



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CIVIL CASE NO. 335 OF 2016

IN THE MATTER OF SECTIONS 47, 48(3) & 51 OF THE ADVOCATES ACT (CAP 16) LAWS OF KENYA

AND

IN THE MATTER OF NJERI KARUIKI, ADVOCATE

AND

IN THE MATTER OF AN APPLICATION BY MARY WAMAITHA KAITTANY FOR

AN ORDER FOR THE TAXATION OF AN ADVOCATE-CLIENT BILL OF COSTS

AND FOR THE DELIVERY UP OF DEEDS, DOCUMENTS AND PAPERS

BETWEEN

MARY WAMAITHA KAITTANY.....PLAINTIFF/APPLICANT

=VERSUS=

NJERI KARIUKI.....DEFENDANT/RESPONDENT

RULING

1. This is the Notice of Motion dated 19th March 2019 brought under Section 3 and 5 of the Judicature Act Caps 8, Section 1A, 1B, 3A and 63(a), (b), (c) of the Civil Procedure Act, Cap 21 and Order 51 rule 1 of the Civil Procedure Rules.

2. It seeks orders:-

(1) Spent

(2) That this honourable court declares that the defendant/respondent has willfully disobeyed the lawful court order issued herein on 7th February 2019 and consequently finds her to be in contempt of court.

(3) That the defendant/respondent be committed to jail for six months or such other period that the honourable court may order

(4) That the defendant/respondent be condemned to pay such fine as shall be commensurable or reasonably proportional to punishment for disobedience of the court order issued on 7th February 2019.

(5) That costs be borne by the defendant/respondent.

3. The grounds are on the face of the application and are set out in paragraphs (1) to (10).

4. The application is supported by the affidavit of Mary Wamaitha Kaitanny the plaintiff/applicant herein sworn on the 19th March 2019 and a further affidavit sworn on the 10th April 2019.

5. The application is opposed. There is a replying affidavit sworn by Njeri Kariuki, the defendant/respondent, on the 28th March 2019.
6. On the 25th July 2019, the court directed that the application be canvassed by way of written submissions.

The Plaintiff's/Applicant's Submissions

7. It is not open for the respondent to interpret the court order to suit her desires. Court orders must be obeyed regardless of what opinion one may have on the, same, at least until the orders are varied, vacated on discharge. By holding onto the mother titles, the respondent, cannot be said to by any stretch of imagination to have complied with the court order issued on 7th February 2019.
8. There is no exemption to the vendors obligation to hand over the original certificate of title to the purchaser notwithstanding the fact that the latter has only bought a portion to be sub divided out of a larger parcel. The purchaser would be automatically vested with proprietary rights in the mother title to the extent of his purchase and the vendor hands over the mother title to the purchaser to perfect his title by registering the applicable Deed Plan against it and acquiring a new certificate of title. The mother title, with the registration of the subdivision endorsed on it, is then returned to the vendor. The vendor cannot force a purchaser to hand over his transfer to be registered by his (vendors) advocate.
9. Where a court finds that a person wilfully disobeyed a court order, it has only one recourse; make an order citing the person for contempt of court. They have relied on the cases of **Teachers Service Commission vs Kenya National Union of Teachers & 2 Others [2013] Eklr; Africa Management Communication International Land vs Joseph Mathenge Thuo & Another [2013] eKLR; Republic vs PS Ministry of Defence exparte George Kariuki Waithaka [2019] eKLR.**

The order was effected and the respondent wilfully disobeyed the same by holding onto two mother titles. She prays that the application be allowed.

The Respondent's submissions

10. The applicant made a formal request for her documents to be released through her advocate. The respondent delivered all the documents that rightly belonged to the applicant on 19th February 2019, receipt of which was confirmed by the applicant's advocates. There has not been any disobedience of the court order by the respondent as alleged. The respondent should not be compelled to hand over original documents of which she has sole custody by virtue of an authority granted to her by a third party registered proprietor under specified terms.
11. The respondent has made it clear to the applicant's advocate that she not only represents the vendor of the plot to be transferred to the applicant but also has sole custody of the mother title pertaining to LR No. 12422/318 and the Head Title Pertaining to LR NO. 12422 which were handed to her by the registered proprietor of the two titles to retain and hold on to the two titles until such time as the two are spent all subdivisions therein contained, having been transferred out into own titles.
12. She has put forward the cases of **Moses P N Njoroge & Others vs Rev Musa Njuguna & Another Nakuru HCCC No 247 "A" of 2004**. Contempt of court being quasi criminal in nature the standard of proof is beyond the balance of probability and just below beyond reasonable doubt and where there is even the smallest of any doubt raised such doubt should be interpreted in favour of the alleged contemnor. She has also put forward the case of **Re Bramble Vale Ltd [1970] CH 128**. The applicant has brought this application prematurely and with no merit.
13. I have considered the notice of motion dated 19th March 2019, the affidavit in support and the annexures. I have also considered the replying affidavit, the written submissions of counsel and the authorities cited. The issues for determination are:-

(i) Whether or not the alleged contemnor is guilty of disobeying court orders.

(ii) Who should bear costs?

14. It is the applicant's contention that the respondent has wilfully disobeyed the court orders issued on 7th February 2019. On the 28th January 2019 this Honorable court granted the following orders:-

"That the defendant/respondent be and is hereby ordered to forthwith deliver to the plaintiff/applicant or into custody of this honourable court, all deeds, title documents, and papers in her possession, custody or power relating to properties land reference number 12422/207, 12422/343 and 12422/344 respectively".

The said order was served on the respondent on the 8th February 2019.

15. By a letter dated 19th February 2019, the respondent wrote to the applicant's advocate indicating that she would not be releasing the mother titles LR No. 12422/318 and 12422/207 which she states do not belong to the applicant. She however released other documents.
16. It is the applicant's contention that she could not proceed with registration in the absence of the remaining documents. I find that the mother title for LR No. 12422/318 and LR No. 12422/207 are documents relating to properties LR Nos 12422/207, 12422/343 and 12422/344 as framed in the court order issued on 7th February 2019.

17. I have gone through the respondent's replying affidavit sworn on the 28th March 2019. The learned counsel's argument seems to be that it would be unprofessional for her to release documents she has been entrusted with. This is an admission that she has indeed not released all the documents in compliance to the orders of 7th February 2019. Her contention is that the mother title will get lost if she releases them. I find this to be an excuse not to comply with the court orders.

18. Court orders must be obeyed. In the case of **Hadkinson vs Hadkinson [1952] p 285 at 288** it was held thus:-

“It is plain and unqualified obligation of every person against or in respect of whom an order is made by the court of competent jurisdiction to obey it unless and until that order is discharged. The compromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or even void”.

The respondent has failed to give a reasonable explanation as to why she has not complied with the orders.

19. The standard of proof in contempt of court cases has been settled in the case of **Mutitika vs Baharini Farm Limited [1985] KLR 299**, the court of appeal held:

“In our view, the standard of proof in contempt proceedings must be higher than proof in the balance of probabilities, almost but not exactly, beyond reasonable doubt...”

The standard of proof beyond reasonable doubt out to be left where it belongs, to wit in criminal cases. It is not safe to extend it to an offence which can be said to be quasi criminal in nature”.

Also in **Justus Kariuki Mate & Another vs Martin Nyaga Wambora Civil Appeal No, 24 of 2015**, the Court of Appeal 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 to the existence of the order of the court forbidding it. The threshold is quite high as it involves possible deprivation of a persons liberty”.

I am satisfied that the respondent herein has wilfully disobeyed the court order by failing to surrender the mother title for LR No. 12422/318 and LR 12422/20 in order for the applicant to effect registration.

20. In the case of **Econet Wireless Kenya Ltd vs Minister for Information & Communication of Kenya & Another [2005] eKLR Ibrahim J** (as he then was) stated as follows:-

“It is essential for the maintenance of the rule of law and order that the authority and the dignity of our courts are upheld at all times. The court will not condone 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 to cases where the person affected by an order believes it to be irregular or void”

I am guided by the above authority.

21. I have considered the circumstances herein and I find that the respondent knowingly disobeyed the orders of this court issued on 7th February 2019. I find the respondent to be in contempt of that order. I am guided by Article 159 of the Constitution in granting the respondent an opportunity to purge the contempt.

22. In conclusion, I find merit in this applicant and the same is allowed in the following terms:-

(a) That the respondent is found guilty of contempt for wilfully disobeying the court order issued on 7th February 2019.

(b) That the respondent is hereby fined Kshs.200,000 in default thirty (3) days imprisonment.

(c) The sentence in (b) above is suspended for thirty (30) days to give the respondent an opportunity to release the mother titles for LR No. 12422/318 and LR No. 12422/207 to enable the applicant to undertake registration in default the sentence shall take effect.

(d) The costs of this application be borne by the respondent.

It is so ordered.

Dated, signed and delivered in Nairobi on this 5TH day of DECEMBER 2019

.....

L. KOMINGOI

JUDGE

In the presence of:-

Mr. Omulama for the plaintiff

Mrs Sang for the Defendant

Kajuju - Court Assistant