REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

CIVIL CASE NO. 13 OF 2013

ABEL ODHIAMBO WERE …..... PLAINTIFF

VERSUS

1. **MARGARET AUDI ONG'ARO**
2. **EVERLYNE AKINYI ONG'ARO …..... DEFENDANTS**

R U L I N G

BACKGROUND

1. The applicants are widows of the late Henry Goro Akum (deceased) who died on 16/11/1989. The deceased was the registered owner of LR NO. Kitale Municipality 2116/260 (I 13679). The respondent used to be a friend of the deceased and when the deceased was ailing, he assisted the applicants in offsetting medical bills of the deceased. When the deceased died, the applicants agreed to sell the deceased's property to the applicant even before they obtained letters of administration in respect of the estate of the deceased. It was a term of the agreement that the property was to be transferred to therespondent upon the applicants obtaining confirmed letters of administration in respect of the estate of the deceased.

2. The respondent later learnt that the applicants intended to sell the same property to other buyers. Based on this information he moved to court and filed an application for temporary injunction. He was granted ex-parte interim orders of injunction on 19/2/2013. The application was set down for inter-partes hearing on 28/2/2013. The hearing could not take place as the trial Judge was away. Interim orders were extended to 14/3/2013 when the application was to be heard. In the mean time on the same date, the applicants entered appearance through their lawyer M/S Yano & Co. Advocates.

3. On the 14/3/2013 the application for injunction was heard ex-parte the court having been satisfied that there was proper service of hearing notice. On 10/4/2014 a ruling was delivered confirming the interim injunction which had been granted on 19/2/2013.

4. On 28/1/2014 the respondent herein filed an application seeking leave of court to commence contempt proceedings against the applicants. Leave was granted on the same day. The application for contempt was then filed on the same day following leave of court to do so. This application was set down for hearing on 18/2/2014.

5. During the hearing of the application dated 28/1/2014, the applicants applied for adjournment through Mr Bosek who was holding brief for their lawyer Mr Ogone. The application for adjournment was opposed and the same was rejected by the court. The respondent urged his application. In a ruling delivered on 18/3/2014, the court found the applicants in contempt of court

and issued warrants of arrest for the two. This is what prompted the filing of the application dated 18/3/2014.

THE APPLICANTS CONTENTION

6. The applicants sought five prayers but two have since been spent. The prayers which are to be addressed in this ruling are;-

(a) That the Honourable court be pleased to set aside the proceedings of 18/2/2014 and ruling delivered on the 18/3/20014 along with all other consequential orders thereon.

(b) That upon granting prayer (a) above the applicants be granted leave to file replying affidavit and defence in response to the application dated 20/1/2013.

(c) That if the application is allowed the court do set time within which the applicants can file replying affidavit and defence out of time.

(d) That costs of the application be provided for.

7. The applicants filed two separate affidavits in support of their application but the same are one thing word for word. The applicants contend that they were not personally served with the application for contempt and that in any case they did not commit any act of contempt because the order restraining them from dealing with the property was given on 19/2/2013 whereas the property had been sold on 7/12/2012.

8. The applicants contend that since they had sold the property on 7/12/2012, they were not in possession of the same and therefore cannot be held responsible for what happened after execution of the sale agreement. The applicants therefore contend that the proceedings and rulings be set aside and they be allowed to defend the application of 30/1/2013.

RESPONDENT'S CONTENTION

9. The respondent contends that the applicants were properly served with all the applications in this matter together with orders which restrained them from dealing with the suit property but that they ignored the orders of the court and went ahead to deal with the property which has now been transferred to other parties.
10. The respondent contends that the applicants have committed numerous acts of contempt for which they should be punished. The respondent has enumerated a number of acts of contempt in his supporting affidavit which I need not repeat herein.

ISSUES FOR DETERMINATION

11. The issues which emerge for determination are firstly, were the applicants served with application for injunction, an order arising therefrom as well as an application seeking to cite them for contempt? Secondly are the applicants in contempt of any court order.

ANALYSIS OF THE SUBMISSIONS

12. On the issue of service, the applicants contend that they were not served but I do not find any merit in this contention. When the summons were served together with the injunction order given on 19/2/2013, the applicants instructed their lawyer who entered appearance on the date when the application for injunction had been set down for hearing inter partes on 28/2/2013. They never bothered to file any replying affidavit or grounds of opposition to the application for injunction. When the application was deferred to 14/3/2013, the applicants lawyers were served but they did not attend court for hearing of the application. This therefore shows that they were aware of the injunction orders against them and cannot claim that they were not served.

13. On the contention that the applicants were not served with the application for contempt, I again find that the same has no merit. When the application for contempt was served upon the applicants, they instructed their lawyer Mr Ogone who sent Mr Bosek to hold his brief and apply for adjournment. Mr Bosek applied for adjournment on the ground that the application for contempt was left at the houses of his clients. After the court considering the ground for adjournment, it found no merit and ordered that hearing do proceed. The applicants cannot claim that they were not served with the application for contempt when infact they sent a lawyer to come and say that the application had been received.

14. The applicants are contending that they did not breach or disobey any court order. Their argument is based on the fact that they had already sold the property even before the suit was filed. It is indeed true that a sale agreement with the third parties was signed on 7/12/2012 and the suit was filed on 7/2/2013. The respondent filed the suit when he learnt that the applicants were selling the land behind his back. It does not matter whether suit was filed after a sale agreement had been signed. There are processes which went on even after the applicants had been restrained from in any way dealing or transferring the property. The property was transferred to third parties on 10/10/2013. This was long after the court had given injunction orders. The vesting order of the property was done on or about 6/3/2013. The vesting order was executed by the applicants on or about 6/3/2013. The applicants continued to facilitate transfer of the property when they knew that the court had restrained them from doing so. They cannot therefore claim that what occurred after they signed the agreement of sale cannot be blamed on them.

D E C I S I O N

15. For the reasons given hereinabove, I find that the applicantsapplication has no merit. The same is hereby dismissed with costs to the respondent.

It is so ordered.

Dated, signed and delivered at Kitale on this 23rd day of July 2014,

E. OBAGA

JUDGE

In the presence of Mr Makuto for Plaintiff/Respondent and M/S Nyakibia for Mr Nyamu for Mr Odhiambo for defendant/Applicants. Court Clerk – Kassachoon.

E. OBAGA

JUDGE

23/7/2014