



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT OF KENYA
AT NYERI
ELC CASE NO. 130 OF 2015
ROSE WANJERI MAGWI 1ST PLAINTIFF/APPLICANT
HABLE KAGEMA MAGWI 2ND PLAINTIFF/APPLICANT
-VERSUS-
ARTHUR MAGWI KAGEMADEFENDANT/RESPONDENT

RULING

1. On 5th May, 2015 this court issued an order restraining the respondent, Arthur Magwi Kagema from parting with possession, selling, disposing, alienating, transferring or sub-dividing land parcel **No. Loc. 19/Gacharageini/2968** or evicting the applicants (Rose Wanjeri Magwi and Hable Magwi Kagema) therefrom pending the hearing and determination of the suit.
2. On 30th June, 2015 the applicants filed the notice of motion of even date claiming that the respondent had defied the said order of the court.
3. It is the applicants' case that contrary to the terms of the said order, the respondent has parted with possession and granted access and possession of a portion of the suit property to James Njukia Ihura (hereinafter referred to as the purchaser) and that the purchaser has constructed a house on the suit property.
4. Explaining that both the respondent and the purchaser are aware of the order of the court (were in court when the order of the court was made), the applicants contend that the conduct of the respondent and the purchaser is in contempt of the said order of the court. For that reason, the applicants seeks leave to demolish and confiscate the structure constructed on the suit property.
5. To ensure peace prevails during the demolition exercise, the applicants pray that the exercise be supervised by the Officer Commanding Nyakianga Police Station.
6. Upon been served with the application, the respondent filed the statement dated **5th July, 2015** denying all the allegations levelled against him. The respondent blames the purchaser and his wife for the alleged contemptuous acts. In that regard, he explains that he informed the purchaser to keep off the suit property and states that he was surprised to hear that the purchaser has effected developments on the suit property.
7. Terming the impugned developments on the suit property illegal, the respondent agrees with the applicants that the developments effected on the suit property should be demolished, uprooted and/or

removed.

8. When the application came up for hearing, counsel for the applicant, **Mr. Kimondo** urged the court to allow the application as it is unopposed.

9. As pointed out above, the orders herein relate to an order of this court made on 5th May, 2015. The order restrained the respondent from parting with possession, selling, disposing, alienating, transferring, sub-dividing the suit property or evicting the applicants from the suit property pending the hearing and determination of the suit.

10. Whereas counsel for the applicants informed the court that the application is unopposed, the statement filed by the respondent does not support that position. I say this because the respondent categorically denies being in contempt of the order of the court and instead blames persons who are not parties to this suit; that is to say, the purchaser of the suit property and his wife.

11. In view of the foregoing, it cannot be said that the application is unopposed, especially in respect of prayer 2 which seeks a declaration that the respondent has defied the order made on 5th May, 2015. The only prayer that can be said to be unopposed is prayer 3 which seeks to punish a third party on account of the contempt that the respondent is alleged to have committed.

12. Upon reviewing the pleadings filed in this application and the suit, the following key facts arise:-

a) That by the time this suit was filed, the respondent had already sold and given the purchaser possession of the portion of the suit property sold. See paragraph 12, 13 of the plaint filed in this suit.

b) The orders sought in the suit and the current application are going to affect persons who were not parties to the suit and the application and in particular, the purchaser.

13. The sole issue arising from the above facts is whether some of the orders sought and in particular the order for demolition of the structures effected by the third party, can issue without according the third party an opportunity to be heard.

14. In answering that question, I will be guided by the decision of the Court of Appeal in the case of **Pashito Holdings & another v Ndungu & 2 others (1997) 1 KLR E & L** where it was observed:-

“The learned Judge without having the Commissioner before him and without hearing him in his defence has finally condemned him on an interlocutory application for injunction in the following terms:- “It was not open to the Commissioner of lands to re- alienate the same”.

He could have made only a prima facie finding and that too if the Commissioner had been sued and served with the application. Not only that, the learned Judge appears to have finally sealed the fate of this suit which is yet to be heard on merits by holding: “So the alienation was void ab initio”

No such finding prima facie or final can be made without the Commissioner’s participation in the proceedings.

The gravamen of the respondent’s suit is that the Commissioner had no right to alienate a public land to any person for any use other than that for which it has been reserved. The respondents could not have established a prima facie case with a probability of success which is an essential legal requirement in order to be entitled to an interlocutory injunction unless the Commissioner was a party to the proceedings. The learned Judge should have directed that the Commissioner was a proper party without whom the relief sought against the Commissioner could not be granted.

The rule of “audi alteram partem”, which literally means hear the other side, is a rule of natural justice. According to Jowitts Dictionary of English Law (2nd Edition) “It is an indispensable requirement of justice that the party who had to decide shall hear both sides, giving each an opportunity of hearing what is urged against him”.

There is an unpronounceable Latin maxim which in simple English means: “He who shall decide anything without the other side having been heard, although he may have said what is right, will not have done what is right”.

The learned Judge quite erroneously in our view said: “However, my view is, that in this particular case, it is not necessary to join the Commissioner of Lands as a basis of making such an order. In any case it was open to the defendants to join any party to these proceedings”.

With respect, he should have seen that it was not upto the appellants to fill up the gaping holes in the respondents case who alone should have suffered the consequences of not suing the party against whom they were seeking the relief. (emphasis supplied).

15. In applying the principles enunciated in the above case to the circumstances of this case, I find and hold that the purchaser of the suit property is a necessary party to this suit and the application for contempt. As the orders sought and in particular prayer 3 of the notice of motion dated 30th June, 2015 will definitely affect the purchaser yet he is not a party to the suit or application, I decline to issue the orders sought.

16. Pursuant to the powers conferred on me under **Section 3A** of the Civil Procedure Act and **Order 1 Rule 10(2)** of the Civil Procedure Rules, I direct that the purchaser be added as a party to the suit. The applicant may revisit the issue of contempt after serving the purchaser with the necessary pleadings.

Dated, Signed and Delivered at Nyeri this 22nd day of October, 2015.

L N WAITHAKA

JUDGE

In the presence of:

Mr. Kimondo for plaintiff/applicants

Mr. Machira h/b for Mr. Omulama for the respondents/defendants

Court assistant - Lydia