



**REPUBLIC OF KENYA**

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

**PETITION NO. 3 OF 2015**

**IN THE MATTER OF CHAPTER FOUR OF THE CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF RULES 4(1) OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS (PRACTICE AND PROCEDURAL RULES 2013.**

**AND**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 23, 27, 35, 40 & 47 (SECTIONS 70, 75, 77 & 82 OF THE REPEALED CONSTITUTION OF KENYA 2010.**

**AND**

**IN THE MATTER OF RUIRU LAND DISPUTES TRIBUNAL IN RESPECT OF LAND PARCEL NO. RUIRU/RUIRU EAST/BLOCK 2/1513 (CURRENTLY RUIRU/RUIRU EAST BLOCK 2/12208-12223) BETWEEN GATHONI KURIA AND PETER KAIRU MWANGI AND THIKA CHIEF MAGISTRATE’S COURT D.O. CASE NO. 3 OF 2008.**

**PETER KAIRU MWANGI.....PETITIONER**

**VERSUS**

**HON. ATTORNEY GENERAL.....1<sup>ST</sup> RESPONDENT**

**THE LAND REGISTRAR THIKA.....2<sup>ND</sup> RESPONDENT**

**THE CHIEF MAGISTRATE’S COURT, THIKA.....3<sup>RD</sup> RESPONDENT**

**SAMUEL MUTURA KURIA.....1<sup>ST</sup> INTERESTED PARTY**

**KEZIA WANGECHI NDUNGU.....2<sup>ND</sup> INTERESTED PARTY**

**PATMOS INVESTMENT LTD.....3<sup>RD</sup> INTERESTED PARTY**

**RULING**

On 2nd November 2015 following an Ex-parte application by the Applicant, this Court issued an order of interim injunction restraining the 3rd interested party from developing, sub-dividing, alienating, offering

for sale, selling, transferring in any manner whatsoever, dealing or interfering with the Applicant's quiet use and possession of land parcels No. RUIRU/RUIRU EAST BLOCK 2/12208, 12209, 12210, 12211, 12212, 12213, 12214, 12215, 12216, 12217, 12218, 12219, 12220, 12221, 12222 and 12223 (the suit land) pending the inter-parte hearing and determination of the Notice of Motion dated 28th October 2015 which was slated for 13th November 2015. That application was subsequently moved for mention on 26th November 2015 by which date it was expected that the parties would have filed their respective submissions.

However, on 19th April 2016, the Applicant filed a Notice of Motion seeking the following substantive orders:

***1. Spent.***

***2. That the directors of the 3rd Interested party and particularly JULIUS NJUGUNA MWANGI and MARY WAIRIMU NGETU be jailed for contempt of Court.***

***3. That the Court do issue an order to attach the property of the 3rd Interested party.***

***4. That such further orders as are expedient be made.***

That Notice of Motion which is premised on the grounds set out therein and is supported by the affidavit of **PETER KAIRU MWANGI** is the subject of this ruling.

Before I get into that Notice of Motion dated and filed herein on 19th April 2016, it is important to revisit the interim orders of injunction issued on 2nd November 2015 pursuant to the Applicant's Ex-parte application dated 28th October 2015. That application as I have already indicated above, was fixed for inter-parte hearing on 13th November 2015 but on that day, the interim order was extended in the interest of justice to give the Respondents and 3rd Interested party time to put in their responses. The parties also agreed that they would put in their written submissions to that application and the matter was fixed for mention on 26th November 2015 to confirm compliance. However, by 19th April 2016 when the Notice of Motion which is the subject of this ruling was filed, none of those parties had filed submissions on the application dated 28th October 2015. Indeed it was not until 2nd December 2016 that the 3rd Interested party filed submissions to that application. On the other hand, the Applicant filed his submissions to the application dated 19th April 2016 on 30th November 2016. The 1st and 2nd Respondents on their part only filed grounds of opposition to the Applicant's main petition dated 20th March 2014 and filed on 2nd April 2014.

It is clear from the record that on 26th November 2015, this Court was not sitting and so the parties took dates in the registry for further mention on 16th February 2016 but the Court was engaged elsewhere. On 24th March 2016 when the matter was listed for mention, the Court was also not sitting due to engagements in Nairobi but that notwithstanding, none of the parties had filed submissions to the earlier application dated 28th October 2015 and it was not until 2nd December 2016 that the 3rd Interested party filed submissions to that application. By that time however, all the parties appeared to have abandoned that application because on 5th May 2016 when the parties took dates in the registry by consent, they all confined themselves to the application dated 19th April 2016 and which, as I have stated above, is the subject of this ruling. Therefore, for all intents and purposes, the interim orders of injunction issued on 2nd November 2015 lapsed on 26th November 2015 because they were not extended and no further orders were thereafter issued in relation to them. Therefore, the Applicant's Notice of Motion dated 28th October 2015 and further amended on 2nd November 2015 is spent. Even if this Court was not sitting on 26th November 2015, the file could still have been placed before another Judge to further extend the interim ex-parte orders issued on 2nd November 2015.

It is clear however that before the orders dated 2nd November 2015 lapsed, they were served upon both **SAMUEL MUTIRA KURIA** and **KEZIA WANGECHI NDUNGU** who allegedly represent the 3rd Interested party herein although it is not clear in what capacity. According to paragraph 5 of the supporting affidavit of the Applicant herein, the said 3rd Interested party has through **MARY WAIRIMU**

NGETU commenced developments on one of the resultant parcels of the suit land. It is deponed therein as follows:

***“That despite service and full knowledge of the order, the 3rd Interested party has through MARY WAIRIMU NGETU commenced developments on one of the resultant parcels of land. Annexed and connectively marked PKM-2 are photographs”*** Emphasis added

It is the Applicant’s case therefore that the acts of the 3rd Interested party is calculated to frustrate this Court’s orders and is therefore in contempt of Court.

In opposing that application, the 3rd Interested party through its director **JULIUS NJUGUNA MWANGI** has sworn a replying affidavit in which it is deponed, inter alia, that the order issued on 2nd November 2015 was extended on 13th November 2015 and was not thereafter extended and that the 3rd Interested party has never violated that order nor allowed **MARY WAIRIMU NGETU** to construct on any of the parcels of land subject of this suit. Most significantly, in paragraph 11 of that replying affidavit, it is deponed as follows:

***“That from the affidavit of the Applicant, it is not indicated which plot the alleged construction (sic) being carried out. I had clearly indicated that the original land was sub-divided with (sic) various plots which have since been sold to 3rd parties (see affidavit sworn on 26th November 2015)”.***

Annexed to that replying affidavit are copies of title deeds showing that the following parcels of land which are part of the suit land herein are infact registered in the names of persons who are not parties to this suit. Those parcels are:

1. RUIRU/RUIRU EAST BLOCK 2/12209 - LUCY MUIGI

MATHERI WARUINGI,

LUCY NYAITAHA MURIGI and

JOYCE WAIRIMU GICHOHU

2. RUIRU/RUIRU EAST BLOCK 2/12210 - LUCY MUIGI

MATHERI WARUINGI,

LUCY NYAITAHA MURIGI and

JOYCE WAIRIMU GICHOHU

3. RUIRU/RUIRU EAST BLOCK 2/12211 - LUCY MUIGI

MATHERI WARUINGI,

LUCY NYAITAHA MURIGI and

JOYCE WAIRIMU GICHOHU

4. RUIRU/RUIRU EAST BLOCK 2/12212 - FRANCIS RUCHUU GITUKU

5. RUIRU/RUIRU EAST BLOCK 2/12214 - ESTHER WANJUGU GITAHI

6. RUIRU/RUIRU EAST BLOCK 2/12216 - DAVID MANYAGI GICHIGO

7. RUIRU/RUIRU EAST BLOCK 2/12217 - JUDY WAITHIRA KAMANDE

8. RUIRU/RUIRU EAST BLOCK 2/12218 - LUCY MARGARET NDWIGA

9. RUIRU/RUIRU EAST BLOCK 2/12221 - DANIEL MWANGI NDEGWA and MONICA WAGIKUYU KIARIE

10. RUIRU/RUIRU EAST BLOCK 2/12222 - DANIEL MWANGI NDEGWA and MONICA WAGIKUYU KIARIE

All the above registered proprietors of some of the parcels comprising the suit land are not parties to this suit and it is therefore clear that even if the interim Ex-parte orders of injunction had not lapsed, they could not have been available to With regard to the orders of contempt sought in respect of **JULIUS NJUGUNA MWANGI** and **MARY WAIRIMU NGETU**, the affidavit of service sworn by one **JAMES NDEGWA MUTHIGA**, a process server of this Court, shows that the order dated 2nd November 2015, and which is the basis upon which these contempt proceedings have been filed, was only served on **SAMUEL MUTURA** and **KEZIA WANGECHEI NDUNGU**. There is no evidence that the two alleged contemnors were served with that order. Contempt proceedings are akin to Criminal Proceedings and the standard of proof therefore is higher than proof on a balance of probabilities, almost but not exactly beyond reasonable doubt – *OCHINO & OTHERS VS OKOMBO & OTHERS 1989 K.L.R 165 (C.A)*. Service or knowledge of the order alleged to have been disobeyed are therefore important before a party can be punished for contempt because a person can be jailed for such transgressions. As the affidavit of the process server is very clear that the persons served with the order dated 2nd November 2015 are not the alleged contemnors herein, it is obvious that the Notice of Motion seeking that **JULIUS NJUGUNA MWANGI** and **MARY WAIRIMU NGETU** be jailed is wholly un-meritorious and must be dismissed.

But that is not all. As indicated above, in paragraph 5 of the affidavit of the Applicant **PETER KAIRU MWANGI**, it is deponed that “*the 3rd Interested party through MARY WAIRIMU NGETU has commenced development on one of the resultant parcels of land*”. In an application seeking the committal to civil jail of a person who is alleged to be in contempt of a Court order, the order that has been breached must be specifically pleaded and with certainty. It should not be left to conjecture nor create doubt in the mind of the Court. It is now clear from what I stated earlier that some of the parcels comprised in the suit land are registered in names of persons not parties to this suit. It was necessary therefore that the Applicant, with certainty, show which of those parcels the alleged contemnors are infact constructing on. As it is, the application is rather vague and cannot be the basis upon which this Court can make any orders for committal to jail, which is in itself a serious matter, without adequate proof regarding which of the parcels of land the construction or development has commenced.

The up-shot of the above is that the Applicant’s Notice of Motion dated 19th April 2016 lacks merit. It is accordingly dismissed with costs to the 3rd Interested party.

As the subject matter of this suit is land situated in Ruiru and since we now have an Environment and Land Court at Thika, this suit is hereby transferred to that Court where it will be mentioned before **HON. GACHERU J.** on 24th July 2017 for further directions as to the hearing of the petition herein.

**B. N. OLAO**

**JUDGE**

**14<sup>TH</sup> JULY, 2017**

Ruling delivered, dated and signed in open Court this 14<sup>th</sup> day of July 2017

Mr. Ngigi for Mr. Warima for Petitioner present

Attorney General for Respondents absent

Mr. Gitonga for Interested parties absent.

**B. N. OLAO**

**JUDGE**

**14<sup>TH</sup> JULY, 2017**