



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT MAKUENI

ELC NO.337 OF 2017

FORMERLY NAIROBI ELC NO. 910 OF 2013

ALICE MBESA KEESI1ST PLAINTIFF

JUSTUS KYALO KEESI 2ND PLAINTIFF

LILIAN NTHAMBII 3RD PLAINTIFF

VERSUS

BENJAMIN MUTUA KEESI 1ST DEFENDANT

KINYAMBI KEESI 2ND DEFENDANT

KYAMBA KEESI 3RD DEFENDANT

IGNATIUS KINYAMBI 4TH DEFENDANT

ROSE NGINA 5TH DEFENDANT

MUSAU MASOKA 6TH DEFENDANT

MUTUKU SILINGI 7TH DEFENDANT

PATRICK NZOMO.....8TH DEFENDANT

JOHN KATO 9TH DEFENDANT

MBITHE SILINGI 10TH DEFENDANT

RULING

1. The application before court is the one dated the 26th February, 2014 and filed in court on the 27th February, 2014 for orders:-

1. Spent

2. Spent

3. That the 5th and 9th Respondent be restrained whether by themselves, their agents, servants, employees or whosoever, from continuing to trespass onto, constructing, cultivating, selling invading, wasting or in any way dealing or any way interfering with the suit property known as Kilala/Kaumoni/386 & Kilala/Kaumoni323 respectively pending the hearing and determination of this suit.

4. That the 5th and 9th Defendant be committed to Civil Jail for a period of six (6) months for willful disobedience and contempt of the court order issued by honourable Justice Mutungi on 26th July, 2013.

5. That the 1st, 2nd, 3rd and 4th Respondents be committed to civil jail for a period of six (6) months for aiding and abetting the continued disobedience of the court order issued honourable Justice Mutungi on 26th July, 2013 by the 5th and 9th Respondent.

6. That the costs of the application be provided for.

2. The application is predicated on the grounds on its face and is supported by the affidavit of Justus Kyalo Keesi, the second Plaintiff/Applicant herein, sworn at Nairobi on the 26th February, 2014.
3. The application is expressed to be brought under sections 1A, 1B, 3, 3A, 63 and 95 of the Civil Procedure Act and Order 40 of the Civil Procedure Rules and all other enabling provisions of the law.
4. The application is opposed by the Respondents herein namely the 1st, 5th, 7th, 8th and 9th who filed separate replying affidavits.
5. On the 14th August, 2014 the 2nd, 3rd and 4th Respondents filed the replying affidavit sworn at Nairobi by the second Respondent herein. The replying affidavits by the first, 5th, 7th, 8th and 9th Respondents were sworn at Nairobi on various dates between 30th July, 2014 and 14th August, 2014.
6. On the 15th October, 2014 parties were directed to dispose off the application by way of written submissions.
7. The Plaintiffs/Applicants filed their submissions on the 15th April, 2015 while the 1st to 8th and 10th Defendants/Respondents filed their joint submissions on 23rd April, 2015 the same being dated 22nd April, 2015.
8. The 9th Defendants filed his submissions on the 18th December, 2014 the same being dated 17th December, 2014.
9. The counsel for the Applicants submitted that the Applicants are the administrators of the Estate of Jonathan Keesi Nguzi (deceased), appointed vide letters of administration issued in Succession Cause No. 119 of 2004 and confirmed by a certificate of confirmation of grant issued on the 7th July, 2008. He pointed out that the Defendants/Respondents did not object to the issuance of the said certificate.
10. The counsel submitted that at the time of his death, the deceased was the owner and legal proprietor of the parcels of land known as Kilala/Kaumoni/323, Kilala/Kaumoni/386, Kilala/Kaumoni/365. He went on to submit that the said properties are vested in the 1st Plaintiff/Applicant who holds them in trust for the beneficiaries and has not sold, leased, transferred or alienated any of the said suit properties. That the first second and 3rd Defendants/Respondents without authority purported to sell land parcel number Kilala/Kaumoni/422 to the 4th, 5th, 6th, 7th, 8th and 9th Defendants/Respondents which purported sale the counsel termed as unlawful and constituted an act of intermeddling with the deceased's estate contrary to the provisions of section 45 of the Law of Succession Act chapter 160 of the laws of Kenya.
11. The counsel submitted that the actions of the Defendants/Respondents prompted the filing of a suit and an application under a certificate of urgency by way of notice of motion dated 25th July, 2013 by the Plaintiffs/Applicants seeking injunctive reliefs over the suit properties pending the hearing and determination of the main suit.
12. The counsel submitted that on the 26th July, 2013, temporary injunctive orders restraining the Respondents whether by themselves, agents, servants, employees or whoever from trespassing onto, alienating, selling, transferring, invading, cultivating, wasting, mortgaging, leasing or in any way dealing or in any way interfering with the suit properties for a period of 14 days. The counsel pointed out that the said order was duly effected upon the Defendants/Respondents and an affidavit of service sworn by Peter Mburu Waithaka on 2nd August 2013 was duly filed.
13. That the interim orders were extended on various occasions and the Defendants/Respondents would be served. That in blatant disregard and disobedience of the court order, the 5th and the 9th Defendants/Respondents have continued trespassing and dealing with suit properties Kilala/Kaumoni/386 and Kilala/Kaumoni/323 respectively. The counsel went on to submit that the disobedience of the court order by the two Defendants/Respondents has been aided and abetted by the 1st, 2nd, 3rd and the 4th Defendants. He pointed out that 5th and the 9th Defendants/Respondents persistence in disobedience of the court order will continue unless the court intervenes and commits the two to civil jail.
14. Regarding the contempt of court, the counsel submitted that the application is anchored on section 63(c) of the Civil Procedure Act which provides that:-

“ 63) In order to prevent the ends of justice from being defeated, the court may, if it is so prescribed:-

(c) Grant a temporary injunction and in case of disobedience commit the person guilty thereof to prison and order that his property be attached and sold”
15. The counsel went on to submit that pursuant to section 63(c) aforesaid, it is provided under order 40 Rule 3(1) of the Civil Procedure Rules that;

“3(1) in case of disobedient breach of any such terms, the court granting an injunction may order the property of the person guilty of such disobedience or breach to be attached and may also order such person to be detained in prison for a term not exceeding six months unless in the meantime the court directs his release”

16. The counsel cited Black’s Law Dictionary (Ninth Edition) which defines contempt of court as:

“Conduct that defies the authority or dignity of a court. Because such conduct interferes with the administration of justice, it is punishable usually by fine or imprisonment.”

17. The counsel further submitted that it is the rule of law and the administration of justice which are under challenge when the court orders are disobeyed and cited the case of *Teachers Service Commission V Kenya National Union of Teachers & 2 others [2013] eKLR* where lady Justice Ndolo observed as follows:-

“The reason why courts will punish for contempt of court then is to safe guard the rule of law which is fundamental in the administration of justice. It has nothing to do with the integrity of the judiciary or the court or even the personal ego of the presiding judge. Neither is it about placating the Applicant who moves the court by taking out contempt proceedings. It is about preserving and safeguarding the rule of law.”

18. The counsel went on to submit that the orders of this court must be respected and obeyed and the Defendants/Respondents have no discretion in complying with the orders made on the 26th July, 2013 and cited the case of *Judicial Service Commission V Speaker of the National Assembly & Another [2013] eKLR* where Odunga, J held as follows

“ In Central Bank of Kenya & Another Vs Ratilal Automobiles Limited & others in Civil Application No.Nai 247 of 2006, the Court of Appeal held that Judicial Power in Kenya vests in the courts and other tribunals established under Constitution and that is a fundamental tenet of the rule of law that court orders must be obeyed and it is not open to any person or persons to choose whether or not to comply with or to ignore such orders as directed to him or them by a court of law.”

19. It was also the counsel’s submissions that the order by Justice Mutungi on 26th July, 2013 was very clear that all the Defendants/Respondents were restrained whether by themselves, their agents, servants, employees or whosoever from trespassing into, alienating, selling transferring, invading, cultivating, wasting, mortgaging, leasing, or in any way dealing, interfering with suit properties for a period of fourteen days.

20. He pointed out that the said orders were extended on 8th August, 2013, 9th September 2013, 31st October, and 21st January, 2014. The counsel added that the Defendants/Respondents were personally served with the said orders; as confirmed by the affidavit of service sworn by Peter Mburu Waithaka on 2nd August, 2013, 7th July, 2014 and 28th July, 2014.

21. The counsel further pointed out that the 5th and 9th Defendants/Respondents in flagrant disobedience of the said orders proceeded to interfere with the suit premises by building a granary, pit latrine, and cultivating beans and constructing a residential house.

22. The counsel cited the Court of Appeal decision in Commercial of Africa Vs Ndirangu [1990-1994] where the learned judges when faced with similar application of contempt for disobedience of injunctive orders held that;

“Rules of natural justice are foundation of a judicial system. Their observance is universal but, at the same time, flagrant disobedience of a court order, if allowed to go unchecked, will result in the onset of an erosion of judicial authority.”

The counsel further cited Muli JA, who held that;

“It is imperative that orders of the court must be obeyed as a cardinal basis for endurance of judicial authority and dignity. The blatant disobedience of the courts consent order in this case renders any transactions in breach of the order to be void and the learned judge was fully justified in making the orders complained of. To allow the appeal would tantamount to rewarding the guilty parties for this grave contempt of court”

The counsel pointed out that the order served on the Defendants/Respondents was endorsed with a penal notice which informed them that any party served with the said order and disobeys the same shall be guilty of contempt of court and liable to imprisonment for a term not exceeding six(6) months or both fine and imprisonment. He submitted that this application is a proper case that warrants the court’s intervention to commit the Defendants/Respondents to imprisonment for a term not exceeding six (6) months. He cited the case of *Republic Vs Kenya Posts & Telecommunications [1999] EA 250* where the court of Appeal held that;

“in deciding whether a contempt was serious enough to warrant imprisonment, the court was required to take into account the likelihood of interference with the administration of justice and the culpability of the offender. Another material factor to be considered was the intention with which the act complained of was done. In this instant, the first Respondent had persisted in the contempt and was deserving of a custodial sentence without the option of a fine”.

23. The counsel submitted that the Defendants/Respondents have taken no steps to purge their contempt and still persist in disobedience of the said court order.

24. In conclusion the counsel submitted that the authority of the court has been violated by the Defendants/Respondents. He pointed out that the court has an obligation and duty to uphold the rule of law by punishing the Defendants/Respondents for continued disobedience of its orders. He submitted that the Plaintiffs/Applicants pray that the application be allowed as prayed and further consequential orders be made as follows to prevent further disobedience of its orders and disrespect of the rule of law by the Defendants/Respondents:-

i. The 5th Defendant be compelled to uproot the crops cultivated and the pit latrine built on the suit property properly known as Kilala/Kaumoni/386 be demolished.

ii. The 9th Defendant be compelled to demolish the residential house built on the suit property known as Kilala/Kaumoni/323.

iii. That failure to comply with the consequential orders, the Plaintiffs with the assistance of the County Commander of Makueni County to enforce the consequential orders.

25. The 1st to 8th and 10th Respondents in their submissions told the court that they were not aware of the alleged succession cause number 119 of 2004 and that they had instructed their lawyers to apply for its revocation. They maintained that the Applicants have fraudulently applied for letter of administration without seeking consent of the other beneficiaries. In conclusion the 1st to 8th and 10th Respondents urged the court to dismiss the application dated 26th February, 2014 with costs.

26. The submissions by the 9th Respondents were that he was never served with the order issued on the 26th July, 2013. His counsel submitted that this is confirmed by the affidavit of service annexed to the affidavit of Justus Kyalo Keesi dated the 26th February, 2013 where there is no paragraph that indicates that the 9th Defendant was served. The counsel cited the case of *Africa Management Communication Intentional Ltd Vs Joseph Mathenge Mosa & Another [2013] eKLR* where Mabeja, J stated thus:-

“I am guided by the fact that contempt proceedings are akin to criminal proceedings. A person may be sent to prison thereby lose his or her liberty for that offence, For that reason, it is important that such a person is shown to have had notice of the order and had notice of the order and had the opportunity to obey the same but failed to do so. In the instant case, it is unclear whether Victoria Cecilia Karanja had knowledge of the order or was personally served with the order, In the absence of such proof, I do not think that my good case has been made for her committal.”

27. The counsel further submitted that the 9th Respondent learnt of the existence of the order prohibiting him from dealing with the property herein from his then advocate in the year 2014 and that since then, he has not in any way dealt with the said property.

28. The counsel urged the court to find that the Respondents actions and/or conduct does not amount to contempt of court.

29. As to whether the Applicant has proved his application for injunction, the counsel for the 9th Respondent submitted that the 9th Respondent bought the land herein from the 7th Respondent with the approval/authority of the first Applicant. He added that the 9th Respondent started developing the property and will thus he will suffer irreparable damage. The counsel cited the case of *Paul Sauti Muthui alias Paul Saidia Muthui V Wilson Maingi Mutia [2013] eKLR*. He added that the orders in question were granted on 26th July, 2013.

30. He said that under Order 40, interim orders are meant to last one year and the said orders have lapsed.

31. Having read the application, the supporting affidavit as well as the replying affidavits by the Respondents and the submissions filed, it is clear that the application dated 26th February, 2014 has two limbs. One limb is for an injunction against the Respondents while the second limb is for citing of the 1st, 2nd, 3rd, 4th, 5th and 9th Respondents for contempt of court. With regard to the first limb, the principles for the grant of an order of temporary injunction are well enunciated in the case of *Giella Vs Cassman Brown and Company Ltd [1973] EA 358*. I need not repeat the principles herein as they are well known.

32. On the principle of whether or not the Applicants have shown prima facie case with probability of success, the Applicants have stated that they are the administrators of the estate of the late Jonathan Keesi Nguzi and also have the proprietary interest in the suit property. On the other hand, the 1st, 2nd and 3rd Respondents have stated that they are siblings of the Applicants though from different mothers. It is clear that the Respondents they are not administrators of the estate of the said Jonathan Keesi and even though they have indicated that they have instructed their lawyer to file an application for revocation of the grant in succession cause no. 119 of 2004, there is nothing to show that this was ever done. The 1st, 2nd and 3rd Respondents have not denied the fact that they sold land to the 7th and 8th Respondents notwithstanding the fact that they did not have letters of administration. That would clearly amount to intermeddling with the property of a deceased person contrary to section 45 of the Law of Succession Act chapter 160 of the Laws of Kenya. Given those above circumstances, I am satisfied that the Applicants have shown a prima facie with probability of success in that as administrators of the estate of their deceased father, they have a duty to protect it.

33. Regarding the principle of an interlocutory injunction will not normally be granted unless the Applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages, it is clear that the Applicants and other legitimate beneficiaries will be denied their rightful share in the estate of the deceased if the estate is wasted before its distribution. As earlier on stated, it is worthy to note that the Respondents have admitted transacting with the suit property notwithstanding that they have not followed the provisions of the Law of Succession Act.

34. On the principle of if the court is in doubt, it will decide on a balance of convenience, I wish to point out that this court is not in

doubt and even it were, for the reasons that I have indicated in the first two principles, the balance of convenience tilts in favour of the Applicants.

35. Regarding the limp of contempt of court, I do note that whereas the affidavit of service sworn at Nairobi on 2nd August, 2013 by the Peter Mburu Waithaka, the process server, and annexed as annexure JKK -6 of the supporting affidavit of the second Applicant, it is clear that even though the 1st, 2nd, 3rd, 4th, 7th and 8th Respondents were served with the order dated 26th February, 2013, there is no indication that the 5th and the 9th Respondents were ever served. It is my considered view that the two cannot be said to have disobeyed a court order that was never served upon them. Equally, the 1st, 2nd, 3rd and 4th Respondents cannot be said to have aided and abetted the continued disobedience of the said court order.

36. The upshot of the foregoing is that the notice of motion dated 26th February, 2014 and filed in court on 27th February, 2014 partially succeeds in terms of prayers 3 and 6. In the circumstances, I hereby decline to issue prayers 4 and 5 of the applicant it so ordered.

SIGNED, DATED AND DELIVERED AT MAKUENI THIS 20TH DAY OF DECEMBER, 2018.

MBOGO C.G

JUDGE

IN THE PRESENCE OF;

Mr. Hassan holding brief for Mr. Issa for the Plaintiffs/Applicants

No appearance for the Respondents

Mr. Kwemboi - Court Assistant

MBOGO C.G, JUDGE

20/12/2018.