



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT NAKURU**

**HCC 26 OF 1992**

**NDEFFO COMPANY LIMITED .....  
....PLAINTIFF**

**VERSUS**

**JOHN WACHIRA KAMAU**

**LUCY WANGARI KAMAU( Sued as the Administrators**

**Of the Estate of Florence Nyambura) .....1<sup>ST</sup> DEFENDANT**

**M.H SHAW ( Administrator of the estate of the late J.T Oberholzer.....2<sup>ND</sup> DEFENDANT**

**RULING**

***(Application to punish for alleged disobedience of an order of injunction; such application not to be confused with a Section 5 of the Judicature Act application for contempt; order of injunction stopping sale or dealing in land issued; allegation that there has been a sale and interference with the ground; reliance placed on a letter by alleged purchasers claiming to have purchased the land; no sale agreement nor search to show transfer of the property annexed; such letter not proof enough of sale; not clear whether injunction covered the status on the ground; application not proved and is dismissed; court making further order of status quo)***

1. The application before me is that dated 5 May 2015 filed by the plaintiff. As drawn, it seeks the following orders :-

*(a) That this honourable court be pleased to hold John Wachira Kamau and Lucy Wangari Kamau in contempt of court orders and commit them to civil jail for a period of 6 months or as the court deems fit, for disobeying court orders made on the 10th day of October 2014.*

*(b) That pending interpartes hearing of this application, this honourable court be pleased to order that the OCPD Bahati do ensure that there is no subdividing, partitioning, letting, leasing, sale, erection of structures thereon, trespass, entering, remaining thereon or any other dealings on the parcel of land LR No 6501 by John Wachira Kamau and Lucy Wangari Kamau either by themselves, their agents, servants and anybody claiming under them.*

*(c) That in the alternative this Honourable Court do order the attachment of the 1st defendant/respondent herein, John Wachira Kamau and Lucy Wangari Kamau, properties as a consequence of the breach or disobedience of the court orders issued on 10th October 2014.*

*(d) That the orders granted herein be executed and enforced by OCPD Bahati.*

*(e) That costs of this application be provided for.*

2. The application is based on the following grounds :-

*(1) That this honourable court vide an order dated 10th October 2012, restrained the 3rd and 4th defendant/respondent by themselves, agents, employees, servants, children, spouses, legal representatives, or anybody else claiming authority from them from subdividing, partitioning, leasing, selling, charging or dealing in any other way with parcels of land known as LR Nos. 449 and 6501.*

*(2) That the above mentioned order was issued to be in place and to be enforced pending the hearing and determination of this suit.*

*(3) That subsequently both the 1st and 2nd respondents were served with the said order.*

*(4) That despite being served with the said Order the said John Wachira Kamau and Lucy Wangari Kamau have in blatant disregard of the court order gone ahead to allegedly dispose of the suit parcel LR No. 6501 to Sarah Nyambura Karenju and Catherine Wambui Karenju.*

*(5) That the Orders of this honourable court were meant to maintain the status quo pending the hearing and determination of this suit which has been abused arising from the actions of John Wachira Kamau and Lucy Wangari Kamau.*

*(6) That the actions of John Wachira Kamau and Lucy Wangari Kamau undermine and erode the dignity and authority of this honourable court.*

*(7) That it is in the interest of justice that John Wachira Kamau and Lucy Wangari Kamau suffer the consequences of their actions.*

3. The application is supported by the affidavit of one Charles Mbugua, a director of the plaintiff company and is opposed. Before I go to the gist of the affidavits on record, I think it is necessary that I lay a little background to this suit.

4. This is an old case filed on 20<sup>th</sup> January 1992. The plaint as originally filed had Ndeffo Ltd as the plaintiff and it was against Florence Nyambura as 1st defendant and M.H Shaw (Administrator of the Estate of the late J.T Oberholzer) as 2nd defendant. The properties in issue are two, that is LR numbers 449 and 6501. In the plaint, it was pleaded that these properties belonged to one J.T Oberholzer, and in July 1981, Ndeffo, a land buying company, offered to purchase the same for its members who were already settled on the land. After protracted negotiations, the parties did agree on 18 November 1985, to have Ndeffo purchase the properties and in June 1987, the total consideration was paid to the 2nd defendant, the administrator of the Estate of Oberholzer who had now died. It is pleaded that despite this sale, the 1st defendant, colluded with the 2nd defendant to enter into another sale in August 1987, and obtained consent to transfer from the Nakuru Land Control Board. It is the plaintiff's case that this later sale was fraudulent. In the plaint, Ndeffo has asked for a declaration that it is the legal purchaser of the two suit properties; a declaration that the Land Control Board consent approving the sale of the land to the 1st defendant is null and void; eviction orders; vacant possession and a permanent injunction.

5. The 1st defendant entered appearance and filed defence through which she stated that she is the legal

owner of the two properties having purchased the same from J.T Oberholzer. In the course of time, the 1st defendant died and an application to substitute was made. The same was allowed and John Wachira Kamau (John) and Lucy Wangari Kamau (Lucy) were made the 1st defendant in place of the late Florence Nyambura.

6. Later, the plaintiff filed an application dated 9 May 2013, seeking orders to restrain John and Lucy, from dealing with the suit properties pending hearing and determination of the case. The application was heard and allowed by my predecessor, Waithaka LJ, through a ruling delivered on 10<sup>th</sup> October 2014.

7. In the supporting affidavit, Mr. Charles Mbugua has pointed at the order of 10<sup>th</sup> October 2014 and has averred that the court restrained the defendants from subdividing, portioning, leasing, selling, charging or dealing in any other way with the parcels of land known as LR 449 and 6501 pending hearing of the suit. It is deposed that the order bound John and Lucy, and was served upon them. Despite this, it is alleged that the two, John and Lucy, have gone ahead and disposed the parcel of land LR No. 6501 to Sarah Nyambura Karenju and Catherine Wambui Karenju. He has annexed a letter dated 28<sup>th</sup> January 2015 drawn by the lawyers of Sarah and Catherine addressed to one Elijah Thungu, through which it is stated that the land parcel No. 6501 is now owned by Sarah and Catherine, having acquired the same on 21<sup>st</sup> October 2014 and that Elijah has trespassed into a house which is situated within the said land. It is further alleged that John and Lucy have gone ahead to subdivide and prepare the land for planting, have deposited building materials as well as dug a pit latrine. Some photographs of the site are annexed. It is the view of the plaintiff that the actions of John and Lucy are in violation of the order of 10 October 2014 and they therefore deserve to be punished for contempt.

8. The application is opposed through a replying affidavit sworn by John Wachira Kamau. He has deposed that the suit property was sold to his mother Florence Nyambura by the late Oberholzer and that Florence sold the land parcel No. 6501 many years ago before they (himself and Lucy) came into the picture as administrators of her estate. He has deposed that he does not have possession of the title and he cannot be said to have subdivided it. He has deposed that he does not know Sarah Nyambura Karenju and Catherine Wambui Karenju and has no knowledge of the contents of the letter dated 28<sup>th</sup> January 2015. He has stated that the applicant cannot insinuate that they sold the land parcel No. 6501 to the two persons without demonstrating any sale agreements. He has denied having been in contact with Elijah Thungu or having subdivided, prepared for planting, or having deposited building materials on the land. It is also deposed that the applicant has not served a notice upon the Director of Public Prosecution and that the application is therefore defective.

9. In his submissions, Mr. Kibet for the applicant, inter alia submitted that the respondents participated actively in the application that gave rise to the order of injunction and cannot now say that they do not know who is on the ground. He stated that the respondents are in contempt and deserve to be punished. In his submissions, Mr. Kipkoech for the respondents made written submissions which he highlighted. First he submitted that there is no proper application for contempt as the rules for filing such application have not been adhered to. Secondly, he submitted that the applicant has no right to claim the land in issue as the original owner had properly sold it to Florence Nyambura. He submitted that before her death, Florence had sold the land and that "therefore, there exists no land title in respect to the land in question." He submitted that the respondents had no title and it is impossible for them to sell the land as claimed. Thirdly, he submitted that the respondents are wrongly sued. In his oral address, Mr. Kipkoech submitted inter alia that there is no subsisting suit and that the issues herein were litigated in Nairobi HCCC No. 1933 of 1980. He submitted that the parcels of land claimed do not exist and that there is no evidence tabled that they actually exist. He further submitted that there is no evidence of any transfer of the land to Sarah and Catherine.

10. I have considered the application . I think I first need to address the argument that the application before court is defective and incompetent as proper procedure has not been adhered to. Counsel for the respondent argued that this is an application for contempt and therefore the procedure outlined by the Supreme Court Rules and Procedure of England have to be adhered to. This of course is following the provisions of Section 5 of the Judicature Act, CAP 8, Laws of Kenya, which is drawn as follows :-

## Section 5 . Contempt of Court

(1) *The High Court and the Court of Appeal shall have the same power to punish for contempt as is for the time being possessed by the High Court of Justice in England, and such power shall extend to upholding the authority and dignity of subordinate courts.*

(2) *An order of the High Court made by way of punishment for contempt of court shall be appealable as if it were a conviction and sentence made in the exercise of the ordinary original criminal jurisdiction of the High Court.*

11. It has been decided before, that when filing an application for contempt, one has to follow the procedure outlined in Supreme Court Rules and Procedure of England. See for example the Court of Appeal decision in the case of ***Christine Wangari Gachege vs Elizabeth Wanjiru Evans & 11 Others (2014) eKLR.***

12. I have had a keen look at the present application and I observe that it is brought under the provisions of Section 3A and 63 (c) of the Civil Procedure Act and Order 40 Rule 3 of the Civil Procedure Rules. These provisions of the law are drawn as follows :-

### Section 3A

#### **3A. Saving of inherent powers of court.**

*Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.*

#### **63. Supplemental proceedings**

*In order to prevent the ends of justice from being defeated, the court may, if it is so prescribed—*

(c) *grant a temporary injunction and in case of disobedience commit the person guilty thereof to prison and order that his property be attached and sold.*

#### **Consequence of breach [Order 40, rule 3.]**

(1) *In cases of disobedience, or of breach of any such terms, the court granting an injunction may order the property of the person guilty of such disobedience or breach to be attached, and may also order such person to be detained in prison for a term not exceeding six months unless in the meantime the court directs his release.*

(2) *No attachment under this rule shall remain in force for more than one year, at the end of which time, if the disobedience or breach continues, the property attached may be sold, and out of the proceeds the court may award such compensation as it thinks fit, and shall pay the balance, if any, to the party entitled thereto.*

(3) *An application under this rule shall be made by notice of motion in the same suit.*

13. It will be noted from the above, that Section 63(c) of the Civil Procedure Act and Order 40 Rule 3, do give the court that has issued an injunction, the power to punish for disobedience of that order. Section 3A is a general section giving the court inherent power to issue any order deemed just in the circumstances. The application before me is one which seeks the punishment of the respondents for disobeying an order of injunction. I see nothing wrong in the procedure adopted by the applicants. The order in issue was one of injunction and the application herein is properly premised on Section 63 (c) of the Civil Procedure Act and Order 40 Rule 3 of the Civil Procedure Rules, which are the provisions that squarely deal with the issue of disobedience of an order of injunction.

14. It is apparent that this application is not one brought under Section 5 of the Judicature Act, and indeed it was not necessary to invoke Section 5 of the Judicature Act, for the provisions of Section 63 (c) of the Civil Procedure Act, and Order 40 Rule 3 of the Civil Procedure Rules are self-contained. This application should not be confused with an application for contempt proper, which may be filed under the provisions of Section 5 of the Judicature Act. True the act complained of, if true, would be contemptuous of the orders of court and an application under Section 5 of the Judicature Act could be filed, but since the order in issue is one of injunction, one cannot quarrel if the applicant opts to come under Section 63 (c) of the Civil Procedure Act and Order 40 Rule 3 of the Civil Procedure Rules which directly deal with situations where a person is deemed to have disobeyed an order of injunction, and avoid Section 5 of the Judicature Act.

15. I therefore see no merit in the arguments of counsel for the respondents that the application before court is fatally defective.

16. There are also some arguments raised by the respondents which have absolutely no bearing on this application. It was contended that the land in issue properly belongs to Florence Nyambura as she legally purchased it from the late Obeholzer. That to me is neither here nor there, at least in so far as an application for disobedience of an order of injunction is concerned. That actually is the issue for trial and it has not yet been determined who between Florence and Ndeffo are the proper purchasers of the land parcels in issue. Indeed, that can only be settled after hearing the case on its merits.

17. The core question in issue in this application is whether or not the respondents breached the order of injunction issued on 10<sup>th</sup> October 2014. That order was made pursuant to the application dated 9<sup>th</sup> May 2013. In her ruling, the learned Honourable Judge allowed prayer 3 of the application which was drawn as follows :-

*3. That pending the hearing and determination of this suit, this Honourable court be pleased to issue an order restraining the 3rd and 4th defendant/ respondent by themselves, agents, employees, servants, children, spouses, legal representatives, or anybody else claiming authority from them from subdividing, partitioning, leasing, selling, charging or dealing in any other way with parcels of land known as LR Nos. 449 and 6501.*

18. The 3rd and 4th defendants named in the order are Lucy and John, although I later did direct that they be referred to jointly as the 1st defendants, since they were taking the place of the late Florence, who was the original 1st defendant. There is therefore no doubt that this order applied to them and it behoves upon them to obey it.

19. The respondents have of course refuted that they have disobeyed the said order. Inter alia, they have said that their late mother had sold the land prior to her demise and they have no title to it. I have no evidence before me of any sale by Florence to any person prior to her death. Neither have her successors amended their defence to state that they no longer have any interest in the suit properties. The defence on record still asserts that the land parcels in issue were properly purchased by Florence and that the properties belong to her. There has been no amendment of that pleading, and as I have stated, no evidence of any sale by Florence to any other parties. If there is any sale, any such purchasers can only claim under the title of Florence.

20. The applicants have of course alleged that Lucy and John have sold the suit properties specifically to Sarah and Catherine and it is their view that this sale is clearly in violation of the order of injunction. The applicant has based his allegation on the letter dated 28 January 2015. I have looked at the letter which is written by the law firm of M/s Kanyi Ngure & Company Advocates. I think I need to lay it out as drawn and it is written as follows :-

To

*Elijah Thungu,*

*C/o Engoshura Estate*

*Nakuru.*

*Dear Sir,*

*RE : YOUR UNLAWFUL INVASION AND ENCROACHMENT ON PARCEL NAKURU MUNICIPALITY LR NO. 6501 BELONGING TO SARAH NYAMBURA KARENJU AND CATHERINE WAMBUI KARENJU.*

*We refer to the above matter whereby our aforementioned clients namely SARAH NYAMBURA KARENJU AND CATHERINE WAMBUI KARENJU have instructed us to address you as hereunder :-*

*That our clients are the registered owners of the aforesaid parcel No. Nakuru Municipality LR No. 6501 whereby they acquired registered interests on the 21st October 2014. That in the month of November, 2014, you unlawfully invaded our clients' parcel and thereon started residing on the three (3) bedroomed farm house located on our clients' parcel. Our clients contend that your acts of encroachment and trespass are without any colour of right for they are the registered owners of the parcel.*

*Further, despite several demands and warnings you have failed, refused, and/or ignored to desist from your said unlawful acts of trespass.*

*In the circumstances, our instructions are to demand as we hereby do that you should surrender vacant possession of our clients' property in order to regularize their position as registered owners.*

*TAKE NOTICE THEREFORE, that if you shall not desist with your unlawful acts of encroachment and trespass as aforesaid within the next fourteen (14) days from the date hereof, then our mandatory instructions are to seek appropriate eviction orders from court all at your own risk as to costs and other incidentals thereby incurred.*

*Yours Faithfully,*

*For Kanyi Ngure & Company Advocates.*

21. It will be seen that the above letter claims that the land parcel No. 6501 which is a subject of this suit, belongs to Catherine and Sarah having allegedly acquired interest on 21st October 2014. Unfortunately, I do not think that this letter by itself is proof enough that the land has been sold or transferred to Catherine and Sarah. I have no sale agreement and no transfer instrument. Neither do I have a copy of the search of the property to demonstrate that indeed it has been transferred to Catherine and Sarah. The respondents in their replying affidavit have denied knowing the two persons let alone selling land to them. It is obvious that a sale cannot be effected without documentation and if indeed there was a sale, it would not have been too difficult for the applicant to get copies of the transfer instrument from the lands office, or a copy of the title or search, to show that indeed the land has changed hands.

22. Merely because a person writes a letter claiming to have acquired land, is not by itself proof that the said person actually owns the land as alleged. Anyone can write a letter and claim to own property but that by itself would be no proof of ownership. If there was any sale to Catherine and Sarah, I am afraid that I have no proof of it and I cannot therefore hold that the respondents have sold land to the two individuals. On this score, I will have to give benefit of doubt to the respondents.

23. Apart from the alleged sale, the applicant has also stated that the respondents have gone ahead to subdivide, prepare the land for planting, deposit building materials and dig a pit latrine. The applicant has annexed three photographs which are said to demonstrate these activities. I have looked at the photographs. I have seen some evidence of ploughing, and some deposit of stones used for building. I am not too sure of the photograph said to show a pit latrine but for there is no building standing but there appears to be some evidence of excavation.

24. The order of injunction issued stopped the respondents from "...subdividing, partitioning, leasing, selling, charging or dealing.." with the suit properties. It is not very obvious whether this order also stopped any construction or planting of crops by the respondents or any persons claiming under their title. It has in fact not been very clear to me on who is in possession of the property, whether it is the plaintiff or defendants. I cannot therefore say with certainty that there has been disobedience through the planting of crops or development. Again, on this point, I have little option but to give benefit of doubt to the respondents.

25. But that said, and given that this court has inherent power under Section 3A to make any order deemed just in the circumstances and to prevent any abuse of the court process, I take this opportunity to order that the status quo on the land be preserved. That means that the prevailing occupation and use on the ground do continue and there be no development of any structure by any person in occupation. I mentioned that it is not very clear to me whether it is the plaintiff or its members, or whether it is the defendants or their agents and/or assigns, who are in occupation. Given that uncertainty, this order of status quo is directed at both plaintiff and defendants. If it is the plaintiff's agents or assigns in occupation, then the plaintiff must ensure that they do not enter into any sale or lease or any further assignment of the property in issue and should not develop any additional structures on the property. If it is the defendant's agents/ servant or assigns on the ground, then the responsibility is squarely on the defendants to ensure that these persons do not sell, lease or further assign the land to any other person and they do not develop any structure on the properties. In essence, the status quo currently prevailing must be maintained by all parties and it is the responsibility of the parties to make sure that this is observed. Any party going against this will be held to be in disobedience of a valid order of the court and may be liable for contempt.

26. I have not forgotten the fate of this application. As I stated, it has not been proved that there has been an actual sale and transfer of the property to Sarah and Catherine as alleged and there is some difficulty in the interpretation of the order of injunction in so far as activities on the ground are concerned. I am therefore unable to hold that the respondents have disobeyed the order of injunction issued on 10<sup>th</sup> October 2013 and I have no option but to dismiss this application. I do not however think that the applicant had no reason to make this application and I therefore make no orders as to costs. Having said that, I cannot stop myself from repeating that status quo must be observed until this old case is finally put to rest. I also urge the parties to promptly take directions on its disposal and I promise the parties to give them a hearing date on priority.

27. It is so ordered.

**Dated, signed and delivered in open court at Nakuru this 21<sup>st</sup> Day of January 2016.**

**MUNYAO SILA**

**JUDGE**

**ENVIRONMENT & LAND COURT**

**AT NAKURU**

**In presence of -:**

Mr Lawrence Karanja for the plaintiff/applicant

Mr Gordon Ogolla present for respondents

CA: Janet

**MUNYAO SILA**

**JUDGE**

**ENVIRONMENT & LAND COURT**

**AT NAKURU**