



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS**

**ELC. CASE NO. 73 OF 2018**

**MICHAEL WAMBUA MULWA.....1<sup>ST</sup> PLAINTIFF**

**ANDERSON MUIINDE MULWA.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**JOHN MULWA NZIOKI.....1<sup>ST</sup> DEFENDANT**

**JACKSON MUISYO MULWA.....2<sup>ND</sup> DEFENDANT**

**NICHOLAS MUTHAMA MULWA.....3<sup>RD</sup> DEFENDANT**

**BENARD MUTINDA MULWA.....4<sup>TH</sup> DEFENDANT**

**JOHNSON MBENZA MULWA.....5<sup>TH</sup> DEFENDANT**

**RULING**

1. In the Notice of Motion dated 27<sup>th</sup> May, 2019, the Plaintiffs are seeking for the committal of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants to civil jail for a period of six (6) months for disobeying the court orders of 7<sup>th</sup> May, 2018.
2. The Application is premised on the grounds that on 17<sup>th</sup> April, 2018, the court issued orders of injunction restraining the 1<sup>st</sup> Defendant from dealing with parcels of land known as Mavoko Town Block 3/62387, 62388, 62391, 62390, 62393 and 3558 (*the suit properties*).
3. According to the 1<sup>st</sup> Plaintiff, the court order was served upon the Defendants who promptly appointed the law firm of B.M. Mung'ata & Co. Advocates; that the order was also served upon the Defendants' advocates and that during the pendency of the court orders, the 1<sup>st</sup> Defendant transferred some of the suit properties while the 2<sup>nd</sup> Defendant had Mavoko Town Block 3/3558 sub-divided into several parcels of land into parcels number 75378-75880. According to the 1<sup>st</sup> Plaintiff, parcel number 75880 was then transferred to Cross-order Border Works Limited.
4. The 1<sup>st</sup> Plaintiff finally deponed that the sub-division of the suit property was done during the existence of the court orders and that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants were in contempt of the court orders and should be punished.
5. In his reply, the 1<sup>st</sup> Defendant deponed that they were served with the Application dated 16<sup>th</sup> April, 2018 together with the Plaint on 25<sup>th</sup> April, 2018; that as at the time of serving them with the Plaint and the Application, the Applicants did not serve them with any court order and that the Applicants extracted the court orders of 7<sup>th</sup> May, 2018 and served their advocates with the same on 11<sup>th</sup> May, 2018.
6. The 1<sup>st</sup> Defendant finally deponed that the process of transfers was initiated long before the Applicants filed the suit; that parcel of land number Mavoko Town Block 3/3207 was sub-divided and transferred to various purchasers on 27<sup>th</sup> November, 2017; that parcel number 3558 was transferred to Jackson Muisyo Mulwa on 17<sup>th</sup> October, 2017 and that the Application for injunction was dismissed on 31<sup>st</sup> January, 2019 effectively discharging the earlier orders of injunction.
7. In his submissions, the Plaintiffs' advocate submitted that the transfers and the sub-divisions of the suit property were done between the months of July, 2018 and October, 2018 in breach of the court orders which had been issued on 17<sup>th</sup> April, 2018.
8. The Defendants' advocate submitted that the Plaintiffs extracted the court orders on 7<sup>th</sup> May, 2018 and served the Defendants with the

same on 11<sup>th</sup> May, 2018; that the transfer of the suit property was initiated long before the Applicants filed the suit and that the Applicants' Application for injunctive orders was dismissed on 31<sup>st</sup> January, 2019 effectively discharging the earlier orders of injunction.

9. The record shows that on 17<sup>th</sup> April, 2018, the Plaintiffs filed an Application dated 16<sup>th</sup> April, 2018 seeking to restrain the Defendants from sub-dividing, selling, transferring or dealing in any matter with several parcels of land, including Mavoko Town Block 3/62387-62393; Mavoko Town Block 3/332, 408, 1194, 1224, 2936, 3557, 3558. The court granted to the Plaintiffs ex-parte interim orders of injunction for fourteen (14) days on 17<sup>th</sup> April, 2018. The record shows that the Defendants filed a Replying Affidavit on 9<sup>th</sup> May, 2018.

10. From the Supporting Affidavit, it is not clear when the order of 17<sup>th</sup> April, 2018 was first served on the Defendants or their advocates. However, the record shows that both the Plaintiffs and the Defendants' advocates were in court on 26<sup>th</sup> April, 2018, on which day the interim orders granted on 17<sup>th</sup> April, 2018 were extended until 3<sup>rd</sup> July, 2018.

11. On 3<sup>rd</sup> July, 2018, the interim orders of injunction were again extended until 26<sup>th</sup> July, 2018. Again on 26<sup>th</sup> July, 2018, the said orders were extended by the court until 31<sup>st</sup> January, 2019 when the Application for injunction was dismissed.

12. In the case of *Mutitika vs. Baharini Farm Limited, Nairobi Civil Appeal No. 24 of 1985*, the Court of Appeal held as follows:

***“A person who, knowing of an injunction or an order of stay, willfully does something, or causes others to do something to break the injunction or interfere with the stay is liable to be committed for contempt of court as such a person has by his conduct obstructed justice.”***

13. Indeed, all the Applicant has to show to succeed in an Application for contempt is the terms of the orders; knowledge of the terms by the Respondent, and failure by the Respondent to comply with the terms of the order. Upon proof of these requirements, the presence of willfulness and bad faith on the part of the Respondent would normally be inferred.

14. Indeed, personal service of an order is no longer a prerequisite before one can be found to have been in contempt of the order. All the Applicant has to show is that the Respondent, or his advocate was aware of the order and the contents thereof (*See Shimmers Plaza Limited vs. National Bank of Kenya Limited (2015) eKLR*).

15. As I have stated, the Defendants' advocate was aware of the injunctive orders of 17<sup>th</sup> April, 2018 on 26<sup>th</sup> April, 2018. This was the day the Defendants' advocate appeared in court on behalf of the Defendants for the hearing of the Plaintiffs' Application dated 16<sup>th</sup> April 2018. On the same day, and in the presence of the Defendants' advocate, the injunctive orders were extended. The said order remained in force until 31<sup>st</sup> January, 2019 when the Application for injunction was dismissed

16. The 1<sup>st</sup> Defendant has not denied that as at the time this suit was filed on 17<sup>th</sup> April, 2018, he was the registered proprietor of parcels of land number Mavoko Town Block 3/62387; 62388; 62391; 62390 and 62393 as indicated in the official searches annexed on the Plaintiffs' Affidavit. On the other hand, the 2<sup>nd</sup> Defendant was the owner of parcel of land number Mavoko Town Block 3/3558 at the time of the filing of the suit.

17. The Plaintiffs have exhibited official searches showing that on 4<sup>th</sup> July, 2018, parcel number Mavoko Town Block 3/62387 was transferred from the 1<sup>st</sup> Defendant to the County Housing Co-operative Society. The said County Housing Co-operative Society Limited sub-divided the said land into parcels of land numbers 75482-75560 on 14<sup>th</sup> November, 2018.

18. The Plaintiffs have exhibited a search showing that the 1<sup>st</sup> Defendant transferred parcel of land known as Mavoko Town Block 3/62388 to Gedion Musyoki Mutuku on 20<sup>th</sup> June, 2018. The Title Deed was then issued to Gideon Musyoki on 17<sup>th</sup> September, 2018.

19. On 20<sup>th</sup> June, 2018, the 1<sup>st</sup> Defendant transferred to Nicholas Muthama Mulwa parcel land number Mavoko Town Block 3/62391 and also transferred parcel number 62392 and 62393 to Johnson Mbenza Mulwa and Meshack Nzioki Muisyo respectively.

20. The official search exhibited by the Plaintiffs shows that on 13<sup>th</sup> September, 2018, the 2<sup>nd</sup> Defendant sub-divided parcel of land known as Mavoko Town Block 3/3558 into parcels of land numbers 75378-75880. The 2<sup>nd</sup> Defendant proceeded to transfer parcel number 75880 to Cross Border Works Limited on 8<sup>th</sup> October, 2018.

21. It is therefore obvious that between 20<sup>th</sup> June, 2018 and 8<sup>th</sup> October, 2018, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants sub-divided and transferred the suit properties during the pendency of the court order. Indeed, during this period, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants and their advocates were not only aware of the court order restraining them from transferring or sub-dividing the suit land, but had been served with the extracted court order. Indeed, this fact has been admitted by the 1<sup>st</sup> Defendant who deponed as follows:

***“7. That the Applicants extracted the court orders on 7<sup>th</sup> May, 2018 and served upon my advocates on 11<sup>th</sup> May, 2018”.***

22. Although the 1<sup>st</sup> Defendant deponed that the process of transfers was initiated long time before the Applicants moved to court, he has not produced the copies of the Sale Agreements and Transfers to prove that assertion. Having failed to show that the process of transferring the land commenced before the orders of this court were issued, or before they became aware of the orders, I find and hold that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants intentionally and contemptuously sub-divided and transferred the suit properties during the pendency of a valid court order.

23. It has been held by the courts that unless and until a court order is discharged, it ought to be obeyed. As was held by the Court of Appeal in **Central Bank of Kenya & Another vs. Raital Automobiles Limited & Others, Civil Application No. Nairobi 247 of 2006**, it is a fundamental tenet of the rule of law that court orders must be obeyed and it is not open to any person or persons to choose whether or not to comply with or to ignore such orders as directed to him or them by a court of law.

24. In the case of **Awadh vs. Marumbu (No. 2) No. 53 of 2001 (2004) KLR 458**, the court held that it is the duty of the court not to condone deliberate disobedience of its orders nor waiver from its responsibility to deal decisively and firmly with the approved contemnors.

25. Having considered the totality of the evidence before me, it is my finding that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants are in contempt of the orders of this court. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants should be punished for their contemptuous actions by this court. The Application dated 27<sup>th</sup> May, 2019 is therefore allowed in the following terms:

*a. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants are in contempt of the orders of this court of 17<sup>th</sup> April, 2018 and issued on 7<sup>th</sup> May, 2018.*

*b. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants to mitigate before a sentence is issued by the court.*

*c. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants to pay the costs of the Application.*

**DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 31<sup>ST</sup> DAY OF JANUARY, 2020.**

**O.A. ANGOTE**

**JUDGE**