



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO. 72 OF 2018

PIUS MBUGUA NGUGI1ST PLAINTIFF

LUCY WANJIKU LEITMANN2ND PLAINTIFF

UKINGONI FARM LIMITED3RD PLAINTIFF

VERSUS

THE CHIEF LAND REGISTRAR.....1ST DEFENDANT

THE ATTORNEY GENERAL.....2ND DEFENDANT

HARUN CHEMJOR CHEPKEITANY3RD DEFENDANT

THE DIRECTOR OF SURVEY KENYA.....4TH DEFENDANT

THE NATIONAL LANDS COMMISSION.....5TH DEFENDANT

DISTRICT LAND REGISTRAR, NAKURU.....6TH DEFENDANT

DIRECTOR OF LAND ADMINISTRATION.....7TH DEFENDANT

R U L I N G

1. Before me for ruling is the plaintiffs/Applicants Notice of Motion application dated 5th February 2020 expressed to be brought under section 1A, 1B, 3A and 63 (c) of the Civil Procedure Act, section 5 of the Judicature Act, section 4 and 5 of the access of information Act of 2016, Articles 3(1), 10(2) 21 (1), 22(1), 35 and 232 of the constitution. The application prays for a raft of orders which inter alia include:-

2. *That the Honourable Court be pleased to issue summons to the 1st and 6th defendants/Respondents respectively to appear in this Court on a date to be set by this Honourable Court to explain why orders issued on 9th March 2018 have been breached under their watch and complicity.*

3. *That the 1st and 6th defendants/respondents be compelled to avail to the applicants and/or this Honourable Court copies of all the illegal titles issued to third parties in reference to the suit properties known as **Kasegas/Subukia West Block 5 (Ukingoni) Sub division LR No. 8437** and **Kasegas Subukia West Block 6 (Chemarmas) Sub division LR 10762**.*

4. *That a temporary injunction do issue restraining the Defendants whether by itself, its servants and/or agents or whomsoever from further issuance of any titles to third parties arising from the suit properties **Kasegas/Subukia West Block 5 (Ukingoni) sub Division LR No. 8437** and **Kasegas Subukia West Block 6 (Chemarmas) Sub Division LR 10762**.*

5. *That temporary injunction do issue restraining any person issued with any titles in contravention with the orders of the Court of 9th March 2018 from interfering, Building, taking possession, selling, alienating charging ,transferring or in any other manner whatsoever interfering with the property known as **Kasegas/Subukia West Block 5 (Ukingoni) Sub Division LR. No. 8437** and **Kasegas Subukia West Block 6 (Chemarmas) sub Division LR 10762** pending hearing and determination of the main suit.*

6. That the 1st and 6th defendants/respondents be compelled to register prohibition orders issued by this Honourable Court on the 9th March 2018 and any other orders the Court shall grant over each and every title issued to third parties in contravention of the orders issued on 9th March 2018 in reference to the suit properties known as **Kasegas/Subukia West Block 5 (Ukingoni) sub division LR No. 8437 and Kasegas Subukia West Block 6 (Chemarmas Sub Division LR. 10762 pending determination of the main suit.**

7. That in the alternative to prayer no. 2 the Chief Land Registrar and the District Land Registrar Nakuru be cited for contempt of Court for disobeying the order of 9th March 2018.

8. That upon the 1st and 6th defendants being cited for contempt, an order of committal to be made against the Chief Land Registrar and the District Land Registrar Nakuru to be committed to prison for such period as this Honourable Court may deem fit and just.

2. The application is supported on the grounds set out on the body of the application and on the supporting affidavit and further affidavit sworn in support thereof by Pius Mbugua Ngugi, the 1st plaintiff herein. The plaintiffs contend that the 1st and 6th Respondents, the Chief Land Registrar and the District Land Registrar Nakuru, have in utter disregard and disobedience of this court's order dated 9th March 2018 barring any dealings whatsoever with Land parcels **Kagegas/Subukia West Block 5 (Ukingoni) subdivision LR No. 8437 and Kagegas/Subukia, West block 6(Chemarmas) subdivision LR.10762** sanctioned the processing subdivision and issuing of subtitles to third parties. The plaintiffs pray for *interalia* orders citing the 1st and 6th defendants for contempt of Court and for their punishment for being in contempt of Court.

3. The plaintiffs aver that in spite of the Court on 9th March 2018 issuing orders prohibiting the defendants/Respondents from further subdividing or allocating to any other party or dealing in any manner with the suit properties, the Respondents have illegally subdivided, allocated the suit properties to unknown third parties and issued 169 new titles emanating from the illegal subdivision of the suit properties. The plaintiffs aver that the respondents executed these acts in defiance of the existing Court order and were therefore in contempt and deserved to be punished. The Plaintiffs argued that disobedience of Court orders erodes the dignity of the Court and that unless the Court punishes offenders, the public is bound to lose confidence in the Court system which would lead to anarchy as the public could resort to the rule of the jungle.

4. The plaintiffs further averred that the Court Order of 9th March 2018 was made in the presence of counsel for the Respondents and thus argued that the Respondents were fully aware of the terms of the order and/or had knowledge of the order and consequently their acts of disobedience were deliberate and intentional and urged the Court act decisively and find the 1st and 6th defendants to be in contempt and punish them appropriately. The plaintiffs stated that they did not wish to file any submissions explaining that they would rely entirely on the affidavit filed in support and the annexures supplied which they contended clearly illustrated the blatant acts of disobedience of the Court Order by the 1st and 6th defendant. The plaintiffs however furnished the Court two authorities namely **Republic vs Principal Secretary, Ministry of Defence, Ex parte George Kariuki Waitthaka (2019) eKLR**; and **Woburn Estate Limited vs Margaret Bashforth (2016) eKLR** that they relied on in support of the application.

5. On behalf of the 1st, 4th, 6th and 7th Defendants, the Hon Attorney General filed grounds of opposition to the plaintiffs application on 13th July 2020. *Interalia* in the grounds of opposition the Attorney General contended no Court order was lodged for registration against the title of the property as an encumbrance to any dealings affecting the property, that there was not appropriate service of the Court order and in the absence of the registration of the Court order in the land registry, there was nothing to impede the registrar from effecting the registration of any other instruments; and further that in the circumstances of this case actual service of the court order needed to be effected on the 1st and 6th defendants in lieu of the registration of the order against the title which the applicants failed to do. The AG thus argued the 1st and 6th defendants in the circumstances could be held to be in contempt of the order.

6. The 3rd Defendant Harun Chemjor Chepkeintany swore a replying affidavit dated 7th October 2020 in opposition to the plaintiffs application for contempt under consideration. The 3rd defendant also filed written submissions dated 9th November 2020. The main thrust of the 3rd defendants opposition to the plaintiffs application was that the Court order the subject of the contempt proceedings had been overtaken by event since the land register relating to LR No.10762 and LR No. 8437 had already been closed by the 1st defendant following subdivision of the suit land. The 3rd defendant deponed that members of Ukingoni Farm Limited on 13th February 2010 unanimously resolved to subdivide the suit properties after the ownership dispute was determined on 13th October 2006 in Nakuru HCCC No.71 of 1994 where judgment was delivered in favour of Ukingoni Farm Limited as against Ngedalel Koiyo Farm Ltd. The 3rd Defendant stated that as the directors of Ukingoni Farm Limited, they surrendered the provisional title deeds they held over the suit lands to facilitate the subdivision and to enable the issuance of individual titles to the members.

7. The 3rd defendant further stated that the 1st plaintiff came to the suit land in 2017 and by then the subdivision had been completed and that the list of the beneficiaries of the subdivision had been produced in August, 2016. The 3rd defendant further deponed that the 1st plaintiff had sought to stop the subdivision by way of a Judicial Review application in Nakuru ELC No. 420 of 2017 (formerly Nairobi J/R No.639 of 2017) but was unsuccessful. The 3rd defendant was of the view that the court order issued herein by the Court was not capable of being complied with as the subdivision had been carried out, the register closed, and the beneficiaries had been issued with individual title deeds. He contended the instant application had been overtaken by events and should be dismissed.

8. There is no doubt that the court has jurisdiction to punish for the violation of its orders. The Court of Appeal in the case of **Woburn Estate Limited -vs- Margaret Bashforth (supra)** while affirming that position stated as follows:-

“ the jurisdiction of the High Court (or any other court for that matter) to punish for the violation of its orders cannot be in

question. Apart from section 5(1) of the Judicature Act that vests in the High Court the power, like those of the High Court of Justice in England, to punish any party who violates its orders., the Court, by virtue only of being a Court has inherent powers to make sure its process is not abused and its authority and dignity is upheld at all times”

9. Contempt of Court is a serious indictment and for a person and/or party to be punished for contempt it must be demonstrated the party was served with the order and /or was well aware and had knowledge of the terms of the order and willfully and deliberately disobeyed the order. The standard of proof of contempt is at a higher pedestal than proof on a balance of probabilities though not as high as proof beyond reasonable doubt as is the case in Criminal cases. The Court of Appeal in the case of **Michel Sistie Mwaura Kamau -vs- Director of Prosecutions & 4 others (2018) eKLR** stated as follows as to what would amount to contempt of court:-

“- It is trite that to commit a person for contempt of Court, the Court must be satisfied that he had willfully and deliberately disobeyed a Court order that he was aware of. That is made absolutely clear by section 4 of the Contempt of court Act (now declared unconstitutional) and the ruling of the Supreme Court in **Republic -vs- Ahmed Abolfathi Mohammed & Another** (supra) secondly, as this Court emphasized in **Jilan Freighters Ltd -vs- Hardware & General Stores Ltd** and **A.B & another -vs- R (2016) eKLR** to sustain committal for contempt of court, the order of the court that is alleged to have been deliberately disobeyed must be clear and precise so to leave no doubt as to what a party was supposed to do or to refrain from doing. Lastly, the standard of proof in committal proceedings is higher than proof on a balance of probabilities, though not as high as proof beyond reasonable doubt.(see **Mutitika -vs- Baharinin Farm** (supra) and **Republic -vs- Ahmed Abolfathi Mohammed & another** (supra)”

10. The Respondents have protested that the Court order was not served upon them and neither was the same registered against the title register as an encumbrance against the title. The court in **Woburn Estate Limited -vs- Margaret Bashforth** (supra) referred extensively to an earlier decision of the same Court in **Christine Wangari Gachege -vs- Elizabeth Wanjiru Evans & 11 others (2014) eKLR** where the Court of Appeal affirmed the procedure applicable in contempt of Court proceedings was the Civil Procedure Rules of England, then applicable in England. The Court held that part 81.4 of the Civil Procedure (Amendment No. 2) Rules 2012 of England applied to our situation by virtue of Section 5 of the judicature Act, Cap 8 Laws of Kenya.

11. Regarding the application of part 81 of the English Civil Procedure Rules, the Court in **Woburn Estate Ltd** case (supra) inter alia stated as follows:-

“—Under Rule 81.6, and as a general rule, service of the judgment or order must be personal on the contemnor unless the Court dispenses with that requirement. Exceptions to that rule are found in Rule 81.8 to the effect that personal service will be dispensed with if the Court is satisfied that the contemnor was present when the judgment or order was given or made, if the contemnor was notified of its terms by telephone, email or otherwise or if the Court thinks it is just to dispense with service. There has been little change in this requirement since the decision of this court in **Ochino & Another -vs- Okombo & Others (1989) KLR 165**. The court may also make an order of service by alternative method or at an alternative place.”

12. In the case of **Kenya Tea Growers Association -vs- Francis Atwori & 5 others (2012) eKLR** the Court held where a contemnor had personal awareness and knowledge of the Court order it was not obligatory to effect personal service of the order and a penal notice on the contemnor for the contemnor to be found and held to be in contempt of the order. In the present matter the plaintiffs/Applicants have contended that all the parties were represented by counsel on the date that the order was made and hence the Respondents are deemed to have been aware of the Court order. The court record shows that the Court order that is alleged to have been disobeyed by the respondents was made on 28th February 2018 and was in regard to the plaintiffs application dated 12th February 2018. On the date Mr. Musyoka advocate represented the plaintiffs, Ms Fatma State Counsel represented the 1st, 2nd, 4th, 6th & 7th defendants and Mr. Kibet advocate represented the 3rd defendant. It appears the court order was made by consent following prompting by the Court. The Court in making the order that was intended to preserve the land the subject matter of the suit stated:-

“It is only proper that the subject matter of the case be preserved so that the parties can be allowed opportunity to litigate. I therefore confirm prayer 5 of the application dated 12th February 2018 as drawn until the case is finalized. None of the parties should also sell, charge, or enter into other disposition on the parcels land identified in prayer 5 of the said application until this case is finalized or until further orders of this court.”

13. The order was extracted and was issued by the court on 9th March 2018 and the particulars of order Number (1) & (2) of the extracted order which is relevant to the present application was in the following terms:-

1. That an order of prohibition is issued barring or prohibiting the defendants whether by themselves, servants, or agents from further subdividing or allocating to any other party or dealing in any way with the land comprised in Kasegas/Subukia West Block 5 (Ukingoni) subdivision LR No. 8437 and Kasegas Subukia West Block 5 (Ukingoni) Subdivision Subukia West Block 6 (Chemarmas) Subdivision LR. 10762 resulting from subdivisions of the extinguished title comprised in LR 10762 (IR 18060) and LR 8437 (IR No.10710) until the case is finalized.

2. That none of the parties should also sell, charge or enter into any other dispositions on the parcels of land Kasegas /Subukia West Block 5 (Ukinngoni) subdivision LR No.8437 and Kasegas Subukia West Block 6 (Chemarmas) sub division LR 10762 resulting from the subdivisions of the extinguished title comprised in LR 10762 (IR 18060) and LR 8437 (IR 10710) until this case is finalized or until further orders of this court.

14. Although the 1st plaintiff stated in his further affidavit (under paragraphs 3) that the order was served on the Respondents personally and that the Chief Registrar refused to register the order, there is no evidence to demonstrate that indeed the order was served as alleged and/or was presented for registration at the land registry. The order that is shown to have been presented for registration is the court order issued on 10th November 2017 in Nakuru ELC No. 420 of 2017. The Registrar of Titles declined to register the order observing that:-

“I am unable to register your order because the order has been overtaken by events (Original Title surrendered)”.

15. The order in respect of which registration was declined was not made in the instant suit though it related to the same parcels of land. When the plaintiffs obtained the order issued on 9th March 2018, they had knowledge that the titles had been surrendered and the registers of the land parcels had been closed on subdivision. The 3rd defendant/ Respondent in his replying affidavit annexed as an annexure, a replying affidavit in ELC No. 420 of 2017 by Charles Kipkirui Ngetich, the Principal Land Registration Officer (Ministry of Lands, Ardhi House) who at paragraph 18 and 19 had deponed as follows:

18. That the Directors of Ukingoni Farm Limited surrendered the Provisional Certificate of Titles from subdivision and the surrender was registered on 14th August, 2017.

19. That the 1st Respondent has not refused to register the Order issued on 9th November, 2017 but the register is already closed for subdivision and there is no record against which to register the order unless the register is reinstated.

16. The Court order issued by the Court on 9th March 2018 was in effect an inhibition within the meaning of section 68 of the Land Registration Act, 2012. Section 68 of the Land Registration Act, 2012 provides as follows:-

68. Power of the court to inhibit registered dealings

(1) The court may make an order (hereinafter referred to as an inhibition) inhibiting for a particular time, or until the occurrence of a particular event, or generally until a further order, the registration of any dealing with any land, lease or charge.

(2) A copy of the inhibition under the seal of the court, with particulars of the land, lease or charge affected, shall be sent to the Registrar, who shall register it in the appropriate register.

(3) An inhibition shall not bind or affect the land, lease or charge until it has been registered.

17. Under subsection (2) of Section 68 of the Act, the inhibition with the particulars of the land is required to be registered by the Registrar, in the appropriate register. Subsection (3) of section 68 of the Act provides that an inhibition does not bind or affect the land unless it is registered. In the present matter the titles in respect of LR No. 8437 and LR No. 10762 had been surrendered apparently in consideration of a conversion and approval of a subdivision scheme. The title registers were closed on subdivision. At the time the court order in ELC 420 of 2017 was lodged for registration, there was no appropriate register in regard to the suit properties against which the order could be registered there having been a surrender of the titles. The plaintiff /applicants did not apply for the reinstatement of the surrendered titles to facilitate the registration of the Court order although the Land Registrar in declining to register the court order had intimated the register could be reinstated.

18. The Court order issued in this matter was not presented for registration and could not in fact be registered because there was no register against which it could be registered at the Land office. As observed earlier in this ruling there is no evidence that the defendants, notably the 1st and 6th Defendants were personally served with the Court order as alleged by the plaintiffs. There is no certainty that they indeed were aware of and/or had knowledge of the Court order. It is true Ms Fatma who represented the 1st, 2nd, 4th, 6th and 7th Defendants was present in Court when the order was made on 28th February 2018 but did that absolve the plaintiff from presenting the order for registration and/or effecting service of the order on the defendants? I do not think so. The order sought to restrain the 1st and the 6th defendants from carrying out a mandate that they were empowered to undertake statutorily. The only way the Chief Land Registrar and the Land Registrar would have become aware of the terms of the order that was ineffect curtailing their powers conferred under statute was by them being served with the order issued by the court or if the order was registered. In my view mere knowledge that there was an order issued was not enough. Service of the order personally on the officers in lieu of registration of the order was essential for them to be found to be in contempt of the order.

19. It is apparent that the land the subject matter of the suit has been subdivided to create various sub titles as evidenced by the copies of titles exhibited in the 1st plaintiff's further affidavit and that has obviously brought another dimension to the suit. Who are the persons who have been issued subtitles, and need they be enjoined to the suit? That is an issue the parties may need to grapple with before the matter goes to trial with a view of determining whether such persons have a role to play in the present suit. What is however clear is that the issued subtitles emanate from the land the subject of the suit. As I have explained above I am not able to hold that the land Registrar willfully and deliberately acted in defiance of the Court order in processing and issuing the title deeds. The Land Registrar could have been properly and validly exercising the mandate bestowed upon him by the statute in processing and issuing the deeds considering no inhibition has been registered against the register of the subtitles. It is on that account and considering the threshold in regard to proof of contempt, that I find the charge of contempt not proved against the 1st and 6th respondents.

20. Notwithstanding that I have found the charge of contempt against the respondents not established, there is necessity to maintain the integrity of the suit property. The plaintiff's claim relates to the entirety of land parcels LR No.8437 and LR No.10762 as they originally existed. There is uncontroverted evidence that these parcels of land have been subdivided and that the subtitles exhibited herein emanate from such subdivision. That would mean the subdivision has been registered and subtitle registers have been opened against which the title deeds have been issued and/or are being issued. In order to preserve in some form the suit properties the Land Registrar, Nakuru is ordered to register restrictions on all the title registers of all the subdivisions emanating from land parcels **Kasegas/Subukia West Block 5 (Ukingoni) formerly LR No.8437** and **Kasegas/Subukia West Block 6 (Chemarmas) formerly LR No. 10762** prohibiting the registration of all transactions and dealings affecting the subtitles until the present suit is heard and determined. For the avoidance of any doubt the restriction will also be registered against the registers of the subtitles where title deeds have been issued.

22. The net result is that the plaintiffs Notice of Motion dated 5th February 2020 as it related to contempt of the court order issued on 9th March 2018 fails. The application however succeeds as relates to the prayer for the 1st and 6th defendants to be required to register prohibition orders against the register of the subtitles created following the subdivision of the suit properties. Subject to the order requiring the registration of restrictions on the registers of the subtitles as aforesaid, the plaintiff's Notice of Motion stands dismissed but with no order as to costs.

23. Orders accordingly.

Dated signed and delivered virtually at Nakuru this 17th day of December 2020.

J M MUTUNGI

JUDGE