



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MAKUENI

ELC SUIT NO. 371 OF 2017

EDWARD KAVAI NZIOKA.....1ST PLAINTIFF/APPLICANT

THOMAS NZIOKA.....2ND PLAINTIFF/APPLICANT

DICKSON MWANTHI NZIOKA.....3RD PLAINTIFF/APPLICANT

MBUVA NZIOKA.....4TH PLAINTIFF/APPLICANT

JAMES KIMENGEI NZIOKA.....5TH PLAINTIFF/APPLICANT

KAMUTI NZIOKA.....6TH PLAINTIFF/APPLICANT

JONATHAN MUTUNGA NZIOKA.....7TH PLAINTIFF/APPLICANT

MUTHINI NZIOKA.....8TH PLAINTIFF/APPLICANT

VERSUS

NZIOKA MUTWANYIGI.....1ST DEFENDANT/RESPONDENT

KATUTI NZIOKA.....2ND DEFENDANT/RESPONDENT

RULING

1) What is before this Court for ruling is the Plaintiffs'/Applicants' Notice of Motion application dated 15th October, 2018 and filed in court on even date for orders;

1. Spent

2. The Defendants herein be cited for contempt of the orders of this honourable court issued on 17/1/2018 and they be subsequently imprisoned for a period not exceeding six months.

3. That an order of restriction do issue to the land registrar restricting registration of any dealings in the title to land parcel number Nzaui/Kawala/472/993 and 994.

4. That the costs of this application be borne by the Respondent in any event.

2) The application is predicated on the grounds on its face and is supported by affidavit of Edward Kivai Nzioka, the first Plaintiff/Applicant herein.

3) The application is expressed to be brought under Sections 1A, 1B, 3A of the Civil Procedure Act and Order 40 Rule 3 of the Civil Procedure Rules.

4) The 2nd Defendant/Respondent has opposed the application vide the replying affidavit of Katuti Nzioka, the 2nd Defendant/Respondent herein, sworn at Makindu on 3rd December, 2018 and filed in court on 4th December, 2018.

5) Amongst the grounds that the Plaintiffs/Applicants rely on are:- On 17th January, 2018 they obtained orders of court and proceeded to serve them on the two Defendants/Respondents herein, that the orders stopped/restrained the Defendants/Respondents from subdividing the land or interfering with the use of land parcel number Nzau/Kawala/170, that the Defendants/Respondents failed to comply with the said orders and have instead subdivided land parcel No. Nzau/Kawala/170, to create Nzau/Kawala/993 and Nzau/Kawala/994, that the Defendants/Respondents transferred land parcels No. Nzau/Kawala/472 from the 1st Defendant/Respondent to the 2nd Defendant/Respondent in spite of the caution in both titles.

6) The 1st Plaintiff/Applicant has deposed in paragraph 2,3,4,5 and 6 of his supporting affidavit that he obtained the orders of this court issued on 17th January, 2018, that the orders were served upon the Defendants/Respondents as can be seen from a copy of the order marked "EKM 1" that the order prohibited the Defendants/Respondents from evicting, subdividing, trespassing, encroaching or in any manner interfering with the Plaintiffs'/Applicants' lawful use and occupation of land parcel No. Nzau/Kawala/472, that the Defendants/Respondents have failed to comply with the said orders and have instead subdivided land parcel No. Nzau/Kawala/170 to create Nzau/Kawala/993 and Nzau/Kawala/994 as per the attached copy of land search and green card marked "EKM 2(a) and (b)" and that the Defendants/Respondents have also transferred land parcels No. Nzau/Kawala/472 from the 1st Defendant/Respondent to one Elizabeth Mwikali and the 2nd Defendant/Respondent despite a caution in both titles.

7) In response, the 2nd Defendant/Respondent has deposed in paragraphs 3,4,5,6,7 and 8 of her replying affidavit that the application has been made after the process of subdivision, demarcation and transfer had already been completed as can be seen from the demand letter to the Plaintiffs/Applicants marked KN-1 when the latter interfered with the boundaries after the suit property had been surveyed for subdivision, that the surveyor also wrote quoting the financial implication of surveying and subdividing the two parcels of land as can be seen from the letters marked KN-2(a) and (b), that the issues were also propagated by other land stake holders after the 1st Defendant/Respondent had expressed his wishes on how the land was supposed to be shared in a meeting held at the Deputy County Commander (SIC) Nzau Sub-county offices in which the Plaintiffs/Applicants were in attendance, that by 31st January, 2018 there was no caution registered in favour of the Plaintiffs/Applicants when they conducted official search as can be seen from the document marked KN-3, that the orders in the application dated 5th December, 2017 did not apply to Elizabeth Mwikali Kioko and the Land Registrar since the two are not parties to this suit and that the issue of transfer to the 1st Defendant/Respondent's interest in the two parcels of land were decisions facilitated by the Deputy County Commissioner Nzau Sub county and started long before this suit as can be seen from the land control consent signed by the Deputy County Commissioner and marked KN-4.

8) Counsel on record for the parties herein filed their submissions pursuant to the directions to dispose of the application by way of written submissions.

9) It was the Plaintiffs/Applicants' Counsel's submissions that the Defendants/Respondents having been duly served with the order dated 18th January, 2018, which service is not disputed, the Defendants/Respondents were under unqualified obligation to obey it until the order was discharged. The Counsel pointed out that the Defendants/Respondents acted in disregard of the orders by transferring and/or allowing to be transferred the land parcel No. Nzau/Kawala/472 from Nzioka Mutwanyingi to the 2nd Defendant/Respondent and that of one Elizabeth Mwikali. That in so doing, the Defendants/Respondents acted in contempt of court. It was further submitted that court orders cannot be issued in vain and that this court has jurisdiction to enforce its orders and to punish those who disobey them. The Counsel added that the decision of the Deputy County Commander cannot override a court order. The Counsel urged the court to cancel, nullify and declare illegal all the transactions carried out in disobedience of the court on land parcels No. Nzau/Kawala/472 and Nzau/Kawala/170.

10) It was also the Counsel's submissions that a party who knows of an order whether on null or valid, regular or irregular, cannot be permitted to disobey it.

11) The Counsel cited the case of **Woburn Estate Ltd v Margaret Bashforth [2016] eKLR** where the Court of Appeal quoted with approval the case of **Refrigeration and Kitchen Utensils Ltd v Gulabchand Popatlal Shah & Another** in Civil Application No. 39 of 1990 where it was observed;

"A party who knows of an order, whether null or valid, regular or irregular, cannot be permitted to disobey it.... It would be most dangerous to hold that the suitors, or their solicitors, could themselves judge whether an order was null or valid – whether it was regular or irregular. That they should come to court and not take upon themselves to determine such a question.... he should apply to the court that it might be discharged. As long as it exists it must not be disobeyed."

12) The Counsel further cited the case of **Republic v Attorney General & 2 Others Ex parte Mountain Slopes Commercial Services Ltd & Another [2016] eKLR** which applauded the decision in **Econet Wireless Kenya Ltd Vs. Minister for Information & Communication of Kenya & Another [2005] 1KLR 828** where Ibrahim, J (as he then was) stated;

"It is essential for the maintenance of the rule of law and order that the authority and dignity of our courts are upheld at all times. The court will not deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors. It is the plain and unqualified obligation of every person against, or in respect of whom, an order is made by a court of competent jurisdiction, to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even in cases where the person affected by an order believes it to be irregular or void."

13) On the other hand, the Counsel for the Defendants/Respondents cited the cases of **Jacob Zedekiah Ochino & Another v George Aura Okombo & Others in Civil Appeal No. 36 Of 1989** and **Mwangi Wangondu v Nairobi City Council in Civil Appeal No. 95 Of 1985** and **Mutitika v Baharini Farm Ltd [1985] KLR 229**. It should be noted however that the Counsel cited the case of **Phelix Polycarp Odhiambo Ogolla V William Kangara & KLR J. M Mutungi J** observed thus;

“For a party to be punished for contempt of court it has to be positively established that either the Respondent was served with a court order personally and/or any rate the Respondent had knowledge of and the contents of the order nonetheless went ahead to disobey the order. Indeed, until the rule was recently relaxed though case law the requirement was that a party had to be personally served with the court order for him or her to be held to be in contempt.”

14) The Counsel was of the view that the Applicants have not established the required threshold that the 2nd Defendant/Respondent is in contempt of the orders dated 18th January, 2018.

15) Having read the application together with its supporting affidavit as well as the replying affidavit by the 2nd Defendant/Respondent and having considered the submissions filed by Counsel on record for the parties, I do note that there is no evidence to show that the 2nd Defendant/Respondent was aware of the order issued by this court on 17th January, 2018. No affidavit of service was ever filed to show that the 2nd Defendant/Respondent was served with the said court order. What comes out clearly is that there is contradiction between the Plaintiffs/Applicants and the 2nd Defendant/Respondent as to whether not the suit land had been subdivided and transferred by the time the order was issued. As earlier on observed, the onus of proving otherwise lay on the Plaintiffs/Applicants and they have failed to discharge it. The 2nd Respondent cannot therefore be said to be in contempt of the aforementioned court order.

16) The upshot of the foregoing is that the application lacks merit. Same is hereby dismissed with costs to the 2nd Defendant/Respondent

Signed, Dated and Delivered at Makueni this 26th Day of September, 2019.

MBOGO C.G,

JUDGE.

In the presence of: -

Mr. V. M. Muia holding brief for Mr. Wasolo for the Defendant/Respondent

Makau & Co. Advocates for the Plaintiff/Applicant Absent

Mr. Kwemboi - Court Assistant

MBOGO C.G, JUDGE,

26/09/2019.