



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ELC SUIT NO. 908 OF 2016**

**JUDITH NEKESA WASWA.....PLAINTIFF**

**VERSUS**

**MICHAEL ODIEMBO.....1<sup>ST</sup> DEFENDANT**

**CO-OPERATIVE BANK OF KENYA.....2<sup>ND</sup> DEFENDANT**

**HABIBA DAKANE ABEY.....3<sup>RD</sup> DEFENDANT**

**RULING**

The Plaintiff brought this suit against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants on 19<sup>th</sup> July, 2016 seeking among others a permanent injunction restraining the 1<sup>st</sup> and 2<sup>nd</sup> Defendants from interfering with and/or dealing with her matrimonial home situated at Syokimau. The land reference for this property was not given in the plaint.

Together with the plaint, the Plaintiff brought an application by way of Notice of Motion dated 24<sup>th</sup> July, 2016 in which the Plaintiff sought a temporary injunction restraining the 1<sup>st</sup> and 2<sup>nd</sup> Defendants from interfering with and/or dealing with by either advertising, selling, transferring, auctioning and/or doing any acts that are detrimental to the interest of the Plaintiff in the property known as Land Title Number I. R 154327 pending the hearing of the suit. According to the certificate of title that was attached to the Plaintiff’s affidavit in support of the application, Title Number I.R 154327 is for Land Reference Number 12715/12413 (Original Number 12715/1144/2). This means that the property that was in dispute in the original plaint was Land Reference Number 12715/12413. The property according to the said certificate of Title was charged by the 1<sup>st</sup> Defendant to the 2<sup>nd</sup> Defendant on 25<sup>th</sup> March, 2014.

The Plaintiff’s application was opposed by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. In a ruling that was delivered by Gacheru J. on 25<sup>th</sup> October, 2016, the court allowed the Plaintiff’s application for injunction on the following terms,

*“(a) Temporary injunction be issued against the 1<sup>st</sup> Respondent/Defendant restraining him either by himself, his agents and/or employees or assigns from interfering with and/or dealing with the suit property either by advertising, selling, transferring and/or doing any acts that are detrimental to the interest of the Plaintiff/Applicant on the suit property being L.R No. I.R 154327 or on the new title being LR No. 12715/12414 (Original Number 12712/1144/2) L.R 154327 pending the hearing and determination of the suit property.*

*(b) A mandatory order be and is hereby issued against the 1<sup>st</sup> Defendant compelling him to delete*

*and/or withdraw the advertisement for the sale of the suit property on his facebook account “Michael Odiembo Real Estate Investments Groups and individuals” dated 1<sup>st</sup> April, 2015 and on Habiba Odiembo’s Account dated 21<sup>st</sup> July bearing Advert “For sale” show House Ready and telephone No. 0721[...].”*

On 2<sup>nd</sup> February, 2017, the 3<sup>rd</sup> Defendant was joined in the suit as a party and the Plaintiff was granted leave to further amend the plaint to effect the joinder which she did on 15<sup>th</sup> March, 2017. In the Further Amended Plaint the Plaintiff averred that the original parcel of land which the 1<sup>st</sup> Plaintiff owned was Land Parcel Number 12715/1144 (Original Number 12715/353, Title No. I.R No. 71890. The Plaintiff averred that in the year 2013, the 1<sup>st</sup> Defendant without any right subdivided the said original parcel and created two titles namely; Title No. I.R 154326, Land Reference Number 12715/12414 (Original Number 12715/1144/3) and Title No. I.R 154327, Land Reference Number 12715/12413 (Original Number 12715/1144/2). The Plaintiff averred that on 8<sup>th</sup> September, 2016 while this suit was pending the 1<sup>st</sup> Defendant went ahead and transferred Title Number I.R 154326, L.R No. 12715/12414 (Original Number 12715/1144/3) to the 3<sup>rd</sup> Defendant.

What is now before me is the Plaintiff’s Notice of Motion dated 15<sup>th</sup> March, 2017 in which the Plaintiff is seeking the committal of the 1<sup>st</sup> and 3<sup>rd</sup> defendants to civil jail for contempt of court. The application has been brought on the grounds that the 1<sup>st</sup> and 3<sup>rd</sup> Defendant have disobeyed the orders which were issued herein on 25<sup>th</sup> October, 2016 by Gacheru J. The Plaintiff has averred that the 1<sup>st</sup> and 3<sup>rd</sup> Defendants have refused to delete the advertisements which they had posted for the sale of the apartments built on the suit property. The Plaintiff has averred that the 1<sup>st</sup> Defendant has displayed photographs of the completed rooms built on the suit property for the purposes of selling the same on his face book page “FA Michael Odiembo” in disobedience of the court orders aforesaid. The Plaintiff has averred that on 31<sup>st</sup> January, 2017 the 1<sup>st</sup> Defendant uploaded the details and/or features of the four units to be sold on his face book page. The Plaintiff has averred that the 3<sup>rd</sup> Defendant disobeyed the said court orders by displaying and advertising the apartments built on the suit property on her face book page bearing the name “Habiba Odiembo”. The 3<sup>rd</sup> Defendant has also given the details and displayed the photographs of the completed rooms with title “ready 3 bedroom apartment selling at 7.5M, also available for rent at 30 K.”

The application was opposed by the 1<sup>st</sup> and 3<sup>rd</sup> Defendants through separate replying affidavits. In his affidavit sworn on 18<sup>th</sup> April, 2017, the 1<sup>st</sup> Defendant stated that he was the registered owner of the two properties the subject of this suit namely Title No. I.R 154327, Land Reference No. 12715/12413 (hereinafter referred to as “the 1<sup>st</sup> suit property”) and Title No. I.R 154326, Land Reference No. 12715/12414 (Original Number 12715/1144/3) (hereinafter referred to as “the 2<sup>nd</sup> suit property”) The 1<sup>st</sup> Defendant has contended that it is on the 1<sup>st</sup> suit property that he is living with his children after the Plaintiff with whom they have now divorced voluntarily vacated the property. The 1<sup>st</sup> Defendant has contended that he transferred the 2<sup>nd</sup> suit property to the 3<sup>rd</sup> Defendant on 8<sup>th</sup> September, 2016 and that the property did not form part of matrimonial property. The 1<sup>st</sup> Defendant has contended that the 2<sup>nd</sup> suit property was registered in the name of the 3<sup>rd</sup> Defendant on 16<sup>th</sup> September, 2016. The 1<sup>st</sup> Defendant has contended that when the court order said to have been disobeyed was made on 25<sup>th</sup> October, 2016 and issued on 31<sup>st</sup> October, 2016, the 3<sup>rd</sup> Defendant had not been joined to the suit as a party. The 1<sup>st</sup> Defendant has contended that the court order of 25<sup>th</sup> October, 2016 did not involve the 2<sup>nd</sup> suit property that he transferred to the 3<sup>rd</sup> Defendant on 8<sup>th</sup> September, 2016. The 1<sup>st</sup> Defendant has averred that the property that was in dispute when the court order of 25<sup>th</sup> October, 2016 was issued was the 1<sup>st</sup> suit property. The 1<sup>st</sup> Defendant has stated that this property has not been transferred to any third party and remains charged to the 2<sup>nd</sup> Defendant. The 1<sup>st</sup> Defendant has contended that there were no orders issued by this court restraining him from transferring the 2<sup>nd</sup> suit property to a third party when he transferred the suit property to the 3<sup>rd</sup> Defendant on 8<sup>th</sup> October, 2016. The 1<sup>st</sup> Defendant has contended that since the 2<sup>nd</sup> suit property did not form part of their matrimonial home, he had a right in law to deal with the

same as he wished. The 1<sup>st</sup> Defendant has contended that the Plaintiff's application is malicious and driven by ulterior motives. The 1<sup>st</sup> Defendant has contended that the apartments which he and the 3<sup>rd</sup> Defendant have advertised for sale in their face book pages have been built by the two of them on the 2<sup>nd</sup> suit property.

In her affidavit sworn on 18<sup>th</sup> April, 2017, the 3<sup>rd</sup> Defendant contended that the Plaintiff's application does not disclose any cause of action against her because the court order in question did not relate to her property which is the 2<sup>nd</sup> suit property. The 3<sup>rd</sup> Defendant has contended that the 2<sup>nd</sup> suit property was transferred to her lawfully on 8<sup>th</sup> September, 2016. The 3<sup>rd</sup> Defendant has contended that the court order that was made on 25<sup>th</sup> October, 2016 was issued after the 2<sup>nd</sup> suit property had been transferred to her by the 1<sup>st</sup> Defendant. The 3<sup>rd</sup> Defendant has contended that she contributed towards the construction of the apartments that they have advertised for sale.

The Plaintiffs application was argued by way of written submissions. The Plaintiff filed her submissions on 8<sup>th</sup> May, 2017 while the 1<sup>st</sup> and 3<sup>rd</sup> Defendants filed joint submissions on 24<sup>th</sup> May, 2017. I have considered the Plaintiffs application together with the affidavit filed in support thereof. I have also considered the 1<sup>st</sup> and 3<sup>rd</sup> Defendants' affidavit in reply in opposition to the application and the submissions by the advocates for both parties. The only issue that arises for determination in the application before me is whether the 1<sup>st</sup> and 3<sup>rd</sup> Defendants disobeyed the order that was made herein on 25<sup>th</sup> October, 2016 and issued on 31<sup>st</sup> October, 2016 and such should be punished for being in contempt of court. It is now well settled that contempt of court proceedings are quasi criminal in nature because a contemnor is bound to lose his liberty if found guilty of the contempt complained of. In view of this fact, the standard of proof of contempt is higher than proof on a balance of probabilities. See the holding in the Court of Appeal case of, Mutitika-vs-Baharini Farm Ltd. (1985) KLR 227, where the court stated that the standard of proof in contempt proceedings must be higher than proof on a balance of probability, and almost but not exactly, beyond reasonable doubt. It follows therefore that for the Plaintiff to succeed in the present application, she had to satisfy the court to a degree beyond a balance of probabilities that the 1<sup>st</sup> and 3<sup>rd</sup> Defendants disobeyed the orders of the court made herein on 25<sup>th</sup> October, 2016.

The 1<sup>st</sup> and 3<sup>rd</sup> Defendants' defence to the charge of contempt leveled against them is that the order of the court did not extend to the property on which they are carrying out the activities complained of by the Plaintiff. The 1<sup>st</sup> and 3<sup>rd</sup> Defendants have contended further that the 3<sup>rd</sup> Defendant was not a party to the suit when the said order was made and as such, the order was not made against her. In her submissions, the Plaintiff has admitted that when she came to court and sought injunction, she was not aware that the Original parcel of land Title No. 71890/1 that was owned by the 1<sup>st</sup> Defendant had been sub-divided into two portions, the 1<sup>st</sup> suit property and the 2<sup>nd</sup> suit property. The Plaintiff has submitted that when she came to court, the 1<sup>st</sup> Defendant declined to disclose the particulars of the 2<sup>nd</sup> suit property upon which he was erecting apartments and advertising the same for sale. The Plaintiff admitted that the evidence that she relied upon in support of the injunction application emanated from the advertisements for sale of the apartments which were erected on the 2<sup>nd</sup> suit property whose particulars the 1<sup>st</sup> Defendant had concealed. The Plaintiff has contended that the 2<sup>nd</sup> suit property is part and parcel of the property which was the subject of the court order since the same resulted from the sub-division of the matrimonial property which is the subject of the suit herein.

I am not in agreement with the Plaintiff that the orders issued by the court herein on 25<sup>th</sup> October, 2016 can be extended by implication to cover the 2<sup>nd</sup> suit property. When the Plaintiff came to court and sought an injunction, the Plaintiff was very specific as to the property in respect of which she wanted the injunction to attach to. The injunction application was directed expressly to the activities which were said to be taking place on "Land Title Number I.R 154327" whose certificate of title was annexed to the affidavit in support of the application. This is the 1<sup>st</sup> suit property. The Plaintiff was not aware of the existence of the 2<sup>nd</sup> suit property, Title No. I.R 154326. It is not correct as submitted by the Plaintiff that when she filed the suit, the suit concerned the original title I.R No. 71890/1, Land Reference Number

12715/114 (Original Number/2715/353/16) which was sub-divided to give rise to the 1<sup>st</sup> and 2<sup>nd</sup> suit property. This original parcel of land was introduced into these proceedings through the further amended plaint dated 15<sup>th</sup> March 2017 which was filed herein on 15<sup>th</sup> March, 2017.

I am of the view that once the Plaintiff discovered that the original parcel of land had been sub-divided and that the activities she was complaining about were taking place on another portion of the original parcel in respect of which she had not sought injunction she should have in addition to amending the plaint brought another application for injunction in respect of the other portion of the original parcel which was not covered in her earlier application. The Plaintiff could not assume that the injunction order that was granted in respect of the 1<sup>st</sup> suit property would apply to the 2<sup>nd</sup> suit property. The Plaintiff having admitted that the injunction that was granted by the court was in respect of the 1<sup>st</sup> suit property and that the activities she is complaining about and which is the subject of the contempt application are taking place on the 2<sup>nd</sup> suit property the contempt application must fail. I have also noted that when the order of the court was made on 25<sup>th</sup> October, 2016, the 3<sup>rd</sup> Defendant was not a party to the suit. The order was not therefore directed at the 3<sup>rd</sup> Defendant. In any event, no evidence was placed before the court showing that the order in question was served upon the 3<sup>rd</sup> Defendant or that she was aware of the same.

For the foregoing reasons, I find no merit in the Plaintiff's application dated 15<sup>th</sup> March, 2017. The application is dismissed with costs to the 1<sup>st</sup> and 3<sup>rd</sup> Defendants.

**Delivered and Dated at Nairobi this 19<sup>th</sup> day of January, 2018**

**S. OKONG'O**

**JUDGE**

**Ruling read in open court in presence of:**

Mr. Kinga'	for the Plaintiff
N/A	for 1 <sup>st</sup> Defendant
N/A	for 2 <sup>nd</sup> Defendant
N/A	for 3 <sup>rd</sup> Defendant
Catherine	Court Assistant