



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NYAHURURU**

**ELC NO E003 OF 2021**

**MUHU HOLDINGS LIMITED.....PLAINTIFF**

**VERSUS**

**NYAKUHI KAMAU AND 173 OTHERS .....DEFENDANTS**

**RULING**

**A. INTRODUCTION**

1. By a notice of motion dated 22<sup>nd</sup> January, 2021 premised upon **Order 40 Rules 1 and 4 of the Civil Procedure Rules (*the Rules*)**, the Plaintiff sought a temporary order of injunction restraining the Defendants from forcefully taking possession, trespassing upon, sub-dividing, interfering with, or dealing with **L.R. No. 5605/3 (*the suit property*)** pending the hearing and determination of the suit.
2. The Plaintiff contended that it was the registered proprietor of the suit property and that the Defendants had violated its proprietary rights. In particular, it was contended that on 18<sup>th</sup> January, 2021 the Defendants, their agents and servants had forcibly and illegally entered the suit property, sub-divided the same amongst themselves and started construction of permanent structures thereon.
3. The said application was, with leave of court, served by substituted service for *inter partes* hearing on 15<sup>th</sup> February, 2021. The record shows that none of the Defendants defended the application hence it was allowed *ex parte* and the interim injunction granted as prayed.

**B. THE PLAINTIFF'S APPLICATION**

4. By a notice of motion dated 18<sup>th</sup> March, 2021 expressed to be based upon **Sections 1A, 1B, & 3A of the Civil Procedure Act (Cap. 21), Sections 3 & 5 of the Judicature Act, Order 51 of the Rules and all other enabling provisions of the law**, the Plaintiff sought the following orders:

(i) ...spent

(ii) ..spent

(iii) *That upon hearing interpartes, the 1<sup>st</sup> – 174<sup>th</sup> Defendants/Respondents, their agents, servants and or anyone claiming through them be committed to prison for six months for blatant disregard and disobedience of this court's order made on 15<sup>th</sup> February, 2021 and the County Police Commander (PC)- Nyandarua County and the Sub-County Police Commander (SPC) Mirangine Sub-County be ordered to ensure compliance with the Order.*

(iv) *That upon grant of either prayer (2) or (3) herein above, the County Police Commander (PC)- Nyandarua County and the Sub-County Police Commander (SPC) Mirangine Sub-County be ordered to appear before this Honourable Court and/or to file a report to confirm compliance with order (2) and (3) hereinabove.*

(v) *That upon grant of either prayer (2) (3) and (4) herein above, once again the County Police Commander (PC)- Nyandarua County and the Sub-County Police Commander (SPC) Mirangine Sub-County be ordered to ensure that the 1<sup>st</sup> – 174<sup>th</sup> Defendants/Respondents, their servants, agents and/or anyone acting do comply with the order of 15<sup>th</sup> February, 2021.*

(vi) *That the suit herein being undefended, the matter be set down for hearing and determination of the main suit to avoid any further interlocutory applications.*

(v) That the costs of these contempt of court proceedings be borne by the 1<sup>st</sup> -174<sup>th</sup> Defendants/Respondents, their agents, servants and/or anyone claiming through them.

5. The said application was based upon the grounds set out on the face of the motion and the contents of the supporting affidavit sworn by Waithera Muhu on 18<sup>th</sup> March, 2021 and the exhibits thereto. In a nutshell, it was contended that the Defendants had disobeyed the *ex parte* interim injunction made on 15<sup>th</sup> February, 2021 hence they ought to be committed to prison for contempt of court. The Plaintiff annexed some photographs dated 16<sup>th</sup> March, 2021 depicting some temporary structures said to be on the suit property as evidence of contempt.

#### **C. THE DEFENDANTS' RESPONSE**

6. The record shows that the Defendants were served through substituted service by advertising court process in the Daily Nation Newspaper. There is, however, no evidence of any response to the application having been filed.

#### **D. THE ISSUES FOR DETERMINATION**

7. The court has considered the Plaintiff's notice of motion dated 18<sup>th</sup> March, 2021 together with the supporting affidavit and exhibits thereto. The court has also considered the material on record in so far as the same is relevant to the instant application. The court is of the opinion that the following issues arise for determination herein:

(a) **Whether the Plaintiff has demonstrated the contempt of court alleged on the part of the Defendants.**

(b) **Whether the Plaintiff is entitled to the orders sought in the application.**

(c) **Who shall bear costs of the application.**

#### **E. ANALYSIS AND DETERMINATION**

##### **(a) Whether the Plaintiff has demonstrated the contempt of court alleged on the part of the Defendants**

8. The gist of the Plaintiff's application is that the Defendants were in disobedience of the interim injunction granted on 15<sup>th</sup> February, 2021 hence they ought to be punished for contempt of court and for undermining the authority of the court. The Plaintiff's notice of motion and the contents of the supporting affidavit bear this out.

9. The court has considered the entire material on record and the Plaintiff's written submissions on this issue. The court agrees with the Plaintiff's submissions that all persons who are obligated to obey a court order must do so unless and until such order is vacated or set aside. See **Hadkinson v Hadkinson [1952] ALL ER 567**. However, such alleged contempt must be proved to the required standard. It has to be proved to a standard higher than a balance of probabilities but not as high as beyond reasonable doubt. In other words, the alleged contempt must be proved to the satisfaction of the court. See **Mutitika v Baharini Farm Ltd [1985] KLR 229**.

10. A close examination of the material on record and the Plaintiff's own affidavits and exhibits indicate that the Defendants had invaded the suit property on or about 18<sup>th</sup> January, 2021 and sub-divided it amongst themselves. Paragraph 4 of the Plaintiff's supporting affidavit sworn by Waithera Muhu on 22<sup>nd</sup> January, 2021 in support of the application for an interim injunction stated as follows:

**“That on 18<sup>th</sup> January, 2021, the 1<sup>st</sup> to 174<sup>th</sup> Defendants/Respondents, their agents and/or servants without any colour of right forcefully, unlawfully illegally and irregularly entered the Applicant's parcel of land, subdivided the same amongst themselves and have started erecting permanent structures on the same. (Annexed hereto and marks “WM2” is a bundle of documents attesting the same.)**

11. Among the documents marked as exhibit WM2 is a copy of a newspaper cutting of the Daily Nation of 19<sup>th</sup> January, 2021, in which it was reported that the families of 170 IDP's affected by the 2007/08 post-election violence had on 18<sup>th</sup> January, 2021 forcibly invaded Kwa Muhu Farm and sub-divided the same amongst themselves. Each family had reportedly taken up 2 ½ acres out of the suit property which measured 523 acres in total.

12. In its supporting affidavit sworn on 18<sup>th</sup> March, 2021 in support of the instant application, the Plaintiff repeated the contents of the said paragraph in paragraph 4 of the affidavit in exactly the same terms. The Plaintiff also relied on a newspaper cutting dated 20<sup>th</sup> January, 2021 which showed some people moving some structures and belongings within the suit property.

13. It is evident from the material on record that although the Defendants and their families are said to have invaded, sub-divided and occupied the suit property on 18<sup>th</sup> January, 2021 there is no evidence on record to show that by the time the interim injunction was granted on 15<sup>th</sup> February, 2021 the process of forcible entry, possession, trespass, or sub-division had not been completed. The Plaintiff's own documents indicate that the wrongful actions complained of were undertaken on 18<sup>th</sup> January 2021 and not after the grant of interim orders on 15<sup>th</sup> February, 2021.

14. The court is, therefore, of the opinion that although the Plaintiff obtained an interim injunction on 15<sup>th</sup> February, 2021 such order could not legally restrain the Defendants from doing what had already taken place. A restraining order could not effectively undo what had already taken place in the circumstances of this case. It could not restrain forcible entry, possession, sub-division or construction which had already

taken place since it looks to the future and not the past. It is only an order of eviction or removal which can look to the past and undo what may have already taken place. A dealing with registered land involves changing its legal status such as leasing, charging, alienating etc. Since the Defendants are not registered as owners they cannot possibly deal with the suit property. Accordingly, the court is not satisfied that the Plaintiff has proved the contempt alleged on the part of the Defendants as required by law.

**(b) Whether the Plaintiff is entitled to the orders sought in the application**

15. The court has already found and held that the Plaintiff had failed to prove the contempt of court charge against the Defendants. It would, therefore, follow that all the consequential orders which would follow a finding of contempt are not available to the Plaintiff. Consequently, Order Nos. 3, 4 and 5 of the application relating to contempt of court are not available to the Plaintiff and the court is not inclined to grant them. The Plaintiff is, however, entitled to take steps to set down the suit property for hearing in accordance with the **Rules** subject to any pre-trial directions which may be given by the court.

**(c) Who shall bear costs of the application**

16. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso of **Section 27 of the Rules**. However, since the Defendants did not defend the application, the court is of the opinion that there should be no order as to costs.

17. The court has noted that even though the Plaintiff had all along been granted leave to serve court process through substituted service, there are no exceptional circumstances to warrant service of summons to enter appearance upon the Defendants through substituted service. The material on record shows that the Plaintiff knows where the suit property is located. The Defendants are said to be in occupation of the suit property. Clearly, the whereabouts of the Defendants are known to the Plaintiff. The Defendants in the suit are only 174 in number hence there should be no difficulty in serving them personally or by affixing the summons to the structures they are said to have constructed on the suit property. Accordingly, the orders on service of summons made on 15<sup>th</sup> January, 2021 are hereby varied to require the Plaintiff to serve the summons to enter appearance upon the Defendants as stipulated under **Order 5 of the Rules**.

18. The upshot of the foregoing is that the court finds no merit in the Plaintiff's notice of motion dated 18<sup>th</sup> March, 2021. Accordingly, the court makes the following orders for disposal thereof:

**(a) The Plaintiff's notice of motion dated 18<sup>th</sup> March, 2021 is hereby disallowed with no orders as to costs.**

**(b) The Plaintiff shall serve the summons to enter appearance upon the Defendants personally or by affixing copies of the summons upon the structures where the Defendants actually reside.**

**(c) The suit shall be mentioned on 10<sup>th</sup> November, 2021 for pre-trial directions.**

**RULING DATED AND SIGNED IN CHAMBERS AT NYAHURURU THIS 7TH DAY OF OCTOBER, 2021 AND DELIVERED VIA MICROSOFT TEAMS PLATFORM.**

**IN THE PRESENCE OF:**

**MR. KAHARI FOR THE PLAINTIFF**

**NO APPEARANCE FOR THE DEFENDANT**

**CA- CAROL**

.....

**Y. M. ANGIMA**

**JUDGE**