



**REPUBLIC OF KENYA**

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

**ELC CIVIL SUIT NO. 167 OF 2014**

**LAZARUS WANJOHI WAIRAGU.....PLAINTIFF/APPLICANT**

**VERSUS**

**COUNTY GOVT. OF KAJIADO.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**JOSEPH GACHIGI MURAGE .....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**RULING**

1. In the Application dated 19<sup>th</sup> July, 2016, the Plaintiff is seeking for the following orders:

***a. That pending the hearing of the Application herein inter-parties, this Honourable Court be pleased to order and or direct the Officer Commanding Ongata Rongai Police Station to ensure that the Defendants/Respondents comply with the orders of the court made on the 20<sup>th</sup> day of January, 2015 by stopping any excavation, construction and removing the excavator and the personnel from the suit land known as Plot No. 720-Residential, Ongata Rongai Trading Centre forthwith.***

***b. That this Honourable Court be pleased to find that the Defendants/Respondents are in violation of the orders of the court made on the 20<sup>th</sup> day of January, 2015 and accordingly punish them by imposing a jail term of six (6) months upon each of them, and or issue any other orders that the court may find appropriate in the circumstances.***

***c. That the costs of this Application be provided for.***

2. The Application is premised on the grounds that on 20<sup>th</sup> January, 2015, this court made and recorded orders of injunction by consent and in the presence of counsels for both parties; that on 16<sup>th</sup> July, 2016, the Defendants invaded the suit land and that on 18<sup>th</sup> July, 2016, the Defendants started excavating the suit property in total disobedience of the orders of the court.

3. The Plaintiff has deponed that it moved to this court for protection when the Defendants invaded the suit property on 14<sup>th</sup> November, 2014 and commenced illegal eviction of the Plaintiff on a parcel of land known as Plot No. 720-Residential, Ongata Rongai Trading Centre.

4. It is the Plaintiff's deposition that despite the consent order of 20<sup>th</sup> January, 2015, the Defendants invaded the suit property on 16<sup>th</sup> July, 2016, hoarded the suit land by way of iron sheets and proceeded to

excavate the suit property.

5. The Plaintiff deponed that unless drastic measures are taken against the Defendants, they will continue to disobey the orders of the court and that the orders being sought should be granted to protect the authority and dignity of the court.

6. In a Further Affidavit, the Plaintiff deponed that it has emerged that the 2<sup>nd</sup> Defendant sold the suit property to a Mr. Philip Yego on 4<sup>th</sup> August, 2015 in violation of the orders of the court; that Mr. Yego has since reported the issue of the fraudulent sale of the suit property to him by the 2<sup>nd</sup> Defendant and that the 2<sup>nd</sup> Defendant has deliberately disobeyed the orders of the court.

7. In response, the 1<sup>st</sup> Defendant's County Secretary deponed that the dispute herein is between the Plaintiff and the 2<sup>nd</sup> Defendant; that the order being referred to has never been served on the 1<sup>st</sup> Defendant and that he is not aware of the violation of the said order by the 1<sup>st</sup> Defendant.

8. The 2<sup>nd</sup> Defendant deponed that when the matter came up for hearing on 20<sup>th</sup> January, 2015, he was not present in court; that his advocate had informed him that the matter was only coming up for the hearing of an Application and that his advocate was to revert to him later with the outcome.

9. The 2<sup>nd</sup> Defendant deponed that on 20<sup>th</sup> January, 2015, his advocate informed him through the phone that the orders of 16<sup>th</sup> December, 2014 had been extended to the effect that neither him nor the Plaintiff was to do anything on the suit premises until the suit is heard.

10. It is the 2<sup>nd</sup> Defendant's case that thereafter, the matter went into a limbo; that as of 19<sup>th</sup> July, 2016, there were no orders obtaining by dint of the provisions of Order 40 Rule 6 of the Civil Procedure Rules and that in any event, the impugned order was not personally served on him.

11. In his Further Affidavit, the 2<sup>nd</sup> Defendant deponed that it is false to allege that the orders of the court were explained to him; that the approvals alluded to by the Plaintiff were issued in the year 2016 after the injunctive orders had lapsed by the operation of the law and that he has never been served with the orders that were extracted on 19<sup>th</sup> July, 2016.

12. According to the 2<sup>nd</sup> Defendant, the Plaintiff should seek for the extension of the orders that were made on 20<sup>th</sup> January, 2015 and set down the suit for hearing.

13. In his submissions, the Plaintiff's advocate submitted that the 2<sup>nd</sup> Defendant confirmed in his Replying Affidavit that he was briefed about the consent order that was recorded in court; that it is the 2<sup>nd</sup> Defendant who gave express instructions to his counsel to record the said consent and that a party to a consent is presumed to have knowledge of the terms and import of the consent.

14. The Plaintiff's counsel submitted that a party who is aware of the order of the court need not be personally served with a copy of the order and a penal notice; that the 2<sup>nd</sup> Defendant disobeyed the order of the court by selling the suit property and that the 2<sup>nd</sup> Defendant is not remorseful at all.

15. The Plaintiff's counsel relied on several authorities which I have considered.

16. The 1<sup>st</sup> Defendant's counsel deponed that the consent order was only extracted on 19<sup>th</sup> July, 2016; that the same was never served on the 1<sup>st</sup> Defendant and that it is improper to cite the 1<sup>st</sup> Defendant for contempt of an order that it was never served with.

17. The 2<sup>nd</sup> Defendant's counsel submitted that this being a civil suit, there is no law that allows the involvement of the police; that there is no evidence that there is a threat to public peace and that the

police need not be involved in this matter.

18. On the issue of whether the 2<sup>nd</sup> Defendant is in contempt of the order of the court, counsel submitted that as at 16<sup>th</sup> July, 2016, there were no injunctive orders in place; that the orders that were granted by the court lapsed by the operation of the law (*Order 40 Rule 6 of the Civil Procedure Rules*) and that once an injunction is given, the same can only remain valid for twelve (12) months.

19. According to the 2<sup>nd</sup> Defendant's counsel, the injunctive order having been made on 20<sup>th</sup> January, 2015, the same lapsed on 19<sup>th</sup> January, 2016; that the actions being complained of took place six (6) months after the orders had lapsed and that a party cannot be cited for breaching that which does not exist.

20. The 2<sup>nd</sup> Defendant's advocate submitted that in any event, the impugned order was only extracted on 19<sup>th</sup> July, 2016 and that it does not bear a panel notice; that the order has never been served on the 2<sup>nd</sup> Defendant; that as a general rule, an order must be served on a party and that personal service can only be dispensed with if it is proved that the contemnor was notified of the order.

21. Counsel submitted that the 2<sup>nd</sup> Defendant has denied that he was notified of the order that was made in his absence; that the Application before the court does not set out the grounds on which it is premised and that failure to comply with the rules leads to the collapse of an Application to commit someone for contempt.

22. The only issue that is before me for determination is whether the Defendants are in contempt of the order of the court that was made on 20<sup>th</sup> January, 2015, and further, whether the Officer Commanding Ongata Rongai Police Station should enforce the said order.

23. The record in this matter shows that when the Plaintiff's Application dated 17<sup>th</sup> November, 2014 came up for hearing on 24<sup>th</sup> November, 2014, the court granted to the Applicant prayer numbers 2 and 3 "until further orders of the court." The Application was fixed for hearing inter-partes on 20<sup>th</sup> January, 2015.

24. The prayers that the court granted to the Plaintiff on 24<sup>th</sup> November, 2014 restrained the Defendants from trespassing on Plot No. 720 Residential in Ongata Rongai Trading Centre and from selling the said property.

25. The 2<sup>nd</sup> Defendant was aggrieved with the orders of 24<sup>th</sup> November, 2014. The record shows that the 2<sup>nd</sup> Defendant filed an Application dated 5<sup>th</sup> December, 2014 in which he sought to set aside the orders of 24<sup>th</sup> November, 2014.

26. When the Plaintiff's Application dated 17<sup>th</sup> November, 2014 came up for hearing on 20<sup>th</sup> January, 2015, the record shows that the Plaintiff's and the 2<sup>nd</sup> Defendant's advocate entered into a consent which was recorded by the court as follows:

***"By consent, the Plaintiff and the 2<sup>nd</sup> Defendant, themselves, agents, servants, representatives or any other person claiming under them be and are hereby restrained from constructing, erecting any structures, developing, building, selling, transferring or assigning in any manner all that parcel of land known as Plot No. 720 Residential within Ongata Rongai Town Centre pending the hearing and determination of the suit. Mention on 24<sup>th</sup> February, 2015 for pre-trial direction. Costs of the Application to be in the cause."***

27. With the above consent recorded by the consent of the parties, the record shows that the two advocates counter-signed the order which was then adopted by the court.

28. For one reason or the other, as it often happens, the matter was not fixed for the hearing of the main suit.

29. The Plaintiff has deponed that on 18<sup>th</sup> July, 2016, and while the order of 20<sup>th</sup> January, 2015 was subsisting, he noticed that the Defendants or their representatives had commenced excavating the suit property. The Plaintiff took the photographs of the said excavation which he has annexed on his Affidavit.

30. Upon investigating on the actual person that was undertaking the excavation of the suit land, the Plaintiff discovered that the 2<sup>nd</sup> Defendant had sold the suit property to a Mr. Philip Yego who had obtained a licence from NEMA to undertake construction on the suit land.

31. The Plaintiff has annexed on his Further Affidavit a copy of the “*Replying Affidavit*” that was sworn by Mr. Philip Yego in National Environment Tribunal Case No. 187 of 2016 in which Mr. Yego deponed that he purchased the suit property from the 2<sup>nd</sup> Defendant on 4<sup>th</sup> August, 2015.

32. The said Mr. Yego further deponed that upon purchasing the suit land, he obtained a licence from NEMA whereafter he commenced the excavation of the land for the purpose of developing it.

33. The 2<sup>nd</sup> Defendant has not denied the depositions of Mr. Yego that it is him (*the 2<sup>nd</sup> Defendant*) who sold to Mr. Yego the suit property on 4<sup>th</sup> August, 2015.

34. According to the 2<sup>nd</sup> Defendant, he was not personally served with the order of 20<sup>th</sup> January, 2015; that in any event the said order was only extracted on 19<sup>th</sup> July, 2016 and that by the time the order was being extracted, the same had lapsed by operation of the law.

35. As I have indicated above, the injunctive order that was issued by the court on 20<sup>th</sup> January, 2015 was by the consent of the advocates of the Plaintiff and the 2<sup>nd</sup> Defendant.

36. Indeed, the 2<sup>nd</sup> Defendant has admitted in his Replying Affidavit that after the said consent was entered into, his advocate duly informed him of the same. The 2<sup>nd</sup> Defendant deponed as follows:

***“That on the 20<sup>th</sup> January, 2015, my advocate did notify me through phone that the earlier orders that we had obtained on the 16<sup>th</sup> December, 2014 had been extended to the extent that neither me nor the Plaintiff was to do anything on the suit premises till the suit was heard and a pre-trial date was set for the 24<sup>th</sup> February, 2015 on which date neither me nor my advocate was present and the matter was given another date for the 31<sup>st</sup> March, 2015 before the Deputy Registrar.”***

37. The above deposition by the 2<sup>nd</sup> Defendant is an admission by the 2<sup>nd</sup> Defendant that he was aware of the injunctive orders of 20<sup>th</sup> January, 2015. Indeed, the 2<sup>nd</sup> Defendant has not stated that the said orders were ambiguous, and even if they were, he never sought to set them aside.

38. The 2<sup>nd</sup> Defendant has also not denied that he is the one who instructed his advocate to enter into the consent of 20<sup>th</sup> January, 2015.

39. The law relating to the serving of a court order has now been settled. In the case of ***Shimmers Plaza Limited vs. National Bank of Kenya Limited (2015) eKLR***, the Court of Appeal approved the emerging jurisprudence that established that personal service of a court order for the purposes of contempt proceedings is not mandatory as long as the court satisfies itself that the contemnor was aware of the order.

40. In the ***Shimmers Plaza Ltd (supra)*** case, the court cited with approval the holding of Lenaola J (*as he*

was then) in *Basil Criticos vs. Attorney General & others (2012) eKLR* where the judge held as follows:

***“The law has changed and as it stands today knowledge supercedes personal service... where a party clearly acts and shows that he had knowledge of a court order, the strict requirement that personal service must be proved is rendered unnecessary.”***

41. The Court of Appeal in the *Shimmers Plaza Ltd (supra)* case also quoted with approval its own decision in the case of *Justus Kariuki Mate & Another vs. Martin Nyaga Wambora & Another Civil Appeal No. 24 of 2014 (Nyeri)* where it was held as follows:

***“It is important however, that the court satisfies itself beyond any shadow of doubt that the person alleged to be in contempt committed the act complained of with full knowledge or notice of the existence of the order of the court forbidding it. The threshold is quite high as it involves possible deprivation of a person’s liberty.”***

42. Indeed, the fact that the 2<sup>nd</sup> Defendant’s advocate recorded the consent of 20<sup>th</sup> January, 2017 bound the 2<sup>nd</sup> Defendant (*See Commercial Bank of Africa vs. Isaac Kamau Ndirangu, Civil Appeal No. 157 of 1991*). It was therefore not necessary for the Plaintiff to extract the said consent order and serve it upon the 2<sup>nd</sup> Defendant.

43. Having admitted that he was made aware of the orders of 20<sup>th</sup> January, 2015 and in view of the fact that the impugned order was entered into by the consent of the 2<sup>nd</sup> Defendant and the Plaintiff, I find that the issue of extracting the order and serving the same on the 2<sup>nd</sup> Defendant was not necessary. The 2<sup>nd</sup> Defendant was bound by the consent order which he instructed his advocate to enter into.

44. The 2<sup>nd</sup> Defendant has deponed that in any event, the order of 20<sup>th</sup> January, 2015 lapsed by the operation of the law on 19<sup>th</sup> January, 2016.

45. It is true that Order 40 Rule 6 of the Civil Procedure Rules provides that where a suit in respect of which an interlocutory injunction has been granted is not determined within a period of twelve (12) months from the date of the grant, the injunction lapses *“unless for any sufficient reason the court orders otherwise.”*

46. Order 40 Rule 6 is clear that an injunction ought to lapse if a suit is not determined within twelve (12) months, unless the court orders otherwise.

47. The import of the words *“unless the court orders otherwise”* is that the court can allow an injunction to subsist for more than twelve (12) months.

48. The impugned consent order in this matter was clear that the order was to remain in force until the hearing and determination of the suit, meaning that the parties agreed, and the court ordered, that the said injunction was to remain in place way beyond the requisite twelve (12) months. That was the agreement between the parties, which agreement was adopted as an order of the court.

49. In addition to the above, this court interpreted the provisions of Order 40 Rule 6 of the Civil Procedure Rules in the case of *Machakos ELC Case No. 195 of 2000, Wilfred Munyao Ndalana vs. Nicholas Muli Kimeu & Another*, as follows:

***“7. Although Order 40 Rule 6 of the Civil Procedure Rules provides that an injunctive order will lapse after the expiry of twelve (12) months, the said order should be read alongside the provisions of Section 3A of the Civil Procedure Act which provides that the court has the inherent powers to issue any order as may be necessary for the ends of justice.***

***8. Where a court issues a temporary injunction “pending the hearing and determination of the suit”, such an order cannot be varied on the basis of the provision of Order 40 Rule 6, unless the***

*court itself does so.*

**9. In my view, the provision of Order 40 Rule 6 of the Civil Procedure Rules comes to play only where the court is silent on when the injunction would lapse.”**

50. Having ordered that the injunctive order was to remain in place until the suit is heard, the 2<sup>nd</sup> Defendant cannot be heard to argue that the said order lapsed automatically after the lapse of twelve (12) months.

51. Indeed, if the 2<sup>nd</sup> Defendant was of the view that the court should not have issued an injunction “*pending the hearing of the suit*”, then he should have applied to set aside the said order after the lapse of twelve (12) months from the date when the order was granted.

52. Having not set aside the order, the 2<sup>nd</sup> Defendant was bound by the order of the court until when the suit would have been heard and determined. His argument that he could deal with the suit property in any manner that he deemed fit after the lapse of twelve (12) months is not only mischievous but also an affront to the authority and dignity of the court.

53. As I have already stated above, the evidence before this court shows that the 2<sup>nd</sup> Defendant sold the suit property to Mr. Philip Yego during the pendency of the suit and contrary to the orders of this court.

54. In fact, the 2<sup>nd</sup> Defendant did not bother to inform Mr. Yego that there was a suit pending in court between himself and the Plaintiff.

55. Unbeknown to Mr. Yego of the order of the court, Mr. Yego proceeded to excavate the suit land for the purpose of developing the same.

56. The above chronology of events, and the interpretation of the facts and the law leads me to only one conclusion, that the 2<sup>nd</sup> Defendant is in contempt of the orders of this court of 20<sup>th</sup> January, 2015.

57. The 1<sup>st</sup> Defendant did not participate in the consent order of 20<sup>th</sup> January, 2015. Indeed, there is no evidence that its officers were aware of the said order or that they disobeyed the order.

58. For those reasons, I find that the 2<sup>nd</sup> Defendant is in contempt of the orders of 20<sup>th</sup> January, 2015 and should be punished. The said punishment shall await the 2<sup>nd</sup> Defendant’s mitigation.

59. The court however declines to involve the police in this matter at this stage, considering that this is a civil matter.

60. The 2<sup>nd</sup> Defendant shall pay the costs of the Application.

**DATED AND DELIVERED AT MACHAKOS THIS 24<sup>TH</sup> DAY OF MARCH, 2017.**

**OSCAR A. ANGOTE**

**JUDGE**