



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & TAX DIVISION – MILIMANI

CIVIL CASE NO. 922 OF 2001

GRACE WAMBUI

NGIGI.....PLAINTIFF

VERSUS

**GABRIEL NGUGI NGIGE.....1ST
DEFENDANT/RESPONDENT**

**EUNICE WAKINI.....2ND
DEFENDANT/RESPONDENT**

RULING

The Applicant, Grace Wambui Ngige, seeks orders from this court that –

- (1) The 2nd Respondent be cited for contempt of court for disobeying this court's orders made on 14th December, 2009 and amended on 22nd June, 2010.**
- (2) The Honourable court do commit the 2nd Respondent to civil jail for a period of six (6) months or such other period as this court deems fit and order such other punishment as it deems appropriate in view of the aforesaid contempt.**
- (3) The said 2nd respondent be compelled by a further order to abide by the order made on 14th December, 2009, by the Honourable Lady Justice Khaminwa.**
- (4) The costs of this application be borne by the 2nd Respondent in any event.**

The application is supported by the Notice to the Attorney General, the *ex parte* Chamber Summons, statutory statement and the verifying affidavit of Grace Wambui Ngigi the Applicant herein, all dated

20th September, 2010 and is based on the grounds that –

(a) On 14th December, 2009, this court made orders against the 2nd Respondent to the effect that –

(i) The 2nd respondent be and is hereby ordered to produce the original title for LR No. 7660/94 (Original No. 7660/70/2) LImuru, before this court.

(ii) The Deputy Registrar of this court is hereby directed to execute the necessary transfer forms to have 2 acres of land excised from LR No. 7660/94 (Original No. 7660/70/2) registered in the name of the Plaintiff/Decree Holder as per the decree dated 26th October, 2001.

(b) The 2nd Respondent was served with the said court order together with a penal notice by an authorized process server on 6th July, 2010 but she has continued to blatantly disobey the said orders and has refused to surrender the title despite numerous pleas by the Applicant.

(c) The Applicant has no other way of enforcing the said orders.

(d) The 2nd Respondent's conduct amounts to disrespect of court orders and renders the course of justice an exercise in futility.

The background to this saga dates back to 24th October, 2001 when a consent decree was recorded in this matter and duly signed by the parties' respective counsel. The said consent read as follows –

“By consent the Originating Summons dated 7th February, 1994 is hereby settled on the following terms;

(i) That the Defendant shall cause the subdivision of Land Reference No. 7660/94 Original No (7660/70) into two (2) parcels of two (2) acres and three (3).

(ii) That the Defendant do transfer to the Plaintiff Grace Wambui Ngigi 2 acres comprising the main house that she has been occupying hereinafter called the Original Farm House. The said parcel shall be transferred to Grace Wambui Ngigi jointly with her children of the marriage.

(iii) That the Defendant shall likewise transfer to Eunice Wakini Munene a portion of 3 acres comprising of her house that she has been occupying.

(iv) That Grace Wambui Ngigi shall withdraw the caution she lodged on 7660/94 Original No. (LR 7660/70) immediately to enable transfer and subdivision be effected.

(v) That Gabriel Ngugi Ngigi undertakes to execute the transfer documents.

(vi) Each party shall bear his/her own legal costs of subdivision and transfer shall be borne by all the parties on proportionate basis.

(vii) Upon the issuance of Titles herein stated, this suit shall be marked as settled with no further claims whatsoever by the Plaintiff from the 1st Defendant and the 2nd Defendant.

(viii) Each party to bear its own costs.

**Sgd Martha Koome & Company, Advocates
Advocates for the Plaintiff**

**Kahuthu & Kahuthu, Advocates
Advocates for the 1st and 2nd Defendants”**

A decree was issued in terms of the above consent on 26th October, 2001.

On 21st June, 2002, the respective Counsel for the parties jointly wrote to Kamwere & Associates, Cadastral Engineering & Topographical Surveyors, instructing them to carry out a subdivision of the suit property in terms of the above court order, a copy of which was attached to the instructions. By a letter dated 25th May, 2005, Kamwere & Associates wrote to the respective parties' Advocates advising that the necessary planning and survey work had been duly completed and that the resultant Deed Plans were available for collection. This was followed soon thereafter by the death on 8th July, 2005, of Gabriel Ngige Ngugi, the 1st Defendant herein, at Tigoni Estate before executing the necessary transfer in favour of the Plaintiff/Applicant.

On 16th February, 2006, Muciimi Mbaka & Co., Advocates for the Plaintiffs, wrote to the Defendant's Advocates requesting them to let the former have the original title which was in their client's possession in order to facilitate the registration of the Plaintiff's portion as delineated under Deed Plan No. 259563. Since the 1st Plaintiff had died on 8th July, 2005, the Plaintiff filed an application by Notice of Motion dated 13th February, 2009, seeking orders, *inter alia*, that this court be pleased to issue an order compelling the 2nd Defendant to produce the original title for LR No. 7660/94 (Original No. 7660/70/2) Limuru, before the court. Paragraph 8 of the supporting affidavit sworn by the Plaintiff in support of that application attests that at the time of his death, the 1st Plaintiff was leaving with the 2nd Respondent at Ngara area in Nairobi. The application was based on the grounds that the 1st Defendant had died before executing the transfer in favour of the Plaintiff, and that the 2nd Defendant was in actual possession of the original title and had failed to surrender it to enable the Plaintiff to register her portion of the land. The application was served on the 2nd Plaintiff by David Kamanguya, a Process Server of this court, on 29th February, 2009 at about 9.30 am. An appropriate affidavit of service was duly filed in court on 13th March, 2009.

When that application came for hearing before the Honorable Lady Justice Khaminwa on 14th December, 2009, the Plaintiff was duly represented by Counsel but the 2nd Defendant did not attend nor was she represented by Counsel. Indeed, she did not file any replying affidavit or Grounds of Opposition in spite of having been served on 29th February, 2009. In effect, the application was not opposed. The court accordingly ordered the 2nd Defendant to produce the original title for LR No. 7660/94 (original No.

7660/70/2) Limuru before the court. The court further directed that the Deputy Registrar of this court do execute the necessary transfer forms to have two acres of land excised from LR no. 7660/94 (Original No. 7660/70/2) registered in the name of the Plaintiff Decree Holder as per the decree dated 26th October, 2001.

As the said order was not endorsed with a penal notice, on 4th June, 2010, Ms Muciimi Mbaka & Co., the Plaintiffs Advocates, requested the Deputy Registrar to have the said order amended and reissue the amended order bearing a penal notice to facilitate service upon the Judgment Debtor and commence contempt proceedings in the event she failed to comply. The order was accordingly amended on 22nd June, 2010, and served on the 2nd Defendant on 6th July, 2010. It was after that service that the Plaintiff filed the present application by Notice of Motion dated 24th October, 2010 seeking the citing of the 2nd Respondent for contempt of court by disobeying this court's orders made on 14th December, 2009, as amended on 22nd June, 2010 as observed above.

The application is opposed by the replying affidavit sworn by the 2nd Respondent on 16th November, 2010. The main thrust of her reply is that the application is fatally defective for non compliance with mandatory requirements. In particular, she avers that she was not served with the order that she is alleged to have breached and that she only came to learn about it from her current advocates after their perusal of the court file. She further takes the line that the application is misconceived as it purports to have her committed to civil jail for disobedience of a court order which she is not capable of obeying. She further states that the applicant is misleading the court by stating that the 2nd Respondent is in possession of the title to the suit property registered in the name of the 1st Respondent, now deceased. She then "**states categorically**" that she is not in possession of the said title deed.

Arising from the above pleadings, the main issues to be determined are whether the 2nd Respondent was actually served with the court order which is alleged to have been disobeyed, and if so, whether the Respondent is incapable of obeying the said order. Although the Respondent denies having been served with the order bearing the penal notice, the court Process Server, one Fredrick Muema Kilonzo, clearly deposes that he served it on her. For the avoidance of any doubt, paragraphs 1, 2 and 3 of his Affidavit of Service read as follows –

- (1) That I am a process server of this honourable court, and duly authorized to serve court process.**
- (2) That on 6th July, 2010, I received copies of an amended order dated 22nd June, 2010, from Muciimi Mbaka & Company, Advocates, for service upon Eunice Wakini, the 2nd Defendant/Judgment Debtor.**
- (3) That on the same day around 9.00 am accompanied by Mr Njogu Ngigi, the son of the Plaintiff/Decree Holder, we went to Ngara Estate, Nairobi, along Quarry Road where Eunice Wakini lives. On arrival at the said premises, Mr Njogu Ngigi pointed out the house on the ground floor which is next to Wa Michey House and fortunately we found Eunice Wakini standing at the door of her house. I introduced myself to her and the purpose of my visit and thereafter served her with a copy of the amended order which she accepted service (sic) but declined to sign on my original copy which I now return to court duly served."**

The above affidavit of service speaks for itself. It is so detailed that the service could not have been a figment of the process server's imagination. He did not know the respondent's abode personally, and had to be escorted there by a son of the applicant who knew the respondent well. I therefore believe the court process server's deposition and hold that the Respondent was duly served with the amended court order bearing the penal notice. Consequently, I also find it petty for the respondent to allege that she was not served with the said order. By so doing, she is obviously denying the obvious.

Another small issue is that the Respondent avers that she was not aware of the original consent order recorded in this matter on 24th October 2001. It is on record that the 2nd Respondent was joined in this suit in 2001. The record further shows that both the 1st and 2nd Respondents were represented by the same firm of Advocates when the consent order settling the Originating Summons dated 7th February, 1994 was recorded. It is unbelievable that a person who was a party to the suit never got to know that a consent was entered in the matter since she shared the same Advocates with the 1st Respondent. By extension, it is equally unbelievable that as a party to the suit, she never knew that one of the consent orders was that she obtains three (3) acres out of the five (5) acres in terms of the said consent. For that consent to be recorded, she must have consented to the terms thereof in advance, otherwise it would never have been recorded.

I note that in Paragraph 12 of her affidavit, the 2nd Respondent takes the stand that she did not know the position of the case as she all along entrusted the matter to the 1st Respondent (deceased) who did not inform her of the said consent order, and in paragraph 13 she attests that when the 1st Defendant died in 2005, there was a breakdown in communication between her and her former Advocates and was not aware of the position of the matter herein as all along she thought that her interests were being handled by her then Advocates. I find this a bit strange. When the 1st Respondent was alive, she avers that she entrusted the matter to him but he never informed her of the consent order. After he died and with the knowledge that the 2nd Respondent was left as the sole Defendant in the matter, it is surprising that she could have allowed a breakdown in communication between her and her lawyers, as those lawyers were her only source of information.

An ordinary litigant would take the trouble to consult with the lawyers to find out the position of the case since the person who used to deal with the lawyers was no more. Surprisingly, the Respondent would like the court to believe that she just sat tight and waited for the lawyers to come looking for her. She is the one who should have gone looking for them. I believe that the Respondent is much more intelligent than she feigns to be, and the probability is that she must have been briefed on the consent on record. When she alleges that she was not aware of that consent order, she is not telling the truth. I cannot believe that she never knew at any time that she was going to be a beneficiary of 3 acres to be excised from the suit property.

Against that background, I note that in Paragraph 8 of the replying affidavit, the Respondent alleges that she did not take possession of any documents belonging to the deceased at the time of his death. Indeed, she avers that at the time of the demise of the deceased, she was leaving in Ngara while the deceased died at Limuru whilst staying with the Applicant, which fact is clear from the death certificate annexed to the verifying affidavit. It is interesting to note that while the Respondent cleverly states that she was living in Ngara, she also states that the deceased died at Limuru while staying with the Applicant. I have looked at the Death Certificate and it is true that the deceased died at Tigoni. That does not mean that he was necessarily living with the Applicant at Tigoni. He could have fallen ill when he was there on a visit while all his properties were still at Ngara. On a balance of probability, I find that the deceased was living with the Respondent and that his properties were most likely left behind in the Respondent's house. For the above reasons, I find that contrary to what she alleges, the Respondent is in the best position to know where the Certificate to the suit property is located, and further that she is in a position to produce it.

Being of the above persuasion, I find that the Respondent's conduct in this matter is a bare faced attempt to frustrate the cause of justice by blatantly denying the obvious like, for instance, service of a lawful court order, and that contrary to what she contends, she is the only person in a position to produce the certificate of title to the suit property. Her denial is nothing more than a smoke screen and a mask through which the eye of equity can see clearly.

I therefore find that the 2nd Respondent is guilty of contempt of court for which she ought to be appropriately punished.

I accordingly sentence her to a fine of Kshs 200,000/-.

Orders accordingly.

DATED and **DELIVERED** at **NAIROBI** this 5th day of May, 2011.

L NJAGI

JUDGE