



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CIVIL CASE NO. 950 OF 2013

WILHELMINA I. KHAMINWA

CECEILIA N. KAREITHI

HELEN K. KIRUGU

JOYCE G. MAINA

MARY MUGO T/A METPAT ENTERPRISES.....1ST PLAINTIFF/APPLICANT

JULIUS MAINA NDIRANGU.....2ND PLAINTIFF/APPLICANT

=VERSUS=

OBADIAH M. WAINAINA T/A COUNTRY MAPS AGENCIES.....1ST DEFENDANT/RESPONDENT

KARUIUA MWIRIUKIA FARMERS COOPERATIVE SOCIETY.....2ND DEFENDANT/RESPONDENT

RULING

1. This is the Notice of Motion dated 10th October 2016 brought under Order 40 Rule 3 of the Civil Procedure Rules, 2010 and other enabling provisions of the law.

2. It seeks order:-

1. Spent.

2. That this honourable court be pleased to issue summons against J. M. Macharia, Kenneth Macharia and Godfrey Kioni, the Chairman, Secretary and Treasurer respectively of the 2nd defendant/respondent to appear before this honourable court during the hearing of the interparties hearing of the application herewith and/or any other day this court may appoint to show cause why they should not be committed to civil jail for disobeying lawful court orders issued by this honourable court dated the 9th of October 2013 and the consent orders dated the 23rd July 2014.

3. That this honourable court be pleased to commit the contemnors herein J. M. Macharia, Kenneth Macharia and Godfrey Kioni being the 2nd defendant's/respondents' Chairman, Secretary and Treasurer respectively to civil jail for a period of six months without the option of a fine or as the court may direct for disobeying lawful orders of the court dated the 9th October 2013 and the 23rd of July 2014.

4. That in the alternative and without prejudice to 3 above, this honourable court be pleased to order the attachment of any movable properties of the 2nd defendant/respondent and/or its officials and the contemnors herein J. M. Macharia, Kenneth Macharia and Godfrey Kioni being the Chairman, Secretary and Treasurer respectively on such term as the court may direct.

5. That this honourable court be pleased to issue any further orders as it may deem fit to secure the interest of justice.

6. That the 2nd defendant/respondent be condemned to meet the cost of this application.

3. The grounds are on the face of the application and are set out in paragraphs 1 to 9.

4. The application is supported by the affidavit of Julius Maina Ndirangu, the 2nd plaintiff/applicant sworn on the 10th October 2016 and a supplementary affidavit sworn on the 21st December 2016.

5. The application is opposed. There are grounds of opposition dated 4th November 2016 and filed in court on the same day. There is also a preliminary objection dated 4th November 2016.

6. On the 31st October 2016, the court directed that the Notice of Motion be canvassed by way of written submissions. On the 13th June 2016, the court further directed that the preliminary objection and the notice of motion be heard together. The submissions were highlighted on 18th September 2018.

7. It is the 2nd Plaintiff/Applicant's case that the alleged contemnors are guilty of disobeying the court orders issued on 9th October 2013 and 23rd July 2014. They have put forward the cases of **A.W vs L.W [2016] eKLR**. There were orders in force prohibiting any adverse actions against the defendants/respondents in respect of the suit premises. The 2nd defendant/respondent had the knowledge of the orders forming the subject matter of this dispute. They have also put forward the cases of **Abdalla ali Taib & 3 Others vs Rabinder Kaur Ahluwalia [2015] eKLR; Osano & Associates vs ICT Authority [2016] eKLR**. The 2nd respondent/defendant has flouted the orders of this court by transferring the property to a third party. They pray that the application be allowed.

8. It is the 2nd defendant's/respondent's case that the orders alleged were issued more than twelve months ago and as per order 40 rule 6 of the Civil Procedure Rules have lapsed. The applicant did not seek leave of the court before bringing this application. The orders do not bear the penal notice as required by law. They pray that the preliminary objection be upheld and the notice of motion be dismissed with costs.

9. I have considered the preliminary objection dated 4th November 2016. The notice of motion dated 10th October 2016, the affidavits in support and the grounds of opposition. I have considered the written submissions of counsel, the oral highlights and authorities cited. The issues for determination are:-

i. Whether the preliminary objection is merited.

ii. Whether or not the alleged contemnors were served with the said court orders.

iii. Whether or not the alleged contemnors are guilty of disobeying the said orders.

iv. Who should bear costs?

10. I have gone through the court record. On the 9th October 2013, Hon. Lady Justice Pauline Nyamweya issued the orders :-

“That a temporary injunction be and is hereby granted preventing the defendants whether by themselves, agents, representatives or otherwise from selling, wasting, letting, assigning, utilizing, deriving benefits, trespassing into, or in any other manner dealing with the whole of the property known as L.R. No. Samuru/Mwitungiri/Block 1/2221 & Block 1/2087 pending the hearing and determination of this suit.”

Further on 23rd July 2014 Hon. Justice Mutungi issued orders by consent that:-

“That the plaintiffs' application dated 1st August 2013 be and is hereby heard by consent dispensed with on the terms that the parties maintain and observe the obtaining status quo where they will be no sale, transfer and/or disposition of the suit property until the suit is heard and determined”

The first part of the preliminary objection is that the orders of the court have since lapsed as they were issued more than two years ago. I disagree with this position. The orders issued by Honourable Justice Mutungi were meant to subsist until the suit is heard and determined. There was therefore no requirement for the plaintiffs'/applicants' to apply for extension. I find that this ground fails.

11. The second ground of objection is that no leave was obtained from the court prior to bringing this application. I agree with the counsel for the plaintiffs'/applicants' that the requirement to seek leave before commencing contempt proceedings is no longer necessary. If that this ground fails as well.

I also find the requirement for the orders to contain penal notice was not necessary as this was a consent order where all parties were represented by counsel. The fact that the 1st plaintiff claim was settled does not extinguish the 2nd plaintiff's claim. The upshot of the matter is that I find no merit in this preliminary objection and the same is dismissed with no orders as to costs.

12. I have gone through the affidavit of Albert Mulindi process server sworn on the 14th October 2013. In paragraph 3 he deposes that:

“That on the 11th October 2013, I proceeded to the 2nd defendant Kariua Mwiriukia, Thika off Thika Muranga highway where I served them with the copies of court order of which was acknowledged by the secretary who signed on the front page of my copy which I now return duly served and signed”.

The said process server does not give the name of the said secretary. It is clear from the above that the alleged contemnors were not served personally with the orders of the court nor did they have knowledge of the court orders.

13. I am guided by the holding of Emukule Judge in **Mombasa HCC Misc. Application No. 20 of 2015 Republic Ex parte Farid Mohammed Al Maary & 2 Others vs County Government of Mombasa** where the court observed that:-

“For purposes of contempt proceedings the responsibility attaches to an individual or individual of officials and not every official of the respondent.”

It was therefore important for the applicant/2nd plaintiff to ensure that the alleged contemnors were served personally.

14. In the case of **Justus Kariuki Mate & Another vs Martin Nyaga Wambora & Another CA Civil appeal No. 24 of 2014**, the court held that :-

“It is important that the court satisfies itself beyond any shadow of doubt that the person alleged to be in contempt committed the act complained of with full knowledge or notice of the existence of the order of the court forbidding it. The threshold is quite high as it involves possible deprivation of personal liberty.”

15. The standard of proof in matters of contempt is well settled. The Court of Appeal in **Civil Appeal No. 39 of 1990 Refrigeration & Kitchen Utensils Ltd vs Gulab Chand Popattal Shah & Others** in approving the standard of proof in contempt cases as set out in the case of **Gatheru Mutika & Others vs Bahari Farm Limited Civil Appeal No. 24 of 1995** held:

“That in case of alleged contempt the breach for which the contemnor is cited must not only be precisely defined but proven in standard which is higher than proof of a balance of probabilities but not as high as proof beyond reasonable doubt. This is because the charge of contempt of court is an offence of criminal character and a party may lose his liberty.”

It would therefore mean before a court cites a contemnor for contempt, there must be sufficient evidence to prove that he/she had knowledge of the court order and has willfully disobeyed it. It is incumbent upon the applicant to prove that the acts complained off actually occurred and that the acts were committed by the contemnors herein.

16. All in all I find that the applicant has failed to discharge the burden a required by law. I find that the application herein lacks merit and the same is dismissed. The costs do abide the outcome of the main suit.

It is so ordered.

Dated, signed and delivered in Nairobi on this 12TH day of FEBRUARY 2019.

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L. KOMINGOI

JUDGE

In the presence of:-

Mr. Amalende Advocate for the Plaintiffs

No appearance for the Defendants

Kajuju - Court Assistant