



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENTAL AND LAND COURT AT NAIROBI**  
**ELC SUIT NO. 113 OF 2008(O.S)**

**MARY NJERI KABUNDI.....PLAINTIFF**

**VERSUS**

**CHRISTINE MITHIRI MBUGUA.....1<sup>ST</sup> DEFENDANT**

**SAMUEL N. KABUNDI sued as the administrator of**

**The estate of the late MARGARET NJERI.....2<sup>ND</sup> DEFENDANT**

**RULING**

**The Plaintiff's Application**

The Plaintiff filed an application by way of a Notice of Motion dated 16<sup>th</sup> August 2012 , seeking the following orders:-

1. That the 1<sup>st</sup> Defendant does stand committed to civil jail for such period of time as the court may determine for contempt of court by knowingly and willfully violating and/or disregarding the orders issued by the court on the 4<sup>th</sup> March 2009.
2. That 1<sup>st</sup> Defendant does purge the contempt of court by restoring the suit property title deeds to its original estate prior to the filing of this suit and Kiambu CMCC No. 67 of 2008.
3. That writs of attachment be issued against the assets of 1<sup>st</sup> Defendant to satisfy an amount that may be determined by the court together with interest at commercial rates form 4<sup>th</sup> day of March 2009.

The application is premised on grounds that the Kubo J. issued an injunction order against the 1<sup>st</sup> Defendant on 6<sup>th</sup> March 2009, restraining dealings on the suit land. It is alleged that despite service of the order, the 1<sup>st</sup> Defendant went ahead to cause subdivision of, and purported to sell the suit property. According to the Plaintiff, the 1<sup>st</sup> Defendant's continued disobedience of the court order is being undertaken knowingly and willfully, and that the authority and dignity of the court has been, and continues to be exposed to ridicule and disrepute.

These facts are deponed to in a supporting affidavit and further affidavit sworn by the Plaintiff on 31<sup>st</sup>

May 2012 and 17<sup>th</sup> July 2013 respectively. The Plaintiff has stated that the genesis of this matter is Kiambu CMCC 67 of 2008 which was instituted by the 1<sup>st</sup> Defendant, and the copies of her pleadings in the said case were annexed as evidence. The Plaintiff has averred that the said suit was consolidated with the instant suit, and that a finding on the ownership of the suit property is yet to be made. It is the Plaintiff's case that on the 6<sup>th</sup> March 2009, Kubo J. ordered that the suit property namely L.R No. Ndumberi/Raibai/1705 be preserved pending the determination of the suit, and he exhibited a copy of the said order.

The Plaintiff alleged that the 1<sup>st</sup> Defendant has in the past claimed ownership of Ndumberi/Raibai/325 and Ndumberi/Raibai/1705, despite there being clear evidence that she does not own and know the suit land. Further, the Plaintiff has contended that on 19<sup>th</sup> June 2008, she lodged a caution on the parcel of land known as L.R No. Ndumberi/Riabai/1705, which was removed by the 1<sup>st</sup> Defendant through a misleading letter to the District Officer stating that the matter in court had been concluded and orders issued in the 1<sup>st</sup> Defendant favour. A copy of a green card for L.R No. Ndumberi/Riabai/1705 dated 16<sup>th</sup> December 2008 showing the said restriction entered on 19/6/2008 was exhibited by the Plaintiff.

The Plaintiff averred that while the suits filed in court by both parties were pending, the 1<sup>st</sup> Defendant illegally subdivided the suit property in breach of the doctrine of *lis pendens*. It is the Plaintiff's averment that upon notification of the illegalities conducted by the 1<sup>st</sup> Defendant, the court issued injunctive orders on 9<sup>th</sup> March 2009. Further, that upon presentation of the said orders, the concerned District Officer lodged a second caution on the suit property and all the subsequent parcels borne out of the sub-division. It is alleged by the Plaintiff that on 8<sup>th</sup> September, 2009 hooligans hired by the 1<sup>st</sup> Defendant invaded her parcel of land where they caused destruction of crops and flowers growing therein which actions were reported to the police.

The Plaintiff has stated that despite the 1<sup>st</sup> Defendant being present in court when the orders were issued in addition to service upon her, the 1<sup>st</sup> Defendant has breached the court orders and unless punished by the court, the 1<sup>st</sup> Defendant is determined to create a web of deceit and fraud, and to move the suit property beyond the reach of the court and/or frustrate any court orders issued in the Plaintiff's favour. It is the Plaintiff's contention that the 1<sup>st</sup> Defendant has in the past acknowledged her physical presence in the suit land and has sought injunctive orders against the Plaintiff in Kiambu CMCC 67 of 2008.

### **The 1<sup>st</sup> Defendant's Response**

The application is opposed by the 1<sup>st</sup> Defendant who filed grounds of opposition dated 5<sup>th</sup> November 2012 as well as a replying affidavit sworn on 1<sup>st</sup> November 2012. The 1<sup>st</sup> Defendant contended that the application before court is fatally defective, incompetent and unmerited, since the Plaintiff's verifying affidavit sworn on 31<sup>st</sup> May 2012 and the statement which purport to support the application were signed before leave to institute the contempt proceedings was granted on 25<sup>th</sup> July 2012. The 1<sup>st</sup> Defendant has denied being in breach or acting contrary to the court orders issued on 6<sup>th</sup> March 2009. Further, the 1<sup>st</sup> Defendant has contended that to date, she has never been personally served with the said court orders and has also never been served with a Penal Notice.

According to the 1<sup>st</sup> Defendant, the grounds upon which the application is based and as set out in the Plaintiff's statement are false, incorrect and malicious. The 1<sup>st</sup> Defendant's case is that on 28<sup>th</sup> May 1979, she bought a quarter (1/4) undivided share of land title No. Ndumberi/Riabai/35 from the late Margaret Njeri, and she annexed a copy of a sale agreement of the same date between Margaret Njeri as the vendor and an undisclosed purchaser. The 1<sup>st</sup> Defendant has contended that upon buying the quarter (1/4) undivided share of land title L.R. No. Ndumberi/Riabai/35, she and the late Margaret Njeri were registered as tenants in common and were issued with a title deed. She exhibited a copy of a green card for L.R. No. Ndumberi/Riabai/35 dated 5<sup>th</sup> March 2008 as well as a title deed dated 26<sup>th</sup> March 1985 issued in the name of the 1<sup>st</sup> Defendant and Margaret Njeri .

It is the 1<sup>st</sup> Defendant's averment that land title No. Ndumberi/Riabai/35 was partitioned on 24<sup>th</sup> April, 1989, where upon she was issued with a title deed for her share which translated to 1.5 acres as reflected in a copy of the annexed green card. The 1<sup>st</sup> Defendant averred that her share was registered as Title No. Ndumberi/Riabai/1705, and that the register for land title No. Ndumberi/Riabai/35 was closed on 24<sup>th</sup> April 1984 upon subdivision of the same into many portions.

The 1<sup>st</sup> Defendant also stated that in October 2008, she subdivided her parcel of land title No. Ndumberi/Riabai/1705 into six sub-divisions, which gave rise to title nos. LR. No. Ndumberi/Riabai/3820-25. It is the 1<sup>st</sup> Defendant's averment that on or around 29<sup>th</sup> January 2009, she transferred the sub-divided parcels to third parties before the court orders of 4<sup>th</sup> March 2009 were issued. The 1<sup>st</sup> Defendant has averred that title no. Ndumberi/Riabai/1705 does not exist, and has attached copies of titles for the subdivisions numbers LR. No. Ndumberi/Riabai/3820-3825 as evidence.

It is the 1<sup>st</sup> Defendant's case that as at the time she sub-divided and sold her parcel of land, there was no order stopping her from doing the same. According to the 1<sup>st</sup> Defendant, the restrictions placed on the title were removed by the District Land Registrar Kiambu at his discretion. The 1<sup>st</sup> Defendant has also averred that contrary to the Plaintiff's assertions, it was the Plaintiff and her husband who were using the police to coerce her to conceding to the orders sought in this case. She exhibited a copy of a letter she wrote dated 15<sup>th</sup> April 2001 addressed to the OCS Kiambu Police Station complaining about harassment.

The 1<sup>st</sup> Defendant also contended that the Plaintiff had failed to set down the suit for hearing and determination of the main issues, and stated that she is over seventy years old and is experiencing health problems and would wish for the expeditious disposal of this case.

The 1<sup>st</sup> Defendant reiterated In a further affidavit sworn on 19<sup>th</sup> June 2013, that she is not in contempt of court since the ex-parte order issued by Kubo J. was not retrospective and was only for a limited period. The 1<sup>st</sup> Defendant averred that during the pendency of that order, she did not do anything that warrants her to be accused of contempt of court. According to the 1<sup>st</sup> Defendant, the 2<sup>nd</sup> Defendant's support of the Plaintiff's application for her committal to civil jail is malicious and conspiratorial.

The 1<sup>st</sup> Defendant annexed a copy of a title in respect to LR. No. Ndumberi/Riabai/1705 issued in her name on 15<sup>th</sup> October 1996, and stated that a title in respect to the same parcel in the name of Samuel Ngara Kabundi was inadvertently annexed to her affidavit of 1<sup>st</sup> November 2012. The 1<sup>st</sup> Defendant attributed the mix-up to an alleged fraudulent transfer caused by the Plaintiff and the 2<sup>nd</sup> Defendant, and averred that she was reinstated as the registered owner of LR. No. Ndumberi/Riabai/1705, as shown in the copy of green card relating to the said property dated 16<sup>th</sup> December 2008, which she annexed.

### **The 2<sup>nd</sup> Defendant's Response**

The 2<sup>nd</sup> Defendant through a replying affidavit sworn on 13<sup>th</sup> June 2013 argued that he was previously a party to the suit in **Kiambu CMCC No. 67 of 2008, Christine Mithiri Mbugua –vs- Samuel Ngara Kabundi & Mary Njeri Kabundi** which was withdrawn on 8<sup>th</sup> February 2010 by a consent order between himself and John Nganga Njoroge, Joyce Wairimu Wanjiru, Samuel Ndimu Mbugua and Stephen Mbugua who have now filed fresh suits in flagrant disregard of the stated court order which is still in force.

It was the 2<sup>nd</sup> Defendant's contention that a consent order cannot be appealed from, and may only be set aside on the same grounds as that for setting aside a binding contract. The 2<sup>nd</sup> Defendant also stated that the new suits are further evidence of continuing contempt of court, as the 1<sup>st</sup> Defendant has made witness statements in the suits in contempt of the orders made herein.

### **The Submissions**

Parties were directed to file submissions which were highlighted in court on 24<sup>th</sup> March 2014. The Plaintiff's counsel in submissions dated 14<sup>th</sup> November 2012 argued that the 1<sup>st</sup> Defendant is guilty of contempt on two fronts. First, it was submitted that despite the 1<sup>st</sup> Defendant knowing that the Plaintiff was in use of the suit property and seeking a declaration of ownership, she illegally subdivided the suit land into 6 portions. It was the Plaintiff's submission that since no determination of ownership has been made in the 1<sup>st</sup> Defendant's favour, she lacks power to dispose the suit property during the pendency of this suit.

Counsel for the Plaintiff submitted that despite there being an injunctive order restraining the 1<sup>st</sup> Defendant from dealing with the suit property, the 1<sup>st</sup> Defendant proceeded to subdivide and dispose of the suit property thereby contravening the doctrine of *lis pendens*. It was argued for the Plaintiff that unless the court orders the 1<sup>st</sup> Defendant to restore the suit property into its original state, any judgement issued by the court will be an academic exercise. Lastly, it was argued that any party who submits themselves before a court of law and destroys the subject matter of the suit during the pendency of the hearing is guilty of contempt and so is the 1<sup>st</sup> Defendant.

The 1<sup>st</sup> Defendant's counsel filed submissions dated 26<sup>th</sup> November 2012, wherein he reiterated the facts of the case and argued that the 1<sup>st</sup> Defendant undertook a sub-division exercise of Ndumberi/Riabai/1705 in October 2008. Further that six sub-divisions were created and sold to third parties on 29<sup>th</sup> January 2009 when there was no injunction restraining her from dealing with her land. Counsel for the 1<sup>st</sup> Defendant submitted that the orders of 6<sup>th</sup> March 2009 were issued after the event. It is the 1<sup>st</sup> Defendant's submission that since subdivision had earlier been undertaken, the title number cited in the order was non-existent at the time.

In further submission, the 1<sup>st</sup> Defendant stated that the application before court is supported by a verifying affidavit and statement dated 31<sup>st</sup> May 2012, before leave to institute contempt proceedings was granted on 25<sup>th</sup> July 2012. In addition, counsel argued that the further affidavit sworn by the Plaintiff on 16<sup>th</sup> August 2012 was filed without leave of court and therefore, that the stated documents are not properly on record and should be expunged.

While submitting that the application before the court is fatally defective, the 1<sup>st</sup> Defendant stated that leave to file the committal proceedings lapsed and the motion was filed 9 days later without extension. Counsel for the 1<sup>st</sup> Defendant relied on Order 52 Rule 3(2) of the Supreme Court of England Practice rules 1999 which stipulate that the motion should be filed within 14 days of issuance of leave. The court was referred to the case of **Nyamodi Ochieng' Nyamogo & anor -vs- Kenya Posts and Telecommunications Corporation** for the proposition that a party must comply with all procedural requirements.

Further reliance was placed on the case of **Andrew Kamau Mucuha -vs- The Ripples Ltd** for the proposition that an application for contempt filed outside the prescribed time without any extension being made renders the order to the said application a nullity having been made without jurisdiction. Counsel for the 1<sup>st</sup> Defendant also submitted that the application is premised on the wrong provisions of the law since Order 53 of the Civil Procedure Rules strictly applies to judicial review proceedings.

While submitting that the application before court is an afterthought, counsel for the 1<sup>st</sup> Defendant argued that the Plaintiff is coming to court nearly three and a half years after the issuance of the order and it was contended that the delay is unreasonable and unconscionable.

In further submission, it was contended that the order of 9<sup>th</sup> March 2009 is ambiguous, unclear and incapable of being violated. It was argued that the order was granted after subdivision and sale by the 1<sup>st</sup> Defendant of land to which she held title and further, that since the injunction was not mandatory in nature, the Plaintiff's submission that the 1<sup>st</sup> Defendant was under a duty to restore the *status quo* of the

property is unfounded. It was also argued by the 1<sup>st</sup> Defendant that the land known as Ndumberi/Riabai/1705 originally known as Ndumberi/Riabai/35 had ceased to exist when the order in question was issued, and had been replaced by subdivisions in the hands of third parties.

The court was referred to the treatise **Halsbury Laws of England, Vol 9: Contempt of Court** at paragraphs 50-64 for the submission that the court will only punish disobedience of a court order if satisfied that the terms of the order are clear and unambiguous. Reliance was also placed on the case of **Gachoni Enterprises Ltd -vs- D. N Nyaga t/a Njeru Nyagai & Co. Advocates, (2012) e KLR** for the submission that the slightest ambiguity to an order can invalidate an application for committal.

It was also submitted for the 1<sup>st</sup> Defendant that the requirement for personal service of the order endorsed with a penal notice on the contemnor had not been met as no evidence of personal service had been exhibited and therefore, that the application is fatally defective. In support of this submission, the 1<sup>st</sup> Defendant also referred the court to the decisions in **Maryl Wanjiru Gitau -vs- Margaret Wangechi Wachira, (2004) e KLR**; **Loise Margaret Waweru -vs- Stephen Njuguna Gichuru, C.A Nairobi Civil Appeal No. 198 of 1998**; and **Christine Wangari Gachege vs Elizabeth Wanjiru Evans & 11 Others (2014) e KLR**

In respect to the doctrine of *lis pendens*, it was argued that the same was not stated on the face of the application before court and further, that there was no explanation how *lis pendens* apply in fact and in law to the circumstances of this case. The 1<sup>st</sup> Defendant contended that *lis pendens* was a doctrine obtaining under the Transfer of Property Act 1882 which did not apply to properties registered under the Registered Land Act and further, that both statutes have since been repealed. It is the 1<sup>st</sup> Defendant's submission that her title was protected under the Registered Land Act (now repealed) and that she was the *bona fide* and legal owner of the subject property with powers to dispose the same since there was no injunction in place at the material time.

Lastly, it was submitted that the standard of proof for contempt which is above a balance of probabilities has not been discharged in light of the incompetence, ambiguous and procedural issues raised by the 1<sup>st</sup> Defendant. Counsel relied on the case of **Godfrey Kamau -vs- Thomas Wambura, (2012) eKLR** for the proposition that since a man may be sent in prison for contempt of court which is an offence of a criminal character, it must be proved beyond reasonable doubt.

The 2<sup>nd</sup> Defendant's counsel filed submissions dated 20<sup>th</sup> November 2012 where he supported the Plaintiff's application for contempt. The counsel narrated a history of the dispute and argued that that the 1<sup>st</sup> Defendant was in contempt having subdivided the suit parcel while she was prosecuting Kiambu CMCC No. 67 of 2008 where she had obtained an interim injunction on 3<sup>rd</sup> April 2008. Counsel for the 2<sup>nd</sup> Defendant argued that the 1<sup>st</sup> Defendant sought to frustrate the doctrine of *lis pendens* by disposing off the suit property.

### **The Issues and Determination**

It is my opinion that it is necessary to restate the law on committal for contempt of court for disobedience of court orders at this juncture, to appreciate the issues for determination herein. Section 63 (c) of the Civil Procedure Act and Order 40 Rule 3 of the Civil Procedure Rules provide for the consequences of breach of an order of injunction, and state that 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. The procedure in my view to be followed in making such an application is provided under order 51 of the Civil Procedure Rules that provides for the mode of filing, serving and hearing of applications brought under the Civil Procedure Act and Rules.

The substantive law that applies to contempt of court is the English law on committal for contempt of court by virtue of section 5(1) of the Judicature Act which provides that:

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

Personal service of the orders alleged to have been disobeyed, and of a penal notice is a requirement in proceedings for committal for contempt of court as a result of the application of English law, which has traditionally insisted on compliance with certain procedural safeguards before courts could exercise their jurisdiction to punish for contempt of court. This insistence arose from the arbitrary nature of contempt of court proceedings as courts essentially apply a summary jurisdiction, and also because of the threat that is presented by such proceedings to the liberty of the alleged contemnors.

The applicable English law in this respect is Part 81 of the English Civil Procedure Rules of 1998 as variously amended, which part repealed in most part the Rules of the Supreme Court that previously applied, including Order 52 and parts of Order 45 of the Rules of the Supreme Court. The law on the personal service of court orders is now found in Rule 81.8 of the English Civil Procedure Rules.

The said rule provides that unless the court dispenses with service, a judgment or order may not be enforced by way of an order for committal unless a copy of it has been served on the person required to do or not do the act in question. Rule 81.6 of the English Civil Procedure Rules specifically provides that the method of service shall be personal service, which is effected by leaving the order with the person to be served. Similar provisions were also provided by Order 45 Rule 7 (2) and (3) of the Rules of the Supreme Court that was repealed by Part 81 of the English Civil Procedure Rules of 1998.

This Court notes that Kenyan courts have also as a result held personal service of orders and a penal notice to be a requirement in contempt of court proceedings, and reference is made to the Court of Appeal decisions in **Nyamogo & Another v Kenya Posts and Telecommunications Corporation, (1994) KLR 1**, and **Ochino & Another v Okombo & 4 others (1989) KLR 165** in this respect.

It has also been held in several Kenyan judicial decisions that if personal awareness of the court orders by the alleged contemnors is demonstrated, they will be found culpable of contempt even though they had not been personally served with the court orders. See in this regard the decisions in **Kenya Tea Growers Association vs Francis Atwoli & Others, Nairobi High Court Constitutional Petition No 64 of 2010**, **Husson v Husson, (1962) 3 All E.R. 1056**, **Ronson Products Ltd v Ronson Furniture Ltd (1966) RPC 497**, and **Davy International Ltd vs Tazyman (1997) 1 WLR 1256**.

The applicable law on culpability for contempt of court is as stated in **Mwangi H.C. Wangondu vs Nairobi City Commission, Nairobi Civil Appeal No. 95 of 1998**, where the Court of Appeal held that the threshold of proof required in contempt of Court is higher than that in normal civil cases, and one can only be committed to civil jail or otherwise penalized on the basis of evidence that leaves no doubt as to the contemnor’s culpability.

Lastly, the principal sanctions for contempt of court are imprisonment, fine and seizure of the contemnor’s goods under orders of sequestration. Seizure of a contemnors goods can only be made where an order requires a person to do an act within a specified time or to abstain from doing an act, and its purpose is to coerce the contemnor into compliance with the order, and should not be granted in circumstances where it is not effective. In addition, such property as is attached remains in the hands of the court, and is not given to any of the parties. See in this regard **Arlidge, Eady and Smith on Contempt, 3<sup>rd</sup> Edition (2005) Sweet and Maxwell** at paragraphs 14-111 to 14-124.

Coming to the facts of the present case, I will firstly deal with the preliminary issue raised by the 1<sup>st</sup> Defendant as to the procedure used by the Plaintiff in bringing this application. I agree with the 1<sup>st</sup> Defendant that the procedure used by the Plaintiff in bringing the application for contempt of court was irregular, as the procedure for such an application as explained in the foregoing is that provided under order 51 of the Civil Procedure Rules. Order 51 requires all applications to be by way of motion, which shall state in general terms the grounds of the application, and where any motion is grounded on evidence by affidavit, a copy of any affidavit intended to be used shall be served.

The Plaintiff appears to have employed the procedure in Order 53 of the Civil Procedure Rules which applies only to judicial review proceedings, and annexed a statement and verifying affidavit to her notice of Motion. However, this court does not find this irregularity to be fatal as the grounds and evidence the Plaintiff relied upon were included in the statement and verifying affidavit. In addition, our Civil Procedure Rules do not provide for the requirement of leave or any time limits within which a substantive application for committal contempt of court pursuant to Order 40 Rule 3 of the said Rules should be made.

I shall therefore proceed to consider the substantive issues raised from the pleadings and submissions by the parties herein, which are three in number: Firstly, whether there was personal service of the orders given by this court on 6<sup>th</sup> March 2009 on the 1<sup>st</sup> Defendant. Secondly, if so, whether the 1<sup>st</sup> Defendant is culpable for contempt of court. The last issue is whether the Plaintiff can be granted the remedies sought.

On the first issue of personal service, the Plaintiff herein did not bring any evidence of personal service of the orders issued on 6<sup>th</sup> March 2009 and/or of a penal notice on the 1<sup>st</sup> Defendant. This court therefore finds that there was no such personal service on the 1<sup>st</sup> Defendant. In addition, even if this court were to dispense with the requirement of personal service of the court order and penal notice, and were to find that the 1<sup>st</sup> Defendant was aware of the said order, it is my view that it would still not be possible to find the 1<sup>st</sup> Defendant culpable for contempt of court for various reasons.

Firstly, it is not disputed that the orders that are claimed to have been disobeyed by the 1<sup>st</sup> Defendant were the orders given by Kubo J. on 6<sup>th</sup> March 2009 and issued on 9<sup>th</sup> March 2009. The said orders which were annexed as exhibit “MNK 2” to the verifying affidavit sworn by the Plaintiff on 31<sup>st</sup> May 2012 were as follows:

1. **“That the 1<sup>st</sup> Defendant herself servants and agents and all persons claiming title of land through her be and is hereby restrained from harassing the plaintiff and her family for 14 days only, pending hearing and determination of the Notice of motion dated 4<sup>th</sup> March 2009.**
2. **That there be no further dealings with the parcels of land known as Ndumberi/Riabai/1705 Original known as Ndumberi/Riabai/35 until hearing and determination of Notice of Motion dated 4<sup>th</sup> March 2009...”**

The Plaintiff alleges that the 1<sup>st</sup> Defendant knowing that the Plaintiff was in use of the suit property, and in blatant disobedience of the court order went ahead to sub-divide and dispose of the suit property. The Plaintiff however did not bring any evidence of the said sub-divisions and dealings with the suit property after the court orders were issued on 6<sup>th</sup> March 2009.

The evidence that the Plaintiff relied upon was the restriction placed on the title to L.R No. Ndumberi/Riabai/1705 on 19<sup>th</sup> June 2008 which she claimed was removed by the 1<sup>st</sup> Defendant. According to the green card for L.R No. Ndumberi/Riabai/1705 dated 16<sup>th</sup> December 2012, which was attached as exhibit “CMM2” to the 1<sup>st</sup> Defendant’s further affidavit sworn on 19<sup>th</sup> June 2013, the said restriction was removed on 26<sup>th</sup> September 2008, before the court orders issued on 6<sup>th</sup> March 2009.

Secondly, the 1<sup>st</sup> Defendant has in addition shown that the subdivision and sale of Ndumberi/Riabai/1705 to third parties occurred after the said restriction was removed and before the court orders of 6<sup>th</sup> March 2009 were issued. This is evidenced by the 1<sup>st</sup> Defendant's exhibits “CMM 5(a)- (f)” annexed to the replying affidavit she swore on 1<sup>st</sup> November 2012, and exhibit “CMM 2” annexed to her further affidavit sworn on 19<sup>th</sup> June 2013.

Exhibit “CMM2” is a copy of the proprietorship section (Part B), commonly referred to as “the green card”, of the title to Ndumberi/Riabai/1705. It clearly indicates that the title to the said parcel of land was closed on 21<sup>st</sup> October 2008 upon subdivision of new parcels numbers 3820- 3825. Exhibits “CMM 5(a)-

(f)” are copies of the proprietorship sections (the green cards) of the title to Ndumberi/Raibai/3820 – 3825 which show that the said parcels were registered in the name of the 1<sup>st</sup> Defendant and title deeds issued to her on 21<sup>st</sup> October 2008. The green cards also show that parcels 3821 to 3825 were subsequently transferred to third parties on 29<sup>th</sup> January 2009, 19<sup>th</sup> January 2009, 6<sup>th</sup> January 2009 and 18<sup>th</sup> December 2008 respectively, before the orders of 6<sup>th</sup> March 2009 were granted

Thirdly, the Plaintiff seeks to rely on the doctrine of *lis pendens*. In my view, the doctrine of *lis pendens* cannot form the basis of an application for committal for contempt of court, as it is trite law that the rules embodied in the law of contempt of court are intended to uphold the dignity of the court, and not personal dignity or the private rights of parties or litigants. That is why contempt of court is only restricted to actions that disrupt or interfere with court proceedings and the administration of justice, and those that consist of disobedience of court orders and breaking of undertakings given to the court (see **The Law of Contempt, Third Edition** by Nigel Lowe and Brenda Sufrin, Butterworths, 1996 at pp 1-2).

The doctrine of *lis pendens* on the other hand has been defined in the **Black’s Law Dictionary, Ninth Edition** at page 1015 as “the jurisdiction, power, or control acquired by a court over property while a legal action is pending” . The concept of *lis pendens* was embodied in Section 52 of the repealed Transfer of Property Act, 1882, which provided that during the pendency of a suit, in which any right to immovable property is in question, the property cannot be transferred by any party to the suit so as to affect the rights of other parties.

*Lis pendens* literary means a pending suit, and under the common law, the mere existence of a lawsuit involving real property creates notice to the world, and will bind subsequent purchasers of that property as to the outcome of the pending suit, regardless of their actual notice. The doctrine therefore is aimed at the protection of the property rights of parties involved in a suit, and gives authority to the court to bind any subsequent purchasers of that property. The objectives of the doctrine are therefore quite distinct from, and inapplicable to contempt of court proceedings.

Lastly, the 2<sup>nd</sup> Defendant on his part is relying on statements made by the 1<sup>st</sup> Defendant in cases filed by the third parties, which statements only serve to confirm that the 1<sup>st</sup> Defendant did sell the said parcels of land to the said third parties before the orders of 6<sup>th</sup> March 2009.

It is thus the finding of this court that the Plaintiff has not established any contempt of court as against the 1<sup>st</sup> Defendant since there is no evidence that the 1<sup>st</sup> Defendant has dealt with Ndumberi/Raibai/1705 or the sub divisions thereof subsequent to the orders granted herein by Kubo J. on 6<sup>th</sup> March 2009. The prayers sought in the Plaintiff’s Notice of Motion dated 16<sup>th</sup> August 2012 are therefore denied, and the Plaintiff shall meet the costs of the said Notice of Motion.

Orders accordingly.

**Dated, signed and delivered in open court at Nairobi this \_\_\_\_26<sup>th</sup>\_\_ day of \_\_\_\_May\_\_\_\_, 2014.**

**P. NYAMWEYA**

**JUDGE**