REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KITALE

Civil Suit 40 of 2007

DANIEL PTIONY
SAMUEL POGHISIO
REGINA LORIONO.....PLAINTIFF
VERSUS
CHEPORONGER NGOLESWA.....DEFENDANT.
R U L I N G.

By Notice of Motion dated 6th November, 2007, pursuant to the provisions of sections 8 and 3A and 63 (1) and (e) of the Civil procedure Act, order XXXIX Rules 2 (a) (2), and (3) of the Civil Procedure Rules and order L Rule 1 of the Civil Procedure Rules, the applicant seeks orders.

(1) **THAT,** the application be certified as urgent and that a hearing date be fixed on a priority basis.

(2) **THAT**, the sub-division of the parcel comprised in title No. West Pokot/Chepkono/181 resulting in issuance of title Numbers West Pokot/Chepkono/1388, 1389, 1390, 1391 and 1392 be revoked and the Title No. West Pokot/Chepkono/181 be restored.

(3) **THAT**, upon restoration of title No. West Pokot/Chepkono/181 in the Register, then the said parcel should be preserved until the determination of the pending applications and the suit herein.

(4) **THAT**, the respondents be detained in prison for a term not exceeding six (6) months for having sub divided the land comprised in title No. West Pokot/Chepkono/181 and thereby deliberately disobeyed the order issued by this court at their instance on 29/3/2007. That the status quo over the said parcel be maintained, and which order was extended on 21/5/2007, 25/7/2007 and on 18/9/2007.

(5) **THAT**, the costs of this application be borne by the respondents/plaintiffs.

The application is based on the grounds:-

1. **THAT**, the respondents applied for an injunction to restrain the applicant from hiving off part of the land comprised in title No. West Pokot/Chepkono/181.
2. **THAT**, the applicant in her defence and counterclaim on record, claimed that part of her land comprised in title No. West Pokot/Chepkono/182 was forcefully taken by the respondents and made to form part of plot No. 181 aforesaid allegedly in execution of the award by the Minister in Appeal Case No. 167 of 1994 but which award was subsequently quashed by the High Court, vide

Kitale HC MISC. Civil Application No. 45 of 2005 but the respondents still remained in occupation of the land forcefully taken by them.

3. **THAT**, the applicant in her counterclaim is claiming about 30 acres which forms part of Plot No. 182 but which was forcefully taken by the respondents and incorporated into plot No. 181.
4. **THAT**, there is a pending application dated 24/5/2007 seeking a mandatory injunction to compel the respondents to move out of the 30 acres, so that the applicant can take possession thereof.
5. **THAT**, the court on the 29/3/2007 ordered that the status quo prevailing on the ground be preserved while awaiting the hearing of the pending applications and the order on status quo and which was made at the instance of the respondents was extended in their presence on the 21/5/2007, 25/7/2007 and on 18/9/2007.
6. **THAT**, notwithstanding the subsistence of the order on status quo, the respondents appeared before the Judge on 24/5/2007 (in Kitale HCP & A cause No. 138 of 2005) and sought an order confirming the grant of Letters of Administration, and the subdivision of plot No. 181 aforesaid into five (5) portions while deliberately concealing from the court the fact of the subsistence of the order on status quo over the same property.
7. **THAT,** upon the confirmation of the grant in Kitale HC P & A Cause No. 138 of 2005, the respondents proceeded to sub divide plot No. 181 aforesaid and new title Nos. West Pokot/Chepkono 1388, 1390, 1391 and 1392 were created.
8. **THAT**, upon subdivision of Plot No. 181 aforesaid, the title for the said plot and which is the subject of this suit was now closed and became extinct.
9. **THAT**, upon subdivision of Plot No. 181 has rendered the applicants suit by way of a counterclaim, a nullity and proceeding with the same would be an exercise in futility.
10. **THAT,** the subdivision of plot No. 181 has made the respondents technically win the present suit and indeed they would have no need to further prosecute it.
11. **THAT**, the respondents have not only acted in contempt, of court but they have also abused the process of this honourable court and stolen the match against the applicant.
12. **THAT**, the application is further supported by the annexed affidavit of **CHEPORENGER NGOLESWA**.

The application is predicated upon the annexed affidavit of Cheporenger Ngoleswa sworn on the 6th day of March, 2007.

The applicant contends that there was Arbitration Board decision of 2nd March, 1989. Exhibited as "CN 2" are proceedings and judgment in the Arbitration Board case No. 9 of 1987 – 1988 between Pkolol Kitiar (Plaintiff) and Kapulony Tiony (defendant)

That the said Arbitration Board decision was implemented on the 22nd day of March, 1990, and a boundary established between plot No. 181 and 182 in Chepkicho Adjudication section as per the sketch map annexed to the judgment aforesaid.

That subsequent thereto the objection proceedings filed by the late Kapuluny Tirop claiming part of plot No. 182 was dismissed with the remarks that the decision of 2nd March, 1989 by the Arbitration Board remain in force.

Arising therefrom appeals Nos. 166 and 167 of 1994 were proffered to the Minister for Lands and the late Kapuluny Tirop. Abstracts for title No. West Pokot/Chepkono/181 and 182 in the names of the late Kapuluny Tiony and the late Pkolol Kitiar are exhibited and marked "CN4" and "CN 5" respectively.

Thereafter, a restriction was registered against plots Nos. 181 and 182 on 28th January, 1989. The restriction reads in part:

> ***"……That except with the order of the Chief Land***
>
> ***Registrar no dealing in the subject land was to be registered until the appeals to the Minister were determined."***

A decision of the Minister of Lands dated 16th March, 2005 which gave part of plot No. 182 belonging to Pkolo Kitiar to the late Kapuluny Tiony is exhibited herein and marked "CN6".

Being aggrieved by the Minister's said decision of 16th March, 2005, the applicant's late husband applied for leave to apply for an order of certiorari to remove into the High Court and quash the said Minister's decision on 16/3/2005. An order of leave was eventually granted vide Kitale H.C. Misc. Application No. 45/2005. The said leave was to operate as a stay of enforcement of the Minister's decision.

Notwithstanding the stay order, the respondents/plaintiffs with their agents and servants nevertheless forcefully moved into part of the land comprised in parcel No. West Pokot/Chepkeno/182, purporting to be enforcing the Minister's decision of 16th March, 2005. In the process the plaintiffs demolished houses and developments and in place thereof put their own fences which encroached onto about 30 acres of the applicant's land. The respondents/plaintiffs have since then moved onto the said parcel.

The applicant complained to the police about malicious damage to her property. As a consequence thereof, the 1st plaintiff and the 3 others were on 7th June, 2005 arrested and arraigned in court, vide Kapenguria RMC Criminal case No. 603 and 612 of 2005. A photocopy of the charge sheets are annexed and marked "CN8" and "CN9" respectively.

The 1st plaintiff and his co-accused challenged the prosecution aforesaid in Kitale H.C. Misc. Civil Application No. 77 of 2005. A copy of the said application is exhibited as "CN10"

In reaction to the application, the 1st respondent/plaintiff admitted having moved into part of plot No. 182 pursuant to the Ministers decision, took possession, forced and even planted maize crop thereon. Subsequently vide Kitale H.C. MISC. Civil application No. 45/2005, the Kitale High court quashed the Minister's decision on 16th March, 2005. A copy of the order to that effect is exhibited as "CN 1".

It was the applicant's contention that the Ministers decision of 16th March, 2005 had not been reflected in the Register for title **No. WEST POKOT/CHEPKONO/182.**

Upon the decision of the Minister being quashed by the High Court on 16th October, 2006, the plaintiffs were obliged to move out of plot No. 182 and transfer themselves to plot No. 181 with a view to abiding by the boundary established on 22nd March, 1990 by the Arbitration Board, the same being the boundary reflected in the survey plan that gave birth to the issuance of titles in 1997.

With a view to re-establishing the boundary upon the quashing of the Minister's decision, the applicant moved into the suit land on 21st March, 2001 with security and fenced the same using posts and barbed wires. But the following day he found the fence uprooted and all the posts burnt down.

By an order of this court dated 29th March, 2007 the ***status-quo*** over parcel No. 181 was to be maintained. That order was extended to 21st July, 2001 and 18th September, 2007 in the presence of the respondents and his counsel.

On 18th September, 2007 the applicant was shocked to hear from the respondent's counsel that the suit plot had been sub-divided culminating into five (5) resultant titles. In this regard a copy of affidavit filed by the respondent and exhibited as "CN 12" sworn on 18th September, 2007 is evidence of the said sub-division.

On 24th May, 2007, the first respondent on behalf of the other respondents asked the court to confirm the grant and have the parcel No. 181 sub-divided into five portions by way of distribution.

In doing so, the 1st respondent failed and/or refused to disclose to the court the fact of existence of orders made on 29th March, 2007 and 21st May, 2007 preserving the ***status-quo*** in relation to parcel No. 181 which is the suit land. That this is in bad taste considering that the order extending the ***status-quo*** had been extended on 21st May, 2007 just 3 days before the 1st respondent appeared before the judge on 24th May, 2007 seeking the sub-division of the suit land.

In sub-dividing the suit land in spite of the orders made by this court on 29th March, 2007, 21st May, 2007 and 25th July, 2007 respondents willfully disobeyed the said court orders.

The applicants' last and final position is that by sub-dividing the suit land – plot No. 181 – the applicant has rendered the suit comprised in the counterclaim nugatory. Equally, by sub-dividing the land the respondents have achieved the very purpose of this suit thereby finalizing the suit before hearing.

The respondents opposed the application by filing a replying affidavit through David Ptiony, the first respondent.

On behalf of the respondents, it was confirmed that he moved into part of plot No. 181 and occupied 23.47 hectares. A copy of the report of the District Survey of **WEST POKOT** is exhibited as "DRI"

The 1st respondent further contended that his understanding of the order of ***status-quo*** was that the respondents were to continue physically occupying their respective parcels as was at the time of filing plaint in March, 2007. That he did not understand the order to mean that the land should not be sub-divided or transferred to the beneficiaries. That in any event succession cause in respect of the estate of Kapuluny Ptiony was published in the Kenya Gazette and no objection, including one from the applicant, was received. A copy of the said Gazette Notice is exhibited as "DP2". That subsequently the High Court confirmed the grant vide Kitale High Court Succession cause No. 132 of 2005 and issued a certificate of confirmation of grant dated 29th May, 2007 thereby sanctioning the sub-division and transfer of land parcel No. West Pokot/Chepkono/181. A copy of the said certificate is exhibited as "DP3".

That at all events the orders that are alleged to have been disobeyed by the respondents have not been served on the respondents and hence the application, is in law, incompetent.

That the Minister's order, in any event, was implemented by the Chief Land Registrar and not the respondents. That the applicant should have included the Chief Land Registrar Trans-Nzoia as a party to these proceedings because the applicant never served the order upon them.

The respondents' last and final position is that the High Court has no jurisdiction to revoke sub-division of land parcel No. **WEST POKOT/CHEPKONO/181** or cancel the resultant title deeds as this would amount to condemning the registered proprietors unheard.

I have fully considered the issues raised by this application. Having done so, it is clear to me that Kitale High Court vide Misc. Civil Application No. 45/2005 granted leave to the applicant to apply for an order of certiorari to remove into the High Court and quash the Minister's decision on 16th March, 2005. The said order of leave was to operate as a stay of execution of the Minister's said decision.

Notwithstanding the stay order, the respondents/plaintiffs forcibly moved into the land comprised in parcel No. **WEST POKOT/CHEPKONO/182** purporting to be enforcing the Minister's decision. In so doing the respondents demolished developments and structures in place.

The applicant through the police instigated suit for malicious damage to property vide Kapenguria R.M. Criminal case No. 603 and 621 of 2005. The 1st respondent and his cronies challenged the prosecution in Kitale H.C. Civil Application No. 72 of 2005. In response to the said application the 1st respondent admitted having moved into part of parcel No. 182 pursuant to the Minister's order which was quashed on 16th March, 2005, fenced and even planted maize crops. Upon the quashing of the Minister's decision, the respondents refused to move out of the parcel occupied by them as aforesaid.

With a view to reclaiming his possession, the applicant moved into the suit land on 21st March, 2007 with security and fenced the same using posts and barbed wire. The following day the fence was uprooted and the post burnt – an act of vandalism.

Most importantly, by an order of this court dated 29th March, 2007 the status-quo over parcel No. 181 was to be maintained. That order was extended to 21st May, 2007, 25th July, 2007 and 18th September, 2007 in the presence of the respondents and their counsel.

Subsequently, the respondents put in motion the process of sub-division of the suit land culminating into five (5) resultant titles. This was after clandestinely moving the High Court on a succession cause to confirm the grant. In doing so, the 1st respondent on behalf of the respondents concealed the existence of the order maintaining the ***status-quo*** with regard to parcel No. 181. This was in bad taste considering that the order was made in the joint presence of the parties and their counsel.

In my view, in sub-dividing the suit land, during the existence of the order maintaining the ***status-quo,*** the respondent were in flagrant disobedience of the court order aforesaid.

The law relating to contempt of court is provided for under section 5 of the Judicature Act (Cap 8) Laws of Kenya and order XXXIX rule 2 (3) of the Civil Procedure Rules. The Kenya courts have to follow the procedure and practice in England. As I understand it, the effect of the English provisions is that as a general rule, no order of court requiring a person to do or abstain from doing any act may be enforced (by committing him for contempt) unless a copy of the order has been served personally on the person required to do so or abstain from doing the act in question. The said copy of the order must be endorsed with a notice informing the person on whom the copy is served that if he disobey the order, he is liable to the process of execution to compel him to obey it. In this regard, I call in and the authority of

MWANGI WANGONDU VS. NAIROBI CITY COMMISSION (CA) NO. 95 of 1988 (unreported).

On the available evidence, I have no doubt that the correct procedure was followed in bringing this application. I am equally convinced, on the evidence, that contempt was committed by the respondents. The application thus succeeds. Accordingly the plaintiffs are convicted of the offence of contempt of court. Having taken into consideration their mitigation, I sentence each one of them to pay a fine of Ksh. 100,000/= or in default to serve six (6) months imprisonment.

In the same vein, I order that the sub-division of parcels comprised in title No. **WEST POKOT/CHEPKONO/181** resulting/ arising from the issuance of title numbers West Pokot/Chepkono/1388, 1389, 1390, 1391 and 1392 be revoked and title No. West Pokot Chepkono/181 be restored by the Land Registrar West Pokot.

Upon restoration as aforesaid the title West Pokot/chepkono/181 be preserved by maintenance of the ***status-quo*** until the determination of the suit and any application.

The respondents shall bear the costs of this application.

Dated and delivered at Kitale this 4th day of March, 2010.

N.R.O. OMBIJA.

JUDGE.

Mr. Ingosi for Kiarie for defendant/applicant.

Mr. Mukoross for Samba for plaintiff/respondent.