



**REPUBLIC OF KENYA**

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

**ELC. CASE NO. 15 OF 2016**

**JOHN KYALO MULINGE.....PLAINTIFF**

**VERSUS**

**JULIUS KIMEU MUTUA.....1<sup>ST</sup> DEFENDANT**

**JAMES MUIA KIITHYA.....2<sup>ND</sup> DEFENDANT**

**PIUS KIITHYA.....3<sup>RD</sup> DEFENDANT**

**PETER KIMONGO KUNGA.....4<sup>TH</sup> DEFENDANT**

**RAPHAEL MUMO KIITHYA.....5<sup>TH</sup> DEFENDANT**

**BOSCO KAMOTE.....6<sup>TH</sup> DEFENDANT**

**MATHIAS MUTHUSI MUTUA.....7<sup>TH</sup> DEFENDANT**

**NTHENYA KITEMA.....8<sup>TH</sup> DEFENDANT**

**GRACE MUMBUA KAMOTE.....9<sup>TH</sup> DEFENDANT**

**MALIA NDUKU NYILU.....10<sup>TH</sup> DEFENDANT**

**MUTAVE NYILU.....11<sup>TH</sup> DEFENDANT**

**SYOKAU KIITHYA.....12<sup>TH</sup> DEFENDANT**

**ITUMBI WAMBUA.....13<sup>TH</sup> DEFENDANT**

**MILKA NDUKU MAKAU.....14<sup>TH</sup> DEFENDANT**

**MUTHEU NZIOKA.....15<sup>TH</sup> DEFENDANT**

**JOSEPH MWAKE MWALIVI.....16<sup>TH</sup> DEFENDANT**

**RULING**

1. What is before me is the Application by the Plaintiff dated 18<sup>th</sup> November, 2017. Other than the injunctive orders, the Application is seeking for the following additional prayers:

***a. That this court do issue summons directed to the 1<sup>st</sup>, 2<sup>nd</sup>, 8<sup>th</sup>, 9<sup>th</sup>, 12<sup>th</sup>, 14<sup>th</sup>, and 15<sup>th</sup> Defendants to attend court and show cause why contempt of court proceedings should not be taken against them.***

***b. That the 1<sup>st</sup>, 2<sup>nd</sup>, 5<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup>, 13<sup>th</sup>, 16<sup>th</sup> and 17<sup>th</sup> Defendants be cited for contempt of court and sentenced to six months in jail and/or fined such amount as this court may deem fit or both for disobeying this court's orders dated 27<sup>th</sup> July, 2016 and 22<sup>nd</sup> September, 2017.***

2. This Ruling is only in respect to the above two prayers. The remaining prayers will proceed for hearing on a different date.

3. The Application is supported by the Affidavit of the Plaintiff who has deponed that on 27<sup>th</sup> July, 2016, the parties appeared before Gacheru J and the court ordered that status quo to be maintained; that the order was served on the Defendants' advocates on 15<sup>th</sup> September, 2016 and that while the Application was still pending, the 2<sup>nd</sup> Defendant with five of his family members invaded the suit land.

4. The Plaintiff has deponed that on 26<sup>th</sup> September, 2017, the court granted an order of injunction pending the hearing of the suit.

5. Despite the said injunction, the Plaintiff has deponed that on 8<sup>th</sup> October, 2017, the 7<sup>th</sup> Defendant mobilized people who invaded the suit land and proceeded to harvest sand from the land.

6. The Plaintiff has further deponed that on 26<sup>th</sup> June, 2017, while the order of *status quo* was still in force, the 1<sup>st</sup> Defendant, as the administrator of the Estate of the deceased sub-divided the land and obtained new parcel numbers 957-966; that after sub-dividing the land, the Defendants jointly distributed the sub-divisions amongst themselves and one Regina Itumbi.

7. The Plaintiff has deponed that later on, the 1<sup>st</sup> and 13<sup>th</sup> Defendant's sub-divided parcel of land number 957 into parcel numbers 969 and 970 and distributed them to the 12<sup>th</sup> Defendant and one Andrew Musila Mbaluto respectively.

8. In response, the 2<sup>nd</sup> Defendant deponed that the Application is full of falsehoods and cannot stand the test of law; that the 10<sup>th</sup>, 11<sup>th</sup> and 16<sup>th</sup> Defendants are all deceased and that the process-server could not have served the alleged orders on dead people.

9. According to the 2<sup>nd</sup> Defendant, he was never served with any documents on 10<sup>th</sup> September, 2017 or 28<sup>th</sup> September, 2017 and that he was only served with the summons in March, 2016 and with the current Application on 24<sup>th</sup> September, 2017.

10. The 2<sup>nd</sup> Defendant stated that although the order of 27<sup>th</sup> July, 2016 stated that the status quo should be maintained, the court had not established the status quo as at that date; that the status quo was that the transfer and registration of the suit land had commenced and was ongoing and that there was no order granted on 26<sup>th</sup> September, 2017 that was capable of being obeyed.

11. The 2<sup>nd</sup> Defendant stated that they have not harvested any sand on the suit land as alleged by the Plaintiff neither have they grazed on the land.

12. The advocates for both parties appeared before me on 30<sup>th</sup> November, 2017 and made oral submissions.

13. The Plaintiff's advocate submitted that the Defendants were served with the order of 27<sup>th</sup> July, 2016 and the order of 22<sup>nd</sup> September, 2017; that the 2<sup>nd</sup> Defendant has not disputed that the 1<sup>st</sup> Defendant lives in Nairobi while the rest of the Defendants live in Masii where they were served and that none of the Defendants has denied that they were not served with the court orders.
14. The Plaintiff's advocate submitted that the Defendants have admitted that they were served with the Summons to Enter Appearance and that the process-server has described how he traced the 1<sup>st</sup> Defendant who had changed his place of work.
15. Counsel submitted that as at the time the order of *status quo* was made, the Mutation forms for parcel of land Known as Kithangathini/224 had not been prepared; that Plot No. 224 was in existence when the order of status quo was made and that the 1<sup>st</sup> Defendant sub-divided the land after the orders of status quo had been made by the court.
16. Despite the orders of the court, the Plaintiff's advocate submitted, the Defendants have been invading the land and that he reported about the issue of the invasion to the police.
17. The Defendants' counsel submitted that three of the Defendants are deceased; that the deceased persons could not have been served with court orders and that the orders of the court were not personally served on the Defendants.
18. Counsel submitted that in any event, the status quo order does not have a penal notice and that prove of service is mandatory.
19. Counsel submitted that by the time the order of status quo was made, the process of sub-dividing the suit land had commenced and that the land office should have been served with the order stopping the process of sub-division of the suit land.
20. The record shows that on 18<sup>th</sup> March, 2016, the Plaintiff filed an Application seeking for injunctive orders restraining twenty (20) Defendants from "*selling, advertising for sale, making offers, alienating, transferring or evicting the Plaintiff from parcel of land known as Masii/Kithangathini/224 pending the hearing and determination of the Application.*"
21. When the Application was placed before Gacheru J on 23<sup>rd</sup> March, 2006, she directed that the Application should be served for hearing inter-partes on 6<sup>th</sup> April, 2016. On the said date, the current advocate appeared in court on behalf of all the Defendants. However, the Application did not proceed for hearing.
22. When the Application came up for hearing on 27<sup>th</sup> July, 2016, the record shows that the Plaintiff's advocate sought the leave of the court to withdraw the suit as against the 4<sup>th</sup>, 14<sup>th</sup>, 18<sup>th</sup> and 19<sup>th</sup> Defendants. The said Application was allowed by the court. The Plaintiff's advocate was directed to amend the Plaint accordingly, which he did.
23. According to the amended Plaint, the Plaintiff deleted the names of Nzioka Mwalivi, Kavuli Kiithya, Nduume Kiithya and Joseph Mwake Mwalivi from the suit.
24. On the same date (27<sup>th</sup> July, 2016), the court, with the consent of both advocates, directed that the "*status quo to be maintained.*" The order of "*status quo*" was again made on 23<sup>rd</sup> November, 2016 in the presence of the Defendants' advocate.
25. After hearing the Application inter-parties, this court delivered its Ruling on 22<sup>nd</sup> September, 2017 and allowed the injunctive order as prayed in the Application dated 15<sup>th</sup> March, 2016.
26. The record shows that the Applicant was issued with the orders of the court of 27<sup>th</sup> July, 2016

requiring the parties to maintain the status quo on 5<sup>th</sup> September, 2016, while the order restraining the Defendants from selling or alienating the suit land pending the hearing of the suit was issued on 26<sup>th</sup> September, 2017.

27. The order of the court dated 22<sup>nd</sup> September, 2017 and issued on 26<sup>th</sup> September, 2017 was served upon the Defendants' advocates on 28<sup>th</sup> September, 2017 and the same was duly stamped by Defendants' advocate.

28. In his Affidavit of Service, the process-server has deponed that after serving the order of 22<sup>nd</sup> September, 2017 on the Defendants' advocates on 28<sup>th</sup> September, 2017, he proceeded to the 2<sup>nd</sup> Defendant's home in Kithangathini area where he duly served him with the order. The process-server has deponed that he had previously served the 2<sup>nd</sup> Defendant with the Summons to Enter Appearance and the orders of 27<sup>th</sup> July, 2016. He therefore knew the 2<sup>nd</sup> Defendant's home where he duly served him with the said order.

29. According to the process-server, he served the 3<sup>rd</sup> to 16<sup>th</sup> Defendants with the order of 22<sup>nd</sup> September, 2017 at Kithangathini Shopping Centre.

30. The process-server has deponed that on 1<sup>st</sup> October, 2017, he served the 1<sup>st</sup> Defendant with the order of 22<sup>nd</sup> September, 2017 in his office in the Budget Office, Office of the President, having moved from his previous office at Jogoo House, Nairobi.

31. The process-server has deponed that he served the 2<sup>nd</sup> Defendant with the order of "*status quo*" dated 27<sup>th</sup> July, 2016 and issued on 5<sup>th</sup> September, 2016 on 10<sup>th</sup> September, 2016 at Kithangathini; that he also served the 3<sup>rd</sup> to the 16<sup>th</sup> Defendants with the said order in Kithangathini area on the same day and that he served the 1<sup>st</sup> Defendant with the same order on 11<sup>th</sup> September, 2017 at "*Java Cafe, Re-insurance Plaza*".

32. The first issue which I should determine is if indeed the Defendants were served with the orders of 27<sup>th</sup> July, 2016 and 22<sup>nd</sup> September, 2017.

33. The 2<sup>nd</sup> Defendant has admitted that he was indeed served with Summons to Enter Appearance in Kithangathini by the process-server. The said process-server therefore knew the 2<sup>nd</sup> Defendant's residence. That is where he served him with the two court orders.

34. Indeed, the 2<sup>nd</sup> Defendant never bothered to have the process-server summoned for cross-examination on his Affidavit. In the circumstances, I am convinced that the 2<sup>nd</sup> Defendant was served with the orders of 27<sup>th</sup> July, 2016 and 22<sup>nd</sup> September, 2017 as stated in the Affidavit of Service.

35. The 1<sup>st</sup> Defendant did not also deny that he met the process-server at Java Cafe at Re-Insurance Plaza on 11<sup>th</sup> September, 2017. Indeed, the 1<sup>st</sup> Defendant did not bother to explain where he was on the date he was alleged to have been served with the order of 27<sup>th</sup> July, 2016.

36. On the issue of service of the order of 22<sup>nd</sup> September, 2017, which was allegedly served on the 1<sup>st</sup> Defendant on 1<sup>st</sup> October, 2017, the 1<sup>st</sup> Defendant has not denied that indeed he was working in the Office of the President, Budget Office, on the said date. Consequently, and having not called the process-server for cross-examination, I am satisfied that the 1<sup>st</sup> Defendant was served with the two orders.

37. On the issue of whether the 3<sup>rd</sup> to the 16<sup>th</sup> Defendants were served with the two orders, I find that the process-server was vague on how he served each one of them. In fact, two of the Defendants whom he purportedly served were already dead and could not have been served with the said orders. I therefore

find that there is no evidence to show that the 3<sup>rd</sup> to the 16<sup>th</sup> Defendants were served with the orders of the court.

38. Even if it is true that none of the Defendants were served with the orders of the court, which is not true in respect to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, the evidence before this court shows that the Defendants' advocate was aware of the said orders.

39. The record shows that the order of 27<sup>th</sup> July, 2016 requiring the parties to maintain the status quo was entered into with the consent of the Defendants' advocate on 27<sup>th</sup> July, 2016 and 23<sup>rd</sup> November, 2016. The order of 22<sup>nd</sup> September, 2017 was served on the Defendants' advocate on 28<sup>th</sup> September, 2017.

40. The law relating to personal service of court orders has since moved to “*knowledge*” of the impugned order. This position was reinstated by the Court of Appeal in the case of ***Shimmers Plaza Limited vs. National Bank of Kenya Limited (2015) eKLR*** as follows:

***“As per Rule 81.8, dispensation of service on the basis of notice or knowledge of the terms of an order will only apply to a court Judgment or order requiring a person not to do an act, that is a prohibitory order.”***

***On the other hand however, this court has slowly and gradually moved from the position that service of the order along with the penal notice must be personally served on the person before contempt can be proved... Kenyan's growing jurisprudence right from the High Court has reiterated that knowledge of a court order suffices to prove service and dispense with personal service for the purposes of contempt proceedings.***

***Would the knowledge of the Judgment or order by the advocate of the alleged contemnor suffice for contempt proceedings. We hold the view that it does... There is an assumption which is not unfounded, and which in view is irrefutable to the effect that when an advocate appears in court on instructions of a party, then it behoves him/her to report back to the client all that transpired in court that has a bearing on the client's case.”***

41. Having being aware of the two orders of the court, and on the basis of the decision of ***Shimmers Plaza Limited (supra)***, the Defendants' advocate was under a legal obligation to inform the Defendants about the said orders. Whether indeed the Defendants' advocate informed the Defendants about the orders or not, for the purpose of an Application for contempt, is inconsequential.

42. The next issue that I am required to determine is if the Defendants are in contempt of any of the two orders of the court.

43. The Order of 27<sup>th</sup> July, 2016 was for the maintenance of status quo in respect of parcel of land known as Masii/Kithangathini/224. In the ***Shimmers Plaza case (supra)***, the Court of Appeal defined “*status quo*” as follows:

***“Status quo in normal English parlance means the present situation, the way things stand as at the time the order is made, the existing state of things. It cannot therefore relate to the past or future occurrences or events... All it means was that everything was to remain as it was as at the time the order was given. If there was any transaction that was going on in respect of the land in question, it had to freeze and await the discharging of the court order.”***

44. The state of the suit property as at 27<sup>th</sup> July, 2016 was that the same had not been formally subdivided. That is why the Plaintiff referred to the suit land as portion number 224.

45. The Plaintiff has annexed a Mutation form that was prepared by the Defendants' Surveyor on 21<sup>st</sup> June, 2017, one year after the order of status quo had been made, showing the sub-division of portion number 224 into portion numbers 957-966. The said Mutation form was presented to the lands office on

31<sup>st</sup> August, 2017 for registration.

46. After registration of the Mutation form, the evidence before this court shows that the Title Deeds in respect of parcel numbers 964, 970,969 were issued on 3<sup>rd</sup> September, 2017 and 24<sup>th</sup> October, 2017.

47. According to the exhibited official searches, parcel number 964 was registered in favour of the 1<sup>st</sup> Defendant on 7<sup>th</sup> September, 2017 and a Title Deed issued on 3<sup>rd</sup> September, 2017 while parcel number 970 and 969 were registered in favour of Andrew Mbaluto Musila and Syokau Kiithya who are not parties to this suit. It is not clear to this court how the other sub-divisions have been distributed to the rest of the Defendants. However, the Defendants have not denied the Plaintiff's deposition that the entire land has been distributed amongst the Defendants and third parties.

48. In view of the status quo orders of 27<sup>th</sup> July, 2016, the Defendants should not have instructed the Surveyor to prepare and lodge the Mutation forms. Having gone ahead to cause the suit land sub-divided and titles issued after the order of "status quo", I find that the Defendants are in contempt of the order of 27<sup>th</sup> July, 2016. Indeed, the Defendants further disobeyed the order of 22<sup>nd</sup> September, 2017 when they caused the Title Deeds for parcels number 969 and 970 issued to Syokau Kiithya and Andrew Mbaluto Musila respectively.

49. The Defendants' assertion that the order of status quo meant that the process of sub-division and registration of the suit land which had already commenced by 27<sup>th</sup> July, 2016 should go on.

50. As I have stated above, the formal process of sub-division of the suit land commenced with the lodging of the Mutation form at lands offices on 31<sup>st</sup> August, 2017, way after the order had been made. In any event, even if it is true that the process of sub-division of the suit land had commenced by the time the order of 27<sup>th</sup> July, 2016 was made, the process should have stopped the moment the said order was made. That did not happen in this case.

51. As was held by the Court of Appeal in the case of ***Refrigeration and Kitchen Utensils Ltd vs. Gulabched Popatlal Shah & Another, Civil Application No. 39 of 1990***, it is essential for the maintenance of the rule of law and good order that the authority and dignity of our courts is upheld at all times.

52. Considering that none of the Defendants has stated who amongst them caused the sub-division of the suit land, I find and hold that all the Defendants, except the 10<sup>th</sup>, 11<sup>th</sup> and 16<sup>th</sup> Defendants, who are said to be deceased, are in contempt of the orders of this court of 27<sup>th</sup> July, 2016 and 22<sup>nd</sup> September, 2017. Consequently, the Plaintiff's Application dated 18<sup>th</sup> November, 2017 succeeds in the following terms:

***a. Except the 10<sup>th</sup>, 11<sup>th</sup> and 16<sup>th</sup> Defendants, all the Defendants in this matter are found to have been in contempt of the orders of this court of 27<sup>th</sup> July, 2016 and 22<sup>nd</sup> September, 2017.***

***b. The Officer Commanding Masii Police Station to arrest all the Defendants except the 10<sup>th</sup>, 11<sup>th</sup> and 16<sup>th</sup> Defendants (deceased) and present them to this court for Mitigation and Sentence.***

***c. The Defendants to pay the costs of the Application.***

**DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 23<sup>RD</sup> DAY OF JANUARY, 2018.**

**O.A. ANGOTE**

**JUDGE**