



**REPUBLIC OF KENYA**

**High Court at Nairobi (Nairobi Law Courts)**

**Environmental & Land Case 570 of 2011**

**MUTHONI KIMANI RIUNGU.....1<sup>ST</sup> PLAINTIFF/APPLICANT**

**PETER GICHIRI KIMANI.....2<sup>ND</sup> PLAINTIFF/APPLICANT**

(Suing on their own behalf and on behalf of Kenneth Wagatu Kimani, Simon Kagece Kimani, Susan Waceke and Teresia Wanjiku)

**VERSUS**

**FRANCIS KIMANI WARUINGI.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**JOSPHAT NJENGA NJUGUNA.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**RULING**

The Plaintiffs have filed an application dated 27/2/2012 brought under Order 40 Rules 3(1) & (2) of the Civil Procedure Rules and Sections 1A, 1B, 3 & 3A of the Civil Procedure Act seeking the following orders:-

1. That the property of the 2<sup>nd</sup> Defendant be attached and the 2<sup>nd</sup> Defendant be detained in prison for a term not exceeding six months unless in the meantime the court directs his release for disobeying and breaching the orders of the court made on 21/10/2011 restraining the 2<sup>nd</sup> Defendant from alienating, sale, disposal and or in any respect interfering with the title to land parcel KIAMBAA/WAGUTHU/1207 which orders were extended on 27/10/2011 and 3/11/2011 and further orders made on 18/1/2012.
2. That the resultant subdivisions of land parcel KIAMBAA/WAGUTHU/1207 effected by the 2<sup>nd</sup> Defendant; subdivisions 3429 – 3432 and or any further subdivisions thereof be nullified and title do revert to the original status KIAMBAA/WAGUTHU/1207.

The application is supported by an affidavit sworn by the 2<sup>nd</sup> Plaintiff on 27<sup>th</sup> February 2012, and is premised on the grounds that the Court granted an injunction order on 24/10/2011 restraining the 2<sup>nd</sup> Defendant from alienating, sale, disposal, and or in any respect interfering with the title to land parcel KIAMBAA/WAGUTHU/1207 (hereinafter referred to as the suit property) following an application dated 19/10/2011. The Plaintiffs state that the orders were granted *ex-parte* for a period of 14 days but that the same were extended on 27/10/2011, 3/11/2011 and 18/1/2012. Further, that the 2<sup>nd</sup> Defendant was duly served with the Court order dated 24/10/2011 and that he was duly represented by his counsel on 27/10/2011 and 3/11/2011 when the said orders were extended in Court, and the 2<sup>nd</sup> Defendant's

advocate was served on 25/1/2012 with the court order issued on 18/1/2012. The Plaintiffs claim that the 2<sup>nd</sup> Defendant in utter disobedience and breach of the court orders interfered with the suit property and has caused subdivision thereof into parcels 3429 – 3432, and that his actions amount to utter contempt of court and are calculated to defeat the Plaintiffs' quest for justice.

The 2<sup>nd</sup> Plaintiff annexed as evidence a copy of the court orders issued on 24<sup>th</sup> October 2011; an affidavit sworn by a process server on 26<sup>th</sup> October 2011 and filed in Court on 27<sup>th</sup> October 2011; an extract of title (green card) of the suit property as at 14.11.11, and the receipt for payment of the application of a search certificate with respect to the suit property dated 16/1/2012 with the remarks, "closed on subdivision new no. 3429-3432".

The 2<sup>nd</sup> Defendant filed a Replying Affidavit sworn on 15/3/2012 opposing this application, wherein he deponed that the application is oblivious of the provisions of Order 40 governing the life span of an *ex-parte* injunction order and is thus misconceived. The 2<sup>nd</sup> Defendant further deponed that he is not in disobedience of a Court injunction that has been served upon him. He contended that he had not been served with a Court order extending the *ex-parte* injunction of 24/10/2011 and neither had he been served with the orders made on 3/11/2011 nor 18/1/2012. Further, that the order of 18/1/2012 was made in the absence of his counsel who was indisposed and that it only came to his attention when this application was served upon him. The 2<sup>nd</sup> Defendant also averred that it was evident in the affidavit of service sworn by Michael Njonjo produced in evidence by the Plaintiffs that he was not served with the *ex-parte* injunction order made on 24/10/2011.

The Plaintiffs' Counsel filed submissions dated 11/6/2012 and contended that it is not in dispute that an order of injunction was granted on 21/10/2011 which was extended on 27/10/2011 and 3/11/2011, and that further orders were made on 18/1/2012. Further, that the orders remain unchallenged as the 2<sup>nd</sup> Defendant has not filed an application to have them set aside or varied. Counsel submitted that it was the service effected on 25/10/2011 that prompted the 2<sup>nd</sup> Defendant to enter appearance on 27/10/2011, and further that the 2<sup>nd</sup> Defendant was duly represented on both 27/10/2011 and 3/11/2011 when the orders were extended. It is their submission that the 2<sup>nd</sup> Defendant was not being candid when he purports that he was not aware of the existence of the injunction orders.

Counsel also submitted that the 2<sup>nd</sup> Defendant did not deny causing the suit parcel to be subdivided into land parcels 3429 – 3432. Further that the annexed green card clearly shows at entry No. 14 which was made on 14/11/2011 during the subsistence of the injunction orders that 'Title was closed for subdivision'. It is counsel's submission that 14/11/2011 was the date which the 2<sup>nd</sup> Defendant presented the subdivisions to the lands registry for registration. Counsel relied on the decisions of this Court in **Daniel Nderi Njogu v Lydia Muthoni Kibage, HCCC 34/2009; Gatimu Farmers Company v Geoffrey Kagiri Kimari & 3 others, HCCC 302/2004; Ndertiu Munyiri & 34 others v Margaret Wairimu Ndungu & Anor, HCCC 141/2005; and Mary Wanjiru Gitau v Margaret Wangechi Wachira HCCC No. 274/1999** for the positions that court orders must be obeyed irrespective of one's opinion of the same, and that this court has jurisdiction to deal with the Plaintiffs application.

I have carefully considered the pleadings, evidence and submissions made with regard to the application before this Court. There are three issues for determination. The first issue is whether there was service of the orders issued by this Court on 24<sup>th</sup> October 2011 on the 2<sup>nd</sup> Defendant. The said orders were issued at the hearing of an *ex parte* application dated 19<sup>th</sup> October 2012 brought by the Plaintiffs and *inter alia* stated as follows:

"That a temporary injunction be and is hereby granted restraining the 2<sup>nd</sup> Defendant by himself, his agents and or servants and or employees from alienation, sale, disposal and or in any respect interfering with the title to the land parcel L.R. No. KIAMBAA/ WAGUTHU/1207 for 14 days"

It is specifically required under the Civil Procedure Rules Order 40 Rule 4(3) that *ex parte* orders for injunctions should be served on the party sought to be restrained within three days of its issue, failing

which the injunction automatically lapses. The requirement for personal service is also a requirement in contempt of Court proceedings as held by the Court of Appeal in **Ochino & Another v Okombo & 4 others (1989) KLR 165**. The Court of Appeal in the said decision stated that as a general rule no order of a court requiring a person to do or to abstain from doing any act may be enforced by committing the said person for contempt, unless a copy of the order has been served personally on that person.

There is an affidavit on record stating that such personal service of the orders issued on 24<sup>th</sup> October 2011 was effected on 25<sup>th</sup> October 2011 upon one Samuel Thuo on behalf of the 2<sup>nd</sup> Defendant, and that the said Samuel Thuo acknowledged that he was receiving the orders on behalf of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. Further, that such service was effected at the 2<sup>nd</sup> Defendant's residence and upon his instructions. The process server, Micheal Njonjo, deponed as follows in paragraphs 2 to 5 of the affidavit of service he swore on 26<sup>th</sup> October 2011 with regards to the said service:

2. "That on the 25<sup>th</sup> October 2011 I received a Certificate of Urgency, Plaint dated 19<sup>th</sup> October 2011 and Summons to enter appearance and Court order dated 24<sup>th</sup> October 2011 from the firm of R.W. CHEGE & ASSOCIATES ADVOCATES with instructions to effect service upon the 1<sup>st</sup> and 2<sup>nd</sup> Defendants herein.
3. That on the same day 25<sup>th</sup> October 2011 at 12:00 noon I accompanied by Peter Gichuri the 2<sup>nd</sup> Plaintiff proceeded to the residence of the 2<sup>nd</sup> Defendant situate at RONGAI KAJIADO COUNTY within a residential estate which we were informed is commonly known as Karumaindo that is off Rongai Kiserian Road, near Rongai Orthopaedic Centre.
4. That on arrival at the 2<sup>nd</sup> Defendant's residence, Peter Gichuri called Mr. Josphat Njenga Njuguna on the 2<sup>nd</sup> Defendant's cell phone number 0722360353 and I talked to the 2<sup>nd</sup> Defendant to whom I introduced myself and the purpose of my visit and the person I talked to who confirmed to be Mr. Josphat Njenga Njuguna informed me that he was held up at Ngong Land Office and that he could not make it to his residence and promised to send his worker one Samuel Thuo to come and receive the documents on his behalf.
5. That while at the 2<sup>nd</sup> defendant's residence at about 2:00 p.m. a gentleman who introduced himself as Mr. Samuel Thuo appeared and I introduced myself to him and the purpose of my visit. Mr. Samuel Thuo informed me that he was directed and had authority to receive copies of the application, Plaint Order and summons to enter appearance on behalf of both Mr. Joseph at Njenga Njuguna and Francis Kimani Waruingi the 1<sup>st</sup> Defendant upon which Mr. Samuel Thuo accepted service by signing on my copies, hereof acknowledging service on behalf of both defendants which copies I return to this Honourable Court duly served."

These facts are not denied by the 2<sup>nd</sup> Defendant, who claims that he was nevertheless not personally served.

The requirement of personal service in my opinion serves the purpose of ensuring that the alleged contemnor has knowledge of the court's orders, and that the rights of the contemnor are safeguarded in the committal process. Personal knowledge of the court orders is what is paramount, not the mechanics or technicality of personal service. I find that that the 2<sup>nd</sup> Defendant had knowledge of this court's orders issued on 24<sup>th</sup> October 2011 for the reasons that not only was he orally informed of the said orders, but also because personal service of the said orders was effected on one Samuel Thuo pursuant to the 2<sup>nd</sup> Defendant's directions. In addition, the mode of personal service was one chosen by the 2<sup>nd</sup> Defendant himself, and he is therefore estopped from stating that there was no service on him of the said orders. The 2<sup>nd</sup> Defendant has also not denied the fact that the said orders were variously extended by this Court at *inter partes* hearings held on 27/10/2011 and 3/11/2011 in which hearings he was represented by his Advocate who filed a memorandum of appearance on 26<sup>th</sup> October 2011.

I will now proceed to consider the second issue of whether the 1<sup>st</sup> Defendant is culpable for contempt of court. The threshold of proof required in contempt of Court is higher than that in normal civil cases, and one can only be committed to jail or otherwise penalized on the basis of evidence that leaves no doubt as to the contemnor's culpability. It is not disputed that the suit property herein was originally owned by the 2<sup>nd</sup> Defendant and this is evident from the green card produced by the Plaintiffs showing registration of the 2<sup>nd</sup> Defendant as proprietor on 23/1/96 and issuance of a title deed to him on the same date. The said green card shows the following entries after service of the court orders on 25<sup>th</sup> October 2011:

“Entry 13 on 26/10/2011: Entry 11 above removed vide DO's letter ... dated 14<sup>th</sup> October 2011

Entry 14 on 14/11/11: Title closed on subdivision see 3429-3432”

The entry no 11 referred to in entry 13 was a restriction that had been placed on the title pursuant to the DO's (District Officer's) letter dated 26<sup>th</sup> July 2011. It is instructive to note that the said restriction was removed on the next day following the service of the court orders on the 2<sup>nd</sup> Defendant, and that he commenced with and completed the processes of sub-division of the suit property in a span of sixteen days after service of the said orders, and despite the said orders expressly prohibiting him from doing so. The Court orders that are most material in this regard are the ones issued on 24<sup>th</sup> October 2011, and which are the orders the 2<sup>nd</sup> Defendant was served with within three days as required by Order 40 Rule 4(3) of the Civil Procedure Rules.

If there has ever been any blatant contempt of court, then this is one. It is also clear that the 2<sup>nd</sup> Defendant was attempting to circumvent the Plaintiffs claim by doing away with the suit property, and he is clearly in abuse of the process of court. The 2<sup>nd</sup> Defendant has in addition not denied undertaking the said subdivisions or brought any evidence in rebuttal. It is therefore my finding that the Plaintiff has proved beyond doubt that the 2<sup>nd</sup> Defendant interfered with the suit property after issuance and service on him of court orders prohibiting the same, and that the evidence produced in court points to the 2<sup>nd</sup> Defendant's culpability for contempt of court.

The third and final issue for consideration is whether the mandatory injunction sought of nullification of the subdivisions can be granted. Ordinarily this court would not have hesitated to grant the orders sought. This is for reasons that this Court had already found that the Plaintiffs have shown a *prima facie* case in the ruling delivered on 18<sup>th</sup> January 2012 which granted inhibition orders prohibiting any dealings with the suit property, and also in light of the blatant disobedience of this court's orders by the 2<sup>nd</sup> Defendant. However, it has come to my notice after a perusal of the court record that the 2<sup>nd</sup> Defendant has since sold some of the sub-divided parcels of land to third parties who are not party to this application, and who will therefore be prejudiced by the orders sought without having been heard. Prayer 3 of the Plaintiffs' application dated 27<sup>th</sup> February 2012 is therefore denied for this reason.

The orders of this Court are therefore as follows:

1. That summons do forthwith issue against Josphat Njenga Njuguna, the 2<sup>nd</sup> Defendant herein, to appear in court on 5<sup>th</sup> December 2012 at 11am to show cause why he should not be committed for contempt of court. The Plaintiffs to follow-up on the issuance and service of the said summons.
2. That the 2<sup>nd</sup> Defendant shall within seven days of service of this ruling file in court and serve the Plaintiffs with an affidavit detailing the status of the subdivisions of land parcel KIAMBAA/WAGUTHU/1207 that are shown in the green card produced in evidence herein as subdivisions 3429-3432, including an account of the sub-divisions that have been sold to third parties; details of the said third parties if any and the sale agreements entered into; and the amount received as the purchase price for each such sub-division sold.
3. The Plaintiffs shall personally serve the 2<sup>nd</sup> Defendant and his Advocate with the orders herein

within 5 days of the date of this ruling.

4. There shall be a mention of this matter on 5<sup>th</sup> December 2012 at 11 am for further directions and orders.

5. The 2<sup>nd</sup> Defendant shall meet the costs of this application.

Dated, signed and delivered in open court at Nairobi this \_\_\_\_22<sup>nd</sup>\_\_\_\_ day of \_\_\_\_November\_\_\_\_, 2012.

**P. NYAMWEYA**

**JUDGE**