REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT NAIROBI

ELC SUIT NO. 557 OF 2009

MACHETHA KARIUKI.....1ST PLAINTIFF

WAMBUI NJOROGE.....2ND PLAINTIFF

WAMBUI NJAU.....3RD PLAINTIFF

MARIA KAROKI.....4TH PLAINTIFF

NYAMBURA KABIA.....5TH PLAINTIFF

NJERI MUNYAO.....6TH PLAINTIFF

NJERI MBINDYO.....7TH PLAINTIFF

(Suing on their behalf and as representatives of Kasarani Farmers Co-operative Society)

VERSUS

SAMUEL GITHEGI MBUGUA.....1ST DEFENDANT

GRACE MUTHONI GITHEGI.....2ND DEFENDANT

SAMUEL MBUGUA KIBATHI.....3RD DEFENDANT

MARGARET NYOKABI MBUGUA.....4TH DEFENDANT

RUTH NJERI KABOGO.....5TH DEFENDANT

MOSES MBUGUA MWANGI.....6TH DEFENDANT

CHRISTINE MITHIRI MBUGUA.....7TH DEFENDANT

ZACHARIAH KIMEMIA GAKUNJU.....8TH DEFENDANT

MARY WARURII GAKUNJU.....9TH DEFENDANT

COMMISSIONER OF LANDS.....10TH DEFENDANT

REGISTRAR OF TITLES, NAIROBI.....11TH DEFENDANT

RULING

What I have before me is a Notice of Motion application dated 5th June, 2018 brought by the 1st plaintiff seeking the following orders;

1. That this honourable court cites the 2nd defendant, Grace Muthoni Githegi and the 4th defendant, Margaret Nyokabi Mbugua for contempt of court orders given on 5th March 2015 and issued on 24th March, 2015.

2. That this honourable court does order the arrest and committal of the 2nd defendant, Grace Muthoni Githegi and the 4th defendant, Margaret Nyokabi Mbugua to jail for a term of six (6) months or such time or terms as the honourable court may deem fit for contempt of the said court order.

3. That this honorable court does issue an order to purge the said acts of contempt of court and invalidate/ cancel all the acts done on the suit properties namely, L.R 7153/1, L.R No. 7153/R, L.R 7153/2, L.R 12825 and the subdivisions thereof by the 2nd and 4th defendants in contempt of the said court order and to declare the said acts illegal, null and void *ab initio*.

4. That this honorable court does issue an order to purge the said acts of contempt of court and invalidate/ cancel all the acts done on the suit properties namely, L.R 7153/1, L.R No. 7153/R, L.R 7153/2, L.R 12825 and the subdivisions thereof by the 1st to 11th defendants/respondents during the pendency of this suit from 2nd November, 2009 and be pleased to declare the said acts illegal, null and void *ab initio* under the doctrine of *lis pendens*.

5. That this honourable court does issue an order to purge the contempt of court by the defendants/respondents and, land and survey documents be provided to the court for the purge of the contempt.

6. That the respondents to bear the costs of the application.

The application that was supported by the affidavit sworn by the 1st plaintiff on 5th June, 2018 was brought on the grounds that, on 5th March, 2015, the court made an order directing that the status quo relating to L.R 7153/1, L.R No. 7153/R, L.R 7153/2, L.R 12825 and the subdivisions thereof (hereinafter referred to only as "the suit properties") be maintained. The 1st plaintiff (hereinafter referred to only as "the applicant" where the context so permits) averred that the 2nd and 4th defendants had disobeyed the said orders and had refused and/or neglected to comply with the same. The applicant averred that the 2nd and 4th defendants had in blatant disobedience of the said order proceeded to sell and transfer the suit properties. The applicant averred that the 2nd and 4th defendants had also disobeyed the said order by constructing structures on the suit properties. The applicant averred that the 2nd and 4th defendants were aware of the said order which was obtained by their advocates. The applicant averred that the said acts of disobedience of the said court order was continuing. In his affidavit in support of the application, the applicant annexed; a copy of the court order said to have been disobeyed by the 2nd and 4th defendants, copies of agreements for sale and leases said to have been entered into by the 2nd and 4th defendants in violation of the said court order and copies of photographs said to have been taken on the suit properties showing the structures that had been put up thereon by the 2nd and 4th defendants.

The 1st plaintiff's application was opposed by the 4th defendant through grounds of opposition dated 13th June, 2018 and a replying affidavit of the same date. The 4th defendant averred that the order the subject of the 1st plaintiff's application was made in her favour and as such there was no way she could disobey it. The 4th defendant averred that the 1st plaintiff did not seek any order restraining the 4th defendant from dealing with the suit properties and as such the alleged disobedience of the said court order had no basis. The 4th defendant contended that the 1st plaintiff's application was bad in law as the same was brought contrary to the provisions on section 34 of the Contempt of Court Act, 2016. The 4th defendant averred further that the substantive reliefs sought in the application by the 1st plaintiff could not be granted before the hearing of the suit. The 4th defendant averred that the order of status quo was directed against the plaintiffs and as such the 4th defendant could not disobey the same.

The 4th defendant averred that she was the registered proprietor of L.R No. 12825/8, 9,10 and 17 and part of the subdivisions of the land originally known as L.R No. 7173/1 and L.R No. 7173/2. The 4th defendant averred that she had occupied the said properties peacefully for over 40 years and had developed some of the properties and sold others to third parties. The 4th defendant averred that the 1st plaintiff's application was intended to derail the hearing of the main suit and urged the court to dismiss the same.

The application was heard on 3rd December, 2019. In his submission in support of the application, Mr. Gatitu advocate for the 1st plaintiff/applicant reiterated the grounds on the face of the application and the supporting affidavit of the applicant. Mr. Gatitu submitted that the applicant had demonstrated that the 2nd and 4th defendants (respondents) had disobeyed the order that was made by the court on 5th March, 2015 for the maintenance of status quo in relation to the suit properties. Mr. Gatitu urged the court to grant the orders sought in the application. He submitted that the 2nd and 4th defendants should be arrested and committed to jail and an order should be made reinstating the suit properties to the state in which they were prior to the 2nd and 4th defendants' acts of contempt complained of. Mr. Gatitu submitted that the affidavit filed by the 4th defendant in response to the application supported the applicant's case.

In her submission in opposition to the application, Ms. Mwachiro advocate for the 4th defendant relied on the 4th defendant's grounds of opposition and replying affidavit. Ms. Mwachiro submitted that for the 2nd and 4th defendants (hereinafter referred to only as "the respondents" where the context so permits) to be found guilty of contempt, it had to be demonstrated that there was a clear order made by the court that was disobeyed by the 2nd and 4th defendants. Ms. Mwachiro submitted that it had to be established also that the disobedience of the order was deliberate. Ms. Mwachiro submitted that the order made by the court on 5th March, 2015 restrained the plaintiffs from interfering with the peaceful and quiet occupation of the suit properties. She submitted that there was no order restraining the respondents from dealing with the suit properties. Ms. Mwachiro submitted further that some of the transactions alleged to have been undertaken in breach of the said court order took place prior to the date of the order. Ms. Mwachiro submitted further that some of the orders sought by the applicant were final in nature and as such could not be granted at an interlocutory stage. She submitted that the court could not cancel titles held by third parties who were not parties to the suit and were not before the court. Ms. Mwachiro submitted that the respondents did not disobey the court

order made on 5th March, 2015 and urged the court to dismiss the 1st plaintiff's application.

Ms. Gatuhi who appeared for the 2nd defendant informed the court that the 2nd defendant was deceased and as such the application could not lie as against her. Ms. Kinuva and Ms. Odongo who appeared for the 1st defendant and the interested party respectively left the matter to the court. In his submission in reply, Mr. Gatitu argued that a party to a suit cannot have a free hand to deal with a property the subject of a suit. Mr. Gatitu submitted that the respondents admitted to selling the suit properties to third parties and as such the court must order them to purge their contempt. He submitted that if the said acts of contempt were not purged, it would not be possible to prosecute the suit. He urged the court to consider the effect of the doctrine of *lis pendens* on the transactions undertaken by the respondents.

I have considered the 1st plaintiff's application together with the supporting affidavit. I have also considered the replying affidavit and grounds of opposition filed by the 4th defendant in opposition to the application. Finally, I have considered the submissions of counsels and the authorities referred to in support thereof. In Hardkinson *v* Hardkinson [1952] ALL ER 567, it was held that:

> **"It was the plain and unqualified obligation of every person against or in respect of whom an order was made by a court of competent jurisdiction to obey it unless and until it was discharged and disobedience of such order would as a general rule result in the person disobeying being in contempt and punishable by committal or attachment and in an application to the court by him not being entertained until he had purged his contempt"**.

The conditions that an applicant must satisfy before an order of committal for contempt of court is made were laid down in Republic *v* Nairobi City County Ex-Parte, David Peter Ndambuki [2015] eKLR where the court stated as follows:

> **"It is trite law that where committal is sought for breach of an order, it must be made clear what the defendant is alleged to have done. The notice of motion must state exactly what the alleged contemnor has done or omitted to do which constitutes a contempt of court with sufficient particularity to enable him to meet the charge. The necessary information must be given in the notice itself. The slightest ambiguity to the order can invalidate an application for committal as ambiguity can in turn lead to the standard of proof, which is higher than the standard in civil cases but lower than criminal standard, not being attained especially on affidavit evidence. Therefore, the law is that no order requiring a person to do or abstain from doing any act may be enforced by contempt unless a copy of the order has been served personally and endorsed with a notice informing him that if he disobeys the order he is liable to the process of execution."**

I am aware that courts have since moved from the position that the order alleged to have been breached must be personally served on the person sought to be punished together with a penal notice before contempt can be proved. Knowledge of a court order has been held to be sufficient thereby dispensing with personal service for the purposes of contempt proceedings.See, Shimmers Plaza Limited *v* National Bank of Kenya Limited [2015] eKLR. In Mutitika *v* Baharini Farm Ltd [1985] KLR 227 it was held that:

> **(i) A person who knowing of an injunction, or an order of stay, willfully does something, or causes others to do something, to break the injunction, or interfere with the stay, is liable to be committed for contempt of court as such a person has by his conduct obstructed justice.**
>
> **(ii) The standard of proof in contempt proceedings must be higher than proof on a balance of probabilities and almost but not exactly beyond reasonable doubt.**
>
> **(iii) The principle must be borne in mind that the jurisdiction to commit for contempt should be carefully exercised with great reluctance and anxiety on the part of the court to see whether there is no other mode which can be brought to bear on the contemnor.**

The 2nd and 4th defendants have been accused of disobeying the orders that were made herein on 5th March, 2015. I have looked at the extracted order which is attached to the 1st plaintiff's affidavit in support of the application and the actual order that was made by the court on 5th March, 2015. According to the proceedings of 5th March, 2015, the court made the following orders;

> **"1. The Plaintiffs to file and serve their Replying Affidavit to the Defendants' Notice of Motion dated 20th February, 2015 within 14 days of today. The Defendants to also file their Replying Affidavit to the Plaintiffs' Notice of Motion dated 15th September, 2014 within 14 days of today. Parties granted leave to file Further Affidavits if need be. Mention on 5th May, 2015 for direction on the status quo to be maintained pending the hearing and determination of the Notice of Motion dated 9th July, 2012 and also to reserve a ruling date for the Notice of Motion dated 9th July, 2012.**
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> **2. In the meantime the status quo to be maintained with respect to the properties that are the subject of the Defendants' Notice of Motion dated 20th February, 2015 shall be that the Plaintiffs, their agents or servants shall not in any manner interfere with the Defendants' peaceful occupation and possession of the said property."**

It is not clear from the record as to which firm of advocates extracted the order that was made by the court on 5th March, 2015. There is no doubt however from the order of the court I have reproduced above that the order that was extracted was not in accord with the order that was given by the court. Contrary to the terms of the extracted order, the court only gave one order of status quo in favour of the defendants on the following terms:

> "2. **In the meantime the status quo to be maintained with respect to the properties that are the subject of the Defendants'**

Notice of Motion dated 20th February, 2015 shall be that the Plaintiffs, their agents or servants shall not in any manner interfere with the Defendants' peaceful occupation and possession of the said property."

I am in agreement with the 4th defendant that the order of status quo that was made on 5th March, 2015 was in favour of the defendants. The order restrained the plaintiffs from interfering with the defendants' peaceful occupation and possession of the properties which were the subject of the defendants' Notice of Motion application dated 20th February, 2015. It follows therefore that the court did not make any order restraining the 2nd and 4th defendants from selling, transferring or leasing the suit properties. In the absence of such order, the 1st plaintiff's allegation that the 2nd and 4th defendants breached the said court order made on 5th March, 2015 has no basis.

The 1st plaintiff had also sought the prayers in his application on the basis of the doctrine of *lis pendens*. In Mawji *v* US International University & Another [1976-80] 1 KLR 229 Madan J. cited Bellamy v Sabine (1857) 1 De G & J 566, 584, where Turner L J stated as follows on the doctrine of *lis pendens*:

"It is … a doctrine common to the Courts both of law and equity, and rests, as I apprehend, upon this foundation – that it would plainly be impossible that any action or suit could be brought to a successful termination, if alienations *pendente lite* were permitted to prevail. The plaintiff would be liable in every case to be defeated by the defendant's alienating before the judgment or decree, and would be driven to commence his proceedings *de novo*, subject again to be defeated by the same course of proceeding."

In the same case, Madan L J also cited Gour, on the Indian Transfer of Property Act, 7th Edition, Volume 1 at page 579 where the author stated that:

"Every man is presumed to be attentive to what passes in the Courts of justice of the State or Sovereignty where he resides. Therefore, purchase made of property actually in litigation, *pendente lite*, for a valuable consideration, and without any express or implied notice in point of fact affects the purchaser in the same manner as if he had such notice, and he will accordingly be bound by the judgment or decree in the suit."

In Bernadatte Wangare Muriu *v* National Social Security Fund Board of Trustees & 2 others [2012] eKLR, the court cited Fredrick Joses Kinyua and Peter Kiplangat Koech *v* G.N. Baird, Nairobi Hccc No. 4819 of 1989 as consolidated with Nairobi Hccc No. 6587 of 1991 George Neil Baird and Wanda Baird *v* Fredrick Joses kinyua and Peter Kiplangat Koech in which G.S. Pall J. stated as follows:

"The doctrine of lis Pendens under section 52 of TPA is a substantive law of general application. Apart from being in the statute, it is a doctrine equally recognized by common law. It is based on expedience of the court. The doctrine of lis pendens is necessary for final adjudication of the matters before the court and in the general interests of public policy and good effective administration of justice. It therefore overrides, section 23 of the RTA and prohibits a party from giving to others pending the litigation rights to the property in dispute so as to prejudice the other…"

In Patrick Gathitu Kariuki *v* Hottensiah Wambui Hinga & another [2020] eKLR, this court stated as follows on the effect of the doctrine of *lis pendens*:

"It is not correct as claimed by the plaintiff that the sale transaction between the 1st defendant and 2nd defendant was carried out in breach of a court order issued herein. From the record, the order restraining the 1st defendant from among others selling the suit property was made on 15th March, 2016 while the agreement for sale between the 1st defendant and the 2nd defendant was made on 18th March, 2015. I am however in agreement with the plaintiff that the transaction was carried out in breach of the *lis pendens* rule. Breach of the *lis pendens* rule *per se* in my view does not nullify a sale transaction. What is does is to make the transaction subject to the outcome of the court proceedings which were pending when the transaction involving the land in question was carried out. It follows therefore that, whereas the sale transaction between the 1st and 2nd defendants was valid and enforceable as between them, the same is subject to the outcome of this suit."

I still hold the same view. If the 2nd and 4th defendants sold or leased the suit properties while this suit was pending, the said transactions breached the doctrine of *lis pendens*. However, whether or not the said transactions should be cancelled or nullified can only be determined at the trial of the suit and not at this stage. Due to the foregoing, the 1st plaintiff's application cannot also succeed on the basis of the doctrine of *lis pendens.* The upshot of the foregoing is that the plaintiffs' Notice of Motion application dated 5th June, 2018 is not for granting. The application is dismissed with costs to the 4th defendant.

Delivered and Dated at Nairobi this 4th Day of June 2020

S. OKONG'O

JUDGE

Ruling delivered through Microsoft Teams Video Conferencing Platform in the presence of:

Mr. Mugo h/b for Mrs. Wambugu for the Interested Party

Ms. Gatuhi h/b for Mr. Njagi for the 9th Defendant

Ms. Mwachiro for the 4th Defendant

Mr. Mbuthia for the 10th Defendant

Ms. C. Nyokabi- Court Assistant