



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT THIKA**

**ELC CASE NO. 34 OF 2018**

**SAMSON MWANZIA KITWILI..... 1ST PLAINTIFF**

**ROBERT MUTUKU KITWILI ..... 2ND PLAINTIFF**

**VERSUS**

**BISHOP ARTHUR KITONGA.....1ST DEFENDANT**

**DIRECTOR OF SURVEYS ..... 2ND DEFENDANT**

**JOSEPH KURIA KIBURU ..... INTERESTED PARTY**

**RULING**

1. The plaintiffs brought this suit on behalf of the estate of the late William Kyumba **[the deceased]** on 5/2/2018 through a plaint of even date. They contended that at all material times, they were the administrators of the estate of the **deceased**. Their case was that in 1990, they sold to the 1st defendant 27 acres that were to be excised out of **Land Reference Number 9631/2** and the agreed purchase price was paid in full. In 1993, the 1st defendant undertook survey in furtherance of the excision of the 27 acres, culminating in Deed Plan Number 182078. They contended that although they gave the 1st defendant custody of the original title, they did not authorize the exact subdivision scheme which culminated in the deed plan. Consequently, they termed the subdivision scheme irregular.

2. They sought the following reliefs from the court:

*a) A declaration that Land Survey Plan Number 182078 be declared null and void.*

*b) A mandatory order upon grant of (a) above that the Land Survey Plan Number 182078 be surrendered to the Director of Surveys for cancellation and reversion to former Survey Plan Number 18145.*

*c) Without prejudice and/or in alternative to the relief (a) and (b) there be a resurvey of the proposed 10.9 hectares as per proposed subdivision scheme.*

*d) General and exemplary damages.*

*e) Costs and interest.*

3. Subsequently, on 21/1/2020, parties to this suit recorded a consent in the following terms:

**“By Consent of the parties:**

**1. THAT the 1st defendant does release the sum of Kshs 3,500,000 to the 2nd defendant within 7 days from the date hereof.**

**2. Upon payment and acknowledgement of Kshs 3,500,000 by the 2nd defendant, the 2nd defendant shall stand discharged and shall withdraw his claim against the plaintiffs and against the 1st defendant.**

**3. Pending acknowledgement and payment of Kshs 3,500,000 the status quo subsisting in LR 9632/1 and LR 9632/2 shall**

*prevail.*

**4. The matter shall be mentioned in the next 14 days to confirm compliance and for the purposes of recording a final consent to compromise the suit between the plaintiff and the 1st defendant.”**

4. Subsequent to that, parties decided to amend the consent recorded on 21/1/2021 through a written and signed amended consent dated 4/12/2020 which reads as follows:

**1. That the 1st defendant do release the sum of Kshs 3,500,000 to the interested party (Joseph Kuria Kiburu) within 7 days from the date hereof.**

**2. That upon payment and acknowledgement of Kshs 3,500,000 by the interested party (Joseph Kuria Kiburu) the interested party shall stand discharged and shall withdraw his claim against the plaintiffs and against the defendants.**

**3. That pending acknowledgement and payment of Kshs 3,500,000, the status quo subsisting in LR 9632/1 and LR 9632/2 shall prevail.**

**4. That this matter be mentioned on 3rd March 2021 to confirm compliance and for the purposes of recording a final consent to compromise the suit between the plaintiff and the 1st defendant.**

5. It does appear that the 1st defendant did not pay the sum of Kshs 3,500,000 to the interested party within 7 days as agreed. Consequently, the interested party brought a notice of motion dated 23/8/2021 seeking the following orders against the 1st defendant:

**1. That this honorable court finds the 1st defendant/respondent to be in contempt of court.**

**2. That an order for committal to civil jail, fine and/or such other penal consequences the court may deem fit and just be made against the 1st defendant/respondent.**

**3. Costs be provided for.**

6. The 1st defendant did not respond to the application. The application was canvassed in the virtual court on 9/11/2021 by Ms Wanjira. Counsel for the interested party/applicant submitted that the 1st defendant had elected to defy the consent order. She urged the court to grant the contempt orders sought.

7. The court has considered the application. The court is satisfied that under **Section 29** of the Environment and Land Court Act, it has powers to punish for contempt. In the absence of any opposition or any explanation as to why the 1st defendant cannot abide by the consent order which they willingly recorded as an order of this court, I will grant prayer 2 of the notice of motion dated 23/8/2021. I accordingly make a finding to the effect that the 1st defendant is in contempt of the amended consent order dated 4/12/2020 and adopted on 23/6/2021. Sentencing will await mitigation by the contemnor. This matter will be set down for sentencing on a date to be set at the time of reading this ruling.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA**

**ON THIS 12TH DAY OF NOVEMBER 2021**

**B M EBOSO**

**JUDGE**

**In the presence of: -**

Ms Nyamu for the Interested Party

Ms Mwangi for the Plaintiffs

Court Assistant: Lucy Muthoni

**B M EBOSO**

**JUDGE**