



Gitau & another v Muthiora (Environment and Land Case Civil Suit 1245 of 2014) [2023] KEELC 16860 (KLR) (20 April 2023) (Ruling)

Neutral citation: [2023] KEELC 16860 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE CIVIL SUIT 1245 OF 2014**

AA OMOLLO, J

APRIL 20, 2023

BETWEEN

SAMUEL CHEGE GITAU 1ST PLAINTIFF

JACINTA WANJIKU NGUGI 2ND PLAINTIFF

AND

JOSEPH GICHERU MUTHIORA DEFENDANT

RULING

1. The Plaintiff moved this court vide their notice of motion dated October 13, 2022 and brought under the provisions of section 5 of the Judicature Act Cap 8 of the Laws of Kenya, part 81.4 of the Civil Procedure Rules 1999 of the Supreme Court of England and all the enabling provisions of the Law. The Applicants seeks to be granted the following orders;
 - (i) Spent
 - (ii) The court be pleased to issue an order to the arrest and committal to prison of the Defendant/ Respondent herein for willful disobedience of the judgment & Decree of this Honourable Court issued herein on June 10, 2021.
 - (iii) This court be pleased to punish the defendant/Respondent herein by imposing a fine to be determined by the Honourable Court upon the him for willful disobedience of the judgment & Decree issued herein on June 10, 2021.
 - (iv) Costs of this Application to be borne by the Defendant/Respondent
 - (v) Any other or further order that this Honourable Court may deem fit to grant.
2. The application is premised on the grounds listed on its face that;



- a) Judgment was delivered herein on June 10, 2021 in the presence of the Advocates of the Defendant herein, where the Defendant was ordered, inter alia, to register the mutation dated presented for registration on 6th September, 2011 and transfer to the 1st and 2nd plaintiffs Title No Dagoretti/Riruta/6188 being a portion of Title No Dagoretti/Riruta/3102 within 90 days of transfer to him of Kshs 200,000/= by the 1st and 2nd Plaintiffs.
 - b) Further the honourable court provided for each party to be able to apply limited only to the execution of the orders.
 - c) In spite of the 1st and 2nd plaintiffs having faithfully and dutifully complied with their liability under the judgment and paid Kshs 200,000 to the Defendant, the defendant has deliberately and willfully refused to comply with the judgment in spite of several requests and reminders over a period of over one year.
 - d) It is therefore clear that there is no intention on the Defendant's part to obey the orders of the Honourable Court. The Defendant has shown himself to be a person that holds the authority of this Court in utter contempt and condescension and poses a great danger to the rule of law and the due administration of justice.
3. The 1st plaintiff swore a supporting affidavit dated October 13, 2022 and a further affidavit dated February 1, 2022 (I think should read 2023) in support of the orders sought. Mr Chege deposes to the facts already pleaded in the grounds on the face of the motion. He also deposed that they have written severally to the defendant to follow up on the matter. That the defendant has made no effort to either pursue the registration of the mutation or commence a fresh subdivision and registration as shown in the letters annexed as SCG – 3 & 4.
 4. The plaintiff avers that there is no intention on the part of the Defendant to obey the court order and he should therefore be sanctioned by this court. They asked the court to help them execute the orders through the Deputy Registrar of this court at the Defendant's cost.
 5. In the further affidavit, the plaintiffs averred that paragraph 4 of the judgment stated that where the Defendant was unable to register the mutation, he was to carry out fresh mutation to transfer the plaintiffs portion. They contended that the defendant in concert with his wife have completely and violently refused to take any steps to subdivide the suit property and delineate their portion as ordered.
 6. The Defendant filed a replying affidavit sworn on November 25, 2022 in which deposed that the application has been brought in bad faith. He stated that since the delivery of the judgment, he has done his best and commenced the process of registration of the mutation as shown in the annexure marked JGM 1 which is an extract of the booking form from Central Land Registry dated June 22, 2021.
 7. The Respondent explained that he has not been able to complete the process within the time lines stipulated by the court because the Ministry of Lands decided to digitize the land records. He added that his advocate informed the applicants of the delay and that the Applicants are equally aware of this position. The Respondent annexed the said letter dated September 20, 2022 as JGM 2. He deposed further that the delay in processing the registration of the mutation is not occasioned by refusal or delay on his part. He asked the court for more time to be able to complete the process of registering the mutation.
 8. The parties agreed to prosecute the application through filing of written submissions. The Applicant filed theirs dated February 1, 2023. The Applicants referred the court to the case of *Samwel MN Mweru & Others v National Land Commission & 2 Others* (2020) eKLR for the proposition that there are four elements that must be proved to make the case for civil contempt;



- (i) Terms of the order (or injunction) must be clear and building on the defendant.
 - (ii) The defendant had knowledge of the order.
 - (iii) The defendant has acted in breach.
 - (iv) The defendant’s conduct was deliberate.
9. The Applicants have stated the Defendant was aware of the order and is in breach of the same. In submitting on the breach, the Plaintiffs argue that the defendant has not taken steps in furtherance of order 4. They urged that the application be allowed.
10. The Respondent in his submissions dated February 13, 2023 cited several cases why he should not be condemned having explained the reasons for the delay. The cases cited include, *Sheila Cassat Issenberg & Another v Antony Machatha Kinyanjui* (2021) eKLR where the High Court held in paragraph 62 & 64 thus;
- “In the present application, it has not been sufficiently demonstrated that the respondent deliberately disobeyed court orders or at all. Contempt proceedings are a serious undertaking because a court exercising this jurisdiction is minded to ensure the orderly functioning of society and the rule of law. On conviction, the alleged contemnor stands to lose his or her liberty. It should not, therefore, be taken lightly..... But even as courts punish for contempt to safeguard the peaceful and development of society and the rule of law, it must be borne in mind that the power of punish for contempt is discretionary one and should be used sparingly. That is why the court observed the writing of Cromwell J for the Supreme of Canada in *Carey v Laiken*, 2015 SCC 17 (16th April 2015), that if courts were to find contempt too easily, “a court’s outrage might be treated as just so much bluster that might ultimately cheapen the role and authority of the very judicial power it seeks to protect the court’s contempt power should be used cautiously and with great restraint. It is an enforcement power of last resort rather than first resort.”
11. The Plaintiffs/Applicants have pleaded and submitted that the Defendant has not complied with paragraph 2 & 4 of the orders in the judgment rendered on June 10, 2021. Paragraph 2 required the defendant upon receipt of the sum of Kshs.200,000 from the plaintiffs, to process registration. The mutation was presented for registration on September 6, 2011. That upon registration, he was to transfer title no Dagoretti/Riruta/6188 within 90 days of the receipt of the payment.
12. The plaintiff annexed a bankers cheque of Kshs.200,000 dated June 18, 2021 in favour of the Defendant. The Plaintiffs argue that if the registration process is delayed, then the Defendant ought to have invoked paragraph 4 of the orders which stated that where the mutation was not registrable due to reasons not attributable to the Defendant, he (the defendant) would carryout fresh subdivision of parcel No Dagoretti/Riruta/3102 to transfer the plaintiffs portion.
13. In contesting the application, the Defendant annexed a copy of his advocates’ letter dated September 20, 2021 which letter was equally annexed by the Applicants in their supporting affidavit as SCG – 2. The letter informed the plaintiffs that they had commenced the process of registering the mutation as evidenced by the booking form received from the Central Land Registry on June 22, 2021. The Applicants received the copy of the booking form which bore the stamp of the Land Registry. The booking form referred to the documents enclosed as original title and certified mutation copy.
14. In essence, the plaintiffs were aware that the Defendant took the step of commencing the registration process within 2 weeks of the delivery of the judgment. The Applicants argue that if there was a delay,



the Defendant ought to have taken further steps as directed in order 4. As stated in the case of *Samwel MNMweru* Supra, the plaintiffs had a duty to prove that the Defendant's disobedience was deliberate.

15. In the case before me, the Defendant already presented the document for registration. He is not the registration officer. He has given feedback that the delay is a result of the digitization of land records which activity is within the public domain. The documents have not been retrieved as rejected for the Defendant to take the next step of carrying out fresh subdivision.
16. In any event, even if the Defendant were to prepare fresh mutation anticipated in paragraph 4 of the order, anticipated the will still be presented to the Central Land Registry for registration which process would still suffer the delay caused by the ongoing digitization of records. It would be premature to take that step unless there is evidence that the documents earlier presented have been rejected. The Applicants did not present to this court any evidence to verify that the booking form did annexed by the Defendant not originate from the land office.
17. I do appreciate that the court gave a time line of 90 days for the transfer of the title Dagoretti/Riruta/6188 in the plaintiff's name. However, the delay in the execution cannot be attributed to the Defendant who having presented the requisite documents for registration of the mutation would have been better if both parties pursue the person in charge of registration to fast-track that process instead of filing the application for contempt.
18. Consequently, I find no deliberate act on the Defendant that requires this court to punish him. The application for contempt was premature on the face of the Defendant's counsel letter dated September 20, 2021. Hence the application is found to be without merit and is dismissed with no order as to costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 20TH DAY OF APRIL 2023

A. OMOLLO

JUDGE

