



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC NO. 1289 of 2014

JOSEPH KABUGI KARANJA.....APPLICANT

VERSUS

BENSON MUGO MUKUNYA.....1ST RESPONDENT

JOYCE WAMBUI LANGAT.....2ND RESPONDENT

MILKAH KANENE NDUNGU.....3RD RESPONDENT

BERNARD LEITICH, LAND REGISTRAR THIKA.....4TH RESPONDENT

RULING

1. Coming up for determination is a Notice of Motion application dated 29th October 2019 filed by the Plaintiff seeking the following orders:

i. Spent

ii. THAT the Court be pleased to issue restraining orders barring any dealings with parcel of land LOCATION 16/KIMANDI-WANYAGA/775 and any parcels that may have ensued from a subdivision thereof in particular LOCATION 16/KIMANDI-WANYAGA/1261, 1262 and 1263.

iii. THAT the Court be pleased to summon the land registrar Thika to appear in person in court and explain circumstances under which the property LOCATION 16/KIMANDI- WANYAGA/775 was subdivided and transferred to third parties other than the Applicant in violation of the orders of the court.

iv. THAT the Court be pleased to commit the Respondents herein and Bernard Leitich, Land Registrar Thika to jail and/or order them to pay a fine for violating a valid order issued by this Honourable court on 20th May 2019.

v. THAT the Court be pleased to nullify and/or revoke the subdivision of Land known as LOCATION 16/KIMANDI-WANYAGA/775 and subsequent transfers to 3rd parties in total violation and disregard of a valid court order.

vi. THAT the Court be pleased to order that the Applicant be at liberty to take possession of a portion of 3 acres of the property known as LOCATION 16/KIMANDI- WANYAGA/775 as per the consent orders issued by this Honourable court and that the Officer Commanding Station (OCS) Ndakaine Police Station to supervise and oversee the process and ensure peace and order prevails.

vii. THAT the Court be pleased to issue orders compelling the Respondents to transfer a portion of 3 acres of the property known as LOCATION 16/KIMANDI- WANYAGA/775 to the applicant herein Joseph Kabugi Karanja within 14 days from the date of the order herein.

viii. The costs of the application be provided for.

2. The application is premised on the grounds on its face and on the supporting affidavit of the applicant sworn on 29th October 2019. The Applicant avers that on 4th December 2018 a consent was entered between the parties and adopted as a court order on 20th May 2019. The

consent order provided that the land **LOCATION 16/KIMANDI- WANYAGA/775** be subdivided and 3 acres transferred to the Applicant. The Applicant averred that aided by the 4th Respondent (Land Registrar-Thika), the Respondents proceeded to subdivide the property into 3 portions and transferred the same to 3rd parties. The Applicant stated that the 4th Respondent was aware of the court order since he oversaw the lifting of the conservatory order. The Applicant also avers that the Respondents lifted the conservatory orders without his involvement and went ahead and subdivided the land into parcels **LOCATION 16/KIMANDI- WANYAGA/1261, 1262 and 1263** and transferred the said parcels to Samuel Magana Muigai, Emma Wairimu Mukunya and Thika Credit Traders Limited respectively which was in violation of the consent order. Applicant added that he had been duly informed that the 1st Respondent was a shareholder/director of Thika Credit Traders Limited.

3. The Applicant stated that the Respondents deliberately ignored a court order thus diminishing and insulting the dignity and authority of the court, hence the contempt ought to be punished.

4. The 1st Respondent Benson Mugo Mukunya swore a replying affidavit dated 30th November 2019 on behalf of 1st to 3rd Respondents in which he deponed that on 17th July 2015, Justice L. Gacheru determined that parcel **LOCATION 16/KIMANDI- WANYAGA/775** was registered in the name of a deceased person and noting that no one had been appointed as an administrator, the Defendants did not have capacity to sell the land and any dealings were considered as intermeddling which was punishable under the law. The judge then ordered that the purchase money of Kshs. 8,340,000 paid by the Applicant to the Respondents be refunded. They indicated that the Applicant had refused to accept the refund.

5. The Respondents further stated that the consent filed by the parties on 13th December 2018 was void and no court had jurisdiction to enforce a void transaction. They indicated that the consent order was invalid since the Respondents did not have right to land which had devolved to Zabron Waihenya Mwangi as the administrator vide **Succession Cause No. 314 of 2014**. Respondent added that the applicant and his uncle were aware that the said Zabron was the legal owner of the suit property and approached him to purchase a portion of the land and went ahead and deposited Kshs. 4,000,000 in his bank account. They deponed that Zabron having not been a party to the suit was not bound by any orders made.

6. The parties canvassed their arguments by way of written submissions.

Applicant's Submissions

7. The Applicant's written submissions are dated 14th June 2021, where it is stated that on 4th December 2018, the parties arrived at a consent signed by the advocates for the parties and adopted by court on 20th May 2019 in presence of counsel for both parties. The consent entered was on the following terms:

i. That the conservatory orders given on the 17th July 2015 and issued on 19th August 2015 be and are hereby vacated;

ii. That the Defendants their agents, and/or assigns do transfer to the Plaintiff 3 acres to be excised from Location 16/Kimandi Wanyaga/775;

iii. That the suit be marked as settled.

8. It was submitted that the Defendants subdivided the land and transferred it to 3rd parties in violation of the consent orders in force and the same should be nullified. It was further submitted that the Respondents' argument that the consent order was illegal and not capable of implementation should not stand since both parties voluntarily recorded the consent and presented it to court for adoption. The Applicants noted that the Respondents implemented the consent order selectively by lifting the conservatory orders but failed to transfer the 3 acre portion to the Applicant. If the consent was invalid, they should have moved the court to set it aside. It was further submitted that the conduct of Respondents amounted to contempt of court, hence the Thika Land Registrar should be summoned to explain why he did not comply with the court orders yet he was party to the suit.

9. To support his arguments, the Applicant cited the Court of Appeal in **Christine Wangari Gachege v Elizabeth Wanjiru Evans & 11 others [2014] eKLR**, where the court held 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."

10. Additionally, in **Samuel M. N. Mweru & Others v National Land Commission & 2 others [2020] eKLR**, the court emphasised the importance of observing court orders in the following words:

"...It is for this purpose that courts are entrusted with the extraordinary power of punishing those who indulge in acts whether inside or outside courts which tend to undermine their authority and bring them in disrepute and disrespect by scandalizing them and obstructing them from discharging their duties. When the court exercises this power, it does so to uphold the majesty of the law and of the administration of justice. The foundation of judiciary is the trust and confidence of the people in its ability to deliver fearless and impartial justice..." In this decision, the court cited the elements of contempt as espoused in the book **Contempt in Modern New Zealand [47]**:

"There are essentially four elements that must be proved to make the case for civil contempt. The Applicant must prove to the required standard (in civil contempt cases which is higher than civil cases) that:

- a) *the terms of the order (or injunction or undertaking) were clear and unambiguous and were binding on the Defendant*
- b) *the Defendant had knowledge of or proper notice of the terms of the order,*
- c) *the Defendant has acted in breach of the terms of the order, and*
- d) *the Defendant's conduct was deliberate”*

11. In conclusion, it was submitted that the Applicant had proved that there was contempt of court having satisfied the above elements and the Respondents should be punished for the same.

1st to 3rd Respondents' Submissions

12. In their written submissions dated 24th August 2020, and supplementary submissions dated 15.5.2021, the Respondents raised the following issues; That the consent adopted by court on 20th May 2019 was illegal and court should not enforce it; that the second order that the Defendants transfer 3 acres from LOCATION 16/KIMANDI-WANYAGA/775 is void as the same is impossible to implement and/or impossible to comply with since the land does not belong and have never belonged to the Defendants.

13. It was submitted that upon issuance of its decision, the court became *functus officio* and any aggrieved party could only ventilate their grievance in an application for review or in the Court of Appeal. Reference was made to the following court of appeal cases; **Jasbir Singh Rai & 3 Others v Tarlochan Singh Rai & 4 Others [2007] eKLR**, for the proposition that even the Court of Appeal has no jurisdiction to re-open, re-hear or recall its earlier decision and substitute it with another, and **Patrick Gathenya v Esther Njoki Rurigi & another [2008] eKLR**, for the proposition of the public policy principle that there must be an end to litigation. The Respondents also relied on the following cases; **Telkom Kenya Limited v John Ochanda (Suing On His Own Behalf and on Behalf Of 996 Former Employees of Telkom Kenya Limited) [2014] eKLR**, **Raila Odinga & 5 Others v Independent Electoral and Boundaries commission & 3 others[2013] eKLR**, and **Jersey Evening Post Limited v. Al Thani and Four Others [2002 JLR 542] at page 556**.

14. It was further submitted that the court, in adopting an illegal consent, acted illegally and without jurisdiction since the final decision divested the court of jurisdiction over the matters already adjudicated upon.

15. It was stated that in **Succession Cause No 312 of 2014** (Chief Magistrate's Court, Thika), the Plaintiff participated in the succession cause and consented to the grant of the land to one, Zabron Waihenya Mwangi. The Grant was confirmed on, 11th July 2016 and Zabron thereafter became the sole and absolute owner of the suit land. It was submitted that the Applicant together with his uncle tried to purchase 3 acres from Zabron and deposited Kshs. 4,000,000 in Zabron's bank account. Based on this, they approached the Respondents' advocates to lift the conservatory orders so that the transfer could be effected and that was the genesis of the consent order.

16. The Respondents also submitted that Justice Gacheru determined the issue in dispute between the parties and held that the sale was invalid since the Respondents did not have rights to the property. On this basis, it was argued that the court's jurisdiction and suit came to an end. To this end, reference was made to the following case law on finality of decisions: **Kamau Macharia & Another vs Kenya Commercial Bank Limited & 2 Others (2012) eKLR**; **Standard Chartered Financial Services Limited & 2 Others v Manchester Outfitters (Suiting Division) Limited (Now Known As King Woollen Mills Limited & 2 others [2016] eKLR**, **Kable v Director of Public Prosecutions (NSW)**, **Kenya Commercial Bank Limited v Benjoh Amalgamated Limited [2017] eKLR** and **Eunice Wanjiru Gathithi (the legal representative of the estate of the late Fredrick Gathithi Kabue) v Cannon Assurance Kenya Limited [2021] eKLR**.

17. Therefore, the court, in adopting the purported consent amending or varying the decision of Justice Gacheru, acted in error and without jurisdiction, and the resultant purported consent is void for all purposes. To this end, reference was made to the Latin maxim: "*Ex turpicausa non oritur action*" (from a dishonorable cause an action does not arise). Reliance was also made to the case of **Owners of Motor Vessel "Lillian" Vs Caltex Oil Kenya Ltd** on the issue of jurisdiction.

18. The Respondents contend that courts should not enforce illegal bargains as was held in **Makula International Ltd v His Eminence Cardinal Nsubuga & Anor (Civil Appeal 4 of 1981) [1982] UGSC 2 (08 April 1982)** and that a latter order should not vary an earlier order if two orders over the same matter are at variance as held in **Lazarus Kirech v Kisorio arap Barno [2018] eKLR**.

19. It was submitted that it was impossible for the Respondents to transfer property which they had no rights over. They quoted the case of **Malboeuf vs Hanna, 20180NSC 65629 (CAN Li)** where the court held that for one to be held to have disobeyed a court order it should be shown that the contemnor intentionally did the act the order prohibited or intentionally failed to do the act the order required and in **Victoria Pumps Ltd & another v Kenya Ports Authority & 4 others[2002] eKLR**, the court declined to hold the Defendants as having disobeyed a court order in failing to release a container which was no longer in their possession.

Analysis and determination

20. This court has considered the application, affidavits, rival submissions together with the relevant legal framework and the prevailing jurisprudence. The court finds that the issues for determination are: ***What are the effects of a consent filed in court and whether the Respondents are in contempt of court orders.***

21. From the court record, this court notes that on 13th December 2018, parties to this suit filed a consent dated 4th December 2018 signed by Macharia, Burugu & Company (Advocates for the Plaintiff) and Mukunya & Company (Advocates for Defendants) which stated:

“We the undersigned would be grateful if you could kindly (sic) following orders by consent:

BY CONSENT:

- 1. That the conservatory orders given on the 17th July 2015 and issued on 19th August 2015 be and are hereby vacated;**
- 2. That the Defendants their agents, and/or assigns do transfer to the plaintiff 3 acres to be excised from Location 16/Kimandi Wanyaga/775;**
- 3. That the suit be marked as settled with no orders as to costs” .**

22. The court endorsed the above mentioned consent as an order of the court on 20.5.2019 in the presence of the advocates for the parties. Consequently, the court marked the suit as closed.

23. The Respondents have not rebutted the issues raised by the applicant to the effect that the land parcel LOCATION 16/KIMANDI-WANYAGA/775 has been subdivided into 3 portions namely parcel 1261, 1262 and 1263 which parcels have been sold to 3rd parties. Their argument is that the consent judgement was invalid and void since it gave orders that could not be implemented. The courts have on several occasions held that a consent judgement has a contractual effect as was held in the Court of Appeal case of **Flora N. Wasike v Destimo Wamboko[1988] eKLR**, where it was stated that:

“... It is now settled law that a consent judgment or order has contractual effect and can only be set aside on grounds which would justify setting a contract aside, or if certain conditions remain to be fulfilled, which are not carried out...”

24. If the Respondents knew that the consent they entered into was invalid, why did they enter into it? And if they entered into an invalid contract, why did they not seek to set it aside? It is not lost to this court that the 1st Respondent is apparently a senior Advocate who owned and operated the firm of Mukunya and Company Advocates, the very firm that participated in the consent dated 4.12.2018! (see paragraph 6 and 19 of the affidavit of the Applicant).

25. In the case of **Purcell v F C Trigell Ltd (CA 1971)**, it was held that;

“... The court will not interfere with an existing consent order, save in circumstances in which it could interfere with a contract as a matter of substantive law. A consent order derives its authority from the contract made between the parties...”

26. Similarly, the Court of Appeal in **Flora N. Wasike v Destimo Wamboko[1988] eKLR** cited *Setton on Judgments and Orders (7th edn)*, vol 1, P 124, where it was stated that:

“Prima facie, any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action, and on those claiming under them ...(Emphasize added) and cannot be varied or discharged unless obtained by fraud or collusion, or by an agreement contrary to the policy of the court ...; or if the consent was given without sufficient material facts, or in general for a reason which would enable the court to set aside an agreement.”

27. From the foregoing case laws, this court finds that a consent order is binding upon the parties, and the ensuing judgement ought to be executed unless it has been stayed or set aside. And in this regard, the consent judgement has not been set aside or stayed. The net effect of this, is that parties are bound to obey the court order.

28. The above finding was bolstered in the Court of Appeal case of **East African Portland Cement Company Limited v Superior Homes Limited [2017] eKLR** where on whether the defendant could unilaterally discharge itself from the consent order the court held that:

“As correctly held by the trial court, once parties compromise their suit under Order 25 Rule 5 CPR, a judgment ensues upon which a decree issues out which is subject to the law governing the discharge of court orders and decrees.”

29. So what happens if parties do not adhere to court directives? The Applicant has moved this court for *inter alia* orders compelling the Respondents to execute the consent judgement and punishment for contempt.

30. Section 5 of the Judicature Act provides that:-

“(1) 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. The power to punish for contempt is not specific in its tenure as to particular contempt and applies to all forms of contempt of court, see- **Africa Management Communication International Limited v Joseph Mathenge Mugo & another [2013] eKLR**. In **Republic v Ahmad Abolfathi Mohammed & another [2019] eKLR** the Supreme court of Kenya stated thus;

“ There is no doubt that an act in contempt of the Court constitutes an affront to judicial authority; and the Court has the

liberty and empowerment to mete out penalty for such conduct, in a proper case. The object is, firstly, to vindicate the Court's authority; secondly, to uphold honourable conduct among Advocates, in their standing as officers of the Court; and thirdly, to safeguard its processes for assuring compliance, so as to sustain the rule of law and the administration of justice” .

32. It is trite that to commit a person for contempt of court, the court must be satisfied that he has wilfully and deliberately disobeyed a court order that he was aware of. To this end, the order of the court that is alleged to have been deliberately disobeyed must be clear and precise so as to leave no doubt as to what a party was supposed to do or to refrain from doing. In the Court of Appeal case of **A.B & another v R.B [2016] eKLR** in arriving at their decision, reference was made to the Constitutional Court of South Africa, in **Burchell v. Burchell Case No 364/2005** which underlined the importance to the rule of law, of compliance with court orders in the following terms:

“Compliance with court orders is an issue of fundamental concern for a society that seeks to base itself on the rule of law. The Constitution states that the rule of law and supremacy of the Constitution are foundational values of our society. It vests the judicial authority of the state in the courts and requires other organs of state to assist and protect the courts. It gives everyone the right to have legal disputes resolved in the courts or other independent and impartial tribunals. Failure to enforce court orders effectively has the potential to undermine confidence in recourse to law as an instrument to resolve civil disputes and may thus impact negatively on the rule of law.”

33. If the Respondents did not have the legal capacity to adhere to the court order (of which the court is not dealing with that issue at this stage), they should not have entered into the consent. And if they would have wanted to right a wrong, then they had time to seek the order to be set aside, which they did not. It is crystal clear that the consent has partially been selectively implemented whereby the conservatory orders that had been in force since 17.5.2015 were lifted. But this was apparently done to circumvent the full implementation of the court's judgment.

34. In light of the foregoing analysis, this court is satisfied that

the Notice of Motion dated 29th October 2019 is merited and the same is allowed in the following terms;

i. The Respondents are found to be in contempt of the court order of 20.5.2019.

ii. A notice to show cause is hereby issued to the Respondents to appear personally in court and explain why they should not be punished for contempt of court.

iii. An order is hereby issued to nullify and/or revoke the subdivision of Land known as LOCATION 16/KIMANDI-WANYAGA/775 and subsequent transfers to any 3rd parties.

iv. Subsequent to the revocation mentioned in (iii) above) , a transfer of a portion of 3 acres of the property known as LOCATION 16/KIMANDI- WANYAGA/775 is to be effected to the applicant herein JOSEPH KABUGI KARANJA, with the remainder of the land being registered in the name of the person appearing as owner of LOCATION 16/KIMANDI-WANYAGA/775 . To this end, the Deputy Registrar of this court is hereby authorized to sign all requisite documents appertaining to the aforementioned transfer.

v. An order is hereby issued that the applicant is at liberty to take possession of a portion of 3 acres of the property known as LOCATION 16/KIMANDI- WANYAGA/775 as per the consent orders, and the Officer Commanding Station (OCS) Ndakaine Police Station is to supervise and oversee the process and ensure peace and order prevails

vi. The 1st -3rd Respondents are condemned to pay costs of this application.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 10TH DAY OF NOVEMBER, 2021 THROUGH MICROSOFT TEAMS.

LUCY N. MBUGUA

JUDGE

In the presence of:-

..... for the Applicant

..... for the Respondent

Court Assistant: Edel Barasa