



REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT AT NAIROBI

ELC CIVIL SUIT NO. 741 OF 2014

SIMON KIMANI..... PLAINTIFF

VERSUS

GEOFFREY KIMANI GATHIGI.....1ST DEFENDANT

COUNTY LAND REGISTRAR, KIAMBU COUNT.....2ND DEFENDANT

RULING

The Application

The Plaintiff in his application by way of a Notice of Motion dated 17th June 2014 is seeking the following substantive orders:

1. That the Court commits to civil jail Geoffrey Kimani Gathigi, the 1st Defendant herein, for a period not exceeding six (6) months for contempt of the order made on 13th June, 2014 by the Honourable Lady Justice Kamau.
2. That the court directs the Officer Commanding Station, Kabete Police Station to ensure compliance of this Court's orders issued on 13th June, 2014 and restrain further construction by the 1st Defendant.
3. That the 1st Defendant be condemned to pay the costs of this application.

The application is premised on grounds that 1st Defendant has continuously defied the orders given by the Court and has continued to disrupt the smooth running of the Plaintiff's premises. Further, that the court order was served together with a Notice of Penal Consequences upon the 1st Defendant's employee, one Wesley Kimeli.

The Plaintiff in his supporting affidavit sworn on 17th June 2014 averred that on or about 22nd May, 2014, he visited his property and found that the 1st Defendant had started developing the said property by putting up some rental units. Further, that on the 10th of June, 2014 he instructed his Advocates to get an injunction against him prohibiting any further construction until the boundary between his property and that of the 1st Defendant's property was determined by the Land Registrar.

The Plaintiff averred that on 13th of June 2014, Kamau J. issued a temporary injunction against the 1st Defendant restraining him from entering the Plaintiff's property and causing any construction thereon pending the hearing and determination of the Plaintiff's application dated 10th June 2014. Further, that the said Orders were served on the 1st Defendant on the 14th June 2014 together with a Notice of Penal

Consequences.

However, that on 15th June 2014 he visited his premises and noticed that the 1st Defendant was still going on with constructions on the said property, Further, that in continuing with the said construction, the 1st Defendant's employees and/or agents maliciously demolishing part of the Plaintiff's property, notably his balconies. The Plaintiff annexed copies of the court order and the notice of penal consequences, the affidavit of service of the same, and of photographs showing ongoing construction on the suit premises as at 15th June 2014.

The Plaintiff's counsel filed written submissions dated 12th August 2014 wherein he argued that it is not in doubt that orders was issued by Kamau J. on 13th June 2014, and that the 1st Defendant was aware of the said orders as he allowed his employee to accept service of it. Further, that despite the service of the orders the 1st Defendant continued in construction while demolishing part of the Plaintiff's balconies, and that his acts of disobeying the orders of the Court are calculated to injure the dignity and authority of the Court.

The Plaintiff argued in this regard that the law for purposes of contempt of court makes a distinction between mandatory and prohibitory orders, and that it is only mandatory orders that require to be personally served before contempt proceedings can be instituted and not prohibitory orders. Further, that in the case of prohibitory orders it is enough that the person who disobeyed the orders knew of their existence. The counsel for the Plaintiff cited the decisions in **Husson vs Husson (1962) 3 All E.R. 1056** , and **Republic vs Permanent Secretary, Ministry of State for Provincial Administration and Internal Security & Another (2014) e KLR** in this regard.

The Response

The 1st Defendant filed Grounds of Opposition and a replying affidavit to the Plaintiff's application, both dated 25th June 2014. The main grounds for opposing the application was that there was no personal service of the court order for contempt of court to lie, and that the 1st Defendant is not in contempt of the Court's order as he has not entered or erected any constructions on the Plaintiff's property after the alleged service of the orders.

The 1st Defendant stated that he first came to learn about the nature and content of this Court's order on the 15th June 2015 at the suit premises, whereupon he instructed his workers to halt all construction at the premises. Further, that the construction materials at the site was henceforth collected awaiting further orders of this court, and that there has be no work going on at the premises and his materials are going to waste. HE annexed photographs as evidence.

The 1st Defendant further averred that he has been on the suit premises since the year 2001 and has never constructed on the Plaintiff's land as alleged and/or at all, and that the annexed copies of photographs showed the suit premises before construction with clear cedar posts and a perimeter wall built by the Plaintiff clearly demarcating the area before and during construction. Further, that the photographs clearly showed that he had not interfered or encroached on the Plaintiff's land, and that insufficient material on the encroachment and/or construction had been placed before the court to show any offence of contempt.

The 1st Defendant's' counsel filed written submissions dated 29th August 2014, wherein he argued that section 5 (1) if the Judicature Act applies the English Civil Procedure (Amendment No 2) Rules 2012 to contempt of Court proceedings in Kenya, and as held in **Christine Wangari Gachege vs Elizabeth Wanjiru Evans and 11 Others, (2014) eKLR**. Further, that the importance of personal service in

contempt is emphasized in the English rules, and is also stated in **Halsbury's Laws of England (Fourth Edition) Vol 9** at page 37 and in **Mike Maina Kamau vs Hon. Franklin Bett and 6 Others, (2012) e KLR**.

The 1st Defendant's counsel distinguished the decisions on awareness of court orders including **Republic vs Permanent Secretary, Ministry of State for Provincial Administration and Internal Security & Another (2014) e KLR**, and submitted that in his case there was no knowing with certainty if he was aware of the existence of the Court's orders as the process server only deponed that his employee had been requested to accept the order and keep it for him. Lastly, that the 1st Defendant having deponed to having stopped construction on the suit premises, he had complied with the Court's orders and the Plaintiff had not established contempt to the standard of proof stated in **Mutitika vs Baharani Farm Limited, (1985) KLR 229**.

The Issues and Determination

There are three issues before the court for determination arising from the pleadings and submissions highlighted in the foregoing. The first is whether there was personal service of the orders issued by the court on 13th June 2014 and a notice of penal consequences on the 1st Defendant. Secondly, if there was such service, whether the 1st Defendant is culpable for contempt of court. The last issue is if the 1st Defendant is found culpable, whether the Plaintiff can be granted the remedies sought.

A brief summary of the law applicable to these issues is as follows. Order 40 Rule 3 of the Civil Procedure Rules provides for the consequences of breach of an order of injunction, and states that in cases of disobedience, or of 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 substantive law that applies is the English law on committal for contempt of court by virtue of section 5(1) of the Judicature Act which provides that:

“The High Court and the Court of Appeal shall 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.”

The applicable English Law in this respect is Part 81 of the English Civil Procedure Rules of 1998 as variously amended, which part repealed in most part the Rules of the Supreme Court that previously applied, including Order 52 and parts of Order 45 of the Rules of the Supreme Court. The law on the personal service of court orders is now found in Rule 81.8 of the English Civil Procedure Rules. The said rule provides that unless the court dispenses with service, a judgment or order may not be enforced by way of an order for committal unless a copy of it has been served on the person required to do or not do the act in question. Rule 81.6 of the English Civil Procedure Rules specifically provides that the method of service shall be personal service, which is effected by leaving the order with the person to be served.

Rule 81.9 (1) of the English Civil Procedure Rules of 1998 is also clear that a judgment or order to do or not do an act may not be enforced unless there is a prominently displayed a warning to the person that disobedience to the order would be a contempt of court punishable by imprisonment, a fine or sequestration of assets. Under sub-rule (2) of the said Rule, it is only in the case of an undertaking to do or not to do an act which is contained in a judgment or order where the notice of penal consequences may be dispensed with.

This Court notes that Kenyan courts have also held that personal service of orders and a penal notice is a requirement in contempt of court proceedings, and reference is made to the Court of Appeal decisions in Nyamogo & Another v Kenya Posts and Telecommunications Corporation, (1994) KLR 1, and Ochino & Another v Okombo & 4 others (1989) KLR 165 in this respect.

Coming back to the facts of the present application, the personal service of the order alleged to have been disobeyed has been disputed. I have perused the affidavit of service sworn on 17th June 2014 by Vincent Mambuya Sabatia on the service of the court order and notice of penal consequences, wherein he states at paragraphs 3 – 10 as follows:

3. **“That on the same day at around 11:00a.m. I called the Plaintiff Mr. Simon and requested him to give us directions and whereabouts of the 1st Defendant Geoffrey Kimani Githungi to enable us effect service of Order and Notice of penal Consequences issued by the High Court of Kenya Nairobi on 13th June, 2014 attached to Application Notice of Motion dated 10th June 2014 with the annexure there to and filed under certificate of urgency on 12th June 2014 coming up for hearing on 26th June, 2014.**
4. **That the Plaintiff informed me that the first defendant has a plot next to his plot and he is building a house at Kinoo, and he requested the documents to be taken to the site. He further informed me that he has his care taker Mr. Antony Mwangi Nduruku to wait for me at Kinoo stage so that he can take me to the defendant site. He gave me his caretaker mobile No. 0723853740 and requested me to call him when I reach at Kinoo stage.**
5. **That I proceeded to Kinoo town and upon my arrival I called Mr. Antony Mwangi Nduruku mobile No. 0723855740 who answered and told me he was around and requested me to wait for him. After 5 minutes the gentleman came straight to where I was standing and introduced himself as Mr. Antony Mwangi Nduruku he further went on and confirmed to me that he is the caretaker sent by Mr. Simon Kimani.**
6. **That after exchanging the pleasantries, I together with Mr. Antony Mwangi Nduruku proceeded to the 1st defendant site which is about 300 metres from Kinoo stage and upon we met a gentle man inside the site arranging the stones who introduced himself as Mr. Wesley Kimeli and I introduced myself to him and the purpose of my visit.**
7. **That after introduction I inquired from the said Wesley Kimeli where I could find the 1st Defendant Geoffrey Kimni Gathiga. He confirmed to me that he is employed by the 1st Defendant as caretaker. He further went on and told me that he was expecting that 1st Defendant to come to the site, further he requested me to wait so that he could confirm what he was coming to the site and also to ask him if I could leave the court document with him.**
8. **That the said Wisely called the 1st defendant and personally I had him asking what time was the defendant coming to the site and also I had him asking him if he could accept the documents. After he finished talking he confirmed to me that his boss has requested him to accept the document and keep for him.**
9. **That I served Wesley Kimeli copies of Order and Notice of Penal Consequences and issued by the High Court of Kenya Nairobi on 13th June 2014 attached to Application Notice of Motion dated 10th June 2014 with the annexure there to and filed under certificate of urgency on 12th June 2014 coming up for hearing on 26th June, 2014 at the High Court of Kenya at Nairobi and at the same time I requested him to acknowledge service which he acknowledged service but declined to sign my copy and said that he wished not to sign but promised to give the said documents to the 1st Defendant and he retained the said documents. Time of service was 11:40 a.m.**
10. **That the said Mr. Wesley Kimeli became known to me at the time of service.”**

It is evident from the aforementioned affidavit of service that there was no personal service of the court order and notice of penal consequences on the 1st Defendant. The Plaintiff has nevertheless argued that such personal service is not necessary in prohibitory injunctions and it is enough if the alleged contemnor is found to have been aware of the court orders.

Indeed it is the case that the court can dispense with the personal service of an order under Rule 81.8 (1) of the English Civil Procedure Rules, wherein it is provided that in the case of an order requiring a person not to do an act, the court may dispense with service of a copy of the order if it is satisfied that the person has had notice of it either by being present when the order was given or made; or by being notified of its terms by telephone, email or otherwise. It is only in the stated circumstances that a court can dispense with personal service of orders in contempt court proceedings, and for the record there is no law or rule that states that in the case of prohibitory injunctions no such personal service of orders is required. On the contrary such personal service is a requirement unless specifically dispensed with by the Court.

It is also the position and it has been held in several judicial decisions that if personal awareness of the court orders by the alleged contemnors is demonstrated, they will be found culpable of contempt even though they had not been personally served with the penal notice. See in this regard the decisions in **Kenya Tea Growers Association vs Francis Atwoli & Others**, **Nairobi High Court Constitutional Petition No 64 of 2010**, **Husson v Husson**, (1962) 3 All E.R. 1056, **Ronson Products Ltd v Ronson Furniture Ltd (1966) RPC 497**, and **Davy International Ltd vs Tazzyman (1997) 1 WLR 1256**.

For this court to dispense with personal service of the orders issued on 13th June 2014 and to find that the 1st Defendant was aware of the court's order, the Plaintiff must show that the 1st Defendant was personally aware of the court order through some other means other than personal service. The notification and awareness of the orders required is personal to the person sought to be committed for contempt of court.

The Court notes from the affidavit of service relied upon by the Plaintiff that it is the 1st Defendant's employee who is alleged to have talked to the 1st Defendant about the court order, and not the process server who swore the affidavit. Therefore the Plaintiff cannot rely on the said affidavit of service as evidence of their personal service or notification of the court orders on the 1st Defendant. Neither can the court find from the said affidavit of service that the Defendant was personally aware of the orders on the date of service.

Arising from the foregoing, I find that as the 1st Defendant was not personally served or shown to be personally aware of the orders issued by the court on 13th June 2014, and he cannot be found culpable of disobeying the same or for contempt of court as on 15th June 2014 when the Plaintiff claimed he found the construction ongoing on the suit premises.

The prayers sought in the Plaintiff's Notice of Motion dated 17th June 2014 are accordingly declined for the foregoing reasons and the Plaintiff shall meet the costs of the said Notice of Motion.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this 18th day of December, 2014.

P. NYAMWEYA

JUDGE



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