



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
ENVIRONMENTAL AND LAND DIVISION

ELC CIVIL NO. 963 OF 2013

JOHN MBUGUA KIMARI..... PLAINTIFF

VERSUS

JAMES NJOROGE KIMARI..... DEFENDANT

RULING

The plaintiff's Notice of Motion dated 19th March 2014 seeks the following substantive orders:-

1. That the Defendant be fined and be committed to Civil jail for a period of six (6) months for failing to obey the orders of this Honourable court issued on 20th August 2013.
2. That the Defendant's property situate in plot number **Dagoretti/Kangemi/1627** be attached to recover monies he has unlawfully taken in furtherance of disobedience of the aforesaid orders.

The application is premised on the grounds set out on the face of the application and on the affidavit sworn in support by the plaintiff. Inter alia the grounds in support of the application include:-

1. That on 6th August 2013 **Hon. Justice Nyamweya** made an order restraining the defendant, **James Njoroge Kimani** from interfering selling, transferring, interfering or otherwise alienating or disposing off the property known as **Dagoretti/Kangemi/1627** pending interpartes hearing.
2. That the said orders were extended on 20/3/2013 and was duly served on the defendant.
3. That since being served with the said orders the Defendant has persistently disobeyed the orders and unlawfully embezzled the rent money from the suit property.
4. The Defendant has been threatening to sell the suit property in order to dispossess the plaintiff.

The plaintiff contends that the conduct of the Defendant amounts to interference with the administration of Justice with intent to impede and pervert the course of justice. The plaintiff avers that it is imperative that the Defendant is punished for disobeying the court orders to ensure that the dignity and supremacy of the court and the rule of law is safeguarded.

The Defendant vide a replying affidavit sworn on 11th July 2014 denies being in breach of the court order and/or in disobedience of the court order made on 6th August 2013. The Defendant avers that the plaintiff and the other siblings are intent on using the court order to unlawfully collect rent from the suit premises

to the exclusion of the defendant which was not the intent of the court order. The Defendant states that the court order did not deal with rent collection but rather only restrained the defendant from selling, disposing and/or alienating the suit property which the defendant denies he is doing and/or has attempted to do since the order was made on 6th August 2014. The Defendant states that he had been collecting rent with his late mother as administrators and beneficiaries of the estate of the late **Kimari Ngang'a (deceased)**.

The Defendant avers that he is now the registered owner of the suit property and that the order of 6th August, 2013 does not bar him from collecting rent from the property and he cannot therefore be in contempt of the court order.

The parties were directed by the court to file written submissions to canvas the application for contempt. The plaintiff filed his submissions dated 29th July 2014 on 31st July 2014. The Defendant was on 31/7/2014 granted leave of 10 days to file his submissions and the matter was fixed for highlighting of submissions on 24/9/2014 when the Defendant did not attend court and had not filed the submissions. The court reserved the ruling for delivery on 24/10/2014.

I have carefully considered the plaintiff's application, the affidavits in support and in opposition and the submissions filed by the plaintiff applicant and the issue for determination by the court is whether the defendant has breached the court order given on 20th August 2014 and if so whether the Defendant is liable to be punished for being in contempt of court.

Hon. Lady Justice Nyamweya on 6th August 2013 issued an interim order of injunction against the Defendant in the following terms:-

“that an interim order be and is hereby granted for 14 days restraining the defendant from selling, transferring, charging or otherwise alienating or disposing of the property known as Dagoretti/Kangemi/1627 pending inter-parties hearing of the Notice of Motion on 20th August 2013 before any Judge in the ELC Division.

On 20th August 2013 I extended the interim order and further directed the title to the suit property to be deposited in court on 30th September 2013 when the application was fixed for interpartes hearing. Before the Notice of Motion dated 6th August 2013 could be heard interpartes the plaintiff filed a Notice of Motion dated 18th September 2013 for leave to commence contempt proceedings against the Defendant for apparently disobeying the court order of 6th August 2013. The application for contempt of court was not brought by the plaintiff until 19/3/2014 when the plaintiff by a Notice of Motion application sought to have the Defendant cited for contempt of court and to be imprisoned for a period of six (6) months for disobedience of the court order issued on 20th August 2013.

A court of law will punish a party for contempt of court if it is proved that the party willfully and deliberately disobeyed the court order. The court will also punish as a contempt a breach of injunction if it is satisfied the terms of the injunction are clear and unambiguous. (see the cases of **Ochino & Another –vs- Okombo & 4 others (1989) eKLR 165** and **Mwangi Magondu –vs- Nairobi City Commission (Civil Appeal NO. 95 of 1988)**. In the case of **OCHINO & ANOTHER –VS- Okombo & 4 others (Supra) the court of Appeal** in setting out the conditions that need to be satisfied for a party to be held to be in contempt, referred to their holding in the case of **Mwangi Magondu –vs- Nairobi City Commission (supra)** where the court stated thus:-

“This requirement is important because the court will only punish as a contempt a breach of injunction if satisfied that the terms of the injunction are clear and unambiguous, that the defendant has proper notice of the terms and that proved beyond a reasonable doubt”.

The importance and significance of obeying court orders was aptly captured by **Mabeya J in the case of Africa Management Communication International Ltd –vs- Joseph Mathenge Mugo & another**

(2013) eKLR where he quoted Ndolo, J in TSC –vs- KNUT & 2 others (2013) eKLR where she observed that:-

“38. The reason why courts will punish for contempt of court then is to safeguard the rule of law which is fundamental in the administration of justice. It has nothing to do with the integrity of the Judiciary or the court or even the personal ego of the presiding Judge. Neither is it about placating the applicant who moves the court by taking out contempt proceedings. It is about preserving and safeguarding the rule of law”.

Courts in Kenya have the same power as the High Court of Justice in England to punish for contempt. Section 5 of the Judicature Act, Cap 8 laws of Kenya provides:-

“5.(1) The High Court and the Court of Appeal have the same power to punish for contempt of court as is for the time being possessed by the High Court of Justice in England and that power shall extend to upholding the authority and dignity of subordinate courts”.

Until October 2012 the courts in England were using Order 52 of the Rules of the Supreme Court in contempt of court proceedings but following the Civil Procedure (Amendment NO. 2) Rules 2012 Order 52 of the Rules of the Supreme Court was replaced by PART 81 of the Civil Procedure Rules of England. The courts in Kenya therefore are obligated to ascertain the law of contempt applicable in England at the time the application for contempt is brought as section 5(1) of the judicature Act so requires.

The Court of Appeal in the case of **Christine Wangari Gachege –vs- Elizabeth Wanjiru & 11 others (2014) eKLR** upon considering the application of section 5 (1) of the Judicature Act unequivocally stated that Kenyan courts must ascertain the applicable law of contempt in the High Court of Justice in England, at the time an application is brought so as to determine the applicable law relating to contempt of court proceedings. The court of Appeal held that part 81 of Civil Procedure rules of England was presently applicable Order 52 of the Supreme Court Rules having been replaced.

In regard to breach of judgment, order or undertaking as in the present case the Court of Appeal held that rule 81.4 of the Civil Procedure Rules of England was applicable.

The court in the case of **Christine Wangari Gachege –vs- Elizabeth Wanjiru & 11 others (Supra)** in regard to the application stated thus:-

“An application under Rule 81.4 (breach of Judgment, order or undertaking) now referred to as “application notice” (as opposed to a notice of motion) is the relevant one for the application before us. It is made in the proceedings in which the judgment or order was made or undertaking given. The application notice must set out fully the grounds on which the committal application is made and must identify separately and numerically, each alleged act of contempt and be supported by affidavit (s) containing all the evidence relied upon.

The application notice and the affidavit must be served personally on the respondent unless the court dispenses with service if it considers it just to do so or the court authorizes an alternative method or place of service”.

In the application before the court there is no contest whether or not the court order of 6th August 2013 was served and/or that the Defendant was aware of its contents. The order of 6th August 2013 restrained the Defendant from **“selling, transferring, charging or otherwise alienating or disposing off the property known as Dagoretti/Kangemi/1627”**. The Defendant has stated in his replying affidavit has stated that he had not done any of the things he was restrained from doing. The plaintiff in my view was obligated to adduce clear evidence of breach of the order such as either an actual transfer and/or a sale agreement to be able to demonstrate that the Defendant was acting in breach of the order. The plaintiff in his supporting affidavit states that the Defendant **“has persistently disobeyed the orders and unlawfully embezzled the rent money from the said property”**. The court order did not address any aspect of rent and rent was not the subject of the court order. Perhaps if the plaintiff felt that the

Defendant should account for the rental income he ought to have brought a separate application on that account.

The plaintiff also in the affidavit stated the Defendant was threatening to sell the suit property. Where is the evidence and how was the threat manifested?. This is merely a statement without any proof. Contempt of court needs to be proved beyond a reasonable doubt. Although it is true and correct that the court on 20/8/2013 directed the Defendant to deposit the title on 30/9/2013 the Defendants counsel on the 30th September 2013 informed the court from the bar that the person who had custody of the title was in Europe and the Defendant did not have custody of the title and it was not known when he would be back in the country. This was a direction by the court which it dropped following the explanation.

The court in the premises is not satisfied the plaintiff has established that the Defendant has willfully and deliberately disobeyed the court order of 6th August 2013 so as to render him liable to be punished for contempt of court. I find that no contempt of the court order has been proved to the required standard and I accordingly dismiss the Notice of Motion dated 19th March 2014 with no orders as to costs.

Ruling dated, signed and delivered this...**24th**....day of...**October**...2014.

J. M. MUTUNGI

JUDGE

In presence of:

.....for the plaintiff

..... For the Defendant