



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC SUIT NO. 512 OF 2005

NKUGWE INVESTMENTS LIMITED.....PLAINTIFF/APPLICANT

VERSUS

JANE NJERI WANJIRU KIHARA

JOHN WAIGANJO KIHARA

VICTOR NJUGUNA KIHARA

KENNETH WAIGANJO KIHARA (sued on their own behalf and on behalf of the

Estate of the late Paul Samuel Kihara.....FIRST CONTEMNORS

AND

PATRIC KIHUMBA NGUMO &

JENERICA W. NGUMO.....SECOND CONTEMNOR

WAHANAH DK CONTRACTORS.....THIRD CONTEMNOR

NATIONAL ENVIRONMENT &

MANAGEMENT AUTHORITY (NEMA).....FORTH CONTEMOR

NATIONAL CONSTRUCTION AUTHORITY (NCA).....FIFTH CONTEMNORS

COUNTY GOVERNMENT OF NAIROBI.....SIXTH CONTEMNORS

RULING

1. This is the notice of motion dated 15th February 2017 brought under the constitution of Kenya 2010; the contempt of court Act, 2017; under the provisions of order 40 rule 1 and 2 of the Civil Procedure Rules, Sections 1A, 1B, 3A and 63 of the Civil Procedure Act, Cap 21 of the Laws of Kenya and all other enabling provisions of the law.

2. It seeks orders:-

1. *Spent.*

2. *This honourable court do:-*

A. Find the above named persons and legal entities namely:-

(i) *The defendants herein,*

(ii) *Patrick Kihumba Ngumo and Jenerica W. Ngumo*

(iii) *Wahanah DK Contractors*

(iv) *National Environment and Management Authority (NEMA) (REF:0038294)*

(v) *National Construction Authority (NCA) (REF: 53106160044) and*

(vi) *The County Government of Nairobi (REF: CPF AL 826), in contempt of Court for openly and flagrantly disobeying an order issued by this honourable court on the 23rd June 2006.*

B. Issue an order that the defendants herein and Patrick Kihumba Ngumo and Jenerica W Ngumo be committed to Civil Jail for a period of 6 (six) months or for such other period as this honourable court may deem fit and just; and.

C. Impose the penalty of a fine of Kenya Shillings Ten Million (Kes 10,000,000) against all contemnors jointly and severally and in default of payment of such fine within 14 (fourteen) days of the order hereto, all movable and immovable assets of the contemnors be attached and sold in execution of this order to satisfy the penalty of contempt of court.

D. Deny the contemnor audience before this court until they comply fully with the orders of this honourable court given on 23rd June 2006.

3. *Spent.*

4. *That a mandatory order do issue compelling the defendants and/or the contemnors, their servants and/or agents to demolish all illegal structures built or being built by the defendants and/or the contemnors and to remove therefrom any item, or materials currently placed in the suit premises in violation thereof forthwith.*

5. *That an order be issued cancelling any dealing by the defendants or their agents or nominees or servants that may have been made with any of the contemnors and a declaration that any such dealing are unlawful and therefore null and void.*

6. *That in the event the defendants and/or the contemnors fail to comply with prayer number 2, 3 and/or 4 herein above, the plaintiff be at liberty to demolish and remove all such structures from the suit premises with the assistance of the officer commanding police division (OCPD) Kasarani division and the deputy county commissioner Kasarani sub-county at the cost and expense of the defendants and/or the countemnors.*

7. *That the defendants/respondents do meet the costs of this application in one event.*

3. The grounds are on the face of the application and are set out in paragraphs 1 to 11.

4. The application is supported by the affidavit of Joseck Kairitha, the General Manager of the plaintiff/applicant sworn on the 15th February 2007 and a further affidavit sworn on 25th April 2017. The application is opposed. There is a replying affidavit sworn by Jenerica Wangeci Ngumo the 2nd contemnor herein. She states that she has authority of the son, Patrick Kihumba Ngumo and the 3rd contemnor Wahannah DK Contractors to swear this affidavit.

5. There is also a replying affidavit sworn by David Ong'are Director Compliance and Enforcement of the 4th contemnor, sworn on the 30th March 2017.

6. There is also a replying affidavit sworn by Samson Lukoba, Corporation Secretary and Head of legal, of the 5th contemnor sworn on the 20th March 2017.

7. On the 2nd October 2017 the court with the consent of the parties directed that the application be canvassed by way of written submissions.

8. The plaintiff's submissions are dated 12th November 2018 and the further submissions are dated 30th April 2019. The 2nd and 3rd contemnors' submissions are dated 21st January 2019, the 4th contemnors' are dated 26th March 2019, the 5th contemnor's are dated 16th April 2018 while the 6th contemnor's grounds of opposition and the submissions are dated 27th November 2018 and 22nd January 2019 respectively. It appears the 1st contemnor did not file any response to the application neither did they file written submissions.

9. I have considered the notice of motion and the supporting affidavit. I have considered the responses thereto, the written submissions filed on behalf of the respective parties and the authorities cited. The issue for determination is whether this application is merited.

10. The plaintiff/applicant's claim is that the orders of 23rd June 2006 have been disobeyed. The said orders are:-

"IT IS HEREBY ORDERED BY CONSENT

1. That the defendant's application dated 7th September 2005 be and is hereby withdrawn.

2. That the defendant's whether by themselves, their agents and or servants be and are hereby restrained by an injunction from

selling, disposing or in any way parting with possession of all that parcel of land comprised in LR NO. 7959 (IR 8549) Mirema Drive, Roysambu Nairobi pending the hearing and determination of this suit.

3. That the suit property be preserved pending further orders of this honourable court.

4. That the suit be set down for hearing in the normal manner”

It should be noted that this consent order was between the plaintiff and the 1st contemnor.

11. The 2nd - 6th contemnors were not parties to the suit by 2006. They were therefore not party to the said consent. The plaintiff has not shown that they were served with the said orders or that they had knowledge of the same.

12. From the supporting affidavit of the plaintiff’s general manager, it is not clear what acts the 1st contemnor has committed so as to constitute the disobedience of these orders.

13. This application was filed way back in February 2017, about three years ago. I am of the view that the plaintiff should have concentrated in getting the suit to be heard instead of pursuing this application.

14. The 2nd to the 6th contemnors were not parties to the said consent. It is not clear what steps the plaintiff took from 2006 to set down the suit for hearing. It is clear the plaintiff is not keen in having this matter finalized.

15. I find that the plaintiff/applicant has not demonstrated that it is deserving of the orders sought. In the case of **Gatharia K. Mutitika vs Baharini Farm Ltd** which was quoted with approval in **Katsuri Limited vs Kapurchand Depar Shah [2016] eKLR** the court held that:-

“The courts take the view that where the liberty of the subject is, or might be involved, the breach for which the alleged contemnor is cited must be precisely defined. A contempt of court is an offence of a criminal character. A man may be sent to prison. It must be satisfactorily proved....It must be higher than proof on a balance of probabilities almost, but not exactly beyond reasonable doubt. The standard of proof beyond reasonable doubt ought to be left where it belongs, to wit, in criminal cases. It is not safe to extend it to offence, which can be said to be quasi-criminal in nature. However, the guilt has to be proved with such strictness of proof as is consistent with the gravity of the charge....Recourse ought not to be had to process of contempt of court in aid of a civil remedy where there is any other method of doing justice. The jurisdiction of committing for contempt being practically arbitrary and unlimited, should be most jealously and carefully watched and exercised with the greatest reluctance and the greatest anxiety on the part of judges to whether there is no other mode which is not open to the objection of arbitrariness and which can be brought to bear upon the subject. A judgment must be careful to see that the cause cannot be mode of dealing with persons brought before him. Necessary though the jurisdiction may be, it is necessary only in the sense in which extreme measures are sometimes necessary to preserve men’s rights that is if no other pertinent remedy can be found...applying the test that the standard of proof should be consistent with the gravity of the alleged contempt....it is competent for the court where a contempt is threatened or has been committed and or an application to commit to take the lenient course of granting an injunction instead of making an order for committal or sequestration, whether the offender is a party to the proceedings or not”.

16. There is no proof that the said orders were served on the 2nd – 6th contemnors.

17. In conclusion I find no merit in this application and the same is dismissed with costs to the 2nd to 6th contemnors.

It is so ordered.

Dated, signed and delivered in Nairobi on this 18th day of June 2020.

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L. KOMINGOI

JUDGE

In the presence of:-

Ms Gasansule for the plaintiff

No appearance for the 1st defendant

No appearance for the 2nd and 3rd defendants

No appearance for the 4th, 5th and 6th contemnors

Kajuju - Court Assistant