



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC. CASE NO. 389 OF 2012

JAMES KIMUNYU GATHARE.....PLAINTIFF

VERSUS

VIDELIA MUTHONI NDUNGU.....1ST DEFENDANT

EMBAMAKA MULTIPURPOSE CO-OPERATIVE SOCIETY LTD.....2ND DEFENDANT

RULING

1. Before me is an application dated 3.3.2021 in which the Plaintiff/Applicant prays that the interested parties be joined in these proceedings, that the court orders the personal attendance of the Interested Parties and Defendants to show cause why they should not be punished for contempt of court and the said parties be jailed for such contempt for a period of 6 months. Further, that the Defendants and Interested Parties be ordered to purge the contempt or the court to place an inhibition over the suit land No. 28878 and 28879.
2. The Applicant contends that at the inception of the suit, the court gave orders of maintenance of status quo of the subject parcel of land. However, the Defendant during the existence of this suit proceeded to process title for the plot being claimed by the Plaintiff.
3. A perusal of the documents filed in the digital platform (CTS) did not trace any replying affidavit.
4. On the issue of contempt, I make reference to **Section 5** of the **Judicature Act** which provides for the punishment of contempt of court in the following terms:

**“ (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 the subordinate courts” .**

5. Courts have held that for a person to be cited for contempt it must be evident that the court order was deliberately disobeyed. In the Court of Appeal case of Micheal Sistu Mwaura Kamau v Director of Public Prosecutions & 4 others [2018] eKLR it was stated that;

**“...It is trite that to commit a person for contempt of court, the court must be satisfied that he has wilfully and deliberately disobeyed a court order that he was aware of... Secondly, ... to sustain committal for contempt of court, the order of the court that is alleged to have been deliberately disobeyed must be clear and precise so as to leave no doubt as to what a party was supposed to do or to refrain from doing. Lastly, the standard of proof in committal proceedings is higher than proof on a balance of probabilities, though not as high as proof beyond reasonable doubt...”**

6. Firstly, the applicant has not indicated the specific order which was allegedly violated. The initial orders granted by the court in relation to the application of 4.7.2012 did grant a temporary injunction against 1s Defendant from dealing with the suit property. The substantive ruling was delivered on 11.3.2013 in which I find it necessary to give an extract thereof:

**“From the facts as deponed it appears the plots the 1st Defendant claims are the same plots the Plaintiff is claiming. So who owns these plots? The 2nd Defendant who is a party in this suit chose not to file any affidavit to help this court decided who amongst the two was allocated the plots. Each party claims to be in possession. The photographs in my view show that each party has gone out of its ways to establish themselves on the plot. The Plaintiff has exhibited pictures of a mabati structure and the 1st Defendant a stone structure. I cannot tell when these structures were built as each party has its own story. So what should happen in this case? As I stated earlier the evidence or an affidavit from the 2nd Defendant should have been filed to shed light on who owns plot No. 28 and 29 and whether Plot No. 28 and 29 have another number 12 and 13. In the absence of this crucial evidence, in my view the only appropriate order is that no construction will go on in the plots.**

**Whoever is in possession now will continue to be in occupation. I further order that the parties and their counsels shall go to the offices of the 2nd Defendant and have a meeting with the officials of the 2nd Defendant to establish who owns Plot No. 28 and 29. I give the parties a period of 30 days to do so and return to court on a mention date to be given by the court for further directions. This order therefore varies the injunctive order given on the 5.7.2012. Costs shall be in the cause.”**

7. What emerges from that ruling is that the orders given on 5.7.2012 were varied as 1st Defendant was also found to be on the suit land. Secondly, the orders gave the 2nd Defendant the mandate to establish who owns the suit property.

8. Thereafter, 1st Defendant was to file an application dated 2.10.2013 seeking a review of the ruling of 11.3.2013 as well as an injunction against the Plaintiff. The court declined to grant the orders sought noting that:

**“ the parties can do themselves a lot of justice by fast tracking the hearing of the main suit. That will not happen as long as parties continue to engage in interlocutory applications which merely serve to prolong the day of reckoning when the court will deliver a final judgment in the matter finally determining the ownership of the disputed plots ”.**

9. I find wisdom in the two rulings and I can only urge the parties to take heed and focus on the main trial. As at now, the prayer for contempt certainly fails.

#### **Joinder**

**“The parties can do themselves a lot of justice by fastracking the hearing of the main suit. That will not happen ...”**

10. The Applicant has availed a title deed indicating that the two parcels 28878 and 28879 are owned by Hannah Wambui, Joseph Kuria and Peter Marira. I am at a loss as to why Applicant desires to enjoining one Faith Nyambura and not Joseph and Peter. Nevertheless, I find that in terms of **Order 1 rule 10(2) of the Civil Procedure Rules**, the proposed parties can be termed as Interested Parties. See **Joseph Njau Kingori vs. Robert Maina Chege & 3 Others (2000) eKLR**.

11. I also find that an order of inhibition is necessary in order to preserve the suit land.

#### **Final Orders**

12. The application is partially allowed whereby:

- 1. The proposed Interested Parties are hereby joined in these proceedings.**
- 2. The Plaintiff is given 14 days to amend his pleadings to reflect his claim against the new parties, failure to which the orders given herein shall lapse.**
- 3. All the other parties are given 14 days to also amend or file their pleadings accordingly.**
- 4. An order of inhibition is hereby issued against parcels LR.28878 and 28879.**
- 5. The costs of the application shall abide the outcome of the suit.**

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 9TH DAY OF FEBRUARY 2022 THROUGH MICROSOFT TEAMS.**

**LUCY N. MBUGUA**

**JUDGE**

#### **In the presence of:-**

Ms Waweru holding brief for Mr. Gachomo for the Plaintiff

M/s Gachugu holding brief for Ambani for the Defendant

and the Interested Party

Court Assistant: Eddel Barasa