



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT MILIMANI**

**ELC SUIT NO. 344 OF 2009**

**KIPRUTO KANDIE.....1<sup>ST</sup> PLAINTIFF/APPLICANT**

**KIPTUI KANDIE.....2<sup>ND</sup> PLAINTIFF/APPLICANT**

**=VERSUS=**

**MIOTONI WEST VILLAS LTD.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**SHADY ACRES LTD.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**ANDREW WANDABWA T/A**

**WANDABWA ADVCATES.....3<sup>RD</sup> DEFENDANT/RESPONDENT**

**CHEPCHUMBA K. LOKI.....1<sup>ST</sup> INTERESTED PARTY/RESPONDENT**

**KIGEN KANDIE.....2<sup>ND</sup> INTERESTED PARTY/RESPONDENT**

**RULING**

The Plaintiffs/Applicants brought this Chamber Summons dated 29<sup>th</sup> June, 2010 under **Order 39 Rule 2A (2) and 9 of the Civil Procedure Rules** and Section 1A and 3A of the **Civil Procedure Act**, seeking for **Orders that;**

- i. ***Kigen Kandie, Chepchumba Kandie Loki, Andrew Wandabwa, George Chweya, David Muriuki Mambo, Rose Mambo and Mohammed Hassanali*** , Directors of ***Mitotoni West Villas Ltd*** and ***Shady Acres Ltd*** be detained in prison for a term not exceeding six months (6) for disobeying and breaching the Orders of this honourable court granted on 25<sup>th</sup> November, 2009.
- ii. ***That the 3<sup>rd</sup> Defendant and/or any party holding the original title documents for the suit property LR No. 1055/19 be ordered to deposit the same in court for safe keeping till further orders of the court.***
- iii. ***All the monies collected by the 1<sup>st</sup> and 2<sup>nd</sup> Defendant and/or their respective agents and/or employees from members of the Public for the purchase of the houses being erected on the suit property be deposited in court till further orders of the court.***
- iv. ***The Defendants be compelled by an order of this Honourable court to effect service of all the***

***pleadings of this case upon all persons who may have paid money for the houses being erected on the suit property.***

- v. ***The officer in charge of Karen Police Station do assist in the enforcement of the orders issued by this Honourable Court on 25/11/2009 .***
- vi. ***Costs of the application be provided for.***

The application was premised on these grounds.

- a. **That on 25<sup>th</sup> November, 2009, the Court granted an Order that there be no sale of the suit property to third parties until the hearing and determination of the Preliminary Objection on 3/2/2010.**
- b. **That the Defendants and their respective Directors became aware of the said Order, however, in either disobedience of the said Order, the Defendants through their agents have advertised to sell the houses being erected on the suit property to members of the Public.**
- c. **That the Defendants have breached the orders of this court and their action is contempt of this honourable court and they should be punished for that.**

The application was also supported by the annexed affidavit of

Kipruto Kandie, who reiterated that though the court issued an Order on 29/11/2009, restraining the Defendants from selling the suit property to 3<sup>rd</sup> parties till the hearing and determination of the preliminary objection on 3/2/2010, the Defendants have gone ahead and breached that Order.

The application was opposed by the Defendants herein. One **David Mambo Muriuki**, filed his Replying Affidavit dated 7<sup>th</sup> may 2013 and deponed that there has been no transfer registered to third parties owing to the Orders issued by **Hon. Justice Nambuye** on 25<sup>th</sup> November, 2009 and the Status Quo has been maintained to date. He further averred that long before the proceedings were commenced, transactions had been concluded and possessions surrendered to third parties who had purchased LR No. 1055/19. He further stated that 1<sup>st</sup> Defendant had no intentions of disobeying the lawful Orders of this Honourable Court.

The 4<sup>th</sup> Defendant **Andrew Wandabwa** also filed his Replying Affidavit and deponed that he was never personally served with the Order the subject of this present application. He denied that he has advertised any house on the suit property for sale as alleged or at all nor has he in any way participated in the purported sale of the units on the suit property.

The parties herein filled their written submissions which I have carefully considered. The applicants have brought an application for contempt of Court and specifically to commit the named persons to prison for a period not exceeding 6 months. The application was premised under **Order 39 Rule 2A (2) and 9 of the Civil Procedure Rules**. Order 39 deals with the issue of arrest and attachment before Judgement. The alleged breached was an Interlocutory Order. The applicants brought this application under the wrong provision of the Law. The proper section of the law would have been **Order 40 Rule 3** which states as follows:-

**“ In cases of disobedience, or breach of any such terms the court granting an injunction may order the property of the person guilty of such disobedience or breach to be attached and my also order such person to be detained in Prison for a term not exceeding six months unless in the meantime the court directs his release”.**

The 1<sup>st</sup> Defendant submitted that the application is bad in law as **Order 39 Rule 2A(2)** in non-existence and that **Order 39 Rule 9** is irrelevant in this application as the order issued on 25/11/2009 did not

include an Order for attachment before judgement .That is indeed very correct.However, in dealing with this matter, I will be guided by Article **159 of the Constitution of Kenya** which provides as follows:-

**Article 159(2) (d)**

**“In exercising judicial authority, the court and tribunals shall be guided by the following principles; Justice shall be ministered without undue regard to procedural technicalities”**”.

I will therefore not dismiss the application due to want of procedural technicality but I will look at the merit of the same. The applicants application herein is quasi-criminal, given that they are seeking to have the Defendants detained in prison for a period not exceeding 6 months.The proof in such an application is beyond a reasonable doubt.In VeBramble Vale ltd (1970) Ch.128, Lord Denning M.R said at p 137 (A);

**“A contempt of Court is an offence of criminal character. A Man may be sent to prison for it. It must be satisfactorily proved.To use the time honoured phrase, it must be proved beyond a reasonable doubt.”**

The applicants have alleged that the Defendants have breached the court Order issued on 25/11/2009.The said Court Order stated as follows:-

From the Courts record, I have noted that the parties did appear in Court on 3/2/2010 and the Ruling for the application argued on 10/3//2010 was delivered on 14/11/2011.The applicants argued that the Defendants breached the Court Order of 25/11/2009 and advertised the property for sale to 3<sup>rd</sup> parties.The applicants did not state which dated the advertisement was done.However, annexure KK2 shows that the

date of the attached advertisement was 11<sup>th</sup> February, 2010.The advertisement did not specify whether the houses are on land parcel No. LR No. 1055/19 the suit land or not.

The Defendants denied that they advertised for sale the house on the suit property.They averred that the applicants did not produce any exhibits or tender evidence to show that there has been any registered agreement for sale between the Defendants especially 1<sup>st</sup> and 3<sup>rd</sup> Defendants and 3<sup>rd</sup> parties of any of the houses.There was no evidence of registered transfer of the suit property to the third parties.

It is trite law that he who alleges must prove. The applicants alleged that the Defendants breached the Court Order and advertised for sale the houses on the suit property.However, I will concur with the Defendants submissions that there is no evidence to prove that indeed the houses have been sold to 3<sup>rd</sup> parties.Equally, the applicants have failed to provide evidence or furnish exhibits to show that the 1<sup>st</sup> Defendants or any of its agents or employees have collected money from members of the public for purchase of the houses erected on the suit property.

The applicants only attached a copy of the advertisement but not evidence of proof of sale of the houses to 3<sup>rd</sup> parties. Where the applicants aggrieved by the sale or the advertisement?

The Court order of 25/11/2009 did not prohibit advertisement.In the case of Jacob Zedekiah Ochino and Another Vs Aura Okombo and Others, Civil Appeal No. 36 of 1989, the Court of Appeal held,

**“ The Court will only punish for contempt of Injunction if satisfied that the terms of Injunction are clear and unambiguous and that the Defendant has a proper notice of the terms and breach of the Injunction has been prove beyonda reasonable doubt”**”.

In the instant case, the terms of injunction did not prohibit advertisement and the applicants have not proved beyond reasonable doubt that the Defendants have sold the houses to 3<sup>rd</sup> parties or any other person.

For the reason stated above, the Court finds that the applicants application dated 29/6//2010 is not merited. The same is dismissed with costs to the Respondents.

It is so ordered.

Dated, signed and delivered this **10<sup>th</sup> day of March, 2014**

**L.N. GACHERU**

**JUDGE**

**10/3/2014**

In the Presence of:-

In person for the 1<sup>st</sup> Plaintiff/Applicant

None attendance for the 2nd Applicant

M/s Nyamwata for the 1<sup>st</sup> Defendant

M/s Nyamwata holding brief Mutuli for the 2<sup>nd</sup> Defendant

None attendance for the 3<sup>rd</sup> Defendant

Anne: Court Clerk

**L.N. GACHERU**

**JUDGE**

**10/3/2014**