



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC CASE NO. 792 OF 2015**

**GOLDEN LION ESTATE COMPANY LIMITED.....PLAINTIFF**

**=VERSUS=**

**JAMES ONUNGA.....1<sup>ST</sup> DEFENDANT**

**FRANK LOGISTICS LIMITED.....2<sup>ND</sup> DEFENDANT**

**ASHOK KUMAR SOOD.....3<sup>RD</sup> DEFENDANT**

**THE CHIEF LAND REGISTRAR.....4<sup>TH</sup> DEFENDANT**

**THE HON. ATTORNEY GENERAL.....5<sup>TH</sup> DEFENDANT**

**RULING**

1. This is the Notice of Motion dated 21<sup>st</sup> April 2017 brought under section 5(1) of the Judicature Act, Order 40 Rule 3 of the Civil Procedure Rules, Rule 81.4 of the UK Civil Procedure Rules, 1999 and all other enabling provisions of the law.

2. It seeks orders:-

**1. Spent.**

**2. This honourable court be pleased to order that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants jointly and/or severally are in breach of this court's ruling dated 27<sup>th</sup> January 2017 and consequent orders issued on 24<sup>th</sup> February 2017.**

**3. This honourable court be pleased to punish James Onunga, Francis Nyaga Njeru being a director of the 2<sup>nd</sup> defendant, and the personal representative(s) of the 3<sup>rd</sup> defendant's estate for contempt of court by an order of committal detaining them in prison for a term not exceeding six (6) months.**

**4. This honourable court be pleased to order that the OCS Kilimani Police Station assists in the enforcement of order (3) above.**

**5. Costs of this application be provided for.**

3. The grounds are on the face of the application and are set out in paragraphs (1) to (7).

4. The application is supported by the affidavit of Jun Guo, a manager of the plaintiff, sworn on 21<sup>st</sup> April 2017.

5. The application is opposed. There is a replying affidavit sworn by Francis Nyaga Njeru, the director of the 2<sup>nd</sup> defendant sworn on the 13<sup>th</sup> November 2020.

6. There is also a Notice of Motion dated 27<sup>th</sup> February 2017 brought under Article 159 of the Constitution of Kenya, Section 1A, 1B, 3, 3A, Section 80, 63, Order 22 Rule 51, 52, 53 and 54, Order 45 Rules 1 and 2, Order 51 of the Civil Procedure Rules, 2010 and all other enabling provisions of the law.

7. It seeks orders

1. *Spent.*

2. *Spent.*

3. *That the honourable court be pleased to stay, set aside, vary, vacate, review and/or discharge the order and ruling delivered on 27<sup>th</sup> January, 2017 and all other consequential orders pending the hearing and determination of this application.*

4. *That the Estate of the 3<sup>rd</sup> defendant be granted unconditional leave to file their defence and/or all the pleadings out of time and defend the suit herein.*

5. *That the court does make such further orders as it may deem fit and appropriate to grant in the circumstances.*

6. *The costs of this application be provided for.*

8. The grounds are on the face of the application and are set out in paragraphs (1) to (14).

9. The application is supported by the affidavit of Neeraj Jayatilal Kalaiya, nephew of the 3<sup>rd</sup> defendant, sworn on the 27<sup>th</sup> February 2017.

10. The application is opposed. There is a replying affidavit sworn by Jun Guo the manager of the plaintiff on 20<sup>th</sup> April 2017.

11. On the 20<sup>th</sup> January 2020, the court directed that the two applications be heard together. It also directed that they be canvassed by way of written submissions.

#### **The Plaintiff's Submissions**

12. They are dated 31<sup>st</sup> October 2017. It has put forward the case of **Wardpa Holdings Ltd & Others vs Emmanuel Waweru Lima Mathai & Another [2016] eKLR**. The plaintiff's complaint against the 1<sup>st</sup> – 3<sup>rd</sup> defendants is that they forcefully entered its property, started clearing trees and erected an iron sheet barrier. The 2<sup>nd</sup> defendant was served with the orders of 27<sup>th</sup> January 2017 through its director Mr. Frank Nyaga Njeru.

13. Notwithstanding, there has been continued erection of buildings and structures on the suit property as well as interference with the plaintiff's possession of it by the defendants jointly and severally. The 1<sup>st</sup> – 3<sup>rd</sup> defendants have treated this court's orders with tremendous contempt. Their flagrant disobedience of the same undermines the authority and dignity of this honourable court.

14. The 3<sup>rd</sup> defendant's Notice of Motion dated 27<sup>th</sup> February 2017 is an abuse of this court's process. Neeraj Jayntilal Kalaiya who has purported to make the application on behalf of the Estate of the 3<sup>rd</sup> defendant has not demonstrated his *locas standi*. It has put forward the case of **Sheila Nkatha Muthee vs Alphonce Mwangemi Munga & another [2016] eKLR**.

The 3<sup>rd</sup> defendant's nephew claims he was granted letters of administration *ad litem* to defend this suit on Nairobi Succession Cause NO 228 of 2017. He has not annexed any grant so as to establish his capacity, to make this application on behalf of the 3<sup>rd</sup> defendant. The application is therefore incompetent and should be dismissed.

15. The ruling and orders that the 3<sup>rd</sup> defendant seeks to set aside are neither adverse nor prejudicial to him. The 3<sup>rd</sup> defendant does not have any connection to the suit property. It is on record that the 2<sup>nd</sup> defendant has exhibited a sale agreement and a transfer dated 24<sup>th</sup> January 2011 between 3<sup>rd</sup> defendant and one Edward Shylock Omwega Ndege through which the former sold the suit property to the latter.

16. The 2<sup>nd</sup> defendant then claimed to have bought the suit property from the said Edward Shylock Omwega Ndege. The 3<sup>rd</sup> defendant having relinquished its interest in the suit property more than four years before the instant suit was instituted, he does not stand to suffer any hardship, prejudice or injustice if the orders are not set aside. It prays that the application be dismissed with costs.

#### **The 2<sup>nd</sup> Defendant's Submissions**

17. They are dated 13<sup>th</sup> November 2020. They raise two issues for determination:-

(i) *Should contempt proceedings have been taken out against the 2<sup>nd</sup> defendant?*

(ii) *Is the 2<sup>nd</sup> defendant in contempt of court?*

18. It has put forward the case of **Kenya Tea Growers Association vs Francis Atwoli & 5 Others [2012] eKLR** where Lenaola J cited with approval the case of **Clarke and Others vs Chadburn & Others [1985] 1ALL ER (PC) 211**. This obedience of court orders is not optional, rather it is mandatory and a person does not choose whether to obey a court order or not. Court orders are obligatory unless they are discharged on application, appeal or review.

19. From the pleadings on record, it is clear that the plaintiff has not proved that the 2<sup>nd</sup> defendant is in contempt of court. All they have put forward are allegations without any basis. The Court of Appeal in **Mutitika vs Baharini Farm Ltd [1985] KLR 229, 234 as cited in TSC vs KNUT** the courts stated that the standard of proof in contempt proceedings must be higher than proof on a balance of probabilities almost, but not exactly beyond reasonable doubt. It has also put forward the case of **Mwangi HC Wangonde vs Nairobi City Commission, Nairobi Civil Appeal No 95 of 1998**.

20. The 2<sup>nd</sup> defendant is embroiled in another matter over the same property in **ELC No 144 of 2017, Abaye Tesfu Negussee vs Frank Logistics Ltd**. The 2<sup>nd</sup> defendant is already in compliance with the orders of this court being cognizant of the consequences of non-compliance with a court order. The plaintiff has not met the standard of proof, whether on a balance of probability, or on a standard, almost but not exactly as beyond reasonable doubt. There is no evidence tabled before court that would warrant the holding of the 2<sup>nd</sup> defendant in contempt of court.

### **The 3<sup>rd</sup> Defendant's Submissions**

21. They are dated 13<sup>th</sup> November 2020. They raise two issues for determination: -

(i) *Should the exparte interim orders be varied and or preferably set aside?*

(ii) *Was the injunction issued by this Honourable Court obtained irregularly?*

22. He has put forward the cases of **American Cyanamid Co vs Ethicon Ltd [1975] ALL ER 504; Giella vs Cassman Brown & Co. Ltd [1973] EA 358; Julius Mogaka Gekonde t/a E-Smart Technical College vs Ouro Power Ltd & Another [2016] eKLR**.

23. The purpose of the order for temporary injunction is primarily to preserve the status quo of the subject matter of the dispute pending final determination of the case. He has put forward the cases of **Pricilla Wanja Kibui vs James Kiongo Kibui & Another [2014] eKLR; Republic vs National Environment Tribunal & Another [2013] eKLR**.

The plaintiff has not provided any evidence that it is the owner of the suit property in question thus there is no status quo for them to defend or for them to ask for court to defend on their behalf.

24. The plaintiff is not in possession of the suit property. They neither have the documentation nor any right to be in the suit property, thus no harm will be suffered upon them. The court has unfettered discretion to discharge or vary or even set aside an injunction order if the ends of justice so demands. He has also put forward the cases of **Shah vs Mbogo & Another [1967] EA 116; Esther Wamaita Njihia & 2 Others vs Safaricom Ltd [2014] eKLR; Mrao Ltd vs First American Bank of Kenya Ltd & 2 Others [2003] KLR 125**.

25. There have been concerted efforts by the plaintiff to conceal the fact that the 3<sup>rd</sup> defendant herein had passed away at the time they obtained these orders and thus they were unable to serve the same on the 3<sup>rd</sup> defendant in an effort to steal a march on him. He has put forward the cases of **Bahadulari Ebrahim Shamii vs AI Noor Jamal & 2 Others Civil Appeal No 210 of 1997; Football Kenya Federation vs Kenya Premier League Ltd & 4 Others [2015] eKLR**. The circumstances prevailing are that the party seeking to confirm and enforce the injunction is not entitled to the property. He has also put forward the case of **Richard Nchapai Leiyangu vs IEBC & 2 Others**. The orders of this honourable court given on 27<sup>th</sup> January 2017 are moot and ought to be discharged as they seek to deprive the 3<sup>rd</sup> defendant herein of just due process.

26. The 3<sup>rd</sup> defendant herein was not personally served with the said orders. He has put forward the cases of **Nyamongo vs Kenya Post & Telecommunication Corporation [1994] KLR1; Mwangi HC Wangonde vs Nairobi City Commission Nairobi Civil Appeal No 95 of 1998**. He prays that the Notice of Motion dated 21<sup>st</sup> April 2017 be dismissed and his Notice of Motion dated 27<sup>th</sup> February 2017 be allowed.

### **The Hon. Attorney General's Submissions**

27. They are dated 21<sup>st</sup> June 2019. An order for contempt must contain in it a mandatory penal notice warning of the disobedience of the order. He has put forward the cases of **Sam Nyamweya & 3 Others vs Kenya Premier Ltd & 2 Others [2015] eKLR; Exparte Langley 1879, 13 ChD/10 (CA) Thesiger L. J Shimmers Plaza Ltd vs National Bank of Kenya [2015] eKLR; Miguna Miguna vs Hon. AG [2018] eKLR**.

28. This court has jurisdiction to punish for contempt of court deriving jurisdiction from order 40 rule 3 of the Civil Procedure Rules, 2010 and the inherent powers of the court. This application is therefore properly before court.

29. Obedience of court orders is one of the tenets of the rule of law and contempt of court would not be countenanced in a Constitutional democracy.

30. I have considered the two applications, the affidavits in support and the affidavits in reply. I have also considered the written submission filed on behalf of the respective parties. The issues for determination is whether these applications are merited.

31. I will start by considering the Notice of Motion dated 27<sup>th</sup> February 2017. It seeks that the orders granted by this court on the 27<sup>th</sup> January 2017 be vacated and or reviewed or discharged. The main ground is that the Estate of the 3<sup>rd</sup> defendant has a legitimate claim on the suit property and that the orders issued were oppressive.

32. The application is supported by an affidavit of Neeraj Jaiyatilal Kalaiya sworn on the 27<sup>th</sup> February 2017. He states that he is a nephew of the 3<sup>rd</sup> defendant (deceased). In paragraph 7 of the affidavit he states:-

***“The 3<sup>rd</sup> defendant is deceased and I am related to him by virtue of being his nephew and I was granted letters of administration ad litem to defend the suit against the estate of the deceased in Nairobi Success Cause NO 228 of 2017; in the Matter of the Estate of Ashok Kumar Sood (Deceased)”. The said deponent has not annexed any proof of death of the 3<sup>rd</sup> defendant in the said letter of administration ad litem.”***

33. This issue was raised in paragraph 3 of the replying affidavit by Jun Guo, sworn on the 20<sup>th</sup> April 2017 but the deponent herein Neeraj Jayatilal Kalaiya did not file any response to address it.

34. In the absence of proof of letters of administration then, I am of the view that the applicant herein lacks the *locas standi* to bring this application. In the case of **Sheila Nkatha Muthee vs Alphonse Mwangemi Munga & Another [2016] eKLR**, The Court of Appeal stated:

***“In Otieno vs Ougo & Another [1986-1989] EALR 468 this court rendered itself thus:.....an administrator is not entitled to bring any action as administrator before he has taken out letters of administration. If he does, the action is incompetent as of the date of inception.”***

***“In Rajesh Pranjivan Chadasam vs Sailesh Pranjivan Chadusama [2014] eKLR this court has remained consistent on the issue of stating as follows: That may well be the case, but in our view the position in law as regards locas standi in succession matters is well settled. A litigant is clothed with locas standi upon obtaining a limited or a full grant of letters of administration in cases of intestate succession”.***

***This court has also authoritatively delivered itself on the issue of Virginia Edith Wamboi Otieno & Joash Ochieng Ougo & Another [1982-99] 1 KAR, Morjaria vs Abdalla [1984]KLR 490 and in Trouistik Union International & Another vs Jane Mbeyu & Another Civil Appeal No 145 of 1990. The appellant therefore had no capacity to file the application before the Industrial Court.***

***Locas standi is a primary point of law almost similar to that of jurisdiction since the lack of capacity to sue renders the suit incompetent. In Alfred Njau & Others vs City Council of Nairobi [1982-88] 1KAR 299 this court gave meaning to the term locas standi by stating: “...to say he has no locus standi means he cannot be heard even on whether or not he has a case worth listening to”***

35. I am guided by the above authority in finding that the applicant herein has not demonstrated that he has *locas standi* to bring this application. I find the application is incompetent on this ground.

36. Furthermore, in paragraph 27 of the supporting affidavit, the applicant depones:-

***“After untimely demise of the 3<sup>rd</sup> defendant, I became aware that he had concluded contracts disposing of the suit property to the 2<sup>nd</sup> defendant”.***

This means the Estate of the 3<sup>rd</sup> defendant no longer has any legitimate claim on the suit property.

37. I agree with the plaintiff's submissions that the 3<sup>rd</sup> defendant having relinquished his interest in the suit property does not stand to suffer any hardship, prejudice or injustice if the orders of 27<sup>th</sup> January 2017 are not set aside. This application is therefore an abuse of the court process. I decline to allow prayer (3). However prayer (4) is allowed upon proof that the applicant is a personal representative of the Estate of the 3<sup>rd</sup> defendant.

38. I will now turn to the Notice of Motion dated 21<sup>st</sup> April 2017. On the 27<sup>th</sup> January 2017, this court granted the following orders:-

***“That a temporary injunction is issued barring the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants, their servants and or agents from trespassing, felling any trees, erecting any buildings or structures or in any way interfering with the plaintiff's possession of all that property known as land reference number 1/835 (original number 225/5) pending the hearing and determination of this suit”***

The said orders were issued on 24<sup>th</sup> February 2017.

39. The Notice of Motion dated 21<sup>st</sup> April 2017 is supported by the affidavit of Jun Guo, the manager of the plaintiff in paragraph 8 he depones:-

***“I am advised by the plaintiffs advocates, whose advice I believe to be sound that the continued construction of structures on the suit property in contravention of this honourable court's ruling and orders is not only prejudicial to the plaintiff's proprietary right on it, it defies the authority and dignity of this honourable court.”***

In paragraph 5 he depones:-

***“Nevertheless, the erection of buildings and structures on the suit property as well as the interference with the plaintiff’s possession of it by the defendants jointly or severally has continued in earnest. Annexed hereto and marked “JG2” are photographs of the said plaintiff.”***

40. From the photographs it is hard to tell when the iron sheet perimeter was erected. It is hard to tell if the buildings inside were done after the orders issued on 24<sup>th</sup> February 2017. The plaintiff needed to have provided more particulars of acts of disobedience. For the reading of paragraph 5 of the affidavit of Jun Guo one gets the impression that some structures had been put before the orders of 24<sup>th</sup> February 2017.

It is the plaintiff’s case that the 2<sup>nd</sup> defendant’s director Francis Nyaga Njeru was served with the said orders. There is no mention of whether the 1<sup>st</sup> defendant or the personal representative of the Estate of the 3<sup>rd</sup> defendant were served. It appears that there is no proof that the alleged contemnors were personally served with the said orders.

41. In the case of **Mutitika vs Baharini Farm Ltd [1985] KLR 229, 234** the Court of Appeal held that:-

***“In our view the standard of proof in contempt proceedings must be higher than proof on a balance of probabilities, almost but not exactly, beyond reasonable doubt..... The standard of proof beyond reasonable doubt ought to be left where it belongs, to wit criminal cases. It is not safe to extend it to an offence which can be said to be quasi criminal in nature”.***

42. I am not satisfied that the plaintiff’s/applicant’s application meets the threshold for grant of the orders sought. I find no merit in this application and the same is dismissed. The cost of this application do abide the outcome of the main suit.

43. For the avoidance of doubt the orders granted on 27<sup>th</sup> January 2017 and issued on 24<sup>th</sup> February 2017 ought to be complied with fully by all parties to the suit.

It is so ordered.

**DATED, SIGNED AND DELIVERED IN NAIROBI ON THIS 22ND DAY OF APRIL 2021.**

.....

**L. KOMINGOI**

**JUDGE**

**In the presence of:-**

Mr. Mwangi for the Plaintiff

No appearance for the 1<sup>st</sup> Defendant

Ms Nasimiyu for Mr. Osundwa for the 2<sup>nd</sup> Defendant

No appearance for the 3<sup>rd</sup> Defendant

Ms Fatma for Mr. Kamau for the 4<sup>th</sup> and 5<sup>th</sup> Defendants

Phyllis – Court Clerk