



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 57 OF 2016

MILLICENT WAIRIMU.....1ST PLAINTIFF

WILSON NJERU NJOKA.....2ND PLAINTIFF

VERSUS

JOHNSON NYAGA MAINA.....1ST DEFENDANT

GICHUGU LAND CONTROL BOARD.....2ND DEFENDANT

MAPZONE COMPANY.....3RD DEFENDANT

RULING

On 16th March 2016, the 1st defendant in this case **JOHNSON NYAGA MAINA**, filed **GICHUGU PRINCIPAL MAGISTRATE'S CIVIL CASE No. 5 of 2016** (the Gichugu Case) against **DOROTHY NJOKI NJOKA, EMILY WANJA NJOKA** and **PHILIS WANGUI NJOKA** seeking the main remedy that they be restrained by an order of permanent injunction from interfering with his quiet possession of land parcel No. **NGARIAMA/NGIRIAMBU/4616** (the suit land). Simultaneously with the filing of that suit, **JOHNSON NYAGA MAINA** the plaintiff in the Gichugu Case sought an order of temporary injunction restraining the defendants therein **DOROTHY NJOKI NJOKA, EMILY WANJA NJOKA** and **PHILIS WANGUI NJOKA**, their agents, servants or anybody acting through them from interfering with his quiet possession of the suit land pending the hearing and determination of the suit. The order for temporary injunction was granted by **M. NASIMIYU (RESIDENT MAGISTRATE)** on 1st April 2016.

On 28th April 2016, the plaintiffs herein **MILICENT WAIRIMU** and **WILSON NJERU NJOKA** filed this suit against **JOHNSON NYAGA MAINA, GICHUGU LAND CONTROL BOARD** and **MAPZONE COMPANY** as 1st to 3rd defendants respectively seeking judgment in the following terms:

(a) That pending the hearing and determination of this suit, this Honourable Court be pleased to issue a temporary injunction in respect to L.R No. NGARIAMA/NGIRIAMBU/4616 to restrain the 1st defendant either by himself, his agents, servants and/or employees from transferring, accessing and/or farming in respect to L.R No. NGARIAMA/NGIRIAMBU/4616.

(b) That pending the hearing and determination of this suit, this Honourable Court be pleased to issue a temporary injunction in respect to L.R No. NGARIAMA/NGIRIAMBU/4616 to restrain the Land Registrar either by himself, his agents, servants and/or employees from trespassing land parcel No. L.R No. NGARIAMA/NGIRIAMBU/4616 to any other person.

(c) The plaintiff prays to this Honourable Court to revoke the 1st defendant's title in respect to

L.R No. NGARIAMA/NGIRIAMBU/4616 and subsequent to the revocation, the same be registered in the names of the 2nd plaintiff.

(d) This Court be pleased to award the plaintiffs mesne profit for the loss of enterprise on the suit property.

(e) Costs of the suit.

Simultaneously with that suit, the plaintiffs also filed a Notice of Motion seeking temporary injunctive relief restraining the 1st defendant by himself, his agents, servants and/or employees from transferring, accessing and/or farming in respect of L.R No. NGARIAMA/NGIRIAMBU/4616 and that order was allowed by this Court on 3rd May 2016. This Court was of course not informed about the orders issued on 1st April 2016 in the Gichugu Case involving the same suit land.

On 4th May 2016, the 1st defendant filed a Notice of Motion seeking orders that this Court vacates the orders issued on 3rd May 2016 and in the meantime, there be a stay of execution of those orders on the ground that they were obtained by the plaintiffs through concealment of facts that the 1st defendant had obtained orders in the Gichugu Case. When that application was placed before me on 3rd May 2016, I directed that it be served and the matter be mentioned before me on 11th May 2016 and on that day, a consent order was made in the presence of both **MR. NDEGWA** advocate for the plaintiffs and **MS MUTHIKE** advocate for the 1st defendant in terms of prayer No. 2 of the Notice of Motion dated 4th May 2016 which was a stay of the orders issued on 3rd May 2016 and meanwhile, **MR. NDEGWA** was granted 7 days to file a replying affidavit to the application dated 4th May 2016 which was fixed for mention on 30th May 2016. However, by 30th May 2016, no replying affidavit had been filed to that application and **MS MUTHIKE** asked that the said application be allowed. She also sought that the Gichugu Case file be brought to this Court. The matter was fixed for mention on 3rd June 2016 and the Deputy Registrar was directed to call for the Gichugu Case file which was brought to this Court and although **MS MUTHIKE** sought the consolidation of this case and the Gichugu Case, I was reluctant to do so since **MR. NDEGWA** was not present and I directed that the matter be mentioned in the presence of all parties. On 5th October 2016, this case and the Gichugu Case were consolidated by consent of counsel for all the parties and **MR. NDEGWA** was given 7 days to amend the plaint. Meanwhile, **MR. KAGIO** advocate who was holding brief for **MS MUTHIKE** informed the Court that although the 1st defendant herein who was the plaintiff in the Gichugu Case had obtained injunctive orders with respect to the suit land, he was prevented from working on it. That was however denied by **MR. NDEGWA** who said his clients were law abiding and did not flout Court orders. He added that his clients are infact in possession of the suit land. The case was therefore fixed for mention on 13th October 2016 to explore the possibility of recording a consent. No consent was recorded and on 21st October 2016, the 1st defendant filed a Notice of Motion citing **Order 40 Rule 3 of the Civil Procedure Rules and Section 1A, 1B and 3A of the Civil Procedure Act** seeking the following orders:

1. Spent.

2. That the Honourable Court be pleased to give an order to the Officer Commanding Kianyaga Police Station to ensure compliance with the injunctive order issued on 5th April 2016 and the stay order issued on 19th May 2016 pending the hearing and determination of the main suit.

3. That the Honourable Court be pleased to commit the 1st and 2nd plaintiffs MILLICENT WAIRIMU and WILSON NJERU NJOKA and the defendants in Gichugu Case No. 5 of 2016 DOROTHY NJUKI NJOKA, EMILY WANJA NJOKA and PHILIS WANGUI NJOKA to civil jail for a term of six months for contempt of Court for having deliberately disobeyed orders of this Court issued on 5th April 2010 and 19th April 2016.

4. That the Honourable Court be pleased to issue any other or further orders geared towards protecting the dignity and authority of the Court.

5. That the costs of this application be provided for.

That application is based on the grounds set out therein and is supported by the affidavit of the 1st defendant **JOHNSON NYAGA MAINA**. The gist of the application is that orders were issued in the Gichugu Case on 5th April 2016 restraining the defendants therein from interfering with his quiet possession of the suit land pending the hearing of the suit and the said order was duly served on the said defendants who instead moved to this Court on 3rd May 2016 and obtained interim orders without disclosing the pendency of the Gichugu Case. Those orders were however stayed by consent on 19th May 2016 but when the 1st defendant sent his workers to the suit land on 22nd September 2016, they were chased away by people sent by the plaintiffs and the issue was reported to Kianyaga Police Station vide OB No. 19/22/9/16. Annexed to that is a certificate of search showing that the suit land is registered in the 1st defendant's names, the order issued by the Gichugu Court on 1st April 2016, the order issued by this Court on 3rd May 2016 and the stay of that order issued on 19th May 2016 as well as the O.B report – annexures **JMM 1** to **JMM 5** respectively.

In opposing that Notice of Motion, the 1st plaintiff **MILLICENT WAIRIMU** filed a replying affidavit in which she deponed, inter alia, that the orders issued in the Gichugu Case were issued after that Court's jurisdiction had been taken away following orders issued by the Malindi Constitutional Court, that the order was not served upon the contemnors personally as required by law and no affidavit of service is attached, that the cases have not been consolidated and therefore this application is pre-mature. The 1st plaintiff further pleaded that the orders they are alleged to have violated cannot be clearly mapped out in the physical land since there are no beacons nor physical sub-divisions of the land and this case should proceed to full trial.

The plaintiffs also filed a Notice of Preliminary Objection dated 16th November 2016 raising the following pertinent issues:

- (a) That the order issued on 5th April 2016 by the Principal Magistrate's Court at Gichugu was issued per incurium.***
- (b) That the Court issuing the said orders lacked the requisite jurisdiction in view of Article 162 (2) of the Constitution of Kenya 2010 and the Environment and Land Court Act 2012.***
- (c) That there are no orders of the Court that have been violated, disobeyed and/or ignored.***
- (d) That CMCC No. 5 of 2016 cannot form part of the records as the transfer and subsequent consolidation with ELC No. 57 of 2016 was and is a nullity in law.***
- (e) That the application is incompetent, frivolous and an abuse of the Court process and the same should be dismissed with costs.***

It was agreed by counsel for both parties that the Notice of Motion dated 21st October 2016 and the Preliminary Objection dated 16th November 2016 be canvassed together by way of written submissions which have been duly filed.

I shall first consider the plaintiffs' Preliminary Objection dated 16th November 2016 because if it is upheld, then there will be no need to consider the 1st defendant's Notice of Motion dated 21st October 2016.

A Preliminary Objection, as is now well settled, must only raise points of law and cannot be raised if the Court has to prove any facts. In **MUKISA BISCUIT MANUFACTURING CO. LTD VS WEST END DISTRIBUTORS LTD 1969 E.A 696**, SIR CHARLES NEWBOLD said:

"A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion". Emphasis added

In the same case, **LAW J.A.** said:

“So far as I am aware, a Preliminary Objection consists of a point of law which has been pleaded, or which arises from clear implication out of the pleadings, and which if argued as a Preliminary Objection may dispose of the suit. Examples are an objection to the jurisdiction of the Court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration”.

Looking at the Notice of Preliminary Objection herein, the grounds that there are no orders of this Court that have been violated, disobeyed and/or ignored and also that the Gichugu Case No. 5 of 2016 cannot form part of this record are not, in my view, pure points of law as defined in the **MUKISA** case (supra). It is on record that the order dated 5th October 2016 consolidating this case and the Gichugu case was made with the consent of the parties. It is not in dispute that this Court has the jurisdiction to order a consolidation of suits in appropriate cases where common issues of fact or law arise in two or more cases pending in different Courts. The essence of consolidation is to facilitate the efficient and expeditious disposal of disputes which is among the overriding objectives of the **Civil Procedure Rules**. In this case, the subject matter in the Gichugu Case is the same subject matter in this case i.e. land parcel No. NGIRIAMBUNGARIAMA/4616. It is not clear how the consolidation of this suit and the Gichugu Case can be raised as a Preliminary Objection nor how the same can be a nullity in law when it was by consent of the parties herein. As to whether or not there are orders of this Court which have been violated, disobeyed and/or ignored, those are issues of fact and not points of law.

In my view, the only proper Preliminary Objection raised herein relates to the jurisdiction of the Resident Magistrate at Gichugu to issue the order of temporary injunction dated 1st April 2016. Jurisdiction is a matter of law and once raised, must be settled first. It is the submission of counsel for the plaintiffs that the Resident Magistrate at Gichugu Court had no jurisdiction to grant orders of interim injunction the same having been taken away by the **MALINDI CONSTITUTIONAL PETITION No. 3 of 2016 – MALINDI LAW SOCIETY VS THE ATTORNEY GENERAL & OTHERS**. One of the findings of the Court in that petition was that the amendment to **Section 26 (3) and (4) of the Environment and Land Court Act** that empowered the Chief Justice to appoint certain magistrates to preside over cases involving the Environment and Land was Un-constitutional and therefore null and void. That judgment which was delivered on 11th November 2016 was however stayed by the Court of Appeal in **C.A CIVIL APPLICATION No. 65 of 2016** on 13th December 2016. The judgment in the Court of Appeal is still pending and is due on notice meaning that the position obtaining ante 11th November 2016 remains. In any event, the orders in the Gichugu Case were issued on 1st April 2016 some seven (7) months before the judgment in the Malindi Petition No. 5 of 2016 was delivered. Therefore, the judgment in the Malindi Petition No. 3 of 2016 could not have taken away the jurisdiction of the Resident Magistrate who issued orders in the Gichugu Case as such judgment could not act retrospectively. Most importantly, however, my view has always been that even long before the amendments to **Section 26 of the Environment and Land Court Act to insert Section 26 (3) and (4)** empowering the Chief Justice to appoint magistrates to handle Environment and Land Cases, magistrates had jurisdiction to handle such cases which was not taken away by the enactment of the **Environment and Land Court Act 2012** – see PETER **MBURU VS ANDREW KIMANI & OTHERS 2016 e K.L.R (ELC CASE No. 85 of 2015 KERUGOYA**. LENAOLA J. (as he then was) shared the same view in **EDWARD MWANIKI GATURU & ANOTHER VS ATTORNEY GENERAL & OTHERS 2013 e K.L.R**. Those two cases were decided long before the judgment in the Malindi Petition. Judicial authority vests in the Courts and Tribunals established under the Constitution and the Resident Magistrate’s Court is one of those Courts referred to in **Article 162 (4) and 169 (1) of the Constitution** and is therefore a competent Court empowered to issue injunctive relief. Nothing has been placed before me to suggest that the reliefs that were sought by the 1st defendant in the Gichugu Case were beyond the Resident Magistrate’s pecuniary jurisdiction. In any event, as will become clearer later in this ruling, it is now well settled that once a Court issues an injunctive relief, the party to whom it is directed is obliged to obey it notwithstanding any misgivings about whether or not it ought to have been granted in the first place. I am similarly not persuaded that the order issued on 5th April 2016 by the Resident Magistrate at Gichugu Court was per-incurium as suggested by counsel for the plaintiffs. A ruling or judgment is said to be per-incurium where the Judge or magistrate has not taken into account a previous decision that is binding or where it has been rendered in ignorance of

legislation – ***BLACK’S LAW DICTIONARY 9TH EDITION***. I have already taken the view that the enactment of the ***Environment and Land Court Act*** did not take away the jurisdiction of magistrate to determine land disputes unless those expressly removed from their docket – such as cases on adverse possession. Secondly, the judgment in the Malindi Petition was delivered on 11th November 2016 long after the Resident Magistrate had delivered her orders in the Gichugu Case on 5th April 2016. The Gichugu Court cannot be said to have acted per-incurium in the circumstances.

The up-shot of the above is that the plaintiffs’ Preliminary Objection dated 16th November 2016 lacks merit and is hereby dismissed.

I shall now consider the 1st defendant’s Notice of Motion dated 21st October 2016. It seeks the main prayer that the plaintiffs herein **MILLICENT WAIRIMU** and **WILSON NJERU NJOKA** and the defendants in the Gichugu Case **DOROTHY NJOKI NJOKA, EMILY WANJA NJOKA** and **PHILIS WANGUI NJOKA** be committed to civil jail for six (6) months for disobeying the orders issued by this Court on 5th April 2016 and 19th May 2016. It also seeks an order that the Officer Commanding Kianyaga Police Station do ensure compliance with those orders. In opposing that application, **MILLICENT WAIRIMU** the 1st plaintiff filed a replying affidavit on behalf of her co-plaintiffs. No response was filed by the defendants in the Gichugu Case. Their counsel did however file a Preliminary Objection dated 16th November 2016 which I have considered.

One of the issues raised in that Preliminary Objection is that there are no orders of this Court that have been violated. On her part, the 1st plaintiff has deponed in paragraph 4 of her replying affidavit that the orders of 1st April 2015 were not personally served on the contemnors.

It is of course correct that the orders dated 1st April 2016 were issued by the Gichugu Court and not by this Court. It is also correct that under ***Order 40 Rule 3 (1) of the Civil Procedure Rules***, the Court granting the injunction is the one empowered to commit the contemnor to prison or order the attachment of his property. However, the parties having consented to the consolidation of this case and the Gichugu Case, this Court is empowered to enforce the order issued on 1st April 2016 because they become orders of this Court upon consolidation of the two cases. It cannot be practicable that following the consolidation, this Court again dismembers the two suits so that the Gichugu Case is returned to the Resident Magistrate to handle the contempt proceedings and thereafter return the file to this Court. The consequence of the consolidation of the two cases is that this Court can now enforce any orders issued by the Gichugu Court since it is now seized of this suit and any previous orders must be treated as this Court’s orders for purposes of enforcement. In that regard, counsel for the plaintiffs referred me to the decision of **ANGOTE J.** in ***GULAM MIRDAT & ANOTHER VS SAID KHAMID SAID 2014 e K.L.R*** where the Judge stated that under ***Order 40 Rules 1 and 2 of the Civil Procedure Rules***, the Court that granted the injunction is the one to punish for contempt. In that case however, the Judge was being asked to punish for contempt in respect of orders issued by a subordinate Court on an application filed before him. That case is distinguished from this one where the file from the subordinate Court has been consolidated with the file in the Superior Court and therefore the orders issued by the subordinate Court can be the subject of contempt proceedings in the Superior Court. In terms of the ***Civil Procedure***, Consolidation means:

“To combine, through Court order, two or more actions involving the same parties or issues into a single action ending in a single judgment or, sometime, in separate judgments” – see ***BLACK’S LAW DICTIONARY 9TH EDITION***.

It must also be remembered that contempt proceedings are intended to up-hold the authority and dignity of the Court and not to placate those presiding over the Court that issued the subject of those proceedings. And the Resident Magistrate’s Court that issued the orders dated 1st April 2016, as I have already stated above, is one of the Courts established and recognized by the Constitution.

In her affidavit opposing this application, the 1st plaintiff has deponed in paragraph 4 thereof that neither she nor the 2nd plaintiff were served with the orders dated 1st April 2016. That is true. In any case, they were not parties in the Gichugu Case and neither is it suggested that they are agents of any of the parties

in that case. They cannot therefore be held to be in contempt of the orders issued on 1st April 2016.

What about the defendants in the Gichugu Case i.e. **DOROTHY NJOKI NJOKA, EMILY WANJA NJOKA** and **PHILIS WANGUI NJOKA**? The record shows that the orders dated 1st April 2016 were made in the presence of their advocate **MR. NDEGWA** although the order itself was extracted and issued on 5th April 2016. In **KENYA TOURIST DEVELOPMENT COPROPRATION VS KENYA NATIONAL COPROPRATION LTD & ANOTHER NBI H.C.C.C No. 6776 of 1992**, **AKIWUMI J.** (as he then was) said:

“An injunction in prohibitory form operates from the time it is pronounced, not from the date when the order is drawn up and completed. Consequently, the party against whom it is made will be guilty of contempt if he commits a breach of the injunction after he has received notice of it, even though the order has not been drawn up Where an order requires a person to abstain from doing any act, it may be enforced, notwithstanding that service of a duly endorsed copy of the order has not been served if the Court is satisfied that pending such service, the person against whom enforcement is sought has had notice of the terms of the order either by being present when the order is made or being notified of the terms of the order whether by telephone, telegram or otherwise”

Even if the said three defendants were not in Court when the orders dated 1st April 2016 were made, their advocate **MR. NDEGWA** was present and therefore they must have had knowledge of the said orders and it is now well established that knowledge supersedes personal service – see **BASIL CRITICOS VS ATTORNEY GENERAL 2012 e K.L.R.** The Court of Appeal in the case of **SHIMMERS PLAZA LIMITED VS NATIONAL BANK OF KENYA LIMITED C.A CIVIL APPEAL No. 33 of 2012 2015 e. K.L.R** addressed that issue in the following terms:

“Would the knowledge of the judgment or order by the advocate of the alleged contemnor suffice for contempt proceedings? We hold the view that it does. This is more so in a case such as this one where the advocate was in Court representing the alleged contemnor and the orders were made in his presence. There is an assumption which is not unfounded, and which in our view is irrefutable, to the effect that when an advocate appears in Court on instructions of a party, then it behoves him/her to report back to the client all that transpired in Court that has a bearing on the client’s case” Emphasis added

In his affidavit in support of this application, the 1st defendant has deponed in paragraph 9 thereof that the plaintiffs in this suit and the defendants in the Gichugu Case have disobeyed the orders issued on 5th April 2016 and denied him access to the suit land. The only replying affidavit filed in response to the application is that by the 1st plaintiff herein who has not specifically rebutted that averment but who, as I have said, was not a party to the Gichugu Case. What is clearly the thread running through the submissions herein is that the orders issued in the Gichugu Case were issued by a Court that lacked jurisdiction. However, the law is that obedience of Court orders is not optional and obedience thereof is mandatory whether the party against whom it is directed thinks it is irregular or invalid. This is best captured in the judgment of **ROMER L. J.** in the case of **HADKINSON VS HADKINSON 1952 ALL. E.R 567** where he said:

“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”

Even if the defendants in the Gichugu Case were of the view that the Resident Magistrate at Gichugu Court had no jurisdiction to issue the injunctive orders dated 1st April 2016 and that therefore those orders are irregular, null and void, the option available to them was to go back to that Court and have them set aside or even file an appeal. Indeed an application for review may even have been filed following the consolidation of the two suits. It was not open to the said defendants to prevent the 1st defendant in this case, and who was the plaintiff in the Gichugu Case, from accessing the suit land or

enjoying his quiet possession thereof when the said orders clearly restrained them, their agents, servants or anybody acting through them from interfering with the suit land till the hearing and determination of that suit.

Courts will not condone any deliberate disobedience of their orders nor waver in their responsibility to deal firmly with contemnors once it is shown that such orders have been disobeyed. In doing so, all that the Courts are safeguarding is the rule of law without which there can be no proper administration of justice and anarchy will creep in. Courts must prevent that.

Ultimately therefore and upon considering the Notice of Motion dated 21st October 2016 and the Preliminary Objection dated 16th November 2016, this Court makes the following orders:

- 1. The Preliminary Objection dated 16th November 2016 is dismissed.**
- 2. The Notice of Motion dated 21st October 2016 is allowed but only to the extent that it seeks the committal of DOROTHY NJOKI NJOKA, EMILY WANJA NJOKA and PHILIS WANGUI NJOKA to civil jail for a term of six (6) months for contempt.**
- 3. The Notice of Motion dated 21st October 2016 is so far as it seeks the committal of MILLICENT WAIRIMU and WILSON NJERU NJOKA to civil jail for contempt is disallowed but they are cautioned that the interim orders of injunction issued in their favour on 3rd May 2016 restraining the 1st defendant, his agents, servants and/or employees from accessing the suit land were stayed by consent of the parties on 11th May 2016 meaning therefore that the orders dated 1st April 2016 prevail.**
- 4. The said DOROTHY NJOKI NJOKA, EMILY WANJA NJOKA and PHILIS WANGUI NJOKA be summoned to appear here on 28th April 2017 for further orders.**
- 5. Costs to the 1st defendant.**

B.N. B.N.OLAO

JUDGE

21ST APRIL, 2017

Ruling delivered, dated and signed in open Court this 21st day of April 2017

Ms Muthike for 1st Defendant present

Ms Kiragu for Mr. Mwangi for Plaintiffs present.

B.N. OLAO

JUDGE

21ST APRIL, 2017