



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
ENVIRONMENTAL AND LAND DIVISION
ELC CIVIL MISC. NO. 512 OF 2008

ALVINE KAMANDE.....PLAINTIFF

VERSUS

ESTHER NJERI NJENGA1ST DEFENDANT

JUDITH NYORO (Suing as the widow and

legal representative and Administrator of the estate

of ANDREW NYORO NJENGA (DECEASED)2ND DEFENDANT

LUCY WANJIKU MUCHEKEHU 3RD DEFENDANT

JOSEPHINE NDUTA KARIITHI4TH DEFENDANT

BANCY GATHONI MUSA5TH DEFENDANT

SOPHIE KABURA MACHARIA6TH DEFENDANT

RULING

The 1st Plaintiff/Applicant vide a chamber summons application dated 29th May 2013 stated to be brought under section 3 & 3A of Cap 21, Civil Procedure rules seeks orders that:

- a. **Judith Nyoro** be committed for contempt of the court.
- b. The charge on the land be cancelled.

The application is grounded on the affidavit sworn by **Alvin Kamande Njenga** on 29th May 2013 and the grounds set out on the body of the application was amended on 3rd June 2013 to add a further prayer for **Josephine Nduta Katiithi** to be committed for contempt of court and a further prayer that the Land Registrar, Kiambu do account for irregular conduct over the above charges. The main ground that the plaintiff/Applicant cites for the contempt application is that the court in 2009 had prohibited charge and

any encumbrances being registered against the land in dispute. The plaintiff asserts that the court order has neither varied nor has the respondents proceeded to register a charge against the land in violation of the court order for this reason the plaintiff states the respondents are in contempt and the court ought to punish them to ensure the dignity of the court is maintained and upheld.

The Respondents filed grounds of opposition to the plaintiffs application dated 5th September 2013 and state in the grounds that the Respondents, **Judith Nyoro** and **Josephine Nduta Kariithi** are non suited as they are non-existent. The Respondents further aver that the application by the plaintiff is unmeritorious, vexatious and is otherwise an abuse of the process of the court. The Respondents further contend that they are the absolute owners of the suit property and the order by **Hon. Justice Mbogholi Msagha** did not prohibit them from charging their properties.

The parties filed written submissions articulating their respective positions. The applicants submissions dated 27th February 2014 were filed on 28th February 2014 and the applicant gives the factual background leading to the issuance of the injunctive orders by **Hon. Justice Mbogholi Msagha** on 29th September 2009. The applicant claims on 5th May 2011 caveats registered against the suit properties were fraudulently removed by the Land Registrar Kiambu and subsequently the respondents charged the suit premises to secure funding. This is the applicant submits was in breach of the court order and therefore contemptuous and the respondents ought to be punished by the court for disobeying and disrespecting the court.

The Respondents in their submissions reiterate that the application lacks any merit and is an abuse of the court process. The Respondents submit that the contempt proceedings were commenced without any leave of the court pursuant to section 5 (i) Judicature Act Cap 8 Laws of Kenya. The Respondents further submit that the applicant has not effected service of the order and penal notice on the Respondents as required under the law and further the amended chamber summons was not in conformity with the provisions of order 51 Rule 1 of the Civil Procedure Rules 2010 which require applications of that nature to be by way of Notice of Motion.

For the court to punish for contempt the court has to be satisfied that the order alleged to have been breached was personally served on the respondent together with a penal notice. The court has further to be satisfied the order was clear and there was no ambiguity and that the respondent/defendant had a proper notice of the terms and the breach of the injunction/order has been proved beyond reasonable doubt. Interalia the orders issued by **Hon. Justice Mbogholi Msagha** on 29th September 2009 were as follows:-

1. **That a temporary injunction be and is hereby issued stopping any further transaction by the Defendants on the suit parcels of land until the determination of the suit.**
2. **That the Defendants by themselves, their agents and/or servants be and are hereby temporarily restrained from interfering, transferring, selling, disposing the suit parcels of land pending the hearing and determination of the suit.**
3. **That status quo be maintained until the determination of the suit herein.**
4.
5.
6. **That this Honourable court do hereby issue an order for a caveat Limuru/Ngecha/1966-1975 to be served upon the Kiambu Land Registrar until the case herein is determined.**

No affidavit of service has been exhibited to show that the Respondents were personally served with this order and equally there is no evidence that at the time of service a penal notice was served on the respondents warning them they stood to be penalized should they breach or violate the court order. There is also no evidence of service of the court order on the land Registrar Kiambu. The annexures filed with the applicant's affidavit in support of the application relating to copies of abstracts of titles do not show that the court order was registered against the titles. On 26/11/2009 what is shown to have been registered against the titles is a caution by the applicant and there is no mention of the court order. The abstract of title shows that the caution was removed by the Registrar under the provisions of section 133

(2) (a) & (b) of the Registered Land Act (repealed) meaning due process for the removal of the caution was adhered to.

The application by the applicant is not brought under order 40 of the Civil Procedure Rules and my view is that the applicant ought to have sought leave of the court to commence contempt proceedings against the respondents. He did not and this coupled with the absence of personal service of the court order together with an accompanying penal notice renders the application fatally defective. In the case of **Jacob Zedekiah Ochuno & Another –vs- George Aura Okombo & others (Civil Appeal NO. 36 of 1989) KLR 165** the court of appeal held that no order requiring a person to do or abstain from doing any act may be enforced by contempt unless a copy of the order has been served personally and endorsed with a notice informing him if he disobeys the order he is liable to the process of execution.

If no penal notice is served with the order contempt proceedings are not sustainable as it is not possible to establish and/or prove that the Defendant/respondent was aware of the consequences of disobeying a court order. I agree with the applicant that court orders are meant to be obeyed and that disobedience of orders issued by the court is to be frowned upon by the court. The reason for the court to be empowered to punish for contempt is to ensure the dignity of the court is maintained and that orders are not given in vain. If parties were allowed to wantonly ignore court orders that would be a recipe for the law of the jungle to take root and anarchy to thrive. The respondents assert that the court order did not prohibit them from charging their parcels of land in respect of which they are the registered owners. The first order restrained all further transactions and whether or not there is ambiguity is debatable but I do not think so. By charging the properties the Respondents carried out a further transaction which the order had restrained. The issue turns on whether the order and penal notice had been served on the Respondents and if I was satisfied the Respondents had been properly served I would have held that the respondents were held that the respondents were in contempt. The Applicant in his further affidavit states that he served a penal notice on the Respondents after he discovered that they had charged the suit properties. This was after the event complained of had already taken place.

However for a party to be punished for contempt the service of the order and the proof of the contempt has to be beyond reasonable doubt and having found that there is no proof of service of the subject court order on the respondents. I disallow the application by the applicant and the same is ordered dismissed. I make no order for costs and each party will bear their own costs of the application.

Ruling dated signed and delivered this 19th day of June 2014.

J. M. MUTUNGI

JUDGE

In presence of:

..... For the Plaintiff

.....For the Defendants