



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC NO.267 OF 2013

BEATRICE WAMBUI MUCHIRI.....PLAINTIFF

VERSUS

1. JOSEPH MUCHIRI MUIRURI

2. MARTIN GETE WAWERU

3. JACQUELINE WANJIRU KANJA

4. THE CHIEF LAND REGISTRAR..... DEFENDANTS

RULING

1. The plaintiffs brought this suit against the defendants on 19th February 2013 seeking among others; a permanent injunction to restrain the 1st defendant from transferring, parting with possession, disposing of and/or in any other manner whatsoever interfering with the parcels of land known as Ngenda/Kimunyu/2154 and Ngenda/Kimunyu/T.149. In her plaint dated 19th February 2013, the plaintiffs averred that she was married to the 1st defendant and that they had been blessed with eight (8) children one of whom was deceased. The plaintiff averred that during the subsistence of her marriage to the 1st defendant, they acquired two parcels of land known as Ngenda/Kimunyu/1340 and Ngenda/Kimunyu/T.149. The plaintiff averred that without her knowledge consent or authority, the 1st defendant subdivided Ngenda/Kimunyu/1340 into two portions namely, Ngenda/ Kimunyu/1253 and Ngenda/Kimunyu/1254 and transferred one of the portions, Ngenda/Kimunyu/1253 to the joint names of the 2nd and 3rd defendants. The plaintiff averred that the subdivision of Ngenda/Kimunyu/1340 and transfer of a portion thereof to the 2nd and 3rd defendants were null and void on account of fraud and misrepresentation aforesaid and want of consent. The plaintiff averred that the 2nd and 3rd defendants did not acquire good title to Ngenda/Kimunyu/1253. The plaintiff averred that she was apprehensive that the 1st defendant may transfer Ngenda/ Kimunyu/T.149 to a third party unless restrained by the court.

2. Together with the plaint, the plaintiff filed an application by way of Notice of Motion dated 19th February 2013 seeking an order to compel the 1st defendant to grant her free and uninterrupted access to Ngenda/Kimunyu/1254 pending the hearing and determination of this suit, a temporary injunction restraining the 1st defendant from collecting rent from Ngenda/Kimunyu/T.149 pending the hearing and determination of the suit, an order compelling the 1st, 2nd and 3rd defendants to deposit the title deeds for Ngenda/Kimunyu/1254, Ngenda/ Kimunyu/T.149 and Ngenda/Kimunyu/1253 with the court and a temporary injunction restraining the 1st, 2nd and 3rd defendants from alienating, parting with possession, transferring and/or in any other manner whatsoever interfering with those parcels of land known as

Ngenda/Kimunya/1253 and Ngenda/Kimunya/1254 pending the hearing and determination of this suit or further orders by the court.

3. The plaintiff withdrew the Notice of Motion application dated 19th February 2013 on 1st April 2014 and filed a fresh application by way of Notice of Motion dated 2nd April 2014. In the new application, the plaintiff sought, a temporary injunction to restrain the defendants from alienating, subdividing, transferring, charging and/or interfering with all those parcels of land known as Ngenda/Kimunya/1254 and Ngenda/ Kimunya/T.149 registered in the name of the 1st defendant and Ngenda/Kimunya/2166-2175(subdivisions ofNgenda/Kimunya/ 1253) registered in the joint names of the 2nd and 3rd defendants pending the hearing and determination of the this suit and an order giving the plaintiff liberty to cultivate and/or make use of Ngenda/Kimunya/1254 without hindrance and/or interference from the 1st defendant pending the hearing and determination of this suit and that the O.C.S Gatundu Police Station does ensure compliance with the order.

4. The plaintiff's application which was brought under certificate of urgency was heard by Gacheru J. exparte on 4th April 2014 and the judge issued interim orders of injunction restraining the defendants from alienating, subdividing, transferring, charging and/or interfering with all those parcels of land known as Ngenda/Kimunya/1254 and Ngenda/ Kimunya/T.149 registered in the name of the 1st defendant and Ngenda/Kimunya/2166-2175(subdivisions ofNgenda/Kimunya/ 1253) registered in the joint names of the 2nd and 3rd defendants pending the hearing and determination of the application inter partes. The order that was made by Gacheru J. on 4th April 2014 was extracted and issued on 7th April 2014.

5. The application was heard inter partes by Mutungi J. who allowed the same partly in a ruling delivered on 23rd July 2015. Mutungi J. granted to the plaintiff injunction restraining the defendants from alienating, subdividing, transferring, charging and/or interfering with all those parcels of land known as Ngenda/Kimunya/1254 and Ngenda/ Kimunya/T.149 registered in the name of the 1st defendant in any manner whatsoever pending the hearing and determination of this suit. The court also gave the plaintiff the liberty to cultivate and/or make use of Ngenda/Kimunya/1254 without hindrance and/or interference from the 1st defendant pending the hearing and determination of this suit and directed the O.C.S Gatundu Police Station to ensure compliance with the order. The order made by Mutungi J. on 23rd July 2015was also extracted and issued on 27th October 2015.

6. What is now before me is the plaintiff's application brought by way of Notice of Motion dated 22nd January 2016 seeking an order that the 1st defendant, Joseph MuchiriMuiruri and the O.C.S Gatundu Police Station one, Joshua Nyasimi be arrested and detained in civil jail for a period not exceeding six(6)months and/or their assets be attached for disobedience of the order made herein by Mutungi J. on 23rd July 2015. The plaintiff's application was brought on the grounds that the said order was served upon the alleged contemnors with penal notice on 7th November 2015 and that despite such service, the 1st defendant proceeded to partition Ngenda/Kimunya/1254 into two portions which he then fenced with iron sheets thereby denying the plaintiff unhindered access to the same. In her affidavit in support of the application, the plaintiff stated that after she gained access to the said parcel of land and started cultivating the same, the 1st defendant came and chased away her workers who were tilling the land on her behalf. The plaintiff stated that he did not only chase away her workers but also chased away her son from the said parcel of land with a panga on 29th December 2015. The plaintiff stated that all these incidences were reported to the O.C.S Gatundu Police Station who for reasons only known to him refused to intervene.

7. It is not clear from the material on record whether the application was served upon the O.C.S Gatundu Police Station. There is no affidavit of service on record in proof of such service. I have also noted that the said O.C.S did not respond to the application. The application was however opposed by the 1st defendant who filed a replying affidavit on 20th April 2016 sworn on 8th April 2016. The plaintiff

contended that the order of 23rd July 2015 which he is accused of disobeying was made and served upon him after he had partitioned Ngenda/Kimunya/1254 into three portions and allocated two of the portions to his two wives the plaintiff included and sold the remaining portion to a third party. The 1st defendant contended that the plaintiff was at liberty to cultivate the portion of Ngenda/Kimunya/1254 that he had allocated to her.

8. When the plaintiff's application came up for hearing on 21st July 2016, Mr. Kimondo appeared for the plaintiff while Mr. Masara appeared for the 1st defendant. In his submission in support of the application Mr. Kimondo relied on the affidavit and supplementary affidavit which were filed by the plaintiff in support of the application. He submitted that the order issued by Mutungi J. on 23rd July 2015 was duly served upon 1st defendant and that the 1st defendant had admitted such service. Mr. Kimondo submitted that prior to the order of 23rd July 2015, the court had issued an interim order which was extended from time to time until it was confirmed on 23rd July 2015. He submitted that the said interim order was also served upon the 1st defendant. Mr. Kimondo referred the court to the affidavits of service attached to the plaintiff's affidavit in support of the application in proof of such service. Mr. Kimondo submitted further that the 1st defendant had admitted having been served with the order of 23rd July 2015. He submitted further that the 1st defendant's advocate was in court when the order of 23rd July 2015 was made and as such he knew of the order. He submitted that the 1st defendant must also be taken to have had knowledge of the said order. Mr. Kimondo dismissed the issues that had been raised by the 1st defendant in his replying affidavit as irrelevant and submitted that the 1st defendant had a duty to obey the order of the court. He submitted that even with the knowledge of the said order, the 1st defendant had refused to comply with the same.

9. On his part, Mr. Masara submitted that the 1st defendant was not in contempt of the court order issued herein on 23rd July 2015. Counsel submitted that the said order was made after the 1st defendant had already divided Ngenda/Kimunya/1254 amongst his two wives and sold a portion of the said parcel of land to a third party. Mr. Masara submitted that the plaintiff was a beneficiary of a portion of the said parcel of land and that she was in fact cultivating her share thereof. Mr. Masara submitted that the 1st defendant is a law abiding citizen and that he could not comply with the subject court order because the same came late in the day.

10. I have considered the plaintiff's application together with the affidavit and supplementary affidavit filed in support thereof. The following is my view on the matter. It is well settled that contempt of court proceedings are quasi criminal in nature because the contemnor may lose his liberty if found guilty of the contempt complained of. In view of this, the standard of proof of contempt is higher than 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 probabilities, and almost but not exactly, beyond reasonable doubt. It follows therefore that for the plaintiff to succeed in the present application, she has to satisfy the court to a degree beyond a balance of probabilities that the 1st defendant and the O.C.S Gatundu Police Station disobeyed the order that was made by Mutungi J. on 23rd July 2015.

11. As I have stated hereinabove, the said court order of 23rd July 2015 restrained the defendants from alienating, subdividing, transferring, charging and/or interfering with all those parcels of land known as Ngenda/Kimunya/1254 and Ngenda/ Kimunya/T.149 in any manner whatsoever pending the hearing and determination of this suit. The court also gave the plaintiff the liberty to cultivate and/or make use of Ngenda/Kimunya/1254 without hindrance and/or interference from the 1st defendant pending the hearing and determination of this suit and the O.C.S Gatundu Police Station was directed to ensure compliance with the order. The order of injunction was granted ex parte on an interim basis by Gacheru J. on 4th April 2014. The injunction that was granted by Mutungi J. on 23rd July 2015 confirmed the said ex parte order issued by Gacheru J. with slight variation which is not relevant to these proceedings.

12. From the material before me, I am satisfied that the 1st defendant was served with the ex parte order that was issued by Gacheru J. on 4th April 2014 and the order that was made inter partes by Mutungi J. on 23rd July 2015 and that he was aware of the terms thereof. The plaintiff has accused the 1st defendant of partitioning Ngenda/Kimunyu/1254 into two portions and fencing off the same thereby denying her unhindered access to the same in breach of the order of 23rd July 2015. The plaintiff has also accused the 1st defendant of preventing her from cultivating the said parcel of land. The O.C.S Gatundu Police Station is accused of not ensuring that the 1st defendant complies with the said order of the court. It is not clear to me from the affidavits filed in support of the plaintiff's application as to when the 1st defendant partitioned Ngenda/Kimunyu/1254 and fenced off portions thereof. The 1st defendant has not denied partitioning the said parcel of land. His contention is that the partitioning was done before the order of 23rd July 2015 which he has been accused of disobeying. As concerns the plaintiff's contention that she has been denied access to Ngenda/Kimunyu/1254, the 1st defendant has contended that he had allocated to the plaintiff a portion of that parcel of land and that the plaintiff is in fact cultivating the said portion. He has denied chasing the plaintiff away from Ngenda/Kimunyu/1254. Although the plaintiff has stated in her affidavit that the 1st defendant had chased her workers on several occasions from the suit property, the plaintiff did not place any evidence before the court in proof of such incidences. I have noted that the order of 23rd July 2015 did not give the plaintiff exclusive use of Ngenda/Kimunyu/1254. I am however in agreement with the plaintiff that a court order must be obeyed until it is set aside or varied. Faced with an order that gave the plaintiff a right to use Ngenda/Kimunyu/1254, what the 1st defendant should have done if he had as of that date partitioned the said parcel of land and given the plaintiff a portion thereof was to seek the review and variation of the order to limit it only to the said portion that he had allocated to the plaintiff but not to disobey the order. In the case of Hadkison –vs- Hadkinson(1952) ALLER 567, the court stated that;- *“It was plain and unqualified obligation of every person against or in respect of whom an order was made by a court of competent jurisdiction to obey it unless and until it was discharged and disobedience of such order would as a general rule result in the person disobeying being in contempt and punishable by committal or attachment...”*.

13. In addition to her complaint that the 1st defendant has denied her unhindered access to Ngenda/Kimunyu/1254, the plaintiff has also complained that the 1st defendant had commenced the construction of a permanent structure on the said parcel of land in breach of the said court order of 23rd July 2015. The plaintiff has exhibited a photograph showing the foundation for the said structure. The 1st defendant had contended that it had partitioned Ngenda/Kimunyu/1254 into three portions and allocated two portions to his two wives the plaintiff included and sold the third portion to a third party before the order of 23rd July 2015. The 1st defendant has nevertheless not denied that it is putting up the said structure Ngenda/Kimunyu/1254 or that such structure was prohibited by the order issued by the court on 23rd July 2015.

14. Due to the foregoing, I am satisfied that the 1st defendant is guilty of contempt of court. On the other hand, I am not persuaded that there is evidence to find contempt on the part of the O.C.S Gatundu Police Station. I have noted from the affidavit of the plaintiff that the O.C.S Gatundu Police Station in fact accompanied her to Ngenda/Kimunyu/1254 when they found that the said parcel of land had been partitioned and fenced. I don't think that the said officer had a duty to force the 1st defendant to bring down the said fence and to force the 1st defendant to give the plaintiff access to the portions of that parcel of land that the 1st defendant claimed to have allocated to his other wife and a third party. It was only the court that could do that.

15. Contempt of court is a threat to the rule of law and the administration of justice. Allegations of contempt must be taken seriously. The court must however be slow to send contemnors to jail. In the case of, Mutitika-vs-Baharini Farm Ltd. (supra), it was held that;

“the principle must be borne in mind that the jurisdiction to commit for contempt should be carefully exercised with the greatest reluctance and anxiety on the part of the court to see whether there is no

other mode which can be brought to bear on the contemnor”.

16. In conclusion, the plaintiff’s application dated 22nd January 2016 succeeds in part. I hereby order that the 1st defendant be summoned by the Deputy Registrar of this court to appear in court on a date to be fixed to show cause why he should not be punished for contempt of the order made herein on 23rd July 2015. Further orders in the matter shall await the outcome of the said notice to show case.

Delivered and Dated at Nairobi this 24th day of January, 2017.

S. OKONG’O

JUDGE.

In the presence of:-

Mr. Kimondo for Plaintiff

Mr. Otenyo for 1st Defendant

N/A for the 2nd and 3rd Defendant

N/A for the 4th Defendant

Kajuju Court Assistant