



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 585 OF 2013

MERCY WAITHIRA NJERU

NJERU K. GEOFFREY

ANNE LYDIA NYAWIRA NJERU

ELIZABETH WANDIA NJERU.....PLAINTIFFS

VERSUS

DANIEL NJERU NJOKA MBOGO.....DEFENDANT/1ST CONTEMNOR

JULIUS KILIMO, THE DISTRICT LAND

REGISTRAR, KERUGOYA.....2ND CONTEMNOR

EPHANTUS MUCHIRI KAGWI.....3RD CONTEMNOR

JAMES MATINDI KEGA.....4TH CONTEMNOR

RULING

BACKGROUND

The application before Court is dated 7th November 2016 in which the plaintiffs are seeking the following orders:

- (a) Joinder of the 2nd – 4th contemnors as 2nd – 4th defendants respectively.***
- (b) Consent dated 28th August 2013 entered between the defendant/1st contemnor and the 3rd contemnor and the resultant consent order issued on 19th September 2013 emanating from Civil Suit No. 222 of 2013 (Kerugoya) and registered against BARAGWI/GUAMA/2250 and 2252 be revoked and set aside.***
- (c) Order of committal to civil jail or fine be made against 1st – 4th contemnors.***
- (d) The property of the 1st – 4th contemnors be sold in default of payment of fine.***

The application is opposed by the defendant/1st contemnor vide a replying affidavit sworn on 16th October 2017. The 2nd contemnor also filed grounds of opposition opposing the application. The 3rd contemnor also opposed the application by a replying affidavit sworn on 16th October 2017 and the 4th contemnor equally filed a replying affidavit sworn on 23rd October 2017 opposing the application.

THE PLAINTIFFS/APPLICANTS CASE

the plaintiff/applicants stated that through an injunctive order issued by this Honourable Court on 15th May 2013, the defendant, his agents and/or servants were restrained from disposing, transferring or dealing with L.R. No. BARAGWE/GUAMA/2250 and 2252. They stated that the said order was served upon the 1st defendant on 17th May 2013 and on 3rd June 2013. It was confirmed by the Court to remain in force until hearing and determination of the suit. The prohibitory order was registered and was entered in the Land Register on 21st August 2013

against each of the suit parcels. The plaintiffs stated that unfortunately, the 3rd contemnor instituted a suit before an inferior Court in collusion with the 1st contemnor pertaining to the suit parcels and pleaded that there was no suit pending before any Court of law. Subsequently, a consent order was issued setting aside all restrictions and cautions against the title deeds of the suit land including the subsisting order of this Court. The plaintiffs contend that the 1st – 4th contemnors abetted illegal transfers of the suit parcels first to the 3rd contemnor and then to the 4th contemnor.

1ST CONTEMNOR'S CASE

The defendant/1st contemnor stated that sometime on 21st February 2013, he entered into a sale agreement with one Ephantus Muchiri, the 3rd contemnor herein in respect of land parcel number BARAGWE/GUAMA/2250 and 2252 for agreed consideration of two million shillings. By then, the titles for the two parcels of land were clean. Sometimes in April 2013, a restriction was placed by the DC over his two parcels of land and that he was not informed the reasons why and that the said cautions were against the provisions of Section 77 (1) of the Land Registration Act. He stated that this suit was filed on 15th May 2013 and he was served with summons and other pleadings on 17th May 2013. However, he was not served with any Court order. He stated that the purported orders were confirmed in his absence on 3rd June 2013. The defendant states that the three contemnors are not his agents and/or servants and that they have not acted on his behalf. The defendant/1st contemnor also stated that the three contemnors have never been parties in this suit and have never been aware of any Court orders issued in this case.

The defendant/1st contemnor argued that he acted in good faith when the 3rd contemnor sued him and agreed to have the two (2) parcels of land transferred to him. He stated that this Court cannot set aside order of another Court unless by way of Appeal or Review upon an application to the same Court which made the alleged orders. In conclusion, the 1st defendant contends that the plaintiffs are guilty of laches having slept on orders issued on 3rd June 2013.

2ND CONTEMNOR'S CASE

The 2nd contemnor through her grounds of opposition dated 23rd October 2017 stated that the application is incompetent, misconceived and fatally defective for failing to comply with mandatory provisions of the law. The 2nd contemnor further stated that the standard required in an application for contempt is unique and special and cannot be lumped together with prayers seeking other orders. The 2nd contemnor also stated that the applicants have failed to issue him with the mandatory notice to show cause before filing the application contrary to law. The 2nd contemnor also stated that applicants should have sought leave to amend the pleadings on record to enjoin him as a party before commencing the present application. He stated that proceedings for contempt of Court cannot be initiated after the expiry of a period of six (6) months from the date on which the contempt of Court is alleged to have been committed.

In conclusion, the contemnor stated that the applicants have not met the threshold for joinder of parties under *Order 1 Rules 3 & 10 CPR*.

3RD CONTEMNOR'S CASE

The 3rd contemnor contends that he has never been a party to this case and that he is not an agent of the defendant. He also stated that he has never been issued with any Court order and is not aware if any was issued in respect of this case. He stated that he bought the two (2) parcels of land from the defendant on 21st February 2013 and that by then the title to the land was clean and that the defendant was the only one in occupation. When the defendant failed to transfer the two parcels of land or refund his money, he sued him in CMCC No. 222 of 2013 (Kerugoya). The defendant then agreed to transfer the two parcels of land to him. By then no order had been issued by this Court and registered against any of the two parcels and that the defendant was unaware of any restrictions placed on his land. He stated that the consent order was voluntary and that there has been no attempt to review and/or set aside the same. After he obtained titles to the two parcels of land, he sold L.R. No. BARAGWE/GUAMA/2250 to the 4th contemnor.

4TH CONTEMNOR'S CASE

The 4th contemnor states that he was not a party to this suit when the Court issued injunctive orders in respect of the suit parcels. He stated that he has never been served or notified of the Court order. He was not also a party to the CMCC No. 222 of 2013 (Kerugoya) and that he was not a party to the consent entered therein. He was transferred land parcel No. BARAGWE/GUAMA/2250 on 6th December 2013 by which time the restriction had been removed and that he is an innocent purchaser. He stated that parcel No. BARAGWE/GUAMA/2252 has since been sub-divided into 3511 – 3513.

ISSUES FOR DETERMINATION

The issues for determination in this case can be framed as follows:

- (a) Whether the applicants have established the threshold for contempt proceedings?***
- (b) Whether the applicants have satisfied the principles for joinder of parties?***
- (c) Whether sufficient grounds have been satisfied the Court for setting aside consent orders?***
- (d) Who will pay the costs of this application?***

Whether the applicants have established the threshold for contempt proceedings?

The law of contempt in Kenya is founded on *Section 63 (c) of the Civil Procedure Act* which provides as follows:

“63 (c) In order to prevent the ends of justice from being defeated, the Court may, if it so prescribed, grant a temporary injunction and in case of disobedience, commit the person guilty thereof to prison and order that his property be attached and sold”.

The Court of Appeal pronounced itself on contempt proceedings in *Simmers Plaza Limited Vs National Bank of Kenya Limited (2015) e K.L.R* as follows:

“We reiterate here that Court orders must be obeyed. Parties against whom such orders are made cannot be allowed to trash them with impunity. Obedience of Court orders is not optional, rather, it is mandatory and a person does not choose whether to obey a Court order or not

The Courts should not fold their hands in helplessness and watch as their orders are disobeyed with impunity left, right and centre. This would amount to abdication of our sacrosanct duty bestowed on us by the Constitution. The dignity, and authority of the Court must be protected, and that is why those who flagrantly disobey them must be punished, lest they lead us all to a state of anarchy”.

The Courts have also pronounced themselves on the standard of proof in contempt proceeding in the case of *Kasvi Limited Vs Kapunchaud Depar Shah (2016) e K.L.R* where it stated as follows:

“In Peter K. Yego & others Vs Pauline Nekesa Kode, the Court recognizing that contempt of Court is criminal, held that it must be proved that one has actually disobeyed the Court order before one is cited for contempt. The applicant in an application for contempt must prove beyond peradventure that the respondent is guilty of contempt

Although the proceedings are civil in nature, it is well established that an applicant must prove the elements beyond reasonable doubt, at least higher than the standard in civil cases. The fact that the liberty of the defendant could be affected means that the standard of prove is higher than the standard in civil cases. It is incumbent on the applicant to prove that the defendant’s conduct was deliberate in the sense that he or she deliberately or willfully acted in a manner that breached the order”.

In this case, the prohibitory orders complained of were served on the defendant on 17th May 2013 and on 3rd June 2013, it was confirmed by the Court to remain in force until the hearing and determination of the suit. The affidavit of service dated 23rd May 2013 proves that the defendant was duly served but irrespective of the said Court orders and prohibitory order registered against the suit parcels of land, the defendant proceeded to enter into a consent with the 3rd contemnor. I find that he is in contempt of the Court orders. However, I find that the plaintiffs have not proved that the order was served upon the 2nd, 3rd and 4th contemnors. In addition, as per the entries in the Land Register, the prohibitory orders were lifted vide CMCC No. 222 of 2013 (Kerugoya) before the land was transferred in the name of the 3rd contemnor and later to the 4th contemnor. In the result therefore, they cannot be held to be in contempt.

Whether the Applicants have satisfied the principles for joinder of parties?

Order 1 Rule 10 (2) of the Civil Procedure Rules makes provision for joinder of parties and provides as follows:

“The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon, and settle all questions involved in the suit be added”.

It is clear that under the above provisions of the law, the Court has unfettered discretion to order the joinder of a party at any stage of the proceedings either on its own motion and/or on application by a party. The principal consideration before an order for joinder of a party to the proceedings is whether the presence of such a party is necessary in order to enable the Court to effectually and completely adjudicate and determine the real issues in controversy in the suit. thus, where the Court is of the opinion that there may be issues and/or questions that such a party would be well placed to respond to and/or answer to enable the Court to get a clearer picture of the issues and/or provide a basis for the Court to effectually and completely adjudicate upon the issues, the Court will order that such a party be enjoined to the proceedings.

In this case, I find that there is necessity to enjoin the 2nd, 3rd and 4th contemnors as defendants in this suit so that all the issues in dispute involving the suit land may be effectually and completely adjudicated.

Whether sufficient grounds have been given for setting aside consent orders?

The Court set out the principles for setting aside consent orders in the case of *Samuel Mbugua Ikumbu Vs Barclays Bank of Kenya Limited (2015) e K.L.R* where it was held:

“What are the circumstances that would lead to a consent order or judgment which has been adopted as an order of the Court to

be varied and/or set aside?

The law on variation of a consent judgment is now settled. The variation of a consent judgment can only be on grounds that would allow for a contract to be vitiated. These grounds include but are not limited to fraud, collusion, illegality, mistake, an agreement being contrary to the policy of the Court, absence of sufficient material facts and ignorance of material facts....”

In applying the principles in the above stated case, it is clear in my mind that the defendant was aware of the prohibitory order in place and still proceeded to enter into consent in another suit being CMCC No. 222 of 2013 (Kerugoya). It is therefore my finding that the consent order entered was illegal and fraudulent. Such a consent order cannot be allowed to stand. The same is therefore liable to be set aside and/or varied.

Who will bear the costs of this application?

Costs always follow the event even though costs is also a discretionary power. In this case, the order that comments to the Court is that the 1st defendant shall bear the costs of this application.

The upshot of my finding is that the application dated 7th November 2016 partially succeeds and the same is allowed as follows:

(1) The 2nd, 3rd and 4th contemnors are enjoined to this suit as 2nd, 3rd and 4th defendants respectively.

(2) The 2nd, 3rd, and 4th contemnors are granted leave to file and serve their defence to the plaintiffs’ plaint within 14 days from today.

(3) The consent dated 28th August 2013 entered between the defendant/1st contemnor and the 3rd contemnor emanating from CMCC No. 222 of 2013 and registered as entry number 5 against both title deed numbers BARAGWE/GUAMA/2250 and BARAGWE/GUAMA/2252 and all consequential orders and entries made on the two title deeds be and are hereby vacated and/or set aside.

(4) The defendant/1st contemnor is hereby found guilty for contempt of the orders of this Honourable Court issued on 15th May 2013.

(5) The 1st defendant/contemnor shall bear the costs of this application.

READ, DELIVERED and SIGNED in open Court at Kerugoya this 4th day of October, 2019.

E.C. CHERONO

ELC JUDGE

4TH OCTOBER, 2019

In the presence of:

- 1. Plaintiff – present*
- 2. Ms Wambui holding brief for Maina Kagio*
- 3. M/S Ndudu for 2nd Contemnor*

COURT

In the absence of the 1st Contemnor, a warrant of arrest is hereby issued.

E.C. CHERONO

ELC JUDGE

4TH OCTOBER, 2019