



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC NO. 97 OF 2003

LUIS MUTHINI KITONYI.....APPLICANT

-VERSUS-

KONZA RANCHING & FARMING COOP

SOCIETY.....RESPONDENT

RULING

1. By a Notice of Motion dated 1st December 2020, brought under Section 1A, 1B, 3A and 63(e) of the Civil Procedure Act and Order 51 Rule 1 of the Civil Procedure Rules, the Plaintiff/Applicant sought for the following orders;

(a) That the time within which this Honourable court's order given on 17th October 2018 is to be complied with be fixed and stated.

(b) That the costs of this application be borne by the Defendant/Respondent.

2. The application is supported by the grounds listed on its face together with the affidavit of Francis Mwanza Mulwa Advocate sworn on 1st December 2020. Counsel has deposed that on 17th of October 2018, this court ordered the Defendant/Respondent to register share no. 16 formerly in the name of Timothy Mutunga Ndambuki, in the name of the Plaintiff/Applicant herein. That share no. 16 constituted several plots of land but the Defendant refused to point out and put the Plaintiff into possession of one of the plots measuring 12 acres. That the Defendant's refusal amounts to a blatant disobedience of this court's order and that the ends of justice shall be met when the Defendant is given a specific period within which to obey the said order.

3. The application is opposed. The Secretary of the Defendant/Respondent, one David Mulu Katu, swore an affidavit dated 8th March 2021, where he conceded that the orders made on 17th October 2018 were partially complied with as indicated by the Plaintiff/Applicant. That failure to allocate the 12-acre plot to the Applicant is not an act of disobedience or contempt of court but of practical impossibility, which is well within the Applicant's knowledge.

4. He further deposed that the 12-acre plot allocated to share no. 16 has its title deed issued in favour of the late Timothy Mutunga Ndambuki and his kin are in possession of the said property. That one Pius Matheka Katengu came into occupation of the land in issue at the instance of the late Timothy Mutunga Ndambuki. That as the title deed is already issued in the name of the late Timothy Mutunga Ndambuki, the only alternative for the Applicant is to seek for and obtain cancellation of title or transfer of the same to the Applicant. That it is not within the Respondent's power to transfer the land in the name of the late Timothy Mutunga Ndambuki to the Applicant. That court orders are not made in vain and assigning timelines for compliance in this case will not bear any fruit. That the Applicant has an option of pursuing the estate of the late Timothy Mutunga Ndambuki for the 12-acre piece of land. That the Defendant has no other land to allocate the Applicant other than that which was allocated to the share.

THE PLAINTIFF/APPLICANT'S SUBMISSIONS

5. The Plaintiff/Applicant filed his submissions dated 29th September 2021 on 30th September 2021. He averred that it is not disputed that this court made orders on 17th October 2018 to the effect that share no. 16 of the Defendant formerly in the name of Timothy Mutunga Ndambuki be registered in the name of Moses Mutisya Kitonyi, the Plaintiff/ Applicant in this matter. The Applicant relied on Section 63(e) of the Civil Procedure Act to argue that in order to prevent the defeat of the ends of justice, the court may make other supplementary orders as may appear to the court to be just and convenient.

6. The Applicant further contended that the Respondent admitted in paragraph 3 of their replying affidavit that the order in question was only partially complied with, which amounts to contempt of court. It was further submitted for the Applicant that the fact that the land in issue is in the name of the late Timothy Mutunga Ndambuki cannot be reason enough for the Respondent not to fully comply with the order in issue.

Counsel concluded by submitting that it was fair and just for this court to set timelines within which the Defendant needs to comply with the orders of 17th October 2018.

DEFENDANT/RESPONDENT'S SUBMISSIONS

7. The Respondent submitted that failure to allocate the 12-acre plot is not an act of disobedience or contempt of court but of practical impossibility. He contended that the 12-acre plot is registered in the name of the late Timothy Mutunga Ndambuki and the same is occupied by his kin, hence the only option available for the Applicant is to seek for cancellation of the title issued in the name of the late Timothy Mutunga Ndambuki or seek for transfer of the same to the Applicant.

8. The Respondent contended that Sections 45 and 55 of the Law of Succession Act prohibited any dealings of a deceased person's estate by persons who did not have grant of letters of administration. He therefore asserted that it would be *a nullity* to transfer property in the name of a deceased person without complying with the law of Succession Act Cap 160 of the Laws of Kenya.

9. On the issue as to whether the Defendant/Respondent was in contempt of the orders made on 17th October 2018, the Respondent submitted that for a court to find that there is contempt of court, there must be a wilful disobedience of court orders. He relied on the definition of contempt of court provided for in Black's Law Dictionary. He asserted that the partial compliance was as a result of a challenge which arose due to the fact that the 12-acre plot was registered in the name of the late Timothy Mutunga Ndambuki, which means that the property in issue vests in the administrators of the deceased's estate. They concluded that it was not within the Respondents power to transfer the 12-acre plot to the Applicant.

ANALYSIS AND DETERMINATION

10. I have carefully considered the application, the affidavit in support, the replying affidavit, as well as the parties' submissions. In my view, the issues that arise for determination are;

(i) Whether the Defendant is in contempt of this court's orders made on 17th October 2018; and

(ii) Whether the time within which the orders of 17th October 2018 should be complied with, ought to be fixed by this court.

11. Having perused the pleadings, I note that the Plaintiff in this matter vide her Plaint dated 20th November 2003 had sought for an order compelling the Defendant to register the Plaintiff as member number 16 of the Defendant Society and furnish the Land Registrar Machakos with the correct information in respect of land parcel number KONZA NORTH/BLOCK 1/87 to enable the Registrar to rectify the register to reflect the Plaintiff on behalf of the estate of the late John Kitonyi Muthama. The Defendant filed defence denying the Plaintiff's claim. On 26th July 2018, the parties signed a consent letter addressed to the Deputy Registrar of this court and filed in court on 30th August 2018. The consent terms were as follows;

“By consent share number 16 of the Defendant Society formerly in the name of Timothy Mutunga Ndambuki be registered in the name of Moses Mutisya Kitonyi and this suit be marked as settled with no order as to costs.”

12. On 17th October 2018, this court adopted the consent above as its orders. Now the Applicant states that the Respondent has failed to transfer all the plots in respect of share number 16 to the Plaintiff/Applicant; which to him constitutes contempt of court.

13. The Black's Law Dictionary 9th Edition defines contempt as;

“The act or state of despising; the conduct of being despised. Conduct that defies the authority or dignity of a court or legislature. Because such conduct interferes with the administration of justice.”

14. Therefore contempt is conduct that despises the authority of the court thereby detrimentally impacting on the fair and efficient administration of justice and the rule of law. While the application before court touches on contempt of court, it does not seek for punishment for contempt; rather it seeks for timelines within which the court orders of 17th October 2018 should be complied with.

15. Compliance with court orders is at the core of the rule of law and administration of justice. The contempt power is intrinsic within the jurisdictional authority of a court, so that a court without that power is not a court. See **Samuel M.N. Mweru & Others v. National Land Commission & 2 Others [2020] eKLR**. A court order is to be complied with and is binding on the party or persons against whom it is addressed, until or unless it is set aside.

16. In the South African case of **Burchell v. Burchell, Case No. 364/2005**, the Constitutional Court of South Africa underscored the significance of compliance with court orders in respect to the rule of law 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 or resolve civil disputes and may thus impact negatively on the rule of law.”

17. To prove contempt of court, an Applicant must establish four elements as follows;

(i)The terms of the order should be clear and unambiguous and be binding on the Defendant.

(ii)That the Defendant had knowledge of or proper notice of the terms of the order;

(iii)That the Defendant has acted in breach of the terms of the order; and

(iv) That the Defendant’s conduct was deliberate.

See **Frankel May Pollack Vinderine Inc. vs. Menell Jack Hyman Rosenberg & Co. Inc. [1996] ZASCA21;1996(3) SA 355.**

18. In the case of **Sheila Cassatt Issenberg & Another vs. Anthony Machatha Kinyanjui [2020] eKLR** the court cited with approval the decision of the Supreme Court of Canada in **Carey v. Laiken 2015 SCC 17(16th April 2015)**, that expounded on the elements of Civil contempt that must be established to the court’s satisfaction as follows;

(i) “The order alleged to have been breached “must state clearly and unequivocally what should and should not be done.” This ensures that a party will not be found in contempt where an order is unclear. An order may be found to be unclear if, for example, it is missing an essential detail about where, when or to whom it applies; if it incorporates overly broad language; or external circumstances have obscured its meaning.

(ii)The party alleged to have breached the order must have had actual knowledge of it. It may be possible to infer knowledge in the circumstances, or an alleged contemnor may attract liability on the basis of the wilful blindness doctrine.

(iii)The party alleged to be in breach must have intentionally done the act that the order prohibited or intentionally failed to do the act that the order compels.”

19. In the instant application, the order stated that share number 16 of the Defendant society be registered in the name of Moses Mutisya Kitonyi. There was no mention of how many plots constituted share number 16, and, whether the consent order meant that land already registered in the name of the late Timothy Mutunga Ndambuki ought to be transferred to the Plaintiff is not clear.

20. The Plaintiff/Applicant contends that the Defendant omitted to transfer a plot measuring 12 acres. The Defendant counters this argument by stating that the said 12 acres was already registered in the name of the late Timothy Mutunga Ndambuki and that the said property is occupied by the deceased’s relative, one Pius Matheku Katengu. This assertion has not been denied by the Applicant. If indeed, the property was at the time of the consent, registered in the name of the late Timothy Mutunga Ndambuki, then the consent touching on the said property ought to have involved his estate. The Defendant alleges that his hands are tied and what the Plaintiff seeks, is to force him to intermeddle with the deceased’s estate contrary to Section 45 of the Law of Succession Act, as he is not the Administrator of the estate of the late Timothy Mutunga Ndambuki. By excluding the estate of the late Timothy Mutunga Ndambuki, in these proceedings and entering into a consent that would have the effect of depriving the deceased’s estate of property registered in the name of the deceased, the parties in this matter were effectively condemning the estate of the deceased without according them an opportunity to be heard which is contrary to basic tenets of justice.

21. It is therefore, obvious that even if this court set timelines within which the plot measuring 12 acres in the name of the late Timothy Mutunga Ndambuki is to be transferred by the Defendant to the Plaintiff, it will be an order in futility; as the parties did not avail the legal mechanisms to actualize the consent to that extent. Indeed, it is not practicable for the Respondent to lawfully transfer land registered in the name of the late Timothy Mutunga Ndambuki.

22. In view of the foregoing, I am not satisfied that the Applicant has proved that the Respondent wilfully disobeyed the order of 17th October 2018. Therefore, the Notice of Motion dated 1st December 2020 has not met the conditions for grant of the orders sought. Consequently, I dismiss the application dated 1st December 2020 with no orders as to costs.

23. Orders accordingly.

SIGNED, DATED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 8TH DAY OF DECEMBER 2021.

A. NYUKURI

JUDGE