



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO. 410 OF 2017

(Formerly Milimani 683 of 2014)

IN THE MATTER OF AN APPLICATION FOR COMMITAL TO CIVIL JAIL FOR

CONTEMPT OF COURT

IN THE MATTER OF SECTIONS 4(1) (a), 5(b), 27(b) AND 28 OF THE CONTEMPT OF

COURT ACT NO. 46 OF 2016

KEEKONYOKIE COMMUNITY TRUST.....PLAINTIFF

(Through the duly appointed trustees)

VERSUS

MOSES PARANTAI.....1ST DEFENDANT

JOHN KAMUYE OLE KIOK.....2ND DEFENDANT

THE CABINET SECRETARY MINISTRY OF LANDS,

HOUSING & URBAN DEVELOPMENT.....3RD DEFENDANT

RULING

The application for determination is a Notice of Motion dated the 12th October, 2017 and filed on 13th October, 2017 brought pursuant to Section 1A, 1B and 3A of the Civil Procedure Act and Order 51 of the Civil Procedure Rules, Sections 4 (1) (a), 5(b), 27 (b) and 28 of the Contempt of Court Act 2016.

It seeks the following orders:

1. That this Honourable Court do hereby commit MOSES PARANTAI and JAMES KAMUYE OLE KIOK, the 1st and 2nd Defendants herein, to civil jail for a maximum of six (6) months for breach of the Order by Honourable Justice Gacheru issued on 14th October, 2016.
2. That the costs of this application be borne by the 1st and 2nd Defendants.
3. Such further or other reliefs as this Honourable Court may deem fit, just and expedient to grant.

The Application is premised on the grounds set out in the statement of facts herein which in summary is that on 14th October, 2016, Honourable Lady Justice Gacheru issued a ruling on the Plaintiff's application dated 15th July, 2015 in which she directed that the title deed for LR NO. NGONG/NGONG/12418 be deposited with the Court within 14 days of the Ruling and preservation of the status quo pending final determination of the main suit. The 1st and 2nd Defendants did not deposit the title deed and filed an application seeking for stay pending appeal. He claims on 30th March, 2017 his advocates informed the Deputy Registrar of the 1st and 2nd Respondents failure to comply with the order of the court, to which the Deputy Registrar directed them to do so in 14 days, before directions could be taken. He is aware the 1st and 2nd Respondents filed an Appeal on 16th December, 2017 and use this as an excuse of failure to deposit the title deed in

Court. He insists there are no orders staying the decision of Justice Gacheru and that the Appeal has not been heard. He reiterates that the main suit cannot be set down for hearing because of the 1st and 2nd Respondents' perennial contempt which has held the Plaintiff hostage and the community's right to access justice hindered.

The application is opposed by the 1st and 2nd Respondent who filed a Notice of Preliminary Objection dated the 21st November, 2017 where they stated as follows: ' **Take Notice the 1st and 2nd Defendants herein will raise a preliminary objection on a point of law that the application herein be struck out for being time barred under the provisions of section 34 of the Contempt of Court Act No. 46 of 2016.**

The Respondents' further filed Grounds of Opposition dated the 1st December, 2017 where they stated that:

1. That the application is incompetent, fatally defective and devoid of legal foundation.
2. That this court lacks jurisdiction to entertain the application herein because it has been filed out of the statutorily provided time.
3. That the Plaintiff herein has failed to show that the alleged order was served upon the defendants.
4. That the alleged order was not served upon the defendants.
5. That there having no orders served upon the defendants there was no penal notice notifying them of the consequences on non compliance with the said order.
6. That the application is incurably defective for want of form.
7. That the application herein has no merits.

Both the Applicant as well as the 1st and 2nd Respondents filed their respective written submissions which were highlighted on 7th December, 2017, that I have considered.

Analysis and Determination

Upon perusal of the Notice of Motion dated the 12th October, 2017 including the supporting affidavit as well as Grounds of Opposition dated the 1st December, 2017 and the Notice of Preliminary Objection dated the 21st November, 2017 the following are the issues for determination:

- a) Whether the application dated the 12th October, 2017 is time barred in accordance with Section 34 of the Contempt of Court Act.
- b) Whether the 1st and 2nd Respondents are in contempt of the orders of the court granted on 14th October, 2016

It is the Applicant's contention that the 1st and 2nd Respondents are in contempt of court as they have failed to deposit the title deed to the suit land in court, in accordance with the order issued on 14th October, 2016 thus delaying the setting down of the instant suit for hearing. They insist the 1st and 2nd Respondents were aware of the Order of the Court and were also served with a Penal Notice but defied to obey the same. The Counsel relied on several cases including the **Shimmers Plaza Ltd Vs NBK [2015] eKLR, Africa Management Communication Limited v Joseph Mathenge Mugo & another [2015] eKLR** to support their claim.

The 1st and 2nd Respondents deny being in contempt of court and filed Grounds of Opposition and Notice of a Preliminary Objection where they state that the application is time barred as it offends the provisions of Section 34 of the Contempt of Court Act. They denied service of the Penal Notice together with the Order of Court that they are purportedly in Contempt of. They relied on the following cases including **Mukhisa Biscuit Manufacturing Co. Ltd Vs West End Distributors Ltd [1969] , 696; Gathoni Vs Kenya Cooperative Creameries Ltd (1982) KLR 104 and Kasembeli Sanane Vs Manhu Muli alias Fredrick Sanane & 2 others [2013] eKLR.**

I note the Order of the Court by Justice Gacheru directing the 1st and 2nd Respondents to deposit the title deed in court was granted on 27th October, 2016. I note both parties participated in the proceedings and were present when the Order of the Court was granted.

Black's Law Dictionary defines contempt as follows: ' **Contempt is a disregard of, disobedience to, the rules orders of a legislative or judicial body, or an interruption of its proceedings by disorderly behaviour or insolent language, in its presence or so near thereto as to disturb the proceedings or to impair the respect due to such a body.**'

Section 27(b) of the Contempt of Court Act **describes a party in contempt of court as follows 'a person who willfully and without lawful excuse disobeys an order or directions of a superior or subordinate court in the course of the hearing of a proceeding;'**

While **Section 28(1) of the Contempt of Court Act provides that 'save as otherwise expressly provided in this Act or in any other written law, a person who is convicted of contempt of court is liable to a fine not exceeding two hundred thousand shillings or to imprisonment for a term not exceeding six months, or to both.'**

In the case of **Shimmers Plaza Limited Vs. National Bank of Kenya Ltd (2015) eKLR** the court held as follows: **‘the notice of the order is satisfied if the person or his agent can be said to either have been present when the order was given or made; or was notified of its terms by telephone, email or otherwise. In our view, ‘otherwise’ would mean any other action that can be proved to have facilitated the person having come into knowledge of the terms of the judgement and/or order. This would definitely include a situation where a person is represented in court by counsel. Once the Applicant has proved notice, the Respondent bears an evidential burden in relation to wilfulness and mala fides disobedience.’**

In the case of **North Tetu Farmers Co. Ltd v. Joseph Nderitu Wanjohi (2016) eKLR** where Justice Mativo stated that: **‘ writing on proving the elements of civil contempt, learned authors of the book Contempt in Modern New Zealand have authoritatively stated as follows:-**

‘there are essentially four elements that must be proved to make the case for civil contempt. The applicant must prove to the required standard (in civil contempt cases which is higher than civil cases - (a) the terms of the order (or injunction or undertaking) were clear and unambiguous and were binding on the defendant; (b) the defendant had knowledge of or proper notice of the terms of the order; (c) the defendant has acted in breach of the terms of the order; and (d) the defendant’s conduct was deliberate.’

I note there are three elements that must be proved in contempt proceedings:

- a) Applicant must demonstrate terms of orders
- b) Applicant must demonstrate knowledge of terms by respondent
- c) Applicant must demonstrate failure of respondent to comply with court order

Section 34 of the Contempt of Court Act stipulates that **‘ No court shall initiate any proceedings for contempt of court either on its own motion or otherwise after expiry of a period of six months from the date on which the contempt of court is alleged to have been committed.’**

In the instant case, I note the 1st and 2nd Respondents have not deposited the title deed in court as directed but lodged an appeal against the said order which appeal has not been allowed. I note no stay of execution pending appeal was sought.

In the relying on the authorities above, and the Contempt of Court Act, including the current circumstances, I find that the 1st and 2nd Defendants were present in Court and were well aware of the order of the Court, so the issue of service of the Order including a Penal Notice does not arise. I also find that the Applicant was also well aware of the 1st and 2nd Defendants acts of contempt.

I note that the order was granted in October, 2016 and last mentioned before Justice Obaga more than 6 months before the instant application was filed. In relying on Section 34 of the Contempt of Court Act as listed above, I find that the application fails to meet the threshold required for issuance of an order of contempt and I concur with the 1st and 2nd Respondents first ground on the Preliminary Objection. I decline to allow the application dated the 12th October, 2017 at this juncture but in the interest of justice I order that the 1st and 2nd Defendants do deposit in Court the title deed to the suit land within 21 days from the date hereof failure of which they can be cited for contempt.

Costs will be in the cause

Dated, Signed and Delivered in Kajiado this 5th February, 2018

CHRISTINE OCHIENG

JUDGE

Present:

Hashi for Plaintiff

Mbaka for Senteu for 1st and 2nd Respondent

Moleu for AG

Cc Mpoye