



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT**

**AT MILIMANI**

**ELC CASE NO. 1225 OF 2013**

**KIFARU INVESTMENT LIMITED & 6 OTHERS.....DECREE HOLDERS**

**VERSUS**

**KIHINGO VILAGE**

**(WARIDI GARDENS LTD & ANOTHER.....JUDGEMENT DEBTOR**

**JAMES NDUNGU HITHENJI & 3 OTHERS.....CONTEMNORS**

**RULING**

**Background.**

1. This is a Ruling in respect of two applications which were filed by the Decree holders /Applicants. The first application is dated 8<sup>th</sup> July 2019 and the second application is dated 17<sup>th</sup> October 2019. The two applications seek similar orders most of which have been spent in that they were not granted ex-parte or have been overtaken by events. What remains to be addressed is whether the persons who are sought to be punished for being in contempt of court orders are guilty as alleged; whether the firm of Musyoka Wambua & Katiku Advocates should be barred from acting for the 2<sup>nd</sup> Judgement debtor /Respondent and whether the court should order the Officer Commanding Gigiri Police Station to provide security to FAPCL Group and to the residents of Kihingo village (Waridi Gardens) Estate on a 24 hour basis at their cost.

2. The Applicants had filed a suit against the Respondents in which they sought certain reliefs against the Respondents. The Respondents filed an application for stay of proceedings and reference of the dispute to arbitration. In a ruling delivered on 7<sup>th</sup> November 2014, Justice Gitumbi stayed the proceedings and referred the dispute to an arbitrator. A single arbitrator was appointed who published his award on 28<sup>th</sup> July 2016. The arbitral award was adopted as a judgement of the court on 6<sup>th</sup> February 2019. It is this entry of Judgement which triggered a series of applications which culminated in the two applications which are the subject of this ruling.

**Applicants' contention.**

3. The 1<sup>st</sup> and 2<sup>nd</sup> contemnors are directors of the 2<sup>nd</sup> Respondent. The 3<sup>rd</sup> contemnor is an IT technician who is in charge of the security of the Estate. He takes orders from the 1<sup>st</sup> and 2<sup>nd</sup> contemnors. The 4<sup>th</sup> contemnor is the head of security in the estate and takes orders from the 1<sup>st</sup> and 2<sup>nd</sup> contemnors.

4. The Applicants contend that the contemnors are guilty of breach of various court orders. The Applicants argue that on 2<sup>nd</sup> July 2019, Justice Komingoi ordered that the status quo be maintained until delivery of a pending ruling which was to be delivered on 26<sup>th</sup> September 2019. On 26<sup>th</sup> September 2019 when the ruling was delivered, the Judge ordered the Respondents not to interfere with the provision of services and utilities to the estate.

5. The Applicants argue that in breach of the Court orders, on 20<sup>th</sup> August 2019, the 1<sup>st</sup> contemnor without the authority of shareholders and newly appointed directors, appointed the 2<sup>nd</sup> contemnor as the managing director of the 2<sup>nd</sup> Respondent. On 14<sup>th</sup> October 2019 the 1<sup>st</sup> contemnor in the company of the 3<sup>rd</sup> and 4<sup>th</sup> contemnors invaded the club house and attempted to access the server room. On both occasions, the Applicants contend that the 1<sup>st</sup> contemnor brought in press people who misreported that the 1<sup>st</sup> contemnor had won the suit and that NTV reporters who accompanied him broadcasted the events thus infringing on the privacy of the occupants of the estate.

6. The Applicants also contend that on 16<sup>th</sup> October 2019, all the four contemnors in the company of hired goons invaded the club house, broke into the server room and changed all security codes and cut off internet services to the occupants of the estate. The hired goons also

assaulted Kshorkumar Dhanji Varsani. The hired goons have since been patrolling the estate posing a security threat to the residents. The Applicants allege that the hired goons have destroyed the club house and are behind stealing of water metres and that they play loud music which is annoying to the residents.

7. The Applicants also argue that as a result of interference with the server, all locks for house No. 47 cannot function as all locks are electronically controlled from the sever room. They also argue that a majority of the shareholders on 30<sup>th</sup> July 2019 signed a petition opposing, the firm of Musyoka Wambua & Katiku Advocates from acting for the 2<sup>nd</sup> Respondent. The shareholders had agreed to appoint FAPCL Group as an independent estate agent but this agent has not been allowed to carry out its duties and a call for assistance from the OCS Gigiri Police Station has gone unheeded.

8. The 3<sup>rd</sup> Applicant contends that he hired workers to carry out repairs on his house but the 1<sup>st</sup> and 4<sup>th</sup> contemnors chased them away. He was assaulted and this caused the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> contemnors being charged in criminal case No 1097 of 2019 for various charges.

#### **1<sup>st</sup> Respondent's Position.**

9. The 1<sup>st</sup> Respondent through its lawyers informed the court that it was not opposed to the two applications.

#### **2<sup>nd</sup> Respondent's contention**

10. The 2<sup>nd</sup> Respondent opposed the Applicants' application based on a replying affidavit sworn by Hon. James Ndung'u Gethenji on 1<sup>st</sup> November 2019. The 2<sup>nd</sup> Respondent contends that the application of 17<sup>th</sup> October 2019 is subjudice that of 8<sup>th</sup> July 2019 and that this offends section 6 of the Civil procedure Act and that the latter, Application should be stayed pending the hearing and determination of the former.

11. The 2<sup>nd</sup> Respondent further argues that if any orders were to be granted as prayed in the Applicants' application of 17<sup>th</sup> October 2019, they will be in direct conflict with the orders given on 4<sup>th</sup> December 2018 in **Nairobi High Court Petition No. E 105 of 2018**

( **Gitahi Gethanji & 3 Others Vs James Ndungu Gethanji & 4 Others** in which the High Court directed that the status quo regarding the directorship of the 2<sup>nd</sup> Respondent and the provision of utilities and services to its members prevail pending the hearing and determination of the petition. The 2<sup>nd</sup> Respondent therefore argues that if the directors of the 2<sup>nd</sup> Respondent who are the 1<sup>st</sup> and 2<sup>nd</sup> contemnors were to be kept out of the affairs of the 2<sup>nd</sup> Respondent, this will hamper the running of the 2<sup>nd</sup> Respondent.

12. The 2<sup>nd</sup> Respondent further argues that the status quo which was to be maintained in the Petition mentioned hereinabove is that it is the 2<sup>nd</sup> Respondent who were to provide services and utilities to the residents of the estate and that the applicants' plea that FAPCL be allowed to take over management of the estate would go against the order of 4<sup>th</sup> December 2018. The 2<sup>nd</sup> Respondent in support of this argument referred to Justice Komingoi's ruling of 26<sup>th</sup> September 2019 where the judge was alive to the orders in the petition as a result of which she declined to issue any orders which would have gone contrary to the orders issued in the petition.

13. On the issue of barring the firm of Musyoka Wambua & Katiku Advocates from representing the 2<sup>nd</sup> Respondent the 2<sup>nd</sup> Respondent contends that a petition signed by shareholders is not a recognized way of removing a law firm representing a company and that removal of a firm can only be done in accordance with the memorandum and Articles of a company and that in any case, the alleged petition removing the firm is not exhibited in the application.

14. On the issue of the appointment of FAPCL Group, the 2<sup>nd</sup> Respondent contends that this matter was settled in a ruling delivered on 26<sup>th</sup> September 2019 and to revisit the same issue is like this court sitting on appeal from a ruling of a judge of equal jurisdiction and that the issue is now res judicata .

#### **2<sup>nd</sup> Contemnor's contention.**

15. The 2<sup>nd</sup> contemnor opposed that Applicants' application based on a replying affidavit sworn on 4<sup>th</sup> November 2019. The 2<sup>nd</sup> contemnor contends that the Applicants' application is frivolous and constitutes an abuse of the process of the court. The 2<sup>nd</sup> contemnor argues that the Applicants are trying to get orders outside what the arbitrator granted and that in any case, the issues being raised have been decided by Justice Komingoi in a Ruling delivered on 26<sup>th</sup> September 2019. The 2<sup>nd</sup> contemnor refers to the orders granted in the petition which was before the High Court. He argues that the order of 4<sup>th</sup> December 2018 has never been set aside or appealed against.

#### **Analysis and issues for determination.**

16. I have carefully gone through the two applications as well as the submissions by counsel for the parties made during the oral hearing of the applications. Though there were no directions regarding filing of written submissions, I have also considered the written submissions filed on behalf of the Applicants. Mr Gikonyo for the 2<sup>nd</sup> Respondent had submitted that I do not consider the submissions filed on behalf of the applicants'. I have looked at the submissions which basically reiterate what is contained in the supporting affidavits of the Applicants and the grounds thereof. The rest contain authorities which the Applicants are relying on.

17. There is nothing which prevents a party from preparing written submission even when the application is going to be heard orally. Mr Gikonyo who was opposed to this approach himself refereed to decisions which he had not supplied to counsel and the court but later filed

copies of some of them without the order of the court but the court still went ahead to consider them. Where anything is going to assist the court in determination of the issues involved, a court cannot turn a blind eye to the same unless it will prejudice another party which is not the case here.

18. In paragraph (1) hereinabove, I set out what remains to be determined in the two applications. Some issues will flow from those aspects but before I deal with them, I will first deal with the issue of whether the application dated 17<sup>th</sup> October 2019 is subjudice that of the one dated 8<sup>th</sup> July 2019 . Mr Gikonyo argued that the application dated 17<sup>th</sup> October 2019 is subjudice and ought to be stayed pending the hearing and determination of the one of the 8<sup>th</sup> July 2019. In support of his argument, he relied on Section 6 of the Civil Procedure Act which provides as follows:-

***“No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed”.***

19. Section 6 of the Civil Procedure Act with suits which are filed separately in respect of the same subject matter. In the instant case, the Applicants had filed the application on 8<sup>th</sup> July 2019 from which they were granted ex-parte orders. When the ex-parte orders were set aside following an application by the 2<sup>nd</sup> Respondent, the present application was filed which had expanded prayers. One of the prayers was that the current application be heard together with the early one. There is therefore nothing subjudice in the current application and the case of **Susan Nyambura Mwachu Vs Duncan Kiria Kabete ( 2019 ) eKLR which was relied upon by Mr Gikonyo** is irrelevant.

20. The next issue to be determined is whether the two applications are res judicata. I have looked at the two applications vis-a vis the one dated 23<sup>rd</sup> May 2019 which resulted in the ruling of 26<sup>th</sup> September 2019. Other than the prayer seeking to bar the firm of Musyoka Wambua & Co. Advocates from acting for the 2<sup>nd</sup> Respondent, the rest of the prayers were the subject of the application of 23<sup>rd</sup> May 2019. A decision was made rejecting the appointment of FAPLC Group as managing agents of the estate. The Judge declined the appointment of FAPCL Group because there were orders issued on 4<sup>th</sup> December 2018 preserving the status quo of the directorship of the 2<sup>nd</sup> Respondent in as far as the issue of provision of services and utilities was concerned. This is the same reason given for the judge refusing to have the 1<sup>st</sup> and 2<sup>nd</sup> contemnors punished for contempt.

21. The Applicants in the current application have added the 3<sup>rd</sup> and 4<sup>th</sup> contemnors in their fresh bid to cite the contemnors for contempt. The 3<sup>rd</sup> and 4<sup>th</sup> contemnors are working or were working under the directions of the 1<sup>st</sup> and 2<sup>nd</sup> contemnors. The mere fact that the two were not in the application of 23<sup>rd</sup> May 2019 cannot save the applications from being res judicata. I therefore find that save for the prayer for removal of the firm of Musyoka Wambua & Katiku Advocates; the two applications are res judicata.

22. Mr Allen Gichumbi tried to argue that he had come to court over fresh acts of contempt which had been committed by the contemnors subsequent to the ruling of 26<sup>th</sup> September 2019. This argument is without merit. The position which obtained as from 4<sup>th</sup> December 2018 continued until petition No. E 105 of 2018 was withdrawn on 14<sup>th</sup> November 2019. It is therefore clear that the contempt which is alleged to have been committed before the 14<sup>th</sup> November 2019 had been determined by the ruling of 26<sup>th</sup> September 2019.

23. Having found that the two applications save for prayer which I shall shortly address, are res judicata, it will be superfluous to address myself on whether or not the contemnors are guilty of contempt.

24. The Applicants want the firm of Musyoka Wambua & Katiku barred from representing the 2<sup>nd</sup> Respondent. The Applicants argue that majority of shareholders signed a petition seeking to bar the firm from representing the 2<sup>nd</sup> Respondent. This Petition was not annexed to any of the two applications. Besides this, the Memorandum and Articles of Association of the 2<sup>nd</sup> Respondent do not provide for removal of a law firm vide a petition. There is therefore no basis upon which this court can make an order for removal of the firm of Musyoka Wambua & Katiku . In the case of **Nicholas Mahihu Vs Barclays Bank of Kenya Limited (2018) eKLR**, the Court of Appeal held that a company not being a Physical person can only make its decisions by resolution of its members in general meetings which are then conveyed through its directors and officials.

25. It is therefore clear that there being no resolution removing the firm of Musyoka Wambua & Katiku from representing the 2<sup>nd</sup> Respondent, this Court cannot base its orders on signed petitions which are not even placed before the court.

26. Before I wind up this ruling, there is a prayer which sought provision of security to FAPCL and the residents of the estate on a 24 hour basis at their cost. The order was meant to be directed to the OCS Gigiri Police Station. As I understood this prayer, it was meant to be granted before inter-partes hearing. However if this not be the case, I will simply say that a court cannot order the National Police to provide security to private citizens. If for any reason, a person feels that he requires security which he is ready to pay for, then he or she can approach the relevant police officers for that arrangement but not for courts to give such kind of orders.

### **Conclusion.**

27. In conclusion, I find that the Applicants' application lacks merit. The issues being raised herein will mainly be addressed through the High Court's Commercial, Admiralty and Tax Division. I proceed to dismiss the Applicants' application with costs to the 2<sup>nd</sup> Respondent and the contemnors.

It is so ordered

Dated, Signed and delivered at **Nairobi** on this *13<sup>th</sup> day of February 2020*.

**E.O.OBAGA**

**JUDGE**

In the Presence of:-

Mr Kabugu for decree holders, Mr Gikonyo for Mr Katiku for Judgement debtors and Mr Ooro for Mr Otieno for Chacha Mabanga.

Court Assistant: Hilda

**E.O.OBAGA**

**JUDGE**