



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

ENVIRONMENT & LAND CASE NO.231 OF 2014

BENJAMIN BARASA WAFULA.....PLAINTIFF

VERSUS

ATTORNEY GENERAL.....1ST DEFENDANT

CAMILOUS ORIWO alias WIGE INVESTMENT.....2ND DEFENDANT

JULIUS JUMA alias UGENYA.....3RD DEFENDANT

HON. PATRICK WANGAMATI

[FOR SISULI DEVELOPERS LTD COMPANY].....4TH DEFENDANT

TERESIA WANGUI NJARIA.....5TH DEFENDANT

ROBERT KURIA alias WIFRED KANUI.....6TH DEFENDANT

ALI WAZIRI BAKARI.....7TH DEFENDANT

ALI ABDI AMDM YUSUF KAKAI [FOR MUSLIM

CEMETERY MANAGEMENT COMMITTEE].....8TH DEFENDANT

CALISTUS CHISEKA KASYAMANI.....9TH DEFENDANT

ISAAC WANEKHWE.....10TH DEFENDANT

ANNAH AKEYO MAHIANDA (NEXT OF KIN).....11TH DEFENDANT

JAQUILINE KODEYO MAHIANDA.....12TH DEFENDANT

JACKSON JUMA WENANI.....13TH DEFENDANT

JOB SHIUNDU MACHESO.....14TH DEFENDANT

NICHOLOUS OPELE ATEYA.....15TH DEFENDANT

RULING

On 7th March 2017 the late **MUKUNYA J** issued orders restraining the 1st, 2nd and 3rd defendants from, inter alia, encroaching the road of access passing by the parcels **No. NDIVISI/MUCHI/4080, 2570 and 2571** on one side and 4208 on the other side as well as erecting any developments on parcel **No. NDIVISI/MUCHI/4208** pending the hearing and determination of this suit. Injunctive orders were also issued with respect to land parcels **No. NDIVISI/MUCHI/4227, 4228, 4229, 4230 and 4231.**

It would appear that the said orders have been disobeyed by the 2nd, 3rd, 6th and 9th defendants herein as indicated to the Court by the plaintiff when he appeared before me on 3rd October 2018 to canvass his application dated 3rd July 2018.

That application which is the subject of this ruling seeks orders for the arrest of the 1st, 2nd upto 8th defendants for disobeying the said order by trespassing and developing the Applicant's portion of land parcel **No. NDIVISI/MUCHI/4108 and 1210** and also for encroaching on the access road.

The application is supported by the affidavit of **BENJAMIN BARASA WAFULA** the Applicant herein. I need not delve into the details of that affidavit for reasons that will soon be clear. All that I can observe for now is that there is yet another application dated 2nd August 2018 seeking almost similar orders. I must resist alluding to it since it is not before me for determination.

The application is opposed by the 2nd defendant **CAMILUS ORIWO alias NGOMA** who filed a replying affidavit on behalf of himself and the 3rd, 6th and 9th defendants in which they deny having been served with the order dated 7th March 2017 or having violated the same or any other order.

Again, and for purposes that will shortly be clear, I need not delve into the details of that replying affidavit.

With the consent of the plaintiff and **MR. WATTANGA** Counsel for the 2nd, 3rd, 6th and 9th defendants, the application was canvassed on the basis of the parties respective affidavits.

It is not in dispute that **MUKUNYA J** issued injunction orders on 7th March 2017 restraining some of the defendants herein from, inter alia, trespassing on the properties listed therein. This was pursuant to the plaintiff's application dated 23rd November 2016 brought under **Order 40 of the Civil Procedure Rules. Order 40 Rule 6** of the said Rules provides as follows:

“where a suit in respect of which an interlocutory injunction has been granted is not determined within a period of twelve months from the date of the grant, the injunction shall lapse unless for any sufficient reason the Court orders otherwise”. Emphasis added.

The order of interlocutory injunction having been granted on 7th March 2017, this suit ought to have been heard and determined by 7th March 2018 otherwise the said order lapses. This application was filed on 3rd July 2018 four months after the order had lapsed. An order that has lapsed cannot be the basis upon which any proceedings for contempt can be filed. The word lapse is defined in the **CONCISE OXFORD DICTIONARY 12TH EDITION** to include:

“the termination of a right or privilege through disuse or failure to follow appropriate procedure.”

In **BLACK'S LAW DICTIONARY 13TH EDITION**, the same term is defined as follows:

“The termination of a right or privilege because of a failure to exercise it within some time limit or because a contingency has occurred or not occurred”

It is clear therefore that the plaintiff cannot cling onto the lapsed order of injunction to have the defendants punished for disobedience thereof. In the case of **ERICK KIMINGICHI WAPANG'ANA & ANOTHER V. EQUITY BANK LTD & ANOTHER 2015 eKLR**, the Court of Appeal held as follows:

“Order 40 was made in clear cognizance of the preceding Rules in that order. It therefore follows that notwithstanding the wording of any order of interlocutory injunction, the same lapses if the suit in which it was made is not determined within twelve months “unless”, as the Rule further provides, “for any sufficient reason the Court orders otherwise.” Emphasis added.

It must be clear by now, therefore, that there is no order upon which the plaintiff can purport to cite any of the defendants herein for contempt or have them arrested for disobeying the orders issued by **MUKUNYA J** on 7th March 2017.

Ultimately therefore, the plaintiff's Notice of Motion dated 3rd October 2018 is devoid of merit. It is dismissed with no order as to costs.

BOAZ N. OLAO

JUDGE

22ND NOVEMBER 2018

Ruling delivered, dated and signed in open Court at Bungoma this 22nd day of November 2018 at Bungoma.

Plaintiff present in person

No appearance by the defendants.

BOAZ N. OLAO

JUDGE

22ND NOVEMBER 2018