



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC NO.157 OF 2008

ELIZABETH NJERI HINGA.....1ST PLAINTIFF

ANTHONY LAWRENCE HINGA.....2ND PLAINTIFF

(Suing as Administrators of the estate of the late Bernard Njenga Hinga)

=VERSUS=

NYOIKE NJENGA HINGA.....1ST DEFENDANT

(Sued as the legal representative of the estate of the late Muthoni Nyoike Hinga)

BALCON HOUSING COMPANY LTD.....2ND DEFENDANT

RULING

Background

1. The suit property that is **LR No. 11478** measuring 15 acres is registered in the name of **Bernard Njenga Hinga** (Deceased). On 8th April 2008, the administrators of the Estate of the deceased filed a suit against the Defendants claiming that Muthoni Nyoike who was the wife of the deceased who has since died fraudulently sold the suit property to Balcon Housing Company Ltd, the second Defendant on the basis of a Power of Attorney allegedly given to her by the Deceased.

2. The Plaintiffs, one of whom has since died who are the children of the deceased filed an application for injunction seeking to restrain the Defendants from continuing with construction on the suit property and or in any manner interfering with it. On 27th June 2011, Justice Mbogholi Msagha allowed the application for injunction against the Defendants and in addition made orders preserving the suit property until the hearing and determination of the suit. The Plaintiffs were also asked not to do any acts that would compromise the interests of the Defendants if any in the suit property.

3. The second Defendant/Applicant, M/s Balcon Housing Company Limited has now filed an application against the Plaintiff/Respondent, M/s Elizabeth Njeri Hinga for being in contempt of Court order of 27th June 2011. The application which is dated 2nd October 2019 seeks the following Orders:-

1. Spent

2. Spent

3. That this Honourable Court be pleased to issue warrants of arrests to be effected by the Officer Commanding the Land Fraud Unit of the Directorate of Criminal Investigations Headquarters against the 1st Plaintiff/Respondent herein being Elizabeth Njeri Hinga and the Nairobi Land Registrar, Mr.S.Chege Njoroge for purpose of sentencing and punishment for contempt of court and blatant disobedience and/or disregard of this Honourable Court's Orders dated 27th June 2011.

4. That this Honourable Court be pleased to commit the 1st Plaintiff/ Respondent herein being Elizabeth Njeri Hinga and the Nairobi Land Registrar, Mr S.Chege Njoroge to civil jail for a term not exceeding 6 months for contempt of court with respect to the disobedience of this Honourable Court's Orders dated 27th June 2011.

5. That pending the hearing and the determination of this suit, this Honorable court be pleased to issue an order of inhibition; inhibiting any dealings in the subject property herein being LR No.11478 - IR. 20393 and the consequent subdivisions being LR No.11478/1 TO LR NO.11478/55.

6. Any other or further orders and/or directions as this honorable court deems just and expedient including but not limited to the cancellation of any provisional certificates of title issued in the name of Elizabeth Njeri Hinga, transfers sub-division and / or registration of parcels of land to wit LR NO.11478/1 to 11478/55 and revert the property to its original title being LR NO.11478-IR 20393 under Bernard Njenga Hinga (Deceased).

7. That the costs of this application be provided for.

Applicant's Contention.

4. The Applicant contends that despite clear orders which were given that the suit property should be preserved, the Respondent has gone ahead to subdivide the suit property and has even sold part of it to third parties. The Respondent also obtained change of user from agricultural to residential and has even obtained a provisional certificate of title upon gazettelement which the Applicant states was done fraudulently.

5. The Applicant further contends that the Respondent has without a confirmed grant gone ahead to deal with the suit property when the Family Court clearly stated that confirmation in respect of the suit property will only be done after the disputes pending in court over ownership are settled. The Applicant further argues that the Land Registrar has illegally assisted the Respondent to carry out the sub divisions despite the orders of the court being registered against the title as shown in entry number 9 in the register. This is why the Applicant also wants Mr.S.Chege Njoroge of the Lands Office punished for contempt of Court.

Respondent's Contention.

6. The Respondent contends that the Applicant's application is misconceived as she cannot be punished based on injunctive orders which lapsed after twelve months from the date they were given. She further argues that she proceeded to do what she did on mistaken believe that the injunction only restrained the Applicant from interfering with the suit property.

7. The Respondent denies service of the court order upon her arguing that there was no need to serve the order upon her as she is the one who had applied for injunctive orders. She further states that the process server who purported to have served her did not indicate the name of the OCS who accompanied him to her house where service is alleged to have been effected.

8. The Respondent further states that she was not aware that the court's orders were directed to her as well as her deceased brother until this application was served upon her and her lawyer interpreted the import of the orders to her.

Analysis.

9. I have considered the Applicant's application as well as the opposition to the same by the Respondent. I have also considered the submissions by the parties to this application. The issues which emerge for determination are firstly, whether the Respondent and Mr. S. Chege Njoroge are guilty of the court order given on 27th June 2011, secondly, whether inhibition orders should be granted and thirdly, whether the subtitles which were processed by the Respondent should be cancelled.

10. In an application for contempt, an Applicant is bound to prove that there was a court order issued; that the court order was served upon the contemnor or the contemnor had knowledge of the same and that the contemnor deliberately breached the terms of the order.

11. In the instant case, there was an order of the Court given on 27th June 2011. This order was clear that the suit property was to be preserved until the hearing and determination of the suit. The Respondent and her deceased brother were further directed not to do anything which would prejudice the interest of the Applicant and the other deceased Defendant.

12. The Respondent was aware of the court order and that is why the same was registered against the title. The Respondent's lawyers were present in court when the order was given. Besides this, the order was served upon the Respondent and her deceased brother. The Respondent was served at her house at Mirema area and her deceased brother was served at Karen. Though the Respondent denies being served, I find that she was indeed served and had knowledge of the order and that is why she had it registered against the title.

13. The Respondent's contention that she did not know that the order had also restrained her as well as her deceased brother from dealing with the suit property is not genuine. This is just but an excuse on her part in trying to wriggle out of the contempt.

14. The Respondent deliberately ignored the court order and went ahead to subdivide the suit property. The Respondent was well aware that the original title was with the Applicant but she went ahead to process a provisional title. The Respondent was aware that the grant had not been confirmed but she went ahead to deal with the property as if the grant had been confirmed. The Family Division Court had declined to confirm the grant until the dispute as to ownership had been determined. The Respondent nevertheless went ahead to do subdivision and transfer one of the properties to a third party. I therefore find that the Respondent's actions were deliberate and she is in contempt of the court order.

15. The Respondent's argument that the injunction which was granted lapsed after twelve months as the case was not concluded within that period does not help the Respondent. The injunction which would have lapsed was the one against the Applicant and the deceased Defendant. This is what would be affected by Order 40 Rule 6 of the Civil Procedure Rules.

16. The Judge was categorical that there was need to preserve the suit property and this is why he went ahead to order that the Respondent and her deceased brother were not do anything which would prejudice the interests of the Applicant and the deceased Defendant. These orders were not given in the context of an injunction and this is why they do not fall under the purview of Order 40 Rule 6 of the Civil Procedure Rules.

17. The Respondent does not seem to respect the doctrine of lis pendens. She is disposing of the suit property while the suit is still pending. The Judge had directed that the suit be heard expeditiously. This order was given in 2011. The same seems not to have been heeded. Instead what we are seeing is wanton non-compliance. There is a clear need to inhibit all dealings in the suit property until the dispute is heard and determined.

18. The Applicant had called for cancellation of the titles which have resulted from the subdivision and those which have already been transferred. This order cannot be made for now as to do so will affect parties who are not in this suit and may have purchased their portions without knowing the existence of any dispute. The order of inhibition will suffice to cater for the interest of the Applicant as the dispute is heard and determined.

19. There is a call for punishment of Mr S. Chege Njoroge, a Land Registrar. This is based on his role in the entry in the register. Mr Njoroge was not a party to this suit. There is also no evidence that the bit of the order restraining the Respondent from doing anything which would prejudice the interests of the Applicant or preserving the suit property was brought to his attention. The bit of the order which was registered against the title is the one which restrained the Defendants from interfering with the suit property. There is also no evidence that Mr Njoroge was served with this application. Even though the law is clear that a party can be punished for contempt even if he/she is not a party, in this case, Mr Njoroge cannot be punished when there is no evidence that he was aware of the court order. There is therefore no basis upon which the court can find Mr Njoroge guilty of contempt.

Conclusion.

20. From the analysis hereinabove, it is clear that the Applicant has substantially succeeded in its application. I therefore grant the following orders:-

- i. The Respondent, Elizabeth Njeri Hinga is found guilty of contempt of the Court order given on 27th June 2011.**
- ii. The Respondent shall personally attend court on a date to be given after court business normalizes for purposes of mitigation and further action by court in accordance with the law.**
- iii. Pending the hearing and determination of this suit, an order of inhibition is hereby given inhibiting any dealings in LR No. 11478 (IR 20393) together with the consequential sub-divisions being LR No.11478/1 to 55.**
- iv. The Respondent shall pay the costs of this application.**

It is so ordered.

Dated, Signed and delivered at Nairobi on this 5th day of May 2020.

E.O.OBAGA

JUDGE

In the virtual presence of :-

Mr Musyoka for Defendant/Applicant

Court Assistant: Hilda

E.O.OBAGA

JUDGE