



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
ENVIRONMENTAL AND LAND DIVISION
ELC. CIVIL SUIT NO. 3087 OF 1981

MARGARET ROSE WAMBUI PLAINTIFF

VERSUS

SILVESTER JOHN NJOROGE.....DEFENDANT

RULING

Coming up before me for determination is the Notice of Motion dated 8th November 2013 in which the Plaintiff/Applicant seeks for the following orders:

1. That this honourable court be pleased to lift the suspension of the order committing the Respondent to civil jail dated 21st October 2011 and that the Defendant/Respondent be committed to civil jail for six (6) months.
2. That this honourable court be pleased to order that tenants of property Land Reference Number 209/66/43 Parklands, namely Neela Patel, Rajesh D. Velani and Kanji Dharamesh personally attend court and show cause why rent has not been deposited in court as ordered by the court on 16th February 2012.
3. That this honourable court be pleased to order that property Land Reference Number 209/66/43 Parklands be valued and cots thereof be paid by the Respondent.
4. That this honourable court be pleased to order that property Land Reference Number 209/66/43 Parklands be sold forthwith.
5. That this honourable court be pleased to order that the Respondent deposit in court the rest of the titles in his custody forthwith.
6. That this honourable court grant such other orders as it deems fit.
7. That costs of this Application be in the cause.

The Application is premised on the grounds appearing on the face of it together with the Supporting Affidavit of the Plaintiff/Applicant sworn on 8th November 2013 in which she averred that on 7th June 2002, the honourable court decreed that she was entitled to a half share in each of the following properties:

- a. Land Reference Number Ndeiya/Ndeiya/390
- b. Plot Number 36 Mirithu Market
- c. Plot Number 4A Makutano
- d. Land Reference Number 209/209/15
- e. Ndeiya/Kiroe/T.365
- f. Ndeiya/Kiroe/T.197

She further averred that Land Reference Number 209/66/15 situate in Parklands, which has apartments for rent, was subdivided into two portions namely Land Reference No. 209/66/43 and Land Reference No. 209/66/44 which was subsequently sold. She further averred that according to the court decree, her advocates wrote a letter dated 20th September 2007 informing all tenants on Land Reference No. 209/66/43 that she is entitled to half share of the property and asked the tenants to pay half rent to her which direction was not complied with. She further averred that when this was not successful, she returned to court and on 9th February 2010 the Defendant/Respondent was ordered to deposit all rental income accruing from the apartments on Land Reference Number 209/66/43 in court. She further averred that in addition, the Defendant/Respondent was ordered to deposit in court the title documents relating to the above mentioned properties. She further averred that despite those orders, the Defendant/Respondent continued collecting rent from the tenants and only deposited in court the title document of Ndeiya/Ndeiya/390. She further averred that on 21st October 2011, the honourable court committed the Respondent to civil jail but the order was temporarily suspended when the Defendant/Respondent paid a sum of Kshs. 80,000/- from the rent collected. She however stated that the Defendant/Respondent thereafter persisted in disobeying other limbs of the court order. She further averred that she returned to court and the Respondent was restrained from collecting rent from L.R. No. 209/66/43. She further stated that as at the time of filing this Application, the Respondent has persisted in his refusal to deposit title documents in court as ordered by the court on 26th January 2010 but has been filing numerous applications in court which have all been unsuccessful. She further stated that on 16th July 2012, the court issued an order directing all tenants on Land Reference No. 209/66/43 to deposit the monthly rent in court and that by a letter dated 27th July 2012, all the tenants present on the property were informed of the court's order. She averred that there are currently three tenants on the property namely Neela Patel, Rajesh D. Velani and Kanji Dharamesh. She confirmed that the said tenants have not complied with the court's order as they have not been depositing the rent in court.

The Application is contested. The Defendant/Respondent filed his Replying Affidavit sworn on 11th February 2014 in which he averred that it is true that the court erroneously decreed that the Plaintiff is entitled to half share of the properties listed and that he deposited in court the title document for Ndeiya/Ndeiya/390. He then stated that he has been unable to comply with the orders of the court to deposit the title documents for the other properties for the following reasons:

- a. That the allocation letter for Plot Number 36B Mirithu Market got lost before judgment was delivered in this suit by Justice G.P. Mbitio in the year 2000 and that he has been unable to secure another allocation letter as the same was allocated to him way back in the 1970s. he further indicated that his son with the Plaintiff resides there.
- b. That Land Reference No. 209/66/43 does not belong to him but to his late father known as Njoroge Mwangi and that the ownership documents are still in his late father's names. He further stated that himself and other 8 beneficiaries of the estate of his father intend to take out letters of administration for their late father's estate.
- c. That Plot Numbers 4A Makutano, Ndeiya/Kiroe/T.365 and Ndeiya/Kiroe/T.197 are not owned by him as they were sold way back in the 1980s to cater for school fees for his three children with the Plaintiff.

He further averred that the Plaintiff/Applicant is pressing this court to commit him to civil jail despite the fact that he cannot comply with the aforesaid orders for reasons which are beyond his control as already stated. He further averred that the tenants renting the apartments on land Reference No. 209/66/43 are not parties to this suit and any orders summoning them to court will only result in them moving away from the premises. He further averred that any orders to have Land Reference No. 209/66/43 sold will be futile as beneficiaries of the estate of this late father will be prejudiced as they must also consent to the sale of their own free will by being adults and not a party to this suit.

Both the Plaintiff/Applicant and the Defendant/Respondent filed written submissions which have been read and taken into account in this ruling.

The main issues for determination in my view are only two. These are:-

1. Whether there has been contempt of court by the Respondent.
2. Whether the tenants on Land Reference No. 209/66/43 should be summoned to court.

In determining the first issue on whether there has been a contempt of court by the Respondent this court needs to define what contempt of court means. The **Black's Law Dictionary (7th Ed)** at p.313, defines 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 behaviour or insolent language, in its presence or so near thereto as to disturb the proceedings or to impair respect due to such a body.”

Further, **Halsbury's laws of England, Vol 9 (1) 4th Edition** expounds this matter stating that,

“Contempt of court can be classified as either criminal contempt, consisting of words or acts which impede or interfere with the administration of justice or which create substantial risk that the course of justice will be seriously impeded or prejudiced, or contempt in procedure, otherwise known as civil contempt consisting of disobedience to judgment, orders or other process of court and involving in private injury.”

This concept of contempt of court is premised on the elements of noncompliance and disobedience. I have had the chance to read the judgment of Mbitio J as he then was dated 24th February 2000 which has given rise to several applications in this matter. I note that since the applicants orders sought to be enforced emanate from this judgment and from the court records it shows that it has not been appealed, set aside or varied in any way what this court can do is to enforce them if sufficient explanation has not been demonstrated by the Respondent. It is the business of this court to ensure that its orders are enforced not only to give effect to its orders but also to ensure that the successful litigant accesses an effective remedy by realizing the fruits of the judgment.

The titles in contention as listed are;

- a. ***Plot No 36 Mirithu Market***. The Respondent claims that he surrendered this property to his son who is in occupation of it. He says that the property was surrendered before the judgment was delivered in 2000 and that the Applicant was aware of the same. However the judgment delivered by Mbitio J at page 9 concluded that the Applicant was entitled to half of this asset. The Respondent has also in his written submissions dated 11th March 2014 at page 2 Paragraph 2 submitted that he owns two properties of which he is to deposit the titles and went ahead to state Plot 36 Mirithu Market and LR No Ndeiya/Ndeiya/390. It is his own admission that he owns these two pieces of property. However, he has deposited in court the title for Ndeiya/Ndeiya/390 but has failed to deposit the title to Plot No 36 Mirithu market and has not given explanation for the failure to deposit the same. In his affidavit he stated that he surrendered the same to his son but there is no evidence to support his claim either by a way of deponment of his son. It therefore remains true that whether or not he surrendered the property to his son, half the share of this property belongs to the Applicant herein as per the judgment delivered on 24th February 2000.
- b. ***Plot Number 4A Makutano; Ndeiya/Kiroe/T.365 and Ndeiya/Kiroe /T.197***. With regard to these properties, the Respondent made a claim that they had been sold off for the benefit of the children of the marriage with the Applicant and are now in the names of third parties. He even went ahead and produced copies of certificate of official search to show that the property was sold to third parties. This court has had a look at the copies of search annexed to the Respondent's submissions and note that Ndeiya/Kiroe/T.365 shows that title was issued to Peris Wanjiru Ngugi on 19th June 2003. This is clearly a transaction done after the judgment of Mbitio J was delivered. The search on Ndeiya/Kiroe /T.197 shows that title was issued to David Njenga Ngugi on 24th October 1996. There is also a copy of a letter of allocation of Plot 4A Makutano allocated to James Waweru Kimani on 16th March 1990. There is also a receipt showing payment of Ksh 200/= being the monies for change of ownership from Sylvester John Njoroge to Joseph Waweru Kimani. This court has looked at the judgment of Mbitio J and note that he decreed at page 9 of the judgment

that, ***“I hold that the plaintiff was entitled to 50% of plots No Ndeiya/Kiroe/T.365 and T.195. I accordingly enter judgment for the plaintiff against the defendant for 50% of the sale price if they have since been sold”***. The Respondent did not annex copies of the sale agreements to these properties maybe because he was concealing the amount he realised from these sales to defeat the Applicant’s claim in these properties. It is my considered view that since the Respondent did not appeal against the judgment and decree apportioning the matrimonial property, the least he can do is to provide a full account of the purchase price and other benefits he may have derived from these properties after their alleged sale. Since he has not done so, it is my considered view that the Respondent is bound by the judgment delivered by Mbito, J. to share the proceeds therefrom equally with the Applicant.

- c. ***LR No 209/66/15.*** I will still revisit the decision by Mbito J at page 6 paragraph 4 of the judgment where he stated that, ***“The next property is LR No 209/66/15 registered in the name of Njoroge Mwangi which according to the plaintiff is the name the defendant is also known. In his replying affidavit he does not deny being the owner of the said property.....I therefore find his contention of the hearing that that is his father’s name an afterthought more especially as the signatures on the conference are his own. I find that this property was acquired after the subsistence of the marriage of the parties herein”***. There is also a replying affidavit of the Respondent sworn on 4th June 2012 where he deposed that this property was subdivided by his father Njoroge Mwangi in 1980 into two portions being LR No 209/66/43 and LR No 209/66/44 and stated that the latter was later disposed of leaving LR No 209/66/43. This is the portion the Applicant is now laying claim upon. I have read the ruling delivered by Nambuye J on 21st October 2011 on LR No 209/66/15 she stated at page 18 on the explanation as to why the respondent is unable to comply with respect to LR No 209/66/43 Mogotio Road Parklands where he claims that the property belongs to his deceased’s father. The judge went on to state that the court gave consideration to his explanation and found that that his explanation does not hold water because the Respondent has never produced any identification documents to prove that the names Njoroge Mwangi were his names or his father’s names. A look at the ruling delivered by Odunga J in his ruling dated 16th July 2012 gave a verdict that the judgment delivered by Mbito J made a finding that the property belonged to the Respondent stating that the same was matrimonial property and that the Respondent was in active control of the property. Half of the property LR No 209/66/44 has already been disposed of therefore what the Respondent was expected was to avail to this court the title to half the property which is LR No. 209/66/43 which he has not and at the same time he is collecting rent from the tenants.

From the above breakdown, it goes without saying that the Respondent has been in fragrant breach of not one order but several orders of this court. The general principle regarding respect for court orders was stated in **Chuck v. Cremer (1 Coop Tempt Cott 342)** cited in judgment of Romer, LJ in **Hadkinson v. Hadkinson [1952] All ER 567** that,

“A party who knows of an order, whether null or regular or irregular, cannot be permitted to disobey it... it would be most dangerous to hold that the suitors, or their solicitors, could themselves judge or irregular. That they should come to the court and not take (it) upon themselves to determine such a question. That the course of a party knowing of an order, which was null and irregular, and who might be affected by it, was plain. He should apply to the court that it might be discharged. As long as it existed it must not be disobeyed.” The judge went on to state at page 571 that ***“Disregard of an order of the court is a matter of sufficient gravity, whatever the order may be”***

This principle was re-stated in the same terms in **Wildlife Lodges Ltd. v. County Council of Narok [2005] EA 344**. Further, to drive the point home, Ojwang, J. as he then was observed that there are social limitations afflicting people in developing countries which restrict their access to institutions like the judiciary. He then went on to emphasise,

“Yet this same judiciary is generally viewed as impartial purveyor of justice and the guarantor of an even playing ground for all. This perception ought to be strengthened, through compliance with their orders. Against this background, I would take the position that consistent obedience to court orders is required, and parties should not take it upon themselves to decide on their own which court orders are

to be obeyed and which ones looked, in the supposition that this oversight will not impede the process of justice.”

My determination on the first issue is that the Respondent is in contempt of court orders issued by several judges in this suit. The unfortunate bit is that the Respondent has not attempted to appeal, set aside or vary the orders from this court. It is not sufficient to state that he is not in a position to comply with the orders he has been cited to be in contempt of.

On the second issue for determination, the Applicant has also made a prayer seeking to have the tenants on LR No 209/66/43 namely *Neela Patel, Rajesh D. Velani and Kanji Dharamesh* personally attend court to show cause why rent has not been deposited in court as ordered on 16th February 2012 which are orders arising from Odunga J. I also note that a similar order had earlier been made by Mwera J on 26th January 2010 requiring the Respondent to deposit all rental income accruing from LR No 209/66/43 within 30 days and another order of 30th November 2011 from Mwera J. restraining the Respondent (judgment debtor) from collecting rent from LR No 209/66/43. The Respondent has opposed this prayer of summoning the tenants on the grounds that the tenants are not the owners of the premises and that the tenants are not parties to this suit. His contention is that summoning them will prompt them to vacate the premises. He also raised the issue that since the premises constitutes the estate of the late Njoroge Mwangi, having the rent deposited in court will be opposed by the beneficiaries of the estate as the same will be prejudicial and against their interests. The alleged beneficiaries have not filed any dispositions with regard to this allegation raised by the Respondent. I have looked at the Applicant's supporting affidavit and note that the tenants had been notified of a court order vide two memos; one dated 20th September 2007 and the other dated 27th July 2012 but none has been complied with. I therefore find that the tenants as third parties in this suit were aware of this order. The case of **Z Ltd v A and others [1982] 1 All ER 556** is insightful. The Court of Appeal Judge, Eveleigh LJ held that even third parties may be held in contempt of court. He stated that,

“ ... (1) The person against whom the order is made will be liable for contempt of court if he acts in breach of the order after having notice of it. (2) A third party will also be liable if he knowingly assists in the breach that is to say if knowing the terms of the injunction he wilfully assists the person to whom it was directed to disobey it. This will be so whether or not the person enjoined has had notice of the injunction”.

As far as third party contempt is concerned Eveleigh LJ said at page 567 that

“He is liable for contempt of court committed by himself. It is true that his conduct may very often be seen as possessing a dual character of contempt of court by himself and aiding and abetting the contempt by another, but the conduct will always amount to contempt of court by himself. It will be conduct which knowingly interferes with the administration of justice by causing the order of the court to be thwarted”.

It is on this premises that this court will allow prayer 2 of the application and make an order that the three tenants *Neela Patel, Rajesh D. Velani and Kanji Dharamesh* appear in court in person to show cause why they have not deposited the rent in court.

Having found that the Respondent is in contempt of the Court Orders what remedies are available for the Respondent?

Failure to comply with a court order amounts to contempt of court. The proof in such an application is beyond a reasonable doubt. In **VeBramble Vale ltd (1970) Ch.128**, Lord Denning M.R stated that,

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

This court finds that the Applicant has proved her case beyond reasonable doubt that the Respondent is in contempt of court orders. The remedy available for the Applicant therefore is to have the Respondent cited for contempt of court and consequently liable to imprisonment for six (6) months. A court of law never acts in vain and, as such, issues touching on contempt of court take precedence over any other matter.

The upshot of this is the following orders:-

1. The Applicant's Notice of Motion dated 8th November 2013 is hereby allowed.
2. The Respondent is guilty of contempt of court of the orders made on 16th July 2012, 26th January 2010, and 21st October 2011. He is hereby committed to jail for 6 months effective immediately.
3. Costs shall be in the cause.

DELIVERED AND SIGNED IN NAIROBI THIS 16TH DAY OF MAY 2014.

MARY M. GITUMBI

JUDGE