REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Case 407 of 2005

JOHN G. KIGUNDA……..……..PLAINTIFF

VERSUS

JOHN NJOROGE KIGE & ANOTHER……..……..DEFENDANT

RULING

The Plaintiff moved to this Court and filed suit against the defendants. It has transpired that the first defendant is a director of the 2nd defendant. The key averments in the plaint relevant to the ruling are that this plaintiff was the registered proprietor of two parcels of land namely **Ngong/Ngong/3347 and 3348** which are inter twined No.3348 was charged to the bank to raise a loan facility in the sum of Kshs 5.9 million. Default on loan repayment led to the sale of No.3348 by the bank which is subject of a court of appeal proceedings in C.A.No. NAI.116/2004. The defendants/respondents are the ones who purchased parcel number 3348 and had already entered the premises and embarked on erecting fences and creating entries on the plaintiffs then existing fence. They have also gone ahead and commissioned a surveyor to establish the boundaries without the plaintiffs involvement, that the said commissioned surveyor is not licensed but an impostor and has in fact curved out 2 acres from parcel number 3347 which fact is inconveniencing the plaintiffs rights of access to his farming activities as a smaller portion. That the Plaintiff will contend that the demarcation is illegal without the involvement of the plaintiff. In consequence there of the plaintiff sought a permanent injunction restraining the defendants by themselves, their agents and or servants from interfering with the plaintiffs' quiet possession of land parcels **Ngong/Ngong/3348** until the boundaries between the two parcels have been commissioned accordingly by a licensed surveyor or a registered assistant with the involvement of both parties.

The suit was accompanied by a chamber summons under Order 39 rules 1 and 2 Civil Procedure Rules seeking restraint orders in terms sought in the plaint pending hearing of the application inter parties and thereafter the hearing and the final determination of the suit and further that he be allowed to seal off any entries created by the said first defendants on the suit premises fence and or remove any fences erected until the case is head and determined and that costs be provided for.

The sequence of events leading to the application subject of this ruling are that interim orders were granted ex parte on 11.4.2005 for prayer 2 thereof which was to subsist pending hearing interparties of the interim application. It is apparent on the record that an order was extracted and the same was issued by the Deputy Registrar on 12.4.2005.

The matter came up for hearing inter parties on 22.4.2005 when Counsel for the plaintiff/applicant sought leave to put in a further affidavit in response to the defendant/respondents replying affidavit and was given 14 days to do so.

The defence lawyer filed a notice of appointment dated 19.1.2005 on 20.4.2005. On 22.4.2005 the Plaintiff's Counsel filed a Chamber Summons dated 21.4.2005. Seeking orders to have the defendants herein punished for disobedience of the Court orders issued on 11.4.2005.

On 12.5.2005 Counsel for the defence filed an application dated the same date by way of a Chamber summons seeking an order to have the exparte orders issued by the court on 11.4.2005 to be set aside. The application came up for hearing the same date. The observation of Mugo J. on that date are that the learned judge had perused the court record and was satisfied that the Plaintiffs conduct was wanting and an abuse of the process of the court. That the said plaintiffs had not complied with the terms of the court orders of 22.4.2005 which were to the effect that they do file a further affidavit in response to the replying affidavit with in 14 day of that date and as at 12.5.2005 they had not done so. In the learned judge's opinion the plaintiffs conduct was calculated to delay the finalization of the dispute and on that account found the plaintiffs un deserving of the interim orders issued herein on 11.4.2005 and want ahead to vacate them.

Once vacated they cease to have any effect and were incapable of being transgressed upon. Any transgressions on the said orders which had not been redressed as at 12.5.2005 died with the death of the said orders on 12.5.2005. A perusal of the record reveals that an order was extracted and issued on 13th May 2005 giving effect to the vacation order.

The orders of 12.5.2005 prompted the Plaintiff to come to this court by way of a notice of motion under order XLIV rule 1 and 2 of the

Civil Procedure Rules and Section 3A of the Civil Procedure Act dated 26.5.2005 and filed on 27.5.2005 seeking reinstatement of the orders issued on 11.4.2005 and review of the orders made on 12.5.2005 vacating the orders of 11.4.2005.

The above application came up for hearing on 27.6.2005 and the interim orders were extended. On 27.9.2005 Njagi J. made an order that the interim orders were to remain in force pending hearing inter parties. There is on record a copy of an order issued on 30.5.2005 reinstating the said orders. The court record does not have this entry. The entry by justice Rainsely was on 27.5.2005 on which day the said orders were reinstated. The only entry that this court can use to say that the orders were reinstated were those of justice Mugo made on 27.6.2005. It therefore follows that if there is any extraction of an order the same should bear these dates of 27.5.2005, 27.6.2005 on the date when justice Njagi stated on 27.9.2005 that the said interim orders were to remain in place until the hearing interparties.

On 19.10.2006 the Plaintiff filed an application by way of chamber summons dated 19.10.2006 and filed same date seeking leave to apply for contempt proceedings against he defendants for interfering with the parcel of land **Ngong/Ngong/3348.** The face of the application does not specify how the said contempt had arisen. But paragraph 2 of the supporting affidavit says that the said orders had been reinstated by justice Rainsely which was correct. That application was struck out by the court on 23.10.2006.

The striking out of the Plaintiffs application for leave prompted the plaintiff to come to this court by way of chamber summons dated 25.10.2006 brought under Order 39 rule 2A (2) of the Civil Procedure Rules, Section 3A of the Civil Procedure Act and all other enabling provisions of the law. The orders sought are that the defendant/respondents be held to be in contempt of the court and its orders of 11th April 2005 and extended on 27th May 2005 by failing in spite of service and knowledge to comply therewith.

(2) The defendants and each and every one of them be condemned to serve prison term not exceeding 6 moths for the contempt and that costs of the application be provided for. This is the application which commenced herein inter parties on 19.3.2007 and finalized on 13.6.2007 and which is the subject of this ruling.

The grounds in support are set out in the body of the application, supporting affidavit and oral submission in court and case law. The major ones are that the Plaintiff moved the court by way of interim application on 11.4.2005 which was heard ex parte and restraint or injunctive orders issued in respect of the same, issued on the same date of 11.4.2005 which were extracted and are annexed as J.G.K.1. The said order contained the notice of penal consequences.

(2) That the said orders were duly served on the defendants evidenced by the contents of the Return of service filed in Court on 26.10.2006.

(3) That the defendant had moved the court earlier on to have those orders vacated exparte without the knowledge of the plaintiff but the Plaintiff moved the Court on 27.5.2005 and had them reinstated.

(4) The said orders as initially granted on 11.4.2005 were to last till the hearing of the interim application inter parties which application has never been heard inter parties.

(5) That the defendants since the reinstatement of the said orders on 27.5.2006 have committed various acts of contempt as set out in paragraph 7 –12 of the supporting affidavit as well as particulars of breach set out in the further supporting affidavit.

(6) That a perusal of the defendants replying affidavit shows that they defendants were aware of the said orders and they chose to disobey them.

(7) Further that the Court to believe the Plaintiffs assertion that the defence had knowledge of the existence of the said orders and that is why they instructed Counsel to respond to the suit.

On the basis of the case law cited and the foregoing grounds Counsel urged the Court to allow the application as prayed.

The defendant/respondent on the other hand has opposed the application on the grounds set out in the replying affidavit, further replying affidavit, oral submissions in court and case law. The major ones are that:-

(1) The first defendant was never served with the orders of 11.4.205 as at the time the orders were allegedly served on 13.4.2005 he was in Mombasa and he has exhibited proof to that effect and only learned of the said orders when the contempt proceedings were served on him.

(2) They contend that the plaintiff has no right of enforcement of the said orders unless it can be shown that the alleged condemner was served personally.

(3) The orders were left in some place and when the first defendant came to know of them he directed people at the place where the court papers had been left to direct them to his lawyers.

(4) It is their stand that from the date the first defendant came to learn of the court orders he has been obeying them. Even the subsequent extension order was never served on him but he started obeying the same as soon as he become aware of the same.

(5) They contend that the plaintiff has no interest in the suit properties as parcel number 3348 was sold to the 2nd defendant whose Directors is the 1st defendant where as parcel number 3347 had been sold to Beacon of Hope which factors were not disclosed by the plaintiff when he sought the said orders from the Court. On the basis of this it is their stand that the plaintiff had no interest to protect as at the time he came to court.

(6) They maintain the plaintiff has used the court process in an abusive manner and he should not be allowed to continue. This court should reject his application. In response to the defence Counsels submissions, Counsel for the plaintiff reiterated the earlier submissions and then stressed the following points:-

(1) It is common ground that there was in existence a court order restraining the defendants from doing certain acts.

(2) Personal service can only be faulted if the process server is called for cross-examination on his mode of service. In the absence of cross-examination. The process server's deponent on the manner of service stand.

(3) They maintain that the defendants even after becoming aware of existence of the court order injuncting them, they have continued disobeying the same.

(4) It is not true that the Plaintiff has no proprietary interest in the subject matter of the proceedings as he had them at the time the suit was filed in court. Lack of interest is a matter to be gone into at the time of considering the merits of the application during inter parties hearing and it should be ignored as it has nothing to do with the issue of disobedience of the court orders.

(5) Counsel assured the court that the conduct of his client cannot be impugned as there is nothing in these proceedings to cause the court resort to such an action. That the alleged forged orders emanating from a Thika Court have no bearing to the plaintiff and the advocate in conduct of the current proceedings.

(6) That this court has jurisdiction to issue the orders sought even if it is for purpose of preventing future contempt.

On the courts assessment of the facts herein it is clear that in order for the plaintiff/applicant's application for disobedience to succeed, it has to pass both the technical test and the merit test. The technical test arises on two fronts. Firstly whether the orders alleged to have been breached existed as at the time when they were allegedly breached. Secondly whether they are still in existence and whether they are capable of being breached following the plea by the applicant's himself that this court even if it finds that there is no past breach it can still exercise its discretion to prevent a future breach. The 3rd technical test is whether the said orders are properly cemented on a valued interest capable of being protected by a court of law in view of the defendants/respondents Counsels assertion that as at the time the plaintiff came to court he was not the owner of the suit property.

The merit test will arise only where the technical test has been passed paving the way for the court to examine and determine whether on the facts before it there was breach of the orders or disobedience of the same within the principles established by case law. The ingredients to be determined when dealing with the merits are the usual ones in such proceedings namely:-

(1) That there was a valid order issued by a court of competent jurisdiction.

(2) That the order is self executing meaning that after the order was issued it did not require endorsement in another forum before being enforced.

(3) That the said order was personally served on to the person against whom they were meant to be served.

(4) That the said person despite personal service and knowledge of the existence of the same the person has flagrantly and contemptuously disobeyed the same.

(5) That such disobedience was carried out with impunity and in order to restore the dignity of the court the person disobeying the same must be punished in accordance with the law.

(6) However, hopeless the said orders were or however erroneous they were they must be in the form they were issued until and unless set aside or discharged by a court of competent jurisdiction.

This court has applied both the test and the ingredients online above to the facts herein and makes findings firstly on the technical tests.

(1) Prayer 1 of the application dated 25.10.2006 and filed the same date subject of this ruling talks of disobedience to court orders issued by court on 11.4.2005 and extended by the same court on 27.5.2005. A perusal of the record reveals clearly that indeed when the applicant came to Court in the first instance on 11.4.2005 under certificate of urgency and exparte he was granted ex parte injunctive orders on 11.4.2005. It is stated clearly that the said orders were to remain in force pending hearing inter parties of the interim application. As stated earlier on in this ruling these orders of 11.4.2005 were vacated by this same court on 12.5.2005.

The orders of 11.4.2005 ceased to have any force of law. As pointed out any transgressions on those orders had to be addressed and vindicated before 12.5.2005. Any transgressions on the same not redressed for then as at the time of vacation remains overtaken by events. Disobedience can only be redressed to indicate living orders and not dead orders. This being the case the first limb of prayer 1 of the application dated 25.10.06 cannot be effected.

Concerning the second limb of prayer 1 dealing with reinstatement of the said orders, since this is found to be correct from the record then if the said orders are deemed to have been resuscitated with effect from that date. This means that transgressions on these orders earn the right to be vindicated from 27.5.2005 as they were indeed extended on that date. A perusal of the record reveals the following contents.

"*27.5.2005*

Coram Rainsely

Maina c/c

Mr. Mutiso. This matter is fixed for hearing on 22.6.2005.

Order. The application of 26th May 2005 to be served on the Respondent and heard inter parties on the 26.6.2005 before Lady justice Mugo. Interim orders granted in terms of prayer 2 pending the hearing of the application.

Rainsley"

This entry is proof that indeed these orders were reinstated and extended on 27.5.2005. A subsequent order made on 27.9.2005 by Njagi J. extended them to remain in force till hearing of application. It is common ground that this interim application has not been heard inter parties. The net effect of this is that the orders reinstated and extended on 27.5.2005 and ordered to remain in force till hearing by the order of 27.9.2005 are still alive. They are capable of being disobeyed and their vindication effected. This vindication is limited to breaches committed after 27.5.2005.

Before examining breaches after 27.5.2005 it is necessary to determine whether they are properly anchored on the pleadings. By anchoring it means that the plaintiff had a tangible interest in the subject matter of the proceedings which interest had been transgressed upon by the defendant and that the said plaintiff was entitled to move to court to protect his interest on the said properties. To resolve this the court has to turn to documents and pleadings of both sides. The first one is the Plaint. Paragraph 4 of the plaint avers that the plaintiff was the registered owner of land parcel numbers Ngong/Ngong/3347 and 3348. There is no averment that he was still the registered owner of the suit plots. Paragraph 7 of the said plaint avers that parcel number 3348, was sold to the defendants which sale was being challenged in the Court of Appeal vide C.A. No. NAI 116 of 2004. Paragraph 10 of the said plaint confirms the sale. Upon the sale of the said parcel, the plaintiffs' rights were divested from the bank to which the plaintiff had mortgaged them and vested in the defendants. Until C.A.116/04 reverses the trend if it will at all be reversed, the plaintiff has no proprietary interest to protect. As for parcel No. Ngong/Ngong/3347 a perusal of the supporting affidavit in support of the interim application from which the orders alleged to have been breached emanated annexes a certificate of title and transfer forms dated 19.7.77 and 20.5.80 which documents were used by the Plaintiff to acquire the said property No.3348. Nothing was annexed as regards parcel No.3347. No search certificates are exhibited to show the condition of the two titles as at the time he came to court.

Turning to the supporting affidavit of the application under review, what has been annexed is an application for search but no document revealing the current position of the two properties. Turning to the defendants replying affidavit paragraph 7,8,9 and 10, Annexed to this application is a copy of a title deed for parcel number Ngong/Ngong/3348 showing that the subject property was transferred to the second defendant on 2nd August 2004. JNKI was earlier in place than the suit. By the time the Plaintiff came to Court, the 2nd defendants rights in respect of parcel No.3348 had crystallized and remain so until reversed. As at 3.7.2006 the title was still in the ownership of the 2nd defendant as shown by JNKZ.2. JNK 4 is a Kenya Gazette containing gazette notice No.26 of 13th April, 2006 where by Beacon of Hope ON were exempted from paying stamp duty on parcel number Ngong/Ngong/3347. It is dated 6.4.2006. Search certificate Jnk3 of 3.7.2006 reveal that transfer of parcel 3347 was transferred to Beacon of Hope 15.5.2006 and title deed issued on 25.5.2006.

The significance of entries in these aforementioned documentations on the two parcel of land is that as at 25.10.2006 when the application seeking enforcement of disobedience to the reinstated injunctive orders was filed, the plaintiff had no protect able interest in the suit properties. Counsel for the Plaintiff has urged this court to ignore these revelations as they go to the merits of the inter parties hearing in this courts opinion, where issues are inter twined and un severable there is no way this court can ignore them if they are relevant to the ruling. Herein the issue of legal interest in the suit properties is central to the issuance of the injunctive orders and the same cannot be ignored. Linked to this is also the careful framing of the reliefs sought by the plaintiff in the plaint. It is to be noted that the plaintiff was careful not to assert his rights over the said properties in the prayers in the plaint. The only relief sought is the injunctive relief without a preceding relief by which the plaintiff asserts title to the properties he is seeking to protect. The relief is therefore hanging.

Indeed as submitted by the plaintiffs Counsel, these are matters which go to the merits of the interlocutory application. But since they have been raised this court cannot ignore them. They go to the very core of the anchor of the orders sought to be vindicated so it is right for this court to inquire into them. It should be noted that when these issues were raised by the defence in their replying affidavit, the plaintiff did not respond to them. The respondents Counsel has urged this court to take into account these factors. While Counsel for the applicant has asked the court to ignore them as they go to the merits of the pending application and the main suit.

In deciding whether to consider them or not this court is guided by principles in the case of Kenya

s Ltd Versus Kenya Commercial Bank [2004] KLR 80 where it was held inter alia that an injunction being an equitable remedy the court may while remaining guided by these three principles also look at all circumstances including the conduct of the parties. And in the case of GICHUVI VERSUS MUNJUA AND ANOTHER [2004] KLR 18 Waki J. as he then was now JA stated clearly that when an applicant decides to give selective and inadequate information as the basis for the application, the courts discretion cannot be exercised in his favour.

Turning to the issue of service of the said orders, as pointed out earlier on in this ruling, the orders of 11.4.2005 were vacated and vindication of their transgressions either before or after that died with them. The only orders that can be vindicated are the reinstated orders. The only orders that can be vindicated are the reinstated orders of 27.5.2005. The Return of Service annextures to the supporting affidavit in the bundle marked JGK1 reveals that the first defendant was served but declined to sign the copy. That the process server went further and served the agents of the second defendant as well as Counsel on record for the defendants. Although the defence contended that service was not personal no serious prejudice seems to have been occasioned by that as it is on record that as soon as they learned of the orders they

obeyed them straight away.

Despite this assertion on the part of the defence, the plaintiffs still maintain there were breaches of the said orders. These are contained in paragraph 7,8,9, and 11 of the supporting affidavit. They relate to parcel number 3348. The same parcel number that the interim injunction orders were meant to protect. Key question to be considered is whether these breaches are established and if so whether the plaintiff should be vindicated in respect of the same. Indeed they are alleged to have occurred in the month of October 2006 which period is affected by the reinstated order. All that the applicant has exhibited is documentation relating to registration of the court order and application for search certificate. No documentation in support of the same. There is also no first hand knowledge of the matters complained of. The activities complained of in paragraph 7 of the supporting affidavit and which are alleged to have occurred on 16.10.2006 were witnessed by a Mr. Ngobia who has not sworn an affidavit to that effect. That deponent cannot hold because as per the provision of order 18 Civil Procedure Rules the applicant is expected to depone to matters of his own knowledge and belief. It was necessary for Mr. Ngobia to put in an affidavit to the effect. In the absence of that the contents remain hearsay. The wording of paragraph 8 and 9 has a direct link to paragraph 7. It appears it is the same Mr. Ngobia who witnessed the pointing out of beacons to prospective buyers and he is the one who made inquiries. These are all matters of hearsay which cannot be employed to establish breach. No much assistance can be derived from the further affidavit as the photographs annexed do not show who took them, when they were taken and to which property they relate.

The net result of the foregoing assessment is that the application dated 25.10.2006 and filed on 26.l0.2006 is refused for the following reasons.

(1) Since the orders of 11.4.2005 were vacated before 25.10.2006, they were on capable of being transgressed after the date of vacation on 12.5.2005. Any vindication of any transgressions on respect of the same ought to have been addressed before they were vacated. After those orders were vacated any transgressions on them during their subsistence stood overtaken by events and therefore un enforceable.

(2) The said orders acquired the force of law again after they were reinstated on 27.5.2005. However, as found above no proof of breaches has been established.

(3) Vindication of breach of the said orders cannot be considered in isolation of protection of the interest they were to protect. When so considered it is evident that in so far as parcel No.3348 is concerned the plaintiff had no interest in the said property as they had already passed to the defendants. The protective order was therefore issued in vain and in fact it should not and ought not to have been issued if the court had addressed its mind properly to the documentation before it.

(4) The issue of pendence of proceedings in the Court of Appeal should not have counted and does not count as papers in respect of the same have not been exhibited herein to show that what is sought to be protected herein is the subject in the Court of Appeal. That would have counted if the orders were being sought in that forum.

(5) The application of 25.10.2006 is faulted with non-disclosure as the applicant failed to disclose that as at that time he had also lost protect able interest in parcel number Ngong/Ngong/3347. In the absence of existence of a valid protect able interest on which protective orders can be anchored, there is no justification for complaining of any breach of orders which do not operate to benefit the complainant. Injunctive order being equitable, existence of non-disclosure would have operated to deny the applicant vindication had breach been established.

(6) None disclosure is established by the fact that for reasons best known to the applicant, the applicant selectively chose to annex documentation on acquisition of the property in the late 70's and early 80's but chose not to annex current holders of titles of the suit property as at April, 2005 when he came to court and at October, 2006 when he sought vindication for breach. He did not also display recent searches on both titles.

His conduct is not without blemish.

This application is therefore dismissed with costs to the respondents.

DATED, READ AND DELIVERED AT NAIROBI THIS 29TH DAY OF JUNE 2007.

R.N. NAMBUYE

JUDGE