



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL SUIT NO. 220 OF 1992**

ANGELLO COSTABIR.....1<sup>ST</sup> PLAINTIFF

IRDIS HAJI OSMAN.....2<sup>ND</sup> PLAINTIFF

**-VERSUS-**

**HUSSEIN ALI ODEY**

**AMINA ALI ODEY**

**FATUMA ALI ODEY (Suing as the legal representatives of the**

**estate of AHMED ALI ODEY-Deceased).....1<sup>ST</sup> DEFENDANT**

**JUSTUS NYAMU GATONDO.....2<sup>ND</sup> DEFENDANT**

**GERALDINE JAMES T/A FLAVE ENTERPRISES.....3<sup>RD</sup> DEFENDANT**

**WOOLWICH INVESTMENTS LIMITED.....4<sup>TH</sup> DEFENDANT**

**THE CHIEF LANDS REGISTRAR.....5<sup>TH</sup> DEFENDANT/CONTEMNOR**

**RULING**

1. The 1<sup>st</sup> plaintiff in the present instance took out the Notice of Motion dated 28<sup>th</sup> August, 2017 supported by the grounds laid out on its body and the facts deponed in his affidavit. The 1<sup>st</sup> plaintiff is seeking the following orders from this court:

(i) Spent.

(ii) Spent.

(iii) *THAT this Honourable Court do find the Chief Lands Registrar, 5<sup>th</sup> defendant herein, guilty of contempt of court for failure to comply with the judgment and decree issued on 29<sup>th</sup> November, 2011 and 5<sup>th</sup> March, 2014 respectively.*

(iv) *THAT this Honourable Court be pleased to order the 5<sup>th</sup> defendant to appear before it on a date convenient to the court to show cause as to why he should not be committed to civil jail for contempt.*

(v) *THAT the costs of the application be borne by the 5<sup>th</sup> defendant.*

2. The 1<sup>st</sup> plaintiff through his affidavit stated that judgment was entered in his favour on 29<sup>th</sup> November, 2011 and a decree issued to that effect on 5<sup>th</sup> March, 2014. The 1<sup>st</sup> plaintiff went on to state that amongst the orders made in the aforesaid judgment was an order directed at the 5<sup>th</sup> defendant, compelling him to remove from the register the unlawful conveyances to the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants herein and to reinstate the caveat registered by the 1<sup>st</sup> plaintiff.

3. According to the 1<sup>st</sup> plaintiff's averments, the 5<sup>th</sup> defendant has inexcusably failed and/or neglected to comply with the above order despite various reminders urging him to do so.

4. The 1<sup>st</sup> plaintiff averred that it is evident the omissions by the 5<sup>th</sup> defendant amount to contempt of court and since the 1<sup>st</sup> plaintiff stands to suffer the risk of losing his entitlement to the property in question, it is necessary for this court to intervene.

5. In opposing the Motion, the 4<sup>th</sup> defendant filed Grounds of Opposition dated 15<sup>th</sup> January, 2019 arguing that the 5<sup>th</sup> defendant is yet to be issued with a notice to show cause as to why contempt proceedings should not be lodged against him, and that there is currently in place an order staying execution of the judgment and decree, thus making the application incompetent.

6. The 1<sup>st</sup> defendant equally put in Grounds of Opposition dated 4<sup>th</sup> February, 2019 contending that the application is premature since the 1<sup>st</sup> plaintiff is yet to meet the conditions precedent to registration of the suit property in his favour pursuant to the consent entered into between the 1<sup>st</sup> plaintiff and 1<sup>st</sup> defendant respectively in Civil Appeal No. 31 of 2014; and that the 1<sup>st</sup> plaintiff has utterly failed to disclose the facts of the said appeal.

7. The remaining defendants did not participate at the hearing of the application despite the evidence on record to show that they were served with copies of the same as well as notices to attend court; coupled with this court's directions for compliance.

8. The application was dealt with by way of written submissions. Going by the record, only the 1<sup>st</sup> plaintiff and 4<sup>th</sup> defendant filed theirs.

9. On his part, the 1<sup>st</sup> plaintiff through his submissions filed on 17<sup>th</sup> November, 2017 argued that whereas an order for stay of execution of the judgment pending appeal was previously granted, the same was lifted by the court on 8<sup>th</sup> March, 2017, thereby paving way for the 1<sup>st</sup> plaintiff to enforce his judgment.

10. The 1<sup>st</sup> plaintiff further argued that the 5<sup>th</sup> defendant not only participated in the hearing of the suit but was at all material times aware of existence of the judgment, citing the Court of Appeal case of *Shimmers Plaza Limited v National Bank of Kenya Limited [2015] eKLR* where it was acknowledged that knowledge of a court order is sufficient proof of service and a party need not be personally served with a copy thereof. He added that in any event, copies of the same as well as the decree were subsequently forwarded to the 5<sup>th</sup> defendant.

11. According to the 1<sup>st</sup> plaintiff, the wording of the judgment was crystal clear as to the obligations placed upon the 5<sup>th</sup> defendant and a failure to comply with the same automatically amounts to contempt of court. In so contending, the 1<sup>st</sup> plaintiff referred this court to the *Black's Law Dictionary* meaning of the term 'contempt' as follows:

*“a disregard of, or disobedience to, the rules or orders of a legislative or judicial body, or an interruption of its proceedings by disorderly behavior or insolent language, in its presence or so near thereto as to disturb the proceedings or to impair the respect due to such a body.”*

12. Moreover, the 1<sup>st</sup> plaintiff urged this court to consider the guiding principles in determining whether there has been contempt of court orders, as expressed in *Pinnacle (K) Travel and Safaris Limited v Omar Faruk Osman & 5 others [2017] eKLR* thus:

*a) That the order was clear, unambiguous and binding on the defendant.*

*b) That the defendant had knowledge of or proper service of the terms of the order.*

*c) That the defendant acted in breach of the terms of the order.*

*d) That the defendant's conduct was deliberate.*

13. Finally, the 1<sup>st</sup> plaintiff pleaded with this court to grant the orders being sought in his application.

14. On its part, the 4<sup>th</sup> defendant submitted that the 1<sup>st</sup> plaintiff's application is premised on the Contempt of Court Act No. 46 of 2016 which Act was declared unconstitutional for contravening the Constitution vide the judgment delivered on 9<sup>th</sup> November, 2018 in *Kenya Human Rights Commission v Attorney General & another [2018] eKLR*.

15. Be that as it may, it was the 4<sup>th</sup> defendant's submission that the application is in breach of the provisions of **Section 30(2)** of the **Contempt of Court Act** stipulating that contempt proceedings cannot be commenced against the accounting officer of a State or Government organ unless a notice of not less than 30 days has been issued to the relevant party requiring him or her to show cause as to why contempt proceedings should not be commenced against him or her.

16. The 4<sup>th</sup> defendant also maintained that the order for stay of execution is still in existence, hence the orders being sought ought not to be granted.

17. I have considered the grounds presented on the face of the Motion; the facts stated in the affidavit supporting it; the Grounds of Opposition put in by the 1<sup>st</sup> and 4<sup>th</sup> defendants separately; and the written submissions filed and exchanged between the 1<sup>st</sup> plaintiff and 4<sup>th</sup> defendant.

18. It is evident that the application concerns itself with the question on whether or not the 5<sup>th</sup> defendant ought to be found guilty of contempt of court, catered for under the provisions of the **Contempt of Court Act No. 46 of 2016**. That being the case, before I proceed any further on

the subject, I must first address the argument raised by the 4<sup>th</sup> defendant regarding the nullification of the said Act which essentially determines the competency of the application.

19. I have studied the relevant authority pointed out by the 4<sup>th</sup> defendant; being the case of **Kenya Human Rights Commission v Attorney General & another [2018] eKLR** where the Honourable Mr. Justice E.C. Mwita was faced with a petition brought by the Kenya Human Rights Commission essentially challenging the constitutionality of the **Contempt of Court Act** (supra). Upon hearing the parties on the petition, the learned judge reasoned *inter alia*, that the Act limits the powers of the court to punish for contempt, thus making it inconsistent with Articles 2(1), 4(2), 159 and 160 of the Constitution. In the end, the judge issued an order declaring the entire Act invalid for lack of public participation as required by Articles 10 and 118(b) of the constitution and for encroaching on the independence of the Judiciary. The learned judge issued a further order declaring Sections 30 and 35 of the Act inconsistent with the Constitution and thus a nullity.

20. That said, prior to the enactment of the now repealed Contempt of Court Act, **Section 5** of the **Judicature Act, Cap. 8** was the core provision for contempt of court. Subsequently, **the High Court (Organization and Administration) Act, 2015** under **Section 36** as well as **Section 41** of **the High Court (Organization and Administration) Rules, 2016** expressed the power of the courts to punish for contempt.

21. Following the enactment of the Contempt of Court Act in 2016, the above-referenced Sections were repealed under Sections 38 and 39 of the said Act which meant that the Act became the governing written law on matters to do with contempt of court.

22. However, upon its nullification in 2018 as mentioned hereinabove, I am persuaded that the applicable law to revert to in relation to contempt remains Section 5 of the Judicature Act being the paramount substantive law granting superior courts the power to punish for contempt. The section stipulates the following:

**“(1) The High Court and the Court of Appeal shall have the same power to punish for contempt of court as is for the time being possessed by the High Court of Justice in England, and that power shall extend to upholding the authority and dignity of subordinate courts.**

**(2) An order of the High Court made by way of punishment for contempt of court shall be appealable as if it were a conviction and sentence made in the exercise of the ordinary original criminal jurisdiction of the High Court.”**

23. It thus follows that pursuant to the above-cited provision, this court has the authority to entertain the present application.

24. On a separate note, I wish to mention that while the application was brought under the provisions of the High Court (Organization and Administration) Act, 2015; the High Court (Organization and Administration) Rules, 2016; and the Contempt of Court Act, it is noteworthy that at the time of its filing, the latter Act was still in existence. In exercising substantive justice, I will therefore consider the merits of the Motion in line with the applicable law.

25. The background of the suit in brief is that the plaintiffs in the present instance instituted the same, with the 1<sup>st</sup> plaintiff in particular claiming purchaser's interest over the property known as LR NO. 330/357 Nairobi (*“the suit property”*) on the premise that he and Ali Ahmed Odey (*“the deceased”*) had entered into a sale agreement in respect to the suit property for the consideration of Kshs.3,000,000/.

26. The 1<sup>st</sup> plaintiff indicated that upon executing the sale agreement on 9<sup>th</sup> July, 2011 he and the deceased agreed that he would make part payment in the sum of Kshs.1,157,520.80 to the advocate acting for both parties, which was done. That at the time of execution; however; the deceased mentioned that the title documents had been stolen, thereby prompting the 1<sup>st</sup> plaintiff to lodge a caveat against the suit property.

27. Unfortunately, the deceased passed on before the transfer could be effected, yet the said caveat was later withdrawn under suspicious circumstances, resulting in a series of transfers first to the 2<sup>nd</sup> defendant followed by the 3<sup>rd</sup> defendant and finally to the 4<sup>th</sup> defendant. The members of the 1<sup>st</sup> defendant were sued as the legal representatives of the estate of the deceased.

28. Upon hearing the parties, the trial court was satisfied that the plaintiffs had proved fraud on the part of the defendants, further finding that the 2<sup>nd</sup> defendant's title to the suit property was unlawfully acquired hence no lawful title could possibly have passed to the remaining defendants.

29. Consequently, the trial court entered judgment in favour of the plaintiffs on 29<sup>th</sup> November, 2011. Of relevance is the order issued in favour of the 1<sup>st</sup> plaintiff thereby declaring the conveyances to the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants a nullity, and a further order compelling the 5<sup>th</sup> defendant to remove from the register the unlawful conveyances and reinstate the caveat registered by the 1<sup>st</sup> plaintiff.

30. Returning to the application, it is now my duty to ascertain whether the 5<sup>th</sup> defendant has since complied with the relevant order referenced hereinabove and if not, whether he deserves to be held in contempt of the judgment and decree. In so doing, I will draw guidance from the elements brought out in **Pinnacle (K) Travel and Safaris Limited v Omar Faruk Osman & 5 others [2017] eKLR** and laid out hereinabove.

31. I have already set out a clear definition on what amounts to contempt hereinabove as portrayed in the **Black's Law Dictionary, 8<sup>th</sup> edition**. It is thus evident that the inexcusable disobedience to or disregard for court orders is deemed to be contemptuous.

32. The intention behind the principle of contempt of court is to ensure an adherence to court orders and consequently, the maintenance of the rule of law and dignity surrounding the courts as well as to create repercussions for failure to comply. Such position was acknowledged

in the case of *Econet Wireless Kenya Ltd v Minister for Information & Communication of Kenya & another [2005] eKLR* with reference to the unreported Court of Appeal case of *Gulabchand Popatlal Shah & Another-Civil Application No. 39 Of 1990* where the following was elaborated:

***“...It is essential for the maintenance of the Rule of Law and good order that the authority and dignity of our courts are upheld at all times. This court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors...”***

33. It is not contested that the judgment was in favour of the 1<sup>st</sup> plaintiff and a decree was issued to that effect in clear and unambiguous terms. It is also not in dispute that the order in question was directed at the 5<sup>th</sup> defendant specifically.

34. I have ascertained from the record that the 5<sup>th</sup> defendant was represented in those proceedings and participated in the suit to the point of filing written submissions.

35. As per the record, it would appear neither the 5<sup>th</sup> defendant nor his advocate was present in court during delivery of the judgment. Needless to say that the 1<sup>st</sup> plaintiff annexed to his affidavit two (2) letters dated 10<sup>th</sup> May, 2017 and 9<sup>th</sup> June, 2017 addressed to the 5<sup>th</sup> defendant, forwarding copies of the judgment and decree as well as enquiring on the timelines for compliance. The said letters bear the stamp of the 5<sup>th</sup> defendant which leads me to conclude that service was effected.

36. In view of the foregoing, I am convinced that the 5<sup>th</sup> defendant had knowledge of the declaratory order made against him. There is nothing to show that the 5<sup>th</sup> defendant made any attempts at responding to the above letters, neither did he offer a reply to the averments made in the Motion despite being well represented by counsel and being granted the opportunity of doing so by this court. Further to this, there is nothing to show that the 5<sup>th</sup> defendant has either complied with the relevant order or given any reasons/explanation for the non-compliance.

37. Having determined the above, I similarly note from the record that the 1<sup>st</sup> defendant lodged an appeal against the judgment vide Court of Appeal Civil Appeal No. 31 of 2014 and further filed the application dated 2<sup>nd</sup> February, 2012 seeking an order for stay of execution pending its hearing and determination. The application was heard and a conditional order for stay of execution was granted by the High Court vide the ruling delivered on 11<sup>th</sup> February, 2014.

38. Subsequently, the 1<sup>st</sup> plaintiff and 1<sup>st</sup> defendant entered into the consent dated 5<sup>th</sup> June, 2015 and filed on 10<sup>th</sup> June, 2015 by and large discharging the abovementioned order granting a stay of execution. It is not clear whether the consent order was adopted as an order of the court. Be that as it may, the 1<sup>st</sup> defendant through their advocate also filed a notice of withdrawal of the appeal on 8<sup>th</sup> June, 2015. The appeal was eventually marked as withdrawn vide the order issued on 1<sup>st</sup> July, 2015.

39. Going by the record, it would appear the 4<sup>th</sup> defendant sought to have the order for stay of execution of the judgment and decree extended to it through its application dated 15<sup>th</sup> July, 2015 and later filed a cross appeal in the same appeal on 30<sup>th</sup> June, 2016. From my study of the record, it is apparent that the interim order for stay of execution was extended on various occasions, the last extension being granted on 30<sup>th</sup> January, 2017. Nevertheless, there is nothing to indicate that the stay order was extended any further, thereby leading me to conclude that there is currently no subsisting interim order for stay of execution in place.

40. Considering the age of the judgment and the complete and unexplained lack of compliance by the 5<sup>th</sup> defendant, the only reasonable conclusion for me to arrive at is that the 5<sup>th</sup> defendant's non-compliance is a total disregard and disrespect for the judgment entered by the trial court, hence a show of contempt of court.

41. In the premises, I find the averments raised by the 1<sup>st</sup> plaintiff to be valid. I concur with the 1<sup>st</sup> plaintiff that an outright disobedience of court orders not only prejudices the affected parties but tramples on the dignity of the courts.

42. Accordingly, I find merit in the Motion and will allow it. The following orders are made:

*a) The Chief Lands Registrar, the 5<sup>th</sup> defendant herein, is found to be in contempt of the judgment and decree issued on 29<sup>th</sup> November, 2011 and 5<sup>th</sup> March, 2014 respectively, for failure to comply with order 6) of the decree.*

*b) Consequently, the 5<sup>th</sup> defendant is hereby ordered to appear on a date to be fixed by this court to show cause as to why he/she should not be committed to civil jail for being in contempt of the court order.*

*c) The 1<sup>st</sup> plaintiff shall have the costs of the Motion to be borne by the 5<sup>th</sup> defendant.*

Dated, signed and delivered at **NAIROBI** this 21<sup>st</sup> day of November, 2019

**L. NJUGUNA**

**JUDGE**

In the presence of:

..... for the 1<sup>st</sup> Plaintiff

..... for the 2<sup>nd</sup> Plaintiff

..... for the 1<sup>st</sup> Defendant

..... for the 2<sup>nd</sup> Defendant

..... for the 3<sup>rd</sup> Defendant

..... for the 4<sup>th</sup> Defendant

..... for the 5<sup>th</sup> Defendant