



**Gatabaki & 2 others (All Suing as the Co-Administrators of the Estate of Samuel Mundati Gatabaki Deceased) v Muga Developers Limited & 3 others (Commercial Case 151 of 2017) [2023] KEHC 3324 (KLR) (Commercial and Tax) (20 April 2023) (Ruling)**

Neutral citation: [2023] KEHC 3324 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL CASE 151 OF 2017  
DAS MAJANJA, J  
APRIL 20, 2023**

**BETWEEN**

**NANCY WANJA GATABAKI ..... 1<sup>ST</sup> PLAINTIFF  
ESTHER SUSAN WANGARI GATABAKI ..... 2<sup>ND</sup> PLAINTIFF  
JOSEPHINE BEATRICE GATHONI ..... 3<sup>RD</sup> PLAINTIFF  
ALL SUING AS THE CO-ADMINISTRATORS OF THE ESTATE OF SAMUEL  
MUNDATI GATABAKI DECEASED**

**AND**

**MUGA DEVELOPERS LIMITED ..... 1<sup>ST</sup> DEFENDANT  
SURAYA SALES LIMITED ..... 2<sup>ND</sup> DEFENDANT  
SURAYA PROPERTY GROUP LIMITED ..... 3<sup>RD</sup> DEFENDANT  
EQUITY BANK LIMITED ..... 4<sup>TH</sup> DEFENDANT**

**RULING**

**Introduction And Background**

1. The 4<sup>th</sup> defendant (“the Bank”) has filed a Notice of Motion dated 26<sup>th</sup> May 2022 under section 5 (1) of the *Judicature Act*, Rule 81.4 under Part 81 of the *Civil Procedure Rules* of England of 2012, order



40 rule 1 and 3 of the [Civil Procedure Rules](#) and section 24(a), (b), (c) and (d) and section 51(1)(b), (d), (e) and (f) of the [National Police Service Act](#) seeking the following orders that:

1. Nancy Wanja Gatabaki and Josephine Beatrice Gathoni, the 1<sup>st</sup> and 3<sup>rd</sup> plaintiffs be committed to prison for a term not exceeding six months for being in contempt of court.
2. Nancy Wanja Gatabaki and Josephine Beatrice Gathoni, the 1<sup>st</sup> and 3<sup>rd</sup> plaintiffs be fined for being in contempt of court.
3. An order of injunction do issue restraining the plaintiffs whether by themselves, their officers, employees and/or agents from interfering with the survey of the properties known as Land Reference Number 28223/33 — C1, C9, C10 and C11 that are charged to the 4<sup>th</sup> defendant.
  4. An order of injunction do issue restraining the plaintiffs whether by themselves, their officers, employees and/or agents from trespassing, continuing to trespass, leasing, subletting, interfering and/or otherwise dealing with Diasy Court 2C1/154, C2/155, C3/156, C4/157, C5/158, C6/159, C7/160, C8/161, Hibiscus Court 4 P2-A 80, 81 and Iris Court 3 P2-C 51 erected on the property known as Land Reference Number 28223/33 that are still charged to the 4<sup>th</sup> defendant.
  5. That The Nairobi County Officer Commanding Police Division Kasarani, or any other Officer Commanding a Police Station, be directed to assist, Muniu Thoithi and George Weru, the receivers of the 1<sup>st</sup> Defendant, Muga Developers Limited, to undertake a survey of the property known as Land Reference Number 28223/33 - C Plots that are charged to the 4<sup>th</sup> defendant.
  6. The Nairobi County Officer Commanding Police Division Kasarani, or any other Officer Commanding a Police Station, be directed to assist, Muniu Thoithi and George Weru, the receivers of the 1<sup>st</sup> defendant, Muga Developers Limited, to take possession of Diasy Court 2 C1/154, C2/155, C3/156, C4/157, C5/158, C6/159, C7/160, C8/161, Hibiscus Court 4 P2-A 80, 81 and Iris Court 3 P2-C 51 erected on the property known as Land Reference Number 28223/33 that are under the control of the plaintiffs and are still charged to the 4<sup>th</sup> defendant.
  7. The court do grant any other order it deems appropriate in the circumstances against the contemnors.
  8. That the costs of this Application be provided for.
2. The application is supported by the grounds on its face and the affidavits of Job Wamaitha an employee of PricewaterhouseCoopers Limited (PwC), the receivers of the 1<sup>st</sup> Defendant and Moses Ndirangu, the Bank's Director, Corporate Banking all sworn on May 25, 2022 and a further affidavit by Moses Ndirangu sworn on 7<sup>th</sup> March 2023. The Plaintiffs have opposed the application through the replying affidavit and supplementary affidavit of the 1<sup>st</sup> Plaintiff sworn on November 4, 2022 and February 24, 2023. The Bank has further supplemented its arguments by filing written submissions. In addition, the respective counsel made oral submissions.



## The Consent Order

3. It is common ground that on October 18, 2022 the court ruled that the parties' consent dated December 21, 2021 that was adopted as an order of the court ("the Consent") was valid and that the suit has since been settled as between the parties. The court also concluded that the terms of the Consent are currently being implemented by the parties. For context and ease of reference, the Consent provided as follows:
  1. The plaintiffs are to purchase eighteen (18) housing units more particularly detailed in the attached schedule from Muga Developers Limited (In Receivership) for a total purchase price of Kshs 172,700,000/= which sum is to be paid to Equity Bank (Kenya) Limited (the Bank)
  2. The plaintiffs shall endeavour to procure the consent of the directors of Muga Developers Limited to the sale of the eighteen (18) housing units at the total purchase price of Kshs. 172,700,000/= within the next 30 days provided that the sale of the units to the plaintiffs will be deemed proper notwithstanding the refusal or failure of the 1<sup>st</sup> to 3<sup>rd</sup> defendants to give such approval despite the plaintiffs' efforts to obtain it
  3. The plaintiffs shall pay the sum of Kshs. 60,000,000/= to the Bank as a deposit on or before 31<sup>st</sup> December, 2021. The Bank shall be entitled to undertake due diligence on the source of funds as required under applicable laws within ten (10) days of receipt of the deposit. If the due diligence is not satisfactory to the Bank, this shall be treated as a material breach of this Agreement and shall entitle the Bank, without prejudice to any other rights or remedies that it may have, to rescind this Agreement and to refund the deposit and/or make a report to the relevant government authorities as required by law
  4. The plaintiffs are at liberty to engage the Bank to negotiate a facility for payment of the balance of the purchase price in the sum of KShs. 112,700,000/- by 14<sup>th</sup> January, 2022. The plaintiffs to provide the Bank with the details and particulars of the borrower(s)
  5. The plaintiffs withdraw all claims they have against the Bank relating to the Bank's charge over Land Reference Number 28223/33 where the Fourways Junction Estate has been developed including High Court Civil Case 151 of 2017, High Court Commercial Case Number 30 of 2020 (Formerly Nairobi Environment & Land Court Case No.364 of 2019) and Civil Appeal E282 of 2021. The plaintiffs confirm they have no further claims against the Bank arising out of the Bank's charge over Land Reference Number 28223/33. The plaintiffs are to execute consent letters to be filed in the courts where the matters have been instituted in the terms set out in Schedule 3 annexed to this agreement
  6. The plaintiffs are to cease and desist from restricting access to the portions of Land Reference Number 28233/33 that are not owned by the plaintiffs. The plaintiffs are to grant access to the Bank's officers and/or agents and other third parties authorised by the Bank that require access to the developed



and undeveloped portions of Land Reference Number 28223/33 that are not owned by the plaintiffs.

7. The plaintiffs are to pay the Bank's costs for High Court Civil Case 151 of 2017, High Court Commercial Case Number 30 of 2020 (Formerly Nairobi Environment & Land Court Case No.364 of 2019) and Civil Appeal E282 of 2021 to be agreed between the plaintiffs' advocates and the Bank's advocates and in the event the advocates are unable to agree to be taxed by the courts where the matters have been instituted
8. The 4<sup>th</sup> defendant's application dated 5<sup>th</sup> August, 2021 is marked as compromised on the terms set out above
9. The plaintiffs and the Bank are to enter an agreement setting out the terms of settlement above
10. The parties be at liberty to apply.

#### **4<sup>th</sup> Defendant's Application**

4. The Bank now claims that the Plaintiffs have defied the Consent by insisting the survey of the properties known as LR No. 28223/33 — C1, C9, C10 and C11 ("the C Plots") will not be done unless a survey of the entire LR No. 28223/33 ("the suit property") is also done. The Bank acceded to this demand in order to avoid coming back to court on condition that the Plaintiffs cater for the costs of the survey of the suit property but that the Plaintiffs failed to meet the costs of the Bank's surveyor. When the Bank informed the Plaintiffs that it would proceed with its planned survey on May 16, 2022, the 1<sup>st</sup> and 3<sup>rd</sup> Plaintiffs together with their officers, employees and/or agents restricted access to the C Plots, which are charged to the Bank, thus frustrating the conduct of a survey.
5. The Bank claims that the 1<sup>st</sup> Plaintiff also assaulted an officer of its receivers in her efforts to frustrate the survey and that the assault was reported as Occurrence Book Number 14/16/05/2022 at Marurui Police Post, Kasarani. The Bank avers that the 1<sup>st</sup> and 3<sup>rd</sup> Plaintiffs have no right to the C Plots or any portion of the suit property charged to the Bank and that the conduct of the 1<sup>st</sup> and 3<sup>rd</sup> Plaintiffs amounts to disobedience of the Consent. They urge the court to find the 1<sup>st</sup> and 3<sup>rd</sup> Plaintiffs guilty of wilful disobedience of the Consent order.

#### **Plaintiffs' Defence**

6. The Plaintiffs oppose the application. They deny the allegation of disobedience of the Consent made against them. They state that they only learnt of the existence of the Consent when the Bank came to the suit property to commence the survey work. They claim that they were not served with the Consent prior to the commencement of the survey works hence they cannot be guilty of contempt as they have not wilfully and deliberately violated a court order. They assert that their conduct and that of their agents to stop the alleged survey works was in good faith and not intended to defeat the execution of the Consent which they were not privy to. They also deny any knowledge of the allegations of physical abuse on the Bank's officer.
7. The Plaintiffs complain that the Bank seeks interlocutory injunctions camouflaged as a contempt of court application. They assert that they are the lawful and legal owners of the portion of the suit property which was fraudulently charged to the Bank and that there is a pending appeal at the Court of Appeal in that respect. They hold that restraining them from accessing the suit property would amount to condemning them unheard as they have challenged the existence of the said property and the deed



plan creating it and the court is yet to pronounce itself on the matter and that the said property does not form part of the properties listed in the Consent. The Plaintiffs contend that the accusation of contempt stems from the Consent whose contents they have challenged in the Court of Appeal hence they cannot be held liable for contempt.

8. The Plaintiffs submit that the Consent cannot be implemented as the C plots do not exist and are not expressly provided for as part of settlement of the Consent and do not form part of the original deed plan for the suit property and thus incapable of location. They aver that the sketch excision plan of the alleged C Plots in the Bank's deposition is but a proposed sketch of an excision plan that was never registered rendering it illegitimate. That the alleged 'C Plots' were drawn without the Plaintiffs' consent and do not form part of what is or ought to be charged to the Bank.
9. The Plaintiffs also aver they have paid Kshs. 205,000,000.00 for all units to the Bank through its Ridgeways Branch and from those payments, the Bank was to determine the amount to be allocated to which house/unit. That the Bank has not issued to them receipts for the payments or any Statements of Account indicating how much of the charge debt has been set off and the outstanding balance. They accuse the Bank of disposing of their properties without providing a full account of the sales conducted so far and that their hesitation to settle the remaining balance flows from the Bank's lack of accountability and does not amount to disregard of the Consent and or any Court Orders. The Plaintiffs state that they have demonstrated good faith in complying with the Consent by depositing Kshs. 205,000,000.00 worth of settlement and are desirous of putting this matter to rest but for the mischief on the part of the Bank.
10. The Plaintiffs urge the Court to halt the impending survey by the Bank and hold them accountable in line with the legal dictum that he who seeks equity must do equity and must so seek with clean hands. They point out that paragraph 6 of the Consent is incapable of implementation as it is ambiguous as the land belongs to them as their contention is that all the vacant land together with some of the units, all of which have been charged to the Bank, belong to the Plaintiffs. Further, that the paragraph 4 of the Consent is incapable of implementation as the Bank has refused to furnish them with accounts despite them having paid for all the 22 units. The Plaintiffs complain that the Bank has shifted goal posts by purporting to sell unit 51 to a third party, reverting sale of units 80 and 81 to market rates despite clear agreement between them to sell at discounted rates and that the Bank has failed and or refused to issue them with certificates of leases for all the units
11. The Plaintiffs state that they purchased 22 units including Iris Court 51 and Hibiscus Court 80 and 81 pursuant to the Bank's Advocates letter dated 19<sup>th</sup> April 2022 addressed to their previous Advocates, Musyoka Wambua & Katiku Advocates and that further to the purchase, they signed the offer letters on April 26, 2022 which were forwarded to PwC whereupon they commenced payment for the 22 units and by June 2022 they had paid over Kshs. 125,000,000.00 in compliance with paragraph 4 of the Consent. They complain that the Bank did not acknowledge receipt of the payment or dispute that the payment was for all the units or apportion the paid amounts at the time. In September 2022, the Plaintiffs state that they were shocked when the Bank purported to claim that Unit 51 Iris had been sold to a third party without their knowledge despite them having made part payment and renovated the unit for over Kshs. 6,000,000.00.
12. The Plaintiffs further contend that paragraph 4 of the Consent does not give a time limit within which they were to pay fully for the units only that they could seek financing from the Bank, a position they found untenable due to the prohibitive interest rates. Based on the Bank's failure to comply with the terms of the Consent, the Plaintiffs urge the court to dismiss the application.



#### 4<sup>th</sup> Defendant's response

13. The Bank rebuts the Plaintiffs' arguments on the ground that they are raising issues that have either been previously litigated in HCCC 352 of 2011; *Nancy Wanja Gatabaki v. Muga Developers Limited & others* and HCCC No. 30 of 2020; *Nancy Wanja Gatabaki & 2 others v Muga Developers Limited & 11 others* or issues that have never been raised in the present proceedings to justify their failure to fully perform the Consent. These issues include the contention that the Plaintiffs are the owners of the suit property, that it was fraudulently charged to the Bank and that they have challenged the existence of the suit property and the deed plan creating the charge over it.
14. The Bank rejects the Plaintiffs' contention that paragraph 6 of the Consent is ambiguous and cannot be performed, that the C-Plots do not exist or that all vacant land within the suit property belongs to the Plaintiffs. They submit that this argument has not been made in the Court of Appeal where the Plaintiffs have moved to stay enforcement of the orders made on 18<sup>th</sup> October 2022. The Bank states that the suit property is owned by the 1<sup>st</sup> Defendant and is charged to the Bank to secure amounts advanced to it by the Bank and that due to the way that the Fourways Junction estate was planned, each portion of the suit property that has been transferred to third parties has since been partially discharged and the proprietors have received registered long term leases for their respective portions of the suit property.
15. The Bank states that the vacant portions of the suit property that have not been transferred to third parties are owned by the 1<sup>st</sup> Defendant and remain charged to the Bank and that various portions have been transferred to the Plaintiffs over time as follows:
  - a. Pursuant to a consent order in HCCC No. 352 of 2011, 42 housing units and 2 undeveloped portions of the suit property were transferred to the 1<sup>st</sup> Plaintiff and the Bank avers that it has never attempted to access or sell these portions.
  - b. By the Consent in these proceedings, the 1<sup>st</sup> Defendant's receiver transferred to the Plaintiffs 18 units together with one additional unit in part performance of the Consent and that the registration of these housing units is ongoing.
16. The Bank affirms that the Plaintiffs own and are in possession of the portions of the suit property which have been transferred to them and that it has not made any attempt to claim, evict or dispossess them as alleged. The Bank points out that the Plaintiffs pleaded at paragraph 6(H) and 6(L) of the amended plaint dated March 10, 2021 that they had possession of the units in question and that it is therefore not true that the Plaintiffs own the entire suit property and that it is also not correct that the C Plots do not exist because with the Bank's consent, the 1<sup>st</sup> Defendant excised undeveloped portions of the charged Property and part of the excised portions became Land Reference Numbers 28223/33 C1 - C11 and that the Bank was not required to seek the consent of the Plaintiffs.
17. The Bank rejects that Plaintiffs position that paragraph 6 of the Consent is incapable of being performed because the Bank intends to undertake a survey of LR No. 28223/83 -C1. C10 and C11 which the Plaintiffs do not own and are still charged to the Bank. That it is therefore entitled to access the C-Plots in order to conduct a survey.
18. The Bank also states that the issue of the Consent being ambiguous and incapable of performance has not been raised previously and is a complete departure from the argument advanced by the Plaintiffs' application dated 7<sup>th</sup> July 2022 seeking to set aside the Consent. The Bank maintains that the Plaintiffs' continued refusal to allow it access the C-Plots amounts to disobedience of the Consent.



19. As regards the purchase of the units, the Bank states that it is not true that the Plaintiffs purchased 22 housing units under the Consent as alleged. That paragraphs 1 and 2 of the Consent are very clear that the Plaintiffs would only purchase 18 housing units as part of the settlement and that by a letter dated January 28, 2022, the Plaintiffs' advocates wrote to the Bank's advocates indicating that one unit had been left out in error. That the error was corrected when Hibiscus 48 was included to the list of the Consent units bringing the total units transferred under the Consent to 19.
20. The Bank avers that after the Consent, the Plaintiffs indicated their interest in purchasing 3 additional housing units; Hibiscus 80 and 81 and Iris 51. These units were offered to the Plaintiffs after the Consent at the market price. That the Plaintiffs delayed in returning the signed offer letters and in signing the sale agreements for these properties and that by an email of 8<sup>th</sup> June 2022 the receiver of the 1<sup>st</sup> Defendant wrote to the 3<sup>rd</sup> Plaintiff informing her that there has been no progress in the purchase of the 3 housing units since the offer letter was signed and that no deposit had been paid. The 3<sup>rd</sup> Plaintiff was also informed that the 1<sup>st</sup> Defendant's receiver was under strict timelines to complete the sales of these 3 housing units. The Bank claims that the Plaintiffs did not progress the sales of Hibiscus 80 and 81 and iris 51 and that by an email of September 20, 2022 the receiver of the 1<sup>st</sup> Defendant wrote to the 3<sup>rd</sup> Plaintiff referring to the email of June 8, 2022 informing her that the offer for Iris 51 was withdrawn as the receiver of the 1<sup>st</sup> Defendant had entered into an agreement with a third party. With respect to Hibiscus 80 and 81, the 3<sup>rd</sup> Plaintiff was informed that if they wished to progress the transactions, the purchase price had to be paid by September 30, 2022. Thus, the Bank insists that the Plaintiffs have not made part payment of Hibiscus 80 and 81 and Iris 51 as alleged because the Plaintiffs only finished making payment of the 19 housing units under the Consent on December 3, 2022 when they made a payment of Kshs. 30 million.
21. The Bank states that by the email of December 13, 2022 from the 1<sup>st</sup> Defendant's Receiver, the 3<sup>rd</sup> Plaintiff was informed that Kshs. 16.9 million out of the Kshs. 30 million received would be applied to clear the Plaintiffs' outstanding balance for the units under the Consent and the remaining Kshs. 13.1 million would be applied as part of the purchase price of Hibiscus 80 and 81. A schedule was also shared with her showing the application of funds.
22. The Bank states that the parties appeared in court on February 14, 2023 for the hearing of the application to cite the Plaintiffs for contempt and the court allowed the parties time to attempt to reach a settlement to allow the Bank access to LR. Number 28223/33— C1, 09, C10 and C11 to conduct a survey. That on 16<sup>th</sup> February 2023 the Bank's advocates wrote to the Plaintiffs' advocates with a proposal to have a virtual meeting. The Plaintiffs' advocates responded on 16<sup>th</sup> February 2023 communicating that they were available on 22<sup>nd</sup> February 2023 for a virtual meeting. The Bank's advocates confirmed availability in their letter dated 21<sup>st</sup> February 2023 and the advocates then held a virtual meeting on 22<sup>nd</sup> February 2023 at 11.30 am. In the meeting, the Plaintiffs' advocate indicated that her clients would not be allowing the Bank access to the property for the survey as the Plaintiffs had alleged that the properties defined as the C Plots belong to them. That the Plaintiffs also demanded; the return of property to Nancy Gatabaki that was illegally incorporated in LR 28223/33 and charged to the 1<sup>st</sup> Defendant, compensation for land that was illegally encroached in the construction of the villas erected on the property and a survey and valuation of the entire property. That the Plaintiffs had previously insisted on a joint survey being carried out and that this was done by the Director of Surveys and a copy of his report dated June 22, 2022 was annexed. The Plaintiffs also demanded the accounts of the 1<sup>st</sup> Defendant showing the total amount outstanding that is owed to the Bank and the amount the Bank has recovered.



23. The Bank contends that no resolution was reached at the meeting of 2February 2, 2023 due to the unreasonable demands by the Plaintiffs as the same were not matters that were pleaded in the amended plaint of March 10, 2021 and were a repetition of matters that were previously determined in HCCC 352 of 2011 and HCCC 30 of 2020. The Bank asserts that it is improper and unreasonable for the Plaintiffs to make the performance of the Consent conditional on the demands set out above. The Bank avers that it cannot share the 1<sup>st</sup> Defendant's account statements with the Plaintiffs as this is confidential. customer information between the 1<sup>st</sup> Defendant and the Bank in light of the bank-customer relationship.
24. The Bank reiterates that the Plaintiffs have performed the parts of the Consent in their favour but continue to refuse to comply with paragraph 6 of the Consent to allow the Bank access the C-Plots to conduct a survey. The Bank further restates that that some of the parties to whom the C-Plots were sold are threatening to take action against the Bank because they are yet to receive title and vacant possession. The Bank urges that the Plaintiffs' demands are an afterthought as they came after the Consent and are intended to frustrate the Bank. The Bank thus urges the court to allow the application.

### **Analysis and Determination**

25. The main issue for determination is whether the Plaintiffs are guilty of contempt of the Consent and if so, what relief or orders should the court grant?
26. The Consent was adopted as an order of the court and this position was affirmed by the court in its ruling of October 18, 2022 when it declined to set it aside. This court also declined to stay the ruling pending the Plaintiffs' appeal to the Court of Appeal as the court stated that there was nothing to stay as the court did not issue any positive order.
27. On the issue of contempt, it bears repeating that once a court issues an order, it binds all and sundry, the mighty and the lowly equally without exception. It is meant to be obeyed and not otherwise. In *Attorney General v Times Newspapers Ltd and Another* (1991) 2 All ER 398, it was held that it is immaterial whether one is a party to a suit or not and that anyone who knowingly impedes or interferes with the administration of justice is guilty of contempt irrespective of whether he is named in the order or not (see also *Econet Wireless Kenya Limited v Minister for Information and Communications of Kenya and Another* [2005] KLR 828).
28. On the ingredients required to be proved for a successful contempt prosecution, the Court of Appeal in *Ochino and Another v Okombo and 4 Others* [1989] KLR 165 cited its own decision in *Mwangi Mangondu v Nairobi City Council* (Civil Appeal No. 95 of 1988) where it held that, "[T]he court will only punish as a contempt breach of injunction if satisfied that the terms of the injunction are clear and unambiguous, that the defendant has proper notice of the terms and that breach of the injunction has been proved beyond reasonable doubt." The position on the applicable standard of proof was later finessed in *Gatharia K. Mutitika v Baharini Farm Limited* [1985] KLR 227 where the Court of Appeal considered the fact that contempt of court was criminal in character hence the standard of proof in contempt proceedings must be higher than proof on the balance of probabilities, almost but not exactly, beyond reasonable doubt. It added that, "the guilt has to be proved with such strictness of proof as is consistent with the gravity of the charge."
29. Whereas the Plaintiffs initially alleged that they had no knowledge of the Consent, they later conceded its knowledge, at least through the course of these proceedings. In any case, they cannot feign knowledge of the Consent as they have complied with and benefitted from it. The Plaintiffs also do not dispute that they actually denied the Bank access to enable it conduct a survey on the said C Plots. However, they state that the said denial of access was done in, "good faith and were not in any way



meant to defeat the execution of a lawful order by the Honourable Court if any as we were not privy to any such order”. Even if I am to accord the Plaintiffs the benefit that they had no knowledge of the Consent order, which I do not, as the court has already ruled that their advocates participated in and had full knowledge of the Consent, I find that the Plaintiffs, even after knowledge of the Consent, blatantly went about disobeying the same. The Bank has annexed evidence of correspondence where they have raised issue with the Plaintiffs obstructing the 1<sup>st</sup> Defendant’s Receivers from conducting a survey in accordance with Clause 6 of the Consent. In one email dated 25<sup>th</sup> February 2022, the Bank appears to indulge the Plaintiffs and acquiesce to a joint survey of the suit property on condition that the 1<sup>st</sup> Defendant’s receivers would only pay for the survey of the C-plots while the Plaintiffs would cater for the rest of the survey. In a subsequent email dated 27<sup>th</sup> April 2022, the Plaintiffs state that they were still consulting on whether the surveyors’ fee charged was reasonable. On May 10, 2022, the Bank laments to the Plaintiffs that it was yet to receive confirmation on whether the said fees was agreeable and the Bank stated that it was anxious to proceed with the survey of the C Plots immediately.

30. By the time of filing this application, there is no indication that the Plaintiffs had commented on the said surveyors’ fees or granted the Bank access to the property to conduct the survey. I agree with the Bank that from the tenor of the Plaintiffs’ depositions and overall conduct, they are still attempting to re-litigate issues that have been previously raised and determined in HCCC No. 352 of 2011 and HCCC No. 30 of 2020. They are, in effect, holding the Bank at ransom by raising demands that are intended to impede enforcement of the same.
31. I have no doubt that the Plaintiffs’ actions fit into all the four elements of civil contempt and the Bank has been able to prove the same; the terms of the Consent are clear and unambiguous and were binding on the Plaintiffs; the Plaintiffs have knowledge of and proper notice of the terms of the Consent, the Plaintiffs have acted in breach of the terms of the Consent and the Plaintiffs’ actions and conduct of disobeying the Consent are deliberate. It is not a defence that the Plaintiffs have since appealed the ruling of the court of 18<sup>th</sup> October 2022 and that this alone purges them of their contempt. The Consent remains in force and the Plaintiffs have performed part of it.

### **Conclusion and Disposition**

32. I therefore find and hold that the Plaintiffs knowingly and wilfully disobeyed the Consent Order dated 21<sup>st</sup> December 2021. They are therefore guilty of contempt of court. Turning to the penalty, I am aware that ultimately the purpose of the contempt is to maintain the dignity of the court and its processes. However, the interest of the court and no doubt the Defendants is to ensure that court orders are obeyed and implemented. I will therefore give the Plaintiffs’ an opportunity to purge their contempt by directing them not to interfere with the Defendants’ access to suit property and it is only after the survey is completed that I will sentence them. The orders of injunction I will issue are merely to facilitate the implementation of the Consent.
33. I therefore issue the following orders:
  - a. The Plaintiffs Nancy Wanja Gatabaki and Josephine Beatrice Gathoni be and are hereby found guilty of contempt of court by wilfully disobeying and impeding the implementation of the Consent Orders dated 21<sup>st</sup> December 2021.
  - b. An order of injunction be and is hereby issued restraining the Plaintiffs howsoever from interfering with the survey of the properties known as Land Reference Number 28223/33 — C1, C9, C10 and C11.



- c. An order of injunction be and is hereby issued restraining the Plaintiffs howsoever from interfering and/or otherwise dealing with Daisy Court 2C1/154, C2/155, C3/156, C4/157, C5/158, C6/159, C7/160, C8/161, Hibiscus Court 4 P2-A 80, 81 and Iris Court 3 P2-C 51 erected on Land Reference Number 28223/33.
- d. The Nairobi County Officer Commanding Police Division Kasarani, or any other Officer Commanding a Police Station, be directed to assist, Muniu Thoithi and George Weru, the receivers of the 1<sup>st</sup> defendant, Muga Developers Limited, to undertake a survey of the property known as Land Reference Number 28223/33 - C Plots.
- e. The Nairobi County Officer Commanding Police Division Kasarani, or any other Officer Commanding a Police Station, be directed to assist, Muniu Thoithi and George Weru, the receivers of the 1<sup>st</sup> Defendant, Muga Developers Limited, to take possession of Daisy Court 2 C1/154, C2/155, C3/156, C4/157, C5/158, C6/159, C7/160, C8/161, Hibiscus Court 4 P2-A 80, 81 and Iris Court 3 P2-C 51 erected on the property known as Land Reference Number 28223/33 that are under the control of the plaintiffs and are still charged to the 4<sup>th</sup> defendant.
- f. The sentencing of the Plaintiffs is adjourned to a date to be fixed to enable the 4<sup>th</sup> Defendant complete the survey and implement the Consent Order.

**DATED AND DELIVERED AT NAIROBI THIS 20<sup>TH</sup> DAY OF APRIL 2023.**

**D. S. MAJANJA**

**JUDGE**

Court of Assistant: Mr M. Onyango

Ms Beacco instructed by Wanyonyi and Muhia Advocates for the Plaintiffs.

Mr Kimani, SC with him Mr Ondieki instructed by Hamilton Harrison and Mathews Advocates for the 4<sup>th</sup> Defendant.

