



**REPUBLIC OF KENYA**

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

**CASE No. 189 OF 2012**

**WISEMAN TUMBO NGIGI..... PLAINTIFF**

**VERSUS**

**JACKLINE SIGEI .....DEFENDANT**

**RULING**

1. Proceedings herein commenced through plaint filed on 4<sup>th</sup> June 2009 by the plaintiff Wiseman Tumbo Ngigi against his wife Jackline Sigiei. The dispute revolves around the parcel of land known as Njoro/Ngata Block 8/257 (Karuiru) which he averred that they jointly purchased and built a matrimonial home on. Among other reliefs, he sought a declaration that the defendant holds the said property in trust for both herself and himself. In her defence filed on 12<sup>th</sup> June 2009, the defendant admitted the marriage. She added that she single-handedly bought the property and urged the court to dismiss the suit.

2. By Notice of Motion dated 8<sup>th</sup> March 2019, the plaintiff seeks the following orders:

1. Spent

2. Spent

3. *That this honourable court be pleased to declare as null and void any dealings by way of sale or disposition of suit land number Njoro/Ngata Block 8/257 (Karuiru) done at the instance or at the behest of the defendant/respondent.*

4. *That this honourable court be pleased to hold and find that pursuant to the consent order dated 28<sup>th</sup> March, 2017 the suit parcel of land known as Njoro/Ngata Block 8/257 (Karuiru) can only be sold or disposed off with the participation and consensus of both the plaintiff and defendant.*

5. *That this honourable court be pleased to hold and find that the defendant herein Jackline Sigiei is in contempt of the court orders issued on 4<sup>th</sup> June, 2009 by the Honourable Justice Maraga and the subsequent injunction orders issued by Honourable Justice Ouko.*

6. *That this honourable court be pleased to hold and find that the defendant herein Jackline Sigiei is in contempt of the court orders issued on 28<sup>th</sup> March, 2017 by this honourable court.*

7. *That this honourable court be pleased to commit the defendant Jackline Sigiei to jail for a period of not less than 6 months for contempt of court and in addition order her to pay a fine of KShs 200,000.00 for contempt of court.*

8. *That this honourable court be pleased to issue such further directions as may be necessary to give to effect to the orders dated 28<sup>th</sup> March, 2017.*

9. *That the costs hereof be borne by the defendant.*

3. The application is supported by an affidavit sworn by the plaintiff/applicant. He deposed that the defendant has sold the suit property in total disobedience of the orders made by the court on 4<sup>th</sup> June 2009 and 28<sup>th</sup> March 2017. He therefore urges the court to grant the orders sought.

4. The defendant opposed the application through her replying affidavit in which she deposed that after the consent orders of 28<sup>th</sup> March 2017, the applicant sent her a text message stating: "Hi, how do we proceed now that we have done valuation. Already potential buyers are making offers. My valuation is btwn 1.6 and 2.1 M. Suggest how we move forward. Thks". That they later talked on phone and the applicant

asked her to sell the property and deduct money that will cover the value of her property left in the matrimonial home. She added that there was an ongoing divorce case between them at that point and the applicant made certain demands and further deployed people to scare away potential buyers. That as a result the property was devalued and on realizing that the applicant did not mind her welfare and was only keen on subjecting her to further mental anguish she looked for a buyer and managed to sell the property at Kshs 1,250,000. That after the sale she deducted her expenses and availed the applicant his share. She further deposed that the property has since been registered in the name of the purchaser.

5. The applicant responded through a supplementary affidavit in which he denied being in touch with the respondent after the consent of 28<sup>th</sup> March 2017 was recorded other than on the 28<sup>th</sup> March 2017 when they spoke and they agreed that both of them would inform their advocates of any developments such as potential serious buyers.

6. A consent order was made that the application be canvassed through written submissions. The applicant duly filed submissions but the respondent did not file any. I have carefully considered the application, affidavits and the submissions. The applicant concedes that the property was sold. In fact, that is the very basis of his application. I note that he has not denied the respondent's contention that the property has since been transferred to the buyer. The respondent annexed a copy of a certificate of search as at 1<sup>st</sup> July 2019 which shows that the property is now registered in the name of Joseph Kipchumba Kipkiyoi. Consequently, although the applicant has strongly argued that the orders be granted, prayers 3 and 4 of the application cannot issue since they affect the new registered proprietor who is not a party to the suit. Besides, the declaratory orders sought in prayer 3 are final in nature and I find no basis to award them in an application such as the present one.

7. Regarding prayers 5 to 7 which deal with contempt of court, I note that on 4<sup>th</sup> June 2009 Maraga J (as he then was) granted an interim injunction restraining the respondent from selling, charging, alienating, disposing of, leasing or in any other way interfering with the suit property without the approval and consent of the plaintiff/applicant. Following an inter parte hearing, the orders were confirmed by Ouko J (as he then was) on 12<sup>th</sup> November 2009. The record further shows that on 28<sup>th</sup> March 2017, parties through their advocates recorded an oral consent upon which orders were issued as follows:

***“By consent each of the parties to appoint an independent valuer to do a valuation of the property known as Njoro/Ngata Block8/257 (Karuiru).***

***After the said valuation and agreement thereof, the said property be disposed of and the proceeds thereof to be banked in a joint account in the names of the parties' advocates.***

***The proceeds thereof to be shared equally between the plaintiff and the defendant (at the ratio 50% to 50%)”***

8. The matter was then set for mention on 26<sup>th</sup> April 2017 when parties informed the court that they had agreed on valuation and that there were other aspects that they were yet to agree on. What followed was the present application.

9. In **Micheal Sistu Mwaura Kamau v Director of Public Prosecutions & 4 others [2018] eKLR**, the Court of Appeal stated as follows as regards the test for establishing contempt of court:

***... It is trite that to commit a person for contempt of court, the court must be satisfied that he has willfully and deliberately disobeyed a court order that he was aware of. That is made absolutely clear by section 4 of the Contempt of Court Act and the ruling of the Supreme Court in Republic v. Ahmad Abolfathi Mohammed & Another ... Secondly, as this Court emphasized in Jihan Freighters Ltd v. Hardware & General Stores Ltd and in A.B. & Another v. R. B. [2016] eKLR, to sustain committal for contempt of court, 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. Lastly, the standard of proof in committal proceedings is higher than proof on a balance of probabilities, though not as high as proof beyond reasonable doubt. (See Mutiika v. Baharini Farm ... and Republic v. Ahmad Abolfathi Mohammed & Another ...***

10. The import and tenor of the consent order made on 28<sup>th</sup> March 2017 were clear enough and left no doubt on what the parties were to do or not to do. The orders were made in the presence of and with the full approval parties advocates and had the effect of supplanting the earlier orders of 12<sup>th</sup> November 2009. Still, it remained clear that the suit property could only be sold after valuation and agreement on the valuation. The proceeds of the sale were to be banked in a joint account in the names of the parties' advocates after which it would be shared equally between the plaintiff and the defendant.

11. In view of the update given to the court by the parties on 26<sup>th</sup> April 2017, I accept that there was some agreement on valuation. The sale price of KShs 1,250,000 is not a major departure from the figures mentioned in the text message that the applicant is said to have sent to the respondent, bearing in mind that each side was to have their own valuation. However, all other aspects of the consent order were yet to be complied with. From the contents of the replying affidavit, there is no dispute that the respondent sold the suit property unilaterally, did not bank the proceeds of the sale in any joint account and did not avail 50% of the proceeds to the applicant as was ordered.

12. Court orders, even if by consent, are not issued in vain. They are binding and must be obeyed unless varied by the court on the basis of an application or further consent. The Court of Appeal recently rendered itself in **Fred Matiang'i the Cabinet Secretary, Ministry of Interior and Co-ordination of National Government v Miguna Miguna & 4 others [2018] eKLR** as follows:

***When courts issue orders, they do so not as suggestions or pleas to the persons at whom they are directed. Court orders issue ex cathedra, are compulsive, peremptory and expressly binding. It is not for any party; be he high or low, weak or mighty and quite regardless of his status or standing in society, to decide whether or not to obey; to choose which to obey and which to ignore or to***

*negotiate the manner of his compliance. ...*

13. Assuming that the respondent faced any frustrations or had difficulties complying with the order as she alleges, the only acceptable recourse would have been to approach the applicant's advocates through her advocates for variation of the orders and in the event of any non-cooperation from the advocates, to move the court. I have not seen any such efforts. She also appears to have attempted to make some deductions from the proceeds of the sale contrary to the consent. I find that her actions were deliberate and in open and flagrant violation of the order of 28<sup>th</sup> March 2017. She is in contempt of court. Nevertheless, I take note that the parties have been married and have been going through divorce proceedings. I will therefore make orders to punish for the contempt and also to facilitate compliance, with a view to minimising the sticking points between the parties.

14. In the result, I make the following orders:

- a) The defendant to remit to the plaintiffs advocates on record the sum of KShs 625,000 (six hundred twenty five thousand), being 50% of the proceeds of the sale, within 21 (twenty one) days from the date of delivery of this ruling.**
- b) The defendant shall pay to the court a fine of KShs 50,000 (fifty thousand) within 21 (twenty one) days from the date of delivery of this ruling.**
- c) In default of compliance with both a) and b) above, the defendant shall be arrested and be committed to civil jail for a period of two (2) months.**
- d) Costs of the application are awarded to the plaintiff.**

15. This ruling is delivered remotely through video conference and e-mail pursuant to the Honourable Chief Justice's "Practice Directions for the Protection of Judges, Judicial Officers, Judiciary Staff, other Court Users and the General Public from the Risks Associated with the Global Corona Virus Pandemic" (Gazette Notice No. 3137 published in the Kenya Gazette Vol. CXXII—No. 67 of 17<sup>th</sup> April, 2020).

**Dated, signed and delivered at Nakuru this 14<sup>th</sup> day of May 2020.**

**D. O. OHUNGO**

**JUDGE**