



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET**

**E & L NO. 125 OF 2018 (OS)**

**SIMON KIPLETING KEMEI.....1<sup>ST</sup> PLAINTIFF/RESPONDENT**

**AMOS KIPKEMBOI KEMEI.....2<sup>ND</sup> PLAINTIFF/RESPONDENT**

**VERSUS**

**KIPTANUI JOSHUA KEMEI.....DEFENDANT/RESPONDENT**

**AND**

**WILDRED KIPKOLUM TIROP.....APPLICANT/INTERESTED PARTY**

**RULING**

**[NOTICES OF MOTION UNDER CERTIFICATE OF URGENCY DATED 15<sup>TH</sup> JULY, 2020 AND 17<sup>TH</sup> JANUARY, 2020]**

1. The Plaintiffs seek for the Interested Party, to be committed to civil jail or ordered to pay a fine under **Section 29 of the Environment and Land Court Act, 2011** for being in contempt of court by blatantly and with impunity disobeying and breaching the orders issued on 5<sup>th</sup> December, 2019. The Plaintiffs also pray for the Interested Party to be ordered to purge his contempt before he can be afforded audience with regard to his pending application dated 10<sup>th</sup> July, 2020 and that he pays costs of the current application. The application is predicated on the fifteen (15) grounds marked (i) to (xv) on its face and is supported by the affidavits sworn by **Amos Kipkemboi Kemei** on the 15<sup>th</sup> July, 2020 and 8<sup>th</sup> October, 2020. The Plaintiffs' case is that the parties entered a consent on the 28<sup>th</sup> November, 2018 to preserve the status quo of the suit land pending the hearing and determination of the suit. That during a site visit by the Deputy Registrar, it was discovered that a house was being constructed on the suit land by the Interested Party, and the Defendant was cited for contempt through the ruling delivered on the 5<sup>th</sup> December 2019, through which the Court also prohibited occupation/possession of the said house by the Interested Party pending the determination of the suit, in line with the status quo order of 28<sup>th</sup> November, 2018. That though the Interested Party and his wife were at the scene during the site visit and were made aware of the orders, he has filed the Motion dated the 17<sup>th</sup> January, 2020 to be enjoined in the proceedings and setting aside the order of 5<sup>th</sup> December, 2019 against him. That in the presence of the Interested Party and his Counsel, the Court extended the orders of 5<sup>th</sup> December 2019 but he has in total disobedience taken possession of the house hence bringing the sanctity and dignity of the court to question. That the Interested Party should purge his contempt before being heard in the application dated the 17<sup>th</sup> January, 2020 as equity demands those seeking justice to do so in clean hands. That the occupation of the house on the suit land by the Interested Party will change the status quo order that is in force until determination of the suit and he should be committed to civil jail.

2. The application is opposed by **Wilfred Kipkolum Tirop**, the Interested Party through his replying affidavit sworn on the 7<sup>th</sup> September, 2020. It is the Interested Party's case that he was not party to the suit when the order not to access the suit land was made on the 5<sup>th</sup> December, 2019. That he was not served with the application leading to the ruling of 5<sup>th</sup> December, 2019 and the contempt application against him by the Plaintiffs should be dismissed. That he has filed an application seeking to review or set aside the order of 5<sup>th</sup> December, 2019 that is still pending. That if his application was granted, the Plaintiffs' application for contempt would be rendered nugatory. That the orders of 5<sup>th</sup> December, 2019 were issued without affording him an opportunity to be heard and hence contravening his rights under **Article 50 of the Constitution**.

3. That the learned Counsel for the Plaintiffs and Interested Party filed the written submissions dated the 21<sup>st</sup> July, 2020 and 7<sup>th</sup> September, 2020.

4. The Interested Party's Motion dated the 17<sup>th</sup> January, 2020 seeks for the leave to be enjoined in the suit as an Interested Party, setting aside and or review of orders issued on the 5<sup>th</sup> December, 2019, pending the hearing of this application inter-partes, stay of orders of 5<sup>th</sup> December, 2019 barring and or denying the Interested Party access to his home pending the hearing of the application inter-partes and costs. The application is based on the ten (10) grounds marked (i) to (x) on its face and is supported by the affidavit sworn by Wilfred Kipkolum

Tirop on the 17<sup>th</sup> January, 2020. It is the Interested Party's case that he bought part of the suit land, and the ultimate orders and decree in this case will affect him, yet he is not a party. That he has identifiable legal interest in the proceedings, and the ruling of 5<sup>th</sup> December, 2019 has affected him. That as an innocent purchaser for value residing on the house constructed on the suit land, he is a necessary party to be enjoined in the suit for the court to completely, and finally determine all the issues relating to the suit land, and avoid a multiplicity of suits. That the order of 5<sup>th</sup> December, 2019 barring any access to the suit land, where his house is situated, should be set aside and or reviewed to allow him access his portion which does not in any way affect the plaintiffs' parcels of land. That his house was already complete when the order of 5<sup>th</sup> December, 2019 was made. That he should not be condemned unheard.

5. The Interested Party's application is opposed by the Plaintiffs through the replying affidavit sworn by **Simon Kipleting Kemei**, the 1<sup>st</sup> Plaintiff, on the 10<sup>th</sup> March, 2020. That it is the Plaintiffs' case that the order of 5<sup>th</sup> December, 2019 was aimed at sustaining the status quo order issued by consent on the 27<sup>th</sup> November, 2019, and this court is functus officio, as the order was issued by a court of concurrent jurisdiction. That the Interested Party should have filed an appeal or sought review from the Judge who made the order. That the preservative order was registered at the Land Registry on the 23<sup>rd</sup> November, 2018 having been issued before the inter-partes hearing on 27<sup>th</sup> November, 2018 when the consent order was entered. That the consent was to maintain the status quo subsisting as at the time of their late grandfather **Kipserem Mugun**. That contempt proceedings were initiated after the Defendant placed building materials on the land, and construction of a structure thereon. That during the hearing of the application dated 10<sup>th</sup> July, 2019 against the Defendant, the Court directed the Deputy Registrar to visit the land after the Defendant denied being in contempt. That during the visit by the Deputy Registrar, a construction was found ongoing on the suit land, and through the ruling of 5<sup>th</sup> December 2019, the defendant was found to be in contempt. That later, the defendant purported to transfer the suit land to the Interested Party on the 28<sup>th</sup> June, 2019. That the Interested Party's claim should lie against the Defendant. That they do not oppose the Interested Party being enjoined as a party but oppose the other prayers. That their claim is over the whole suit land, and not a part of it as alleged by the Interested Party. That the Interested Party had prepared to move onto the house they had constructed, but the Deputy Registrar's visit stopped him and thereafter the court barred him from taking possession of the suit land.

6. The learned counsel for the Interested Party and the Plaintiffs filed their written submissions dated the 8<sup>th</sup> September, 2020 and 14<sup>th</sup> July, 2020 respectively.

7. The following are the issues for the Court's determinations;

*(a) Whether there are further prayers in the Interested Party's Notice of Motion dated the 17<sup>th</sup> January, 2020 that awaits determination after prayer 1 was granted by consent on the 10<sup>th</sup> February 2020, or alternatively;*

*(b) Whether prayers 2 and 3 of the Interested Party's Notice of Motion dated the 17<sup>th</sup> January, 2020 that seeks for setting aside and or review and stay of the order of 5<sup>th</sup> December, 2020 "pending the hearing of this application interpartes" can issue at this stage.*

*(c) Whether if the answer to (b) above is in the affirmative, whether the Interested Party has made a reasonable case for setting aside and or review, and stay of the orders of 5<sup>th</sup> December, 2019 barring him from accessing the suit land.*

*(d) Whether the Plaintiffs have established that the order barring access to the suit land of 5<sup>th</sup> December, 2019 affected the Interested party.*

*(e) If the answer to (d) above is in the affirmative, whether the order was served or brought to the attention of the Interested Party, and if so, when?*

*(f) Whether the Plaintiffs have proved that the Interested Party has disobeyed the said order and what sanction to issue.*

*(g) Who pays the costs in each of the two applications?*

8. The court has carefully considered the grounds on the two applications, the affidavit evidence, the written submissions, decided superior court's decisions cited therein, the record and come to the following findings;

(a) That the record and pleadings filed clearly shows that Wilfred Kipkolum Tirop, the Interested Party, was not a party in these proceedings until 10<sup>th</sup> February, 2020 when prayer 1 of his notice of motion dated 17<sup>th</sup> January, 2020 was allowed by consent. That though the Plaintiffs allege that the Interested Party was among those present when the Deputy Registrar visited the suit land on the 16<sup>th</sup> August, 2019 in compliance with the court order of 31<sup>st</sup> July 2019, that allegation is not apparent on the Deputy Registrar's Report dated the 22<sup>nd</sup> August, 2019 and filed on the record. That further, the Plaintiffs' allegation that the Interested Party was in Court on the 5<sup>th</sup> December, 2019 is also not supported by the proceedings of that day. That indeed, what the Court directed in its ruling of 5<sup>th</sup> December, 2019 was that **"the building under construction should not be accessed by any person including Wilfred Kiptolum Tirop..."** The Court takes the said Wilfred Kiptolum Tirop referred to in the said ruling to be the Interested Party herein. That even though there is no evidence to show that the Plaintiffs had the said Interested Party personally served with the said order, the fact that he moved the Court for the review of the order through his application dated the 17<sup>th</sup> January, 2020 confirms he got to know the contents of the order on or before the 17<sup>th</sup> January, 2020. That therefore, the Interested Party had a duty to obey the said court order from the date he got to know of it.

(b) That the Plaintiffs' case is that the house now occupied by the Interested Party was finalized after the consent order of 28<sup>th</sup> November, 2018, and 5<sup>th</sup> December, 2019. That paragraph 9 and 10 of the Interested Party's affidavit sworn on 17<sup>th</sup> January, 2020,

and filed with his Notice of Motion, confirms that the Interested Party was using the said house, and that is why he wanted the order of 5<sup>th</sup> December, 2019 reviewed as it specifically barred him from accessing the land. That evidently, the Interested party chose not to obey the order, and continued accessing the suit land despite the clear direction of the order of 5<sup>th</sup> December, 2019, whose contents he obviously knew. The Interested Party is therefore in contempt of the Court order, and need to be sanctioned.

(c) That prayers 2 and 3 of the Interested Party's Motion dated the 17<sup>th</sup> January, 2020 sought for the setting aside and or review and stay order "***pending the hearing of this application interpartes.***" That as the prayers were not granted at the interim like prayer 1 was, they cannot be granted after interpartes hearing. That the court cannot grant a prayer that is not specifically sought.

(d) That as the Judge who issued the order of 5<sup>th</sup> October, 2019 left this station on transfer in September 2019, then contrary to the position taken by the Plaintiff, this court has jurisdiction under **Order 43 Rule 2(2) of Civil Procedure Rules** to hear and determine the Interested Party's application.

(e) That as the Interested Party's refusal to obey the order of 5<sup>th</sup> December, 2019 is the one that made the Plaintiffs file their application dated the 15<sup>th</sup> July, 2020 in which they have succeeded proving, the Interested Party should pay their costs under **Section 27 of the Civil Procedure Act Chapter 21 of Laws of Kenya**. That the costs for the Interested Party in respect of his Motion dated the 17<sup>th</sup> January, 2020 will be in the cause.

9. That in view of the foregoing, the Court finds and orders as follows;

(a) That save for prayer 1 of the Interested Party's Motion dated the 17<sup>th</sup> January, 2020 that was allowed by consent on 10<sup>th</sup> February 2020, the other prayers are dismissed with costs in the cause.

(b) That the Plaintiffs have proved to the standard required that the Interested Party is in contempt of court by accessing the suit land contrary to the order of 5<sup>th</sup> December, 2019 that he knew of from 17<sup>th</sup> January, 2020. That the Court therefore allows the Plaintiffs' Motion dated the 15<sup>th</sup> July, 2020 with costs against the Interested Party. The Interested Party should immediately comply with the restraining order of 5<sup>th</sup> December, 2019, and appear personally in Court on the date to be fixed here below for mitigation and sentencing. Orders accordingly.

**Delivered virtually and dated at Eldoret this 18<sup>th</sup> day of November, 2020.**

**S. M. KIBUNJA**

**JUDGE**

**In the presence of:**

Plaintiffs: Absent.

Defendants: Absent.

Interested Party: Absent.

Counsel: Mr. Chepkwony for Interested Party.

M/s Isiaho for the Plaintiff.

Court Assistant: Christine

and the Ruling is to be transmitted digitally by the Deputy Registrar to the Counsel on record through their e-mail addresses.