



Nganga & another v Ndoge; Njoroge & 3 others (Interested Parties) (Environment and Land Case 45 of 2024) [2024] KEELC 5082 (KLR) (Environment and Land) (4 July 2024) (Ruling)

Neutral citation: [2024] KEELC 5082 (KLR)

FORMERLY NAKURU ELC NO. 139 OF 2019

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIVASHA
ENVIRONMENT AND LAND
ENVIRONMENT AND LAND CASE 45 OF 2024**

MC OUNDO, J

JULY 4, 2024

BETWEEN

HARRISON WAWERU NGANGA 1ST PLAINTIFF

MATIGARI NDUNYU NJERU COMPANY LIMITED 2ND PLAINTIFF

AND

ANTONY KAMAU NDOGE DEFENDANT

AND

JOSEPH KIRAGU NJOROGE INTERESTED PARTY

THE LANDS REGISTRAR, NAIVASHA INTERESTED PARTY

THE DISTRICT SURVEYOR, NAIVASHA INTERESTED PARTY

THE HONOURABLE ATTORNEY GENERAL INTERESTED PARTY

RULING

1. Before me for determination are the two Applications by the Defendant/Applicant both dated 12th June 2023. The first Application is a Notice of Motion brought pursuant to the provisions of Section 5(1), 10 of the *Judicature Act* Cap 8 of the laws of Kenya, Part 1 Rule 2(2), 3(1) and (2) of the *High Court Practice and Procedure Rules* and under Order 25, (6), 40, 51 Rule 16 Order 60, 63 of the *Civil Procedure Rules*, Section 1A, 1B and 3A of the *Civil Procedure Act* (under Article 159 (2) (d) of the *Constitution*, and Section 63 (e) & 80 of the *Civil Procedure Act*, Order 45 of the *Civil Procedure Rules, 2010*, the inherent powers of the Court and all the enabling provisions, in which the Defendant seeks that the Respondents be committed to civil jail and or be fined accordingly for being in contempt



of courts orders directing all parties to maintain *status quo*. He also seeks that the court compels the Plaintiffs/Respondents to deposit the original title dated 19th March, 2019 in court pending the hearing and determination of the instant suit. Lastly he seeks for costs of the Application.

2. The application was supported by the grounds therein and a Supporting Affidavit dated the 12th June 2023 sworn by Anthony Kamau Ndoge the Defendant/Applicant herein, who deponed that the Plaintiffs had hived off and sold part of the subject property to one Joseph Kiragu Njoroge in the pendency of the present matter and that a new title No. Gilgil/Gilgil Block 1/60823 (Kikopey) measuring 0.348 hectares under map sheet 6 and 3 had been issued on 2nd March 2022.
3. That the Defendants/Plaintiffs' conduct had directly and adversely affected the Applicant and third parties because they had, in defiance of the pending orders of *status quo*, proceeded to extract and register titles irregularly wherein they were at an advanced stage towards the disposal of the subject matter herein.
4. That the Applicant would continue to suffer irreparable damage/loss were the orders sought herein not granted as there was an ongoing invasion by the Respondents and strangers on the suit property in respect of which the Applicant had heavily invested in and which investment would be depleted squandered or even dissipated in the absence of stay. That further, the Applicant had a good case with high chances of success which would be rendered academic were the orders sought herein not granted.
5. That there was apparent admission on the face of the record, the Pleint and the accompanying statement that the Defendant owns the incision of 50 acres that had been cited in the Pleint and responses thereto. That there had been ongoing mutations and subdivisions of the subject property, even alienation, through deliberate misrepresentation and misinformation to the Land Registrar, department of surveys wherein innocent third-party purchasers were unaware of the ongoing court case and the orders of *status quo* obtaining therein.
6. That the Applicant had since become aware that the said Joseph Kiragu Njoroge had started land clearance, fencing and extensive development and illegal control of the subject property, alongside other potential buyers who had occupied the suit land against the *status quo* orders that had been issued by the court.
7. That the orders sought herein would safeguard the subject matter which was being dissipated by the Respondent and his agents with a view of destroying the substratum of the present suit. That the Applicant had been enjoying unfettered ownership and had extensively developed the suit property before the present invasion and illegal occupation which had disrupted his enjoyment and he was now suffering irreparable loss hence if the stay orders were not granted, the instant suit would be merely academic as damages could not compensate the ongoing losses. That further, the Plaintiff herein who had continued to interfere with his peaceful enjoyment of the suit property had proceeded to plant illegal beacons thereon despite the *status quo* orders.
8. The second Application also dated the 12th June 2023 is a Notice of Motion brought pursuant to the provisions of Section 1A, 1B and 3A of the Civil Procedure Act Cap 21, Order 8 Rule 3 and 51 Rule 1 of the Civil Procedure Code (sic) 2010, Articles 22, 40 and 159 of the Constitution and all other enabling provisions of the law wherein the Defendant/Applicant sought for re-opening of the Plaintiffs/Respondents case so that the Plaintiffs could be allowed to recall their witnesses to adduce additional evidence and thereafter the Defendant/Applicant be at liberty to cross-examine them on their additional evidence (if need be.) The Defendant/Applicant further sought that he be granted leave to amend their Defence and Counter-Claim and thereafter effect service upon the Plaintiffs/ Respondents.



9. The application was supported by the grounds therein and a Supporting Affidavit of an even date sworn by Anthony Kamau Ndoge the Defendant/Applicant herein, who deponed that on the 20th June, 2013, he had entered into an Agreement for Sale with the Respondent for the sale of the parcel known as Hilly and Rocky Area Adjacent to Ndunyu Njeru measuring 50 acres being an incision from a larger 334 acres parcel of land known as Gilgil/Gilgil Block 1/47955 (Kikopey) in which the said Respondent had contracted with him in his capacity as the sole director of Matigari Kianungu Investment.
10. That subsequently, the Respondent had instituted the instant suit against him for the alleged breach of the sale agreement claiming that he (Applicant) had no legal interest over the suit land. That the matter had proceeded for hearing wherein after the close of the Plaintiffs/Respondents' case, and during the pendency of interim orders of *status quo*, the Respondents had proceeded to interfere with the suit property by causing re-mappings, re-survey and subdivisions wherein the same had since been registered in the names of third parties, persons who had since taken possession of their respective lands including on the suit land.
11. That subsequently, the Respondent's case ought to be reopened so that the third parties who were the purchasers of the subdivided parcels could be joined to the suit to enable a fair trial and for the court to consider additional circumstances that would establish the truth.
12. In response and opposition to the Defendant/Applicants Applications, the Plaintiffs/Respondents filed two Replying Affidavits both dated 5th December, 2023 and sworn by Harrison Waweru Ng'ang'a, the 1st Plaintiff/Respondent herein who deponed that the Applications were unmerited and an abuse of the court's process.
13. That he had been allocated the subject parcel of land on 8th July, 2003 by Agricultural and Industrial Holdings Limited and thereafter, pursuant to a letter dated 21st January, 2019, he had been authorized to subdivide the parcel of land No. Gilgil/Gilgil Block 1/47955 (Kikopey) and allocate the same to the members of the 2nd Plaintiff which subdivisions he had embarked on upon the issuance of a title deed in favour of the 2nd Plaintiff on 23rd January, 2019. That subsequently, upon obtaining the consents to subdivide and the Certificate of Compliance, the land had been subdivided into 228 portions wherein the same had been allocated to the members of the 2nd Plaintiff in the year 2019.
14. That the Defendant/Applicant had neither a proprietary interest over the suit property nor had he been in possession of any portion therein as he had breached the terms of the sale agreement dated 20th June, 2013 by failing to pay the agreed consideration. That nevertheless, the said Defendant/Applicant had been selling his land to the unsuspecting third parties. He denied having violated the orders of *status quo* as alleged by the Defendant/Applicant deponing that the Defendant/Applicant had failed to tender any evidence of the alleged re-mapping, re-survey and subdivisions.
15. That he had completed his obligations of allocating the subdivisions to the 2nd Plaintiff's members since the 2nd Interested Party had never been served with any orders stopping the issuance of the title deeds. That conversely, the alleged invasions were done at the behest of the Defendant/Applicant and the third parties whom he had purported to illegally sell the portions of the suit land to.
16. With regard to the re-opening of the Plaintiff's case, he maintained that whereas he together with his witnesses had testified in the instant matter and closed their case, the Defendant/Applicant had never been ready to testify hence the instant application was only intended to scuffle the conclusion of the present matter.



17. He explained that as it could be confirmed from the mutation annexed and marked as HMN (ii), the subdivisions to the members of the 2nd Plaintiff had occurred way before the orders of *status quo* had been issued. He thus deponed that no grounds had been advanced to warrant the re-opening of the Plaintiffs' case hence the instant matter should be set down for defence hearing to allow the court render its judgement. That subsequently, the instant Applications were misconceived and the same ought to be dismissed with costs.
18. The instant Applications were canvassed by way of written submissions which I shall herein summarize as follows:

Defendant/Applicant Submissions.

19. The Defendant/Applicant vide his submissions dated 17th November, 2023 in support of his Notice of Motion Applications dated 12th June, 2023 summarized the factual background of the matter before framing four issues for determination as follows; -
 - i. Whether the Applicant has demonstrated a basis for re-opening of the case herein.
 - ii. Whether the third parties cited should be joined to the instant proceedings.
 - iii. Whether the violations stated are mete for redress vide contempt orders.
 - iv. Whether the reliefs sought are merited.
20. The Defendant/Applicant placed reliance in a combination of decisions in the decided case of *Odinga & 5 others v Independent Electoral and Boundaries Commission & 3 others* (Petition 5, 3 & 4 of 2013 (Consolidated)) [2013] KESC 6 (KLR) (16 April 2013) (Judgment), *IEBC vs Robert K. Nyengi* [2015] eKLR, *John Kiplangat Barbareet & 8 others v Isaiah Kiplangat Arap Cheluget* [2016] eKLR and *Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamad & 3 others* [2018] eKLR to submit that the he had demonstrated proprietorship of the suit property by way of the sale agreement dated 20th June, 2013 which was evidenced by occupation, development, payment of sums and an attempt by the Plaintiff to remit the money back through cheques coupled with the concession by the Respondents on the need to resolve the matter amidst the trial. That subsequently, the suit property needed to be preserved and that the failure to grant the orders sought herein would jeopardize the entire contest and its outcome.
21. That were the Respondents allowed to continue selling off, occupying, accessing and or using the said parcel as they chose during the pendency of the instant suit, a gross harm would be occasioned in view of the purchase price that had been expended, occupation, development and the interest of the third parties and the outstanding claim of title.
22. His further submission was that the instant motions had raised a prima facie and arguable case with a high probability of success and which could be dealt with in a substantial trial. Reliance was placed on the decided case of *Mrao Ltd v First American Bank of Kenya Ltd & 2 Others* [2003] KLR 125.
23. As to whether gross injury would be occasioned if the orders sought were not granted, the Applicant submitted in the affirmative to the effect that the suit would be rendered an academic exercise since the Applicant had demonstrated a fair financial interest coupled with the Respondents' actions of attempting to refund the purchase price to the Applicant in the midst of the trial. That it was trite that parties were bound by their pleadings thus the Respondents having admitted that they had entered the suit property to fend off third parties and thereafter made offers to settle the matter had all pointed to the fact that the Respondents were not interested in trial.



24. Regarding the third-party interests and the burden of probability, it was the Applicant's submission that should the orders herein not be granted and the instant suit succeeds all the functions and duties exercised by the Applicant and the obligations owed to him would be rendered invalid. That subsequently, no amount of costs could compensate the emotional loss and injury that had been incurred since this had been a lifetime investment with fair timelines that had been violated and desiccated by the Respondents.
25. In conclusion, he submitted that since prejudice would be occasioned to the Applicant, re-opening of the Plaintiffs' case would afford the parties an opportunity to address the merits of the case. That further, it would sustain and restore the substratum from the acts of the Respondents. He therefore urged that the original title deed be deposited in court and the Respondents punished for contempt of court's orders. He thus prayed that the Notice of Motions herein be allowed as prayed.

Plaintiffs/Respondents Submissions.

26. The Plaintiffs/Respondents vide their submissions dated 30th January, 2024 in opposition to the Defendant/Applicant's Applications dated 12th June, 2023, framed their issues for determination as follows:
 - i. Whether the Plaintiffs'/Respondents' case should be re-opened.
 - ii. Whether the Defendant/Applicant should be granted leave to amend their defence and counter claim.
 - iii. Whether the court should find the 1st Respondent and the directors of the 2nd Respondent together with their agents in contempt of court.
 - iv. Whether the court should grant the Applicant the orders sought.
 - v. Costs of the Application.
27. On the first issue for determination as to whether the Plaintiffs/Respondents' case should be re-opened, the Plaintiffs/Respondents submitted in the negative to the effect that they had already presented their case before the court wherein their witnesses had testified and produced evidence and the Defendant/Applicant had been granted an opportunity to cross-examine the said witnesses before the Plaintiffs/Respondents closed their case on 7th May, 2023. That the evidence that the Defendant/Applicant wished to cross-examine the Plaintiffs/Respondents witnesses on had always been available during and prior to the closure of the Plaintiffs/Respondents case thus re-opening the same would be akin to wasting the court's time. That conversely, the Defendant/Applicant had no valid defence but had just brought the present applications to delay the conclusion of the instant suit.
28. Their submission was anchored on the decision in the case of *Raindrops Limited v County Government of Kilifi* [2020] eKLR on the principles for re-opening of a case to submit that the Defendant/Applicant's Application did not meet the laid down principles but was only intended to fill the gaps in the Defendant/Applicant's case. That the Applicant had not presented anything to show that the evidence he sought to introduce could not have been obtained with reasonable diligence at the time of hearing the Plaintiffs/Respondents' case nor that the witness he was now seeking to call or the evidence sought to be adduced could not have been called or adduced earlier.
29. That the Defendant/Applicant should not be allowed to keep on introducing new evidence in the middle of the hearing since it was in the interest of justice that litigation should come to an end. They thus urged the court to disallow the application to re-open the Plaintiffs' case as the same would prejudice them and impede the just and efficient disposal of the instant suit because there were no



- compelling reasons to warrant the court re-opening their case. Reliance was placed in the decided case of *Hannah Wairimu Ngethe v Francis Ng'ang'a & Another* [2016] eKLR.
30. That it had been within the Defendant/Applicant's knowledge that the alleged subdivisions had been conducted before commencement of the instant suit. That the Defendant/Applicant had not provided any plausible explanation of the nature of the inadvertence and what had made it difficult or impossible to adduce the evidence in question earlier on in the instant proceedings. They thus urged the court to dismiss the Defendant/Applicant's Application as he had not approached the court with clean hands but was only seeking to delay the conclusion of the instant suit.
 31. On the second issue for determination as to whether the Defendant/Applicant should be granted leave to amend their Defence and Counter claim, the Plaintiffs/Applicants submitted in the negative explaining that the Defendant/Applicant was employing delaying tactics to hinder the final determination of the instant suit for after the case had been scheduled for hearing for the 19th June, 2023, he had resorted to filing numerous applications with a view of further delaying the administration of justice. Reliance was placed on the decision of the court in the case of *Joseph Ochieng & 2 others Trading as Aquiline Agencies v First National Bank of Chicago* [1995] eKLR to submit that the Defendant/Applicant had brought the instant Applications after an inordinate delay hence the same should be disallowed.
 32. On the third issue for determination as to whether the 1st Respondent and the Directors of the 2nd Respondent should be found in contempt of court and be committed to civil jail or fine, their submission was in the negative. That the Plaintiff/Respondents had always maintained the *status quo* as had been ordered by the court on 2nd March, 2020. That the alleged subdivisions of the suit land had been concluded in the year 2019 before the issuance of the said orders. Reliance was placed in the decided case of *Thugi River Estate Limited & another v National Bank of Kenya Limited & 3 others* [2015] eKLR to submit that the *status quo* order in the instant suit had not been specific in nature and did not describe any particular cause of action hence the Plaintiffs/Respondents could not be said to have contravened it.
 33. That moreover, in an application for contempt of court, the Applicant must satisfy the court that there had been an order that had been given, that the said order had been extracted and that it contained a penal notice warning of consequences in case of the failure to observe the same; that the order was personally served upon the contemnor; that the order had sufficiently showed the contemnor what he/she was expected to do and lastly that there had been disobedience of the said order.
 34. The Respondents placed reliance in the decided case of *Gatharia K. Mutikika v Babarini Farm Ltd* [1985] KLR 227 to submit that the Defendant/Applicant had not met the said principles as the order that had been extracted did not contain a penal notice warning of the consequences in case of the failure to observe the same and neither did it show what the contemnor was expected to do. Further reliance was placed on the decision in the case of *Ochino & another v Okombo & 4 others* [1989] eKLR.
 35. Further, the Plaintiffs/Respondents, while placing their reliance in the decided case of *Kasembeli Sanane v Manbu Muli alias Frederick Saname & 4 others* [2013] eKLR submitted that contempt of court being a serious accusation whose burden of proof required more than a balance of probabilities, that the Defendant/Applicant had not tendered sufficient evidence to prove the alleged contempt. That there were no matters that were capable of being in contempt of as had been alleged and neither were there orders that had been contravened by the Plaintiffs/Respondents. They thus submitted that the Defendant/Applicant had not discharged the burden of proof.



36. On the fourth issue for determination as to whether the court should grant the Applicant the orders sought, the Plaintiffs/Respondents submitted in the negative and maintained that the said Defendant/Applicant did not have any proprietary interest over the subject property since he had breached the terms of the sale agreement dated 20th June, 2013 when he failed to pay the agreed consideration.
37. With regards to the costs of the application, they placed reliance on the provisions of Section 27 of the Civil Procedure Act to pray that the same be granted to them since costs followed the event. They thus urged the court to dismiss the Applications dated 12th June, 2023 with costs to themselves.

Determination

38. I have considered both the Defendant's applications, counsels' submissions, the applicable law and the authorities herein cited. I have considered that the issues that have a reason for determination are twofold:
- i. Whether the plaintiff/respondents should be held in contempt of the court orders.
 - ii. Whether the Plaintiff's suit should be re-opened and the Defendant be granted leave to amend their defence and counter claim.
39. On the first issue for determination, the Applicant's first application dated the 12th June 2023 is for contempt proceedings against the Respondents seeking that they be committed to civil jail and or be fined accordingly for being in contempt of courts orders directing all parties to maintain *status quo*. The Applicant's complaint was that despite he being the owner of 50 acres comprised in the subject suit and having developed the said parcel of land and further that there having been orders of *status quo* in place, the Respondents had proceeded to interfere with the suit property by causing re-mappings, re-survey and subdivisions wherein the same had since been registered in the names of third parties including Joseph Kiragu Njoroge-Gilgil/Gilgil Block 1/60823 (Kikohey), Peter Mosigisi Nyaboga-Gilgil/Gilgil Block 1/57166, Precious Sister Women Group- Gilgil/Gilgil Block 1/54294, Kayole Neighbours Women Group- Gilgil/Gilgil Block 1/53317, United Self Help Group- Gilgil/Gilgil Block 1/56907, Harrison Waweru Ng'ang'a- Gilgil/Gilgil Block 1/55744, Suleiman Gachuki Mwangi- Gilgil/Gilgil Block 1/59004 (Kikohey) and David Kuria- Gilgil/Gilgil Block 1/59005, persons who had since taken possession of their respective lands including the suit land.
40. The said application has been opposed by the Respondents for reasons that they had always maintained the *status quo* as had been ordered by the court on 2nd March, 2020. That the alleged subdivisions of the suit land had been concluded in the year 2019 before the issuance of the said orders and further that the *status quo* order in the instant suit had not been specific in nature and did not describe any particular cause of action. Lastly that the order that had been extracted did not contain a penal notice warning of the consequences in case of the failure to observe the same and neither did it show what the contemnor was expected to do and that the Applicant had not tendered sufficient evidence to prove the alleged contempt.
41. I have looked at the proceedings in this matter wherein it is clear that on the 15th January 2020, there had been issued orders of *status quo*. On the 2nd of March 2020 these orders had been sealed when parties had recorded the following consent;

“Parties agree to maintain *status quo* obtaining as today.”



42. I have also looked at the ruling delivered by the court in the instant suit dated the 15th December 2021 and reported as *Harrison Waweru Nganga & another v Anthony Kamau Ndoge* [2021] eKLR where the court had clearly stated as follows;

“It is not in doubt that the court on 15/01/2020 issued a *status quo* order in respect to the suit property. A *status quo* order simply maintains a state of affairs between the parties. On 2/03/2020 the parties went further and also consented that the *status quo* with regard to the suit property be maintained. The state of affairs of the suit property was not addressed and this court will not endeavor to try and demystify the state of affairs as of 15/01/2020.”

43. In land matters, the maintenance of *status quo* order is now literally synonymous with the proceedings. As was held by the Court of Appeal in the case of *Mugab-v-Kunga* [1988] KLR 748, in land matters *status quo* orders should always be issued for purposes of preserving the subject matter. The court’s practice directions vide Gazette Notice No. 5178/2014 Practice direction No. 28(k) gives the court the leeway and discretion to make an order for *status quo* to be maintained until determination of the case.

44. The Applicant’s complaint is that pursuant to these orders being in force, the Respondents have contravened the same by interfering with the subject suit property as herein above described. In so submitting the Applicant annexed the following documentary evidence;

- i. A map sheet 6 and 3 issued on 2nd March 2022 indicating the subdivision of the suit land.
- ii. Search certificates to; Gilgil/Gilgil Block 1/59004 (Kikopey) registered to Suleiman Gachuki Mwangi and title issued on the 17th February 2022.
- iii. Gilgil/GilgilBlock 1/56907 registered to United Self Help Group-and title issued on the 26th January 2023.
- iv. Gilgil/GilgilBlock 1/55744 registered to Harrison Waweru Ng’ang’a-of title issued on 25th January 2021 wherein the land was subdivided into parcels No 88997-89004 and title closed on 4th March 2022.
- v. Gilgil/GilgilBlock 1/53317 registered to Kayole Neighbours Women Group wherein title was issued on 7th July 2020.
- vi. Gilgil/GilgilBlock 1/59005 was registered to David Kuria and title issued on 17th February 2022.
- vii. Gilgil/GilgilBlock 1/54294 was registered to Precious Sister Women Group and a title issued on 17th May 2022
- viii. Gilgil/Gilgil Block 1/57166 was registered to Peter Mosigisi Nyaboga and title issued on the 17th December 2021.
- ix. The applicant also annexed pictorial evidence taken on 14th March 2023 at 11:03 am which pictures were indicative that indeed there was activity going on in the suit parcel of land.

45. The *Black’s Law Dictionary* (Ninth Edition) defines contempt of Court as:-

“Conduct that defies the authority or dignity of a Court. Because such conduct interferes with the administration of justice, it is punishable usually by fine or imprisonment.”



46. The law guiding the present Application is Order 40 Rule 3(1) of the *Civil Procedure Rules* which stipulates as follows:-

“In cases of disobedience, or of breach of any such terms, the Court granting an injunction may order the property of the person guilty of such disobedience or breach to be attached, and may also order such person to be detained in prison for a term not exceeding six months unless in the meantime the Court directs his release.”

47. Section 5(1) of the *Judicature Act* which provided that:

“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.”

48. Section 29 of the *Environment and Land Court* is clear to the effect that;

“Any person who refuses, fails or neglects to obey an order or direction of the Court given under this Act, commits an offence, and shall, on conviction, be liable to a fine not exceeding twenty million shillings or to imprisonment for a term not exceeding two years, or to both.”

49. It is an established principle of law as was held in the case of *Kristen Carla Burchell vs Barry Grant Burchell*, Eastern Cape Division Case No. 364 of 2005 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.

50. Having noted that the orders of *status quo* had been issued on the 15th January 2020 and reaffirmed on the 2nd March 2020 by consent and secondly that the said orders are always issued for purposes of preserving the subject matter, the question to ask ourselves is whether by causing re-mappings, re-survey and subdividing the subject suit properties and having them registered in the names of third parties as herein above disclosed constituted contempt of the court orders of 15th January 2020 and 2nd March 2020.

51. From the sworn affidavit, annexures, submissions by the parties’ Counsel, the applicable law and the decided cases, and having warned myself of the dangers of depriving the Respondents their freedom and further keeping in mind that the power, to commit a person to jail, must be exercised with utmost care, and exercised only as a last resort, in the best interest of justice, I find that the consent agreed upon the parties cannot be questioned.

52. The Court of Appeal in the *Shimmers Plaza Limited v National Bank of Kenya Limited* [2015] eKLR had posed the question whether knowledge of a Court order or judgment by an Advocate of the alleged contemnor would be sufficient for purpose of contempt proceedings and answered the question in the affirmative stating:-

“We hold the view that it does. This is more so in a case as this one where the advocate was in Court representing the alleged contemnor and the orders were made in his presence. There is an assumption which is not unfounded, and which in our view is irrefutable to the effect that when an advocate appears in Court on instructions of a party, then it behooves him to report back to the client all that transpired in Court that has a bearing on the clients’ case...”

53. Indeed from the Court’s record, the same is clear that the order of the Court had been delivered and/or issued in the presence of Counsel for both the Plaintiff /Respondent and the Defendant/



Applicant. This Court thus finds that the Plaintiff/Respondents had knowledge of the Court's orders and therefore personal service was unnecessary.

54. I further find that the said orders of the 15th January 2020 and 2nd March 2020 directing the parties to maintain the *status quo* on the suit property were valid, there was no ambiguity in the same and lastly that the Plaintiff/Respondents brazenly disobeyed the said orders by causing the the suit land to be mapped, subdivided and registered in the names of third parties. I find that the Contemnors' conduct was deliberate, in the sense that they willfully acted in a manner that flouted the Court Orders which had directed that parties maintain the *status quo* prevailing. I thus find that the Plaintiffs/Respondents herein are in blatant contempt of Court orders and will proceed to punish them for contempt.
55. On the second issue for determination as to whether the Plaintiff's suit should be re-opened and the Defendant be granted leave to amend their defence and counter claim, the Applicant in its application dated 12th June, 2023, argued that the Respondents having proceeded to interfere with the suit property wherein the same was now registered in the names of third parties who had since taken possession of their respective lands including on the suit land, that it was only fair that the Respondent's case be reopened so that the third parties who were the purchasers of the subdivided parcels could be joined to the suit to enable a fair trial and for the court to consider additional circumstances that would establish the truth. I agree.
56. It should be noted that the issue to re-open a trial is considered separately from the question of adducing new or additional evidence and that the jurisdiction on reopening of a trial is a discretionary one. I am alive to the fact that the Plaintiff closed their case on the 7th February 2023 wherein the matter was pending hearing of the defence case, however having found that the Plaintiffs/Respondents were in contempt of the court orders of maintaining *status quo* wherein they had interfered with the suit property and now third parties who have taken possession and occupation of the property and who have not been joined to the suit were involved, I find that orders herein made at the finalization of the matter would affect such parties' interest.
57. In *Susan Wavinya Mutavi v Isaac Njoroge & another* [2020] eKLR (which is persuasive) the court held as follows:
- “Over the years, Kenya's superior courts and courts in the Commonwealth have developed principles which guide the exercise of jurisdiction to re-open a case and receive additional evidence in a civil trial court. First, the jurisdiction is a discretionary one and is to be exercised judiciously. In exercising that discretion, the court is duty-bound to ensure that the proposed re-opening of a part's case does not embarrass or prejudice the opposite party. Second, where the proposed re-opening is intended to fill gaps in the evidence of the applicant, the court will not grant the plea. Third, the plea for re-opening of a case will be rejected if there is inordinate and unexplained delay on part of the applicant. Fourth, the applicant is required to demonstrate that the evidence he seeks to introduce could not have been obtained with reasonable diligence at the time of hearing of his case. Fifth, the evidence must be such that, if admitted, it would probably have an important influence on the result of the case, though it need not be decisive. Lastly, the evidence must be apparently credible, though it need not be incontrovertible.”
58. I will therefore allow this second application only to the extent of allowing the Plaintiff to reopen their case. The parties are at liberty to amend their pleadings accordingly so as to determine the true and substantive merits of the case and also out of my discretion and the need to ensure that justice is not only done but seen to be done.



59. In effect thereof both the Defendant/Applicant's applications dated 12th June 2023 are herein allowed with costs

DATED AND DELIVERED VIA MICROSOFT TEAMS AT NAIVASHA THIS 4TH DAY OF JULY 2024.

M. C. OUNDO

ENVIRONMENT & LAND – JUDGE

