



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

MILIMANI LAW COURTS

ENVIRONMENT AND LAND COURT

ELC CASE NO. 721 OF 2012

TAJ MILLENIUM MANAGEMENT COMPANY LIMITED.....PLAINTIFF/APPLICANT

VERSUS

TAJ MALL LIMITEDDEFENDANT/RESPONDENT

RULING

There are two suits before me. There is ELC No. 676 of 2012 and ELC No. 721 of 2012. These two suits involve the same two parties, namely, Taj Mall Limited and Taj Millenium Management Limited. The two suits also involve the same subject matter being unit numbers 1D and 2D situated on L.R. No. 209/14036 (hereinafter referred to as the "suit property"). It would appear that I have been handling the two matters without realizing the existence of the other. The result of this is that the two matters have been handled separately, the danger of which is that conflicting decisions on the two cases could be issued. In light of these circumstances, I hereby consolidate the two cases and direct that the lead file shall be ELC No. 721 of 2012.

In ELC No. 676 of 2012 there were two applications pending ruling and these are Notices of Motion dated 8th October 2012 seeking a temporary injunction and dated 24th March 2014 seeking to strike out ELC No. 721 of 2012. To start with, the Notice of Motion dated 24th March 2014 is already overtaken by events after I have issued an order consolidating the two suits. The same is dismissed with costs in the cause. Notice of Motion dated 8th October 2012 cannot proceed on the ground that in ELC No. 721 of 2012, Justice Ougo already issued a temporary injunction on 6th December 2012 in favour of Taj Millenium Management Limited restraining Taj Mall Limited from dealing in any manner with the suit property pending the hearing and determination of that suit. In light of this injunctive order, this court is not in a position to grant the injunction sought after by Taj Mall Limited in ELC No. 676 of 2012 in their Notice of Motion dated 8th October 2012 as this would amount to reviewing Justice Ougo's order. In the circumstances, Notice of Motion dated 8th October 2012 is also dismissed. Costs shall be in the cause.

In ELC No. 721 of 2012, several interlocutory applications are pending. However, the particular application before me for delivery of a ruling is the Notice of Motion dated 14th February 2014 brought by TajMillenium Management Limited seeking the following orders:

1. Spent.

2. Spent.

3. That pending the hearing and determination of this suit the Officer Commanding Police Station Kileleshwa Police Station or such Officer as may be designated in the Kenya Police or Kenya Administration Police be ordered to enforce and ensure the Respondent hereof is in compliance with the orders issued herein by the Honorable Lady Justice Ougo on 6th December 2012 and specifically that the Respondent do stop any further works in bringing down the gym and/or interfering with the Applicant's quiet and peaceful possession of the suit property and leave and vacate the suit property occupied by its employees/servants/agents.

4. That pending the hearing and determination of this suit, this Honorable Court be pleased to compel the Defendant either by itself, its servants or agents to deposit to the court all the documents belonging to the Plaintiff inter alia:

a. Certificate of Incorporation of the Plaintiff's Management Company;

b. Title Deed of Land Reference No. 209/14306;

c. The Plaintiff's seal

d. Any other document in its possession belonging to the Plaintiff.

5. That this Honorable Court be pleased to order Rameshchandra Govind Gorasia to purge the contempt forthwith and be denied audience before this Honorable court unless and until the contempt is purged.

6. Spent.

7. That this Honorable court be pleased to commit Rameshchandra Govind Gorasia to prison for a term of six months and/or attach his property for contempt of court.

8. That the costs of this Application be provided for.

The Application is premised on the grounds appearing on its face together with the Supporting Affidavit of Michael J. Achola, sworn on 14th February 2014 in which he averred that he is a Director of the Plaintiff/Applicant. He further averred that sometime in 2001, the Defendant developed the suit property in the concept of Apartments which it sold to would be purchasers by way of long term Leases conferring title and ownership upon them. He added that on or about 27th September 2001, the Plaintiff entered into a lease agreement with the Defendant in respect of the suit property as follows:-

a) The Defendant had erected on the said parcel of land certain buildings consisting of thirty (30) residential flats, health club, swimming pool, parking place and developed gardens.

b) Upon payment of full membership fees of Kshs. 50,000/- by each of the sub-lessees (apartment owners) to the Defendant, it will transfer the reversionary interest to the Plaintiff and that all sub-lessees were to pay Kshs. 50,000/- being membership fees for membership in the Plaintiff being the management company and their respective portion of the reversionary interest.

c) The Plaintiff would manage the estate.

He averred further that contrary to their Lease agreement, the Defendant did not construct a health

club/gymnasium but converted two units into a gym where the Defendant has been levying charges on the Plaintiff. He added that sometime towards the end of 2012, the Defendant's Managing Director, the said Rameshchandra Govind Gorasia, during the Annual General Meeting of the Plaintiff, requested to be granted permission to convert the gymnasium into apartments. He averred further that on 18th July, 2012, the Board of Directors of the Plaintiff met and upon deliberation unanimously voted against the request. He added that upon being denied permission to convert the gymnasium into apartments, on 8th October 2012, the Defendant rushed to Court under certificate of urgency seeking an order of injunction restraining the Plaintiff from interfering with its quiet possession, trespassing and or disposing the suit property. He stated further that the application was heard and dismissed for wanting in merit. He further added that the Plaintiff/Applicant being aggrieved by the aforesaid conduct of the Respondent filed this suit on the 18th October 2012 together with a Notice of Motion Application dated 17th October 2012 seeking to restrain the Defendant/Respondent from interfering with the Plaintiffs/Applicants quiet and peaceful possession of the said parcel of land, an injunction against selling, charging and or disposing the said suit premises and further from bringing down the gymnasium or in any way interfering with the same. He further indicated that the said application was heard by this Honourable court and on 6th December 2012, Honourable Lady Justice Ogo granted the following orders:-

- a) Injunction against the Defendant restraining it either by itself and/or agents or servants from disposing off, charging, transferring or in any way dealing with the suit property L.R. No. 209/14306; and
- b) Injunction against the Defendant restraining it either by itself and/or agents or servants from carrying out any further works or bringing down the gymnasium or in any manner interfering with the gymnasium pending hearing and determination of the suit.

He averred further that the said orders were extracted and served on the Defendant/Respondent who duly acknowledged service. He produced a copy of the court order marked "MO3" and a copy of the Affidavit of Service marked "MO4". He added that on 2nd February, 2014 in disobedience of the orders of this Honourable Court issued on 6th December 2012, the Defendant hired goons who forced entry into the estate by destroying the electric fence and main gate and that the goons went straight to the disputed apartments and brought down the gymnasium/health club. He added that it is obvious that this act was premeditated, planned and executed without regard to law, the orders in force and security situation on the ground including children, women and other residents. He further stated that he personally informed the goons/workers that there exist court orders but they informed him that they had been informed by the Defendant's Advocates that there are no orders in force stopping them from constructing and/or bringing down the gymnasium. He stated further that the goons who were armed with pangas, rungs, knives and a host of crude weapons, threatened to attack anyone who got close to them. He added that on 3rd February, 2014 without disclosing to the Honourable Court that they are in contempt of Court order, the Defendant/Respondent through the said RAMESHCHANDRA GOVIND GORASIA filed an application requesting this Honourable court to vacate orders issued on 6th December, 2012 under certificate of urgency but that the Court declined to issue any orders but fixed the application for interpartes hearing on 18th February, 2014. He added that it is evident that there is an intention to run away from their act of contempt and validate the same. He further stated that even after being denied orders vacating the Orders issued on 6th December, 2012, the Defendant/Respondent doubled the number of goons/servants to hasten the process of converting the gymnasium into apartments and hurriedly dispose them. He stated that in light of the foregoing, it is evident that RAMESHCHANDRA GOVIND GORASIA is in contempt and if allowed to continue to disregard lawful orders of this Honourable Court, he stands to set a bad precedent of disrespect of court orders, anarchy and challenging the authority of the court. On those grounds, he sought for this Application to be allowed.

The Application is contested. The Defendant/Respondent filed the Replying Affidavit of Rameshchandra Govind Gorasia sworn on 19th February 2014 in which he averred that he is the Managing Director of the Defendant/Respondent. He further averred that the Defendant/Respondent commenced construction works on the gymnasium/health club by repairing, renovating and restoring it back to its original state as a residential unit in conformity with the other 30 residential flats as it was not commercially viable. He stated further that while doing so, the Plaintiff unlawfully and or illegally trespassed thereon and forcefully restrained the Defendant/Respondent's employee from undertaking the construction and subsequently deployed security guards to barricade the Defendant from accessing the suit property. He denied having been served with the court order. He further added that the impugned court order had expired on 6th December 2013, the same having been issued on 6th December 2012. He further added that under the law, an ex-parte injunction order granted by court should be served on the party sought to be restrained within 3 days from the date of issue and in default, it automatically lapses. He added that the Plaintiff cannot therefore claim that the Defendant is in contempt of a non-existent court order and rely on the same to deny the Defendant's proprietary interests over the suit property. He further added that for a contempt application to succeed, the same must be personally served upon the contemnor and in the present application, the Plaintiff has not alleged service of the court order upon himself and in the circumstances he had not willfully disobeyed any court order. On those grounds, he sought for this Application to be dismissed with costs to the Defendant.

In response thereto, the Plaintiff/Applicant filed the Supplementary Affidavit of Michael J. Achola sworn on 3rd March 2014 in which Mr. Achola averred that the allegation that the Defendant/Respondent was converting the gymnasium into apartments because the gymnasium was not commercially viable is not correct and amounts to a breach of the leases and a deprivation of property to the Plaintiff because the provision of a health facility including a gymnasium was a material term of the leases. He averred further that the court order issued on 6th December 2012 was duly served on the Defendant's advocates on 15th February 2013. He further added that it is now trite law that knowledge of a court order in contempt proceedings supersedes personal service. He stated that it was clear that the Defendant and its advocates were aware of the court order. He added that under Order 40 Rule 6 of the Civil Procedure Rules, 2010, it is permissive for the court to allow the injunction to subsist for a period of more than 12 months as was the case herein. He stated that on the basis of that discretion, Justice Ougo allowed the interlocutory injunction to remain in force until this suit is heard and determined. He further stated that the court order was not issued ex-parte the same having been issued after the Defendant has filed its Replying Affidavit prior to issuance of the same and therefore the requirement of service of the same within 3 days of issue does not apply in this case.

I will address prayer no. 7 of this Application first and foremost which prayer seeks for the committal of one Rameshchandra Govind Gorasia into civil jail for disobedience of the court order issued by Justice Ougo on 6th December 2012. The applicable law is as follows:

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”.

In this particular case, the Defendant/Respondent does not dispute that the court did issue a court order. It further does not dispute that the court order was served upon its advocates on record. However, Rameshchandra Govind Gorasia, the Managing Director of the Defendant who is sought to be committed to civil jail and his property attached has argued that he was not personally served with a copy of the court order as is required in law. The Plaintiff on its part also concedes that it did not serve Mr. Gorasia with the court order personally, but asserted that this notwithstanding, there is sufficient proof that Mr. Gorasia had knowledge of the court order.

I will highlight the Court of Appeal decision in **Ochino & Another vs. Okombo & 4 Others (1989) KLR 165** which provides as follows:

“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.”

My finding is that the court order was not served personally on Mr. Gorasia. No plausible reason has been given by the Plaintiff for this glaring omission. I find that service upon the Defendant’s advocates did not suffice. Since Mr. Gorasia was the one who was targeted to comply with this order, he should have been served personally. The assertions that Mr. Gorasia had, despite lack of personal service, knowledge of the court order are not convincing. The Plaintiff should have made every effort to ensure that Mr. Gorasia was personally served with the court order. This having not been done, I will not issue an order committing Mr. Gorasia to civil jail or order for the attachment of his property.

I also decline to allow any of the remaining prayers. Having obtained an interlocutory injunction way back on 6th December 2012, the Plaintiff has not seen to it that this suit is expedited to full trial. The onus is on the Plaintiff to ensure that this suit goes to full trial at the earliest date so that the court can make a final determination of the matter.

That being my finding, Notice of Motion dated 14th February 2014 is hereby dismissed. Costs in the cause.

It is so ordered.

DELIVERED AND SIGNED AT NAIROBI THIS 7TH DAY OF OCTOBER 2016.

MARY M. GITUMBI

JUDGE



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