



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC SUIT NO. 240 OF 2018

SAMSON KANDIE.....PLAINTIFF/ RESPONDENT

VERSUS

JOEL KAMAU KIBE.....1ST DEFENDANT/ APPLICANT

ESTHER WAMBURA MUTURI.....2ND DEFENDANT/ APPLICANT

BASILINE LOGISTICS& INVESTMENTS COMPANY LIMITED.....3RD DEFENDANT/ APPLICANT

MICHAEL NJAU NJOROGE.....4TH DEFENDANT/ RESPONDENT

PETER NJUGUNA NJENGA.....5TH DEFENDANT/ RESPONDENT

CHIEF LAND REGISTRAR.....6TH DEFENDANT/ RESPONDENT

ATTORNEY GENERAL.....7TH DEFENDANT/ RESPONDENT

RULING

1. Coming up for determination are two applications dated 8th July 2021 filed by the 1st to 3rd defendants and another one dated 13th July 2021 filed by the plaintiff.

2. The Notice of Motion application dated 8th July 2021 seeks the following orders:

i. Spent.

ii. That pending the hearing and determination of this application inter parte this honourable Court be pleased to grant an interim order of injunction restraining the plaintiff/ respondent, by himself, agents or any person(s) acting on his behalf, from entering into, ingressing upon or in any way interfering with the applicants possession of the suit property, title No. LR No. 14970/57, pending the hearing and determination of this application.

iii. That prayer 2 be granted pending the hearing and determination of this matter scheduled for the 17th January 2022.

iv. That costs of this application be provided for.

3. These defendants aver that on 7th July 2021, the Plaintiff with the aid of armed persons tried to forcefully take possession of the property and threatened to cause physical harm and assault on the 1st to 3rd defendants. The matter was recorded at the Runda Police Station vide OB 16/07/07/2021. They further state that the suit property is in possession and control of the 3rd defendant having been duly transferred from the 2nd defendant and registered on 21st January 2014. That the land was purchased by the 2nd defendant from Triton Service Stations which was under the statutory management of the Kenya Commercial Bank Ltd. The 1st - 3rd defendants contend that they are the *bona fide* purchasers for value of the suit property and the title thereof held by the plaintiff had been acquired fraudulently.

4. It is also averred that the 6th Defendant has sworn a witness statement to the effect that the said title was fraudulently issued and should be

cancelled and that the matter was under investigation.

5. In rebuttal to the above, the plaintiff filed his own application dated 13th July 2021 seeking the following orders:

i. Spent.

ii. That the 1st and 2nd defendants in their personal capacity and as directors/ shareholders of the third defendant be arrested and committed to civil jail for six (6) months for wilfully disobeying the orders given by the honourable Court on 4th July 2018.

iii. That the Officer Commanding Runda Police Station as well as the Officer Commanding Gigiri Police Division be compelled to ensure compliance with the orders of this honourable Court.

iv. That the honourable Court be pleased to issue any other or further orders geared towards protecting the dignity and authority of the court and ensuring compliance with its orders.

v. That the defendants or respondents be restrained from accessing and or interfering with the suit property in anyway pending hearing and determination of the suit.

vi. That the Gigiri DCIO be compelled to release the investigation report to the plaintiff/applicant forthwith without any further delay.

vii. That the cost of this application be provided for.

6. The Plaintiff contends that on 4th July 2018, this Court issued a preservative order directing that the Plaintiff shall remain in possession of the suit property pending hearing and determination of the suit. However, on 8th July 2021, the 1st defendant made a report at the Gigiri Police Station that the plaintiff had evicted the 3rd defendant from the suit property and assaulted its caretakers. He however, did not inform the police of the Court order. Following this report, the Plaintiff's workers were arrested and spent the night locked up at the Gigiri Police Station and on the following day, they were taken to the Office of the Director of Public Prosecution for charging. Nonetheless, the ODPP refused to charge them on grounds that malicious damage could not hold against the Plaintiff who had rightful possession of the property. They were later released on police cash bail.

7. It is further averred that while the plaintiff's workers were in detention, the 1st, 2nd, and 3rd defendants invaded the suit property with excavators, trucks and bulldozers, dumped construction materials on the property and began to erect a wall.

8. He noted that the matter was reported at the Gigiri Police Station instead of Runda Police Station which had the territorial jurisdiction of the suit property. Adding that the 1st to 3rd Defendants had been making false reports of the Plaintiff at different police stations including at the Directorate of Criminal Investigations and as such the Plaintiff was frequently being harassed by police officers.

9. It is further stated that in the preservative order issued, the Officer Commanding Runda Police Station was to ensure compliance but the same had not been adhered to due to frustration from the OCS' seniors.

10. In a reply to the 1st - 3rd Defendants application dated 8th July 2021, the Plaintiff swore an affidavit dated 17th September 2021 in which he deponed that the application was *res judicata* since the prayers sought therein had been heard and determined in the application dated 18th May 2018 and the order delivered on 4th July 2018 which was still in effect rendered this court *functus officio*.

11. He added that he had been in possession of the suit property until 8th July 2021 when the 1st to 3rd defendants had his employees arrested and they then took possession. He stated that the forceful takeover was criminal in nature and defiance of court order amounted to contempt of court which is punishable and as such, the application should be dismissed with costs.

12. The applications were to be canvassed by way of written submissions but only the Plaintiff complied with this order. In relation to their application dated 13th July 2021, the submissions dated 19th October 2021 re-emphasised the grounds elucidated in their application by submitting that: The 1st to 3rd Defendants should be cited for contempt since they were aware of the court orders dated 4th July 2018 noting that they had annexed the said order in their bundle of documents. The fact that the 1st-3rd Defendants went to report the matter at the Gigiri Police Station was an act of defiance to the Court order.

13. The following cases were cited to buttress their averments; Johnson v Grant (1923) SC 789, where the court noted that "...The phrase 'contempt of court' ... the offence consists in interfering with the administration of the law; in impeding and perverting the course of justice..." , Teachers Service Commission v Kenya National Union of Teachers & 2 Others (2013) "...the reason why courts will punish for contempt of court is to safeguard the rule of law..." , Hadkinson Vs Hadkinson (1952) P 285 at 288: "It is the plain and unqualified obligation of every person against or in respect of whom an order is made by a court of competent jurisdiction to obey it unless and until that order is discharged" , Johnson Vs Walton (1990) 1 FLR350 at 352:"... when an injunctive order is made or when an undertaking is given, it operates until it is revoked on appeal or by the court itself..." , R Vs Attorney General & Another Exparte Mike Maina Kamau (2020) eKLR: "... an applicant for contempt of court should prove that the terms of the order were clear and unambiguous and binding on the Defendant...".

14. In regard to the application dated 8th July 2021, it was submitted that the 1st - 3rd Defendants' application was barred by the doctrine of

res judicata since the orders dated 4th July had not been set aside. The Plaintiff stated that the defendants have since set up a car yard on the suit land. Further the witness statement by Edwin Munoko Wafula could not be relied on since it had not been taken under oath nor had it been adopted before court as stipulated under S.35 of the Evidence Act. Thus the application dated 8th July 2021 should be dismissed with costs.

Analysis and determination

15. Having analysed the applications together with the affidavits, rival submissions and relevant legal framework and jurisprudence, this court finds that the issues for determination are whether:

i. The 1st and 2nd defendants should be cited for contempt and committed to civil jail for disobedience of court order dated 4th July 2018 and whether the court should order the DCIO at Gigiri to release their investigation report.

ii. The interim injunction orders sought by the 1st to 3rd defendants/ applicants are merited;

16. In regard to the orders sought in the application of 13.7.2021, I find that the orders given on 4.7.2018 read thus;

IT IS HEREBY ORDERED:

1. THAT the Notice of Motion dated 18th May 2018 shall be heard on 31st October 2018.

2. THAT the preservative order shall remain in force and the plaintiff shall remain in possession of the suit property.

3. ...

17. What I discern from the court record is that the Notice of Motion dated 18.5.2018 was not heard on 31.10.2018 or any other day. As regards the preservative orders, they were extended now and then but on 20.2.2019, there was no extension of the said orders. The said orders appear to have been revived on 26.11.2019 when they were extended upto 12.5.2020. However, there was no further extension of the said orders which means that no preservative orders are in existence!. It is clear that the orders of 4.7.2018 were NOT given pending the hearing of the suit!.

18. However, even if the orders of 4.7.2018 had been given pending the hearing of the suit, they would still have lapsed by operation of the law after one year going by the provisions of order 40 rule 6 of the Civil procedure rules –see Court of Appeal Case of **Erick Kimingichi Wapang’ana & Another vs. Equity Bank Limited & Another (2015) eKLR.**

19. What this means is that there are no orders in existence in which the issue of contempt of court orders can be raised.

20. As regards the prayer for release of the investigation report, this was not a court sanctioned process. If the Plaintiff (or the Defendants for that matter) desires to avail any kind of report, they are free to do so. To this end, such a party can request this court to issue summons to the relevant witness to produce the report(s).

21. As regards the application by the 1st-3rd Defendants dated 8.7.2021 for injunctive orders, the court has this to say; Firstly, the Notice of Motion dated 18th May 2018 filed by the plaintiff was not substantially heard and secondly, the 1st -3rd Defendants make reference to the events of 7.7.2021. In that regard, the said application of 8.7.2021 is not *res judicata* and the court is not *functus officio*.

22. *Are the injunctive orders sought merited?* I will deal with this issue both in relation to the application of 8.7.2021 by the 1st -3rd Defendants and the one of 18.5.2018 by the Plaintiffs for two reasons. Firstly, the matter is ripe for trial and is now scheduled for hearing and secondly, the necessity of Active Case Management so as to abide by the overriding objective set out under Section 1A and 1B of the Civil Procedure Act.

23. **Order 40 Rule 1 and 2 of the Civil Procedure Rules, 2010** provides that a Court may grant a temporary injunction or such order for the purpose of staying and preventing the wasting damaging...or disposition of the property as the court thinks fit. (*Paraphrased*). The issue on grant of temporary injunctions was settled in the case of **Giella v Cassman Brown (1973) EA** and reiterated in several case laws including **Nguruman Limited v Jan Bonde Nielsen & 2 others [2014] eKLR**; whereby courts held that the applicants must satisfy that they have a *prima facie* case with a probability of success. Secondly, an interlocutory order will not be granted unless it is demonstrated that the applicant might suffer irreparable injury which would not be adequately compensated by an award of damages. Lastly, if the court is in doubt on the above two requirements, it will decide the application based on the balance of convenience.

24. In **Paul Gitonga Wanjau v Gathuthi Tea Factory Company Ltd & 2 others [2016] Eklr**, the court held that ;

“ An injunction is an equitable remedy, meaning the court hearing the application has discretion in making a decision on whether or not to grant the application. The court will consider if it is fair and equitable to grant the injunction, taking all the relevant facts into consideration.” .

25. For the application of 8.7.2021, the prayers were sought pending the date of hearing (17.1.2022) of which the ruling is scheduled to be delivered on the said date. I do not wish to delve into conclusive findings of facts and the law at this interlocutory stage. As the matter stands,

the parties raise the issue of the different titles. The parties should focus on fast tracking the trial now that the matter already has a hearing date (which is the date of delivery of this ruling). I hold the view that the existence of the various applications would only have the effect of derailing the main trial. Thus this court will apply Active Case Management to shepherd the process of the prosecution of the main hearing.

26. In the case of **Lawrence Kinyua Mwai vs. Nyariginu Farmers Co. Ltd & Another (2019) eKLR**, I stated thus in a case where there were several unprosecuted applications;

“ Active Case management enhances processing efficiency, promotes court control of cases, and provides judicial officers with the tools that may be used to dispose off a case efficiently. These techniques reduce delays and case backlogs, and provide information to support the strategic allocation of time and resources - all of which encourage generally better services from courts”.

27. In light of the above, the disposal orders are given as follows:

- i. The Notice of Motion dated 18.5.2018 is suo moto dismissed.*
- ii. The Notice of Motion application dated 8th July 2021 and the one dated 13.7.2021 are dismissed.*
- iii. The current status quo appertaining on the suit land is to be maintained.*
- iv. Each party is to bear their own costs of the respective applications.*

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 17TH DAY OF JANUARY, 2022 THROUGH MICROSOFT TEAMS.

LUCY N. MBUGUA

JUDGE

In the presence of:-

Mr. K. Kamau for the Plaintiff

Mr. Allan Kamau for the 6th and 7th Defendants

Mr. Njenga for the 1st and 3rd Defendants

Mwangi holding brief for Mwandubo for 4th and 5th Defendants

Court Assistant: Eddel Barasa