Peter Mburu Waithaka both sworn on 16th June 2014. The Plaintiff has contended that after the court order of 11th June 2014 was issued, the 1st Plaintiff and the process served caused the same to be served upon the 2nd Defendant personally in the presence of the Officer Commanding Ruaraka Police Station on 12th June 2014. The 1st Plaintiff and the process server have given a detailed account of how service upon the 2nd Defendant was effected. The Plaintiffs have contended that despite service of the said court order upon the 2nd defendant he continued with the construction of a building on the suit properties in defiance of the said order. It is on account of the foregoing that the Plaintiffs have sought the orders that I have mentioned at the begging of this ruling. The Plaintiffs have annexed to the two (2) affidavits filed in support of the application photographs said to have been taken on the suit property on 13th June 2014 and 14th June 2014 showing the activities which were taking place thereon after service of the order of 11th June 2016 upon the 2nd Defendant. The Plaintiffs have also annexed a copy of the said court order with the endorsement thereon said to have been

made by the 2nd Defendant in acknowledgment of receipt thereof.

The application was opposed by the Defendants through replying affidavits sworn by the 1st and 2nd Defendants and one, Dominic Gathecha Kinyua. The 1st Defendant has denied that he was served with the pleadings herein together with the court order of 11th June 2014. He has stated that he learnt of this case on 23rd June 2014 from the 2nd Defendant who told him that some court documents had been left with his workers at the construction site on the parcels of land that he had sold to him. He has stated that since the 2nd Defendant was out of Nairobi, they agreed that the documents be collected from the construction site and taken to their advocates on record for necessary action. The 1st Defendant has stated that he sent one, a Mr. Kinyua to collect the said documents and have them delivered to the said advocates. The 1st Defendant has stated that he learnt from the said Mr. Kinyua whose full names are Dominic Gathecha Kinyua that he had been summoned by the O.C.S Ruaraka Police Station and forced to receive some documents which he declined. The 1st Defendant has contended that the 1st Plaintiff may have confused him with the said Dominic Gathecha Kinyua. The 1st Defendant has stated that he has no more interest on the disputed parcels of land having sold the same to the 2nd Defendant.

The 2nd Defendant against whom the orders sought herein are directed has also denied having been served personally with the court order that was made by Kamau J. on 11th June 2014. The 2nd Defendant has stated that after purchasing Land Reference Number 31/18/471 and Land Reference Number 31/18/489 from the 1st Defendant, he began construction thereon in May, 2014. He has denied that he was served with the pleadings herein and the court order by the process server on 12th June 2014 as he has claimed in his affidavit of service. The 2nd Defendant has denied his purported signature on the court order annexed to the 1st Plaintiff's affidavit in support of the application herein. He has stated that he became aware of this suit on 23rd June 2014 when his contractor whom he had engaged to construct a building on the disputed parcels of land informed him that some court documents had been brought and left on site. He has denied that he became aware of the suit herein and the court order aforesaid on 12th June 2014. The 2nd Defendant has stated that he is a law bidding citizen and if the court order in contention had been brought to his attention, he would have obeyed it. The last affidavit that was filed by the Defendants in opposition to the application was the by Dominic Gathecha Kinyua. He has stated that on 12th June 2014 he was summoned to the office of the O.C.S Makadara Police Station where he was presented with some documents to sign. He has stated that when he perused the documents, he noted that the same concerned the 1st Defendant and not him and in view of that, he declined to sign the same even after he was left with the documents and warned by the O.C.S that he would suffer dire consequences if he did not sign the same. He has stated that on 23rd June 2014, he was requested by the 1st Defendant to forward some documents which resembled the documents that he had seen at Ruaraka Police Station to the Defendants' advocates on record which he did.

The Plaintiff's application was argued by way of written submissions. The plaintiffs filed their submissions on 21st April 2015 while the 2nd Defendant did so on 7th May 2015. The Plaintiffs filed a reply to the 2nd Defendant's submissions on 25th May 2015. The 1st Defendant did not file submissions. I have considered the Plaintiffs application together with the affidavit filed in supported thereof. I have also considered the Defendants affidavits in reply to the application. The plaintiffs have sought two principal orders. The first prayer is seeking the assistance of the County Commissioner of Police to enforce the *ex parte* order granted herein on 11th June 2014 by Kamau J. The second prayer is the committal of the 2nd Defendant to civil jail for disobeying the said order. The Plaintiffs have contended that the 2nd Defendant was served with the said order and continued with the acts which were restrained by the order in defiance thereof. In my view, the determination of the Plaintiffs' application turns on only one issue namely, whether the 2nd Defendant disobeyed the orders of 11th June 2014. I would therefore consider the prayer seeking the committal of the 2nd defendant to civil jail first before the prayer which is seeking the assistance of the County Commissioner of Police to enforce the said order of 11th June 2014. This is because in determining whether or not the 2nd Defendant should be committed to jail, the court

would have to determine whether the 2nd Defendant indeed disobeyed the said order. It is only after the court finds that the 2nd Defendant disobeyed the said court order that the court would enter into inquiry whether the disobedience is continuing and if so, whether the only remedy available is to involve the police.

It is not disputed that on 11th June 2014, Kamau J. gave an order *ex parte* restraining the Defendants by themselves and through their servants, agents and employees or any other person or persons authorized and/or instructed by them from interfering with or carrying out construction on Plot No. 449(R459) and 472(496) Lucy Summer Estate Phase II pending the hearing of the application *inter-partes*. It is not in dispute that when the order was issued, the 2nd Defendant was constructing a building on the disputed parcels of land which the Defendants have referred to as Land Reference Number 31/18/471 and Land Reference Number 31/18/498. There is no dispute that the parcels of land referred to by the Plaintiffs as Plots No. 449 (R459) and Plot No. 472((496) and by the Defendants as Land Reference Number 31/18/471 and Land Reference Number 31/18/498 are situated at Lucky Summer Estate within Nairobi County and that the said land references refer to the same parcels of land on the ground. It follows therefore that the parcels of land referred to in the order of Kamau J. aforesaid are the same parcels of land which the Defendants have referred to as Land Reference Numbers 31/18/471 and 31/18/498 and on which the 2nd Defendant was carrying out construction.

It is also not in dispute that the 2nd Defendant continued with construction on the disputed parcels of land after the issuance of the order aforesaid on 11th June 2014 until 23rd June 2014 when his workers were arrested by the police at the construction site. What is in dispute is whether the 2nd Defendant was aware of the said court order prior to 23rd June 2014 and continued with construction on the disputed land in defiance thereof. What I have before me are conflicting affidavit evidence of the Plaintiffs and the Defendants on the issue of service of the order of 11th June 2014 upon the Defendants. In his affidavit sworn on 16th June 2014, the 1st Plaintiff has stated that the court order made on 11th June 2014 was served upon the 2nd Defendant personally by a process server, one, Peter Mburu Waithaka on 12th June 2014 at Lucky Summer Estate. The 1st Plaintiff has stated that the said order was served upon the 2nd Defendant in his presence and in the presence of the O.C.S Ruaraka Police Station who had accompanied them to the disputed land. The 1st Plaintiff's statement is corroborated by the affidavit of Peter Mburu Waithaka a process server of this court sworn on 16th June 2014. Peter Mburu Waithaka has stated in his affidavit that he was handed over the order that was issued by Kamau J. aforesaid on 12th June 2014 for service upon the Defendants by the Plaintiff's advocates on record. He has stated that on the same day, he proceeded to Ruaraka Police Station in the company of the Plaintiffs from where the O.C.S of Ruaraka Police Station accompanied them to Lucky Summer Estate where the 2nd Defendant was constructing a house. He has stated that when they reached the construction site, they met several workers who were ordered by the O.C.S Ruaraka Police Station to stop construction. The said O.C.S Ruaraka then asked the foreman to call the 2nd Defendant which he did. He stated that the 2nd Defendant came to the site at 4:30p.m. on the same day and was identified to him by the 1st Plaintiff. He thereafter served the court order and other pleadings herein upon him personally. He has stated that the 2nd Defendant accepted service and acknowledged receipt of the order and other pleadings in the presence of the O.C.S Ruaraka Police Station, the other two police officers who had accompanied him and the Plaintiffs. He stated further that he served the 1st Defendant with similar documents in the office of the said O.C.S Ruaraka Police Station later on that day at 5:20p.m.

As I have stated earlier in this ruling, the Defendants have denied having been served with the court order aforesaid on 12th June 2014 as alleged by the Plaintiff and the process server. They have claimed that they came to know of this suit when they were informed by the workers at the construction site on the disputed land on 23rd June 2014 that some people had dropped some court documents at the site which they asked one, Dominic Gathecha Kinyua to pick up and take to their advocates' on record. The same Dominic Gathecha Kinyua has sworn an affidavit that he was called by the O.C.S Ruaraka Police Station and asked to go to the station on 12th June 2014 and while at the station, he was handed over some

documents to sign which upon perusal he noted referred to the 1st Defendant and which he declined to sign. He confirmed that he picked some court documents from the 2nd Defendant's construction site at the 1st Defendant's request and took the same to the Defendant's advocates on record. He stated that the documents which he picked were similar to the ones which he was allegedly being forced to sign at the office of the O.C.S Ruaraka Police station.

In the case of **Mutitika vs. Baharini Farm Limited [1985] KLR 227**, it was held 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 and it is not safe to extend the latter standard to an offence which is quasi –criminal in nature. The guilt of a contemnor has to be proved with such strictness of proof as is consistent with the gravity of the charge.”

In the case of **Ochino & Another vs. Okombo & 4 Others [1989] KLR 165**, it was held that:-

“As a general rule, no order of court requiring a person to do or abstain from doing any act may be enforced (by committing him for contempt) unless a copy of the order has been served personally on the person required to do or abstain from doing the act in question.”

As I have stated above, what I have before me are conflicting affidavit evidence. In the case of **Karatina Garments Ltd. vs. Nyanarwa [1976] KLR 94**, the court stated that:-

“Where one party to proceedings denies having been served with a relevant document, it is proper for the court to look into the matter. If the court is faced with conflicting affidavits as to the alleged service of process it is proper that the deponents should be examined on oath in order to establish the truth.”

In the case of **Miruka vs. Abok & Another [1990] KLR 541**, it was held that:-

“Where service is disputed there is a qualified presumption in favour of the process server. The burden lies on the party questioning the service, to show that the return is incorrect..... An affidavit of the process server is admissible in evidence and in the absence of contest it would normally be considered sufficient evidence of the regularity of the proceedings. “

In his affidavit sworn on 28th August 2014, the 2nd Defendant stated at paragraph 22 that he had instructed his advocates on record to give notice of his intention to cross-examine the deponents of the affidavits filed herein in support of the Plaintiff's application. From the record, no such notice was served. An application of that nature was also not made orally. I have carefully perused the affidavit of Peter Mburu Waithaka who is a process server of this court sworn on 16th June 2014. He has given a detailed account of how he effected service of the order of 11th June 2014 and other pleadings upon the 2nd Defendant. He has given a step by step account of his movement from the time he received the said court order and other pleadings from the Plaintiff's advocates upto the time he served the same upon the 2nd Defendant. He has mentioned the people who accompanied him during service who were not less than five (5) and who witnessed the service. He has stated how the 2nd Defendant came to the place where he was served and by whom he was identified. He has given the time when the 2nd Defendant arrived and the time he was served. In his affidavit sworn on 28th August, 2014, the 2nd Defendant has not given an account of his movements on 12th June 2014 when he is said to have been served with the court order issued herein. He has not stated whether he was at the disputed parcel of land on 12th June 2014 when he was said to have been served. Considering the process server affidavit vis a vis that of the 2nd Defendant, I find the statement by the process server worthy of belief. The 2nd Defendant has come up with a mere denial which is uncorroborated. The narrative given by the 2nd Defendant is difficult to believe. I am persuaded that the 2nd Defendant was duly served on 12th June 2014 with the court order that was issued by Kamau

J. on 11th June 2014 but chose for reasons only known to him to ignore the same. I don't think that the 2nd Defendant only came to know of the proceedings herein on 23rd June 2014 which is the same day his workers were arrested by police officers from Ruaraka Police station and locked in. I believe that this is when the 2nd Defendant got to appreciate the seriousness of these proceedings which he was aware of all along from 12th June 2014. I don't think that the affidavit of Dominic Gathecha Kinyua has added any weight to the 2nd Defendant's case. The Defendants have not explained their relationship with this Dominic Gathecha Kinyua who seems to be sharing names with the 1st Defendant save for the last name. This Dominic Gathecha is the same one who was allegedly called by the 1st Defendant to go to the disputed properties on 23rd June 2014 to collect the some documents for delivery to the defendant's advocates on record. This Dominic Gathecha who seems to have some relationship with the 1st Defendant has not stated whether he bothered to inform the 1st Defendant of the documents which bore his name which he was allegedly being forced to sign by the O.C.S Ruaraka Police Station. He has also not stated as to what happened to the documents which were handed over to him at Ruaraka Police Station. I find Dominic Gathecha Kinyua a man not worthy of trust.

From what I have set out above, it is my finding that the 2nd Defendant was duly served with the court order that was issued by Kamau J. on 12th June 2014. As I have stated earlier, there is no dispute that the 2nd Defendant continued with construction on the disputed land even after he was served with the said court order on 12th June 2014 until 23rd June 2014 when his workers were arrested. It is my finding that the 2nd Defendant's acts aforesaid amounted to contempt of court.

Having found the 2nd defendant guilty of contempt of court, I wish now to go back to the Plaintiffs' first prayer in which they sought the assistance of the County Commissioner of Police Nairobi County to assist in the enforcement of the said court order that was issued on 11th June 2014. I have noted from the material on record that the 2nd Defendant's workers were arrested on 23rd June 2014 for defying the said court order. It is also on record that the 2nd Defendant did not stop construction on the disputed property until after the said arrest. There is no evidence that the 2nd Defendant has attempted to carryout any activity on the disputed land after 23rd June 2014. I believe that the order sought by the Plaintiffs is not necessary in the circumstances. The Plaintiff would however be at liberty to move the court for police assistance should the 2nd Defendant initiate any activity on the disputed land while the orders of 11th June 2014 are still in force.

In conclusion, I find the 2nd Defendant guilty of contempt of court. The 2nd Defendant shall appear before this court if he is not present today on a date to be fixed by the court for mitigation before a sentence is passed against him. For reasons given above, I decline to grant prayer 2 of the application dated 16th June 2014. The Plaintiffs shall be at liberty to make an application to court for police assistance should it become necessary. The Plaintiffs shall have the costs of the application.

Delivered and Dated at Nairobi this 4th day of November, 2016

S. OKONG'O

JUDGE

In the presence of

Mr. Muriuki for the Plaintiffs

Mr. Kamau for the Defendants

Kajuju Court Assistant