



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT THIKA

ELC SUIT NO. 131 OF 2017

(FORMERLY NAIROBI ELC 621 OF 2011)

SIGONA JUA KALI ASSOCIATION.....PLAINTIFF/APPLICANT

VERSUS

COUNTY GOVERNMENT OF KIAMBU.....1ST DEFENDANT/RESPONDENT

CONTROL BOARD KIAMBU.....2ND DEFENDANT/RESPONDENT

REGISTRAR OF LAND.....3RD DEFENDANT/RESPONDENT

THE ATTORNEY GENERAL.....4TH DEFENDANT/RESPONDENT

JANE WANGECHI KIMANI.....5TH DEFENDANT/RESPONDENT

GRACE WAMBUI KAMUIRU.....6TH DEFENDANT/RESPONDENT

GRACE WANJIRU MBUGUA.....7TH DEFENDANT/RESPONDENT

JOSEPH KIBUIRU WACHIRA.....8TH DEFENDANT/RESPONDENT

JOHN MUTUA KAMENE.....9TH DEFENDANT/RESPONDENT

RULING

By a Notice of Motion Application dated 26th February 2020 the Plaintiff/ Applicant sought for orders that;

- 1. The Land Registrar, Kiambu County, 3rd Defendant /Respondent having failed / declined to comply with most of the orders given by the Honourable Court on 2nd May 2019, the Applicant be given leave to institute contempt proceedings against that office.***
- 2. The OCS Kikuyu Police Station evict occupants in the cancelled titles and prevent those constructing structures on the cancelled titles.***
- 3. Costs of this motion be provided for.***

The Application is based on the grounds that the Court gave nine Orders in the Judgment delivered on 2nd May 2019. That Order No. 3 was to issue green card for title No. 832 in its original format bearing the acreage of 0.055 hectares in the name of the 5th Defendant (*Jane Wangechi Kamau Kimani*). That Order 5 was to categorize, upon reversion Title No. 934 as Public Land under Article 62 (i) (d) of the Constitution. Further that Order 7 gave the Plaintiff liberty to pursue their claim after the said reversion in line with provisions of Article 62(4) of the Constitution. That the Land Registrar, after tremendous pressure from the Plaintiff/ Applicant, has cancelled title numbers *Sigona 935 to 965*, but purports to be unable to comply with orders 3 and 5 aforementioned because the green card for *Sigona 934* cannot be found. That title number *Sigona 832* was cancelled on subdivision. That the reasons are not genuine and cannot be the basis for non-compliance with clear explicit orders from the Court.

Further that the liberty given to the Plaintiff/ Applicant to pursue their claim after the reversion in line with **Article 62 (4) of the Constitution**, cannot be exercised in the face of extreme reluctance by the Land Registrar to comply with the other orders. That construction is still going on some of the cancelled titles, yet there is no stay of execution of the Judgment by this Honourable Court or the Court of Appeal.

In his Supporting Affidavit, **John Kamau Ndere** the Plaintiff/s/ Applicant's Secretary averred that after the Judgment, together with other officials, he made several calls to the Land Registrar Kiambu in view of **Order No. 7**. That on **6th September 2019**, the Land Registrar asked them to pay **Kshs. 15,500/=** on an Application for cancellation of title **Sigona 935 to 965**. That they applied and paid for the same and thereafter the Land Registrar became evasive and uncooperative. That when they consulted their Advocate on record, they were advised to seek help from the Chief Land Registrar and the said Advocate wrote a letter to the Chief Land Registrar dated **20th November 2019**.

That the Chief Land Registrar wrote to the Land Registrar Kiambu on **23rd January, 2019**, asking the said Registrar to process and follow the Order of the Court. After several visits, the Land Registrar informed them that titles **935 to 965** had been cancelled but **Orders 3 and 5** could not be implemented because the green card for title **934** could be found while Green Card for title **832** was closed on subdivision. That their efforts to have the Registrar write to the Court the said information so that the Court may make any necessary orders in light of the allegations had not been fruitful. It was his contention that the reasons given by the Land Registrar are not genuine because new green cards can be opened for parcels **832 and 934** on the authority of the orders given by this honourable Court. That the failure by the Land Registrar to comply with the Court orders is affecting the right of the Plaintiff/ Applicant to pursue their claim as provided in **Order 7** of the Decree. Further that the Respondent continues to occupy and construct houses on the affected titles **935 to 965** in defiance of the Court Orders yet there is no stay of the Judgment by this Court or the Court of Appeal. That his Advocates had advised him that under **Section 3A of the Civil Procedure Act**, the Honourable Court has inherent powers to make such orders as may be necessary to meet the ends of justice and prevent abuse of the Court process.

The Application is opposed and **Jane Wangechi Kimani**, the 5th Defendant/ Respondent swore a Replying Affidavit dated **16th March 2020** and averred that on **29th July 2019**, the Court sitting in **ELC Thika** granted them 30 days temporary stay on the condition that they file the Application of stay pending the hearing of the Appeal. That on **9th August 2019**, they filed an Application at the Court of Appeal seeking further stay pending the hearing of the Appeal. That on **12th July 2019**, their Advocate filed a Record of Appeal in the Court of Appeal that is currently awaiting a date for directions. That the Application was scheduled for inetrparties hearing on **2nd October 2019**. It was her contention that on the date of the hearing, the Court of Appeal on its own Motion took out all the Applications scheduled before the Judges and the Application having not been heard they are awaiting fresh dates.

That their Advocate has on various occasions visited the Court of Appeal seeking audience. Further that it is clear by the averments of the Plaintiff/ Applicant that they have already cancelled all the titles from **935 to 965**, hence affecting over 30 occupants yet they have a good Appeal with high chances of success. It was her contention that there is no risk of loss of any land by anyone. Further that the High Court Judgment did not grant the land to the Plaintiff/Applicant and they fail to understand why the Plaintiff/ Applicant is in a hurry to evict them yet the Land Registrar, County Government of Kiambu and Attorney General who were co Defendants have not made any claim whatsoever. That they followed the Court's direction to the later and have safeguarded their interest in the suit property hence responsibilities of issuing fresh hearing dates lie with the Court of Appeal.

That they have lived on the property for many years and they do not have any other home and hence if the issuance of the order to demolish their only homes will not only render them destitute but also render the appeal nugatory. She urged the Court to disregard the Plaintiff/s/ Applicant's Application.

The Plaintiff/ Applicant filed a further Affidavit sworn on **11th June 2020** by **John Kamau Ndere** and averred that the Respondents have not challenged the averments in his Supporting Affidavit concerning the failure by the Land Registrar to fully comply with Court **Orders No. 3 and 5** and hence compromised **Order 7**. That the continued use of the cancelled titles **Sigona 935 to 965**, by those in occupation including the 5th to 9th Defendants/ Respondents, make a mockery of **Order No. 5** that **Sigona 934** be categorized as public land. That the Respondent's assertions that that their appeal is yet to be heard is a confirmation there is no order of stay of the Judgment of the Court delivered on **2nd May 2019**. He contended that the Judgment was a culmination of a long struggle by the Plaintiff/ Applicant and the Court found the respondent culpable. That the averments by the Defendants/ Respondents that they have lived on the suit property for many years is irrelevant on the face of the orders given by the Court in that the process of acquiring the titles was irregular. That the right to pursue the claim given in **Order No. 7** will and already is being compromised. He urged the Court to allow their Application.

The Application was canvassed by way of written submissions which the Court has carefully read and considered and finds that the issues for determination are;

- 1. Whether the Court should grant the Plaintiffs/ Applicant leave to apply for contempt proceedings.**
- 2. Whether the Plaintiff/ Applicant is entitled to the orders sought**

1. Whether the Court should grant the Plaintiff/ Applicant leave to apply Contempt Proceedings

As the Law that was enacted governing the Contempt proceedings in

Kenya was declared Unconstitutional, we reverted back to section 5 of the Judicature Act which provides;

“ (1) The High Court and the Court of Appeal shall have the same power to punish for contempt of court as is for the time being possessed by the High Court of Justice in England, and that power shall extend to upholding the authority and dignity of

subordinate courts.”

Therefore, the law that governs contempt of court proceedings is the English law applicable in England at the time the alleged contempt is committed. Discussing the procedure in England, the Court of Appeal in *Christine Wangari ChegeVs... Elizabeth Wanjiru Evans & Others(2014)eKLR* held that:-

“Though the Court of Appeal of England and Wales was established in 1875, some 92 years before the commencement of the Judicature Act,[8] the Act in the cited Section 5 simply directs that this court like the High Court must make reference to the powers exercised by the High Court of Justice in England and not those exercised by its counterpart, the Court of Appeal of England and Wales.

The High Court of Justice in England is that level of the court system in England, comprising three divisions, the Queen's Bench, the Chancery and Family Divisions. That court draws its jurisdiction to punish for contempt of court from both the statute, namely the Contempt of Court Act, 1981 and the Common Law. But the procedure to be followed in commencing, prosecuting and punishing contempt of court cases was, until 2012, as will shortly be explained, provided for by Order 52 Rules 1 to 4 of the Rules of the Supreme Court (RSC), made under the Supreme Court of Judicature Act, 1873 (or simply the Judicature Act, 1873). The Judicature Act, 1873 abolished a cluster of courts in England and Wales dating back to medieval periods, some with overlapping judicial powers, and in their place Supreme Court of Judicature, which must not be confused with the Supreme Court of the United Kingdom which was established only on 1st October, 2009 assuming the judicial features of the House of Lords.

Order 52 RSC, until 2012 as alluded to earlier provide the procedure of commencing contempt of court proceedings. The procedure may be summarized as follows, in so far as it relates to the High Court of Justice:-

- i. An application to the High Court of England for committal for contempt of court will not be granted unless leave to make such an application has been granted.*
- ii. An application for leave must be made ex parte to a judge in chambers and supported by a statement setting out the particulars of the applicant as well as those of the person sought to be committed and the grounds on which his committal is sought, and by an affidavit verifying the facts relied on.*
- iii. The applicant must give notice of the application for leave not later than the preceding day to the Crown Office.*
- iv. Where an application for leave is refused by a Judge in chambers the applicant may apply afresh to a divisional court for leave within 8 days after the refusal by the Judge.*
- v. When leave has been granted, the substantive application by a motion would be made to a divisional court.*
- vi. The motion must be entered within 14 days after the granting of leave; if not, leave shall lapse.*
- vii. The motion together with the statement and affidavit must be served personally on the person sought to be committed, unless the Court thinks otherwise.*

Further the Court held that;

“.....It is clear from this summary that leave, now called “permission” is not required where committal proceedings relate to a breach of a judgment, order or undertaking.....”

The Plaintiff/Applicant has sought for leave to institute these proceedings. This Court is further guided by the provisions of **Section 5 of the Judicature Act** that calls upon the Court to be guided by the laws of England. Further as noted by the Court of Appeal which decision this Court is bound by, it is clear that there is no leave required by the Applicant before Contempt Proceedings is filed as the Contempt relates to a Judgment of the Court delivered on **2nd May 2019**. The Court therefore finds that the prayer seeking for leave though not necessary is merited and the Court allows the same.

2. Whether the Plaintiff/ Applicant is entitled to the orders sought

The Plaintiff/ Applicant had sought for leave to file Contempt Proceedings. The , Court having found that leave is not necessary, but has been sought anyways finds that the Plaintiff/ Applicant is entitled to the orders sought.

The Plaintiff/ Applicant has further sought for the eviction of the persons in the cancelled titles and prevention of those constructing structures. It is not in doubt that on **2nd May 2019**, the Court held that the suit properties were Government Land and did not belong to either of the parties and ordered for the cancellation of the subdivisions and reversion back to the government. Though the 5th Defendants/ Respondents has averred that there are stay of Executions Applications pending before the Court of Appeal, it is not in doubt that there is no stay order that has been granted. It is therefore not in doubt that there ought to be no dealings with the said property whilst there clearly exists orders barring the same. Therefore, the Court finds and holds that the prayers seeking to bar further structures from being built or putting up properties on the titles that had been cancelled are merited and should be allowed.

Having now carefully read and considered the **Notice of Motion Application**, the Affidavits in support and in opposition and the written

submissions by the parties, the Court finds and holds that the Application dated **26th February 2020**, is merited and the same is allowed entirely with costs to the Applicants.

It is so ordered

DATED, SIGNED AND DELIVERED AT THIKA THIS 11TH DAY OF MARCH 2021.

L. GACHERU

JUDGE

11/3/2021

Court Assistant - Lucy

ORDER

In view of the declaration of measures restricting court operations due to the **COVID-19** Pandemic, and in light of the directions issued by His Lordship, the Chief Justice on **15th March 2020**, this **Ruling** has been delivered to the parties online with their consents. They have waived compliance with **Order 21 rule 1** of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open Court.

With Consent of and virtual appearance via video conference – Microsoft Teams Platform

Mr. E.N. Mugu for the Applicant

No appearance for the Respondent.

L. GACHERU

JUDGE

11/3/2021