



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
ENVIRONMENT & LAND COURT
CIVIL CASE NO.170 OF 2011

PRICILLAH WANJA KIBUI.....PLAINTIFF

VERSUS

JAMES KIONGO KIBUI

CHARLES WAMBUGU GITONGA.....DEFENDANTS

R U L I N G

The matter before the court is the plaintiff's application filed on 12/7/2012 where she seeks committal to civil jail of the 2nd respondent. The application is supported by an affidavit of the plaintiff dated and filed the the same day. She seeks orders that the 2nd defendant be ordered to be charged with the offence of contempt of court by disobeying this court's temporary injunction order made on the 22nd November 2011, served on him on the 25th November 2011, by borrowing the sum of **Kshs.26,000,000**. He prays that the 2nd defendant be summoned to appear before the court to plead to the said charge and for the consequential orders.

The brief facts of the matter is that the applicant filed the suit herein accompanied by an application under certificate of urgency seeking that the defendants be prohibited from dealing, alienating selling and or transferring the suit property named as NYERI MUNICIPALITY/BLOCK 2/224 measuring 0.1444 Ha or there about. The facts pleaded were that the suit property was a family property which belonged to the parents of the applicant and the 1st defendant. After the demise of their father the property was registered in the names of the 1st defendants and their mother, but who also passed on in 2003.

The applicant being a sister of the 1st defendant avers that the suit property was held by the defendant as a trustee for the whole family but that he secretly sold off the same to the second defendant herein, and therefore brings the suit on behalf of her other sisters. She applied for a prohibitory order against disposal of suit property. On the 22/11/2011, upon reading the prayers sought on the day and listening to the submissions of the applicant's advocate, the court granted orders of maintaining status quo pending interparte hearing. The order was served upon the 2nd defendants wife on 25th Nov 2011.

On 27/3/2012 the plaintiff filed an application seeking leave to prosecute the 2nd defendant for contempt of court which was heard and leave granted on the same day. The 2nd defendant had filed an application dated 8th March 2012 seeking leave to file defence out of time, after the applicant had sought orders for the defence to be struck out for being filed out of time and she be granted date for formal proof, but leave unto the defendant was granted by consent of the parties and the plaintiff's application for dismissal of the defence was withdrawn.

The application for contempt came for hearing before this court and the parties went ahead to submit on the matter on 15/7/2013. Counsels were present: Gikonyo for 1st defendant, Ndiragu for the 2nd defendant, Mr Nderi holding brief for Wachira for the applicant. Each party relied on its submissions. By the time the applicant filed the application that led to issuance of the status quo orders, the 2nd defendant had already charged the suit property to Eco-bank Ltd.

The charge had been executed by the 2nd defendant on the 2/11/11. The applicants main argument is that by the time the order was served upon the defendant on 25/11/2011, the suit property was still registered in his names and hence the status quo ordered by the court ought to have been maintained and the registration details be retained in names of the 2nd defendant so that the succession issue in the matter could be sorted out but the bank registered a charge against the suit property on the 2/12/2011 for securing a facility of Kshs 26,000,00.00 which was exactly 7 days after the court order.

The 2nd defendant in his defence argues that the notice of the court order was effected upon the defendant's wife and not himself hence there was no personal service. He also argues that leave for these proceedings had not been granted but as seen above it had been granted on 27th March 2012. He also states that he was not granted time to defend the application for leave, and that by the time the orders were served the Bank had issued the loan, hence the bank had not breached the orders of status quo.

The grounds advanced by the 1st defendant are that he had only sold his share in suit property being 0.1061 leaving a share of 0.383 for the applicant and other siblings, but the 2nd defendant obtained a charge indication purchase of 1.1444 Ha which is bigger than the original size of the whole property. Parties filed their written submissions and each was in support of its earlier positions, but noteworthy is the 2nd defendant's argument that the registration was carried out by the lands office, hence he is not responsible over them.

He also argues that the status quo orders were not extended, but from the records, were extended on 7/5/12. He also faults the applicant's failure for not annexing penal Notice, arguing that the application is defeated as the application was filed on the 12/7/2012 long after loan had been granted. He also states that the affidavit of service does not state whether the deponent is an adult hence questioning its competency. He claims that so many ex-parte orders have been granted which have denied the defendant a chance to prosecute his defence.

Having heard the rival submissions this court frames the issues to be determined in this matter as follows:-

- a. ***What was the status quo in this case at the time the order was made***
- b. ***Whether the defendants can be punished for a charge registered by the bank***
- c. ***Whether process of creating a charge amounted to a bar from legal proceedings in the matter.***
- d. ***Whether the service of order unto wife of the 2nd defendant amounted to proper service.***
- e. ***Whether failure to include penal notice in the order was fatal.***
- f. ***Whether contempt of court orders can issue.***

On Status quo, the Blacks Law dictionary 8th Edition states that this is a Latin word which means ***“the situation as it exists”***. Status quo order effect has been explained by Murithi J ***in Boabab Beach Resort as quoted by F. Tuiyot Saifudeen Abdullahi & 4 Others in Mombasa High Court Misc.Civil Cause no 11 of 2012 where he states,***

“In my view, an order to Status quo to be maintained is different from an order of injunction both in terms of the principles for grant and the practical effect of each. While the latter is an substantive equitable remedy granted upon establishment of a right, or at interlocutory stage, a prima facie case, among other principles to be considered, the former is simply an ancillary order for the preservation of the situation as it exists in relation to pending proceedings before the hearing and determination thereof.

It does not depend on proof of right or prima facie case. In its effect, an injunction may compel the doing or restrain the doing of a certain act, such as, respectively, the reinstatement of an evicted tenant or

the eviction of the tenant in possession. An order for status quo merely leaves the situation or things as they stand pending the hearing of the reference or complaint. In its negative form, however, an injunction may have the same effect as an order for status quo.”

In other words a restraining injunction has the same effect as status quo order, as they preserve the state as it is at the date of the order. The status in this matter was that the documents had been executed but the charge had not been Registered at the lands office. From the proceedings so far we can see that the charge was in the process of being registered. The question is then to determine whether as at the date the order was issued, the property was in the defendant's control. From the annexures the bank accepted the loan application by the 2nd defendant on the 27th October 2011, and 2nd defendant had already signed the charge by the 2nd Nov, 2011. So the status quo as ordered could also include what was happening as at the date of the order which could also include the registration process which might have had commenced as at then, as its not known when charge was presented at the lands office.

The process of creating a charge was provided for under section 65-75 of the Registered Land Act Cap 300 Laws of Kenya (repealed) under which the suit property was registered. The process was already ongoing as at the date the suit was filed and the orders obtained. In this case the orders sought was prohibition as the property was in danger of being alienated and transferred to 3rd party. From the annexed documents the property had already been transferred to the 2nd defendant who had by then executed a charge in favour of the bank, which might have been in the process of registering the same. The charge had already been signed by the 2nd defendant as at the date of the order and hence this court finds that the documents had left the control of the 2nd defendant as what was remaining was only for the bank to register the charge so that it becomes valid.

Sec 65(3) reads ***“the charge shall be completed by its registration as an encumbrance and the registration of the person in whose favour its created as its proprietor and by filing the instrument”***.

From the above provision the act brings about the issue of filing the charge and there being a process involved until its registered in the specific section of encumbrances. Its clear that the process at the lands office begins by presentation at the registry for registration and its evident from the drafting that registration is the final step as far as charges are concerned. It is possible that by the time the order was served the charge had been presented for registration and that the registry had already accepted the same only that it had not been entered in the register. That remains to be proved. The party responsible from the foregoing as regards registration was purposely the bank, the 2nd defendant having signed the charge and bound himself and so the bank was to do the registration process.

It is trite Law that the service of the orders is required to be effected upon the defendants personally. The orders were served upon the 2nd defendant's wife as per records. Does that amount to personal service? The applicable law is order 52 Rule 3(3) of the Rules of Supreme court of England which makes it mandatory for personal service.

Power of the court over contempt proceedings is granted under section 5 of the Judicature Act which provides that the High Court and the Court of Appeal shall have the same power to punish for contempt of court as is for the time being possessed by the High Court of Justice in England, and that power shall extend to upholding the authority and dignity of subordinate courts. The proceedings are instituted against the party in breach of the court orders and directions. The proper party thus must be before the court and served with the order allegedly breached.

A case of contempt of court is usually a Quasi criminal proceedings in nature because liberty of a person is at stake, and therefore a higher standard of proof is required though not as that in criminal cases but higher than the standard of proof in civil cases. The party responsible for the breach is to be identified. The orders were served on the defendants as per the allegations, but that the property had been transferred to the bank, and what was remaining was for the Bank to register its interest. Was the 2nd defendant obligated to inform the bank of the order once served? As a prudent person, the respondent should have informed the bank that there was an order of status quo being maintained and I believe the bank could have stopped the transaction. However, failure to inform the bank can not be presumed to be

an act in contempt of the court order and the fact that the bank was not served, and the 2nd defendant not being its agent could not really control its discretion. The property was registered 7 days after the order was issued by the court.

It was the duty of the applicant to prove that the act of registration of the charge was strictly upon the 2nd defendant. It is settled Law that for contempt to arise the order stated to be breached should be accompanied by Penal Notice. The applicant has not demonstrated that the order served was accompanied with a penal notice.

The applicant has not shown that she ever served the lands office with the order or placing any caution against the suit property, since they feared that the land might have been under transaction. The applicant appears to have been ignorant of what was happening to the property by the time she filed the suit hence issues such as the existence of a charge were not before the court when it issued the orders.

The upshot of the above is that there is no proper proof that the 2nd defendant was strictly responsible for the registration of the charge or that he had actual control. The bank that presented the charge documents for registration is not a party to the suit and were also not served, and even if they were served and breached the order, they are 3rd parties and hence it will be improper to punish the 2nd defendant for acts which could have been perpetrated by a third party, as personal responsibility on the part of the defendant has not been established. The charge of contempt proceedings fails and is dismissed with no order as to costs.

Dated, signed and delivered on 20th day of June 2014.

A. OMBWAYO

JUDGE