



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET**

**E & L CASE NO. 441 OF 2012**

**JOSEPH TIREITO.....PLAINTIFF**

**VERSUS**

**JACOB KIPSUGUT ARAP LANGAT & 2 OTHERS.....DEFENDANTS**

**RULING**

Joseph Tireito has brought an application before court dated 4<sup>th</sup> December, 2017 and filed on the same date. It was initially wrongly dated 4.11.2017 but it was amended to read dated 4.12.2017. The applicant prays for a review of the ruling delivered on 30.9.2014 and all orders subsequent thereto to the extent of stay of execution that was issued being lifted. Moreover, the applicant prays that the 2<sup>nd</sup> respondent herein be committed to jail for continued disobedience of the court orders issued herein and to be ordered to pay a fine of Kshs. 200,000 and one Stephen Kipyego Lel advocate be imprisoned for six months for disobedience of court orders. The applicant prays that any construction already done be demolished and the 2<sup>nd</sup> defendant to meet costs of demolition. Lastly, that the O.C.P.D., Kapsoya to provide security to the court bailiff on implementation of the demolition of the structure. The application is based on grounds that this honourable court issued orders of stay on 30.9.2014 and ordered the plaintiff to have possession of 26.5 acres of which 2½ acres is part of Eldoret Municipality Block 25 (Lulwet)/2. That the 2<sup>nd</sup> defendant has eventually built on the disputed parcel of land. The applicant states that Mr. Lel should have been aware of the court order and is presumed to be aware under the doctrine of **lis pendens**.

In the replying affidavit of Anna Ngeny, she states that the order of review cannot be issued for want of compliance with the law. She denies being in contempt and confirms to be an old lady, a senior citizen and a law-abiding citizen of the country and that she has never disobeyed the court. She claims that she has never been served with any court order. She claims to be ready to surrender to the plaintiff 2.5 acres. She states that nothing is being done on the land to warrant her arrest and detention. She states that there has never been and there is nothing new being done on her land. She claims that the construction on her land is by one Stephen Kipyego Lel advocate and not herself.

Mr. Joseph Rotich Boit states that he is the son of the 2<sup>nd</sup> defendant and claims that his mother has subdivided land amongst them and each child has his portion whilst the 2<sup>nd</sup> defendant has retained hers. Each child has taken possession and the land each child has belongs to the child. The 2<sup>nd</sup> defendant's portion has no construction. He admits that there is an ongoing construction by a purchaser who has nothing to do with the family. He admits that the portion being under construction was his given to him by his mother.

Mr. Stephen Kipyego Lel through affidavit sworn on 21.12.2017 states that he purchased property measuring 50 x 126 feet part of parcel of land No. Eldoret Municipality Block (Lulwet)/2 from Joseph Rotich Boit on a willing buyer/seller basis for consideration. He paid a full purchase amount for the subject matter.

**Dr. Chebii learned counsel for the applicant** submits that the court gave the plaintiff possession of 26.5 acres and that the order was served on the 2<sup>nd</sup> respondent and Stephen Lel but they have continued to disobey court orders. The second respondent has allowed her son to purportedly sell the portion of land to Mr. Stephen Lel who has constructed a house on the said portion. The sell and construction is being done against a court order. The second defendant has not surrendered the land to the applicant as ordered by the court.

According to Dr. chebii, the doctrine of **lis pendens** applies and that a party in contempt cannot be heard until he purges the contempt. He submits that Mr. Stephen Lel was aware of the plaintiff's interest but continued to construct therefore flouting the law and court orders. He submits that the order made by Justice Munyao was clear and therefore the respondents cannot choose how to comply. The judgment carries all rights and the subject matter is not the boundary and not the last end of the land parcel owned by the respondent but the portion where Mr. Lel is constructing the house.

**Mr. Mukhabane learned counsel for the second respondent** relies on replying affidavits by Anne Ngeny dated 31.1.2018 and Joseph Rotich Boit. He filed his skeleton submissions on 16.4.2018 and authorities thereto. He submits that the order for review cannot be granted by the court because there is no new evidence or facts. There is no reasonable cause to warrant any review. The applicant is trying to compel the court to sit on appeal on its own ruling. He should have raised the issues on appeal as there is a ruling on the record on stay of execution pending appeal. There is appeal pending before Court of Appeal being appeal No. CACA No. 1 of 2018. He has a complete

record of appeal.

On the prayer for committal of the second respondent to civil jail, he argues that the person constructing is Mr. Lel and not Mrs. Ngeny. Mr. Lel purchased the property from another person and not his client. The applicant intends to execute through the back door. The land in dispute is registered in the name of his client and the applicant has not laid claim on the whole portion of land which is 29 acres. She has set aside 2.5 acres for the applicant. The ruling does not point out where the 2.5 acres to be taken. His client has not refused to surrender the 2.5 acres and has not denied them any possession. The plaintiff has refused to take possession. This is abuse of court process according to Mr. Mukabane.

**M/s Cheso learned counsel for Mr. Stephen Lel** submits that the constructions have been stopped and are not ongoing. The application is fatally defective and that the law has to be complied with. According to M/S Cheso, a contempt application requires the applicant to prove that the same orders were served. There is no evidence of service. No orders were issued restraining the interested party from constructing and that the suit property was purchased by one Mugo, the husband to deceased defendant. Ann Ngeny was holding the property in trust for children. Her client purchased the property from Joseph Boit, the son of the 2<sup>nd</sup> respondent who sold part of his own shares.

I have considered the application for review and do find that the same is premised on section 80 of the Civil Procedure Act Cap 21 Laws of Kenya, and Order 45 of the subsidiary rules thereunder. I do agree with Mr. Mukhabane that there is no discovery of any new and important matter which after exercise of due diligence was not within his knowledge and or could not be produced by him at the time when the order was made or any mistake or error apparent on the face of the record or any other sufficient reason. The appeal has been filed and it is only the Court of Appeal that can determine the merit of the appeal. Moreover, there is need to preserve the status quo in this matter. The application for review fails as it lacks merit.

On the issue of contempt, this court took time to visit the disputed parcel of land and found that the disputed portion is still being utilized by the 2<sup>nd</sup> defendant and that the same has been cultivated and a building is being put up by Mr. Stephen Lel on the said portion. The court had visited the said portion earlier and seen the house that was blocked by the acts of the 2<sup>nd</sup> defendant or her agents. During the second visit, the 2<sup>nd</sup> respondent attempted to mislead the court by showing the court a portion deferent from the one visited earlier. It is a fact that on the 30<sup>th</sup> September 2014 this court made an order inter alia that the possession of the 26.5 acres be given to the plaintiff pending appeal.

The 2<sup>nd</sup> defendant has never given the plaintiff possession of the same but now attempts to change the subject matter by showing a totally different portion and giving Mr. Lel possession of part of the disputed portion through her son Mr. Boit.

The court found in the judgment dated and delivered on 26<sup>th</sup> February, 2014 that the plaintiff has been in occupation of the two houses since he purchased the suit land and that the two houses fall within the 2.5 acres claimed by the plaintiff but are now comprised in the title of the 2<sup>nd</sup> defendant. When the court visited the disputed portion it found that the said houses are still intact and that they are in the portion where Mr. Lel is constructing a house which is the portion found to rightfully belong to the plaintiff. The Court observed that the 2<sup>nd</sup> defendant is still in occupation of the portion to be relinquished to the plaintiff even after being found to be in contempt and fined.

As stated by **ROMER L.J in HADKINSON VS HADKINSON (1952) ALL ER 567:**

**“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 even void”**

**“For, 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 question. That the course of a party knowing of an order which was null and irregular, and who might be affected by it, was plain, he should apply to court that it might be discharged. As long as it exists, it should not be disobeyed.” Per Lord Cottenham L.C in Chuck Vs Cremer (1) 1 COOP TEMP COTT 342.”**

I do find that there is sufficient evidence that the 2<sup>nd</sup> defendant has no intention whatsoever of obeying the court order. By refusing to give possession off the whole 26.5 acres to the plaintiff, even after being found to be in contempt, the 2<sup>nd</sup> defendant has refused to purge the contempt and is in still in breach of the court order. The issue of a trust as argued by M/s Cheso is an afterthought as it was not brought to the attention of justice Munyao before he delivered his judgment.

For Mr. Lel, this court finds that the doctrine of *lis pendens* applies as he is presumed to have been aware of the pending proceedings in the court of law. Moreover, Mr. Lel ought to have done an official search before purchasing the land in dispute.

*Lis pendens* is a common law principle, and in addressing the relevance of common law principles within the Kenyan context, **Section 3 (1)** of the **Judicature Act Cap 8** stipulates that, **“The jurisdiction of the High Court, the Court of Appeal and of all subordinate courts shall be exercised in conformity with-**

**a. the Constitution;**

**b. subject thereto, all other written laws, including the Acts of Parliament of the United Kingdom cited in Part I of the Schedule to this Act, modified in accordance with Part II of that Schedule;**

c. subject thereto and so far as those written laws do not extend or apply, the substance of the common law, the doctrines of equity and the statutes of general application in force in England on the 12th August, 1897, and the procedure and practice observed in courts of justice in England at that date:

Provided that the said common law, doctrines of equity and statutes of general application shall apply so far only as the circumstances of Kenya and its inhabitants permit and subject to such qualifications as those circumstances may render necessary.

*Black's Law Dictionary 9<sup>th</sup> edition*, defines *lis pendens* as the jurisdictional, power or control acquired by a court over property while a legal action is pending. Turner L. J, in *Bellamy vs Sabine [1857]* 1 De J 566 held as follows: -

**“It is a doctrine of common to the courts both of law and equity, and rests, as I apprehend, upon this jurisdiction, that it would plainly be impossible that any action or suit could be brought to a successful determination, if alienation pendent lite were permitted to prevail. The Plaintiff would be liable in every case to be defeated by the Defendants alienating before the judgment or decree, and would be driven to commence his proceedings de novo, subject again to defeat by the same course of proceedings.”**

In the case of *Mawji vs US International University & another [1976] KLR 185*, Madan, J.A. stated thus: -

**“The doctrine of lis pendens under section 52 of TPA is a substantive law of general application. Apart from being in the statute, it is a doctrine equally recognized by common law. It is based on expedience of the court. The doctrine of lis pendens is necessary for final adjudication of the matters before the court and in the general interests of public policy and good effective administration of justice. It therefore overrides, section 23 of the RTA and prohibits a party from giving to others pending the litigation rights to the property in dispute so as to prejudice the other...”**

In the same case at page it was observed inter alia that: -

**“Every man is presumed to be attentive to what passes in the courts of justice of the State or sovereignty where he resides. Therefore, purchase made of a property actually in litigation pendete lite for a valuable consideration and without any express or implied notice in point of fact affects the purchaser in the same manner as if he had notice and will accordingly be bound by the judgment or decree in the suit.”**

Having found that the 2<sup>nd</sup> defendant has disobeyed the order issued by the court, and being in contempt of Court for a second time in this matter, I do order that she be jailed for a period of two months and in the alternative, pay a fine of kshs.200,000. The 2<sup>nd</sup> defendant is hereby ordered comply with the court order immediately by giving the plaintiff possession as ordered by the court. However, Mr. Lel cannot be punished for contempt of court as he was not party to the suit and was not aware of the court order but he is bound by the said court order and therefore any further act of construction will amount to disobeying the court order. On the prayer for demolition of the building on the ground, I do order that it be preserved but no further construction. Costs of the application to be borne by the 2<sup>nd</sup> respondent.

**Dated and delivered at Eldoret this 8<sup>th</sup> day of May, 2018.**

**A. OMBWAYO**

**JUDGE**