



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELC NO. 7 OF 2020

CHARITY GATHIGIA NDUATI.....APPLICANT/PLAINTIFF

-VERSUS-

MARTIN NDUATI NJOROGE.....1ST RESPONDENT/DEFENDANT

SAMUEL KARIUKI WACHIRA.....2ND RESPONDENT/DEFENDANT

SIMON MURIITHI NDUIRE.....3RD RESPONDENT/DEFENDANT

LAND REGISTRAR, NYERI COUNTY.....4TH RESPONDENT/DEFENDANT

RULING

1. By this Notice of Motion application dated 14th January, 2021 brought pursuant to **Section 5(1) of the Judicature Act, Section 3A of the Civil Procedure Act and Order 51 Rule 1 of the Civil Procedure Rules**, Charity Gathigia Nduati (*the Plaintiff*) prays for an order of committal to be made against Samuel Kariuki Wachira and Simon Muriithi Nduire (*the 2nd and 3rd Defendants respectively*) and that the two be ordered to pay the costs of this application.

2. The application which is supported by an affidavit sworn by the

Plaintiff is premised on the grounds:

(i) *That the 2nd and 3rd Defendants were on 10th February, 2020 restrained from interfering with Land parcel LR Thegenge/Karia/3782;*

(ii) *That the two Defendants and/or their servants have blatantly disobeyed the said orders by renting the suit land to one Simon Kangethe Kimani together with his wife and children on 1st September, 2020;*

(iii) *That the dignity, integrity and authority of this court has been undermined by such disobedience and it behooves this court to stamp its authority as enshrined in the constitution;*

(iv) *That the two Defendants are in the process of selling the said suit property through e-commerce application e-jiji having advertised the same through the said forum;*

(v) *That courts will not condone deliberate disobedience of its orders and will not shy away from their responsibility to deal firmly with the proved contemnors.*

3. By their Ground of Opposition dated 1st February, 2021, the 2nd and 3rd Respondents oppose the application on the grounds that:

1. *The application lacks merit;*

2. *The application is based on false grounds; and*

3. *The application is an abuse of the court process.*

4. In addition to the grounds, the two Defendants have though a Replying Affidavit filed herein on 16th April, 2021 denied the Plaintiffs accusations. In the affidavit sworn by the 3rd Defendant, the two Defendants assert that the allegations of contempt are not true for the following reasons:

(a) *The suit property has not been rented out to anyone as deponed or at all;*

(b) *The suit property has not been offered for sale as stated or at all and the alleged advertisements are strange to the Defendants and do not refer to the suitland.*

5. The Defendants aver further that they had taken full possession of the suit property as per the sale agreement and that as registered owners, they remain in possession through their relatives as both of them reside outside Nyeri County. They deny that they have disobeyed the court's orders as claimed and/or that they have any intent of so-doing.

6. I have carefully considered the Motion and the response thereto. I have equally perused and considered the written submissions and authorities as placed before me by the Learned Advocates for the parties.

7. On 6th February, 2020, the Plaintiff's application dated the same day was placed before the Honourable Lady Justice Mary Oundo under certificate of urgency. Upon consideration of the issues ex-parte, the Learned Judge granted orders which were subsequently extracted on 10th February, 2020 as follows:

1. *That an order of status quo (is hereby issued) to the effect that the suit land shall not be disposed, transferred, sub-divided in any manner (and) that the same shall be preserved as at this date pending the hearing of the application inter-partes; and*

2. *That the application be served upon the Respondents within the next (3) days for inter-parties hearing on 13th February, 2020.*

8. From a perusal of the record, when the matter came up for hearing on the said 13th day of February, 2020, the 2nd and 3rd Defendants who were represented by counsel sought time to respond to the application. The matter was thereafter adjourned severally for one reason or the other and was yet to be heard *inter-partes* until 14th January, 2021 when the Plaintiff filed this present application seeking an order of committal to be made against the two Defendants.

9. I think it is now widely accepted that if courts are to perform their duties and functions effectively, the dignity and authority of the court has to be respected and protected at all costs. For this reason, courts are entrusted with the extraordinary power of punishing those who, whether inside or outside the court precincts, indulge in acts or omissions which tend to undermine their authority and thereby bring them to disrepute and disrespect.

10. It is equally accepted that the application for committal for contempt is a peculiar amalgam, for it is a civil proceeding that invokes a criminal sanction or its threat. While the litigant seeking its enforcement has a manifest private interest in securing its compliance, the court enforces compliance because of the broader public interest in obedience to its orders as any disregard thereof sullies the authority of the courts and detracts from the rule of the law.

11. Arising from the foregoing, it is an established principle of law that in order to succeed in civil contempt proceedings, the applicant has to prove not only the terms of the order said to have been disobeyed but also the Respondent's knowledge of those terms. Having proved the two and even more significantly, the applicant must then demonstrate that the respondent failed willfully to comply therewith.

12. Discussing the standard of proof in cases of contempt in **Mutitika –vs- Baharini Farm Limited (1985) KLR 229**, the Court of Appeal held as follows:

“In our view, the standard of proof in contempt proceedings must be higher than proof on the 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, in criminal cases. It is not safe to extend it to an offence which can be said to be quasi – criminal in nature.”

13. Explaining that rationale in **Republic –vs- Ahmad Aboltathi Mohamed and Another (2019) eKLR**, the Supreme Court of Kenya observed thus:

“The rationale for this standard is that if cited for contempt, and the prayer sought is for committal to jail, the liberty of the contemnor will be affected. As such the standard of proof is higher than the standard in civil cases. This power to c omit a person to jail, must be exercised with utmost care, and exercised only as a last resort. It is of utmost importance, therefore, for the Respondents to establish that the alleged contemnor's conduct was deliberate, in the sense that he or she willfully acted in a manner that flouted the court order.”

14. In the matter before me, the Plaintiff contends that the 2nd and 3rd Defendants did on 1st September, 2020 blatantly disobey the orders issued herein on 10th February, 2020 by renting out the suit premises to third parties. It is further their case that the two Defendants are now in the process of selling the property in that they have advertised the same online for sale.

15. The two Defendants however refute the Plaintiff's contentions. They have denied putting the property up for sale as stated by the Plaintiff and aver that since they both live outside Nyeri County, they have taken occupation of the houses by letting their relatives reside thereon. In this respect, the Defendants aver that those in occupation of the suit premises are mere licencees and not tenants as contended by

the Plaintiff.

16. Having set out their respective positions as such, one would have expected the Plaintiff to go ahead and produce evidence that the suit premises had been rented out. I would have also expected that the Plaintiff would demonstrate that the photos annexed to their

application purporting to be advertisement had been done by the 2nd and 3rd Defendants and/or by their respective authorized agents. There was however nothing of the sort.

17. In the premises and given the nature of the standard of proof required in such cases, it is my finding that the Plaintiff has woefully failed to prove her case to the required standard. The application dated 14th January, 2021 has no basis and the same is hereby dismissed with costs.

DATED, SIGNED AND DELIVERED AT NYERI THIS 4TH DAY OF NOVEMBER, 2021.

In the presence of:

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J. O. Olola

JUDGE