



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT NYERI

ELC CASE NO. 25 OF 2016

DAVID WARUI CHIURI (*suing on behalf of himself*

***and all RAGATI VILLAGERS*).....1ST PLAINTIFF**

GEORGE MURIITHI WAMAI (*suing on behalf of himself ..*

***and all RAGATI VILLAGERS*).....2ND PLAINTIFF**

-VERSUS-

COUNTY GOVERNMENT OF NYERI.....1ST DEFENDANT

JOHN GIKUHI MUHIUHA.....2ND DEFENDANT

JACKSON WACHIRA KARUNGA3RD DEFENDANT

WILLIAM KINYUA..... 4TH DEFENDANT

DADSON MAINA NGETHA.....5TH DEFENDANT

JOHN KAGOMBE KARUE.....6TH DEFENDANT

NGATIA MURIITHI.....7TH DEFENDANT

GEORGE NJUKI..... 8TH DEFENDANT

MUGWERU KAHUHA.....9TH DEFENDANT

GITONGA GACURL..... 10TH DEFENDANT

KINYUA GACHIHI..... 11TH DEFENDANT

JAMEW MWANGI GICHOHL.....12TH DEFENDANT

KARIUKI KARANGI..... 13TH DEFENDANT

MUTUA WAMBUA14TH DEFENDANT AND

SIMON MWANGI..... INTERESTED PARTY

RULING

A. THE APPLICANTS' APPLICATION

1. By a chamber summons dated 18th September, 2020 expressed to be based upon the provisions of **Section 8(2) of the Law Reform Act**,

(Cap 26), Order 53, Rule 1 of the Civil procedure Rules, Section 5(1) of the Judicature Act, Article 165 of the Constitution, Section 3A of the Civil Procedure Act, Fair Administrative Action Act No. 4 of 2015 and the applicable Rules of the Supreme Court, the Plaintiffs sought the following orders:

(a) That this honourable court be pleased to find the **interested Party herein namely SIMON MWANGI** in contempt of the order by Honourable Lady Justice L. WAITHAKA at Environment and Land Court of Kenya at Nyeri, in ELC Case Number 25 of 2016 on 27th October, 2016.

(b) That the said **SIMON MWANGI** be arrested and committed to prison for a term not exceeding six (6) months.

(c) That this Honourable Court be pleased to order that the said **SIMON MWANGI** not be heard by this court until they purges the contempt.

(d) That this Honourable court be pleased to order that the Respondents to comply with the Court Orders by Honourable Lady Justice L. Waitthaka.

(e) That this Honourable court be pleased to preserve the orders issued on 27th October, 2016.

(f) That this Honourable Court be pleased to issue such other or further punitive orders in respect of the said contempt as may be necessary for the end of justice to be met.

(g) That the costs of and occasioned by this application be costs in the cause.

2. The said application was based upon the grounds set out on the face of the motion and the contents of the supporting affidavit sworn by the 2nd Plaintiff, George Muriithi Wamai, and an affidavit of service sworn by a process server. It was contended that the Interested Party had disobeyed an order of inhibition made on 27th October, 2016 by undertaking construction on a portion of the suit property in violation of the said order. The Plaintiffs further contended that despite of service of the court order, the Interested Party had continued with further construction.

B. THE INTERESTED PARTY'S RESPONSE

3. The Interested Party filed a replying affidavit sworn on 5th October, 2020 in opposition to the said application. He contended that he was a stranger to the suit since he was never joined in the suit hence he did not participate in the proceedings matter leading to the issuance of the order of inhibition dated 26th October, 2016. It

was further contended that he had never been in possession of parcel 476 and that his parcel of land was Title No. Magutu/Ragati/520/128 which he purchased for valuable consideration and a certificate of title issued to him on 2nd April, 2012 long before the filing of this instant suit. He denied prior knowledge of the instant suit and the interim orders.

4. The Interested Party contended that his said parcel of land had never been the subject of the instant suit and that no injunctive orders had been issued restraining him from developing it. He considered the instant application as misplaced, frivolous and an abuse of the court process hence he urged the court to dismiss it with costs.

C. THE APPLICANTS' REJOINDER

5. The Plaintiffs filed a further affidavit sworn on 27th October, 2020 in reply to the Interested Party's replying affidavit of 5th October, 2020. The Plaintiffs reiterated the contents of the supporting affidavit and stated that issuance of a court order is a matter of

public notoriety and that "ignorance of the law" was no defence. They further contended that the Interested Party's property described as Title No. Magutu/Ragati/520/128 was part and parcel of Parcel 476 and that it was illegally created through a mutation in violation of a court order made on 23rd June, 1992. It was thus contended that the Interested Party's title was a nullity.

D. DIRECTIONS ON SUBMISSIONS

6. It would appear from the material on record that when the application came up for *inter parties* hearing on 7th October, 2020 it was directed that the same shall be canvassed through written submissions. The parties were granted 14 days each to file and exchange further affidavits and written submissions. However, the record shows that the Plaintiffs' filed their submissions on 17th November, 2020 whereas the Interested Party filed his on 8th February, 2021.

E. THE ISSUES FOR DETERMINATION

7. The court has considered the Plaintiffs' chamber summons dated

18th September, 2020 together with the supporting affidavit and annexures thereto, the Interested Party's replying affidavit in opposition thereto as well as the Applicants' further affidavit. The court is of the opinion that the following issues arise for determination herein:

(a) Whether the Plaintiffs have proved the contempt alleged against the Interested Party to the required standard

(b) Whether the Plaintiffs have made out a case for the grant of the rest of the orders sought.

(c) Who shall bear costs of the application.

F. ANALYSIS AND DETERMINATION

a) Whether the Plaintiffs have proved the contempt alleged against the Interested Party to the required standard

8. The court has considered the submissions and material on record on this issue. In the case of **Samuel M.N. Mweru & Others v National Land Commission & 2 Others [2020] eKLR** the High Court considered the elements to be proved in contempt of court proceedings as follows:

“40. It is an established principle of law that in order to succeed in civil contempt proceedings, the Applicant has to prove (i) The terms of the order, (ii) Knowledge of these terms by the Respondent, (iii) Failure by the Respondent to comply with the terms of the order. Upon proof of these requirements the presence of willfulness and bad faith on the part of the Respondent would normally be inferred, but the Respondent could rebut this inference by contrary proof on a balance of probabilities. Perhaps the most comprehensive of the elements of civil contempt was stated by the learned authors of the book *Contempt in Modern New Zealand* who succinctly stated:- “There are essentially four elements that must be proved to make the case of civil contempt. The Applicant must prove to the required standard (in civil contempt cases which is higher than civil cases) that:- (a) the terms of the order (or injunction or undertaking) were clear and unambiguous and were binding on the defendant; (b) the defendant had knowledge of or proper notice of the terms of the order’ (c) the defendant has acted in breach of the terms of the order; and (d) the defendant’s conduct was deliberate. These requirements – that is the refusal to obey should be both wilful and *mala fides*, and that unreasonable non-compliance, provided it is *bona fide*, does not constitute contempt – accord with the broader definition of the crime, of which non-compliance with civil orders is a manifestation. They show that the offence is committed not by mere disregard of a court order, but by the deliberate and intentional violation of the court’s dignity, repute or authority that this evinces. Honest belief that non-compliance is justified or proper is incompatible with that intent.”

9. So, what is the evidence of contempt against the Interested Party in the instant application? The Plaintiffs relied upon 3 components in support of the alleged contempt. First, they exhibited a copy of a consent order dated 26th October, 2016 which stated as follows:

“That the application dated 15th February, 2016 is compromised in the following terms:-

(a) That an order of inhibition is hereby issued against the alienation, transfer, charge or sale of LR. No. Magutu/Ragati/476 pending the hearing and determination of the suit.

(b) That the inhibition order to be registered against the title.

(c) That parties are granted 30 days to fully comply with Order 11.

(d) That a mention date to be taken for pre-trial once parties are ready”.

10. It is apparent from the material on record that the said consent order was a compromise between the Plaintiffs and the Defendants in the suit. The Interested Party was not party to the consent. He was not even a party to the suit at the time the compromise was reached. At the outset, the court is of the opinion that parties to a suit cannot record a consent order which has binding force upon a person who is not party thereto without according such party an opportunity of being heard on the matter in question.

11. It is pertinent to note that the consent order only provided for an order of inhibition to prevent the alienation, transfer, charge or sale of parcel 476 pending the hearing and determination of the suit. It is obvious to the court that such order of inhibition was made pursuant to **Section 68 of the Land Registration Act, 2012** hence the reason it was to be registered against the title. It was not a prohibitory injunction restraining the Defendants or any other person from undertaking construction on the suit property.

12. In fact, the material on record shows that in their interlocutory application dated 15th February, 2016, which was compromised by consent, the Plaintiffs had sought an injunctive order restraining the Defendants from dealing with or in any way interfering with the suit property. It is the said application which was compromised by the orders of 26th October, 2016 whereby only an order of inhibition was granted. It is, therefore, obvious that the Plaintiffs were aware all along that no injunction was issued restraining the Defendants or the Interested Party from developing the suit property.

13. The third component of evidence is an affidavit of service sworn by the process server on 4th September, 2020. The process server indicated that on 3rd September, 2020 he received a copy of the order dated 26th October, 2016 with instructions to serve the Interested Party and the OCS Karatina Police Station. He did not disclose from whom he received the order. He further indicated that he served the Interested Party on the same date but he declined to acknowledge receipt by signing on the duplicate copy.

14. It was not explained by the Plaintiffs why the court order made on 26th October, 2016 was not served until 3rd September, 2020 about 4 years later. The process server did not disclose in his affidavit how he came to know the Interested Party or who identified or pointed him out for the purpose of service. It would further appear from the annexed certificate that although the process server claimed to have served the court order in September, 2020, his licence was only valid until the end of 2019.

15. The court has further noted from the photographs annexed by the Plaintiffs to demonstrate the alleged contempt that some of them were taken on 19th April, 2016 long before the consent order of 26th October, 2016 was recorded. That begs the question as to why the Plaintiffs did move the court for the alleged contempt whereas construction was ongoing as far back as 2016. The Plaintiffs' conduct in this matter raises serious doubts as to the *bona fides* of their application.

16. In view of the foregoing the court is of the opinion that the Plaintiffs have failed to demonstrate the contempt alleged against the Interested Party. There is no iota of evidence on record to demonstrate that the Interested Party has alienated, transferred, charged or sold parcel 476 (or any other property) in violation of the consent order dated 26th October, 2016. There is no evidence to demonstrate that there was any injunction granted restraining the Interested Party from developing the suit property either. In any event, the court is not satisfied that the consent between the Plaintiffs and the Defendants was legally binding upon the Interested Party.

17. The court is thus of the opinion that the instant application is totally misconceived. The court fully agrees with the Interested Party's contention that the application is frivolous and otherwise an abuse of the court process. It is a mischievous attempt by the Plaintiffs to intimidate the Interested Party using the court process. That is why they caused an affidavit of service to be sworn in 2020 shortly before the filing of the application in respect of an order made in

2016. That is also why they exhibited photographs taken in April 2016 to support the application for alleged contempt of a court order made in October, 2016.

(b) Whether the Plaintiffs have made a case for the grant of the rest of the orders sought in the application

18. The Plaintiffs also sought several orders against the Interested Party which were hinged upon the alleged contempt of court by the Interested Party since the Plaintiffs have failed to prove their allegations against the Interested Party then there is no legal basis upon which any of the consequential orders sought can be granted. Accordingly, the Plaintiffs have not made out a case for the granting of the consequential orders.

(c) Who shall bear costs of the application

19. Although costs of an action or proceeding are at the discretion of the court the general rule is that costs shall follow the event in accordance with the proviso to **Section 27 of the Civil Procedure Act (Cap 21)**. A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs

otherwise. See **Hussein Janmohamed & Sons Vs Twentsche Overseas Trading Co. Ltd [1967] EA 287**. The court finds no good reason why the successful party should not be awarded costs of the application. Accordingly, the Interested Party shall be awarded costs of the application. Since the court has found that the application is frivolous the court shall direct the costs be paid within 30 days from the date hereof.

F. CONCLUSION AND DISPOSAL ORDER

20. The upshot of the foregoing is that the court finds no merit whatsoever in the Plaintiffs' application dated 18th September, 2020 which the courts finds to be frivolous and an abuse of the court process. Accordingly, the court makes the following orders for disposal thereof:-

(a) The Plaintiffs' chamber summons dated 18th September, 2020 be and is hereby dismissed in the entirety with costs to the Interested Party

(b) The Plaintiffs shall pay the Interested Party's costs assessed at Kshs 25,000/= to be paid within 30 days from the date hereof in default of which the Interested Party shall be at liberty to execute for recovery thereof.

It is so decided.

RULING DATED AND SIGNED IN CHAMBERS AT NYERI AND DELIVERED VIA MICROSOFT TEAMS PLATFORM THIS 24TH DAY OF MARCH, 2021.

In the presence of:

Mr. Kimani for the Plaintiffs

Ms Mwikali for Mr. Kahiga for the Interested Party

No appearance for Defendant

Court assistant - Wario

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HON. Y. M. ANGIMA

JUDGE

24.03.2021