



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO 727 OF 2017

AYUB NJENGA WAINAINA1 ST PLAINTIFF

IRENE WAIRIMU WAINAINA.....2 ND PLAINTIFF

-VERSUS-

JOHN EDWARD NGURE.....1 ST DEFENDANT

MAWEGA COMPANY LIMITED.....2 ND DEFENDANT

THE DISTRICT LANDS REGISTRAR NAIROBI..... 3 RD DEFENDANT

THE ATTORNEY GENERAL4 TH DEFENDANT

AND

STEPHEN NJAU KANGETHE.....1 ST INTERESTED PARTY

BENARD KAMANDE MBUGUA2 ND INTERESTED PARTY

ASWANI OBUTABILA PATRICK..... 3 RD INTERESTED PARTY

RULING

1. The plaintiffs (**the applicants**) through their notice of motion dated 19/10/2018 sought contempt orders against the 1st and 2nd defendants in the following verbatim terms:

2. The 1st and 2nd defendant be cited for contempt of court for disobeying the stop orders dated and issued on 29th May 2018.

3. Upon grant of prayer number 2, the defendants, their directors and servants be punished either by imprisonment for a period not exceeding six (6) months and/or fined a monetary fine or such other punishment as the court shall deem fit.

2. The application was premised on nine grounds set out in the motion and it was supported by an affidavit sworn on 19/10/2018 by Irene Wairimu Wainaina. The case of the applicants was that the 1st and 2nd defendant had continued with construction activities on the suit properties in contempt of the consent order adopted by the court on 29/05/2018. The applicants exhibited as Exhibit "1RW2" photographs of what they contended was the state of the suit properties immediately before the court order was issued. Exhibit "1RW 2" did not reveal any permanent development on the suit properties. They also exhibited an Exhibit "1RW3" what they described as the state of the suit property on 11/10/2018. Exhibit "1RW 3" revealed permanent structures under construction on the suit properties. The applicants contended that the 1st and 2nd defendants had, through their agents, undertaken construction activities on the suit properties during the subsistence of the consent court order. They urged the court to grant the contempt orders.

3. The 1st defendant responded to the motion through a replying affidavit dated 28/11/2018. He deposed that he bought the suit properties in 2016 and transferred them to the 2nd defendant's name on 20/2/2017. He added that he had no control over the suit properties.

4. The 2nd defendant responded to the motion through a replying affidavit sworn on 22/11/2018 by Peter Ndonga Wainaina, a director of the company. He deposed that the 2nd defendant was a land buying company which acquired the suit properties from the 1st defendant. He

added that the 2nd defendant had sub-divided and sold the subdivisions to various third parties. Mr Wainaina deposed that at the time this suit was instituted, the 2nd defendant had already sold the suit properties and therefore the 2nd defendant was not in contempt of the court order.

5. The 3rd interested party responded to the notice of motion through a replying affidavit sworn on 10/7/2019. He deposed that he bought plot number 490 within Parcel Title Number Nairobi/Block 126/821 from the 2nd defendant in 2016 after carrying out due diligence. He exhibited a document bearing the letter-head of the 2nd defendant and titled "certificate of ownership". He contended that upon payment of the purchase price in full, he took vacant possession of the said piece of land and developed it.

6. The application was canvassed by way of written submissions. The plaintiffs' counsel filed written submissions dated 04/6/2019 in which he argued that the 1st and 2nd defendants were in contempt of court and they should not be allowed to disobey the subsisting court orders. It was submitted that court orders should be obeyed by all. It was further submitted that courts should not sit and fold their hands in helplessness as its orders are disobeyed by litigants. Reliance was placed on **Shimmers Plaza Ltd v National Bank of Kenya [2015]eKLR** and **North Tetu Farmers Co. Ltd v Joseph Nderitu Wanjohi [2016]eKLR**. It was the plaintiffs' submission that the order of the court was clear and unambiguous and, therefore, the court had powers to make appropriate orders geared towards maintaining public confidence in the judicial system. Reliance was placed on **Africa Management Communication International Limited v Joseph Mathenge Mugo & Another [2013] eKLR**.

7. The 1st defendant's counsel filed written submissions dated 28/5/2019. He argued that the preservatory order did not apply to the 1st defendant because at the time of instituting this suit, the suit premises had already been sold to the 2nd defendant on 19/8/2016 and 15/11/2016. He submitted that the structures in the suit properties did not belong to him as he was no longer in possession of the suit properties. He urged the court to dismiss the application against him.

8. The 2nd defendant's counsel filed written submissions dated 4/6/2019. He argued that the suit properties had been sold to other parties by the time this suit was instituted. It was submitted that the 2nd defendant was not in possession of the suit properties by the time the court issued the preservatory consent order. He urged the court to dismiss the application.

9. The 3rd interested party's counsel filed written submissions dated 10/7/2019. He argued that he bought plot number 490 from the 2nd defendant in the year 2016 and had been in occupation since then. It was submitted that the 3rd interested party was a *bonafide* purchaser for value and had developed the plot. He further submitted that the application for contempt should fail because the property was developed way back in 2016 before the court orders were issued.

10. I have considered the application together with the responses filed by the parties. I have also considered the parties' respective submissions. Similarly, I have considered the prevailing legal framework and jurisprudence on the subject of contempt. The single issue falling for determination is whether the 1st and 2nd defendants have committed contempt.

11. The court order giving rise to the present contempt proceedings was a consent order recorded and formally endorsed by counsel for the plaintiffs, the 1st defendant and the 2nd defendant on 29/5/2018. It read thus:

"BY CONSENT

1. Pending hearing and determination of the suit, there be an order preserving the suit property and restraining all the parties to the suit, their servants agents and assigns and any other person whatsoever acting on their behalf; their employees and associates against disposing, charging subdividing, developing by construction or in any manner whatsoever interfering with the suit property known as Nairobi/Block 126/816 and Nairobi Block 126/821.

2. The plaintiffs to file and serve bound, paginated and indexed bundle of pleadings, written statements and evidentiary documents within 15 days.

3. Defendants to file and serve similar bundle within 30 days.

4. Mention on 9/7/2018 to fix a hearing date."

12. The applicants have placed before the court photographs showing the state of the two suit properties at the time of recording the consent order. They have also placed before the court photographs said to have been taken on 11/10/2018. They show structures under construction on the suit properties. The 1st and 2nd defendants did not contest the photographs and the alleged construction activities. All they say is that they sold the suit properties prior to the institution of this suit by the plaintiffs and they have no control over the suit properties.

13. The substantive dispute before court is that the plaintiffs hold what they call valid certificates of lease, both issued in their respective names on 11/6/2007 in relation to the two parcels of land. Similarly, the 2nd defendant holds what it calls valid certificates of lease issued on 20/2/2017 in relation to the two parcels of land. The Chief Land Registrar filed a defence dated 19/12/2012. The statement of defence does not offer any useful pronouncement on the validity of the parallel documents which the plaintiffs and the 2nd defendant are waving.

14. At this point, there is no evidence that the parallel titles held by the 2nd defendant have been transferred to any other party. Similarly, there is no evidence before court to suggest that lawful subdivision schemes relating to the two suit properties have been carried out. Thirdly, there is no evidence that the regulatory authorities have authorized any of the interested parties to carry out any lawful developments on the suit properties. I therefore reject the 2nd defendant's contention that it is not privy to the construction activities carried out on the suit properties during the subsistence of the consent conservatory order.

15. It is not lost to the court that the 1st and 2nd defendants through the consent order undertook to preserve the suit property. If the 2nd defendant did not have the capacity to preserve the suit property it would not have entered into the consent. It is therefore my finding that the 2nd defendant as holder of the parallel certificates of lease was privy to the impugned and illegal construction activities and is guilty of acting in contempt of the consent order adopted and issued by the court on 29/5/2018. The 2nd defendant is accordingly found guilty of contempt.

16. The 1st defendant contended that it had already conveyed the parallel certificates of lease to the 2nd defendant by the time this suit was instituted. It did not hold itself as the registered proprietor at the time the conservatory order was issued. In the absence of evidence to the contrary, there is no proper basis laid for contempt orders against the 1st defendant.

17. In light of the above findings, I make the following disposal orders in relation to the plaintiffs' notice of motion dated 19/10/2018:

a. The 2nd defendant is pronounced guilty of contempt of court in relation to the consent order adopted and issued on 29/5/2018.

b. This matter shall be listed on a date to be set by the court when the court will make pronouncements on appropriate penalty.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 23RD DAY OF OCTOBER 2019.

B M EBOSO

JUDGE

In the presence of:-

Mr Wachira Advocate for the 1st defendant

Ms Nganga Advocate for the 2nd defendant

Court Clerk - June Nafula