



REPUBLIC OF KENYA



In re Estate of Elijah Ngari alias Ngari Ngotho (Deceased) (Miscellaneous Application Probate & Administration 30 of 2013) [2022] KEHC 14323 (KLR) (19 October 2022) (Ruling)

Neutral citation: [2022] KEHC 14323 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
MISCELLANEOUS APPLICATION PROBATE & ADMINISTRATION 30 OF 2013
RM MWONGO, J
OCTOBER 19, 2022**

BETWEEN

**CATHERINE NJERI NGOMBO 1ST APPLICANT
DAN KINYUA NGOMBO 2ND APPLICANT
CHARLES NYAMU NGOMBO 3RD APPLICANT
RICHARD MAINA NGOMBO 4TH APPLICANT
CHARLES MWANGI NGOMBO 5TH APPLICANT
JAMES KANAI NGOMBO 6TH APPLICANT**

AND

ELIZABETH WAMBUI NGARI RESPONDENT

AND

**JUDY WAMUYU MACHARIA INTERESTED PARTY
BERNARD MWAI NJIRAINI INTERESTED PARTY
JOSEPH MURIMI NGOMBO INTERESTED PARTY
DANIEL KARANI KINYUA INTERESTED PARTY**

RULING

1. This file has a long and chequered history.
2. The deceased died on February 3, 1993, and his wife Elizabeth Wambui Ngari applied in Kerugoya CM Succession No 262 of 2004 to administer the estate on November 16, 2004. The application was advertised in the Gazette on December 3, 2004, and a grant was then issued dated January 27, 2005, to her as Administratrix.



3. A confirmed grant dated December 8, 2005 was issued to the Administratrix; and a rectified grant was issued on March 9, 2006 incorporating new beneficiaries. Copies are in the file. Under the confirmed grant, the deceased's estate was indicated as Mwerua/Gitaku/96 comprising 4.6 acres. The beneficiaries and their share in the property were listed as follows:

Teresia Wamuyu Migwi	1.3 Acres
Kagio Ngombo	1.3 Acres
Elizabeth Wambui Ngari	1.0 Acres
David Maina Ngombo	0.5 Acres
Amos Rukenya Ngari	0.5 Acres

4. The file was then transferred to Embu High Court and renumbered Succession Cause No 245 of 2007. After a High Court was established in Kerugoya, the file was transferred to this Court and anomalously registered as Misc Succ Cause No 30 of 2013.
5. The first application for revocation of grant appears to have been filed in Embu on June 29, 2007, which was stood over by consent, and a subsequent application for revocation was filed on September 26, 2007. Over time, the Administratrix proceeded with the administration of the estate which was not without challenges and encumbered with various types of applications.
6. Given the many challenges over the years, it appears from the record that on July 11, 2016, the parties agreed by consent in this court, to the court issuing a new confirmed grant (which is erroneously indicated to have been issued on June 15, 2016). In the confirmed grant, the Administratrix remained Elizabeth Wambui Ngari.
7. The beneficiaries named in the confirmed grant were Judy Wamuyu Macharia, Bernard Mwai Njiraini, Elizabeth Wambui Ngari and Joseph Murimi Mbogo; and each was to receive a 1.15 acre share of Mwerua/Gitaku/96.

The present Application

8. The background to the present application is that on June 25, 2018, the applicants, as grandchildren of the deceased, filed an application for revocation of the grant issued on January 27, 2005 and confirmed on July 11, 2016. The grounds of the application include, inter alia, that no notice was issued to Teresia Wamuyu, Migwi Kagio Ngombo and David Maina Ngombo, or their representatives prior to the confirmation.
9. Simultaneously, the applicants sought an interim order of inhibition against any transactions relating to LR No Mwerua/Gikaku/96 pending hearing of the application for revocation.
10. On June 27, 2018, an interim order was granted by the Court pending an inter partes hearing. After inter partes hearing, an order of inhibition was granted on February 7, 2019 against any transactions relating to Mwerua/ Gikaku/96 pending hearing and determination of the prayer for revocation of grant.
11. The applicants then filed the present application, now under consideration, by certificate of urgency dated April 10, 2019, in which the applicants seek:



1. An order enjoining the interested parties as parties to the proceedings;
 2. An interim order of inhibition against any transactions relating to LR No Mwerua/Gitaku/1852, 1853, 1854, 1855 and 1856 pending determination of prayers 5-9 of the application;
 3. An interim order of inhibition against any transactions relating to LR No Mwerua/Gitaku/1852, 1853, 1854, 1855 and 1856 pending hearing and determination of the Summons for revocation of Grant dated June 25, 2018;
 4. An order cancelling Entry No 8 in the register of LR Mwerua/Gitaku/96 and thereby cancel the title deeds to LR Mwerua/Gitaku/1852, 1853, 1854, 1855 and 1856 pending the hearing and determination of Summons for Revocation of Grant dated June 25, 2018;
 5. An order of stay of proceedings in Baricho SPMC ELC Cases No 12 of 2019 and 14 of 2019 pending the hearing and determination of Summons for Revocation of Grant dated June 25, 2018;
 6. That the Court be pleased to punish the respondent herein for disobeying the order issued by the Court on June 27, 2018 and served upon her on June 28, 2018 by committing her to jail.
12. The grounds of the application are:
- a. That on June 27, 2018 the court made an order in which it issued an inhibition against LR Mwerua/Gitaku/96 and also made an order for status quo on the said land, which the applicants are in possession of;
 - b. That the respondent herein was served with the application dated June 25, 2018 and the order issued on June 27, 2018 on June 28, 2018 by a court process server, Francis Kunga Mugi, and an affidavit of service was duly filed in court on July 19, 2018.
 - c. That at the time the respondent, and the 1st, 2nd and the 3rd Interested Parties were the registered proprietors of LR Mwerua/Gitaku/96 in common in accordance with the certificate of confirmation of grant which is being challenged in the proceedings herein.
 - d. That the respondent, who was the administratrix of the deceased's estate, violated the court order on July 17, 2018 when she caused the land to be partitioned to LR Mwerua/Gitaku/1852, 1853, 1854, 1855 and 1856.
 - e. That the court made its ruling after hearing the parties on February 7, 2019 and ordered that an inhibition be issued against any dealing in Mwerua/Gitaku/96 without knowing that it had been partitioned.
 - f. That it is in the interest of justice that court orders should never be in vain. That an interim order ought to be issued against the resultant partitions of LR Mwerua/Gitaku/96, that is, LR Mwerua/Gitaku/1852, 1853, 1854, 1855 and 1856 in the spirit of the findings and ruling of the court made on February 7, 2019. That the court should also order the cancellation of the illegal entry No 8 of the register of LR Mwerua/Gitaku/96 which was made in blatant violation of the order of this court. The resultant parcels LR Mwerua/Gitaku/1852, 1853, 1854, 1855 and 1856 and the title deeds thereto should also be cancelled before the hearing of the Summons for revocation of Grant since they are fruits of a poisoned tree.
 - g. That LR Mwerua/Gitaku/1855 was transferred to the 4th interested party in unclear circumstances and on an unknown date.



- h. That it is in the interest of justice for the court to revert to the position it was when it issued an order of inhibition against any transactions relating to LR Mwerua/Gitaku/96 on June 27, 2018.
13. In the supporting affidavit of Catherine Njeri Ngombo, the 1st applicant, she attached the affidavit of service deposed by Francis Kunga Mugi on July 2, 2018 wherein he states that on June 28, 2018 he served the Court Order on the Respondent/ Administratrix at her homestead after she was pointed out to him by the 3rd applicant, and that she received the copies but declined to sign.
14. The lengthy supporting affidavit also states, inter alia: That the respondent violated the court order on July 17, 2018 when she caused the land to be partitioned to LR Mwerua/Gitaku/1852, 1853, 1854, 1855 and 1856; That the court made its ruling after hearing the parties on February 7, 2019 and ordered that an inhibition be issued against any dealing in LR Mwerua/Gitaku/96 without knowing that it had been partitioned; That LR Mwerua/Gitaku/1855 was transferred to the 4th interested party in unclear circumstances and on an unknown date; and that it is in the interest of justice for the court to revert to the position it was when it issued an order of inhibition against any transactions relating to LR Mwerua/Gitaku/96 on June 27, 2018.
15. In a Supplementary Supporting affidavit dated July 16, 2019, the applicants also deposed , inter alia: That the respondent was aware of the interim orders of inhibition and maintenance of status quo on June 28, 2018 when she was served with the same; That she in fact responded to the filed application; That consequently partition of the suit land, which she facilitated on July 17, 2018, was done in blatant violation of the orders of the court; That it is fraudulent for the respondent to allege that Joseph Murimi Ngombo was representing the applicants during confirmation of grant when they had not granted him consent to act as such, were not even aware of the proceedings leading to confirmation of grant; nor did the Court in any way grant him authority to represent the applicants and that the confirmed grant did not indicate that he holds land in trust for the applicants but instead he was given his share absolutely.
16. The supplementary affidavit further avers that the respondent was one of the vendors who allegedly sold land to the 4th interested party. Despite being aware of the court order; and the transfer to the 4th respondent is therefore unlawful, fraudulent, null and void, and amenable to cancellation as the applicants' interests are overriding interests which need not be registered; and finally, that the interested parties cannot violate court orders then put forth a defence that the same are overtaken by events
17. The 1st Interested Party's response is in her Replying and Supplementary affidavits which make the following the essential assertions: That she was never served with the court order dated June 27, 2018; That when the court delivered its ruling on February 7, 2019, the grant had been implemented and new titles issued to beneficiaries; That the applicants have their rightful share of the estate which is registered in the name of their brother, the 3rd interested party and their claim is oppressive on other beneficiaries; That since the estate herein has been fully distributed the court is functus officio and the applicants should file counterclaims in the ELC Cases at Baricho.; That the parcel of land under succession belonged to their late father in law Elijah Ngari alias Ngotho; That all the applicants herein are his nephews and nieces hence well known to me; That after the death of her husband she applied to be replaced as substituted beneficiary and that was granted; That by the time of subdivision no order had been served on us; That Joseph Murimi Ngombo was orally appointed to represent the members of his father's household; That the applicants got their father's share from the confirmed grant of letters; That the revocation application is a waste of time and misuse of court.



18. The 2nd Interested Party filed a Replying Affidavit reiterating the averments in the 1st Interested Party's Replying Affidavit. He further deposed an 11 paragraph Supplementary Replying Affidavit, and reiterated the averments in the 1st Interested Party's Supplementary Replying Affidavit.
19. The 4th Interested Party's Replying Affidavit averred as follows in significant aspects: That he is the registered proprietor of land parcel Mwerua/Gitaku/1855 which is a subdivision of LR Mwerua/Gitaku/96; That on June 29, 2007 he entered into an agreement of sale with Samuel Njiraini Ngari, Elizabeth Wambui Ngari and Judy Wamuyu Macharia for a portion of 0.75 acres from their shares in land parcel Mwerua/Gitaku/96 for an agreed sum of Ksh 270,000/=, of which he paid the sum of Ksh 64,000/= on 29.06.07 and the balance of Ksh 206,000/= on January 17, 2017; That on April 23, 2017 he entered into a further agreement of sale for 0.125 acres of land parcel Mwerua/Gitaku/96 with Bernard Mwai Njiraini, Elizabeth Wambui Ngari and Judy Wamuyu Macharia for an agreed sum of Kshs 175,000 of which he paid a sum of Kshs 175,000 on June 15, 2018; That the transaction received the consent of the land control board in its meeting on July 19, 2018; That land parcel Mwerua/Gitaku/1855 was then transferred to him on July 20, 2018; That at the time the parcel of land Mwerua/Gitaku/1855 was transferred to him there was no inhibition or encumbrances in the register;
20. He further stated that he is an innocent purchaser for value without notice of any defect, fraud or illegality in the register; That he filed at Baricho PM ELC case number 14 of 2019 so as to have unimpeded access to his land parcel Mwerua/Gitaku/1855; That as the registered proprietor of Land Parcel M Werua/Gitaku/1855 he would be greatly prejudiced by any orders made by this court when he was not a party thereto.
21. The 4th Interested party filed a Replying Affidavit, of which the following are the major averments: That he is one of the sons of the beneficiaries of the estate of the late Elijah Ngari and participated in the succession proceedings of his estate; That the estate was shared equally amongst: Judy Wamuyu Macharia, Elizabeth Wambui Ngari, Samuel Njiraini Ngari and Abednego Ngombo Ngari. That the distribution was equitable and thus he opposed the revocation as each family is represented.
22. The Respondent made the following main averments in her lengthy Replying Affidavit: That she opposes the said application vehemently and prays that it be dismissed with costs; That she was neither served with the order dated June 27, 2018 and nor was she informed of its contents or import before it was inserted as annexure CNN in this application; That on April 24, 2018 land parcel Mwerua/Gitaku/96 had been transferred to Judy Wamuyu Macharia, Bernard Mwai Njiraini, Joseph Mwai Ngombo and herself as per the confirmed grant issued by Justice RK Limo J on June 15, 2016; That the partitioning of Land Parcel Mwerua/Gitaku/96 was done on June 23, 2018 and no inhibition had been registered at the Lands Office.
23. Further the Respondent asserts that the application filed by the applicants is a gross abuse of the court process since they are not children of the deceased or dependants; That the applicants who are all sons of Abednego Ngombo Ngari who was a son of the deceased herein were properly catered for as their father's share was awarded to Joseph Murimi Ngombo in the grant dated June 15, 2016; That the applicants father Abednego Ngombo had his own parcel of land Mwerua/Mutithi/47 which the applicants and their siblings have already inherited.
24. The parties also filed written submissions which are carefully considered within the body of the analysis hereunder. It is apt to mention that the 1st and 2nd interested parties' submissions concern their opposition to the revocation of the grant, which application has not yet been substantially argued.
25. As for the 4th Interested Party, he submitted that he is a purchaser for value of an interest in land without notice of the order dated June 27, 2018. He asserts that he has a valid agreement of sale which



was blessed with the requisite consent of the land control board dated July 19, 2018. As far as he was concerned, at the time of transfer of land parcel Mwerua/ Gitaku 1855 the grant dated June 15, 2016 had not been revoked and there was no caution or encumbrance registered against the title.

26. He cited the case of *Damaris Wanjiru Nganga v Loise Naisiae Leiyen & another [2015] eKLR* where Munyao J held:

' It is unusual, if not out rightly improper, for a plaintiff to seek orders against a party, described as interested party. If a litigant wants orders against any person, then such person needs to be defendant, so that they may lodge their objection to the claim of the plaintiff, or concede to it if they so wish'

Accordingly, the 4th Interested Party argued that it would be unfair and improper for any action to be taken that affected his land without his having been given a proper opportunity to be heard.

27. I have carefully considered the application and the documents and material availed by the parties, together with their submissions and authorities. I note that the applicant's submissions incorrectly. The issues that the court must determine are as follows, and each is analyzed as hereunder.

Issues

28. The issues that arise for determination are as follows:

1. Whether the interested parties should be enjoined in the suit.
2. Whether there should be grant of an Interim Order of Inhibition.
3. Whether there should be a grant of an order for stay of the proceedings in Baricho SPMC ELC Cases No 12,13, and 14 of 2019.
4. Whether the respondent should be punished by being committed to jail for disobeying court orders.

Analysis and Determination

Whether the interested parties should be enjoined in the suit.

29. The application by the Applicants to enjoin the interested parties to the suit since their Summons for Revocation of Grant are still pending determination by this Court, is not opposed by the respondent. Indeed, she argues that a reasonable tribunal would want to know why the applicants were seeking to revoke a grant which had conferred ownership to four people by suing only one of the four registered proprietors.
30. The procedure of enjoining new parties to a suit is well articulated under Order 1 of the *Civil Procedure Rules, 2010* which stipulates that a party can only be enjoined to a suit if the same is still ongoing and pending in a court of competent jurisdiction. This is the position in this case. Order 1 Rule 3 of the Civil Procedure Rules, 2010 provides:

' (1) All persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if separate suits were brought against such persons any common question of law or fact would arise'.



31. In *Lucy Nungari Ngigi & 128 others v National Bank of Kenya Limited & another* [2015] eKLR Gikonyo, J aptly stated:

' In law, joinder should be permitted of all parties in whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally; or in the alternative, where if such persons brought separate suits, any common question of law of fact would arise.'

32. Accordingly, this is a proper case for joinder. The interested parties should, and are hereby, enjoined in this suit. The interested parties will be entitled to be served with the pleadings in this matter.

Whether there should be grant of an Interim Order of Inhibition.

33. The applicants submit that the court has power to make an order of inhibition in favour of the applicant herein. Further, that the status quo of LR Mwerua/Gitaku should be maintained.
34. The respondents submit that in seeking that the order of status quo be maintained, the applicants who are grandchildren of Elijah Ngari are asking the court to disinherit them, the respondents. Further, the share for the applicants which ought to have gone to their father Abednego Ngombo Ngari has rightly been allocated to Joseph Murimi Ngombo in the confirmed grant dated June 15, 2016 to hold in trust for himself and his siblings. On the issue of inhibition, the respondent notes that these prayers are being sought against interested parties who had not been enjoined in the suit when the alleged transgression was done.
35. The court notes that the applicants filed an application for Revocation of grant herein vide Summons dated June 25, 2018. They pray for a grant of an interim order of inhibition against transactions relating to LR Mwerua/Gitaku/1852, 1853, 1854, 1855 and 1856 and an order maintaining the status quo.
36. The applicants claim that the respondent, who was the administratrix of the deceased's estate, violated the court order on July 17, 2018 when she caused Land Parcel Mwerua/Gitaku/96 to be partitioned into five portions, namely, LR Mwerua/Gitaku/1852, 1853, 1854, 1855 and 1856. Further, the applicants claim that when the court made its ruling after hearing the parties on February 7, 2019 and ordered that the inhibition be issued against any dealing in Mwerua/Gitaku/96, it did not know that the parcel had been partitioned.
37. The respondent deponed in her replying affidavit that when the partitioning of Mwerua/Gitaku/96 was done on June 23, 2018 no inhibition had been registered at the Lands Office. Further, the applicants who are all sons of Abednego Ngombo Ngari who was a son of the deceased herein, were properly catered for as their father's share was awarded to Joseph Murimi Ngombo in the grant dated June 15, 2016.
38. Section 68 *Land Registration Act* gives the court discretion to inhibit registered dealings on land for a particular time or until the occurrence of a particular event.
39. The principles for the granting of an inhibition are the same one as those for the granting of an injunction. The principles were laid down in the Case of *Giella v Cassman Brown* (1973) EA 358. The applicant must establish a prima facie case with a probability of success. An injunction will not normally be granted unless damages will not be an adequate remedy. Where the court is in doubt the application will be decided on a balance of convenience.
40. The respondent deponed in her replying affidavit that the applicants are all sons of Abednego Ngombo Ngari who was a son of the deceased. Thus, they were not the deceased's children, herein but



grandchildren, and were properly catered for as their father's share was awarded to his son Joseph Murimi Ngombo, in the grant dated June 15, 2016.

41. From the material laid before the court, I am of the considered view that the applicants have not presented a prima facie case with a probability for success. Accordingly, there is no basis for the grant of an interim order of inhibition.

Whether there should be a grant of an order for stay of the proceedings in Baricho SPMC ELC Cases No 12,13, and 14 of 2019.

42. The applicants submitted that the actions of the Respondent and the interested parties herein, resulted to the partitioning of LR Mwerua/Gitaku/96 into LR Mwerua/Gitaku/1852,1853, 1854,1855 and 1856. Consequently, the resultant parcels now have new registered owners who have filed ELC cases namely Baricho SPM ELC Cases No 12, 13 and 14 of 2019. They urge that the ELC cases were filed in bad faith and are an abuse of the court process since the subject parcels of land are the subject of the proceedings herein.

43. They submitted that the Summons for Revocation of Grant are very clear that the Applicants were in possession of the suit land and that position should not have been interfered with pending the hearing and determination of the said summons They urged the court to stay the proceedings in the ELC cases before the lower court until it determined the Summons for Revocation of Grant herein.

44. The Applicants rely on Section 3A of the Civil Procedure Act which provides that:

' Nothing in this Act shall limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court. '

45. The applicants relied on the case of Mukunya Mugo 'A' & Another v Elizabeth Mugure Mukunya [2019] eKLR where the court cited the case of Global Tours & Travels Limited; Nairobi HC Winding Up Cause No 43 of 2000 in which Ringera J (as he then was) held:

' As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of Justice the sole question is whether it is in the interest of justice to order stay of proceedings and, if it is, on what terms it should be granted'.

46. The applicants' submission is that the cancellation of all entries in the registers of the parcels of land in question as well as the title deeds therein will protect the property rights and interests of the Applicants herein and protect them from being condemned unheard as the suit land is in real danger of being alienated. As such, they urged that it is in the interest of justice for the court to revert to the position extant when an order of inhibition against any transactions relating to LR Mwerua/Gitaku/96 on June 27, 2018 was issued.

47. These arguments are attractive, but as noted, are untenable given that the orders would affect interested parties who are not parties to the present suit., but are parties to a suit in the ELC courts to which the applicants are also not parties. This would be absurd, and in addition, it is questionable whether this court has supervisory jurisdiction over suits in the lower courts relating to matter to which the ELC courts have sole jurisdiction.

48. Whilst it may be that the ELC cases were filed in bad faith and are potentially an abuse of the court process since the subject parcels of land are the subject of the proceedings herein, I think the correct



action would be for this court not to intermeddle with those suits in the ELC court for, amongst other reasons, jurisdictional challenges, and violation of the right to be heard. As pointed out in the case of [JMK v MWK & Anor \[2015\] eKLR](#) cited by the respondent:

' The courts of this land have been consistent on the importance of observing the rules of natural justice and in particular hearing a person who is likely to be adversely affected by a decision before the decision is made'

49. For the foregoing reasons, this court does not find it prudent or apt to issue an order for stay of the proceedings in Baricho SPMC ELC Cases Nos 12,13, and 14 of 2019.

Whether the respondent should be punished by being committed to jail for disobeying court orders

50. The applicants' submission was that, in order to uphold the integrity of the court and the sanctity of its orders, it is imperative that the Respondent herein be punished for violating the express orders of this court. They cite Section 4(i)(a) of the [Contempt of Court Act](#) which defines contempt of court to include civil contempt which means willful disobedience of any judgement decree, direction, order or process of a Court or willful breach of an undertaking given to Court.

51. It is deponed in paragraph 5 of the applicants supporting affidavit that the respondent was served with the court order on June 28, 2018, by a court process server but declined to sign the same. The Court Process server's affidavit of service was also annexed as CNN2.

52. The applicants in their supplementary affidavit dated July 16, 2019 deponed that respondent was aware of the interim orders of inhibition and maintenance of status quo on June 28, 2018 when she was served with the same. Consequently, the partitioning of the suit land, which the respondent facilitated on July 17, 2018, was done in blatant violation of the orders of the court.

53. The respondent's submission was that she was not served with the order dated June 27, 2018. However, she added that even if she had been served with the said order, the applicant has not attained the threshold required to warrant committal for contempt. She submits that a perusal of the order attached to the applicant's supporting affidavit dated April 10, 2019 as annexure CNN1 indicates that the impugned order does not include the mandatory penal notice.

54. According to the [Black's Law Dictionary](#), contempt of court is defined as follows:

' Contempt is a disregard of, disobedience to, the rules or orders of a legislative or judicial body, or an interruption of its proceedings by disorderly behavior or insolvent language, in its presence or so near thereto as to disturb the proceedings or to impair the respect due to such a body'

55. In [Civil Case No 111 of 2016 Cecil Miller vs Jackson Njeru & Another \[2017\] eKLR](#) Njuguna J listed the elements of civil contempt as follows; -

' The element of a Civil Contempt as espoused in a book titled 'Contempt in Modern New Zealand', were set out as follows:

- a. The terms of the order (or injunction or undertaking) were clear and unambiguous and were binding on the defendant.
- b. The defendant had knowledge of or proper notice of the terms of the order.
- c. The defendant has acted in breach of the terms of the order and.



d. The defendant conduct was deliberate.'

56. Section 63 (c) of the [Civil Procedure Act](#) provides that:

' A disobedience of an order of a temporary injunction will attract punishment in the form of imprisonment or attachment and sale of the contemnor's property.'

57. In the present case, the respondent submitted that even if she had been served with the said order, it did not have the mandatory penal notice. She relied on the Court of Appeal case of [Jacinta Njeru Kaitha v David K. Kanyiri \[2015\] eKLR](#) where the English procedure on was adopted in Kenya when the Court stated and held:

' 23. The latest exposition of the law on contempt came from two decisions of this court namely: Christine Wangari Gachege versus Elizabeth Wanjiru Evans and 11 others [2014] eKLR, and Shimmers Plaza Limited versus National Bank of Kenya Limited [2015] eKLR a decision of this court made as recently as the February 18, 2015. In those decisions, the current developments in the law of contempt in England were extensively explored and the decisions of the High court in the Teachers Service Commission case and the Basil Criticos case (supra) rationalised. The court found that under the English [Contempt of Court Act](#) of 1981, in Part 81(Applications and Proceedings in relation to contempt of court), there were 'four different natures or forms of violations under contempt of court'. The relevant violation for purposes of the matter before us is stated under Rule 81.4 (a), that is :-

'Contempt for breach of a judgment, order or undertaking to do or abstain from doing an act'.

24. The court reaffirmed the procedures enumerated under that rule for punishment which requires service of the order and penal notice. Rule 81.9 makes provision that all judgments or orders or undertakings to do or not to do an act may not be enforced in contempt proceedings unless a warning to the person required to do or not to do the act in question that disobedience to the order would be a contempt of court punishable by imprisonment, a fine or sequestration of assets, has been prominently displayed on the front of the copy of the judgment or order served. Consequently, the court order and penal notice must be served simultaneously. Rule 81.5 governs personal service of the judgment or order which must carry a penal notice before the expiry of the period to perform an act, unless the court dispenses with the personal service under Rule 81.8.'

58. It is to be noted that the requirement to perfect service demands the mandatory simultaneous service of a penal notice to the order served. I have not seen any penal notice on the file. Indeed, the affidavit of service (CNN2) does not indicate that anything, other than the order in the form issued by the court, was served.

59. Further, the affidavit of service indicates that the respondent was pointed out by the 3rd applicant at the time of service. For such an important order the receipt of which a respondent has purportedly declined to sign in acknowledgment, one would expect that the 3rd applicant would have sworn a supporting affidavit corroborating the service. This would fulfil the requirement that the respondent was truly served personally in the absence of an acknowledgment.

60. This court is not satisfied that there was proper service of the court order and the penal notice, thus contempt cannot lie.



61. Finally, whilst perusing the file, I noted the Replying affidavit of the respondent dated July 16, 2018, which annexes the Mutation Form that was used to give instructions for the sub-division of Mwerua/Gitaku/96. The instructions to the Surveyor appear to have been given prior to June 23, 2018 because the Form indicates that the registered proprietors were to meet the surveyor on that date. On page 2 of the Form the sketch plan of the proprietors' intentions to sub-divide the parcel are dated June 23, 2018. On page 3 of the Form the Surveyor's certificate under section 9 of the survey regulations appears to have been issued on June 26, 2018. On page 4 of the Form, the confirmation of the survey and authority to register is dated June 16, 2018
62. The date of the registration of the Mutation Form on the first page is shown as July 1, 2018. Thus, the instructions to partition the land had been given before the Interim court orders were issued on June 27, 2018. To that extent, the partition horse had bolted from the stable before the time the orders of June 27, 2018 had been issued by the court.
63. In these circumstances, the proper action would have been for the applicants to file a caution on the strength of the court orders

Disposition

64. On each of the issues herein the applicant has failed, and the application is hereby dismissed. Each party to bear its own costs.
65. Orders accordingly

Dated at Kerugoya this 19th day of October, 2022

RICHARD MWONGO

JUDGE

Delivered in the presence of:

1. Muchira - for the Respondent and 4th Interested Party
2. Muturi for the Applicant
3. No representation - Joseph Murimi 3rd Interested Party
4. Bernard Njiraini - 2nd Interested Party present in person
5. Judy Wamuyu - 1st Interested Party present in person
6. Mr. Murage - Court Assistant

