



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E&L 424 OF 2013

PETER MWAURA KARIUKI.....PLAINTIFF

VS

FLORENCE GACHAMBI.....1ST DEFENDANT

HURUMA FARMERS COMPANY LIMITED.....2ND DEFENDANT

(Application seeking punishment of respondent for disobedience of a consent order; consent emanating from an application for injunction; respondent agreeing not to lease out premises; premises apparently leased out; no reply by respondent; clear default demonstrated; respondent fined and in the alternative be jailed for 3 months)

RULING

The application before me is that dated 14 August 2014. It is an application brought under Order 40 of the Civil procedure Rules and Sections 1A, 3, 3A, and 63 (e) of the Civil Procedure Act. Principally, the application seeks orders to have the 1st defendant, Florence Gachambi, punished for disobeying a consent order entered into on 13 February 2014.

A little background will shed light as to why this application has been filed.

This suit was commenced by way of plaint filed on 30 August 2013. The subject matter of the case is the land parcel Eldoret Municipality Block 15 (Huruma)/140 (the suit land). The case of the plaintiff is that together with the 1st defendant, who is his sister, they purchased the suit land from the 2nd defendant. A dispute arose as to whether the land is owned jointly or by one party which dispute ended up before the Land Disputes Tribunal. The Tribunal decided that the land belonged to the 1st defendant. However, that decision was not adopted by the Magistrate's Court because it was heard after the Land Disputes Tribunal had already been disbanded. However, the 1st defendant went ahead and obtained title in her own name. It is said that this was done fraudulently in collusion with the 2nd defendant. In the suit, the plaintiff wants the 1st defendant permanently restrained from the suit land.

Alongside the plaint, the plaintiff filed an application for injunction dated 20 August 2013 to have the defendants restrained from dealing with the suit land. On 12 November 2013, I granted interim orders whereby I issued an order of inhibition, inhibiting the registration of any disposition in the register of the suit land, and also restrained the 1st defendant from selling, charging, or in any other manner to adversely deal with the suit land pending inter partes hearing. On 17 January 2014, the plaintiff filed an application dated 16 January 2014, seeking to have the 1st defendant cited for contempt for breaching the orders of injunction. The allegation made was that the 1st defendant has sold or is attempting to sell the suit land. It was claimed that on 20 December 2013, the 1st defendant sold the land to an unknown church and caused them to develop on the property. It was claimed that developments started on 22 December 2013 and the

developments were completed on 9 January 2014. The 1st defendant filed a replying affidavit vide which she inter alia stated that she had leased the suit land to Christian Restoration Fellowship Church on 6 June 2013 before the suit was filed. She annexed the lease as annexure F1. When that application came up for inter partes hearing on 13 February 2014, the 1st and 2nd defendant entered into a consent. The consent was as follows :-

(a) The parties to maintain the status quo obtaining on the suit land as at 27 November 2013 subject to the following :-

(i) The lease referred to in annexure F1 in the Replying Affidavit of the 1st defendant be allowed to run out, that is upto 5th June 2014, and thereafter the tenant to move out.

(ii) There be no more construction on the suit premises.

(iii) The 1st defendant to remain in possession till the hearing and determination of the main suit.

(b) The application dated 20 August 2013 be allowed in terms of prayer (c).

(c) The application dated 21 January 2014 be deemed as duly compromised.

(d) There be liberty to apply.

(e) The matter to proceed for full hearing and a date to be given to confirm compliance with pre-trials.

(f) Costs in the cause.

Prayer (c) of the application dated 20 August referred to in clause b of the above consent reads as follows :-

A temporary injunction do issue restraining the 1st defendant by herself, her agents and or assigns or anybody acting through them from transferring, charging, wasting, alienating, selling, disposing of that parcel of Land No. Eldoret Municipality Block 15 (Huruma) 140 measuring 0.0889 acres pending hearing and determination of this suit.

The reference in the consent to the application dated 21 January 2014 is definitely erroneous as there was no application filed that is dated 21 January 2014. I can only deem it as referring to the application dated 16 January 2014.

Through this application dated 14 August 2014, the plaintiff contends that the 1st defendant has breached the terms of the consent by proceeding to renew the lease to the church after it expired on 5 June 2014.

There is no response filed by the 1st defendant to the subject application despite me having allowed them time to do so. On 1 October 2014 when this matter came up for inter partes hearing, an application for adjournment was made by Mr. Maritim who was holding brief for Mr. Kamau for the 1st defendant. I rejected that application and gave time allocation for the matter to proceed. At the appointed time, Mr. Maritim did not appear and neither did Mr. Kamau. I ordered the application to proceed and Miss Tum for the applicant, urged me to allow the application.

I have considered the application. There is no material tendered by the 1st defendant to deny the averments of the plaintiff. The plaintiff has contended that despite there being a consent order stopping the renewal of the lease, the lease has been renewed as the tenant is still in place. The 1st defendant, despite being given opportunity to do so, has failed to demonstrate that the presence of a 3rd party in the premises is not in violation of the consent order.

I have no reason to disbelieve the plaintiff. I am of the view that he has demonstrated that the 1st

defendant is in breach of the consent order. Court orders must be obeyed. No one is above the law. If court orders were to be disobeyed with impunity, this country will fall into anarchy. When faced with a disobedience, the court must put its foot down so as to sustain its own dignity.

This application has been brought under Order 40 and Section 63 of the Civil Procedure Act. These provisions give power to the court to punish for disobeying an order of injunction. The penalty is upto 6 months imprisonment.

Section 28 of the Environment and Land Court Act also gives this court power to punish for disobedience. The penalty therein is a jail term of 2 years and/or a fine not exceeding Kshs. 20 Million.

I have considered the circumstances herein. The 1st defendant deserves to be punished. In my opinion, the following punishment is suitable for the circumstances herein.

- (1) The 1st defendant shall pay a fine of Kshs. 50,000/=.
- (2) In default of the above, the 1st defendant shall be jailed for a period of 3 months.
- (3) The OCPD, Eldoret to ensure that order 2 above is effected in the event that the 1st defendant does not pay the said fine.
- (4) The 1st defendant should also ensure that no tenant remains on the premises from the date hereof.
- (5) If order 4 above is not performed by the 1st defendant, I order the OCPD, Eldoret Police Station to ensure that no 3rd parties make use of the premises.
- (6) The 1st defendant and the OCPD Eldoret to make report on compliance with the above orders on 19 November 2014.

It is so ordered.

DATED AND DELIVERED AT ELDORET THIS 5TH DAY OF NOVEMBER 2014

JUSTICE MUNYAO SILA

ENVIRONMENT AND LAND COURT AT ELDORET

Delivered in the presence of:

Miss G.B. Shilwatsu holding brief for Mr. Magare for plaintiff.

Mr. M.K. Rop holding brief for Mr. Kamau for 1st defendant.

N/A for M/s Gitonga for 2nd defendant.