



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

HCCC NO. 517 OF 2014

LUCY NUIGARI NGIGI & 264 OTHERS.....PLAINTIFF

VERSUS

NATIONAL BANK OF KENYA LIMITED.....1ST DEFENDANT

PCEA RUIRU PARISH DEVELOPMENT

FOUNDATION.....2ND DEFENDANT

RULING

1. Mary Gladys Njeri Warui (the 64th Plaintiff) and Caroline Warui (the 116th Plaintiff) allege that the Officials of the PCEA Ruiru Parish Development Foundation (the 2nd Defendant) have disobeyed the Court order of 2nd November 2016. The two have moved Court through a Notice of Motion dated 17th August 2018 for the following orders:-

1. *Spent*

2. *Spent.*

3. THAT the Honourable Court be pleased to find the 2nd Defendant, PCEA Ruiru Parish Development Foundation in contempt of the order of Honourable Justice F. Gikonyo in the High Court of Kenya in Civil suit No. 517 of 2014.

4. THAT the Honourable Court be pleased to issue orders for committal to civil jail of the 2nd Defendants officials for such terms as this Court may deem fit unless they purge their contempt by honouring this Court's order given on 2nd November, 2016.

5. THAT the costs of this application be borne by the 2nd Defendant.

2. The Court Order of 2nd November 2016 was through a consent in the following terms:-

“That it is hereby agreed by consent of the parties to this suit that the order of the Honourable Court given on 13th May 2015 be and is hereby varied in the following terms:-

1. *That the 2nd Defendant shall avail to the surveyor, Charles Gathogo of Geosury Systems Limited, an approved sub-division plan and original Deed Plans for the individual plots on the suit property within seven (7) days of the date of this Consent. The Surveyor shall not release the said documents to any person and/or party without the express consent of the 1st Defendant save as provided herein under;*

2. *The Surveyor shall on receipt of the approved sub-division plan and original Deed plans from the 2nd Defendant, and under the supervision of the 1st Defendant, process the individual title deeds for each plot bearing a Deed plan. The 2nd Defendant shall bear all the costs arising from and incidental to the processing of the individual titles;*

3. *All titles belonging to plots claimed by the Plaintiffs named in the Further Amended Plaint dated 12th May 2016 shall be released to the said Plaintiffs and/or the said Plaintiff's Advocates subject to confirmation that the said Plaintiffs have fully paid the purchase*

price together with the processing fee as agreed upon with the 2nd Defendant in the Plaintiff's respective Agreements of sale;

4. The title deeds belonging to any Plaintiff who has arrears with respect to the purchase price together with other costs as agreed upon between the Plaintiff and the 2nd Defendant shall be released to them on payment of the balance to the 2nd Defendant.

5. The 1st Defendant shall recover the loan debt and incidental costs owed to it by the 2nd Defendant as provided for in the Consent filed in Nairobi HCCC 559 of 2014; PCEA Ruiru Parish Development Foundation – vs- National Bank of Kenya Limited in that regard;

6. Save as provided in paragraph (5) above, each party in these proceedings shall bear their own costs;

and

7. The matter be mentioned in 90 days to confirm progress and for further orders”.

3. Mary and Caroline each purchased one plot from the 2nd Defendant. These are parcel numbers 243 and 361 respectively. Their complaint is that in spite of paying all the fees required to process titles to the said land parcels of land, the 2nd Defendant has failed to release their titles insisting that they each pay Khs.100,000 as contribution for the construction of a perimeter wall.

4. The 2nd Defendant's defence to the allegation is that in a meeting of 14th September 2013 members agreed to the contribution for construction of a perimeter wall. This Court is shown a Notice of a Special Resolution of that day duly lodged with the Registrar of Companies. It reads:-

NOTICE OF SPECIAL/ORDINARY RESOLUTION REQUIRED BY COMPANIES ACT TO BE LODGED WITH REGISTRAR

(Companies Act, 2015)

To the Registrar of Companies This notice is lodged in respect of the: PCEA RUIRU PARISH DEVELOPMENT FOUNDATION, CPR/2010/22456

[Insert here the name and number of the company concerned]

At a duly convened general meeting of the company held on 14th September 2013, the meeting passed a special/ordinary resolution a copy of which is required by the companies Act, 2015, to be lodged with the Registrar of Companies. Details of the resolution are as follows:-

Date and place of meeting at which resolution was passed	Copy or contents of the resolution
14 th September 2013 At Ruiru Township/222	<u>That all the purchasers of sub-divisions in L.R. No.248/IV will contribute a sum of Kshs.100,000/= towards fencing of the entire property and a further sum of Kshs.85,000/= towards the processing of their titles.</u>

The resolution is authenticated by:-

Signed

[Director/secretary of the company]

Lodge on behalf of the company by;

Wahito & Co. Advocates

Address of person lodging copy of resolution;

Embassy House, 1st Floor

P.O Box 837-00100

NAIROBI

Date of lodgment; 29.8.18 (my emphasis)

5. A visitors' book is produced by the 2nd Defendant to prove that Caroline attended that meeting. It is further alleged that she did so on her own behalf and on behalf of Mary. The two have not denied this.

6. Whether or not the application succeeds will turn on whether the consent order contemplated that costs other than fees to process the titles needed to be paid by members before the 2nd Defendant release the titles. The 2nd Defendant points to order 4 of the orders of 2nd November 2016 which reads:-

“4. That the title deeds belonging to any Plaintiff who has arrears with respect to the purchase price together with other costs as agreed upon between the Plaintiff and the 2nd Defendant shall be released to them on payment of the balance to the 2nd Defendant”.
(my emphasis)

7. Order 4 does not specify the nature of costs to be paid but this Court has to find that the 2nd Defendant may have a plausible argument in insisting on the payment of the contribution towards the perimeter wall as members had resolved in that regard. The degree of proof in Civil contempt is higher than a balance of probabilities, almost that of beyond reasonable doubt (see Mutikika vs. Baharini Farm Ltd [1985] KLR 227). Given that order 4 of the Consent order can be given different interpretations, I do not find it to be unequivocal that the costs of the wall were not part of the costs agreed by the parties.

8. The Court takes the view that instead of dealing with the matter as a contempt of Court issue, the two applicants need to present the question of the impugned charges/costs as a matter to be determined substantively by Court.

9. The Notice of motion of 11th August 2018 is hereby is dismissed with costs.

Dated, Signed and Delivered in Court at Nairobi this 5th day of April, 2019.

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F. TUIYOTT

JUDGE

PRESENT:

Ndummo h/b Wahito for 2nd Defendant

N/a for 64th -116th for Defendants

N/a for other parties

Nixon - Court Assistant