



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

CASE No. 141 OF 2012

(FOMERLY HCCC No 7 OF 2006)

JETHRO MWANGI MUKUNDIPLAINTIFF

VERSUS

JOHN MUREU KIMOTHODEFENDANT

RULING

(An application seeking to punish the defendant for contempt of court and seeking cancellation of title deed said to have been issued in breach of an order of the court; application also seeking joinder of the new registered proprietor as a party to the suit; there being no proof of existence of the order said to have been violated and the court not being able to determine its meaning and scope, prayer seeking to punish the defendant for contempt of court dismissed; for similar reasons prayer seeking cancellation of title deed dismissed; the new registered proprietor being a necessary party, the court orders her joinder as second defendant; to preserve suit property, the court issues an order of inhibition)

The application

1. By Notice of Motion dated 22nd May 2017, the plaintiff moved the court seeking the following orders:

a) Spent.

b) Spent.

c) That this honourable court be pleased to hold John Mureu Kimotho in contempt of court orders and commit him to civil jail for a period of 6 months or as the court deems fit, for disobeying court orders made on 29th day of April 2008 being a consent order maintaining the status quo in respect of the suit property.

d) That in the alternative this honourable court do order the attachment of the properties of John Mureu Kimotho as a consequence of the breach or disobedience of the court order of status quo issued on 29th April 2008.

e) That Jeniffer Wambui Gitonga be enjoined in this suit, for purposes of the plaintiff's application seeking to nullify the transfer of 17th August, 2011 between the defendant and the said Jeniffer Wambui Gitonga and the subsequent title deed issued on the 19th day of August 2011.

f) That this honourable court be pleased to direct that the title deed issued in the name of Jeniffer Wambui Gitonga on the 19th day of August 2011 by the Nakuru District Land Registrar and in breach of a consent order of the court of 29th April 2008 be cancelled and the entries in the register revert back as at 29th April 2008.

g) That costs of this application be provided for.

Evidence in Support

2. The application is brought inter alia under Order 40 rule 3 of the Civil Procedure Rules and is supported by an affidavit sworn by the plaintiff. It is deposed in the affidavit that ownership of the parcel of land known as **Nakuru/Olongai Phase II/112** was on 19th August 2011 transferred from the defendant to Jeniffer Wambui Gitonga. That the said transfer was in violation of a consent order made in this suit on 29th April 2008 maintaining the *status quo*. The said order has not been set aside or reviewed. The order was meant to ensure that there were no dealings in respect of the suit property both in terms of the physical parcel of land as well as the documents of title.

3. The plaintiff further deposed that the defendant was aware of the order since it was made in open court and in the presence of counsels for both parties. As regards the new registered proprietor, the plaintiff deposed that she is not an innocent purchaser for value since the plaintiff has all along been in occupation and remains in occupation of the suit property.

Evidence in response

4. The defendant responded to the application through his replying affidavit filed on 8th September 2017. He denied that he had disobeyed any court order. He stated that he was not aware of any consent orders issued on 29th April 2008 and that he had not instructed his advocate on record at the time to record any such consent. No order had been served on him or on his former advocate. That as registered owner, his title was still sacrosanct when he transferred his interest.

Submissions and issues for determination

5. The application was argued by way of written submissions. The applicant's submissions were filed on 11th October 2017 while the defendant/respondent's submissions were filed on 22nd May 2017. In his submissions, the plaintiff argued that the defendant is guilty of contempt of court and that the transfer of the suit property in favor of Jeniffer Wambui Gitonga should be cancelled since it was done in violation of the order and the principle of *lis pendens*.

6. On the other hand, the defendant argued that the application is incompetent and bad in law since it seeks to enforce orders against the defendant when the defendant is no longer the registered proprietor of the suit property and since it seeks orders against Jeniffer Wambui Gitonga who is neither a party to the suit nor has she been served with the application. Further, the defendant argued that there was no contempt of court since he was not aware of the court order and was not served with it.

Issues emerge for determination

7. I have considered the application, the affidavits filed by both sides, the submissions and the authorities cited.

8. Three issues emerge for determination:

a) Whether the defendant is guilty of contempt of court.

b) If so, whether the court should commit defendant to civil jail for a period of 6 months or order attachment of his property.

c) Whether Jeniffer Wambui Gitonga should be joined to this suit.

d) Whether the title deed issued in the name of Jeniffer Wambui Gitonga should be cancelled.

Whether the defendant is guilty of contempt of court

9. A court of law must always take a keen interest whenever the question of contempt of court is raised in any proceedings. This is partly because willful disobedience of court orders is a matter that goes to the root of rule of law and the authority of the court. Further, there is always the possibility that a litigant may lose his personal liberty or property as a result of such proceedings.

10. That this court has jurisdiction to punish for contempt is not in doubt. In **Woburn Estate Limited v Margaret Bashforth [2016] eKLR**, the Court of Appeal stated as follows:

The jurisdiction of the High Court (or any other court for that matter) to punish for the violation of its orders cannot be in question. Apart from section 5 (1) of the Judicature Act that vests in the High Court the power, like those of the High Court of Justice in England, to punish any party who violates its orders, the court, by virtue only of being a court has inherent powers to make sure its process is not abused and its authority and dignity is upheld at all times. See Refrigeration and Kitchen Utensils Ltd v Gulabchand Popatlal Shah & Another, 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 the 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.”

11. The defendant herein is accused of willfully disobeying a consent order made by the court in this matter on 29th April 2008. The order is said to have maintained the *status quo*. The nature of disobedience is said to be by transferring ownership of the parcel of land known as **Nakuru/Olongai Phase II/112** (the suit property) on 19th August 2011 to Jeniffer Wambui Gitonga. It is argued that the order was made in open court and in the presence of counsels for both parties. There is no allegation that the defendant was served with the order. It is instead stated that the defendant knew about the order since he was represented by counsel when the order was made.

12. Before we can conclude that there is contempt, we must first ascertain whether there exists any such order as is alleged to have been violated. The applicant has not annexed any extracted order in respect of the said order. Considering proceedings on 29th April 2008 were not before me, it would have been helpful if an extracted order was exhibited so as to ascertain the scope and tenor of the said orders.

13. I have perused the handwritten record herein. I can see that the matter was before Waithaka J. on 29th April 2008. I can see also that an order was made on that day but from the handwritten record, I cannot ascertain the full wording and meaning of the order made.

14. Proceedings seeking to punish for contempt of court are *quasi* criminal in nature. As such, the court must adopt a higher standard of proof than proof on a balance of probabilities. Such proof is required not only as regards the alleged conduct of the party sought to be punished but also, and more importantly, as regards existence of the order said to have been disobeyed. In **Woburn Estate Limited** (supra) the Court of Appeal quoted Lord Denning's passage in **Re Bramblevale Ltd** [1970] 1 CH 128 at page 137 where he stated that;

A contempt of court is an offence of criminal character. A man may be sent to prison for it. It must be satisfactorily proved showing that when the man was asked about it, he told lies. There

must be some further evidence to incriminate him.

15. Whereas contempt of court is a serious matter which if proven should attract appropriate punishment, in view of the court's inability to ascertain the existence, the full wording and meaning of the order made on 29th April 2008, I am not persuaded that sufficient material has been put before me to warrant a finding that there has been contempt of court and so deprive the defendant of his liberty or property. Simply put, the applicant has not shown that the defendant is guilty of contempt of court. Issues (a) and (b) above are therefore answered in the negative.

Whether Jeniffer Wambui Gitonga should be joined to this suit

16. There is no dispute that since 19th August 2011, Jeniffer Wambui Gitonga is the registered proprietor of the suit property. The transfer was effected in her favor by the defendant during the pendency of this matter. A perusal of the plaint shows that among others, the plaintiff is seeking judgment for cancellation of the defendant's title in respect of the suit property. Assuming that the court finds that the defendant's title was liable for cancellation, there would be implications as to whether or not Jeniffer Wambui Gitonga obtained a good title from the defendant. Since validity of her title would be in issue, Jeniffer Wambui Gitonga is not only a necessary party to the suit, it is also in her interest that she be a party. Issue (c) is therefore answered in the affirmative.

Whether the title deed issued in the name of Jeniffer Wambui Gitonga on should be cancelled

17. The applicant seeks an order for cancellation of the title deed issued in the name of Jeniffer Wambui Gitonga on 19th day August 2011 on the ground that transfer and registration were effected in violation of a consent order of the court made on 29th April 2008. I have already discussed the difficulties that face the court in regard to that order. In view of the court's inability to ascertain the existence, the full wording and meaning of the order, I would have no basis upon which to conclude that the transfer and registration in favor of Jeniffer Wambui Gitonga was done in breach of a court order.

18. Even if I was satisfied about the existence and scope of the order, I would still need to accord Jeniffer Wambui Gitonga a hearing before ordering cancellation of her title. The plaintiff herein has not availed any evidence of service of Notice of Motion dated 22nd May 2017 upon Jeniffer Wambui Gitonga. The plaintiff has sought to rely on the decision of Angote J. in **Carol Silcock v Kassim Sharrif Mohamed [2013] eKLR** to support the argument that cancellation of the title can be ordered on the basis of an application such as the one before the court. However, in that case, the registered proprietor was served and even participated in the hearing of the application. In the circumstances, I am not satisfied that a case has been made for cancellation of the title.

19. The foregoing notwithstanding, it is necessary to preserve the suit property so as to allow a hearing and determination of the suit before the court. It is necessary to stop further dispositions which will inevitably necessitate introduction of new parties to the case and several amendments to the pleadings. Doing the best I can while respecting the proprietary rights of current registered proprietor, I am persuaded that an order of inhibition is necessary in the circumstances. I also take into account that the plaintiff is in occupation and possession of the suit property.

20. In the end, I make the following orders:

- a) Prayers (c), (d) and (f) of Notice of Motion dated 22nd May 2017 are dismissed.
- b) Jeniffer Wambui Gitonga is hereby joined to this suit as second defendant. The plaintiff to file and serve an amended plaint to effect the joinder within 14 (fourteen) days from the date of delivery of this ruling.
- c) Pending hearing and determination of this suit, an inhibition be registered against **Nakuru/Olongai Phase II/112.**

d) Costs in the cause.

Dated, signed and delivered in open court at Nakuru this 30th day of January 2018.

D. O. OHUNGO

JUDGE

In the presence of:

No appearance for the plaintiff/applicant

Mr. Gitonga holding brief for Mr. Ruiru for the defendant/respondent

Court Assistants: Gichaba and Lotkomoi