



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT NYERI

E.L.C CASE NO. 691 OF 2014

(Formerly Nyeri HCC No. 79 of 2009)

- 1. AMON KINYUA**
- 2. CHARLES NDIGIRIRI WANG'OMBE**
- 3. DAVID RUNYORA MACHARIA**
- 4. JULIUS CHIIRA NJIRU**
- 5. VERONICA WAMBUI KIMUNYA**
- 6. ELIMA alias ALIMA WATETU MIATU**
- 7. DANIEL THIRIKWA KININI**
- 8. TERESIA MUTHONI MAINA**
- 9. ELIZABETH NYAWIRA MUTHANGA**
- 10. JOHNSON GATHURI MWANU**
- 11. WILSON NDIRITU NGIRI**
- 12. ALICE WANGARI NDIGIRIRI**
- 13. ESTHER WANJA THIRIKWA**
- 14. JOSHUA WANJA THIRIKWA**
- 15. JULIUS MWANGI MUGO**
- 16. ALBERT NGURE NYINGI**
- 17. JULIUS CHAKI MBOGO**
- 18. CHARLES NJURE MURAGE**
- 19. SHELMITH WAMBUI WAWERU.....PLAINTIFFS/RESPONDENTS**

-VERSUS-

NDATHI MUGUNDA COMPANY LIMITED..... DEFENDANT (APPLICANT)

RULING

1. The notice of motion dated **20th November, 2015** *inter alia* seeks to punish the 11th and 18th plaintiffs herein (Wilson Ndiritu Ngiri and Charles Njure Murage) for alleged contravention of orders issued by this court (read High Court) on **19th March, 2008**.

2. The application is premised on, among other grounds, that the 11th and 18th plaintiffs/respondents (hereinafter referred to as respondents), in breach of the orders in question interfered with the affairs of the defendant company. In particular, the 11th and 18th respondents are accused of having called a meeting, disguised as members of Chaka Plot Owners Association, where the affairs of the defendant company were discussed. The 11th and 18th respondents are also accused of having entered into an agreement for sale of plot No. 49 Chaka Market contrary to the orders hereto.

3. Maintaining that the 11th and 18th respondents have disobeyed the orders hereto, the applicant urges the court to grant the orders sought in order to protect the dignity of the court and to protect the subject matter of the suit herein.

4. The application is supported by the affidavit of **Charles Kinyua Karoki**, where the grounds on the face of the application are reiterated.

5. The following documents are annexed to the affidavit:-

I) Copy of the ruling referred to herein above, marked **CKK 1**;

II) Copy of a court order issued on 27th July, 2007 for maintenance of status quo on the suit properties, marked **CCK 2**;

III) Copy of a court order issued on 25th March, 2008 for maintenance of status quo on the suit properties. The order also restrained the 1st and 11th plaintiffs from further interfering with the administration of the defendant company's affairs and more specifically from further purporting to be directors/officials of the defendant company, marked **CCK 3**;

(IV) Letter from the defendant's advocate to the Deputy County Commissioner complaining about the breach of the court orders hereto by the 1st and the 11th plaintiffs herein;

V) A copy of sale agreement and two receipts believed to have been issued by the 11th plaintiff over alleged illegal sale of one of the subject matters of the suit, Chaka Plot No. 49, collectively marked **CCK-5**.

6. In reply and opposition to the motion, the 11th respondent has, vide the replying affidavit he swore on **27th January, 2016**, denied all the allegations leveled against him. Through that affidavit, the 11th respondent has given a brief history of the defendant company, of which he is a member, and explained that some of the members who are allottees of the respondent's plots at Chaka formed an association known as "Chaka Plot Owners Self Help Group" to oversee their welfare.

7. Arguing that the members of the defendant company have a right to freely associate, the 11th respondent contends that by forming the association herein, they neither encroached nor infringed on any of the applicant's rights.

8 Terming the association herein a totally different entity from the applicant, the 11th respondent avers that the association does not carry out the duties or the mandate of the applicant.

9. The 11th respondent further denies the allegation that they masquerade or pass off as officials of the defendant company.

10 He terms the letter marked **CKK 4** annexed to the applicant's supporting affidavit as part of the schemes by the applicant to taint the respondents' good image.

11. Concerning the alleged illegal sale of Chaka Plot No. 49 by the 18th respondent and himself, the 11th respondent denies having signed the receipts annexed to the defendant's supporting affidavit and marked **CCK 5**.

12. Terming the application for contempt scandalous and meant to intimidate the respondents, the 11th respondent contends that the applicant has not proved that they willfully disobeyed the court order hereto.

13. With regard to prayer number 4 in the notice of motion herein, which seeks to declare the transaction concerning Chaka Market Plot No. 49 to have been null and void for contravening the order issued on 25th March, 2008; he contends that such an order cannot be issued in favour of the defendant because it is final in nature.

14. When the matter came up for hearing, counsel for the applicant, **Mr. Mugambi**, reiterated the averments contained in the affidavits sworn in support of the application and pointed out that the 11th respondent does not in his replying affidavit deny the sale of a plot to a third party.

15. Based on the court's record (proceedings), it is submitted that the 11th respondent continued asserting that he was an official of the defendant company.

16. To prove the alleged contemptuous conduct of the plaintiffs, the deponent the of supporting affidavit played an audial- visual recording concerning the meeting allegedly held by the plaintiffs in contravention of the orders hereto.

17. Maintaining that the said meeting and the transfer of Chaka Market Plot No.49 were done in contravention of the court orders hereto, counsel for the defendant urged the court to find the 11th and 18th respondents to have been in contempt of the orders hereto and to accordingly punish them for the alleged contemptuous conduct. The court is also urged to declare the impugned transfer of plot No. 49 null and void.

18. With regard to the prayer for leave to amend the statement of defence and a counter-claim, it is pointed out that the defendant seeks to amend its pleadings so as to bring on board the purchaser of plot No. 49.

Analysis and determination

19. The order allegedly disobeyed by the 11th and 18 respondents was inter alia for maintenance of status quo on the 21 plots that are the subject matter of the suit property. Those plots include plot No.49 which the 11th and 18th respondents are accused of selling in disobedience of the order hereto. The order in question also restrained the 1st and 11th respondents herein from further interfering with the administration of the defendant's affairs. To be specific, the 1st and 11th respondents were restrained from purporting to be directors/officials of the defendant company.

20. The issues for determination are:

1. Whether the applicant has made up a case for punishment of the 11th and 18th respondents or any of them for contempt.

2. What orders should the court make.

21. On whether the applicant has made up a case for punishment of the 11th and 18th respondent, having considered the evidence adduced by the applicant against the respondent's and in particular the 11th respondent who was restrained from interfering with the administration of the affairs of the applicant and or purporting to be a director of the applicant, I find the same to be incapable of discharging the heavy burden imposed on the applicant of demonstrating that the 11th respondent breached the said orders of the court. I say this because no evidence was presented before the court capable of proving to the required standard of proof that the 11th respondent attended the meeting he is accused of having attended and addressed the members as an official of the applicant.

22. I note that the respondents' contention that the meeting they attended was of a different entity called Chaka Plot Owners Self Help Group was not controverted by the applicant. Besides, the electronic evidence that the applicant sought to rely on appears to offend the provisions of **Section 106B** of the Evidence Act, Cap 80 Laws of Kenya, which requires the maker of such evidence to generate certain certificates to confirm to the court that the gadget used in collection of the evidence was in good working condition when the evidence contained therein was collected. In this regard see the said section of the law which provides as follows:-

“...Admissibility of electronic records

106B(1) Notwithstanding anything contained in this Act, any information contained in an electronic record which is printed on paper, stored, recorded or copied on

optical or electro-magnetic media produced by a computer (herein referred to as “computer output”) shall be deemed to be also a document, if the conditions mentioned in this section are satisfied in relation to the information and computer in question and shall be admissible in any proceedings, without further proof or production of the original, as evidence of any contents of the original or of any fact stated therein where direct evidence would be admissible.

(2) The conditions mentioned in subsection (1), in respect of a computer output, are the following—

(a) the computer output containing the information was produced by the computer during the period over which the computer was used to store or process information for any activities regularly carried out over that period by a person having lawful control over the use of the computer;

(b) during the said period, information of the kind contained in the electronic record or of the kind from which the information so contained is derived was regularly fed into the computer in the ordinary course of the said activities;

(c) throughout the material part of the said period, the computer was operating properly or, if not, then in respect of any period in which it was not operating properly or was out of operation during that part of the period, was not such as to affect the electronic record or the accuracy of its content; and

(d) the information contained in the electronic record reproduces or is derived from such information fed into the computer in the ordinary course of the said activities.

(3) Where over any period, the function of storing or processing information for the purposes

of any activities regularly carried on over that period as mentioned in paragraph (a) of subsection (2) was regularly performed by computers, whether—

(a) by combination of computers operating in succession over that period;

or

(b) by different computers operating in succession over that period; or

(c) in any manner involving the successive operation over that period,

in whatever order, of one or more computers and one or more combinations of computers, then all computers used for that purpose during that period shall be treated for the purposes of this section to constitute a single computer and references in this sections to a computer shall be construed accordingly.

(4) In any proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following—

(a) identifying the electronic record containing the statement and describing the manner in which it was produced;

(b) giving such particulars of any device involved in the production of that electronic record as may be appropriate for the purpose of showing that the electronic record was produced by a computer;

(c) dealing with any matters to which conditions mentioned in subsection

(2) relate; and

(d) purporting to be signed by a person occupying a responsible position in relation to the operation of the relevant device or the shall be evidence of any matter stated in the certificate and for the purpose of this subsection it shall be sufficient for a matter to be stated to be the best of the knowledge of the person stating it.

(5) For the purpose of this section, information is supplied to a computer if it is supplied thereto in any appropriate form and whether it is so supplied directly or (with or without human intervention) by means of an appropriate equipment whether in the course of activities carried on by any official, information is supplied with a view to its being stored or processed for the purpose of those activities, that information, if duly supplied to that computer, shall be taken to be supplied to it in the course of those activities.”

23. With regard to the allegation that the 11th respondent helped the 18th respondent to sell plot number 49 during the pending of the orders herein, I equally found no evidence capable of proving that allegation against the 11th respondent. However, I do find that there is evidence of disobedience of the order for maintenance of status quo concerning the plots which the subject matter of this suit by the 18th respondent. The evidence on record shows that the 18th respondent entered into an agreement for sale of the said plot with Samuel Muthua Karimi which action, in the absence of any explanation to the contrary, I find to have been contemptuous of the order for maintenance of the status quo concerning the 21 plots which are the subject matter of the suit property. Consequently, I find the case against the 18th respondent for contempt established and accordingly declare him to be in contempt of the court order hereto.

24. With regard to the other prayers, and in particular, the prayers aimed at the parcel of land which was alienated in disobedience of the orders hereto, I find and hold that the applicant has made up a case for issuance of those orders.

25. As to whether the applicant should be granted leave to amend his pleadings, in view of the changed circumstances, I am persuaded that the defendant deserves leave of the court to amend its pleadings to capture the changed circumstances of the case.

26. The upshot of the foregoing is that the application is allowed in terms of prayers 3 and 8 only.

27. The 18th respondent is ordered to, within 14 days of delivery of this ruling, show cause why he should not be punished for disobedience of the orders hereto.

Dated, signed and delivered at Nyeri this 9th day of November, 2016

L. N. WAITHAKA

JUDGE

In the presence of:

Mr. Kihara for the respondents

N/A for the applicants

Court assistant -Lydia