



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC CASE NO. 853 OF 2012 (OS)**

**ANN NJERI MBUGUA (Suing as the personal Representative of the Estate of**

**PETER MBUGUA MUKORA).....PLAINTIFF**

**-VERSUS-**

**DAVID M. GATHAIYA (being sued as the personal Representative of the Estate of**

**Rachael Wairimu Mbugua).....1<sup>ST</sup> DEFENDANT**

**JOHN GITARI NDAMBIRI.....2<sup>ND</sup> DEFENDANT**

**GEOFFREY MUKINYA MBUKU.....3<sup>RD</sup> DEFENDANT**

**RULING**

**INTRODUCTION**

1. This Ruling herein is in respect of two Applications, namely the Applications dated the **10<sup>th</sup> of May 2021**, and the **21<sup>st</sup> of July 2021**, respectively.

2. In respect of the Application dated the 10<sup>th</sup> May 2021, the Plaintiff herein has sought for the following reliefs;

*a. ....Spent.*

*b. Declaration be made by this Honourable court for Contempt for court order against the 2<sup>nd</sup> & 3<sup>rd</sup> Defendants.[Wordings extracted verbatim from the Application]*

*c. Cost of this Application be in the cause.*

3. Upon being served with the subject Application, the 2<sup>nd</sup> & 3<sup>rd</sup> Defendants filed a Replying affidavit sworn on the **4<sup>th</sup> October 2021**, which was sworn by one John Gitari Ndambiri and in respect of which, same denied and/or controverted the allegations contained at the foot of the subject Application.

4. On the other hand, the Application the Application dated the **21<sup>st</sup> July 2021**, which has been filed by the 2<sup>nd</sup> and 3<sup>rd</sup> Defendant, seeks the following Reliefs;

*a. ....Spent.*

*b. The Orders of this Honourable Court given on the 31<sup>st</sup> August 2017 and issued on the 22<sup>nd</sup> April 2021, be set aside together with all subsequent orders issued thereof.*

*c. Prayer b if allowed, to apply to ELC Civil Suit No. 112 of 2010 (OS), which was also the subject of the Ruling of Hon. Justice Muchelule, Judge, dated the 19<sup>th</sup> January 2011 in ELC Civil Suit No. 648 of 2011 (OS).*

*d. Cost of this Application be provided for.*

5. Upon being served with the Application herein, the Plaintiff/Respondent filed a Replying affidavit sworn on the **27<sup>th</sup> September 2021** and in respect of which, same vehemently opposed the setting aside and/or variation of the orders of the court issued on the **31<sup>st</sup> August 2017**, either in the manner sought or at all.

#### **DEPOSITIONS BY THE PARTIES**

##### **DEPOSITION BY THE PLAINTIFF**

6. In support of the Application dated the **10<sup>th</sup> May 2021**, the Plaintiff has sworn an affidavit wherein same has averred as hereunder;

7. On or about the **31<sup>st</sup> August 2017**, this Honourable court granted an order whereby the Land Registrar, Nairobi, was ordered and/or directed to forbid all dealings or further registration of any entries in the Register over **L.R No. Dagoreti/Mutuini/913, 914, 915, 916 and 917**, respectively.

8. It has further been averred that despite the issuance of the said orders, the 2<sup>nd</sup> & 3<sup>rd</sup> Defendants herein has proceeded to disobey same and in particular, the 2<sup>nd</sup> Defendant has been moving to the property asking for the details from the tenants in the suit property, with an aim of moving to the Business Rent Tribunal, so as to obtain orders to enable same collect Rents therefrom.

9. On the other hand, the Plaintiff has further averred that the 3<sup>rd</sup> Defendant has on his part proceeded to construct a Perimeter wall fence in respect of the suit property and same is therefore keen to prevent the Plaintiff from enjoying the benefit of the suit Property.

10. Owing to the foregoing, it has been averred that the actions by and/or on behalf of the 2<sup>nd</sup> & 3<sup>rd</sup> Defendants amounts to Contempt of lawful court orders and in this regard, the 2<sup>nd</sup> & 3<sup>rd</sup> Defendants ought to be punished.

##### **RESPONSE BY THE 2<sup>ND</sup> & 3<sup>RD</sup> DEFENDANTS**

11. Vide Replying affidavit sworn by Geoffrey Mukinya Mbuku, namely, the 2<sup>nd</sup> Defendant herein, same has averred that the orders which were granted by the court on the **31<sup>st</sup> August 2017**, were issued against the 1<sup>st</sup> Defendant herein, who is now deceased and in any event same were issued long before the 2<sup>nd</sup> & 3<sup>rd</sup> Defendants were joined into the suit.

12. Secondly, the 2<sup>nd</sup> Defendant has averred that in any event, though the said orders were issued before same were joined into the suit, the said orders have never been served upon same and in this regard same were not aware of and/or privy to the impugned orders.

13. Thirdly, the 2<sup>nd</sup> defendant has averred that at any rate, the orders which are alluded to only restricted further entries and/or transactions involving **L.R No's Dagoreti/Mutuini/913, 914, 915, 916 and 917**, respectively and in this regard, it has not been shown that there has been any entries and/or activities affecting the suit properties, after the issuance of the orders referred to by the Plaintiff.

14. Finally, the 2<sup>nd</sup> Defendant has averred that contrary to the allegations by the Plaintiff, it is the 2<sup>nd</sup> & 3<sup>rd</sup> Defendants, who have been in occupation of the suit properties, even as at the time when the orders were issued.

15. In the premises, the 2<sup>nd</sup> Defendant has averred that the allegations of contempt, or Disobedience of Lawful Court Orders, are misleading and/or misconceived. Consequently, the 2<sup>nd</sup> & 3<sup>rd</sup> Defendant have sought to have the application dated the **10<sup>th</sup> May 2021**, Dismissed.

##### **APPLICATION DATED 21<sup>ST</sup> JULY 2021**

##### **DEPOSITION BY THE 2<sup>ND</sup> & 3<sup>RD</sup> DEFENDANTS**

16. As concerns the subject Application, it has been averred that the orders issued on the **31<sup>st</sup> August 2017**, touching on and/or concerning the suit premises, were issued in the absence of the 2<sup>nd</sup> & 3<sup>rd</sup> Defendants and hence it is imperative that the said orders be discharged.

17. It has further been averred that to the extent that the suit Properties belong to and/or are registered in the names of the 2<sup>nd</sup> & 3<sup>rd</sup> Defendants, same should be allowed to enjoy their Rights to and/or in respect to the suit Properties.

##### **RESPONSE BY THE PLAINTIFF**

18. On her part, the Plaintiff herein swore a Replying affidavit on the **27<sup>th</sup> September 2021**, and wherein same has averred as hereunder;

19. That the orders which were issued on the **31<sup>st</sup> august 2017**, were effectively meant to preserve and/or protect the status of the suit properties, so as to ensure that same are not alienated and/or disposed of, during the pendency of the suit.

20. Further, it has been averred that if the said orders were varied and/or vacated, either in the manner sought by the 2<sup>nd</sup> & 3<sup>rd</sup> Defendant,

then the entire suit herein would be defeated and/ or rendered an academic Exercise.

21. At any rate, the Plaintiff has further averred that the issues being raised in the subject Application, were actually raised before the court and same were duly considered in the cause of the ruling rendered on the **31<sup>st</sup> August 2017**. In this regard, the Plaintiff has alluded to the Doctrine of Res Judicata.

22. Owing to the foregoing, the Plaintiff has therefore implored the court to find and hold that the Application is Misconceived, an abuse of the Court process and otherwise, legally Untenable.

### **SUBMISSIONS**

23. The subject matter came up for Mention on the **13<sup>th</sup> October 2021**, whereupon it transpired that there were two Application which were pending for determination in the matter. In this regard, the Parties herein sought for and obtained directions to have the two-Application heard and disposed of together.

24. Pursuant to and in line with the request by Counsel for the respective Parties, the Court proceeded to and directed that the two-Application be heard and disposed of together. Besides, the Court also ordered that same be canvassed by way of written submissions.

25. It is imperative to note that the Parties herein thereafter proceeded to and filed their respective written submissions. For clarity, the Plaintiff filed her written submissions on the **22<sup>nd</sup> November 2021**, whilst the 2<sup>nd</sup> & 3<sup>rd</sup> Defendant filed their written submission on the **27<sup>th</sup> October 2021**.

26. Suffice it to say, the two-sets of written submissions forms part and parcel of the record of the Court and same have been duly considered and appreciated.

27. Nevertheless, it is worthy to point out that the written submissions have reiterated the averments that have been highlighted vide the Depositions contained at the foot of the various Affidavits filed by and/or on behalf of the Parties.

### **ISSUES FOR DETERMINATION**

28. Having reviewed the two (2) Applications herein, together with the Supporting Affidavit thereto and having considered the written submissions which were filed by and/or on behalf of the Parties, the following issues are germane for determination;

*a. Whether the 2<sup>nd</sup> & 3<sup>rd</sup> Defendant are guilty of contempt of court orders, either as alleged or at all.*

*b. Whether the 2<sup>nd</sup> & 3<sup>rd</sup> Defendants are entitled to the setting aside and/or variation of the Orders made on the 31<sup>st</sup> August 2017.*

*c. Whether the 2<sup>nd</sup> & 3<sup>rd</sup> Defendants are guilty of Latches.*

### **ANNALYSIS AND DETERMINATION**

#### **ISSUE NUMBER 1**

***Whether the 2<sup>nd</sup> & 3<sup>rd</sup> Defendant are guilty of Contempt of court Orders, either as alleged or at all.***

29. The Plaintiff herein has contended that the 2<sup>nd</sup> & 3<sup>rd</sup> Defendants have breached, disregarded and/or otherwise violated the orders of the Honourable Court and in this regard, same ought to be cited and punished for Contempt.

30. However, despite contending that the 2<sup>nd</sup> & 3<sup>rd</sup> Defendant have violated and/or disobeyed lawful court orders, the Plaintiff has however not stated, which court orders are said to have been breached and/or violated. For clarity, the Application dated the **10<sup>th</sup> May 2021**, does not allude to the date of issuance of the alleged court orders that (sic) have been disobeyed.

31. Nevertheless, I must point out that before one can be cited and punished for contempt, it must be shown that there exists some lawful and legitimate court orders, which were issued and which are within the knowledge of the person who is alleged to have disobeyed same.

32. Secondly, even where there are court orders which have been issued (which is not the case herein), it must also be evident that the said Orders were unequivocal, clear and unambiguous, to warrant compliance and/or adherence.

33. Suffice it to say, that the importance of existence of court orders, which are clear and unequivocal, is essential and/or paramount and in any event, forms the foundation for Contempt and by extension, Contempt Proceedings.

34. On the other hand, a Person who impleads Contempt and therefore seeks the citation of another to be punished for contempt, is enjoined to lay before the honourable court sufficient evidence to establish the occurrence and disobedience of a court order. For clarity, the proof of the occurrence and/or incidence of Disobedience must be established to the requisite standard, not less.

35. In support of the foregoing observation, I invoke and rely on the Decision in the case of **Mutitika v Baharini Farm Ltd[1985] eKLR**, where the Court Of Appeal observed as hereunder;

*Re Breamblevale Ltd [1969] 3 All ER 1062, Lord Denning MR. (as he then was), at page 1063*, had this to say,

*“A contempt of court is an offence of a criminal character. A man may be sent to prison. It must be satisfactorily proved. To use the time– honoured phrase, it must be proved beyond reasonable doubt”.*

*With the greatest possible respect to that eminent English judge, that proof is much too high for an offence “of a criminal character” and, ipso facto, not a criminal offence properly so defined.*

**“We agree with Mr. Khaminwa’s submissions in this respect. In our view the standard of proof in contempt proceedings must be higher than proof on the balance of probabilities, almost but not exactly, beyond reasonable doubt. We envisage no difficulty in courts determining the suggested standard of proof. The standard of proof beyond reasonable doubt ought to be left where it belongs, to wit, in criminal cases. It is not safe to extend it to offence which can be said to be quasi – criminal in nature Winn LJ on page 1064 was in our view right in saying that the guilt has to be proved”.**

36. Owing to the foregoing, I must now point out that to the extent that no Court order has been spoken to and/or identified by the Plaintiff, either in the Application or at all, the claim that the 2<sup>nd</sup> & 3<sup>rd</sup> Defendant are in Contempt, has therefore been mounted in vacuum.

37. In the premises, it is my finding and holding that the Application dated the **10<sup>th</sup> May 2021**, seeking for the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants to be punished for Contempt, is not only pre-mature and misconceived, but same is also legally untenable.

## **ISSUE NUMBER 2**

**Whether the 2<sup>nd</sup> & 3<sup>rd</sup> Defendants are entitled to the setting aside and/or variation of the orders made on the 31<sup>st</sup> August 2017.**

38. In respect of the second issue herein, it is worthy to note that the Ruling which was rendered on the **31<sup>st</sup> August 2017**, and which is the basis of the Application by and/or on behalf of the 2<sup>nd</sup> & 3<sup>rd</sup> Defendants, touched on and/or concerned three topical aspects or better still, nuances.

39. First and foremost, the Honourable court considered a claim that the 1<sup>st</sup> Defendant, now Deceased, had disobeyed and/or disregarded orders of the Court which were made on the **7<sup>th</sup> June 2013**.

40. However, in this regard the Court found and held that the said orders had long lapsed, by the time same were alleged to have been breached and/or violated by the 1<sup>st</sup> Defendant, now deceased.

41. As pertains to this limb of the ruling dated **31<sup>st</sup> August 2017**, it is worthy to observe that the orders which were sought touched on and/or concerned the 1<sup>st</sup> Defendant, now deceased and not the 2<sup>nd</sup> & 3<sup>rd</sup> Defendant herein.

42. In the premises, it is difficult to appreciate and/or understand how and on what basis the 2<sup>nd</sup> & 3<sup>rd</sup> Defendants, are affected by the aforesaid limb of the Order, to warrant the variation, Review and/or setting aside of the same.

**43.** The Second limb of the Ruling, which is the subject of the current Application, touched on and/or concerned, whether the subject suit was *Res-judicata* the decision in the cases, namely, **Nairobi High Court Succession 2141 of 1998 and Nairobi Civil Appeal no. 141 of 2006, respectively.**

44. Suffice it to point out that the Honourable court considered the submissions which contended that the subject suit was *Res-judicata* and after contrasting the Pleadings and Decisions made in the said cases, the Court found and held that the cases dealt with and/or touched on, separate and distinct issues. Consequently, the Court returned a verdict that the subject suit was not *Res-judicata*.

45. I must point out that the finding and holding that the subject suit was not *Res-judicata*, was made by a court of co-ordinate Jurisdiction and in this regard, this court cannot re-visit or regurgitate the issue of *Res-judicata*.

46. In my humble view, the invitation to re-visit the issue as to whether the suit is *Res-judicata*, would amount to sitting on Appeal, over and in respect of a Decision of a court of concurrent Jurisdiction, which is legally untenable and is tantamount to inviting anarchy into the Corridors of Justice.

47. Be that as it may, I must say that I am not prepared to follow the invitation by the 2<sup>nd</sup> & 3<sup>rd</sup> Defendants. At any rate, such an invitation ought to be frowned upon.

48. The third limb of the ruling dated the **31<sup>st</sup> August 2017**, which is sought to be set aside and/or varied, related to an order which made by the court whereby the court issued an inhibition, to bar, prohibit and/or restrict further entries on the Register in respect of the suit properties and/or such other dealings, that would alienate the suit Properties.

49. For the avoidance of doubt, the Court found and held that if the said orders were not issued, then the suit Properties would be alienated and/or otherwise be disposed of and in this regard, the entire suit herein, which is premised on a claim for adverse possession, would be defeated and/or rendered academic exercise.

50. It is imperative to point out that despite the fact that the subject suit was filed in the year 2012, same has never been heard and to the contrary, the Parties have engaged in several and endless Applications, the current two (2) Applications being the latest ones, in the long Que of Applications.

51. Be that as it may, the variation and/or setting aside of the orders which were made on the 31<sup>st</sup> August 2017, either in the manner sought by the 2<sup>nd</sup> & 3<sup>rd</sup> Defendants or at all, would be tantamount to allowing the 2<sup>nd</sup> & 3<sup>rd</sup> Defendants, who are currently the registered proprietors of the suit properties, the latitude to dispose of and/ or alienate the same.

52. Effectively, the Application by the 2<sup>nd</sup> & 3<sup>rd</sup> Defendant is an ingenious way of seeking to kill of the case and therefore *non-suit* the Plaintiff. For clarity, the subject Application, is calculated to drive the Plaintiff away from the Seat of Justice.

53. Nevertheless, it must be observed that where a Dispute is placed before the court, the court is enjoined to hear and determine the Dispute and to ensure that the Parties are afforded a Fair Hearing in line of the provision **Article 50(1) of the Constitution, 2010**.

54. In view of the foregoing, it is my finding and holding, that the Application to vacate and/or set aside the orders made on the 31<sup>st</sup> August 2017, is not calculated to achieve Justice, but to the contrary, same is geared towards defeating the Rule of law.

### **ISSUE NUMBER 3**

#### **Whether the 2<sup>nd</sup> & 3<sup>rd</sup> Defendants are guilty of Laches.**

55. It is worthy to note that the Ruling and orders which are now sought to be set aside and/or vacated, were made and/or rendered on the 31<sup>st</sup> August 2017. For clarity, same were made more than four years, prior to and/or before the subject Application, the latter which is dated the 21<sup>st</sup> July 2021.

56. On the other hand, the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants herein filed an Application whereby same sought to be joined into the subject suit on the 26<sup>th</sup> February 2018, and thereafter the Application was heard and allowed on the 19<sup>th</sup> February 2020.

57. Upon being joined into the subject proceedings, it was incumbent upon the 2<sup>nd</sup> & 3<sup>rd</sup> Defendants to move with Due diligence and dispatch and to file any necessary Application, that is assuming, that any orders that hitherto been issued, had infringed and/ or violated their rights.

58. However, despite being aware of the impugned orders, which were made on the 31<sup>st</sup> August 2017, the 2<sup>nd</sup> & 3<sup>rd</sup> Defendant took more than 1 year 5 months, before coming up with the subject Application and now seek to Discharge the impugned orders.

59. In my humble view, the 2<sup>nd</sup> & 3<sup>rd</sup> Defendants had a duty to act with due diligence and to the extent that same did not move the court with such dispatch, the 2<sup>nd</sup> & 3<sup>rd</sup> Defendants must be taken to have forfeited and/or relinquished their entitlement to mount the subject Application.

60. In the premises, I find and hold that the 2<sup>nd</sup> & 3<sup>rd</sup> Defendants Application herein, would also fail, on the basis of unreasonable and Inordinate delay, which amounts to and/or contravenes the Doctrine of Laches.

61. In support of the foregoing observation, I invoke and rely in the decision in the case of **Edward Akong'o Oyugi & 2 others v Attorney General [2019] eKLR** in which the learned Judge stated as follows:

***82. Laches ("latches") refers to a lack of diligence and activity in making a legal claim, or moving forward with legal enforcement of a right, particularly in regard to equity; hence, it is an unreasonable delay that can be viewed as prejudicing the opposing [defending] party.***

***When asserted in litigation, it is an equity defense, that is, a defense to a claim for an equitable remedy. The person invoking laches is asserting that an opposing party has "slept on its rights", and that, as a result of this delay, circumstances have changed, witnesses or evidence may have been lost or no longer available, etc., such that it is no longer a just resolution to grant the plaintiff's claim.***

***Laches is associated with the maxim of equity, "Equity aids the vigilant, not the sleeping ones [that is, those who sleep on their rights]." Put another way, failure to assert one's rights in a timely manner can result in a claim being barred by laches.***

### **FINAL DISPOSITION:**

62. Having considered the issues which were enumerated herein before, it is now appropriate and/or expedient to render a determination over and in respect of the two (2) Applications, which were itemized herein before.

63. To my mind, the two (2) Applications, which have been filed by the Plaintiff, on one hand and the 2<sup>nd</sup> & 3<sup>rd</sup> Defendants, on the other hand, are Devoid of Merits and thus Courts Dismissal.

64. In the premises, the Applications dated the **10<sup>th</sup> May 2021 and the 21<sup>st</sup> July 2021**, be and are hereby Dismissed.

65. Nevertheless, Each Party shall bear own costs of the Applications.

66. It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 24<sup>th</sup> DAY OF FEBRUARY 2022.**

**HON. JUSTICE OGUTTU MBOYA**

**JUDGE**

In the Presence of:

**June Nafula Court Assistant**

**Miss Wanjiku for the 2<sup>nd</sup> & 3<sup>rd</sup> Defendants/Applicants.**

**Mr. Desmond Otieno for the Plaintiff/Respondent**

**Mr. Gatumuta for Charles Mukora (who is a party in ELC 112 of 2011 (OS))**