



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KITALE

LAND CASE NO. 66 OF 2004

SAMUEL POISHO KAPTIBIN.....PLAINTIFF

VERSUS

ELIZABETH CHESANG.....1STDEFENDANT

JOSEPH ROTICH.....2NDDEFENDANT

JACKSON KIPLAGAT.....3RD DEFENDANT

ERICK SIKUKUU KIPCHUMBA.....4TH DEFENDANT

ENOCK KIPKOECH.....5TH DEFENDANT

JACOB RUTO.....6TH DEFENDANT

RULING

1. The Notice of Motion application dated 3/3/2020 and filed in court on the same date has been bought under **Section 5** of the **Judicature Act Cap 8, Section 1A, 1B, 3A, 34(1)** of the **Civil Procedure Act, Order 22 Rule 22, Order 51 Rule 1** and **Order 40(1)** of the **Civil Procedure Rules 2010**. In the application the defendants seek the following orders:-

1. That this application be certified as urgent and be heard *ex-parte* in the first instance.

2. That there be temporary stay of enforcement of judgment given on 22/4/2015 by restraining the respondent from selling and or transferring land parcels West Pokot/Siyoi/5847,6848, 5849, 5850,5851 and 9852 which are titles emanate from subdivision of LR West Pokot/Siyoi/3271 pending the hearing and determination of this application.

3. That the respondent Samwel Poisho Kaptibin herein be committed to civil jail for contempt for honourable court decree given on 22/4/2015.

4. That the firm of Mukabane Kagunza & Co. Advocates be granted leave to come on record on behalf of the defendants/applicants.

5. That the survey carried out by a private surveyor subdividing LR No. 324 into six portions be set aside and or in the alternative title No. West Pokot 5847, 5848 and 5851 be amalgamated into one to constitute 19 acres in favour of Joseph Rotich in trust for the applicants.

6. Costs be awarded to the applicants.

2. The application is supported by the affidavit filed on 3/3/2020 by the 2nd defendant who expresses to have authority from the other defendants herein. The grounds upon which the application is made are that the plaintiff/respondent has in defiance of the judgment of this court subdivided the suit land and sold off some of the resultant portions to third parties. The defendants/applicants aver that this is contrary to the order of this court that requires the plaintiff have **11 acres** and the defendants to have **19 acres**.

3. The plaintiff filed a replying affidavit sworn on 12/3/2020. Turning the tables on the defendants, he depones that the defendants are

members of his family, being wife and sons respectively; that the parcels of land are registered in his name and he should not be controlled by any person in the use thereof; that the defendants/ applicants were restrained by the judgment from interfering with the plaintiff's user of the land; that the judgment never gave the defendants **19 acres** as alleged; that he has subdivided the land to enable the transfer of portions thereof to his wives and children, the defendants included; that he has not acted in contempt of court. He adds that the orders that the defendants seek are substantive orders overtaken by events as they should have been sought in a counterclaim in the suit. According to his affidavit he is to remain with **12 acres**, *Elizabeth Chesang*, the 1st defendant is to get **3 acres**, *Joseph Rotich*, the 2nd defendant and his brothers are to get **4 acres**; one *Magdalene Kaptibin* is to get **4 acres** one *Paulina Kaptibin* is to get **6 acres** and one *David Kisang*, said to be a minor, is to get **1 acre**.

4. The applicants/defendants filed their written submissions on **9/12/2020**. I have perused the record and found no submissions filed on behalf of the plaintiff.

5. The only issues arising in this application are as follows:

a. Whether the plaintiff should be committed to civil jail for contempt of court;

b. Whether the subdivision of the suit land should be nullified and a 19 acre parcel be registered in favour of the 2nd defendant to hold in trust for the applicants.

c. Who should pay the costs of the application?

6. The issues are addressed as hereunder.

(a) Whether the plaintiff should be committed to civil jail for contempt of court;

7. The offence of contempt of court is a serious offence. A man may be sent to jail for it. There has to be sufficient evidence of contempt which in this case should constitute willful disobedience of a court order of which the alleged contemnor, the plaintiff, had knowledge.

8. It is true as the plaintiff states that the court order in this suit restrained the defendants from interfering with the plaintiff's user of the **11 acres** that he was utilizing. However the court never gave any specific orders stating that the plaintiff could not deal with the rest of the land. Indeed the court observed that the children of a surviving parent can not dictate him on what they want regarding the land registered in his name. In the light of the dicta of the court it is the defendants who were at fault in the suit by preventing the plaintiff's use of the **11 acre** portion. Besides the defendants have not demonstrated that there was an express order of the court issued against the plaintiff which he has been in breach of. The origin of the informal sharing of the suit land into two parcels of **11** and **19 acres** respectively was a consent that never finalised the suit and which could not be said to have precipitated into substantive and exclusive rights on the part of the defendants over the **19 acres** since they were still registered in the name of the plaintiff. That consent was intended to maintain peace among all the litigants herein pending the hearing and determination of this suit. No express order was issued at the end of the suit entitling the defendants to **19 acres** of the plaintiff's land. Consequently it is the view of this court that the defendants have not established the offence of contempt of court against the plaintiff at all.

(b) Whether the subdivision of the suit land should be nullified and a 19 acre parcel be registered in favour of the 2nd defendant to hold in trust for the applicants;

9. In the light of the sentiments of the court both in the judgment dated **22/4/2015** and in the preceding paragraphs of this ruling there is no good ground set out to compel the court to restrain the plaintiff, who is the landowner, in this post-judgment application, from dealing with his land as he wishes.

10. Any orders that would effectively prevent a registered title holder from dealing with his land as he wishes would only come from the decision of a court in a substantive judgment, and I have found that the judgment in this case did not have such orders against the plaintiff.

11. It is the further view of this court that the plaintiff has by his replying affidavit given an implicit undertaking that he will not transfer the resultant subdivisions to third parties but to his family and the instant applicants are members thereof. Nullification of the subdivisions and ordering their amalgamation would therefore operate to deny the defendants the intended exercise of generosity of the plaintiff in their favour and possibly unnecessarily revive and protract the dispute.

12. The defendants' application clearly has no merit in the light of the foregoing.

(c) Who should pay the costs of the application?

13. In this court's view the plaintiff intends good for the applicants and since their application has no merit as seen above, the applicants should bear the costs of this application.

14. Consequently I find that the application dated **3/3/2020** has no merit and the same is hereby dismissed with costs to the plaintiff.

It is so ordered.

Dated, signed and delivered at Kitale via electronic mail on this 26th day of January, 2021.

MWANGI NJORGE

JUDGE, ELC, KITALE.