



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KAJIADO**

**ELC CASE NO 447 OF 2017**

**(Formerly Machakos ELC No. 117 of 2015)**

**NICHOLAS LETOYA LESHINKA.....PLAINTIFF**

**VERSUS**

**ROSE NJAMBI NYAGA.....1<sup>ST</sup> DEFENDANT**

**THE REGISTRAR OF LANDS KAJIADO.....2<sup>ND</sup> DEFENDANT**

**RULING**

What is before me for determination is the Plaintiff's Notice of Motion application dated the 28<sup>th</sup> June, 2019 brought pursuant to Order 40 Rule 3 of the Civil Procedure Rules, Section 5 of the Judicature Act, Article 159 (2) (d) of the Constitution and Rules of the Supreme Court of England. The Applicant seeks the 1<sup>st</sup> Defendant ROSE NJAMBI NYAGA NYANDORO to be committed to civil jail for contempt for disobeying this Court's Order dated the 23<sup>rd</sup> April, 2015. The Application is premised on the summarized grounds that the 1<sup>st</sup> Defendant being aware of the Court's order prohibiting/ injuncting dealing in the suit premises, namely Kajiado/ Oloolotikoshi/ Kitengela/ 89 has transferred the same to an entity known as Relief Organization of East Africa in defiance to the said Court Order.

The Application is supported by the affidavit of NICHOLAS LETOYA LESHINKA the Plaintiff herein where he deposes that he instituted this suit seeking injunctive reliefs against the 1st Defendant. He explains that by an application dated the 14<sup>th</sup> April, 2015 he sought for restraining orders against the 1<sup>st</sup> Defendant from alienating, transferring, entering into, building thereon or interfering with the peaceful enjoyment of land known as Kajiado/ Oloolotikoshi/ Kitengela/ 89 hereinafter referred to as the 'suit premises', pending the determination of the application. He contends that on 23<sup>rd</sup> April, 2015, this Honourable Court granted an order which is marked as annexure 'NL1' in the supporting affidavit. He claims the Order dated the 23<sup>rd</sup> April, 2015, together with the Notice of Motion and the Complaint were served upon the 1<sup>st</sup> Defendant. Further, that the 1<sup>st</sup> Defendant was well aware of the order as she instructed her advocates after service who then filed a Notice of Appointment of Advocate in Court. He avers that the 1<sup>st</sup> Defendant's advocate was in court on 8<sup>th</sup> April, 2016 when Justice Okongo reiterated that the injunction order remained in force until the hearing of the application. He states that the 1<sup>st</sup> Defendant in complete and utter disregard of the Court Order and Notice of Penal Consequences caused the suit premises to be transferred to an entity known as Relief Organization of East Africa on 17<sup>th</sup> March, 2016. He reiterates that the actions of the 1<sup>st</sup> Defendant are contemptuous of the Court Order and cannot remain un – remedied.

The 1<sup>st</sup> Defendant opposed the application and filed a replying affidavit sworn by ROSE NJAMBI where she deposes that the said application is frivolous, conceals material fact and is an abuse of the court process looking at the facts regarding the ownership of the suit premises. She explains that the Plaintiff filed a suit sometime in 2015 claiming to have purchased the suit premises from one Kimani Gecau through a Sale Agreement dated the 5<sup>th</sup> March, 1996 and obtained a purported title deed on 6<sup>th</sup> August, 2014. Further, after obtaining the said Title Deed, the Plaintiff proceeded to institute the instant suit seeking various reliefs against her. She denies knowledge of the proceedings herein and avers that she only came to learn of the Order dated the 23<sup>rd</sup> April, 2015 on 20<sup>th</sup> July, 2019. She denies ever instructing the firm of messrs Kivuva Omuga & Company Advocates to act for her in this matter. Further, that the said firm has never communicated with her. She contends that there existed a Charge over the suit premises, with Rural Urban Credit Finance Limited from 10<sup>th</sup> July, 1984. Further, that she purchased the suit premises through a public auction in 1995 conducted by the then Rural Urban Credit Finance Limited. She is aware that one Njeri Gechau had instituted a suit known as HCC 2175 of 1995 and obtained orders prohibiting the transfer of the suit premises in her name. She insists neither the original owner of the suit premises Kimani Gecau nor his Attorney Njeri Gechau had any powers to enter into a Sale Agreement with the Plaintiff on 5<sup>th</sup> March, 1996 and if that was so, then the said Sale Agreement was illegal as it could not bestow proprietary interest in favour of the Plaintiff. She further confirms that HCC 2175 of 1995 was concluded in 2014 in favour of Rural Urban Credit Finance Limited and a transfer by Chargee in exercise of power of sale was duly signed by the Official Receiver of Rural Urban Credit Finance Limited in her favour on 28<sup>th</sup> January, 2015. She further states that on 24<sup>th</sup> July, 2006 through fraudulent means and fake

documents, a person filed an illegal Raising Order with the Lands Registry purporting to cancel the Order of the Court registered on 13<sup>th</sup> July, 1995 regarding HCC 2175 of 1996 as entry number 7 of the Green Card in respect to the suit premises. She reiterates that on 29<sup>th</sup> August, 1996, the fraudster proceeded to make an illegal and an unlawful entry transferring the suit premises to the Plaintiff. Further, that the Plaintiff in order to conceal the illegal entries in No. 7 and 8 of the Green Card purported to close the Green Card, subdivide the suit premises into Kajjado/ Oloolotikoshi/ Kitengela/ 17158 – 74173 and this was done through entry Number 10 dated 6<sup>th</sup> August, 2014. She further claims that upon investigation by the Director of Criminal Investigations on how entries Numbers 7, 8, 9 and 10 of the Green Card were endorsed concluded that the said entries were fraudulent and the 2<sup>nd</sup> Defendant proceeded to cancel entry No. 11. She further reiterates that as at 13<sup>th</sup> January, 2015 the Plaintiff did not have proprietary rights over the suit premises or the resultant subdivisions as she was the registered owner from 28<sup>th</sup> January, 2015. Further, that the Order dated the 23<sup>rd</sup> April, 2015 in which the Plaintiff seeks to cite her for contempt was obtained through misrepresentation and an abuse of the court process. She insists the Plaintiff has never served her with the Order dated the 23<sup>rd</sup> April, 2015 nor the same brought to her attention. Further, that if indeed the Plaintiff had a genuine claim, he should have registered the said Order against the Green Card. She avers that there is no justifiable reason why she should be cited for contempt and committed to civil jail.

The Plaintiff and the 1<sup>st</sup> Defendant filed their respective submissions that I have considered.

### **Analysis and Determination**

Upon consideration of the Notice of Motion application dated 28<sup>th</sup> June 2019 including the respective affidavits as well as the submissions filed herein, the only issue for determination is whether the 1<sup>st</sup> Defendant should be cited for contempt of the Order of the Court issued on 23<sup>rd</sup> April, 2015 and committed to civil jail.

The Plaintiff submitted that the 1<sup>st</sup> Defendant should be cited for contempt and committed to civil jail. He contended that the 1<sup>st</sup> Defendant was indeed served with the Order of the Court and since she had an advocate on record, she was well aware of the said Order. He relied on the case of **Nairobi HCCC No 551 of 2009 Kenya Anti Corruption Commission V Gemini Properties Limited & 3 Others** to support his arguments.

The 1<sup>st</sup> Defendant submitted that she was never served with Court Order and further the said Order was obtained by concealing material facts. She relied on the cases of **Akber Abdullah Kassam Esmil V Equip Agencies Ltd & 4 others; Sam Nyaweya & 3 others V Kenya Premier League Limited & 2 others (2015) eKLR; and Shimmers Plaza Ltd V NBK (2015) eKLR** to oppose the instant application.

Black's Law Dictionary (Ninth Edition) defines contempt of court as:- ***“Conduct that defies the authority or dignity of a court. Because such conduct interferes with the administration of justice, it is punishable usually by fine or imprisonment.”***

While section 29 of the Environment and Land Court Act stipulates that: ***‘ Any person who refuses, fails or neglects to obey an order or direction of the Court given under this Act, commits an offence, and shall, on conviction, be liable to a fine not exceeding twenty million shillings or to imprisonment for a term not exceeding two years, or to both***

In the case of **North Tetu Farmers Co. Ltd v. Joseph Nderitu Wanjohi (2016) eKLR** where Justice Mativo stated that: **‘ writing on proving the elements of civil contempt, learned authors of the book Contempt in Modern New Zealand have authoritatively stated as follows:-**

**‘ there are essentially four elements that must be proved to make the case for civil contempt. The applicant must prove to the required standard (in civil contempt cases which is higher than civil cases - (a) the terms of the order (or injunction or undertaking) were clear and unambiguous and were binding on the defendant; (b) the defendant had knowledge of or proper notice of the terms of the order; (c) the defendant has acted in breach of the terms of the order; and (d) the defendant's conduct was deliberate.’**

In the instant case, the 1<sup>st</sup> Defendant denied being served with the Court Order in question. She further denied that she ever instructed the lawyer on record to represent her. I note the Court Order was obtained ex parte and there is no indication whether the application was ever heard inter partes. On a keen perusal of the affidavit of service, I note there was no personal service upon the 1<sup>st</sup> Defendant but the said Notice of Motion and Court Order were left with her son who refused to sign. I further note as per the Court Record, interim orders herein were last extended on the 29<sup>th</sup> August, 2018 by Justice Angote. contrary to the Applicant's averments. Further, there is no indication that Justice Okongo confirms that the interim orders would remain in place until the application for injunction was heard inter partes. From the proceedings thereafter, the Applicant never sought for extension of the same, which in essence means they had lapsed. In the case of **Augustine Marete Rukunga vs. Agnes Njeri Ndungire & Anor, HCCC 2160** the court held that:

**“The consequence of a finding of contempt is penal. The standard of proof is beyond reasonable doubt. The applicant therefore had to prove service beyond reasonable doubt and I must be satisfied that the respondents disobeyed the court order made on the 9th December 1998 and that they did so willfully or intentionally”**

Further in the case of **Shimmers Plaza Limited Vs. National Bank of Kenya Ltd (2015) eKLR** where the court held as follows: **‘the notice of the order is satisfied if the person or his agent can be said to either have been present when the order was given or made; or was notified of its terms by telephone, email or otherwise. In our view, ‘otherwise’ would mean any other action that can be proved to have facilitated the person having come into knowledge of the terms of the judgement and/or order. This would definitely include a situation where a person is represented in court by counsel. Once the Applicant has proved notice, the Respondent bears an evidential burden in relation to wilfulness and mala fides disobedience.’**

In associating myself with the decisions cited above, I am of the view that the Applicant has not proved that the 1<sup>st</sup> Defendant was indeed served with the Court Order dated the 23<sup>rd</sup> April, 2015 that she is purported to have disobeyed. The Applicant has failed to demonstrate that the 1<sup>st</sup> Defendant had knowledge of the Court Order and deliberately disobeyed it. Further, from the 1<sup>st</sup> Defendant's averments which were not controverted, it is clear that there is a dispute in respect to ownership of the suit land and this can only be determined once the matter has been set down for hearing.

It is against the foregoing that I find the application dated 28<sup>th</sup> June, 2019 unmerited and will disallow it.

Costs will be in the cause.

**Dated, Signed and Delivered via email this 11<sup>th</sup> Day of May, 2020**

**CHRISTINE OCHIENG**

**JUDGE**