REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELC NO. 703 OF 2014

(Formerly NYERI HCCC NO. 161'A' OF 2010 (O.S)

JULIUS MUGO GACHAGUA.....APPLICANT/DEFENDANT

-VERSUS-

PETER MAHINDA KANYORA.....1st RESPONDENT/PLAINTIFF

DANIEL MUKUHA WAHOME.....2nd RESPONDENT/PLAINTIFF

JOHN MIRING'U KIMANI (*Suing for and on behalf of* *themselves and the members of*

MAKI PLOT OWNERS SELF HELP GROUP).....3rd RESPONDENT/PLAINTIFF

RULING

1. Pursuant to a ruling that was delivered by this Court on the 17th April 2020 in which the Court found the Applicant herein in blatant contempt of Court Orders of the 10th December 2012 and 27th September 2017 which Orders had directed parties to stop disposing off, transferring or alienating the parcel of land pending the hearing of the suit, the sentencing of the Applicant had thereafter been reserved due to the Covid- 19 pandemic.

2. The Applicant has now filed the present application under certificate of urgency dated the 25th April 2020 and brought under the provisions of Sections 3 & 3A of the Civil Procedure Act, Order 42 Rule 6(1) and Order 51 Rule 1 of the Civil Procedure Rules Articles 22, 50, and 159 of the Constitution in which he seeks for stay of the ruling delivered on the 17th April 2020 pending the determination of an Appeal whose notice had been filed simultaneously with the Application. The Applicant also seeks for Justice M C Oundo to recuse herself from proceeding with this matter and in particular from presiding over his sentencing.

3. The Respondents' as well as Mr. Robert Githaiga filed their Replying Affidavits dated the 20th May 2020 as well as their submissions on the 21st May 2020 in response to the application.

4. The Court directed for the Application to be disposed of by way of written submissions wherein parties complied and filed their respective submissions to which I shall consider as herein under:

Applicant's Submissions.

5. The Applicant's application is firstly premised on the conduct of a Mr. Robert Githaiga who was purportedly acting for the Respondents and who immediately after the pronouncement of the above ruling menacingly and extortionately solicited for monetary payment, and even gave details of his bank account to which the proceeds of extortion were to be channeled, so as to ensure no adversity was suffered by the Applicant consequent to the ruling.

6. That the ruling had been delivered at the instigation of Mr. Robert Githaiga, after which he had made frantic efforts which at the time appeared innocent, and which the Applicant unknowingly fell into his trap. That the letter by Mr. Githaiga to the Court requesting for the ruling by video conferencing, the preparation of the consent letter and procuring of the Applicant's Counsel's signature as well as the delivery of the ruling had come in quick succession and had looked innocent at the time until after the delivery of the ruling when the Applicant realized that the reason for the effort was for extortion purposes.

7. That Mr. Githaiga had informed him that the Judge had taken the matter very seriously and was set to impose a harsh sentence upon the Applicant for which it was imperative for the Applicant to part with the demand for payment. This in the Applicant's mind was that Mr. Githaiga was in private liaison and communication with the Judge by which he was made privy to the intentions of the Judge and thus making reasonable inference that the Judge was party to Mr. Githaiga's menaces which if honored would result in a favorable outcome.

8. The Applicant's further submission was that he was suspicious that the said ruling may not have been delivered and might have been a hoax for reasons that;

i. The Presiding Judge is described by various titles including M.O.Clausina in an Order of 17th December 2019, M. Oundo in an Order made on 9th April 2020, and M.C Oundo in the ruling of 17th April 2020. That the Judge's description was therefore not constant which created a confusion as to her identity thereby creating suspicion of the absence of authenticity.

ii. That secondly, the ruling delivered at Nyeri on 17th April 2020 was purportedly made by a Judge of the Land and Environment Court but was certified as a true copy of the original by the High Court Family Division which was inappropriate and incompetent and therefore raised the issue of authenticity of the ruling.

iii. That the Order extracted from the ruling said to have been delivered at Nyeri on 17th April 2020 is said to have been given in chambers at Nakuru High Court on 9th April 2020 yet the Applicant had not been informed of any sitting over his case at Nakuru or Nyeri on the 9th April 2020 and was left to wonder whether the presiding Judge over the matter on that date described as Justice M. Oundo is the same M.C Oundo whose title was missing from the Ruling.

iv. That the Order purported to have been extracted from the ruling of 9th April 2020 I did not conform with the ruling made on 17th April 2020 at Nakuru as it made no Orders as purported except Order No. 1.

v. That although the Applicant did not have the identities of the seemingly different Deputy Registrars who signed the various Orders, the difference in styles of the signatures on the Orders and rulings rendered those documents highly suspicions.

vi. That the speed at which the Order after the ruling of 17th April 2020 was extracted rendered it suspect.

vii. That the said Order bore the name of Lady Justice M.O Clausina (and the Applicant wondered whether it was the same person as M C Oundo) as the issuer contrary to the established practice where Orders were presented as given and issued under the hand of the Deputy Registrar. The Applicant wondered why the Judge descended to that level when the Deputy Registrar was available to sign the document. That this having been said, the Orders as extracted were flawed inappropriate and rendered the judicial authority, respect and esteem to despicable conduct.

9. The Applicant's submitted further that his application, and ruling were stage managed and unjustifiably fast tracked ahead of perhaps more deserving cases where its outcome was pre-determined so that Mr Githaiga would make his solicitation for monetary payment. That the impression he had created in the mind of the Applicant was that the honorable Judge was party to the scheme and expected the financial reward to deter her from punishing the Applicant for the contempt of which she had found him culpable.

10. That the Honorable Judge had made the following uncalled for and unsolicited remarks speculating as to the damages suffered by the Respondents and the manner in which the same should be addressed pursuant to the contempt.

> *'The sub-division of the suit land herein and the further alienation of the same will now cause the Applicants to incur further expenses as the original suit land has now ceased to exist and third parties have since been introduced into the suit therefore necessitating the amendment of the pleadings'.*

11. The above captioned, remarks re-informed the impression of the bias on the part of the Honorable Judge and the same were irrelevant to the application before her which was to decide whether the Applicant was guilty of contempt. The nature of the damages suffered by the Respondents and how to address them had waded into the province which was not the subject of the application, and therefore the reasons for doing so was to prepare the ground and basis of the seriousness of the envisaged sentence.

12. That the trial Judge's Ruling also considered a supplementary affidavit filed by the Respondents on 15th January 2020 after she had given directions to the parties to file their submissions based on the affidavits that had been before her. That the said affidavit had not been on record and no leave had been obtained for its filing as at the time and neither had it been served upon the Applicant. That this aspect would have been considered as a judicial error and not an act of bias had it not been for the shenanigans of Mr. Githaiga and the irregularities of the various rulings and Orders described above

13. That the circumstances surrounding the events as outlined would create in the mind of a reasonable person the impression that the presiding Judge being the person on whose hands the fate of the Applicant lay pursuant to the ruling of 17th April 2020, was party to the scheme to extort money from the Applicant. The Applicant relied on the decided case in **Barnaba Kipsongok Tenai vs Republic [2014] eKLR, Jasbir singh Rai & 3 Others vs Tarlochan Singh Rai & 4 Others [2013] eKLR** as well as in **Re Wavinya Ndeti [2017] eKLR** to submit that their application had met the parameters laid down in the aforesaid case law authorities and should be allowed.

14. That the application was predicted on a ruling which as explained may well be inexistent being a result of a criminal enterprise stage managed by an interloper for his own ends. However this can only be established by the Honorable Judge and it is important that the ruling on the application be made despite the prevailing circumstance, in an open Court where the parties can see that it is the Honorable Judge delivering the ruling lest suspicion arises as to its authenticity just like the ones coming before it as argued herein above.

Respondents' submission.

15. The respondent's submission was that the present application was testing the Courts' response to barefaced disregard of its authority. That there had been similar Orders in the said matter dated 10th December 2012, 27th September 2017 and 17th April 2020 restraining parties from attempting to alienate or howsoever otherwise dealing with the subject matter herein LR No. 10422/9 where the Contemnor Julius Mugo Gachagua had willfully, intentionally and openly disobeyed all the three Orders and had, even during the Contempt proceedings alienated another 49 leases of the land.

16. That the equitable remedy that the Contemnor sought in the stay Orders were sought with 'bloody' hands with the instrument and machinery of the atrocity still running and churning carnage in his hands.

17. That there was a solemn duty bestowed on oath to every Advocate who has been admitted to the bar, to be a custodian of the law and an officer of the Court. That the duty is such that an Advocate must never be one to assist his client in defying the law and must advise his client on how to stay on the right side of the law and not assist their client in wilful breach of the law or Orders of the Court which would be shameful.

18. The Respondents relied both on the Contemnors Notice of Motion dated 25th April 2020, both the Replying Affidavit of Mr. Robert Githaiga and Mr. Peter Mahinda Kanyora dated and filed in Court on 20th May 2020 before giving a background of the matter at hand and thereafter laying the issues for determination as follows:

i. Stay pending Appeal

ii. Is there an arguable Appeal

iii. If there is, would the Appeal be rendered nugatory

iv. Right to be heard where the Contemnor has made no effort to purge the contempt and persists with the same.

19. On the first issue for determination, it was the Respondent's submission that an intention to Appeal did not automatically give rights to stay and the discretion of the Court in granting such stay was wide and unfretted. That each case depended on its own facts and peculiar circumstances.

20. That the 1st principle that guided this discretion was whether there was an arguable Appeal and 2nd being whether the same would be rendered nugatory.

21. That on the first principle, an arguable Appeal was one which must not necessarily succeed but one which ought to be argued fully before the Court and one which was not frivolous.

22. That the Applicant had set out their grounds of Appeal in their Memorandum of Appeal to wit vide the sworn affidavit of their Counsel Mr. Mwangi Kariuki, he had averred that the Respondent had been acting in person contrary to the provisions of Section 9 Rule 8, that Mr. Githaiga was a member of the Plaintiff and not qualified to act as an advocate and lastly that the Plaintiff's Supplementary Affidavit was without leave and should not be relied on.

23. It was their submission that indeed on the 17th December 2019, the Respondents herein led by Mr Githaiga appeared in Court in person having failed to get hold of their Advocate Mr Gitonga, a fact which was known to the Applicant and his Advocate, where they had only received directions as to filing of submissions. That at paragraph 27 of the Contemnor's own affidavit, he had admitted that no documents whatsoever had been signed by the Plaintiffs (Respondent) or by Mr. Githaiga and that indeed all the documents and/ or pleadings had been signed by the Respondent's Advocate.

24. That similarly on the 5th February 2020, the Contemnor had appeared in Court in person during a mention to confirm the filing of submissions and in the absence of his Advocate, presented his bundle of authorities' and served the Respondents with the same wherein parties took a date for the ruling. That the Contemnor and applied double standards in his first ground in the Memorandum of Appeal, the same held no water and cannot be sustained on Appeal.

25. On the issue of supplementary affidavit, the Respondent submitted that the contest was purely an afterthought for parties had appeared in Court on 5th February 2020 to confirm whether all their pleadings and submissions had been filed and to take a date for ruling wherein the Contemnor had all the opportunity to raise any contest on documents that had been served to them three weeks prior, but they chose not do so.

26. That none of the grounds posited by the Contemnor raised any challenge on the correctness of the ruling, on interpretation of any legal point or any point of fact. The Contemnor never filed any affidavit explaining himself in whatever way possible and therefore all the facts of the contempt still stood uncontroverted and the Appeal had no chance of success and therefore the second principle guiding the issuance of a stay did not arise. The Respondents relied on the decided case in **Fred Matiangi vs Miguna Miguna & 4 Others [2018] eKLR** to buttress their submissions.

27. On the second issue for determination as to whether the Contemnor was deserving of the Court's audience, it was the Respondents submission that the Contemnor had, for over a period of 18 years since the issuance of the 1st Court Order illustrated an open defiance to the law. There have been three Orders issued, and one issued while these very contempt proceedings were in motion where the Contemnor has

still proceeded with the contempt. Granting of the stay Orders requested for would thus be at the risk of the law being completely undermined.

28. That by the Contemnors actions, more innocent parties were being lured into purchasing and the suit herein getting progressively complicated by the effects of the content which may never be irreversible. The Contemnor had now ejected one Mrs Alice Mathenge and numerous other Plaintiffs from their suit parcel of land and their suffering cannot be reversed or even compensated. That the Contemnor continues to enjoy his liberty while openly causing suffering to the Plaintiffs by disobeying the Court's Orders which was a complete mockery of the Court.

29. On the application for the Court's recusal, the Respondents submitted that the test of a real likelihood of bias was whether the circumstance in this case gave rise to want of impartiality or alleged bias or likelihood of bias leading a fair minded and informed observer to conclude that there was a likelihood of bias or apparent bias.

30. The Respondents relied on the decided case in **Philip K Tunoi vs Judicial Service Commission [2016] eKLR** to submit that there had been absolutely no evidence provided by the Contemnor to show any shred of impartiality on the part of the Judge. If anything similar and fair treatment had been accorded to both parties.

31. That on the 5th February 2020 the Contemnor Julius Mugo had appeared in person in the absence of his Advocate where the Court gave him similar audience, allowed him to submit a list and bundle of authorities and further went ahead to give a date for the ruling. That treatment had been similar for all parties.

32. That the Hon Judge was neither a member of Marki Self Help Group nor related in any way to any of the member of the Plaintiffs. That there was no interest whatsoever that the Judge had, in the outcome of the matter and none had been shown by the Contemnor.

33. The Respondents relied on the decided case in **Gladys Boss Shollei vs Judicial Service Commission [2019] eKLR** to submit that the Court had a duty to sit without going into detail and that judicial impartiality was considered to be the key note of Chapter 10 of the Kenyan Constitution. That there was always a presumption of impartiality the part of a Judge which presumption could not be taken away whimsically without sound evidence of the same or by mere allegations simply because the Applicant knew that he may not suffer any sanctions for making such allegations.

34. That the reason behind the Contemnor's application for recusal was because the decision of the Court was not favorable and so the Applicant was clutching at straws trying to run away from the fruits of the content that has continued for 8 years.

35. The Respondents cited the case in **JGK vs HCCC 19 of 2019 [2019] eKLR** before proceeding to submit that apart from the Honorable Judge, the Contemnor had also proceeded to blame the Executive Officer, a person who had no bearing on the outcome of any matter in Court.

36. On the issue of the pending sentence, the Respondents submitted that the same was now terribly necessary and urgent. That in the month of February and March 2020, the Contemnor had processed another 49 leases as evidenced by the annexures in response to the application, so as to enable him raise an amount that would comfortably cover any fine imposed on him in this proceedings. That if the contempt was not immediately arrested, there would be nothing to come back to as regards the subject matter. That this was a case that deserved, in addition to the fine imposed, a custodial sentence. They sought for the application herein dated 25th April 2020 to be dismissed with costs and a date to issue for sentencing.

Determination.

37. I have considered the Application herein the Replying affidavits, the submissions as well as the authorities cited. I find the issues for determination as being;

i. whether *the instant application raises sufficient grounds to warrant grant of stay of execution of the Court's* ruling delivered on the 17th April 2020 pending the determination of an Appeal

ii. Whether the Court should recuse itself.

38. This Court in the ruling of the 17th April 2020 found the Applicant herein guilty of willfully and intentionally defying the Orders of the Court despite knowledge of the same. The Respondents have opposed the Applicant's application on the grounds that he had not purged the contempt and continues to commit further actions of contempt in complete disregard of the law and in the pendency of this contempt proceedings and therefore he should not be heard. The Respondents have further opposed this application citing grounds that the Applicant *has not demonstrated and/or shown that he has an arguable Appeal and neither has he demonstrated that the intended Appeal would be rendered nugatory were the Orders sought denied.*

39. *Indeed from the Replying affidavit and submissions of the Respondents herein, the same tend to show that the* Applicant continues to blatantly abuse the Court process, with a sense of impunity which does not warrant him any reprieve. Indeed the intention to Appeal does not give a right of stay of execution, however a look at precedent reveals that Courts are more inclined towards staying the sentence pending hearing and determination of an Appeal.

40. The Supreme Court, in the case of ***Justus Kariuki Mate & Another vs Martin Nyaga Wambora & Another (2014)eKLR***, held as follows:

'Indeed, if this Court declined to maintain the status quo, the High Court would proceed to take mitigation, and then sentence the Applicants. There is a likelihood, in that case, that the Applicants would be incarcerated, and the substratum of the Appeal-cause would have been spent. In the event that this Court eventually finds in favour of the Applicants, it would be impossible to compensate them by way of costs. In the alternative, if the Court finds in favour of the Respondents, no harm would have been occasioned to them'.

41. Similarly, the Court of Appeal, in the case of ***National Bank of Kenya & Another vs Geoffrey Wahome Muotia, [2016] eKLR*** *held that* :-

'If we do not grant the Orders of stay of proceedings sought herein, it is very likely that the proceedings in the High Court will continue, with the result that some officers of the Applicant company may be sentenced, which sentence may entail a loss of liberty. In that event, any intended Appeal from the impugned ruling will therefore have been rendered nugatory.

42. *Similar circumstances were obtaining in* **the case in Rev. Jackson Kipkemboi Koskey & 7 Others V Rev. Samuel Muriithi Njogu & 4 others [2007] eKLR where the Court of Appeal** *adopted with approval the sentiments expressed in* **Stanislus Nyagaka Ondimu v Kalyasoi Farmers' Co-Operative Society & Others, Civil Application No. Nai. 337 Of 2005 (unreported)** *where it had stated that:*

"…we are of the view that this is a proper case in which we should exercise our discretion in favour of the Applicant. It cannot be denied that to refuse the application would render the intended Appeal nugatory since the Applicant is likely to have served the six months jail sentence by the time his Appeal comes up for hearing."

43. The superior Courts have held that in matter such as this one, issuance of Orders of stay of mitigation and sentence, pending an Appeal against the Order that held an Applicant to be in contempt, would be appropriate in the circumstance. The provision of Article 163(7) of the Constitution state that the decision by the Supreme Court has immediate and binding effect on all other Courts to wit this Court is bound by the said decisions and I stand guided.

44. In the premises thereof and since stay of execution involves all processes, an Order for stay of *on mitigation and* sentencing hearing, pending determination of the Appeal is herein granted. The same *shall rest in abeyance, and the status quo* shall be maintained, pending the determination of the Appeal.

45. I note that although the Applicant is undeserving of stay Orders for reason as herein above stated by the Respondent to wit that he continuous to dispose of parcels of land in the pendency of the application for stay of execution pending Appeal the Court having found him in Contempt, the stay of execution is herein premised on condition that should the Applicant continue to be in contempt of the Court Orders restraining parties from alienating or howsoever otherwise dealing with the subject matter herein LR No. 10422/9, then the stay Orders shall automatically stand discharged and the Applicant shall be summoned for sentencing.

46. The costs shall abide the outcome of the Appeal.

47. It is herein ordered.

Dated and delivered at Nyahururu this 8th day of June 2020

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE