



**REPUBLIC OF KENYA**

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

**CIVIL MISC APPL. NO. 476 OF 2012**

**NICHOLAS NJENGA MWANGI.....APPLICANT**

**- V E R S U S -**

**DAVID MWANGI NJOROGE ..... 1<sup>ST</sup> RESPONDENT**

**BENJAMIN MURIUKI GATURUKU**

**T/A BENSURE AUCTIONEERS..... 2<sup>ND</sup> RESPONDENT**

**KARUGA WANDAI.....3<sup>RD</sup> RESPONDENT**

**RULING**

1) This ruling is the outcome of the motion dated 8.10.2012 in which Nicholas Njenga Mwangi, the applicant herein sought for *inter alia*:

***1. THAT the applicant cites for contempt of court the contemnors, that is DAVID MWANGI NJOROGE, BENJAMIN MURIUKI GATURUKU t/a BENSURE AUCTIONEERS and KARUGA WANDAI for contempt of the honourable court wherein the contemnors jointly and severally wilfully purported to advertise and sell by public auction a parcel of land known as Title number Loc. 3/897 belonging to the applicant in violation of clear, unequivocal and valid court orders issued by the Thika Chief Magistrates Court in Thika CMCC 271 of 2001 (David Mwangi Njoroge vs. Harrison Marunda & Nicholas Njenga Mwangi)***

***2. THAT an order be granted committing DAVID MWANGI NJOROGE, BENJAMIN MURIUKI GATURUKU t/a BENSURE AUCTIONEERS and KARUGA WANDAI to civil jail for a period of six (6) months each or such other period as the court may determine for contempt of the honourable court wherein the contemnors jointly and severally wilfully purported to advertise and sell by public auction a parcel of land known as title number Loc, 3/897 belonging to the applicant in violation of clear, unequivocal and valid court orders issued by the Thika Chief Magistrates Court in Thika CMCC 271 of 2001 (David Mwangi Njoroge vs. Harrison Marunda & Nicholas Mwangi.)***

***3. THAT the court be pleased to grant any such or further order which is fit and expedient in the circumstances of this case.***

***4. THAT the cost of this application be provided for.***

2) The motion is supported by the verifying affidavit of the applicant. The motion is also accompanied by

the statutory statement executed by the applicant. When the motion was served upon David Mwangi Njoroge, Benjamin Gaturuku T/A Bensure Auctioneers and Karuga Wandai, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents. The 2<sup>nd</sup> and 3<sup>rd</sup> respondents each filed a replying affidavit to oppose the motion. The 1<sup>st</sup> respondent did not deem it fit to file a response to the motion. This court gave directions to have the motion disposed of by written submissions. At the time of writing this ruling, the 1<sup>st</sup> and 3<sup>rd</sup> respondents were the only parties who filed their submissions.

3) I have considered grounds set out on the face of the motion plus the facts deponed in the affidavits filed in support and against the motion. I have also considered the written submissions filed by the 1<sup>st</sup> and 3<sup>rd</sup> respondents.

4) It is the submission of the applicant that a temporary order for stay of execution was issued on 23.08.2011 prohibiting the 1<sup>st</sup> respondent, either by himself or his agents, servants and or auctioneers from auctioning, selling, alienating, dealing or transferring a parcel of land known as Title no. LOC,3/Mukuria/897. It is stated that the aforesaid order was served upon the respondents. The applicant has averred that while the orders for stay were pending ruling the respondents purported to advertise and sell L.R. no. LOC.3/Mukuria/897. The applicant submitted before this court that the purported sale was carried out when there were clear orders prohibiting the same. It is also pointed out that the court has already determined that the aforesaid parcel of land belongs to the applicant and that the land was not therefore available for sale by way of execution by the 1<sup>st</sup> respondent. This court was urged by the applicant to find that the respondents' acts constituted deliberate disregard of a valid court order and that they should be punished for contempt.

5) The respondent on the other hand have argued that by the time the sale was conducted on 17.7.2012 the restraining orders had lapsed because they were not extended and the ruling plus the orders were not served upon them until 18.7.2012. The respondents further argued that even if any contempt was committed, the same can only be punished by the trial court under Order 40 Rule 3(1) of the Civil Procedure Rules. The respondents also pointed out that the land was later restored to the owner in subsequent proceedings in the suit file and that the purchase price was refunded to the purchaser therefore no wrong was done. It was subsequently rectified. The respondents have also complained that the application for contempt took more than five years to prosecute.

6) Having considered the competing arguments, it is clear to me that the respondents are contesting that they were served with the extended order for stay of execution. They contend that those orders had lapsed by the time of the sale. It is not in dispute that the initial order for stay of execution issued on 23.8.2011 was served on 24.8.2011. The temporary order for stay were subsequently extended on various occasions. It is not therefore true that the respondents were not aware of the existence of the order for stay prohibiting the sale of the suit property. I am satisfied that the respondents were properly served as shown in the affidavit of service of Anthony Mwanzia Mulei.

7) The second issue raised and argued by the respondent is that the proper court to punish was the Chief Magistrate's Court which had issued the order. In my humble understanding, I find the argument unconvincing. The truth of the matter is that both the High Court and the trial court both have the power to punish for contempt. The power to punish was not taken away from this court. Though there was delay in prosecuting the application for contempt, it must be appreciated that there is no time limit fixed by law to bar a party from bringing up such applications. I find the aforesaid ground to be without merit. The other grounds raised by the respondents appear to be facts in mitigation submitted albeit prematurely.

8) In the end, I am convinced that the respondents breached the orders for stay of execution issued on 23.8.2011 by the Chief Magistrate's Court and extended to subsist in various occasions. Consequently I find them guilty for contempt. Having convicted them for contempt the contemnor and their legal advisers, they are now invited to submit facts in mitigation to enable this court mete out the appropriate sentence.

Dated, Signed and Delivered in open court this 24<sup>th</sup> day of November, 2017.

**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Plaintiff

..... for the Defendant