



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**  
**AT KERUGOYA**

**ELC CASE NO. 414 OF 2013**

**(FORMERLY NYERI HIGH COURT CIVIL CASE NO. 30 OF 2009)**

**SIMON NJAGI NJOKA.....PLAINTIFF/APPLICANT**

**VERSUS**

**JAMES GATIMU MURIITHI.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**LEONARD MURIITHI MARITHUKU....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**JOHNSON CHEGE MWANGI.....3<sup>RD</sup> DEFENDANT/RESPONDENT**

**GATIMU KANYI.....4<sup>TH</sup> DEFENDANT/RESPONDENT**

**JOSEPH MURIUKI GATIMU.....5<sup>TH</sup> DEFENDANT/RESPONDENT**

**FAUSTO MWAI GATIMU.....6<sup>TH</sup> DEFENDANT/RESPONDENT**

**RULING**

This case should serve as a wake-up call for parties who rush to Court with applications under certificates of urgency seeking injunctive reliefs but thereafter go to sleep after obtaining favourable orders.

On 17<sup>th</sup> February 2009, **SIMON NJAGI NJOKA**, (the plaintiff herein) filed this suit at the **HIGH COURT** in **NYERI** seeking various orders against the defendants including an order of permanent injunction directed at the defendants from in any way purporting to be the owners of land parcel No. BARAGWI/KARIRU/219 (the suit land).

Simultaneously with that plaint, the plaintiff sought and obtained orders injunctioning the defendants jointly and severally, their servants or persons claiming under them from in any way alienating, entering, cultivating or making any use of the suit land pending the hearing and determination of this suit. That order was actually issued on 23<sup>rd</sup> November 2009 with the consent of the parties by **MAKHANDIA J.** (as he then was) and not by **KASANGO J.** as deponed in the plaintiff's affidavit in support of this application dated 6<sup>th</sup> September 2017 which is the subject of this ruling. In the application, the plaintiff seeks the following orders:

***1. Spent.***

**2. That this Honourable Court be pleased to find that the 3<sup>rd</sup> defendant is in contempt of this Court's orders.**

**3. That the 3<sup>rd</sup> defendant be committed to civil jail for a period of not exceeding six months.**

**4. That costs of this application be provided for.**

The basis of this application is that on 20<sup>th</sup> February 2009, the Honourable Justice **MARY KASANGO** issued prohibitory orders against the defendant from interfering with land parcel No. BARAGWE/KARIRU/219 until this suit is heard and determined. However, despite the existence of the said orders, the 3<sup>rd</sup> defendant has commenced construction of a residential house on the suit land hence this application seeking his committal to civil jail for contempt.

In opposing this application, the 3<sup>rd</sup> defendant swore a replying affidavit in which he deponed, inter alia, that although the orders were issued way back on 18<sup>th</sup> February 2009, he has never been served and has seen them for the first time in this application. Further, that the interim injunction was to be in force upto 2<sup>nd</sup> March 2009 and they were never extended. That he has been in occupation of the suit land even before this suit was filed having obtained orders in **GICHUGU SRMCC No. 41 of 2008** which orders have not been appealed. The 3<sup>rd</sup> defendant therefore urged that this application be dismissed with costs.

When the application came up for hearing on 18<sup>th</sup> October 2014, both **MR. NDUKU** advocate for the plaintiff and **MR. KAGIO** advocate for the defendants agreed that the Court determines it on the basis of the parties' respective affidavits.

I have considered the application and the rival affidavits.

As indicated above, the interim ex-parte orders of injunction were issued earlier but on 23<sup>rd</sup> November 2009, **MAKHANDIA J.** (as he then was) issued the following order by consent of the parties:

***“By consent application dated 17.2.09 be allowed in terms of prayers B & C only. Suit to be set down for hearing on priority basis”***

Prayer (C) which is the relevant order for purpose of this application is an injunction restraining the defendants jointly and severally, their servants or persons claiming under them from in any way alienating, entering, cultivating or making any use of the suit land until the hearing and determination of this suit. The 3<sup>rd</sup> defendant has deponed in his replying affidavit that the order was not served upon him. It is true from a perusal of the record that there is no evidence of when he was served with the said order. However, the order was issued pursuant to a consent by all the parties herein which included the 3<sup>rd</sup> defendant's advocate. An order entered into by consent is binding on all parties to the proceedings – **KENYA COMMERCIAL BANK LTD VS SPECIALIZED ENGINEERING CO. LTD 1982 K.L.R 485.** There is nothing to suggest that the consent order recorded on 23<sup>rd</sup> November 2009 was obtained through fraud or collusion. The 3<sup>rd</sup> defendant therefore had notice of the order because it was issued with the consent and in the presence of his advocate. It is also the law now that knowledge of an order is sufficient for purposes of contempt proceedings even if there was no personal service – **JUSTUS K. MATE & ANOTHER VS MARTIN WAMBORA C.A CIVIL APPEAL No. 24 of 2014.** I am therefore satisfied that the 3<sup>rd</sup> defendant was aware about the order of interlocutory injunction issued on 23<sup>rd</sup> October 2009.

Having said so, is the 3<sup>rd</sup> defendant in contempt of the said order? My view is that he is not. **Order 40 Rule 6 of the Civil Procedure** is couched in the following terms:

***“When a suit in respect of which an interlocutory injunction has been granted is not determined within a period of twelve months from the date of the grant, the injunction shall lapse unless for***

***any sufficient reason the Court orders otherwise***". Emphasis added

My understanding of this provision is that once an interlocutory injunction is granted, the suit upon which that injunction is premised must be heard and determined within a period of twelve months. If for some reasons the suit cannot be heard and determined within that period, then the onus is on the party in whose favour it was issued to go back to the Court with sufficient reason seeking an extension of the said order otherwise it "***shall lapse***" automatically by effluxion of time. The mischief that this rule was intended to cure was the practice whereby a party moves to Court, obtains an interlocutory injunction and while enjoying that relief, takes no steps towards prosecuting the suit. Indeed in some cases, such a party will employ all tactics to ensure that the main suit drags on ad infinitum. Such a situation is clearly not in keeping with the overriding objective of the Court under **Section 1A and 1B of the Civil Procedure Rules** which include the expeditious disposal of cases. **Article 159 (2) (b) of the Constitution** also provides that "***justice shall not be delayed***". That is the statutory underpinning of **Order 40 Rule 6 of the Civil Procedure Rules** and notwithstanding the manner in which an order of interlocutory injunction is worded, it "***shall lapse***" if the suit upon which it was made is not determined within twelve months unless, for sufficient reasons, the Court decides otherwise.

The order upon which this Court is asked to cite the 3<sup>rd</sup> defendant for contempt of Court was issued by **MAKHANDIA J.** (as he then was) on 23<sup>rd</sup> November 2009 some eight (8) years ago who even directed that the suit be heard "***on priority basis***". For various reasons including the death of the 4<sup>th</sup> defendant, this case has not yet commenced hearing. To-date, no orders have been issued extending the interlocutory injunction which has now lapsed. The **BLACK'S LAW DICTIONARY 9<sup>th</sup> EDITION** defines the word "***lapse***" as follows:

***"The termination of a right or privilege because of a failure to exercise it within some time limit or because a contingency has occurred or not occurred"***.

Going by that definition, the order of interlocutory injunction issued on 23<sup>rd</sup> November 2009 came to an end after one year since the suit was not determined within that period as required by law. If the plaintiff was unable to have the suit determined within those time lines, he could, for "***sufficient reasons***" move to Court which, upon being satisfied that the plaintiff has taken steps to have the suit disposed of or that an extension is desirable in the interest of justice, could then exercise its discretion under **Order 50 of the Civil Procedure Rules** to extend the order before it lapsed. That was not done in this case. The result is that a lapsed order cannot form the basis upon which the 3<sup>rd</sup> defendant can be cited for contempt.

The up-shot of the above is that the plaintiff's Notice of Motion dated 6<sup>th</sup> September 2017 is devoid of merit. It is hereby dismissed with costs to the 3<sup>rd</sup> defendant.

**B.N. OLAO**

**JUDGE**

**8<sup>TH</sup> DECEMBER, 2017**

Ruling dated, delivered and signed in open Court this 8<sup>th</sup> day of December 2017

Mr. Kagio for the 3<sup>rd</sup> Defendant present

2<sup>nd</sup> Defendant present

1<sup>st</sup> Defendant present

6<sup>th</sup> Defendant present.

**B.N. OLAO**

**JUDGE**

**8<sup>TH</sup> DECEMBER, 2017**