



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT & LAND COURT**

**AT NAIROBI**

**ELC SUIT NO. 1245 OF 2015**

**DELMONTE KENYA LIMITED.....PLAINTIFF**

**VERSUS**

**GOSHEN GARDENS LIMITED.....1<sup>ST</sup> DEFENDANT**

**PIONEER INTERNATIONAL SCHOOLS LIMITED.....2<sup>ND</sup> DEFENDANT**

**RULING**

**Background:**

The facts giving rise to this suit were set out in my ruling of 1<sup>st</sup> July, 2016. The plaintiff brought this suit against the defendants on 4<sup>th</sup> December, 2015 through a plaint of the same date seeking the following reliefs:-

- a) A permanent injunction restraining the 1<sup>st</sup> defendant whether by itself or its agents and/or employees or otherwise whomsoever from trespassing, continuing to trespass, transferring, leasing, subletting, interfering and/or otherwise dealing with the portion of the property known L.R. No. 12157/2 (the suit Property) including operating a school and/or any other business on the suit property or in any other manner howsoever interfering with the plaintiff's rights over suit Property.
- b) A permanent injunction restraining the 2<sup>nd</sup> defendant(sic) whether by itself or its agents and/or employees or otherwise whomsoever from transferring possession of the plaintiff's property being a portion of the property known L. R. No. 12157/2 to the 2<sup>nd</sup> defendant or any other third party.
- c) A permanent mandatory injunction to issue compelling the 2<sup>nd</sup> defendant whether by itself or its agents and/or employees or otherwise whomsoever to remove the sign board of 'Pioneer Girls School' from the plaintiff's property being a portion of the property known as L.R No. 12157/2.

The plaintiff averred that at all material times, the plaintiff let to the 1<sup>st</sup> defendant a portion measuring 75 acres of all that parcel of land known as L.R. No. 12157/2 (hereinafter referred to as "the suit property") for a term of eight (8) years with effect from 3<sup>rd</sup> September, 2013 at a revisable monthly rent of Kshs.550,000/= and on other terms and conditions that were set out in the lease agreement dated 3<sup>rd</sup> September, 2013. The plaintiff averred that in the month of February, 2015, the 1<sup>st</sup> defendant defaulted in its rent payment obligations under the lease aforesaid following which the plaintiff served the 1<sup>st</sup>

defendant with a notice to remedy the default and subsequently a 30 days notice dated 5<sup>th</sup> May, 2015 terminating the 1<sup>st</sup> defendant's lease in accordance with clause 13 of the lease agreement.

The plaintiff averred that upon the expiration of the said notice, the plaintiff requested the 1<sup>st</sup> defendant to deliver possession of the suit property, a request which the 1<sup>st</sup> defendant declined to honour. The plaintiff averred that instead of handing over vacant possession of the suit property, the 1<sup>st</sup> defendant filed a suit against the plaintiff for alleged breach of the lease agreement. The 1<sup>st</sup> defendant's suit against the plaintiff was referred to arbitration on 15<sup>th</sup> July, 2015 and the 1<sup>st</sup> defendant was to continue occupying the suit property pending the outcome of the arbitral proceedings. The plaintiff averred that following the said order that referred the dispute between the plaintiff and the 1<sup>st</sup> defendant to arbitration, the parties decided to pursue an amicable settlement of the dispute. The plaintiff averred that in the course of the meetings that were held between the representatives of the plaintiff and those of the 1<sup>st</sup> defendant to resolve the dispute, the 1<sup>st</sup> defendant gave an indication to the plaintiff of its intention to transfer its assets to the 2<sup>nd</sup> defendant and inquired from the plaintiff whether the plaintiff would have any objection to the 2<sup>nd</sup> defendant taking over the 1<sup>st</sup> defendant's lease over the suit property. The plaintiff averred that it made it clear to the 1<sup>st</sup> defendant that it would only consider entering into a lease with the 2<sup>nd</sup> defendant after the dispute between the plaintiff and the 1<sup>st</sup> defendant had been resolved and the 1<sup>st</sup> defendant had handed over possession of the suit property to the plaintiff.

The plaintiff averred that sometimes in October 2015, it appeared as if the 1<sup>st</sup> defendant had handed over possession of the suit property to the 2<sup>nd</sup> defendant. The plaintiff averred that when it inquired from the 1<sup>st</sup> defendant about the position of the suit property, the 1<sup>st</sup> defendant maintained that it was still in possession of the suit property. The plaintiff averred that despite the denial by the 1<sup>st</sup> defendant that it had not handed over possession of the suit property to the 2<sup>nd</sup> defendant, on or about 30<sup>th</sup> November 2015, the 2<sup>nd</sup> defendant erected a sign board on the suit property and along Thika – Nyeri Highway reading "Pioneer Girls School". The plaintiff averred that it had not consented to the 2<sup>nd</sup> defendant's takeover of the suit property from the 1<sup>st</sup> defendant. The plaintiff averred that the 2<sup>nd</sup> defendant's entry onto the suit property amounted to trespass and had subjected it to loss and damage.

Together with the plaint the plaintiff filed an application by way of Notice of Motion dated 4<sup>th</sup> December, 2015 seeking the following prayers:-

1. This application be certified urgent and be heard ex-parte in the first instance.
2. Pending the hearing and determination of this application inter partes, a temporary injunction be issued restraining the 2<sup>nd</sup> defendant whether by itself or its agents and/or employees or otherwise whomsoever from trespassing, continuing to trespass, transferring, leasing, subletting, interfering and/or otherwise dealing with the plaintiff's property being a portion of the property known as L.R No. 12157/2 situated within Gatanga Sub-County of Muranga County (the suit property) including operating a school and/or any other business on the suit property or in any other manner howsoever interfering with the plaintiff's rights over suit property.
3. Pending the hearing and determination of this suit, an interlocutory injunction be issued restraining the 2<sup>nd</sup> defendant whether by itself or its agents and/or employees or otherwise whomsoever from trespassing, continuing to trespass, transferring, leasing, subletting and/or otherwise dealing with the plaintiff's property being a portion of the property known as L.R No. 12157/2 situated within Gatanga Sub-County of Muranga County (the suit property) including operating a school and/or any other business on the suit property or in any other manner howsoever interfering with the plaintiff's rights over the suit Property.
4. Pending the hearing and determination of this application inter partes, a temporary injunction be issued restraining the 1<sup>st</sup> defendant whether by itself or its agents and/or employees or otherwise

whomsoever from transferring possession of the plaintiff's property being a portion of the property known as L.R No. 12157/2 situated within Gatanga Sub-County to the 2<sup>nd</sup> defendant or any other third party.

5. Pending the hearing and determination of this suit, an interlocutory injunction be issued restraining the 1<sup>st</sup> defendant whether by itself or its agents and/or employees or otherwise whomsoever from transferring possession of the plaintiff's property being a portion of the property known as L.R No. 12157/2 situated within Gatanga Sub-County of Muranga County to the 2<sup>nd</sup> defendant and/or any other third party.

6. Pending the hearing and determination of this application inter partes, a mandatory injunction be issued compelling the 2<sup>nd</sup> defendant whether by itself or its agent and/or employees or otherwise whomsoever to remove the sign board of "Pioneer Girls School" from the plaintiff's property being a portion of the property known as L.R No. 12157/2 situated within Gatanga Sub-County of Muranga County.

7. Pending the hearing of this suit, a mandatory injunction to issue compelling the 2<sup>nd</sup> defendant whether by itself or its agents and/or employees or otherwise whomsoever to remove the sign board of "Pioneer Girls School" the plaintiff's property being a portion of the property known as L.R No. 12157/2 situated within Gatanga Sub-County of Muranga County.

8. Costs of this application be provided for.

The plaintiff's application for injunction dated 4<sup>th</sup> December, 2015 came up for hearing ex parte on 7<sup>th</sup> December, 2015 when the court directed that the same be served upon the defendants for hearing inter partes on 17<sup>th</sup> December, 2015. The application was duly served upon the defendants and the 1<sup>st</sup> defendant appointed the firm of Vusha, Onsembe & Mambiri Advocates to act for it while the 2<sup>nd</sup> defendant appointed the firm of C. N. Kihara & Company Advocates. When the plaintiff's application came up for hearing inter partes on 17<sup>th</sup> December, 2015, the court at the request of the defendants granted them leave to file replying affidavits to the application with liberty to the plaintiff to file a supplementary affidavit and stood over the injunction application to 20<sup>th</sup> January, 2016 for hearing. In the meantime, the court granted prayers 2 and 4 of the application so as to preserve the suit property pending the hearing of the application.

The orders that were granted by the court on 17<sup>th</sup> December, 2015 restrained the 1<sup>st</sup> defendant from transferring possession of the suit property to the 2<sup>nd</sup> defendant or any third party and the 2<sup>nd</sup> defendant from among others, trespassing on the suit property, interfering and/or otherwise dealing with the said property including operating a school and/or any other business on the property. The said order was extracted, signed and sealed by the Deputy Registrar of this court on 23<sup>rd</sup> December, 2015.

#### The application before the court:

What I now have before me is the Notice of Motion application dated 12<sup>th</sup> January, 2016 brought by the plaintiff seeking the following orders:

- 1) That Mr. David Kigwe of the 1<sup>st</sup> defendant and Peter Munga of the 2<sup>nd</sup> defendant be arrested and committed to prison for a term not exceeding 6 months for disobeying orders made on 17<sup>th</sup> December, 2015.
- 2) The officer commanding Ngati Police Station be directed to enforce the warrants of arrest issued by the court.
- 3) The court does grant any other appropriate orders deemed fit in the circumstances.

#### 4) Costs of the application.

The application was brought on the grounds that the defendants had disobeyed the order that was made by the court on 17<sup>th</sup> December, 2015 which was duly served upon them. The plaintiff contended that in breach of the said order, the 2<sup>nd</sup> defendant had taken possession of the suit property and had started operating a school thereon known as Pioneer Girls School. In the affidavit in support of the application sworn on 12<sup>th</sup> January, 2016 by Harry Odondi, the plaintiff averred that the defendants were duly represented in court on 17<sup>th</sup> December, 2015 when the said order was made. The plaintiff averred further, that the 1<sup>st</sup> and 2<sup>nd</sup> defendants were served with the said order together with penal notices on the on 8<sup>th</sup> and 11<sup>th</sup> January, 2016 respectively. To demonstrate that the 2<sup>nd</sup> defendant had taken possession of the suit property and was in occupation thereof as of the date of the application, the plaintiff annexed to its affidavit in support of the application, photographs showing the presence of school buses branded "Pioneer Girls" and employees of the said school in branded uniform on the suit property. The plaintiff averred that a letter dated 23<sup>rd</sup> December, 2015 by its advocates to the defendants' advocates notifying them of the breach of the said order and warning that appropriate action would be taken if the disobedience continued did not elicit any response.

The plaintiff averred that contrary to the terms of the said order, signboards for Pioneer Girls School were still erected next to the suit property as well as along the Thika Highway. The plaintiff averred that various activities which were going on in the suit property were consistent with the defendants' averments that the 2<sup>nd</sup> defendant had carried out and was continuing to carry out extensive renovations on the suit property. The plaintiff averred that the heavy vehicular and human traffic to and from the suit property were characteristic of parents and students accessing the property.

#### The response to the application:

The application was opposed by both defendants and the alleged contemnors. The 1<sup>st</sup> defendant filed a replying affidavit sworn on 28<sup>th</sup> January, 2016 by one of its directors, David Kigwe who is one of the alleged contemnors. David Kigwe denied having disobeyed the order of the court which was made on 17<sup>th</sup> December, 2015. He stated that he is a law abiding citizen who respects the rule of law and administration of justice. Mr. Kigwe averred that the plaintiff had not demonstrated how he disobeyed or obstructed the administration of justice which constitutes contempt of the order made on 17<sup>th</sup> December, 2015. He stated that prior to the issuance of the said order of 17<sup>th</sup> December, 2015 the 1<sup>st</sup> defendant had already shut down its operations and cleared with students and teachers of Choice Imani International School which the 1<sup>st</sup> defendant was operating on the suit property.

Mr. Kigwe stated that the 1<sup>st</sup> defendant had remained in possession of the suit property pending inspection and handing over of the property to the plaintiff and on account of the orders which were made in ELC No. 306 of 2015 which required it to remain in possession of the property pending the hearing and determination of the arbitral proceedings or the said case. He averred that the 1<sup>st</sup> defendant withdrew ELC No. 306 of 2015 on 11<sup>th</sup> December, 2015 and by the time the order the subject of these proceedings was made on 17<sup>th</sup> December, 2015, the 1<sup>st</sup> defendant had no interest in the suit property having relinquished its right as a tenant. Mr. Kigwe averred that the 1<sup>st</sup> defendant was ready to hand over possession of the suit property to the plaintiff so that the plaintiff could enter into a new lease with the 2<sup>nd</sup> defendant.

Mr. Kigwe averred that the 2<sup>nd</sup> defendant took possession of the suit property before the order said to have been disobeyed was made on 17<sup>th</sup> December 2015. Mr. Kigwe averred that it was unfair for the plaintiff to cite him for contempt when possession of the suit property had already been taken by the 2<sup>nd</sup> defendant. He averred that the order of 17<sup>th</sup> December, 2015 was incapable of enforcement as against the 1<sup>st</sup> defendant as it had already parted with possession of the suit property to the 2<sup>nd</sup> defendant when the order was made.

The 2<sup>nd</sup> defendant opposed the application through a preliminary objection dated 14<sup>th</sup> January, 2016. The 2<sup>nd</sup> defendant contended that the application was fatally defective for want of leave of the court as a condition precedent prior to the making thereof. The 2<sup>nd</sup> defendant contended further, that the application was misconceived and fatally defective since the plaintiff had misconstrued the effect of the order that was given on 17<sup>th</sup> December, 2015. The 2<sup>nd</sup> defendant contended that the said order was extracted irregularly without following the prescribed procedure.

The 2<sup>nd</sup> defendant contended that the plaintiff had not established a prima facie case with regard to the alleged contempt to warrant an answer from any of the defendants. The 2<sup>nd</sup> defendant averred further that the conduct of the 2<sup>nd</sup> defendant's officer which was alleged to constitute contempt had not been set out and was imprecise. The 2<sup>nd</sup> defendant contended further that, the manner in which it was alleged to have disobeyed or obstructed the administration of justice had also not been set out. The 1<sup>st</sup> defendant contended that the court's jurisdiction to punish for contempt had been irregularly invoked and that the application was based on hearsay evidence and was intended to vex its right to due process before being deprived any of its property and freedom.

The 2<sup>nd</sup> defendant contended that the application was vexatious and an abuse of the court process having been filed during the existence of ELC No. 306 of 2015 which had a subsisting interlocutory injunction order against the plaintiff herein over the same subject matter. The 2<sup>nd</sup> defendant averred that its officers are law abiding persons who had demonstrated fidelity to the rule of law, respected the administration of justice and would not intentionally disobey any court order. The 2<sup>nd</sup> defendant urged the court to accept appeasement should its officers be found guilty of contempt instead of the penal sanctions proposed by the plaintiff.

On 4<sup>th</sup> October, 2016, the second alleged contemnor, Peter Kahara Munga (hereinafter referred to only as "Peter Munga") appointed the firm of Macharia Kahonge & Company Advocates to act for him in the contempt application. Peter Munga opposed the application through a notice of preliminary objection and a replying affidavit sworn on 4<sup>th</sup> October, 2016. He stated that he was a trustee and not a director of the 2<sup>nd</sup> defendant. He denied that the defendants had disobeyed the order of the court which was made on 17<sup>th</sup> December, 2015. He stated that the order was extracted a day before the filing of the contempt application which was *mala fides*. He averred that it was unclear to him as to which parcel of land was in issue since correspondence and the lease agreement between the plaintiff and the 1<sup>st</sup> defendant referred to L.R. No. 12157/4 while the plaint and the application before the court referred to L.R No. 12157/2. He averred that in its defence in ELC No. 306 of 2015 the plaintiff had argued that the court had no jurisdiction in the matter since the lease agreement dated 3<sup>rd</sup> September, 2013 with the 1<sup>st</sup> defendant had an arbitration clause. He averred that the defence that was taken in that case by the plaintiff is contrary to the arguments the plaintiff has put forward herein.

Peter Munga contended that the plaintiff had not set out details of his wrong doing as an individual since he was not a party to this suit and no application for his joinder had been made. He stated that before a contempt application is made, the person sought to be punished must first be served with the court order accompanied by a penal notice stating clearly what the respondent is required to do and within what period. He stated that since the application before the court was seeking to limit his personal liberty with penal consequences of criminal nature, he was entitled to be accorded his constitutional right to a fair hearing. He contended that the 2<sup>nd</sup> defendant had filed several documents opposing the plaintiff's claim and that in its defence and counter-claim, the 2<sup>nd</sup> defendant had stated that it made substantial payments and incurred expenditure in renovating the school in dispute while acting on representations made by the plaintiff who had now gone back on its promises. He stated that the 2<sup>nd</sup> defendant had also raised an objection to the jurisdiction of the court in its defence and counter-claim which ought to be heard and determined first.

Peter Munga contended further that the 2<sup>nd</sup> defendant had commenced substantial rehabilitation and repair works on the suit property in preparation for the commencement of its lease term. He stated that

other activities the 2<sup>nd</sup> defendant had undertaken included dispatching fliers and interviewing students as well as entering into contracts with teachers and other skilled personnel. He stated that the wording of the order in issue took away the 2<sup>nd</sup> defendant's right to have the dispute and matters in controversy resolved by application of law by an appropriate, independent and impartial body as provided in Article 50(1) of the Constitution. He averred that the right to fair hearing extends to the requirement to be presumed innocent until proven guilty, not to be convicted for an act or omission committed or omitted when it was not an offence as well as the right not to be deprived of one's property arbitrarily.

Peter Munga averred that he was unable to appreciate what he omitted to do or did within less than 12 hours that lapsed between the time the order was served upon him and the filing of the instant application. He apologized for any action or omission constituting wrongdoing on his part and on the part of the 2<sup>nd</sup> defendant.

#### The submissions by the parties:

The advocates for the parties filed written submissions which they highlighted orally before me over several days. The plaintiff filed its submissions on 25<sup>th</sup> February, 2016. The plaintiff's advocate, Ms. Khasindi in her oral submissions before the court, stated that the contempt application was brought under the Civil Procedure Act, Chapter 21 Laws of Kenya and not under the Judicature Act, Chapter 8 Laws of Kenya. She argued that in application of this nature, an applicant must establish the terms of the order; knowledge of the order and deliberate breach of the same. She submitted that at the time the application dated 4<sup>th</sup> December, 2015 that gave rise to the order dated 17<sup>th</sup> December 2015 was made, there was a threat of the 2<sup>nd</sup> defendant starting a school on the suit property necessitating the orders to preserve the suit property.

Ms. Khasindi submitted that prayer 2 of the application which was granted by the court restrained the 2<sup>nd</sup> defendant from trespassing, interfering or otherwise dealing with the suit property which is a portion of LR No. 12157/2. She submitted that the order also restrained the 2<sup>nd</sup> defendant from operating a school on the suit property. She submitted that prayer 4 that was also granted restrained the 1<sup>st</sup> defendant from transferring possession of the suit property to the 2<sup>nd</sup> defendant. She submitted that prior to the filing of this suit, there were negotiations between the plaintiff and the 1<sup>st</sup> defendant on the handing over of the suit property and that the 1<sup>st</sup> defendant had introduced to the plaintiff the 2<sup>nd</sup> defendant which was interested in taking over its lease. She submitted that the negotiations between the plaintiff and the 2<sup>nd</sup> defendant collapsed.

Ms. Kashindi submitted that both defendants were represented in court when the order in question was made. Counsel submitted that David Kigwe of the 1<sup>st</sup> defendant and Peter Munga of the 2<sup>nd</sup> defendant who are sought to be committed for contempt were served with the order and penal notices on 8<sup>th</sup> August, 2016 and 11<sup>th</sup> August, 2016 respectively. She stated that an affidavit by Duncan Munyao to that effect was on the court record and further, that there were judicial authorities to the effect that knowledge of an order supersedes personal service. She submitted further that the defendants were aware of the court order which they even attempted to set aside and as such they deliberately breached the same. Ms. Khasindi submitted that the breach complained of was continuous since the 2<sup>nd</sup> defendant was still running a school on the suit property.

With regard to the 1<sup>st</sup> defendant, Ms. Khasindi submitted that it breached the court order by handing over possession of the suit property to the 2<sup>nd</sup> defendant. Ms. Kashindi contended that the 2<sup>nd</sup> defendant had not addressed the application as it had not explained why it breached the order. She argued that the 2<sup>nd</sup> defendant had gone into great length to justify its continued occupation of the suit property. She submitted that the 1<sup>st</sup> defendant who claimed inability to comply with the court order because the 2<sup>nd</sup> defendant was in possession had initially told the court that to deliver possession of the suit property to the plaintiff was unfair and onerous.

Ms. Khasindi contended that the representations referred to by the 2<sup>nd</sup> defendant were irrelevant to the instant application as they had been made before the order in question was issued. She submitted further, that the description of the suit property was LR No. 12157/2 as indicated in the plaint and the order and that it was the lease agreement dated 3<sup>rd</sup> September, 2013 that erroneously referred to the property as LR No. 12157/4. She submitted that the 2<sup>nd</sup> defendant was not party to the said lease agreement which was in any event terminated and that all parties were aware of the property which was the subject of the court order.

In further submission, Ms. Khasindi submitted that the order was clear and that although the same was not served upon the defendants before extraction, no prejudice had been suffered by the defendants. Counsel submitted that the 2<sup>nd</sup> defendant which had dwelt so much on issues which arose in ELC No. 306 of 2015 was not party to the said suit which had in any event, been terminated. She submitted that Peter Munga had not explained why he disobeyed the court order and that his alleged constitutional rights could not override the plaintiff's rights. She submitted that Peter Munga had admitted that the 2<sup>nd</sup> defendant had no authority to be on the suit property and had even sent emissaries to the plaintiff to allow the 2<sup>nd</sup> defendant to occupy the property.

Ms. Khasindi referred the court to an agreement between the defendants dated 27<sup>th</sup> November, 2015 attached to the affidavit of David Kigwe sworn on 28<sup>th</sup> January 2016 where the 1<sup>st</sup> defendant undertook to give vacant possession of the suit property to the 2<sup>nd</sup> defendant and averred that this was in clear breach of the court order. Counsel submitted that the authorities which were cited by the defendants were distinguishable as they referred to applications brought under the Judicature Act while the instant application was premised on Order 40 Rule 3 of the Civil Procedure Rules.

In her rejoinder to the submissions made by the defendants, Ms. Kashindi submitted that the court had jurisdiction to entertain the application and that a director or officer of a company can be found liable for contempt committed by the company. She submitted that what the court needed to ascertain was whether there was knowledge of the order and breach. Counsel stated that the case of Christine Wangare Gachege vs. Elizabeth Wanjiru Evans & others Civil Application No. 233 of 2007 should be disregarded as the present application was not based on section 5 of the Judicature Act but was brought under Order 40 Rule 3 of the Civil Procedure Rules and section 63 of the Civil Procedure Act.

Ms. Kashindi argued that one cannot justify disobedience of a court order by relying on constitutional provisions. She submitted that there had been no discrimination against Peter Munga who was involved in these proceedings and had sworn affidavits. She submitted that Article 24 of the Constitution does not set out rights which can be limited and that section 63 of the Civil Procedure Act and Order 40 Rule 3 of the Civil Procedure Rules provide a limitation to the right to liberty. Ms. Khasindi contended that an application by the 2<sup>nd</sup> defendant to have the orders in question set aside was supported by an affidavit sworn by Peter Munga. She submitted that Peter Munga was therefore aware of the order restraining the defendants from running the school which they continue to run on the suit property.

Ms. Khasindi submitted that prayer 2 of the application referred to L.R No. 12157/2 which was the suit property and that the erroneous reference to the suit property in the lease as L.R No. 12157/4 was a non-issue as there was no dispute as to the parcel of land where the school was located. Further, that the 2<sup>nd</sup> defendant and Peter Munga were not parties to the said lease.

In respect to the constitutionality or otherwise of Order 40 Rule 3, Ms. Khasindi submitted that the proceedings before the court were not on the constitutionality of any provision of the law and that the respondents should file a petition in that regard should they wish to have the issue determined. On the 1<sup>st</sup> defendant's assertion that it had no interest in the suit property as confirmed by its withdrawal of the earlier suit, Counsel submitted that the same did not constitute an answer to the application before the court. She argued that the prayers sought in the 1<sup>st</sup> defendant's counter-claim amounted to an admission that the 1<sup>st</sup> defendant parted with possession of the suit property in breach of the court order.

Ms. Khasindi submitted that when the order was issued on 17<sup>th</sup> December 2015, the school had not commenced operation. Counsel submitted that the 2<sup>nd</sup> defendant was not a party to ELC No. 306 of 2015 which stands withdrawn following a notice of withdrawal filed in that suit. Counsel argued that the suit was withdrawn under Order 25 Rule 1 of the Civil Procedure Rules and that it was not necessary for any endorsement to be made before the withdrawal. The plaintiff submitted that the issue raised by Mr. Kihara such as the competency of the suit could only be determined at trial. Counsel argued that it was not necessary for an authority to swear an affidavit to be annexed to the affidavit. While admitting that Peter Munga was not party to this suit, Ms. Khasindi submitted that he nonetheless controlled an entity that disobeyed a court order.

In response to the submissions by Ms. Khasindi, the learned Counsel for the 1<sup>st</sup> defendant Ms. Mambiri relied on the affidavit of David Kigwe sworn on 20<sup>th</sup> January, 2016 and the submissions the 1<sup>st</sup> defendant had filed in court on 14<sup>th</sup> March 2016. She submitted that in October, 2015 prior to the issuance of the court order the subject of these proceedings, Mr. Kigwe had already closed the school the 1<sup>st</sup> defendant was running on the suit property. She submitted that Mr. Kigwe only kept possession of the property pending determination of ELC No. 306 of 2015 which was withdrawn on 11<sup>th</sup> December, 2015. She submitted that the withdrawal of the aforesaid suit meant that the 1<sup>st</sup> defendant was not contesting the termination of the lease. Ms. Mambiri submitted that when the order herein was made on 17<sup>th</sup> December 2015, the 1<sup>st</sup> defendant had relinquished its rights over the suit property and could therefore not grant possession of the same to the 2<sup>nd</sup> defendant.

Counsel submitted that from the evidence on record, the 2<sup>nd</sup> defendant had already taken possession of the suit property by the time the order in question was made. Counsel referred to paragraph 27 of the affidavit of Harry Odondi sworn on 12<sup>th</sup> January 2016 in which he had stated that the plaintiff had taken issue with the 2<sup>nd</sup> defendant taking possession of the suit property as at September 2015. She submitted further that the 2<sup>nd</sup> defendant had in an affidavit sworn on 30<sup>th</sup> December 2015 admitted to have substantially taken possession of the suit property and that by 8<sup>th</sup> December 2015, the 2<sup>nd</sup> defendant had informed the public of its intention to start Pioneer Girls School. Ms. Mambiri submitted that before the order in contention was issued, the said school was already running and there is no way the 1<sup>st</sup> defendant could have been restrained from handing over possession of the suit property to the 2<sup>nd</sup> defendant which was already in possession.

In her further submission, Ms. Mambiri stated that the agreement for sale between the defendants did not give vacant possession of the suit property to the 2<sup>nd</sup> defendant. She submitted that clause 4.1.2(b) of the said agreement provided that the 2<sup>nd</sup> defendant was to pursue the lease directly with the plaintiff. Counsel submitted that the 1<sup>st</sup> defendant had through letters dated 30<sup>th</sup> November, 2015 informed the plaintiff and the 2<sup>nd</sup> defendant's previous advocates that it was not privy to a sign post erected by the 2<sup>nd</sup> defendant along Thika Road without its consent.

Mr. Kihara learned Counsel for the 2<sup>nd</sup> defendant filed the 1<sup>st</sup> defendant's submissions dated 4<sup>th</sup> October 2016 on the same date. In his oral submission, he submitted that although the plaintiff had sought 3 substantive prayers in the instant application, there was no application to commit the 2<sup>nd</sup> defendant to jail for contempt of court. He argued that an application under Order 40 of the Civil Procedure Rules should be made against parties before the court. Counsel contended that the grounds in support of the application were at variance with the prayers and further, that the grounds attacked the defendants generally without setting out particulars which are distinct to the 1<sup>st</sup> and 2<sup>nd</sup> defendants.

Mr. Kihara submitted that that prior to the filing of this suit on 4<sup>th</sup> December 2015, there existed ELC No. 306 of 2015 which had an injunction order in favour of the 1<sup>st</sup> defendant as against the plaintiff herein over the same subject matter. He submitted that the dispute in ELC No. 306 of 2015 was in respect to the actual acreage of LR No. 12157/4 said to be 75 acres as well as the rent arrears. He argued that the title document exhibited in this suit was for a different parcel of land and further, that the dispute as to the size

and parcel number for the disputed property had not been resolved when this suit was filed.

Counsel argued that the plaintiff did not make full and frank disclosure to the court in respect of the dispute as to the actual size and description of the suit property before the court granted the interim orders of injunction. Mr. Kihara submitted further that the orders sought herein could have been sought in ELC No. 306 of 2015. Mr. Kihara argued further that the order of 17<sup>th</sup> December 2015 was framed in a way that made it mandatory in nature and did not save the order that had been made in ELC 306 of 2015. He submitted that the order issued herein was in conflict with the order that was made in ELC No. 306 of 2015.

Mr. Kihara submitted that the 2<sup>nd</sup> defendant had talked to the plaintiff which had agreed to meet the 2<sup>nd</sup> defendant as a prospective purchaser of the business of the 1<sup>st</sup> defendant. He submitted that the plaintiff had asked the 1<sup>st</sup> defendant to finalize the purchase of its business after which the 2<sup>nd</sup> defendant would be issued with a lease. Counsel argued that the only dispute that existed between the plaintiff and the 1<sup>st</sup> defendant was in respect to rent arrears. He submitted that the 2<sup>nd</sup> defendant was entitled to equitable reliefs since what remained after the negotiations between the plaintiff and the 2<sup>nd</sup> defendant were the terms of the new lease.

Mr. Kihara submitted that the persons sought to be committed for contempt are not rogues but law abiding citizens. He stated that through an application dated 30<sup>th</sup> December, 2015 as amended on 2<sup>nd</sup> September, 2016, the alleged contemnors moved to court to seek an interpretation of the order in question. He submitted that in the said application, they explained that the 2<sup>nd</sup> defendant had entered into a sale transaction with the 1<sup>st</sup> defendant and that the 2<sup>nd</sup> defendant continued to pay rent to the plaintiff on behalf of the 1<sup>st</sup> defendant. Further, that the correspondence between the plaintiff and the 2<sup>nd</sup> defendant was exhibited and the 2<sup>nd</sup> defendant had demonstrated that it had painted the premises and purchased a lot of equipment on site. Counsel submitted that a letter showing that an agreement for the plaintiff to lease the suit property to the 2<sup>nd</sup> defendant had been reached was exhibited and that the court was also informed that students had been enrolled.

Mr. Kihara submitted that the status quo as at the time when the order was made is not in dispute and that had the 2<sup>nd</sup> defendant been heard on 17<sup>th</sup> December, 2015, it could have argued that the plaintiff was abusing the court process since the order in ELC No. 306 of 2015 had not been discharged. While admitting that the 2<sup>nd</sup> defendant was not a party to the lease agreement between the plaintiff and the 1<sup>st</sup> defendant, Counsel argued that the 2<sup>nd</sup> defendant was a protected tenant on the suit property and as such the court lacked jurisdiction under the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, Chapter 301 Laws of Kenya to entertain the plaintiff's claim.

Counsel made reference to the provisions of section 73, 74 and 75 of the Land Act, 2012 and submitted that a purported notice by the plaintiff to terminate the lease of the 1<sup>st</sup> defendant was defective and therefore a nullity. Further, that a notice issued in respect to rent which is subsequently paid becomes superfluous. Mr. Kihara argued that where a tenancy of the head tenant is unlawfully terminated, the sub-tenant is entitled to ask for the balance of the unexpired term of the lease.

In his further submission, Counsel argued that an ex-parte mandatory injunction is not envisaged under Order 40 of the Civil Procedure Rules. Further, that if the court concludes that the 2<sup>nd</sup> defendant was in possession when the order was made, the application for contempt should have been brought under the Judicature Act. Counsel submitted that in cases of eviction, a party cannot be held in contempt unless a time limit within which to vacate the premises was given.

Mr. Kihara argued that the 1<sup>st</sup> and 2<sup>nd</sup> defendants who were served with the order on 8<sup>th</sup> and 11<sup>th</sup> January 2016 respectively were not parties to the contempt application. Further, that the 2<sup>nd</sup> defendant who was served a day prior to the filing of this application was not given time to comply since service of the order was only effected for purposes of this application. He argued that the application which was brought after

the 2<sup>nd</sup> defendant had sought interpretation of the order was an abuse of the court process. Further, that since the order issued in ELC No. 306 of 2015 was still in existence on 4<sup>th</sup> December, 2015, the bonafides of the plaintiff in bringing this suit was eroded by its failure to have ELC No. 306 of 2015 terminated.

It was also submitted by Mr. Kihara that the 2<sup>nd</sup> defendant understood the order to mean maintenance of status quo. Counsel urged that as at 12<sup>th</sup> January, 2016, nothing had changed from what was on the ground on 17<sup>th</sup> December, 2015. He argued that since the acts sought to be restrained had taken place, the order had been overtaken by events. Reference was made to paragraph 21 of the affidavit in support of the application where the plaintiff had contended that the 2<sup>nd</sup> defendant was in possession of the suit property and the prayer for a temporary mandatory injunction which was declined by the court. Mr. Kihara submitted that in the circumstances, the orders of 17<sup>th</sup> December, 2015 were vague and difficult to comprehend.

Counsel stated that the plaintiff extracted the order without the 2<sup>nd</sup> defendant approving the same and that the order as extracted amounted to summary eviction of the 2<sup>nd</sup> defendant. He averred that by the time the order was issued, the 2<sup>nd</sup> defendant had a right to be in the suit property pursuant to an order issued in ELC No. 306 of 2015 which had not been set aside and which order was vacated on 8<sup>th</sup> December, 2015 when the 2<sup>nd</sup> defendant was already in possession. Mr. Kihara contended that the plaintiff had not moved the court with clean hands and was therefore the party who was causing indignity to the court and the author of the mischief it was complaining about.

It was also submitted by Mr. Kihara that the application had not specified which order had been disobeyed by which party and that the orders sought were vague. Further, that the application had been brought under Order 40 Rule 3 of the Civil Procedure Rules which provides for other reliefs other than custodial sentence. Mr. Kihara argued that the court had jurisdiction over civil and not criminal contempt and that the plaintiff herein had invoked the criminal process. He submitted that where criminal sanctions have been sought, the court must blend the procedure in the Civil Procedure Rules with the requirements of a fair hearing under the Constitution and that the plaintiff had to state clearly what the defendants were accused of.

In his further submission, Counsel submitted that in its defence and counter-claim, the 2<sup>nd</sup> defendant had raised the issue of the jurisdiction of this court to hear the claim. Counsel argued that the relationship between the plaintiff and the 1<sup>st</sup> defendant as at the time this suit was filed was guided by the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, Chapter 301 Laws of Kenya. He submitted that since paragraph 23 of the lease provided that the same could be terminated without default before the end of the lease, the lease was controlled and any dispute arising therefrom should have been referred to the Business Premises Rent Tribunal. He submitted further, that the plaintiff's authority to institute this suit was also under challenge and that in the absence of authority, the proceedings are a nullity and should be struck out.

Mr. Kahonge, Counsel for Peter Munga was the last to make submission. Mr. Kahonge submitted that Peter Munga was not a party to this suit. He argued that under Order 40 Rule 3 of the Civil Procedure Rules, contempt proceedings can only be brought against a party to the suit and as such the contempt application was defective as it should have been directed against the 2 defendant. He submitted further, that since this application was lodged before the enactment of the Contempt of Court Act, 2016, the court should adopt the procedure that prevailed prior to the enactment of the said Act. He submitted that the applicable law was stated in the case of Christine Wangare Gachege vs. Elizabeth Wanjiru Evans & others Civil Application No. 233 of 2007 and that by moving the court by way of Notice of Motion instead of an application notice, the plaintiff had failed to comply with substantive and procedural law. Further, that whereas service was mandatory owing to the quasi-criminal nature of contempt proceedings where a person's liberty is at stake, Peter Munga had not personally been served with this application.

Counsel also submitted that the application did not state what Peter Munga had done or had failed to do. Counsel made reference to Article 27 of the Constitution and argued that bringing these proceedings

against Peter Munga and leaving out other trustees of the 2<sup>nd</sup> defendant was discriminatory. Reliance was also placed on Article 50(2)(a) of the Constitution. Mr.Kahonge submitted that Mr. Munga was entitled to be informed of the charge against him.

Counsel submitted that different parcels of land were the subject of these proceedings and that the charges in the application were vague. Mr.Kahonge argued that under section 25 of the Contempt of Court Act, a person facing contempt of court charges should be informed of the charge and afforded an opportunity to make a defence. Mr. Kahonge contended further that contempt of court was not one of the limitations of rights and fundamental freedoms contemplated under Article 24 of the Constitution. He argued that the Constitution does not provide for punishment for contempt and therefore Order 40 Rule 3 of the Civil procedure Rules was unconstitutional as it did not have constitutional underpinnings.

#### The Determination:

I have considered the plaintiff's application together with the affidavit filed in support thereof. I have also considered the alleged contemnors and the defendants' preliminary objections, grounds of opposition and replying affidavits which were filed in opposition to the application. Finally I have considered both written and oral submissions which were made before me by the advocates for the parties and the various authorities that were cited in support thereof. As I have stated earlier in this ruling, the parties spent considerable time arguing the application herein. My analysis of the submissions by the parties attests to this fact. I am of the view that the parties spent considerable time and effort submitting on issues which were neither relevant nor material to the application before the court. The only issues that arise for determination in the application before me are, whether the 1<sup>st</sup> and 2<sup>nd</sup> defendants disobeyed the order which was made herein on 17<sup>th</sup> December, 2015 and if they did, whether they should be punished. The respondents submitted at length on the jurisdiction of the court to grant the order of 17<sup>th</sup> December, 2017, the validity of the said order, the constitutionality of the same and the fairness thereof.

It is not disputed that on 17<sup>th</sup> December, 2015, this court made among others, the following orders:

1. *“ THAT a temporary injunction be and is hereby issued restraining the 2<sup>nd</sup> defendant whether by itself or its agents and/or employees or otherwise whomsoever from trespassing, continuing to trespass, transferring, leasing, subletting, interfering and/or otherwise dealing with the plaintiff's property being a portion of the property known as L.R No. 12157/2 situated within Gatanga Sub-County of Muranga County (the suit property) including operating a school and/or any other business on the suit property or in any other manner howsoever interfering with the plaintiff's rights over suit property pending the hearing of the application on 20<sup>th</sup> January, 2016.*

2. *THAT a temporary injunction be and is hereby issued restraining the 1<sup>st</sup> defendant whether by itself or its agents and/or employees or otherwise whomsoever from transferring possession of the plaintiff's property being a portion of the property known as L.R No. 12157/2 situated within Gatanga Sub-County to the 2<sup>nd</sup> defendant or any other third party pending the hearing of the application on 20<sup>th</sup> January, 2016.”*

It is not disputed that the said orders were given in the presence of the advocates for the defendants. It is also not disputed that a formal order was extracted and personally served upon the alleged contemnors. It is also not disputed that copies of the order that was served upon the contemnors had a penal notice warning the alleged contemnors that disobedience of the order would amount to contempt of court which attracts punishment. The orders that were granted by the court in my view were clear in their terms. The 1<sup>st</sup> defendant was restrained from transferring possession of the suit property to the 2<sup>nd</sup> defendant. The 2<sup>nd</sup> defendant on the other hand was restrained by the court from among others trespassing on the suit property, interfering or otherwise dealing with the suit property including operating a school and/or any other business on the suit property or in any other manner interfering with the plaintiff's rights over the suit property.

It is not disputed that despite the issuance of the said court order in the presence of the advocates for the defendants who strenuously defended them in the present application and personal service of the said order upon the officers of the defendants who are sought to be committed for contempt herein, the 2<sup>nd</sup> defendant is still operating a school on the suit property in the name of Pioneer Girls School. I am convinced from the evidence on record that as at 17<sup>th</sup> December, 2015 when the court made the orders in question, the 1<sup>st</sup> defendant had already given the 2<sup>nd</sup> defendant possession of the suit property. However, the 2<sup>nd</sup> defendant had not started operating a school on the suit property. From the evidence before the court, by the time the plaintiff came to court and obtained the orders sought to be enforced, the 2<sup>nd</sup> defendant was carrying out renovation on the buildings on the suit property and enrolling students for the first term of the school calendar which was to commence in January, 2016. After being served with the said court order or being made aware of the same, the 2<sup>nd</sup> defendant had an obligation to stop all forms of activity on the suit property even if the 2<sup>nd</sup> defendant viewed the order as irregular or illegal. The application which was filed herein by the 2<sup>nd</sup> defendant on 31<sup>st</sup> December, 2015 seeking the discharge of the said order of 17<sup>th</sup> December, 2015 leaves no doubt that as at that date, the 2<sup>nd</sup> defendant was aware of the said order. The affidavit in support of that application was sworn by Peter Munga who described himself as a director of the 2<sup>nd</sup> defendant. He was similarly aware of the order. A company acts through its officers. As a director of the company or a trustee as he has referred to himself in these proceedings, he had an obligation to cause the company to obey the order of the court. In contempt of the order of this court, the 2<sup>nd</sup> defendant proceeded to admit students to Pioneer Girls School run by the 2<sup>nd</sup> defendant on the suit property. It is outrageous to note that even as at the time of arguing the present application the 2<sup>nd</sup> defendant was still operating a school on the suit property in defiance of the said court order. In the case of Hadkison –vs- Hadkinson (1952) ALLER 567, the court stated that;-

*“It was plain and unqualified obligation of every person against or in respect of whom an order was made by a court of competent jurisdiction to obey it unless and until it was discharged and disobedience of such order would as a general rule result in the person disobeying being in contempt and punishable by committal or attachment...”.*

In the case of Kyoga Hauliers Limited vs. Long Distance Truck Drivers & Allied Workers Union, Mombasa CA No. 63 of 2014, (2015) eKLR, the court stated that:

*“The power to deal with contempt of court is provided for under Section 5(1) of the Judicature Act, Section 63(c) of the Civil Procedure Act and Order 40 Rule 3 of the Civil Procedure Rules. Of importance in the determination of this issue is however Section 5(1) of the Judicature Act, since Section 63(c) of the Civil Procedure Act and Order 40 Rule 3 of the Civil Procedure Rules are concerned with disobedience of an order of temporary injunction and resultant consequences which are punishment in the form of imprisonment or attachment and sale of the contemnor’s property”*

In the case of Woburn Estate Limited vs. Margaret Bashforth, Malindi CA No. 18 of 2015,(2016)eKLR the court stated that:

*“The jurisdiction of the High Court (or any other court for that matter) to punish for the violation of its orders cannot be in question. Apart from section 5 (1) of the Judicature Act that vests in the High Court the power, like those of the High Court of Justice in England, to punish any party who violates its orders, the court, by virtue only of being a court has inherent powers to make sure its process is not abused and its authority and dignity is upheld at all times. See Refrigeration and Kitchen Utensils Ltd v Gulabchand Popatlal Shah & Another, Civil Application No.39 of 1990, where it was observed.*

*“A party who knows of an order, whether null or valid, regular or irregular, cannot be permitted to disobey it... It would be most dangerous to hold that the suitors, or their solicitors, could themselves judge whether an order was null or valid-whether it was regular or irregular. That they should come to the court and not take upon themselves to determine*

*such a question.....he should apply to the court that it might be discharged. As long as it exists it must not be disobeyed.””*

In the case of Mutitika vs. Baharini Farm Ltd(1985) KLR 227, it was held that:

1) *“A person who, knowing of an injunction, or an order of stay, wilfully does something, or causes others to do something, to break the injunction or interfere with the stay, is liable to be committed for contempt of court as such a person has by his conduct obstructed justice.*

2) *The standard of proof in contempt proceedings must be higher than proof on a balance of probabilities, and almost, but not exactly, beyond reasonable doubt as it is not safe to extend the latter standard to an offence which is quasi-criminal in nature. The guilt of a contemnor has to be proved with such strictness of proof as is consistent with the gravity of the charge.”*

I am satisfied from the material before me that the plaintiff has proved a charge of contempt against the 2<sup>nd</sup> defendant and that Peter Munga being a principal officer of the 2<sup>nd</sup> defendant has been properly cited for punishment for the disobedience of the order of the court by the 2<sup>nd</sup> defendant. As I have stated above, as at the time when the orders of 17<sup>th</sup> December, 2015 were issued, the 1<sup>st</sup> defendant had already handed over possession of the suit property to the 2<sup>nd</sup> defendant. It is therefore my finding that the 1<sup>st</sup> defendant is not guilty of disobeying the order of this court that was made on 17<sup>th</sup> December, 2015 when it no longer had possession of the suit property. I find no merit in the various objections that had been raised by the 2<sup>nd</sup> defendant and Peter Munga to the application before me. As was stated in the cases that I have cited above, a party served with a court order or who is aware of the order has a duty and obligation to obey the same even if in his opinion the order has been given without jurisdiction, is unconstitutional or is irregular. The 2<sup>nd</sup> defendant took the earliest opportunity to have the order set aside on various grounds. Until the application was heard and allowed, the 2<sup>nd</sup> defendant had to obey the order however distasteful the terms thereof were to the 2<sup>nd</sup> defendant.

For the foregoing reasons, the plaintiff’s application dated 12<sup>th</sup> January, 2016 succeeds in part. This court finds the 2<sup>nd</sup> defendant and its director and/or trustee, Peter Munga guilty of contempt of the order that was made by this court on 17<sup>th</sup> December, 2015 and makes the following orders:

1. In view of the nature of the business which the 2<sup>nd</sup> defendant is carrying out on the suit property which involves education of children, the 2<sup>nd</sup> defendant and the said Peter Munga are granted one hundred and twenty (120) days from the date hereof within which they shall purge their contempt.
2. The Deputy Registrar shall issue Summons to be served upon Peter Munga to appear before this court on 10<sup>th</sup> April, 2018 to address the court in mitigation before a sentence is passed against him.
3. The plaintiff shall have the cost of the application to be paid by the 2<sup>nd</sup> defendant.

**Delivered and signed at Nairobi this 8<sup>th</sup> day of December 2017**

**S. OKONG’O**

**JUDGE**

Ruling read in open court in the presence of:

Mr. Khasindi for the Plaintiff

No appearance for the 1<sup>st</sup> Defendant

Mr. Kihara for the 2<sup>nd</sup> Defendant

Mr. Kahonge for Peter Munga

Catherine Court Assistant