



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENT AND LAND COURT
ELC. CASE NO. 1264 OF 2013

FREDRICK KATHANZU KAVUTHI t/a

KANYUNI CONSTRUCTORS.....1ST PLAINTIFF/APPLICANT

JAMES KYALO t/a SECOND TRY

CONSTRUCTION COMPANY.....2ND PLAINTIFF/APPLICANT

VERSUS

AL-HAIEE INVESTMENTS LIMITED.....DEFENDANT/RESPONDENT

RULING

Coming up before me for determination is the Notice of Motion dated 12th February 2014 in which the Plaintiffs seeks for orders that Abdullatiff Abeid Oywer, the Defendant's alleged director Diamond Hasham Lalji, the Defendant's advocate Maurice Otieno Omuga and the OCS Embakasi Police Station Victor Nyongesa be committed to civil jail and detained in a prison for a term of 6 months or for such period as the Honourable court may deem just for contempt of court orders issued on 7th February 2014. The Plaintiffs also sought for the costs of this Application to be provided for.

The Application is premised on the grounds appearing on the face of it together with the Supporting Affidavit of the Plaintiffs, Fredrick Kathanzu Kavuthi and James Kyalo sworn on 12th February 2014 in which they averred that on 7th February 2014, this court issued a temporary injunction restraining the Defendant/Respondent together with its agents from evicting or interfering with the Plaintiffs' peaceful possession of the piece of land known as L.R. No. 209/1297/1 (hereinafter referred to as the "suit property") pending the hearing and determinate of the Notice of Motion Application dated 7th February 2014. They further averred that despite the Defendant's Advocate being duly served with the said court order, on 12th February 2014, one Abdullatiff Abeid Oywer, the Defendant's alleged director Diamond Hasham Lalji and the Defendant's advocate Maurice Otieno Omuga entered the suit property and assaulted workers in an effort to intimidate and evict them from the suit property. They further averred that these persons further erected a wall and a gate on the suit property. They further averred that some of their workers were arrested and charged in court with fabricated charges of trespass. They concluded by saying that these actions are contemptuous of the court's order which should be obeyed whether one agrees or disagrees with it.

The Application is contested. The Defendant filed the Replying Affidavit of its advocate, Maurice Otieno Omuga, sworn on 20th February 2014 in which he averred that the Plaintiffs' advocates' process server served him with a sealed order on 10th February 2014 at 5.02 pm upon which he made his comments on the order, signed and stamped it with his official stamp. He further averred that as at the date of service, neither the Plaintiffs nor their agents had physical presence on the suit property and that they have never at any given time previously occupied the suit property. He further stated that he was informed by the Security Manager of the Defendant, Mr. Abdullatiff Abeid Oywer, that on the night of 11th February 2014 at about 11.40pm, a large group of men armed with crude weapons forced their way into the suit property through the demolished parts of the perimeter wall and the gate which by that did not have a shutter, overpowered him and the security guards from Prowler Security Services who were on duty that night. He further averred that Mr. Oywer informed him that he called Embakasi Police Station and the OCS responded to his distress call and sent police officers who managed to apprehend five of the intruders who have now been charged in court. He added that this is the second time the Plaintiffs' hired gang of thugs were invading the suit property, the first such incident having taken place the previous week on 6th February 2014, during which incident their ring leader by the name of Stanlaus Kyalo Ndi was arrested and arraigned in the same court. He concluded by stating that the Plaintiffs were misusing the court order to commit criminal activities. He urged the court to visit the suit property to confirm that indeed the Plaintiffs have never occupied the same and have no property there.

It is true that upon filing their Notice of Motion dated 7th February 2014, the Plaintiffs obtained a temporary injunction from this court in terms of prayer number 2 of the said Application. This temporary injunction was to last up until the said Application is heard and determined. To date, that Application is still pending and the temporary injunction therefore remains in force.

Section 63(c) of the Civil Procedure Act, 2010 provides that,

“In order to prevent the ends of justice from being defeated, the court may, if it is so prescribed grant a temporary injunction and in case of disobedience commit the person guilty thereof to prison and order that his property be attached and sold”.

Further, it is provided under **Order 40 Rule 3(1) of the Civil Procedure Rules, 2010** that,

“3(1) In case of disobedience, or 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”

The Court of Appeal in **Refrigeration and Kitchen Equipment Utensils Ltd –vs Shah & Others 1990 LLR 294 (CAK)** held that,

“It is Essential for the maintenance of the rule of law and good order that the authority and the dignity of the court are upheld at all times. Therefore the court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors”.

While it is common ground on both sides that this court did issue the temporary injunction to the Plaintiffs directed at the Defendant, what is still not addressed is the issue of personal service of the court order on the parties who are stated to have disobeyed it. To that end, I wish to cite and rely on the case of **Anne Wanjiru Kabiru v. Bedan M. Chege (t/a Bedans Auctioneering Services) Misc. Appl. No. 114 of 2007 (2008) eKLR** wherein it was stated as follows:

“It is now trite law that for an application for committal of anyone to prison for contempt of court to succeed, there must have been personal service of the order in question as well as a penal notice upon the alleged contemnor”

This court has seen the Affidavit of Service of Stephen Munyao Kisilu sworn on 12th February 2014 upon which the Plaintiffs rely. It is evident that service was effected personally upon Maurice Otieno Omuga, the Defendant's advocate and one Peter Maraga, a policeman at Embakasi Police Station. There is no evidence that service was effected personally upon Victor Nyongesa, Abdullatif Abeid Oywer and Diamond Lalji. It is therefore not clear that the said persons were aware of the court order issued by this court. It was vital for the Plaintiffs to demonstrate that the alleged contemnors were personally served with that court order or had knowledge of the same. However, I must state that the Plaintiffs have failed in this regard. In the circumstances, I find it difficult to declare them contemnors of this court's order.

In the circumstances, I can do no better than to dismiss this Application. Costs shall be in the cause.

DELIVERED AND SIGNED AT NAIROBI THIS 23RD DAY OF JANUARY 2015.

MARY M. GITUMBI

JUDGE