



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CORAM: D. K. Kemei – J

CIVIL SUIT NO. 2 OF 2014

WENDANO MATUU COMPANY LIMITED.....1ST PLAINTIFF

STEPHEN NDAMBUKI MULI.....2ND PLAINTIFF/RESPONDENT

ONESMUS MUISYO KIMATU.....3RD PLAINTIFF/RESPONDENT

VERSUS

JOSHUA KIMEU KIOKO.....1ST DEFENDANT/APPLICANT

JAMES KIOKO KIVUVO.....2ND DEFENDANT/APPLICANT

JOHN BOSCO NDIINGA.....3RD DEFENDANT/APPLICANT

SAMUEL MWANZA NZIOKA.....4TH DEFENDANT/APPLICANT

JUVENALIS MUSYOKI KAVITA.....5TH DEFENDANT/APPLICANT

MUNGU NGOLO.....6TH DEFENDANT/APPLICANT

ROSE NDANU MUTUA.....7TH DEFENDANT/APPLICANT

RULING

1. The Defendants/Applicants vide a notice of motion dated 24/9/2019 filed under Order 40 Rule 3(1) of the Civil Procedure Rules,2010, Section 1A,1B & 3A Civil Procedure Act and Section 5(1) Judicature Act seeks the following orders:-

1. THAT Stephen Ndambuki Muli (2nd Plaintiff) and Onesmus Muisyo Kimatu (3rd Plaintiff) be arrested and committed to prison for a period not exceeding six (6) months for contempt of court.

2. THAT costs of the application be paid by the 2nd and 3rd Plaintiffs herein.

2. The application is based on several grounds inter alia:- that; On 1/2/2017 this Honourable court (Nyamweya J.) made an order maintaining the status quo and specifically restraining both the Plaintiff and Defendants or their agents from selling, transferring, subdividing, advertising for sale, charging or in any other way dealing with or disposing the properties known as Donyo Sabuk/Kiboko Block 1/1812,Donyo Sabuk/Kiboko Block 1/1884 and Donyo Sabuk/Kiboko Block 1/1885 pending the hearing and determination of the Notice of Motion dated 24/6/2014; that on 21/9/2019, this Honourable court delivered a ruling whereby it found the defendants guilty of contempt of court and set the matter down for mitigation and sentencing at a later date, which he court fixed (17/6/2019); that mitigation is yet to be done, and the notice of motion dated 24/6/2014 is, therefore yet to be determined; that regardless of the foregoing, and in clear contravention and breach of this Honourable court's aforesaid orders dated 1/2/2017, the 2nd Plaintiff (Stephen Ndambuki Muli) and the 3rd Plaintiff (Onesmus Muisyo Kimatu) purporting to be directors of the First Plaintiff company(though they are not such directors) signed and executed land transfer instruments on 17/4/2019, and contemptuously transferred land parcel No. Donyo Sabuk/Kiboko Block 1/1884 to a third party (CANON ALUMINIUM FABRICATORS COMPANY LIMITED); that records held by the Registrar of companies as at the time of the aforesaid contemptuous land transfer show that the defendants, but not the 2nd, and 3rd plaintiffs, were and still are the directors of the 1st plaintiff company; that this Honourable court ought to uphold its authority and dignity by punishing the 2nd and 3rd Plaintiffs for contempt of court.

3. It is the defendants' contention that the interim orders of status quo issued by Justice Nyamweya were disobeyed by the plaintiffs since their advocates were present in court when they were issued. It was also contended that the plaintiffs ought not to have taken a move to purport to enter into sale arrangements with third parties over the 1st plaintiff's assets while the records at the Registrar of companies still has the defendants as directors. It was finally contended that the court should stamp its authority and dignity by punishing the 2nd and 3rd plaintiffs for being in contempt of court.

4. The application was opposed by the Plaintiffs. Vide a replying affidavit sworn on 3/12/2020 the 2nd plaintiff averred inter alia; that the Plaintiffs Notice of Motion dated 24/6/2014 was determined upon the delivery of the ruling of Justice G. V Odunga dated 21/1/2019 and hence the orders of Justice Nyamweya issued on 1/2/2017 lapsed with the said determination; that the purported transfer of land was executed on 17/4/2019 more than 86 days after the said ruling and determination in respect of the application dated 24/6/2014; that the claim lodged by the defendants is disingenuous, false and devoid of any lawful or factual basis since from 21/1/2019 there were no orders in force that barred the Respondents from transferring the said properties to third parties on behalf of the 2nd plaintiff and 3rd plaintiffs and hence the contempt proceedings against them are frivolous, vexatious and an abuse of the court process as it discloses no legitimate/ lawful cause of action against them.

5. Parties took directions to canvass the application by way of written submissions. However, its only submissions by the Plaintiffs' counsel dated 26/4/2021 that are on record. Learned counsel submitted that upon the determination of the Plaintiffs' application dated 24/6/2014 by Justice Odunga on 21/1/2019 the orders that had been issued by Justice Nyamweya dated 1/2/2017 lapsed with the said application. It was further submitted that the respondents are not in contempt of court as alleged since the defendants have not satisfied the requisite standard of proof as was stated by the Court of Appeal in the case of **Mutitika V. Baharini Farm Ltd [1985] KLR 229,234**. The court was urged to dismiss the Defendants' application dated 24/9/2019 with costs.

6. I have considered the rival affidavits and the submissions herein. It is not in dispute that the Plaintiffs herein had filed an application dated 24/6.2014 in which they sought for an interim order of injunction to restrain the defendants herein pending determination of the said application and that the same was granted by Nyamweya J on 1/2/2017 as follows:

“3) in the meantime, the status quo be maintained with respect to the properties known as Donyo Sabuk/Kiboko Block1/1812, Donyo Sabuk/Kiboko Block1/1884 and Donyo Sabuk/Kiboko Block1/1885 shall be that neither the plaintiff nor the Defendants or their agents shall sell, transfer, subdivide, advertise for sale, charge or in any other manner deal with or dispose of the said properties pending the hearing and determination of the Notice of Motion dated 24th June, 2014.”

It is also not in dispute that the said application dated 24/6/2014 was later determined by Justice Odunga on the 21/1/2019 wherein he found the defendants guilty of contempt of court. The defendants were subsequently sentenced by this court. It is also not in dispute that the plaintiffs herein later transferred parcel number **Donyo Sabuk /Kiboko Block 1/1884** to third parties on the 17/4/2019. The issue for determination is whether the 2nd and 3rd Plaintiffs committed contempt of court.

6. The Defendants/ Applicants have pitched tent and asked this court to find the Second and Third Plaintiffs/Respondents in contempt of Justice Nyamweya's orders of 1/2/2017 that restrained both the Plaintiffs and Defendants together with their agents from interfering with properties namely **Donyo Sabuk/Kiboko Block 1/1812, Donyo Sabuk/Kiboko Block 1/1884 and Donyo Sabuk/Kiboko Block 1/1885**. The 2nd and 3rd Plaintiffs' contention is not whether or not they sold and transferred the properties in disobedience of the court order but whether there was a court order in force as at the time of sale and transfer that stopped them from dealing with the said properties on behalf of the 1st Plaintiff. It is not in dispute that the 2nd and 3rd Plaintiffs had knowledge of the court order.

8. **Mativo J.** in **Samuel M. N. Mweru & Others v National Land Commission & 2 others [2020] eKLR** relied on the High Court of South Africa case of **Kristen Carla Burchell vs Barry Grant Burchell, Eastern Cape Division Case No. 364 of 2005** where it was held that: -

“...It is an established principle of law that in order to succeed in civil contempt proceedings, the applicant has to prove (i) the terms of the order, (ii) Knowledge of these terms by the Respondent, (iii) Failure by the Respondent to comply with the terms of the order.

Further the Learned Judge stated that:-

“Perhaps the most comprehensive of the elements of civil contempt was stated by the learned authors of the book Contempt in Modern New Zealand who succinctly stated:-

“There are essentially four elements that must be proved to make the case for civil contempt. The applicant must prove to the required standard (in civil contempt cases which is higher than civil cases) that:-

(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's conduct was deliberate.

9. The Defendants/Applicants have attached the court proceedings that contained the ruling of Justice P. Nyamweya's order as annexure JKK-(i). The court order that the Defendants/Applicants contend to have been disobeyed by the 2nd and 3rd Plaintiffs/Respondents reads inter alia as follows:-

3) In the meantime, the status quo to be maintained with respect to the properties known as Donyo Sabuk/Kiboko/1812, Donyo Sabuk/Kiboko Block 1/1884 and Donyo Sabuk/Kiboko Block 1/1885 shall be that neither the Plaintiff nor the Defendants or their agents shall sell, transfer, subdivide, advertise for sale, charge or in any other manner deal with or dispose of the said properties pending the hearing and determination of the Notice of Motion dated 24/6/2014.

P. NYAMWEYA, J

1/2/2017

10. The Plaintiff/Respondents assert that Justice Nyamweya's orders of 1/2/2017 lapsed upon the determination of the Plaintiffs/Respondents Notice of Motion dated 24/6/2014 by Justice G. V Odunga on 21/1/2019 where at paragraph 69 of his ruling held that the Respondents were guilty of contempt of court and must be punished accordingly and further at paragraph 73 the learned Judge directed the Respondents (Applicants herein) to personally appear before the court for the purposes of mitigation and sentencing.

11. Indeed the Court of Appeal in *Shimmers Plaza Limited v National Bank of Kenya Limited [2015] eKLR* was categorical that:-

"We reiterate here that court orders must be obeyed. Parties against whom such orders are made cannot be allowed to trash them with impunity. Obedience of Court orders is not optional, rather, it is mandatory and a person does not choose whether to obey a court order or not. For as Theodore Roosevelt, the 26th President of the United States of America once said:-

"No man is above the law and no man is below it; nor do we ask any man's permission to obey it. Obedience to the law is demanded as a right; not as a favour."

The courts should not fold their hands in helplessness and watch as their orders are disobeyed with impunity left, right and centre. This would amount to abdication of our sacrosanct duty bestowed on us by the Constitution. The dignity, and authority of the Court must be protected, and that is why those who flagrantly disobey them must be punished, lest they lead us all to a state of anarchy."

12. Similarly the Court of Appeal in *Central Bank of Kenya & Another vs Ratilal Automobiles Limited & Others Civil Application No. Nairobi 247 of 2006* held that it is a fundamental tenet of the rule of law that court orders must be obeyed and it is not open to any person or persons to choose whether or not to comply with or to ignore such orders as directed to him or them by a court of law.

13. It follows from the above decisions that there must be observance and obedience of an order issued by a court. Can the 2nd and 3rd Plaintiffs/Respondents be cited for contempt of a court order that they assert had lapsed? *Jason Sore Shikuku v Christopher Naibey Chemengu [2018] eKLR*. The court held:-

"Indeed, there is no evidence that the said ex-parte Orders were ever served upon the defendant as mandated by Order 40 Rule 4(3) of the Civil Procedure Rules. Those Orders therefore lapsed automatically by effluxion of law three days after they were issued. An order that has lapsed ceases to exist and cannot be the basis upon which any contempt proceedings can be founded."

14. I agree with 2nd and 3rd Plaintiffs' averments that the orders of Justice Nyamweya lapsed upon determination of the Notice of Motion dated 24/6/2014 by G.V.Odunga. The Defendants/Applicants herein having been found guilty for contempt of orders issued on 1/2/2017 and later punished, the said orders lapsed. The transfer of the land was done in April 2019 long after Justice G. V. Odunga delivered his ruling on 21/1/2019. Further, it is noted that the initial application dated 24/6/2014 had been filed by the plaintiffs against the defendants herein and upon issuance of the conservatory orders issued, the plaintiffs' concerns then had been met leaving only the main suit remaining for determination. It is noted that though the defendants contend that they are the bonafide directors of the 1st Plaintiff, they are yet to file and serve a counterclaim against the Plaintiffs' suit. Indeed, this court had earlier granted them the requisite leave to do so but are yet to do so. It is quite clear that the orders dated 1/2/2017 were to be in force until the determination of the application dated 24/6/2014. Upon the determination of the aforesaid application and the subsequent sentencing of the defendants, none of the parties sought for further orders to be issued pending determination of the main suit. The defendants indicated to the court that they had lodged an appeal against the court's ruling dated 21/1/2019 and to date the court has not been apprised of the outcome of the appeal. The main suit is yet to be set down for hearing as there are some few pending applications to be determined. Looking at the explanation offered by the 2nd and 3rd Plaintiffs and the express orders issued on 1/2/2017, I am unable to find that the said plaintiffs are guilty of contempt of court as the act complained of took place long after the lapse of the conservatory orders. The said plaintiffs had described themselves as directors of the 1st plaintiff and as such they are entitled to act for the 1st plaintiff in the absence of an order to the contrary. The issue as to the who are the directors of the 1st plaintiff is the crux of the main suit now pending for determination. This leads me to come to the conclusion that the defendant/applicants have not proved the allegations of contempt of court against the 2nd and 3rd plaintiffs beyond the threshold of proof.

15. In the result, I find the Notice of Motion dated 24/9/2019 lacks merit. The same is dismissed with costs.

It so ordered.

DATED AND DELIVERED AT MACHAKOS THIS 20TH DAY OF MAY, 2021.

D. K. KEMEI

JUDGE