



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC PET. NO. 6 OF 2017

IBRAHIM SHEIKH ABDULLAH..... PLAINTIFF

VERSUS

1. ZAFFER EBRAHIM TAYABALI KARIMJEE

2. MUSTAFA EBRAHIM TAYABALI

3. MUSTAFA FAZALABBAS MOHAMMEDALI

4. HASSAN SHEIKH ABDALLA

5. NATIONAL LAND COMMISSION

6. LAND REGISTRAR, MOMBASA

7. HASHIM GOTSAT.....RESPONDENTS

RULING

1. By a Notice of Motion dated 22nd February, 2019, the Plaintiff/applicant moved this court under Section 5 (1) of the Judicature Act, Order 40 Rule 3 (1) and Order 51 Rule 1 of the Civil Procedure Rules and all other provisions of the law seeking the following orders:

1. THAT this Honourable court do find the 1st, 2nd, 3rd and 4th respondents are in contempt of court for disobedience of the orders of this Honourable Court issues on the 20th April 2017.

2. THAT this honourable court do order the 1st, 2nd, 3rd and 4th respondents do pay to the Honourable court a fine for contempt of court or in the alternative;

3. THAT the 1st, 2nd, 3rd and 4th respondents be committed to civil jail for a term of six months for contempt of court for having deliberately disobeyed orders of this court issued on the 20th April 2017.

4. THAT the 1st, 2nd, 3rd and 4th respondents to deposit in court security for good behavior in the sum of Kshs,1,000, 000/= pending the hearing and determination of this application.

5. THAT the 1st, 2nd, 3rd and 4th respondents to deposit in court security for good behavior in the sum of Kshs.1,000,000/= pending the hearing and determination of this application and the Petition herein.

6. THAT there be an order directing an investigation at the Mombasa Land Registry as to the enabling of a transfer defying this Honourable court's order.

7. THAT there be an order for a directing the physical protection of the file at the lands registry using secured serialized padlocks or seals pending the hearing and determination of this application.

8. THAT there be an order directing the physical protection of the file at the lands registry using secured serialized padlocks

or seals pending the hearing and determination of this petition.

9. THAT the 1st, 2nd, 3rd and 4th respondents to bear the costs of this application.

2. The grounds relied upon are that on 20th April 2017 the Honourable Lady Justice Komingoi issued a conservatory order directing the status quo in relation to the property and the parties be maintained. That the said order was served on the respondents and have been extended severally. That the respondents are fully aware of the doctrine of *lis pendens* and that there is government restriction on the land by the Directorate of Criminal Investigations in order to investigate the matter. The applicant avers that despite being aware of the court order, the 1st, 2nd, 3rd and 4th respondents willfully defied the order and transferred the land that is under dispute in court. The applicant states that he is bringing this application in order to preserve the integrity and dignity of this honourable court and so that the sanctify of the court can be upheld and the rule of law preserved and observed. The applicant states that the continuing contempt of the orders of 20th April, 2017 are highly prejudicial to the fair determination of this suit, and as such ought to be stopped forthwith.

3. The application is supported by the affidavit of Ibrahim Sheikh Abdullah, the applicant, sworn on 22nd February 2019 in which he has annexed the order of 20th April 2017. The applicant avers that the respondents disobeyed the said order by transferring the land in dispute and has annexed copies of the title before and after the transfer as well as a certificate of official search showing restriction made by the Directorate of Criminal Investigation.

4. In opposing the application, the 1st, 3rd and 4th respondents filed a replying affidavit sworn by Hassan Sheikh Abdalla, the 4th Respondent on 21st March 2019. It is deposed that the orders sought cannot issue as the applicant is a mere tenant who is trying to question the legality or title of his landlords and/or registered owners of the suit property, adding that the issue was conclusively dealt with in a ruling dated 29th July 2016 by Honourable Justice P. J. Otieno in Mombasa HCCA No. 82 of 2016. A copy of the said ruling has been annexed. The respondents deny being in contempt of court because they allege they had nothing to do with the acts complained of. It is their contention that the change of title to other names was done pursuant to a lawful court orders granted to the various administrators of the estate of deceased co-owners of the tenancy property. It is further deposed that upon the demise of Mustafa Ebrahimjee on 22nd April, 2012, his share was granted to Aftab Mustafa Karamjee pursuant to the orders of Hon. Justice M. Muya issued on 12th November 2013 in Mombasa Succession Cause No. 403 of 2012 and that changes in the title were effected by the Registrar when the beneficiary lodged the said court order in the Lands office. That upon the demise of Taibali Ebrahimjee, the Kadhi on 24th February 2017 did grant Mustaq Tayabali Karimjee powers to have the title changed to his name as per the court orders of 24th February 2017 in succession Cause No. 241 of 2016. Further, that upon the demise of Gulamabbas Ebrahimjee, the Kadhi on 24th February 2017 granted Adnan Gulamabbas Karimjee powers to have the title changed to his name as per the court orders of 24th February, 2017 in Succession Cause No. 240 of 2016. Copies of the said orders and decrees have been annexed. It is the respondents contention that the changes in respect of the suit title were effected in the lands office pursuant to court orders. The 1st, 3rd and 4th respondents aver that none of them was involved in those succession matters. They aver that the persons who effected the changes, including the judicial officers and the new owners are not parties to this matter and therefore no orders adverse to them ought to be issued against them when no evidence of service on them of the order of 20th April 2017, adding that their orders were all issued prior to 20th April 2017. The respondents state that the transfers in this matter were by way of transmission and via court orders to third parties and therefore there was no contempt of court that was committed as alleged.

5. The application was canvassed by way of written submissions. The petitioner filed his written submissions through his advocates, M/s Garane & Somane Advocates on 25TH November, 2019, while the 1st, 3rd 4th and 7th respondents filed theirs on 18th December, 2019 through M/s Mogaka, Omwenga & Mabeya Advocates.

6. I have considered the application; the submissions filed as well as the authorities relied on by the parties. The issue for determination is whether the respondents disobeyed or committed actions that are in breach of the court order issued on 20th April, 2017.

7. Contempt proceedings are quasi-criminal in nature and since the liberty of a person is at stake, the standard of proof is higher than in civil cases. In the case of **Gatharia K. Mukikika –v- Baharin Farm Ltd (1985) KLR 227**, it was held as follows:

“The courts take the view that where the liberty of the subject is, or might be involved in 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.”

8. In the case of **Katsuri Limited –v- Kapurchand Depar Shah (2016) eKLR**, the court held:

“In Peter K. Yego & Others –v- Pauline Nekesa Kode the court recognizing that contempt of court is criminal, held that it must be proved that one has actually disobeyed the court order before one is cited for contempt. The applicant in an application for contempt must prove beyond peradventure that the respondent is guilty of contempt (.....). Although the proceedings are civil in nature, it is well established that an applicant must prove the elements beyond reasonable doubt, at least higher than the standard in civil cases. The fact that the liberty of the defendant could be affected means that the standard of proof is higher than the standard in civil cases. It is incumbent on the applicant to prove that the defendant’s conduct was deliberate in the sense that he or she deliberately or willfully acted in a manner that breached the order.”

9. In **Shimmers Plaza Limited –v- National Bank Limited (2015) eKLR**, the Court of Appeal held as follows:

“We reiterate here that court orders must be obeyed. Parties whom such orders are made cannot be allowed to trash them with impunity. Obedience of court orders is not optional, rather, it is mandatory and a person does not choose whether to

obey a court order or not. The courts should not fold their hands in helplessness and watch as their orders are disobeyed with impunity left, right and centre. This would amount to abduction of our sacrosanct duty bestowed on us by the constitution. The dignity, and authority of the court must be protected and that is why those who flagrantly disobeyed them must be punished, lest they lead us all to a state of anarchy. ”

10. The main prayer sought is for committal for contempt. It is clear from the cases referred to hereinabove that the power to commit for contempt is one to be exercised with great care. An order committing a person to prison for contempt is to be adopted only as a last resort, and in clearest of cases.

11. In this case, the respondents are alleged to have disobeyed the orders issued by the court on 20th April 2017. The said order states:

ORDER

In open court before Hon. Lady Justice L. Komingoi on 20th April 2017)

This matter coming up for hearing of application dated 20th April 2017, brought under Certificate of Urgency (Articles 22, 23 (b), (c), 47 (1) & 159 (2) of the Constitution of Kenya, 2010, Section 1A, 1B and 3A of the Civil Procedure Act, Cap 21 Laws of Kenya and any other enabling provisions of Law)

IT IS HEREBY ORDERED:

- 1. THAT the application is certified urgent.**
- 2. THAT pending the inter-partes hearing of this application this honourable court be pleased to issue a conservatory order directing that the status quo in relation to the property and the parties herein be maintained.**
- 3. THAT hearing inter-parties on 5/5/2017.**
- 4. THAT the respondents to be served.**

GIVEN under my hand and seal of the court at Mombasa on 20th day of April 2017.

Deputy Registrar

Mombasa

Issued at Mombasa this 21st day of April 2017

PENAL NOTICE “TAKE NOTE any party duly served with this order but does not obey is liable for prosecution for contempt of court and upon conviction may be imprisoned upto six (6) months and/or fined and or face both court sanctions as the court may deem fit and appropriate.”

12. The applicant avers that the said order was served on the respondents and that it was extended by this court. That despite being aware of the said court order, the respondents willfully defied it and transferred the suit land. The respondents on their part, have denied disobeying the said order. Instead, the respondents aver that the transfers were effected to third parties by way of transmission pursuant to court orders.

13. The order given by the court on 20th April 2017 simply directed that the status quo in relation to the property and the parties be maintained. From the said order, it is not clear what the status quo that was to be maintained was. It is not clear whether the actions attributed to the respondents were part of the alleged status quo to be maintained. Furthermore as matters stand, it is apparent that the impugned transfers were effected pursuant to court orders in other suits or proceedings and there is no evidence that those orders have been set aside or vacated.

14. As pointed out earlier, in an application of this nature, we are dealing with the liberty of a person and such an order ought to be granted in the clearest circumstances. In the instant application, I am unconvinced that the allegation of contempt of court has been proved to the required standard. In as much as the respondents may have been served and were aware of the court order issued on 21st April 2017, I am satisfied that the applicant has demonstrated that the respondents have willfully disobeyed the said order. Moreover, the acts allegedly committed by the respondents are not precise.

15. In the result, it is my finding that the notice of motion dated 22nd February, 2019 lacks merit and the same is hereby dismissed with costs to the respondents.

It is so ordered.

DATED, SIGNED and DELIVERED at MOMBASA this 7TH day of July 2020.

IN THE PRESENCE OF:

