



**REPUBLIC OF KENYA**

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

**ELC NO. 233 OF 2016**

**KENNETH NANDI MATIVA.....PLAINTIFF/APPLICANT**

**VERSUS**

**ALEX ANG'UNDO.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**PERRY SENELWA MATIVA.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**RULING**

This application is brought under section 24, 25, 27 and 28 of the Contempt of Court Act and Section 1A, 1B, 3A and 63 (e) Civil Procedure Act seeking the following orders;

1. That the application herein be certified urgent and same be heard on priority basis.
2. The honourable court be pleased to require the attendance of the defendants/contemnors to appear before the honourable court.
3. The honourable court be pleased to cite the defendants/contemnors, in particular the 1<sup>ST</sup> defendant/contemnor for contempt of court, and in particular, for disobeying/disregarding the court orders dated 8<sup>th</sup> March, 2017.
4. Consequent to prayer (3) herein above granted, the defendant/contemnors herein be committed to jail for a duration not exceeding six (6) months and/or such other duration as the honourable court may deem fit and expedient.
5. In the alternative to prayer 3, above, the honourable court be pleased to impose any other penalty upon the contemnors that can, in its discretion, be pleased to purge the contempt of the court orders.
6. That an order do issue for the demolition and removal of the house put on the suit parcel KAKAMEGA/LOGOVO/1016 and to revert it to the status quo that existed when the order was issued on 8<sup>th</sup> March, 2017.
7. Costs of the application be borne by the defendants/contemnors.
8. Such further and/or other orders be made as the court may deem fit and expedient.

The application is based on the annexed affidavit of Kenneth NandiMativa, and on the following grounds; that the defendants/contemnors have willfully and deliberately defied the orders of this court dated 8<sup>th</sup> March, 2017. That the aid court order gave conservatory order “preserving the substratum of the

suit as pertains the use of LR. NO. KAKAMEGA/LOGOVO/1016” pending the determination of the suit. That the defendants/contemnors, particularly the 1<sup>st</sup> defendant/contemnor, have willfully and deliberately defied the order issued by forcefully entering and taking possession of the suit parcel, and proceeding with the construction of a house therein. That the defendants/contemnors were served in person. That the existence of the orders was therefore well known to the contemnors, before they took the unilateral decision to willfully defy the court’s order. The conduct of the defendants/contemnors in disobeying a lawful court order issued, duly extracted and served upon them personally, amounting to violation of the rule of law, impending and interference with the course of justice and may set a dangerous precedent if left unpunished. That the extracted order dated 8<sup>th</sup> March, 2017 was duly indorsed with a penal notice. That it is in the interest of justice that the application herein be allowed.

The applicant submitted that on the 8<sup>th</sup> March, 2017, the court, pursuant to the application dated 23<sup>rd</sup> November 2016 issued conservatory orders to preserve the substratum of the suit, as pertains the use of LR. NO. KAKAMEGA/LUGOVO/1016 pending the determination of the suit (Annexed and marked KNM001 is a copy of the said order). The ruling in this matter was delivered on 1<sup>st</sup> March, 2017 in the presences of the applicant’s advocate and the 2<sup>nd</sup> defendant/contemnor. The said order was served upon the defendants/contemnors on 8<sup>th</sup> March, 2017 (Annexed and marked KNM 002 is a copy of the affidavit of service to that effect). That at the commencement of this suit, any construction work on the parcel of land was at the slab level. That after service of the order upon the two defendants/contemnors the applicant proceeded to his work place in Nairobi. That the defendants/contemnors were intent in defying the court orders and the 1<sup>st</sup> defendant/contemnor continued with construction (annexed and marked KNM 003 a,b and c are photographs showing ongoing constructions on the site.). The 1<sup>st</sup> defendant/contemnor is still proceeding with construction even to date. That by entering the suit parcel and carrying out and continuing with construction, the 1<sup>st</sup> defendant/contemnor have circumvented the court and perverted the cause of justice and rendered the suit nugatory.

The 1<sup>st</sup> defendant/respondent submitted that he purchased the suit property from the 2<sup>nd</sup> defendant but due to controversies surrounding it they agreed that he (2<sup>nd</sup> defendant) gives him an alternative parcel of land in Kitale measuring  $\frac{1}{4}$  an acre. That he has no further interest in the parcel of land which he has left to the 2<sup>nd</sup> defendant. That the applicant should therefore direct his cause of action to the 2<sup>nd</sup> defendant for whom they co-own the property. That he will separately make an application to have his name struck out from these proceedings.

The 2<sup>nd</sup> defendant/respondent submitted that he co-owns the suit property with the applicant. The applicant has not been keen to have the same portioned so that each of them can have their separate title deed. He has allowed the applicant to develop the portion of land given to him by their deceased father and he has made developments thereon and also plants diverse food crops. That he normally resides in Kitale Trans Nzoia District where he migrated to. That he sold the parcel to take care of their ailing mother who the applicant had abandoned. He has also taken over the construction of the 1<sup>st</sup> defendant at a cost of Ksh. 450,000/=. However it is their submission that no construction work is going on since the injunction was ordered.

This court has carefully considered both the applicant’s and the respondents’ submissions. It is not disputed that that on the 8<sup>th</sup> March, 2017, the court, pursuant to the application dated 23<sup>rd</sup> November 2016 issued conservatory orders to preserve the substratum of the suit, as pertains the use of LR. NO. KAKAMEGA/LUGOVO/1016 pending the determination of the suit (Annexed and marked KNM001 is a copy of the said order). That the ruling in this matter was delivered on 1<sup>st</sup> March, 2017 in the presences of my advocate and the 2<sup>nd</sup> defendant. That the order was served upon the defendants on 8<sup>th</sup> March, 2017 (Annexed and marked KNM 002 is a copy of the affidavit of service to that effect). That at the commencement of this suit, any construction work on the parcel of land was at the slab level. That after service of the order upon the 2 defendants continued with construction (annexed and marked KNM 003 a,b and c are photographs showing ongoing constructions on the site.). The 1<sup>st</sup> defendant is still proceeding with construction even to date. That by entering the suit parcel and carrying out and

continuing with construction, the 1st defendant has circumvented the court and perverted the cause of justice and rendered the suit nugatory.

The 1<sup>st</sup> respondent stated that he has since been given an alternative parcel of land in Kitale by the 2<sup>nd</sup> respondent and is not involved in any construction work at the suit premises. The 2<sup>nd</sup> defendant does not dispute this and states that he has taken over the construction work and that it is the applicant who is trying to delay the subdivision of the said land. I have perused the photos annexed to the application and agree with the respondents that indeed the same are not dated and hence it would not be possible at this stage to ascertain whether the construction works continued even after the respondents were served with the court order on 8<sup>th</sup> March, 2017. The applicant has not proved the contempt as against the two defendants. I find this case application has no merit and I dismiss it with costs.

**DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 27<sup>TH</sup> DAY OF SEPTEMBER 2017.**

**N.A. MATHEKA**

**JUDGE**