



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NYAHURURU**

**ELC No. 312 OF 2017**

**JOHN KIMANI NGANGA.....PLAINTIFF/RESPONDENT**

**VERSUS**

**STEPHEN KAMAU KARIRI & OTHERS.....DEFENDANT/APPLICANTS**

**RULING**

1. Before me for determination is the Notice of Motion dated 4<sup>th</sup> June 2019 and filed on the 7<sup>th</sup> June 2019, brought under the provisions of Section 51 of the Civil Procedure Rules, Section 3A of the Civil Procedure Act, Section 29 of the Environment and Land Court Act and all the enabling provisions of the law where the Defendant/Applicants seek for the following orders;-

- i. That the Court do find John Kimani Nganga, Alex Maina Mbugua and Samuel Mburu Kiarie the Directors of Agendi Investments Company Ltd guilty of contempt of Court for disobeying the Court order issued on the 5<sup>th</sup> December 2018 and be punished as provided for under Section 29 of the Environment and Land Court Act
- ii. That the Court do issue any other or further orders as may be necessary for protecting the dignity and authority of the Court.
- iii. That the costs of this Application be provided.

2. The said Application was supported by the grounds set on its face as well as on the supporting affidavit of Stephen Kamau Kariri the Applicant herein sworn on the 4<sup>th</sup> June 2019.

3. The Application was opposed by the Respondent's Replying Affidavit of 6<sup>th</sup> November 2019.

4. On the 29<sup>th</sup> July 2019, parties by consent sought to have the Application dated 4<sup>th</sup> June 2019 be disposed of by way of written submissions which Application was granted and the parties obliged.

**Applicant's submission.**

5. The Applicant, though his written submissions of the 25<sup>th</sup> November 2019 was to the effect that the officials of Agendi Investment Company be held in contempt for disobeying a lawful Court order of 5<sup>th</sup> December 2018, which order had been issued in the presence of their Counsel and one of the Officials of the Company.

6. That on the said date, the Court had ordered amongst other orders that the Respondent and his fellow officials prepare the transfer documents for the members who had fully paid up the transfer fee and not all members. That for the unpaid members, the Court had directed that they pay their transfer fee within 45 days failure to which execution proceedings to apply.

7. That the said Court order had not been discharged and therefore remained binding as against the Respondent.

8. That the Respondent had not prepared the transfer documents for the paid up members as ordered by the Court and therefore was in contempt of the Court orders.

9. That the said orders had not been based on the happening of a condition namely that all members pay up fully. That the list of the fully paid up members annexed to their Application had not been contested by the Respondent.

10. That the Respondent had not produced anything before Court as proof that the transfer documents had been delivered to the Applicants and neither had they taken any step, since the filing of the Application to purge their disobedience.

#### **Respondent's submission.**

11. In response and opposition to the Applicant's Application, the Respondent's submission was to the effect that at no time had the Court, on the 5<sup>th</sup> December 2018, issued any orders alluded to by the Applicants. That on the said date, the matter had come up for mention to confirm compliance of an earlier order of the 2<sup>nd</sup> October 2018 by the Applicant, and other Defendants he had purported to represent, where the Court had ordered the Applicants to pay the balance of Ksh 172,000/= being payments for the transfer process of 48 parcels into their respective names within 30 days. The Court order had been extracted and served upon Counsel for the Applicant.

12. That on the 5<sup>th</sup> December 2018, the Applicants through their counsel had informed the Court that they had paid the remainder of the money and had undertaken to present evidence of such payments by supplying receipts to the Court and to the Plaintiff.

13. The Plaintiff on the other hand confirmed that the Company in whose account the money was to be credited, had not received the said payment of Ksh. 172,000/= shillings wherein the Court had directed that the Applicant presents evidence of such payment and also furnish the Plaintiff/Respondent with the said evidence. The matter had then been slated for mention on the 4<sup>th</sup> March 2019 to confirm compliance.

14. The Respondent further submitted that on the 4<sup>th</sup> March 2019 neither the Applicants nor his counsel had attended Court although they had partially complied with the orders of the payment wherein Ksh. 97,000/= was yet to be paid. The Court had thus transferred the matter to the Deputy Registrar for execution.

15. That as at the time of filing the present Application, a further sum of Ksh 10,000/= had been paid and therefore the outstanding sum of money was Ksh. 87,000/=. It had been their submission that the Court had not ordered for the transfer of the said parcels of land unconditionally. That the transfer process was to be funded by the monies collected from the membership of the Company who had not paid.

16. That the orders had been directed to the Directors of the Company to prepare documents of members who had paid which order was different from an order to 'transfer' as was understood by the Applicant.

17. That as the Court record would show, the necessary documents to enable them seek consent and transfer of the respective suit land, had long been prepared for the 48 members including the Applicant and what the Directors awaited for was the completion of the payment of the remaining sum of Ksh. 87,000/= by some members.

18. That sometime in March 2018, while the matter was still pending in Court, the Applicant had lodged a complaint with the Nyandarua County Commissioner seeking for his intervention, wherein the County Commissioner had demanded for all the documents relating to the suit land and which documents had been presented to him by the Company Secretary Mr. Alex Mbugua. That the documents had since been in his custody, a fact that was known to the Applicant and his Counsel.

19. That earlier in the year 2019, the Respondent had asked 48 members represented by the Applicant to pay Ksh 48,000/= of the 97,000/= they owed the company to the Land Board for purpose of booking so that they could get the consent for the transfer of the 48 parcels of land. On the 25<sup>th</sup> April 2019 when the Board was to sit, the said money had not been paid and only less than 5 members out of the 48 members were present, the consent had not been given.

20. That the Respondent had tried on several occasions, as the Court record would depict, to solve the pending issues but that it had been the Applicant and his members who had stalled the process.

21. That further, the Respondent had asked the Applicant and its members to pay Ksh 1,000/= each to the Land Registrar as fee for allocation of new numbers but again, none of the members had paid the said fee.

22. The Respondent's submission was that the Applicant and his fellow members were the ones who had been in contempt of Court orders of the 2<sup>nd</sup> October 2018, having had been directed to pay the additional amounts so as to facilitate the Respondent and fellow officials to transfer the mutated parcels to them.

23. That indeed the Applicant and its members had refused to pay the sums of money expected of them so as to facilitate the transfer of their respective parcels of land. They submitted that party who was in contempt itself was not deserving of the Court's attention and further that who came to equity ought to go with clean hands and must also do equity. That the Applicant and his members did not come to Court with clean hands and therefor equity frowned upon their concealment and underhand tactic. They relied on the decided case of **John Njue Nyaga vs Nicholas Njiru Nyaga & Another [2013]eKLR** to buttress their submission. Their final submission was that the Applicant's Application was an abuse of the Court process and the same must fail.

#### **Determination.**

24. I have considered submissions by both Counsel for the Applicant and the Defendants. **The Black's Law Dictionary (Ninth Edition)** defines contempt of Court as:-

*"Conduct that defies the authority or dignity of a Court. Because such conduct interferes with the administration of justice, it is punishable usually by fine or imprisonment."*

25. The law guiding the present Application is Order 40 Rule 3(1) of the Civil Procedure Rules which stipulates as follows:-

*In cases of disobedience, or of breach of any such terms, the Court granting an injunction may order the property of the person guilty of such disobedience or breach to be attached, and may also order such person to be detained in prison for a term not exceeding six months unless in the meantime the Court directs his release.*

26. In the case of **Woburn Estate Limited v Margaret Bashforth [2016] eKLR** the Court of Appeal held as follows:

*For many years in the history of the Judiciary of Kenya the Courts have, pursuant to section 5 (1) of the Judicature Act, resorted to the prevailing law of England in the exercise of the power to punish for contempt of Court.....*

*Today that position has drastically changed, starting with the establishment of the Supreme Court which was not envisaged when section 5 of the Judicature Act was enacted. By Act No.7 of 2011, Article 163 (9) of the Constitution was operationalized by the enactment of the Supreme Court Act (CAP 9A), which among other things, makes express provision for the power of the Supreme Court to punish for contempt.*

*Under section 29 of the Environment and Land Court Act, it is an offence punishable, upon conviction to a fine of not exceeding Kshs.20,000,000 or to imprisonment for a term not exceeding two years, or to both, if any person refuses, fails or neglects to obey an order or direction of the Court given under the Act.*

*We have gone to this great length to demonstrate how, before the passage of these legislations the powers of the High Court and this Court to punish for contempt of Court were dynamic and kept shifting depending on the prevailing laws in England. Today each level of Court has been expressly clothed with jurisdiction to punish for contempt of Court. The only missing link is the absence of the rules to be followed in commencing and prosecuting contempt of Court Applications*

27. The Contempt of Court Act commenced on the 13<sup>th</sup> January, 2017 but had been declared invalid by the High Court in the case of **Kenya Human Rights Commission vs Attorney General & Another [2018] eKLR**. In their Application, the Applicants have filed their Application pursuant to various provisions of the law including those that were inapplicable in the circumstance. However they have also filed the same pursuant to all other enabling provisions of the law. I am therefore obliged to revert to the provisions of the law that operated before the enactment of the Contempt of Court Act, to avoid a lacuna in the enforcement of Court's orders.

28. It was in this respect as observed in the case of **Republic vs. Returning Officer of Kamkunji Constituency & The Electoral Commission of Kenya HCMCA No. 13 of 2008**, that the High Court (read Environment and Land Court) has the responsibility for the maintenance of the rule of law, hence there cannot be a gap in the Application of the rule of law.

29. In addition, in the case of **Republic v Principal Secretary, Ministry of Defence Ex parte George Kariuki Waithaka [2019] eKLR**, it was held that where there is a lacuna with respect to enforcement of remedies provided under the Constitution or an Act of Parliament, or if, through the procedure provided under an Act of Parliament, an aggrieved party is left with no alternative but to invoke the jurisdiction of the Court, the Court is perfectly within its rights to adopt such a procedure as would effectually give meaningful relief to the party aggrieved, in exercise of the inherent jurisdiction granted to the Court by section 3A of the Civil Procedure Act to grant such orders that meet the ends of justice and avoid abuse of the process of Court.

30. Section 5(1) of the Judicature Act which provided that:

*“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 subordinate Courts.”*

31. Section 29 of the Environment and Land Court is clear to the effect that;

*Any person who refuses, fails or neglects to obey an order or direction of the Court given under this Act, commits an offence, and shall, on conviction, be liable to a fine not exceeding twenty million shillings or to imprisonment for a term not exceeding two years, or to both*

32. In the case of **Samuel M. N. Mweru & Others v National Land Commission & 2 others [2020] eKLR** the Court held that

*A Court without contempt power is not a Court.[30] The contempt power (both in its civil and criminal form) is so innate in the concept of jurisdictional authority that a Court that could not secure compliance with its own judgments and orders is a contradiction in terms, an “oxymoron.” Contempt power is something regarded as intrinsic to the notion of Court; even obvious, I would say. In the common lawyer’s eye, the power of contempt “is inherent in Courts, and automatically exists by its very nature.....*

*A Court order is binding on the party against whom it is addressed and until set aside remain valid and is to be complied with. Article 159(1) of the Constitution provides that judicial authority is derived from the people and vests in, and shall be exercised by, the Courts and tribunals established by or under the Constitution. Under Article 10(1) of the Constitution the national values and principles of governance in the Article bind all State organs, State officers, public officers and all persons whenever any of them (a) applies or interprets the Constitution; (b) enacts, applies or interprets any law; or (c) makes or implements public policy decisions. Under clause (2) (a) of the same Article the national values and principles of governance include the Rule of Law.*

*It is a crime unlawfully and intentionally to disobey a Court order.*

*This type of contempt of Court is part of a broader offence, which can take many forms, but the essence of which lies in violating the dignity, repute or authority of the Court. [36] The offence has in general terms received a constitutional 'stamp of approval,' since the Rule of Law – a founding value of the Constitution – 'requires that the dignity and authority of the Courts, as well as their capacity to carry out their functions, should always be maintained.'* [

33. It is an established principle of law as was held in the case of Kristen **Carla Burchell vs Barry Grant Burchell, Eastern Cape Division Case No. 364 of 2005** in order to succeed in civil contempt proceedings, the Applicant has to prove (i) the terms of the order, (ii) Knowledge of these terms by the Respondent, (iii). Failure by the Respondent to comply with the terms of the order.

34. From the sworn affidavits, annexure's, submissions by the respective parties' Counsel s on record, the applicable law and the decided cases, the following issues stand out for determination:-

i. Whether the Respondent herein was served with or was made aware of the order of 5<sup>th</sup> December 2018

ii. Whether there was any valid Court order issued by this Court on the 5<sup>th</sup> December 2018.

iii. Whether the Respondents are guilty of contempt of Court order issued on 5<sup>th</sup> December 2018.

35. On the first issue as to whether the Respondent herein was served with or was made aware of the order of 5<sup>th</sup> December 2018, in the case of **Kenya Tourist Development Corporation vs Kenya National Capital Corporation & Another, Nairobi High Court Civil Case No. 6776 of 1992, it was held that** the knowledge of an order supersedes personal service. On this line of argument, there was no submission on the same and therefore nothing turns here.

36. On the second issue for determination as to whether there were any valid orders issued by this Court on the 5<sup>th</sup> December 2018, it is of interest to note that on the said date, the matter had been slated for mention to confirm whether the orders of the 2<sup>nd</sup> October 2018 where the Court had ordered the Applicant/Defendants to pay the balance of Ksh 172,000/= for the transfer of the properties into their respective names within 30 days, had been complied with.

37. On the date in question, the 5<sup>th</sup> December 2018, the Court had been informed that ten Applicant/Defendants had not been able to fully comply with the order of 2<sup>nd</sup> December 2018 but that they have made a substantial payment wherein the remaining amount payable was now Ksh. 97,000/= .It was thus based on this submission by counsel for the Respondent herein that the Court directed as follows;

*'I therefore do direct that the transfer documents be prepared for the members who have fully paid up, a list to be supplied to counsel for the Plaintiff by counsel to the defendants forthwith.*

*Further orders are to the effect that the remaining members who have not paid do so within the next 45 days as prayed.'*

38. It is clear that vide the terms of the above order which was valid, that the Applicant had been directed to prepare transfer records of the fully paid members and thereafter to submit the same to the counsel for the Respondent. Further the Applicant's members who had not paid up monies that would facilitate the transfer of their respective parcels of land had been asked to do so within 45 days.

39. It is therefore not correct to state that the Respondents had been in contempt of the Court orders of 5<sup>th</sup> December 2018 as the same were not directed to them but to the Applicant and his members who had failed to adhere to the orders of 2<sup>nd</sup> December 2018.

40. I find that the Application dated the 4<sup>th</sup> June 2018 lacks merit and the same is herein dismissed with costs to the Respondent.

**Dated and delivered at Nyahuru this 6<sup>th</sup> day of May 2020**

**M.C. OUNDO**

**ENVIRONMENT & LAND – JUDGE**