



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANG'A

ELC MISC. APPLICATION NO.10 OF 2017

MACHARIA WAIGURU - PLAINTIFF/APPLICANT

VS

HON ATTORNEY GENERAL - 1ST DEFENDANT/ RESPONDENT

ELIZABETH MUTSOLI - 2ND DEFENDANT/ RESPONDENT

MR. KIBIRO (DISTRICT

SURVEYOR MURANG'A) - 3RD DEFENDANT/ RESPONDENT

RULING

1. By a Notice of Motion dated 20th March, 2017, the Applicant herein seeks the following orders against the Defendants:

a. That the respondents be committed to jail for contempt of Court for a period not exceeding six months.

b. That costs of the application be provided for.

2. The application is premised on the following grounds;

a. That the respondents disobeyed an order issued by the subordinate Court at Murang'a and do not therefore have audience in this Court until they purge the contempt by obeying it.

b. The respondents have nothing to lose by obeying the Court order.

c. The obligation to obey the Court order is mandatory.

3. *The application is supported by the affidavit of Macharia Waiguru the Applicant herein. In his affidavit he depones that on 16/02/2015 he received an order from the Chief Magistrate's Court at Murang'a (CMCC NO. 24 OF 2015) ordering the defendant to excise his portion of land out of L. R No. Loc11/Maragi /71 and transfer ¼ an acre to the Applicant. The said order is attached herewith. That the land is registered in the names of Julius Irungu Ndungu and Joyce Gachui in equal shares.*

4. *That a mutation form was duly drawn and the land sub-divided into two equal parts. That on*

presentation to the lands office the District surveyor (3rd respondent) refused to register it for reasons that he is serving the interests of some people. The Applicant then filed CMCC 146/2016 at Murang'a and the 2nd respondent filed a defence. In the defence the 2nd respondent avers that she is a stranger to the Court order and the mutation form yet they were served with the application which was stamped by the Attorney General. The 3rd respondent was also served.

5. The Applicant avers that the respondents are in contempt of the said Court order and should therefore not be granted any more audience in Court until they comply with the order. The Applicant depones that the respondents have the option of going to Court to discharge the order otherwise they remain bound by the order. In the alternative the Applicant demands that the respondents compensate him in monetary terms and that the current value of the suit property stands at about Kshs. 5,000,000/-.

6. The order referred to by the Applicant herein which was issued by the CMCC at Murang'a on 18/02/2015 reads as follows in verbatim;

“Upon reading a consent letter dated 27/1/2015 signed by the plaintiff and defendant requesting the Court to enter the consent as judgment I hereby record the consent;

a. The defendant is ordered to excise his portion out of land parcel Loc 11/Maragi/71 and transfer 0.25 acres to the plaintiff.

b. The plaintiff to pay the sub-division of the said land parcel plus the balance of the purchase price.

c. The E.O to sign the relevant documents if the defendant's co- proprietor becomes uncooperative”

7. In opposing the application, the 1st respondent then filed a notice of Preliminary Objection on 8/05/2017 on the following grounds;

a. That the application offends section 30 of the Contempt of Court Act by failing to issue a 30-day notice to the respondents to show cause why Contempt of Court proceedings should not be commenced against them.

b. The application has been brought well over 6 months after the order was issued which contravenes section 34 of the Contempt of Court Act.

c. The application offends Section 8 of the office of the Attorney General Act no. 49 of 2012 which protects the Hon. Attorney General, solicitor General and any other subordinate officers from personal liability in respect of any proceedings in a Court of law in the course of discharging of the functions of the Attorney General.

d. The respondents are strangers to the Court alleged to have been disobeyed.

8. The Applicant responded to the preliminary objection on 18/09/2017 by stating that section 30 of the Contempt of Court Act applies to a money decree hence the mention of accounting officer in that Act. That the 3rd respondent kept promising he would comply with the order but failed. That no one has immunity against a Court order. That since the property does not relate to governments land it should be obeyed.

9. The parties choose to canvass the application by written submission. The Court directed the same to be filed and served and highlighting to be done on 25/09/2017. The Applicant did not file any written submissions while the respondents and proceeded to highlight their submissions in Court.

10. In their submissions the respondents contend that the order was directed to the defendant one Julius

Irungu Michael Ndung'u and nothing was directed to any of the respondents quoted in the application. The order was not directed to the District Land Surveyor as alleged in the application. They have further expounded their grounds of preliminary objection in their submissions. They have drawn the attention of the Court to the case of **Ex parte Langley 1879,13 Chancery Division, 110 (C.A)** where Thesiger L.J confirmed the threshold of proof for a contempt of Court to be beyond reasonable doubt that the contemnor had full knowledge and notice of the existence of the order of the Court forbidding it. Lastly the respondents submitted that the registration of the mutation is to be registered by the Land Registrar and not the District Land Surveyor as alleged in the plaint.

11. It is trite law that Court orders are not made in vain and are meant to be complied with. If for any reason a party has difficulty in complying with Court orders the honourable thing to do is to come back to Court and explain the difficulties faced by the need to comply with the order. Once a Court order is made in a suit the same is valid unless set aside on review or on appeal. In **Econet Wireless Kenya Ltd vs. Minister for Information & Communication of Kenya & Another [2005] 1 KLR 828 Ibrahim, J** (as he then was) stated:

“It is essential for the maintenance of the rule of law and order that the authority and the dignity of our Courts are upheld at all times. The Court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors. 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 void”.

12. As was held by the Court of Appeal in **Central Bank of Kenya & Another vs. Ratilal Automobiles Limited & Others Civil Application No. Nai. 247 of 2006**, judicial power in Kenya vests in the Courts and other tribunals established under the Constitution and that it is a fundamental tenet of the rule of law that Court orders must be obeyed and it is not open to any person or persons to choose whether or not to comply with or to ignore such orders as directed to him or them by a Court of law.

13. Section 34 of the Contempt of Court Act provides;

“No Court shall initiate any proceedings for contempt of Court either on its own motion or otherwise after the expiry of a period of six months from the date on which the contempt of Court is alleged to have been committed”

14. Section 30 of the Contempt of Court Act provides;

(1) Where a State organ, government department, ministry or corporation is guilty of contempt of Court in respect of any undertaking given to a Court by the State organ, government department, ministry or corporation, the Court shall serve a notice of not less than thirty days on the accounting officer, requiring the accounting officer to show cause why contempt of Court proceedings should not be commenced against the accounting officer

(2) No contempt of Court proceedings shall be commenced against the accounting officer of a State organ, government department, ministry or corporation, unless the Court has issued a notice of not less than thirty days to the accounting officer to show cause why contempt of Court proceedings should not be commenced against the accounting officer.

(3) A notice issued under subsection (1) shall be served on the accounting officer and the Attorney-General.

(4) If the accounting officer does not respond to the notice to show cause issued under subsection (1) within thirty days of the receipt of the notice, the Court shall proceed and commence contempt of Court proceedings against the accounting officer.

(5) Where the contempt of Court is committed by a State organ, government department, ministry or corporation, and it is proved to the satisfaction of the Court that the contempt has been committed with the consent or connivance of, or is attributable to any neglect on the part of any accounting officer, such accounting officer shall be deemed to be guilty of the contempt and may with the leave of the Court be liable to a fine not exceeding Kenya Shillings Two Hundred Thousand. (6) No State officer or public officer shall be convicted of contempt of Court for the execution of his duties in good faith”.

15. Section 8 of the Attorney General Act provides;

1. “No criminal proceeding or civil suit shall be brought against the Attorney General, the Solicitor-General or a subordinate officer in respect of any proceeding in a Court of law or in the course of discharging of the functions of the Attorney General under the Constitution and this Act.

2. No matter or thing done by the Attorney-General, the Solicitor-General or a subordinate officer shall, if the matter or thing is done in good faith for executing the functions, powers or duties of the Commission, render the Attorney-General, Solicitor-General or other subordinate officer personally liable to any action, claim or demand whatsoever”.

16. Section 6 of the Contempt of Court Act states that every subordinate court shall have power to punish for contempt of court on the face of the court in any case where a person —

a. assaults, threatens, intimidates, or willfully insults a judicial officer or a witness, during a sitting or attendance in a court, or in going to or returning from the court to whom any relevant proceedings relate;

b. willfully interrupts or obstructs the proceedings of a subordinate court; or

c. willfully disobeys an order or direction of a subordinate Court.

17. I have seen the pleadings in the file and noted that there is mention of a suit in the Chief Magistrate Court CMCC No. 146 of 2016 filed by the applicant against the respondent. I have not seen the Plaintiff being referred to. I have also sighted a defense filed by the 1st - 3rd respondents and it is not certain what the claims in this suit were or whether the Court issued orders binding the 1st - 3rd respondents in the application. I have also noted that the application refers to the orders issued in CMCC No 24 of 2015. The presentation of this application is rather confusing and for now I shall ignore the reference to the suit No. CMCC 146 of 2016 as I am unable to appreciate the claim in its entirety and more so its relevance.

18. Applying the law and the legal principles enunciated above it is clear to me that the Applicant has failed to directly link the three respondents to the orders alleged to have been disobeyed. The respondents ought not to have been sued in their personal capacity for official duties as they are not parties to the suit in which the Court orders were issued. The Applicant failed to follow the procedure for pursuing a contempt of Court action as provided by the law. The Applicant must prove beyond reasonable doubt that the respondents had knowledge of the order. There is no such evidence to support this. The application is statute barred by not having been filed within 6 months. There is therefore no contempt that was committed. As to whether the application is properly before this court by way of Misc. application without it being anchored in a suit prescribed by procedure, the answer is no and therefore the application is fatally incompetent, misconceived and an abuse of the process of the Court.

19. In the end, I find and hold that the Preliminary objection is merited. In the circumstances the application is dismissed with costs.

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 18TH DAY OF OCTOBER 2017.

J.G. KEMEI

JUDGE