



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAKURU

ELCC No. 117 OF 2019

(FORMERLY HCCC No. 233 OF 2006)

MBUGUA THUO.....PLAINTIFF

VERSUS

JOSEPHAT MWANGI MUHORO.....1ST DEFENDANT

SAMUEL NJOGU MUNGAI.....2ND DEFENDANT

JOSEPH MWEMA NG'ANG'A.....3RD DEFENDANT

CHRISTOPHER KARIUKI KAMAU.....4TH DEFENDANT

JOSEPH CHEGE NDUGUGA.....5TH DEFENDANT

WANJIKU GATHORONJO.....6TH DEFENDANT

JACKSON MIRINGU KAMAU.....7TH DEFENDANT

DORIS NYAIRURI NJIRI.....8TH DEFENDANT

FRANCIS NGUGI MUNGAI.....9TH DEFENDANT

DELIVERANCE CHURCH (sued through its registered trustees).....10TH DEFENDANT

TAYARI FARMERS CO. LTD.....11TH DEFENDANT

JOSEPH KIRAGU MURAYA.....12TH DEFENDANT

MARY MUTHONI KARIUKI.....13TH DEFENDANT

ESTHER WANGARE NDEGWA.....14TH DEFENDANT

CHARITY NJERI MWANGI.....15TH DEFENDANT

MICHAEL WAWERU MWANGI.....16TH DEFENDANT

THE REGISTERED TRUSTEES,

MOLO STREET CHILDREN PROJECT.....17TH DEFENDANT

RULING

1. This ruling is in respect of Notice of Motion dated the 12th October 2020 through which the following orders are sought:

1. *THAT an entry be made on the record that the plaintiff is deceased.*

2. *THAT Eliud Ngugi Mbugua be substituted as a plaintiff in the place of Mbugua Thuo.*

3. *THAT the 10th and 12th defendants - Deliverance Church through its pastor, one – Aliakim Okwiri and Joseph Kiragu Muraya be committed to prison for a period six months or such other period as this Honourable Court may decide for deliberately violating clear, unequivocal orders of this Honourable court adopted on the 3rd day of February 2017 by Hon. Justice M. Sila;*

4. *THAT this Honourable Court fines Deliverance Church through its pastor, one – Aliakim Okwiri and Joseph Kiragu Muraya as this Honourable Court may decide for deliberately violating clear, unequivocal orders of this Honourable court adopted on the 3rd day of February 2017;*

5. *THAT the Officer Commanding Station (OCS), Molo Police Station, under whose jurisdiction the suit land is located, be served with this order to enforce this order and ensure law and order is maintained;*

6. *THAT costs of the application be in the cause.*

2. The application is supported by an affidavit sworn by Eliud Ngugi Mbugua, the applicant, who deposed that he has been issued with limited grant *ad litem* in respect of the estate of the plaintiff Mbugua Thuo, his father, who passed away on 5th January 2020. He deposed further that the 10th and 12th defendants have been trespassing on the suit property with the intention of constructing permanent structures and cultivating crops contrary to a consent that was adopted on 3rd February 2017 to the effect that the status quo be maintained until the case is heard and determined. He added that since the 10th August 2020, the 10th and 12th defendants have continued to bring raw materials such as building stones on to the suit property.

3. The 1st to 6th, 8th, 10th to 16th defendants opposed the application through a replying affidavit sworn by 12th defendant. He deposed that the order said to have been adopted by the court on 3rd February 2017 was neither extracted, paid for, issued nor served upon him or any of the defendants and that he was not aware of any orders of 3rd February 2017. He further deposed that it was upon the applicant to extract a court order from the contents of the consent of 25th April 2016 and have it served upon all the defendants. According to him, the said consent only bars the respondents from disposing or alienating the subject properties. He added that he has neither disposed nor alienated the properties.

4. The application was canvassed through written submissions. It was argued on behalf of the applicant that since the plaintiff is deceased and since he has obtained letters of administration in respect of the deceased's estate, he ought to be substituted in place of the deceased plaintiff pursuant to **Order 24 rule 3** of the Civil Procedure Rules.

5. Placing reliance on the cases of **Econet Wireless Kenya Limited vs Minister For Information & Communication of Kenya & Another [2005] eKLR, A.B & another v R.B [2016] eKLR and Miguna Miguna v Fred Okengo Matiang'i Cabinet Secretary, Ministry of Interior and Coordination of National Government & 6 others; Kenya National Commission on Human Rights (Interested Party) [2018] eKLR** among others, counsel for the applicant further submitted that the 10th and 12th defendants being fully aware of the consent recorded between the plaintiff and the defendants on the 3rd February 2017, deliberately took building stones to the suit properties with the intention of erecting additional structures and thereby disregarded orders of the court for which they should be held in contempt of court.

6. The 1st to 6th, 8th, 10th to 16th defendants stated in their submissions that they are not opposed to the substitution of the deceased plaintiff with the applicant. Regarding the aspect of contempt of court, they relied on their replying affidavit and pointed out that the applicant did not file any further affidavit to challenge their said replying affidavit. They urged the court to dismiss the prayer seeking to punish them for alleged contempt.

7. The 7th, 9th and 17th defendants neither responded to the application nor participated in its hearing.

8. I have considered the application, the affidavits and the submissions. From the material on record, it is apparent that the applicant obtained limited grant *ad litem* in respect of the estate of the plaintiff on 1st September 2020 in Nakuru High Court Probate and Administration Cause No. 22 of 2020. The said grant was limited to prosecuting this suit among other suits and indicates that the plaintiff passed away on 5th January 2020.

9. **Order 24 rule 3** of the **Civil Procedure Rules** provides:

(1) Where one of two or more plaintiffs dies and the cause of action does not survive or continue to the surviving plaintiff or plaintiffs alone, or a sole plaintiff or sole surviving plaintiff dies and the cause of action survives or continues, the court, on an application made in that behalf, shall cause the legal representative of the deceased plaintiff to be made a party and shall proceed with the suit.

(2) Where within one year no application is made under subrule (1), the suit shall abate so far as the deceased plaintiff is concerned, and, on the application of the defendant, the court may award to him the costs which he may have incurred in defending the suit to be recovered from the estate of the deceased plaintiff:

Provided the court may, for good reason on application, extend the time.

10. The present application was filed on 15th October 2020, within 9 months of the plaintiff's demise and before abatement of the suit. Considering that the prayer for substitution is not opposed, I see no reason not to grant it.

11. Regarding the prayers that the 10th and 12th defendants be punished for violating orders said to have been adopted on 3rd February 2017, it is important to restate the law. Every person against whom an order is made by court of competent jurisdiction has a duty to obey it unless and until it is discharged. An allegation of contempt of court is a serious matter since if proven, the liberty and or property of the contemnor are at risk. It is for that reason that the standard of proof in contempt proceedings is higher than the usual one in civil proceedings of proof on a balance of probabilities. See Mutitika vs. Baharini Farm Limited [1985] KLR 229. Court orders are not issued in vain and are not suggestions or pleas to the persons at whom they are directed. See Fred Matiang'i the Cabinet Secretary, Ministry of Interior and Co-ordination of National Government v Miguna Miguna & 4 others [2018] eKLR. Every court has inherent powers to make sure its process is not abused and its authority and dignity is upheld at all times. See Woburn Estate Limited v Margaret Bashforth [2016] eKLR and Kiru Tea Factory Company Ltd v Stephen Maina Githiga & 14 others [2019] eKLR.

12. The applicant claims that the 10th and 12th defendants have violated an order made on the 3rd February 2017 by taking building stones to the suit properties with the intention of erecting additional structures thereon. The said order of 3rd February 2017 has not been annexed. Instead, the applicant has annexed a copy of a consent dated 25th April 2016. As the 1st to 6th, 8th, 10th to 16th defendants have rightly maintained, nothing has been availed to show adoption, extraction or issuance of any order emanating from the consent. A perusal of the record does not reveal any proceedings or order on 3rd February 2017. Perhaps the applicant meant the proceedings of 23rd March 2017 when the consent dated 25th April 2016 was adopted as an order of the court.

13. The terms of the consent dated 25th April 2016 as follows:

1. That the status quo prevailing on title numbers Mau Summit/Molo Block 7/1595, 1596, 1597, 1598, 1599, 1600, 1601, 1602, 1603, 1160 and 1403 be maintained pending the hearing and final determination of this suit.

2. That status quo is hereby defined that the respondents, their agents and/or employees should not dispose and or in anyway whatsoever alienate the aforesaid suit properties pending the hearing and determination of the suit.

14. Thus, the consent itself described what parties were to desist from doing: they were not to dispose and or in any way whatsoever alienate the said properties pending the hearing and determination of the suit. Clearly, the consent did not preclude by depositing building stones on the properties. I do not in the circumstances agree with the applicant that the 10th and 12th defendants have violated the consent or the order of 23rd March 2017. The prayers that the 10th and 12th defendants be punished for contempt of court thus fail.

15. In the result, I make the following orders:

a. Eliud Ngugi Mbugua is hereby substituted as the plaintiff in the place of Mbugua Thuo (deceased).

b. The new plaintiff to file and serve an amended plaint to reflect the substitution within 14 (fourteen) days from the date of delivery of this ruling.

c. Prayers 3, 4 and 5 of the application are dismissed.

d. Costs of the application shall be in the cause.

Dated, signed and delivered at Nakuru this 4th day of May 2021.

D. O. OHUNGO

JUDGE

In the presence of:

Mr Biko holding brief for Ms Kiumbuku for the plaintiff/applicant

Mr Karanja Mbugua for the 1st to 6th, 8th, 10th to 16th defendants/respondents

No appearance for the 7th, 9th and 17th defendants/respondents

Court Assistants: B. Jelimo & J. Lotkomo