



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC CASE NO. 649 OF 2011**

SAMUEL NGUGI KARUNGU.....1<sup>ST</sup> PLAINTIFF

ESTHER WAMBUI NGUGI.....2<sup>ND</sup> PLAINTIFF

DAVID NGINYI NGUGI.....3<sup>RD</sup> PLAINTIFF

**=VERSUS=**

ESTHER WANGECI CHEGE NGANGA.....DEFENDANT

**RULING**

1. This is the notice of motion dated 19<sup>th</sup> July 2021 brought under order 51 rule 1, order 40 rule 3 (1), (2) and (3) of the Civil Procedure Rules, Section 5(1) of the Judicature Act Cap 8 Laws of Kenya, Section 3A of the Civil Procedure Act the Inherent jurisdiction of the court and all other enabling provisions of the law.

2. It seeks orders:-

**1. Spent.**

**2. Spent.**

**3. That this honourable court be pleased to issue eviction orders against the Defendant, her agents, servants, employees from the subject suit property known as LR NO Dagoretti/Waithaka/562 portion measuring 0.49 acres.**

**4. That the OCS Riruta Police Station does enforce compliance of this honourable court orders.**

**5. That further orders as ends of justice may require be made.**

**6. That the cost of this application be provided for.**

3. The grounds are on the face of the application and are set out in paragraphs 1 to 4.

4. The application is supported by the affidavit sworn by David Nginyi Ngugi, the 3<sup>rd</sup> Plaintiff/Applicant on the 19<sup>th</sup> July 2021.

5. The application is opposed. There is a replying affidavit sworn by Esther Wangeci Chege, the Defendant/Respondent sworn on the 5<sup>th</sup> October 2021.

6. On the 18<sup>th</sup> October 2021, the court with the consent of the parties directed that the notice of motion be canvassed by way of written submissions.

**The Plaintiffs'/Applicants' Submissions**

7. They are dated 9<sup>th</sup> November 2021. The District Land Surveyor Nairobi visited the suit property in order to excise that portion of land as ordered by the court on 25<sup>th</sup> February 2021. The said surveyor did excise the portion measuring 0.49 acres from LR No

Dagoretti/Waithaka/562. The same was done in the presence of all parties as well as the local area chief and the OCS Riruta Police Station.

8. The Defendant has refused to vacate the said portion. She intentionally and willfully continues to disobey the court orders hence she is in contempt.

9. Section 5 of the Judicature Act and Order 40 Rule 3 of the Civil Procedure Rules lays out the law, on contempt. Contempt of court is that conduct or action that defies or disrespect authority of court. They have put forward the cases of **Republic vs A.G & Another Ex parte Mike Maina Kamau; Econet Wireless Ltd vs Minister for Information & Communication of Kenya & Another.**

10. The reason why courts punish for contempt is to uphold the dignity and authority of the court, ensure compliance with directions of the court, observance and respect of due process of law. Preserve an effective and impartial system of justice, and maintain public confidence in the administration of justice by courts. They have also put forward case of the Supreme Court of India **T. N. Gadavarma Thiru Mulpad vs Ashok Khot & Another [2006] 5 SCC.** They pray that the application be allowed with costs.

#### **The Defendant's/Respondent's Submissions**

11. They are dated 12<sup>th</sup> November 2021. The Defendant/Respondent is not guilty of contempt of court. The applicants must prove that the alleged contemnor willfully disobeyed the court's orders or willfully committed an act which could lower the authority of the court. She has put forward the cases of **Katsuri Ltd vs Kapurchand Depar Shah [2016] eKLR; Mutitika vs Baharini Farm Ltd [1985] eKLR; Republic vs Boniface N. Chief Licensing Officer Central Firearms Bureau & Another Ex-parte Bryan Yongo Otumba [2015] eKLR.**

12. The Plaintiffs'/Applicants are only entitled to half of the suit land being the portion they occupied and lived. They however misrepresented this to the regional surveyor who conducted the survey and marked the entire disputed land measuring 0.49 acres as the portion belonging to them.

13. The Plaintiffs claim for encroachment is unsupported since they have always known that the said houses are constructed on half of the portion belonging to the Defendant/Respondent.

14. The Plaintiffs have failed to prove the contempt to the required standards. She has put forward the case of **Katsuri Ltd vs Kapurchand Depar Shah [2016] eKLR.**

15. She prays that the application be dismissed with costs.

16. I have considered the notice of motion and the affidavit in support. I have also considered the response thereto, the written submissions and the authorities cited. The issues for determination are:-

*(i) Whether the Defendant/Respondent is in contempt of the orders issued on 25<sup>th</sup> February 2021.*

*(ii) Who should bear costs of this application?*

17. This court in its Judgment dated 24<sup>th</sup> October 2019 granted the following orders:-

“(i) A declaration is issued that the defendant has always held a portion of Plot Number Dagoretti/Waithaka/562 in trust of the plaintiffs and therefore the plaintiffs are entitled to the said portion out of the said land.

*(ii) An order of injunction is hereby issued restraining the defendants, by herself, servants, employees and/or agents from interfering with the quiet enjoyment of the portion of the land the plaintiffs occupy on Plot Number Dagoretti/Waithaka/562.*

*(iii) Each party do bear own costs.”*

18. The Plaintiffs later filed an application dated 29<sup>th</sup> November 2019. The court after considering the application granted the following orders:-

“(a) That the local chief Kabiria area and the officer in charge of Station Dagoretti/Waithaka do assist parties in keeping the peace when subdivision of the land is executed.

*(b) That the district land surveyor, Nairobi be the one to carry out the survey works to apportion the portion of land under question between the parties.*

*(c) Each party do bear own costs.”*

19. In paragraph 4 of the Plaintiff's/Applicant's affidavit, he deponed:-

*“The District Land Surveyor did excise our portion measuring 0.49 acres from the subject suit property known as Plot No*

**Dagoretti/Waithaka/562 which exercise was done in the presence of all parties herein as well as the local area chief and OCS Riruta Police Station as the court had ordered”.**

20. In paragraph 5 he depones:-

**“That upon excision and identification of our portion by the surveyor in the presence of all the parties herein it was discovered that the Defendant and agents had trespassed and interfered with our quiet enjoyment of our portion (annexed hereto and marked DNN4 are photos depicting the situation on the ground).**

21. The Defendant/Respondent on her part contends that the portion that was to be excised was that occupied by the Plaintiffs. Further that the surveyor undertook the exercise in her absence.

22. If indeed this was the true position, then it would be contrary to the orders granted on 25<sup>th</sup> February 2021.

23. In the current application the Plaintiffs/Applicants in prayer No 3 seeks:-

**“That this Honourable Court be pleased to issue eviction order against the Defendant, her agents, servants, employees form the subject property known as LR NO Dagoretti/Waithaka/562 portion measuring 0.49 acres”.**

One wonders where this is coming from. This had not been sought in the Plaint. This court is unable to grant such orders at this stage.

24. In the case of **Mutitika vs Baharini Farm Ltd [1985] KLR 229, 234**, it was held that:-

**“.....the standard of proof in contempt proceedings must be higher than proof on a balance of probabilities at most, but not exactly, beyond reasonable doubt....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 an offence which can be said to be quasi criminal in nature.....”**

25. Similarly in the case of **Katsuri Limited vs Kapurchand Depar Shah [2016] eKLR** it was stated that:-

**“As pointed out earlier in an application of this nature we are dealing with the liberty of a person and such an order ought to be granted in the clearest circumstances as evidently demonstrated by the authorities cited herein.”**

26. I find that the Plaintiffs/Applicants have failed to demonstrate that the Defendant/Respondent has intentionally and willfully disobeyed the orders granted on 25<sup>th</sup> February 2021.

27. The parties are directed to avail themselves so that the exercise can be undertaken as directed in the orders of 25<sup>th</sup> February 2021.

28. The upshot of the matter is that I find no merit in this application and the same is dismissed. Each party do bear own costs.

It is so ordered.

**DATED, SIGNED AND DELIVERED NAIROBI THIS 10<sup>TH</sup> DAY OF MARACH 2022.**

.....

**L. KOMINGOI**

**JUDGE**

**In the presence of:-**

Ms Ledoro for Mrs Nzakuva for the Plaintiffs

Ms Kirui for Ms Muchira for the Defendant

Steve - Court Assistant