



**Andolo v Oluoch & 2 others; Namachanja & Mbugua Advocates & 3 others (Interested Parties)
(Insolvency Cause 1 of 2017) [2022] KEHC 15197 (KLR) (22 September 2022) (Ruling)**

Neutral citation: [2022] KEHC 15197 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAJIADO
INSOLVENCY CAUSE 1 OF 2017
SN MUTUKU, J
SEPTEMBER 22, 2022
IN THE MATTER OF NATURE GREEN HOLDINGS LIMITED
AND
IN THE MATTER OF THE INSOLVENCY ACT (NO. 18 OF 2015)**

BETWEEN

DONALD MUHONDA ANDOLO PETITIONER

AND

DOUGLAS OKEYO OLUOCH 1ST DEBTOR

PINNACLE DEVELOPERS LIMITED 2ND DEBTOR

WAKISONS INVESTMENT LIMITED 3RD DEBTOR

AND

NAMACHANJA & MBUGUA ADVOCATES INTERESTED PARTY

AMELI INYANGU & PARTNERS ADVOCATES INTERESTED PARTY

TIMOTHY WAMBUGU KAMWARO INTERESTED PARTY

ESTHER WANGUI IHUGU INTERESTED PARTY

RULING

The Application

1. Douglas Okeyo Oluoch and Pinnacle Developers Limited have moved this court vide a Notice of Motion dated February 17, 2021 under sections 1A, 1B, 3A, 63 (e) of the *Civil Procedure Act*, Order 40



Rule 3, 4 (4) of the Civil Procedure Rules, section 5 of the Judicature Act, Article 50 of the Constitution of Kenya, 2010 and all other enabling provisions of the law.

2. They are seeking the following orders:

- i. That the Respondent herein, Donald Muhonda Andolo, be cited for contempt of court and that his property be attached and the Respondent be committed to prison for such term not exceeding six months as this Honourable court may deem fit with or without the option of fines for willfully disobeying orders issued by this court on November 8, 2018 discharging an injunction issued by this court on June 19, 2018 over several properties including Title No Kajiado/Kaputiei North/32240.
- ii. That the Respondent herein, Donald Muhonda Andolo, be cited for contempt of court and that his property be attached and the Respondent be committed to prison for such term not exceeding six months as this Honourable court may deem fit with or without the option of fines for fraudulently holding out a fake document and presenting it to member of the public as a valid order by this court placing an injunction on Title No Kajiado/Kaputier North/32240.
- iii. That his Honourable court be pleased to restrain the Respondent herein, Donald Muhonda Andolo, from continuing to publish to the general public the order of this court dated June 19, 2018 with an intention to willfully and knowingly mislead the said members of the public that there is an injunction over the property known as Title No Kajiado/Kaputiei North/32240 thereby defeating the Applicant's constitutional rights of enjoyment of the said property.
- iv. That this Honourable court be pleased to attach the Respondent's property for failing to pay costs of Kshs 10,000 as awarded to the Applicants on December 2, 2019.
- v. That the Respondent herein be and is hereby ordered by this Honourable court to cease and desist from continuing to comment on the property known as Title No Kajiado/Kaputiei North/32240 and issue appropriate written communication retracting and correcting the misleading information regarding the position of this court on the said property and a copy of the said communication be copied to this Honourable court.
- vi. That this Honourable court be pleased to declare, and which declaration is hereby makes, that there is no injunction placed on property known as Title No Kajiado/Kaputiei North/32240 registered to Pinnacle Developers Limited.
- vii. That the Respondent herein, Donald Muhonda Andolo do bear the costs of this application.

3. The Application is supported by grounds found on the face of it and in the supporting affidavit of the 1st Applicant. The grounds relied on are summarized as follows:

- i. That the Applicant is the registered owner of Title No Kajiado/Kaputiei North/32240 (the suit property).
- ii. That the Respondent filed a Notice of Motion dated June 8, 2018 seeking to have this Honourable Court place an injunction on a series of properties including the suit property.
- iii. That this court issued an ex parte order placing an injunction on the suit property.
- iv. That the Notice of Motion was heard inter partes and the court discharged the injunction placed on the suit property in a ruling delivered on November 8, 2018.
- v. That the order discharging the injunction over the property was delivered in the presence of counsel for both parties and in the presence of both parties.



- vi. That on October 28, 2020, the advocates for the Respondent, under instructions of the Respondent, wrote a letter to NCBA Bank, forwarding a copy of the order discharging the injunction holding that order to be a valid in order to block a transaction that the Applicant was undertaking with the said Bank.
 - vii. That on November 5, 2020, Applicant's advocates sent a demand letter to the advocates for the Respondent demanding that they write to the Bank withdrawing the said letter but this was not done with the result that the Respondent has continued to mislead the public about the order of this court.
 - viii. That the fraudulent, misleading, erroneous, mischievous and contemptuous action of the Respondent so damaged the reputation of the suit property in the eyes of NCBA Bank and a third-party purchaser that the transaction between the Applicant, NCBA Bank and the third-party purchaser failed.
 - ix. That the Respondent has been fraudulently and maliciously flashing a fake document in public alleging it to be a court order purportedly placing an injunction on the suit property and that it is in the interest of justice and honour of this court that the Respondent be punished for showing contempt for this court and for causing untold damage to the third parties by passing off as an agent of this court and bearing a non-existent order.
4. The Application is opposed through the Replying Affidavit sworn by the Respondent and dated July 28, 2021. I have read the Replying Affidavit by the Respondent. It contains averments that are best left for arguments in the main Petition. For the purposes of determining this application, I have concentrated on the relevant portions of that Replying Affidavit.
 5. The Respondent deposes that Nature Green Holdings Limited, the subject of the Insolvency proceedings herein, holds beneficial interest over the suit property by virtue of having entered into a sale agreement with Wakisons Investment Limited, the 3rd Debtor herein and having paid the full purchase price for the same; that through collusion the 1st Applicant caused the transfer of the suit property to the 3rd Interested Party before the same was transferred to the 2nd Applicant.
 6. It is deposed, further, that by dint of the conservatory orders issued on June 19, 2018, any person or entity were prohibited from interfering in anyway with the assets and properties subject to this Petition including the suit property; that the said conservatory order has not been rescinded or set aside by any order of this court and that Annexure DOO-4 under paragraph 5 of the 1st Applicant's Supporting Affidavit is a ruling dated November 8, 2018 and not an order as alleged by the 1st Applicant.
 7. It is deposed that the said ruling does not in any way set aside, rescind nor discharge the conservatory orders, and in its nature, it is not one that an order(s) can be extracted; that there are no such orders discharging the injunction as alleged by the applicants and as such the argument that the Respondent should be held in contempt of non-existent orders should not arise as such assertions are misplaced and misguided and that the advocates for the Respondent responded to the demand letter through their letter dated November 11, 2020.
 8. The Respondent has deposed that this application is frivolous and vexatious and has been filed in an effort to frustrate these proceedings; that the application lacks merit, is a gross abuse of judicial process and should therefore be dismissed with costs.
 9. The 1st Respondent has filed a Supplementary Affidavit dated November 16, 2021 in which he has denied colluding with any third party or any other person. He reiterated that the conservatory orders were raised by the court in its ruling dated November 8, 2018 which ruling discharged the suit property



among others from the initial conservatory order on the ground that the stated property was not registered in the name of Nature Green Holdings Limited but Wakisons Investments Limited.

10. The Respondent specifically highlighted what he refers to as the order of the court discharging the injunction on the suit property in an excerpt of the ruling of this court (Nyakundi, J) as follows:

“.....all properties which were identified and registered in the name of Nature Green be preserved by way of an interlocutory injunction pending the hearing and determination of the Insolvency Cause aforementioned to avoid wastage”

11. And further that “It would be a miss to say that this court grants an injunction against Wakisons Investments without the applicant admittedly joining them as a party to the ongoing proceedings. The Applicant has not discharged the burden of proof that Wakinsons is an associate company with Nature Green Ltd.”

Submissions

12. This application was canvassed through written submissions. Both parties have filed their submissions. The applicants’ submissions are dated November 16, 2021. The applicants have reiterated their assertions contained in their grounds in support of the application under consideration. They have also raised the following issues and arguments in support of each issue:

- i. Whether the terms of the orders were clear and unambiguous and were binding on the Respondents. To this issue, it is submitted that the orders of this court are in plain language, are well written and are concise and easily understandable; that the Respondent was in court together with his counsel when the ruling was delivered discharging the injunction on some properties and retaining it in others.
- ii. Whether the Respondent had knowledge of or proper notice of the terms of the order, to which it is submitted that the order was granted in the presence of the Respondent and his counsel.
- iii. Whether the Respondent acted in breach of the terms of the orders of this court, to which it is submitted that the Applicant has demonstrated through affidavit evidence that the Respondent held out the injunction placed on the suit property in June 2018 as a valid court order whilst knowing that the said injunction had been discharged.
- iv. Whether the Respondent’s actions were deliberate, to which it is submitted that the Respondent’s actions were pre-meditated because by involving himself in a transaction in which he was not privy to, his intention was to frustrate the banking transaction between the applicants and the NCBA Bank.

13. The submissions by the Respondent are dated July 18, 2022. The Respondent has submitted that no orders which the Applicants allege have been disobeyed by the Respondent have been extracted and adduced before this court and that the application giving rise to the ruling alleged to have discharged the injunction was heard and determined ex parte after the Applicants failed to respond after being granted sufficient time to do so>

14. To emphasize on that point, the Respondent cited a section of the ruling as follows:

“The injunction sought was not meant to fully determine the dispute but to put a moratorium on all activities to the assets of the company awaiting the hearing and adjudication of the issues on the merits. The pleadings and affidavit evidence in support of



the notice of motion by the applicant in this issue has been exhaustively dealt with in his disposition. When it came to the position of the respondent he was apparently served but did not file any rejoinder to the notice of motion. That being so the applicant prosecuted his claim as undefended motion and got away with the orders. There is nothing in my opinion on which the orders can be impeached.”

15. It is submitted that Nature Green Holdings Limited had entered into a sale agreement with Wakisons Investment Limited and paid in full the purchase price in respect of the suit property.
16. The Respondent raised the following issue, whether the Application seeking to cite the Respondent for contempt of court should be allowed. The Respondent cited *Katsuri Limited v Kapurchand Depor Shar (2016) eKLR* citing *Kristen Carla Burchell v Barry Grant Burchell* (Eastern Cape Division Case No 364 of 2005) where the court stated that “in order for an applicant to succeed in civil contempt proceedings, the applicant has to prove the terms of the order, knowledge of the terms by the respondent, failure by the respondent to comply with the terms of the order”.
17. The Respondent also cited a Canadian Case, *Carey v Laiken, 2015 SCC 17* (April 16, 2015) in which the three elements to be established to the satisfaction the court in civil contempt of court were expounded thus:
 - “(i) The order alleged to have been breached ‘must state clearly and unequivocally what should and should not be done.’ This ensures that a party will not be found in contempt where an order is unclear. An order may be found to be unclear if, for example, it is missing an essential detail about where, when or to whom it applies; if it incorporates overly broad language; or if external circumstances have obscured its meaning,
 - (ii) The party alleged to have breached the order must have had actual knowledge of it.
 - (iii) The party alleged to be in breach must have intentionally done the act that the order prohibits or intentionally failed to do the act the order compels.”
18. The Respondent submitted that in this matter it has not been sufficiently demonstrated that there exist any orders that expressly and unequivocally states what should be done or not done by the Respondent and therefore the Respondent has not in any way deliberately disobeyed court orders issued by this court.
19. It is submitted that contempt of court is in the nature of criminal proceedings and proof required is higher than in civil cases. To that end, the Respondent cited *Gatharia K Mutitika v Baharini Farm Limited [1985] KLR 227*. It was submitted that there is no evidence placed before the court that the Respondent was served or was aware of the alleged order and that the assertions that the Respondent was in court when the ruling was delivered has not been substantiated. It is submitted that the Ruling delivered by the court is ambiguous and does not in express terms discharge the conservatory orders.
20. It is submitted that the conservatory order was never rescinded, discharged or set aside by any order of this court; that the said Ruling was not one from which orders can be extracted and that the allegations of contempt of court have not been proved to the required standard.



Determination

21. I have considered the Notice of Motion and the grounds in support. I have considered the Replying Affidavit in opposition to the Notice of Motion and the rival submissions. I have seen, from the court record, the conservatory order in issue dated June 19, 2018. It is worded as thus:

“A Conservatory injunction order be and is hereby issued prohibiting disposing, transferring, alienating, sequestering, attaching, levying distress, levying execution, constructing on or dealing in any way that is prejudicial to the interest of the company herein with any of the assets subject of this petition that is to say land parcels known as Kajiado/Kaputiei North/32238, Kajiado/Kaputiei North/32240, Kajiado/Kaputiei North/32242, Kajiado/Kaputiei North/32244, Kajiado/Kaputiei North/32246, Kajiado/Kaputiei North/32248, Kajiado/Kaputiei North/32255, Kajiado/Kaputiei North/32257, Kajiado/Kaputiei North/32258 and Kajiado/Kaputiei North/32259 pending the hearing and determination of the petition herein.”

22. Upon reading this order, it is clear to my mind that the conservatory order covers all the properties enumerated in it including the suit property. The question, that begs an answer, is this: did the court discharge this injunction? If the answer to this question is in the affirmative, then, this court is called upon to determine whether the applicant has demonstrated to the satisfaction of this court, that he deserves the orders he is seeking thereby holding the Respondent accountable for disobeying the court orders. If the answer is in the negative, then the Applicant has no claim against the Respondent for contempt of court.

23. The Ruling that is said to have discharged the injunction is the one delivered on November 8, 2018, a 22-page document. I am alive to the two excerpts of that ruling. The first excerpt is by the Applicant. It is meant to persuade this court that the injunction was lifted. The other is by the Respondent and is meant to persuade this court that the court did not lift the injunction.

24. I have considered this part of the ruling:

“The injunction sought was not meant to fully determine the dispute but to put a moratorium on all activities to the assets of the company awaiting the hearing and adjudication of the issues on the merits. The pleadings and affidavit evidence in support of the notice of motion by the applicant in this issue has been exhaustively dealt with in his disposition. When it came to the position of the respondent he was apparently served but did not file any rejoinder to the notice of motion. That being so the applicant prosecuted his claim as undefended motion and got away with the orders. There is nothing in my opinion on which the orders can be impeached.”

25. I have also considered the following:

“.....all properties which were identified and registered in the name of Nature Green be preserved by way of an interlocutory injunction pending the hearing and determination of the Insolvency Cause aforementioned to avoid wastage”

26. And further that:

“It would be a miss to say that this court grants an injunction against Wakisons Investments without the applicant admittedly joining them as a party to the ongoing proceedings. The



Applicant has not discharged the burden of proof that Wakinsons is an associate company with Nature Green Ltd.”

27. The latter excerpt is relied on by the Applicant to claim that the injunction was discharged. The former is by the Respondent to show that the injunction was not discharged.
28. I have read the entire ruling and applied the elements of contempt of court which the Applicant must prove to a standard above the standard of proof in civil case and below standard of proof in criminal cases. In the excerpt reproduced in paragraph 24 of this ruling, I understand my brother to have been saying that given that the Applicant did not oppose the application seeking conservatory orders despite being given time to do so, then the applicant in that application prosecuted the application as undefended and got the conservatory orders and therefore there being no reason to impeach those orders, they remain in force. But again, I may be wrong because I am not able to read the mind of my brother when he issued those orders.
29. Further, by stating that “.....all properties which were identified and registered in the name of Nature Green be preserved by way of an interlocutory injunction pending the hearing and determination of the Insolvency Cause aforementioned to avoid wastage,” the court seemed to refer to specific properties registered in the name of Nature Green Holdings Limited. To my mind, I am not able to pick which those properties are since they are not specifically named. In my considered view, nothing would have been easier than the court to state, specifically and with clarity, which those properties were. Given the convoluted nature of this dispute, it can only be fair to all the parties to have the court pronounce itself with clarity so that parties do not misinterpret orders of the court to suit their case. I must however state that I am not sitting on appeal on my brother’s orders because I have no such mandate.
30. Then there is this excerpt:

“It would be a miss to say that this court grants an injunction against Wakisons Investments without the applicant admittedly joining them as a party to the ongoing proceedings. The Applicant has not discharged the burden of proof that Wakinsons is an associate company with Nature Green Ltd.”
31. When this excerpt is taken against the pronouncement of the court that there was nothing in the opinion of the court on which the orders could be impeached, because the respondent in that application did not attend court to oppose the application, then it becomes clear to me that there is some ambiguity in the whole ruling of the court. I have painstakingly read over the Ruling of November 8, 2018. It is clear, and I agree with the Respondent, that the orders of the court contained in that ruling are ambiguous and it is not possible to extract them.
32. I agree with the Respondent that the Applicant has failed to prove to the satisfaction of this court that the orders alleged to have been breached do not clearly and unequivocally state what should or should not be done. The properties affected by the conservatory order are clearly stated in the order of the court dated June 19, 2018. But this court was not given the clear order discharging that order.
33. I understand the Respondent to be saying that the orders alleged to have been disobeyed are ambiguous and unclear. I agree with him in that respect. With that state of affairs, it is not easy for the Respondent, in my considered view, to have had actual knowledge of the said orders. It has not been demonstrated that the Respondent intentionally did the act that the order prohibited or failed to do the act that the order compelled. Given that the orders in issue are ambiguous, it cannot be claimed that the Respondent understood them and ignored them. If this was the case, there is no evidence to prove the same.



34. My careful analysis of this matter, it is my conclusion that the Applicants have not reached the threshold for grant of the orders they are seeking to have the Respondent held in contempt of the court. The application dated February 17, 2021 is hereby dismissed with costs to the Respondent.
35. I wish to state, here, that this matter has taken a life of its own. Parties are doing everything to ensure that the main Insolvency matter cannot be heard and resolved. This is demonstrated by the number of applications being filed. As early as November 8, 2018, this court (Nyakundi, J) had this to say on this issue:
- “That this court pursuant to the provisions of Section 1A of the *Civil Procedure Act* on overriding objection to facilitate just, expeditious and affordable resolution of this petition shall not entertain any more interlocutory applications touching on the winding up petition save with leave of the court to avoid unnecessary bites at the cherry by the claimants and escalating the cost of litigation.”
36. Parties did not heed to that caution. Taking advantage of change of the personnel at the High Court in Kajiado, they have continued to file application after another and perhaps without leave of the court. Let parties, specifically the Petitioner, put in place mechanisms of proceeding this dispute further instead of allowing anyone who wishes to come to file application after another.
37. Orders shall issue accordingly.

DATED, SIGNED AND DELIVERED THIS 22ND SEPTEMBER, 2022.

S N MUTUKU

JUDGE

