



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET**

**E L.C. NO.125 OF 2018**

**SIMON KIPLETING KIMEI .....1<sup>st</sup> PLAINTIFF**

**AMOS KIPKEMBOI KEMEI .....2<sup>nd</sup> PLAINTIFF**

**VERSUS**

**KIPTANUI JOSHUA KIMEI .....DEFENDANT**

**AND**

**WILFRED KIPKOLUM TIROP.....INTERESTED PARTY/ APPLICANT**

**RULING**

**[Notices of motion dated the 6<sup>th</sup> January 2021, 13<sup>th</sup> January 2021 and 15<sup>th</sup> April 2021]**

1. The Applicant approached this court by way of the notice of motion dated the 6<sup>th</sup> January 2021 seeking for orders that:

1. "Spent

2. Spent.

3. That pending the hearing and determination of the suit herein, this Honourable Court be pleased to stay the order issued on 16<sup>th</sup> December 2020 directing the Applicant/Interested Party to purge the contempt by vacating from the suit land in 30 days."

2. The application is based on the twenty-eight (28) grounds on its face and supported by the affidavit sworn by Wilfred Kipkolum Tirop, the Applicant, on the 6<sup>th</sup> January 2021. It is the Applicant's case that he entered into a sale agreement with the Defendant on the 21<sup>st</sup> June 2018, under which he agreed to buy land parcel Nandi/Ndalat Settlement Scheme/163, the suit land, measuring 18.5 acres at Kshs. 17,500,000. That he paid a deposit of Kshs. 2,000,000 and the balance was to be paid on the 30<sup>th</sup> July 2018. That he paid the full amount and he was granted full, uninterrupted and vacant possession of the suit property. That he commenced the construction of a permanent home and moved in with his family. That he later came to know that the property was subject to this instant dispute between the Plaintiffs and the Defendant who are brothers, and that on the 5<sup>th</sup> December 2019, the court had issued orders barring access to the property. That he instructed counsel to apply to have him enjoined in this suit, and further to have the orders of the 5<sup>th</sup> December 2019 set aside and or reviewed as he lived on the suit land with his family, and had been caught up in what he described as an extremely helpless, puzzling and intricate situation. That the Plaintiffs filed an application for contempt on 15<sup>th</sup> July 2020 against the Applicant and the two applications were determined through the ruling of 15<sup>th</sup> December 2020. That his application was not granted while that of the Plaintiff was allowed against him, and he was fined Kshs. 200,000. That he was also ordered to purge the contempt by moving out of the suit property in thirty (30) days, which he is yet to do as it will render him homeless and destitute if complied with. That whereas he would have sued the Defendant for a refund of the money paid to him, he is not able to do so as the Defendant died on the 13<sup>th</sup> October 2020, a material fact that was not brought to the court's attention. That the orders barring access to the property were issued without him being heard, and he urged the court to review the said ruling. That the mistake of not having sought for substantive orders in his earlier application should not be visited on him as he stood to suffer irreparable loss and damage should the interim orders sought not be granted.

3. The application is opposed by the Plaintiffs through the replying affidavit sworn by Simon Kipleting Kemei, the 1<sup>st</sup> Plaintiff, on the 12<sup>th</sup> January, 2021. It is their case that the application was an afterthought and is intended to defeat the orders of 15<sup>th</sup> December, 2020 that was arrived at by consent, requiring the Applicant to vacate the suit property on or before the 16<sup>th</sup> January, 2021. That a consent could only be reviewed by a subsequent consent, unless fraud, misrepresentation or undue influence was proven in the making of the initial consent, which has not been established by the Applicant. That the Applicant had entered on a portion of the suit land on the strength of a forged court order

allegedly issued on 26<sup>th</sup> June, 2019. That the Defendant began construction on the suit land contrary to the consent order of 28<sup>th</sup> November 2018, a fact that was confirmed through paragraphs 3 and 6 of the Defendant's replying affidavit of 16<sup>th</sup> January, 2019. That the Defendant had in the application dated the 16<sup>th</sup> January 2019 claimed to be the one in occupation of the suit land, and that he was in the process of putting up his house. That his learned counsel had registered the consent order of 23<sup>rd</sup> November 2018, prohibiting dealings with the suit land at the land's registry. That the forged order of 26<sup>th</sup> June 2019 was made with the Applicant's full knowledge of the said consent order's existence, and with the aim to circumvent the said order, and enable the transfer of the suit property during pendency of the suit. That the Applicant has been aware of these proceedings since June 2019, and that when the ruling was made on 18<sup>th</sup> November 2020, the Interested Party/Applicant never sought to review the orders issued therein. That the Applicant could not seek to review the orders of 15<sup>th</sup> December, 2020 in light of a ruling of 18<sup>th</sup> November 2020 that found him in contempt of the orders. That the Applicant was present when the Deputy Registrar visited the suit land on 16<sup>th</sup> August, 2019, a fact the Applicant had not denied in court. That the Applicant should consider pursuing the beneficiaries of the estate of the deceased Defendant for a refund of the money he may have paid him, as the Plaintiffs' were not privy to any sale agreement over the sale of the suit property. That the suit land was ancestral land having been allocated to their father in 1975. That the Applicant was seeking a way to remain on the suit property through a back door, and that he had been orchestrating the issuance of contradictory court orders by this court. The Plaintiffs urged the court to find that the sale transaction over the suit land between the Defendant and the Applicant went contrary to the doctrine of *lis pendens* and therefore, the application for review should be disallowed.

4. The Applicant responded to the Plaintiff's replying affidavit through his further affidavit sworn on the 25<sup>th</sup> January, 2021, in which he admitted that the order of 15<sup>th</sup> December, 2020 was made pursuant to his mitigation after being found to be in contempt. He attached a copy of bank statement which he stated showed several transfers and withdrawals of various sums on diverse dates between the 21<sup>st</sup> June, 2018 and 5<sup>th</sup> January, 2020 which he claimed he paid the Defendant. He reiterated that he took possession of the property on 21<sup>st</sup> June, 2018 and began construction therein. He stated that he was yet to find a place to stay and that had challenged his capacity to comply with the court's orders. The Applicant questioned why the Plaintiffs disputed his occupation of the suit property yet they were seeking to evict him.

5. The Applicant filed the second notice of motion dated the 13<sup>th</sup> January, 2021 seeking for the application to be certified urgent and heard ex-parte, in the first instance; and that pending the inter parties hearing of the application dated the 6<sup>th</sup> January, 2021, the order of 16<sup>th</sup> December 2020 directing the Applicant to purge the contempt by vacating from the suit land in 30 days be stayed. The record show that the temporary order of stay was granted on the 14<sup>th</sup> January, 2021.

6. The Applicant also filed a third notice of motion dated the 15<sup>th</sup> April, 2021 seeking for the following prayers:

a. *"That the Honourable court be pleased to find that the Plaintiffs/Respondents are in contempt of court for disobedience of the orders of the court issued on 14<sup>th</sup> January 2021.*

b. *That the Honourable court upon granting (the prayer above), be pleased to commit the Plaintiffs/Respondents to imprisonment for a period of 6 months or/and pay an amount of money in fine as the court may deem fit.*

c. *That this Honourable court be pleased to issue any other orders for contempt of court as it may well deem to be fit and just in the circumstances.*

d. *That costs of this application be borne by the Plaintiffs/Respondents."*

7. The application is based on the twenty-one (21) grounds on its face and supported by the affidavit sworn by Wilfred Kipkolum Tirop, the Applicant, on the 15<sup>th</sup> April, 2021. It is his case that the court issued temporary stay of the orders of 16<sup>th</sup> December, 2020, but the Plaintiffs have in violation of the said order trespassed onto the suit land, and have been cultivating and felling trees on the property unlawfully. That he has been having quiet possession of the land since 2018, and it was only after the death of the Defendant that the Plaintiffs started trespassing, and asserting their rights over the land, and should be punished for disobedience.

8. That in opposition to the application, the Plaintiffs filed the replying affidavit sworn by Simon Kipleting Kemei, the 1<sup>st</sup> Plaintiff, on the 21<sup>st</sup> April, 2021. It is the Plaintiffs case that the Applicant has filed the three applications to buy time to continue residing on the suit land. That the Applicant is the one in contempt of court orders of 5<sup>th</sup> December, 2019 and 16<sup>th</sup> December, 2020 by remaining on the suit land. That the Applicant is still in possession of the suit land, pursuant to order issued on the 14<sup>th</sup> January, 2021, following the filing of his application dated the 13<sup>th</sup> January, 2021. That they have always been in possession of portions of the suit land as confirmed in the Deputy Registrar's report made after the locus visit.

9. That upon hearing counsel for the parties, the court issued directions on filing and exchanging submissions on the applications. The learned counsel for the Applicant filed two submissions dated the 14<sup>th</sup> April, 2021 on the application dated the 6<sup>th</sup> January, 2021, and the 18<sup>th</sup> October, 2021 on the application dated the 15<sup>th</sup> April, 2021. The learned counsel for the Plaintiffs filed a combined submission dated the 22<sup>nd</sup> April, 2021 on all three applications dated the 6<sup>th</sup> January, 2021, 13<sup>th</sup> January, 2021 and 15<sup>th</sup> April, 2021.

10. The following are the issues for the court's determinations:

**a. Whether the Applicant has made a reasonable case for granting of stay of the order of 16<sup>th</sup> December 2020 requiring him to purge the contempt in 30 days.**

**b. Whether the Applicant has established to the standard required that the Plaintiffs have disobeyed the court order issued on the 14<sup>th</sup> January 2021, and if so what punishment to issue.**

**c. Who pays the costs in each of the three applications.**

11. The court has carefully considered the grounds on the applications, the affidavit evidence, submissions, superior courts decisions cited thereon, and come to the following conclusions:

a. That the record confirms that the first orders in respect of the suit land are those of the 23<sup>rd</sup> November, 2018 which provided:

**“THAT** the County Land Registrar Nandi be and is hereby restrained from dealing in any manner with the register of that parcel of land known as **NANDI/NDALAT SETTLEMENT SCHEME/163** measuring approximately 7.4 Ha pending the hearing and determination of this application inter-parties and/or as shall be ordered by this Honourable court.”

That while the Applicant’s position is that he bought and took possession of the suit land from the Defendant on 21<sup>st</sup> June 2018, the Plaintiffs disagree, insisting that going by the sale agreement between the Defendant and the Applicant, the forged court order of 26<sup>th</sup> June, 2019 and the Deputy Registrar’s report after the visit to the locus of 16<sup>th</sup> August, 2019, the Applicant could only have come onto the land after that visit. They further argue that from the Defendant’s application of 16<sup>th</sup> January, 2019, the Defendant was the one who was constructing the house now occupied by the Applicant. That paragraphs 3 and 6 of the Defendant’s affidavit to the application dated the 16<sup>th</sup> January, 2019 confirms their contention, and the court finds that it cannot be true that the Applicant had taken possession of the suit land in 2018, and commenced constructing the same house the Defendant was building. That had the Applicant been in possession of the suit land, or part thereof, by the 2018, then that would have been noted by the Deputy Registrar report made after the site visit of the 16<sup>th</sup> of August, 2019, that indicates that the construction of the house now occupied by the Applicant was neither completed nor occupied. It is not lost to the court that when the Deputy Registrar conducted a site visit on 16<sup>th</sup> August, 2019 pursuant to directions issued on 31<sup>st</sup> July, 2019, the house in question was still under construction. That though the Applicant has attached some photographs of the house to support his claim, they are at variance with those photographs attached to the Deputy Registrar’s report after the site visit in the presence of parties to the suit, pursuant to the court order.

b. That I have also considered the Defendant’s replying affidavit of 16<sup>th</sup> January, 2019 in response to the Plaintiffs application dated 14<sup>th</sup> January, 2019 for contempt, and indeed paragraph 3 reads;

**“THAT** as at the time of filing this suit I had started a foundation to build a home on my land as at 28<sup>th</sup> November 2018.”

Paragraph 6 reads:

**“THAT** I bought the materials way back in **November 2018**”

*That the foregoing leads the court to the conclusion that the Defendant is the one who initiated the construction of the house in issue, and was the one in occupation of the suit property, and not the Applicant herein, by the time the orders of the 18<sup>th</sup> November, 2018 were issued.*

c. The Plaintiffs contention that the Defendant and Applicant used the forged court orders dated the 26<sup>th</sup> June, 2019 and their sale agreement executed on the 21<sup>st</sup> June, 2019 to side step the existing court order, and register the transfer at the lands office on the same date, appear probable, and if true then the Applicant could only have come onto the suit land after the Deputy Registrar’s visit to the land on the 16<sup>th</sup> August, 2019. That the question that begs to be answered then is whether the Applicant took possession of the suit land with full knowledge of the orders of 18<sup>th</sup> November, 2018. The Applicant claims to have conducted due diligence, and upon being satisfied of the proprietorship of the suit property, instructed counsel to prepare the sale agreement. The Plaintiffs claim that the Applicant in his joinder application of 16<sup>th</sup> January, 2019 acknowledged the existence of this suit. The Applicant admits to have sought to be enjoined in the suit through the application dated the 17<sup>th</sup> January, 2020 and not the 17<sup>th</sup> January, 2019. The record of the court confirms that the Applicant’s joinder application is dated the 17<sup>th</sup> January, 2020 and filed on the same date, and not 16<sup>th</sup> January, 2019 as alleged by the Plaintiffs. That the Applicant’s supporting affidavit to the application dated the 17<sup>th</sup> January, 2020 at paragraphs does not specifically disclose when the Applicant got to know the existence of this suit.

d. That the transfer and registration of the Applicant with the suit land on the 28<sup>th</sup> July, 2019, despite the court orders of 18<sup>th</sup> November, 2018 having been lodged at the land registry, leaves doubts on whether the order had actually been registered. What the Plaintiffs relied on was an application for registration, which on its own does not amount to a registration. The Plaintiffs should either have availed the receipt for payment for registration, or even a certificate of search of the property to demonstrate that the encumbrance had indeed been registered, before the transfer and registration in the Applicant’s name. That what is however apparent is that the Defendant, who obviously was aware of the existence of the suit, and who allegedly transferred the suit land to the Applicant did so while well aware of the status quo order and pendency of this suit. The whole transaction between him and the Applicant over the suit property contravenes the doctrine of *lis pendens*.

e. That whereas the transfer of the suit land has not been questioned, a cursory look at it shows it lacks a stamp duty stamp. The provision of section 46 of the Land Registration Act No. 3 of 2012 provides that:

**“46. An instrument required by law to be stamped shall not be accepted for registration unless it is stamped in accordance with the Stamp Duty Act, (Cap. 480).”**

That the Applicant must be aware the title under which he claims interest over the suit land is under scrutiny, and the fact that it

apparently lacks the stamp that is a must in the above provision of the law, and existence of the forged court order of 26<sup>th</sup> June 2019, which found paved the way for execution of a sale agreement on 21<sup>st</sup> June, 2019, and the subsequent transfer thereof raises serious concerns about the authenticity of the Applicant's title to the suit property. That the provision of section 119 of the Evidence Act chapter 80 of Laws of Kenya provides that:

***“119. The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.”***

That though the Plaintiffs have alleged that the Applicant forged or authorized the forging of the court order dated the 26<sup>th</sup> June 2019 that together with the sale agreement between him and the Defendant was used in the transfer of the suit land, the Applicant has curiously failed to address that forgery allegation, that is obviously aimed at impugning the title to the suit land, that he allegedly obtained under the sale transactions with the Defendant.

f. That the foregoing confirms that, as at 21<sup>st</sup> June, 2019 when the Applicant dealt with the Defendant and purchased the property, the orders of 18<sup>th</sup> November, 2018 were in place. That it is highly probable that as the Applicant came onto the suit property after the Deputy Registrar's site visit, he did so in full knowledge of this pending litigation and the restrictions on dealing with the property pursuant to this court's orders of 18<sup>th</sup> November, 2018. He is therefore not an innocent purchaser who found himself on the suit property. In any event, even if the Defendant concealed the facts of the property being encumbered, then doesn't his claim lie against the estate of the Defendant as the Plaintiffs have pointed out? That even if the Defendant has now passed on, it is a fact that civil cases are said to lie in rem and bind a deceased's estate. If the sale agreement between Applicant and the Defendant was obtained based on non-disclosure of material facts and misrepresentation of the fact of whether the property was encumbered, he has the option of a remedy against the estate of the deceased's Defendant.

g. That the court therefore finds that the Applicant came into the suit property knowing that there were orders directing the status quo be maintained. With this in mind, what is the court to make of his application dated the 6<sup>th</sup> January, 2021 that seeks for stay of the order of 15<sup>th</sup> December, 2020 requiring him to vacate the suit property? Obviously, even if this application were to succeed, it does not oust the status quo orders of November 2018, which did not authorize him, but the Defendant to stay on the suit land. There is nothing to confirm or suggest that the Applicant has moved this court or the appellate court to review and or set aside the orders of November 2018, which are still in force. That further, the Applicant has been indicted by this court through the ruling of the 18<sup>th</sup> November, 2020 and order of 15<sup>th</sup> December, 2020 on the contempt application for using unscrupulous means to gain possession and occupation of the suit land. That in any case, the temporary order granted on the 14<sup>th</sup> January, 2021 in respect of the application dated the 13<sup>th</sup> January, 2021 did not require the Plaintiffs to do or refrain from doing anything. It had only stayed the order of the 15<sup>th</sup> December, 2020 that required the Applicant/Interested Party to vacate from the suit property in thirty (30) days. That accordingly, the court is persuaded that the application dated the 6<sup>th</sup> January, 2021 has no merit, and is simply aimed at delaying the hearing of the suit, and to further legitimize the Applicant's continued occupation of the suit property, contrary to the dictates of the existing court orders. The court cannot, in the interests of justice facilitate this abuse of the court's process. The Applicant has not demonstrated that he came to court with clean hands, and has not been forthright about material facts, including when he actually took possession of the suit property, and the fact that he did so in contempt of this court's orders.

h. The Applicant may have a valid claim over the monies he allegedly paid the Defendant, under their sale agreement over the suit property when this suit was pending. He appears to take the position that he is unable to seek for its refund as the Defendant has now passed on, while the fact is that he has the option as indicated above, of pursuing his estate, instead of engaging the Plaintiffs. The Applicant has all along known that the court had prohibited dealing in the suit property, before he entered into the transaction over it with the Defendant, probably with full knowledge of the orders on status quo, and he has only himself to blame for his predicament. That it is important to point out that the orders of November 2018 did not prevent the Plaintiffs from cultivating their sections/portions of the suit property that they occupied. The Applicant has claimed that the Plaintiffs have extended the area they cultivated, but has failed to demonstrate this claim with specificity. The Deputy Registrar's report confirms that as at 16<sup>th</sup> August, 2019, the Plaintiffs and Defendant lived on different sections of the suit property. It was therefore not enough to simply claim the Plaintiffs had extended the areas they cultivated. He should have helped the court see this extension, even if it meant simply filing a sketch map alongside the photographs to show the extension. This was not done and this application consequently fails. The flowing from the above, and aware that the original parties were as of the date of the Deputy Registrar's visit to the suit property already utilizing specified portions of the suit land, the court finds no merit in the Applicant notices of motion dated the 6<sup>th</sup> January, 2021 and 15<sup>th</sup> April, 2021.

i. That as the Applicant/Interested Party has failed in the applications dated the 6<sup>th</sup> January, 2021 and 15<sup>th</sup> April, 2021, then under section 27 of the Civil Procedure Act chapter 21 of Laws of Kenya, he should pay the Plaintiffs the costs. That in respect of the notice of motion dated the 13<sup>th</sup> January, 2021 that was seeking temporary order that was granted on the 14<sup>th</sup> January, 2021 thus making the application spent, the cost will be in the cause.

12. That in view of the foregoing, the two (2) applications by the Applicant/Interested Party dated the 6<sup>th</sup> January, 2021 and 15<sup>th</sup> April, 2021 are without merit and are hereby dismissed with costs.

It is so ordered.

**DATED AND VIRTUALLY DELIVERED THIS 9TH DAY OF MARCH, 2022**

**S.M.KIBUNJA,J.**

ELC ELDORET.

IN THE VIRTUAL PRESENCE OF;

PLAINTIFF: .....Absent.....

DEFENDANTS: .....Absent.....

INTERESTED PARTY/APPLICANT: ... ..Absent.....

COUNSEL: ...*Mr. Kiprono for Interested Party /Applicant*.....

COURT ASSISTANT: ONIALA

**S.M.KIBUNJA,J.**

ELC ELDORET