



**REPUBLIC OF KENYA**

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

**E&L 162 OF 2013**

*Formerly HCC NO. 127 OF 2010*

**GEOFREY K. NG'ANG'A.....PLAINTIFF/APPLICANT**

**VS**

**SAMMY WARUI**

**EPHANTUS KIHINGO NGOTHO**

**JOHN K. MATHENGE**

**JOMATHS COMPANY LIMITED.....DEFENDANTS/RESPONDENTS**

**RULING**

The application before me is that dated 28 November 2013 filed by the plaintiff. It seeks the following Orders :-

1. THAT this application be certified as urgent and be heard ex-parte in the first instance.
2. THAT a Notice to Show Cause do issue against the 2nd to 4th defendants/respondents to appear before this court to show cause why they should not be committed to civil jail for disobeying the court order by continuing to sell portions of that parcel of land known as L.R Nos. 779/504 and 779/507 against the order of the court.
3. That the 2nd to 4th defendants/respondents be ordered and/or compelled to surrender and/or transmit all the funds collected out of the sale of portions of land to the plaintiff/applicant within 5 days of the Order and in default the 2nd to 4th defendants be arrested and committed to civil jail.
4. That the 2nd to 4th defendants be arrested and committed to civil jail for the disobedience of a court order and/or their properties be attached and sold for the said disobedience of the court order.
5. That costs of this application be provided for.

Perhaps a little background will shed light as to why the plaintiff has deemed fit to apply for the above orders.

This suit was commenced by way of plaint filed on 4 October 2010. In the plaint, it is pleaded that the plaintiff is the owner of the parcels of land known as L.R No. 779/504 and L.R No. 779/507 (the suit lands). On 28 September 2008, the plaintiff entered into an agreement with the defendants wherein he appointed the defendants to be agents for sale of part of the two suit lands. It was further agreed that the defendants will be paid a 5% commission from the sale proceeds. It is said that the 1st to 4th defendants represented themselves as qualified surveyors and the land was to be sub-divided and the a cost of Kshs. 22,000/= per plot. The plaintiff paid a sum of Kshs. 540,000/= as deposit and the balance was to be paid after completion of survey and sub-division of the suit lands. It is claimed that in purported part performance, the defendants cut up only a part of the suit lands and several portions emerged. The work was however abandoned. The defendants however advertised for sale and sold several of the plots and received monies in the sum of Kshs. 15,847,100/= only part of which was remitted to the plaintiff. Not

being happy, on 7 December 2012, the plaintiff terminated the contract for sale but advised the defendants to continue with the survey and sub-division exercise. On 30 January 2010, the plaintiff entered into an agreement with the 1st defendant through which the 1st defendant represented that he and the other defendants had carried out sub-division of the suit lands and received money but that the only sum that remained unaccounted was Kshs. 5,341,800. It was agreed that out of this sum, the amount of Kshs. 4,620,000/= be retained as fees by the defendants, and that they surrender the sum of Kshs. 721,800/= to the plaintiff together with any further sum that may be received from potential buyers. It is said that the defendants failed to remit any money to the plaintiff. The plaintiff later learnt that the defendants are not qualified surveyors and have no capacity to carry out any survey work or sub-divisions of the suit lands. The plaintiff also claimed that the defendants continued to sell and receive money despite him not authorizing the defendants to do so. In the suit, the plaintiff sought a permanent injunction to stop the defendants from selling any portion of the suit lands, an order for full accounts of money received from prospecting buyers, and an order to remit any money found due.

Simultaneously with the plaint, the plaintiff filed an application for injunction seeking orders inter alia that the defendants be stopped from selling or receiving any money as purchase price in respect of the suit lands. The plaintiff also sought an order that the defendants be asked to furnish accounts and remit any money found due.

The defendants statements of defence through which they denied the allegations of the plaintiff. They also filed responses to the application for injunction. The application was heard and through a ruling delivered on 27 July 2012, Mshila J. The honorable judge made the following principal order :-

*The defendants/respondents by themselves or by agents and/or servants are hereby restrained from entering, selling and/or receiving any monies in respect of sale proceeds from prospective buyers and or dealing with land parcel No. LR No.779/504 and 779/507 or parts thereof pending the hearing and final determination of this suit.*

It will be seen that vide this application, it is the contention of the plaintiff that the defendants have disobeyed the above order. In his supporting affidavit, the plaintiff has inter alia deponed that the order of injunction was served on 2 August 2012 but despite this, the defendants have continued to sell the suit properties. The plaintiff has further claimed that the defendants have acted mischievously by backdating documents related to the subject matter. He has deponed that the latest sale of the suit land was to one Ruth Mwangi, who it is said, was sold a plot identified as Munyaka Phase II No.63A at a sum of Kshs. 650,000/= on 12 July 2013. The plaintiff annexed an affidavit sworn by the said Ruth Njeri. In the affidavit, Ruth Njeri has deponed that on 2 July 2013 while she was looking for land to purchase, the 2nd defendant, Ephantus Mihingo Ngotho, presented himself to be owner of the Plot No. 63A and they agreed that she (Ruth) can purchase the said plot at the sum of Kshs. 650,000/=. An agreement was drawn on 12 July 2013 which she has annexed. The agreement is signed by Ruth as purchaser, and Ephantus M. Ngotho as seller. There are three witnesses named as Peter Mwangi Kibui, Anthony Bokose Nathan, and Julius Kiprotich Andany. She has deponed that she then paid the sum of Kshs. 600,000/= to the 2nd defendant (Ephantus Ngotho) through a banker's cheque dated 12 July 2013 and Kshs. 50,000/= in cash. The copy of the banker's cheque was annexed. The 2nd defendant then issued her with a receipt backdated to read 25 June 2009 for a sum of Kshs. 150,000/= , a receipt that bore the name of Jomaths Company and Associates. A copy of the receipt was annexed. She has further deponed that she found it strange that the receipt was backdated and did not bear the whole sum of Kshs. 650,000/=.

The application is opposed with the 3rd respondent, John K. Mathenge filing a replying affidavit, which states that he has authority of the 2nd respondent to swear the said affidavit also on his behalf. He has stated that the order has no effect since it expired after one year. He has further stated that in the course of the year, he realized that some of his former employees were conning people by selling non-existent land. He says that he reported the matter to the police and two former employees namely Sally K. Rotich and Rose Kakai were arrested with another named Sammy disappearing. He has deponed that the said employees were charged in court and he has annexed a charge sheet. He stated that he was not involved in the sale and that the document stated to be a receipt was forged. He has averred that this court cannot be able to authenticate the genuineness or otherwise of the documents attached in support of the application.

He has stated that neither he, nor the 2nd defendant, has sold any of the suit properties. He has further stated that the plot 63A does not exist and that what exists is a plot No. 63 which he says has been allocated to one Allan Ngige. He has stated that if the said plot were to be sold, then the seller ought to be Allan Ngige and not the 2nd defendant. He has further deponed that he was informed by the 2nd respondent, that one of his former employees, Sally Rotich had asked to use his account to receive some payment since her account had an overdraft and that the 2nd respondent agreed to do so and handed over the money to Sally. He has averred that the plaintiff, instead of concluding the matter, is engaging in side shows.

The plaintiff filed a further affidavit, in which he has inter alia stated that the replying affidavit is full of falsehoods. He has averred that the alleged sale to Ruth Njeri is not the subject of the criminal case mentioned and no steps have been taken to refer the sale to the police for investigation as being fraudulent. He has pointed out that Ephantus has not denied the said sale. He also annexed a copy of the register of sub-divisions and stated that there is no evidence that the plot No. 63 has been allocated or sold to Allan Ngige or any other person.

Mr. Nyairo for the plaintiff urged me to allow the application whereas Mr. C.D. Nyamweya for the defendants argued that the application should fail. Among the arguments raised by Mr. Nyamweya are that there is no proof of service of the order of injunction, that the order of injunction lapsed after 1 year pursuant to Order 40 Rule 6, and that no leave has been granted to prosecute the application.

It is with the above background that I need to make a decision in this matter.

This application has been brought pursuant to the provisions of Section 63 (c) of the Civil Procedure Act, CAP 21, Laws of Kenya and Order 40 Rule 3 (1) of the Civil Procedure Rules, 2010. These provisions state as follows :-

*S. 63 In order to prevent the ends of justice from being defeated, the court may, if it is so prescribed—*

*(a) issue a warrant to arrest the defendant and bring him before the court to show cause why he should not give security for his appearance, and if he fails to comply with any order for security commit him to prison;*

*(b) direct the defendant to furnish security to produce any property belonging to him and to place the same at the disposal of the court or order the attachment of any property;*

*(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;*

*(d) appoint a receiver of any property and enforce the performance of his duties by attaching and selling his property;*

*(e) make such other interlocutory orders as may appear to the court to be just and convenient.*

Order 40 Rule 3

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

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.

No attachment under this rule shall remain in force for more than one year, at the end of  
(2 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.

It will be seen that the above provisions give the court power to punish a person who has been in disobedience of an order of injunction. I agree with Mr. Nyairo that there is no requirement for one to seek leave to file an application under Section 63 (c) of the Civil Procedure Act, or Order 40 Rule 3 of the Civil Procedure Rules. Mr. Nyamweya relied on the case of **Re Estate of Emilia Muchora (Deceased) (2013) eKLR** to support his argument that leave is required before instituting an application for contempt. I have seen the said authority which held that one needs leave to institute an application for contempt. But the applicant in that matter was not relying on the provisions of Section 63 (C) or Order 40 Rule 3, and therefore that decision is distinguishable to this matter. The position that one does not need leave to institute proceedings under Section 63 and Order 40 was indeed held in the case of **Africa Management Communication International Limited v Joseph Mathenge Mugo & Another, (2013) eKLR** which case was cited by Mr. Nyairo. In any event the current procedure relating to contempt of court proceedings has removed the requirement for leave. This was held in the Court of Appeal decision of **Christine Wangari Gachege v Elizabeth Wanjiru Evans & 11 Others, Court of Appeal at Nairobi, Civil Application No. 233 of 2007 (2014) eKLR**. It follows that the argument that leave was required before this application could be filed fails.

The other important issue raised by the respondents was that the Order which is said to have been contravened by the respondents was not served. I will not dwell too long on this argument because I have seen an affidavit of service sworn by Ferdinand Okira on 3 August 2012, which confirms that the defendants were served with the Order of injunction on 2 August 2012. I have no reason to doubt the said affidavit. I hold that the order was indeed served.

It was argued that the Order of injunction has lapsed and cannot be enforced and Order 40 Rule 6 was cited. The same provides as follows :-

Order 40 Rule 6 :- *Where a suit in respect of which an interlocutory injunction has been granted is not determined within a period of twelve months from the date of the grant, the injunction shall lapse unless for any sufficient reason the court orders otherwise.*

The Order that is the subject of this application was issued on 27 July 2012. The violation of the Order is said to have occurred on 12 July 2013 when the agreement for sale is said to have been entered into by the 2nd defendant and payment made. Clearly if there was violation of the Order, then it occurred within 1 year of it being issued. I therefore do not see the applicability of Order 40 Rule 6. But I think it is important that I lend my own words to the interpretation of Order 40 Rule 6. The argument raised by the respondents is that after 1 year, the order lapses and can therefore be violated as a matter of course. That may seem to be what Order 40 Rule 6 provides. Order 40 Rule 6 was probably aimed at ensuring that orders of injunction do not remain indefinitely and that suits are determined expeditiously within a year. However, the reality on the ground is that given the huge backlog of cases in our courts, it is the

exception to find that a case has been finalized within 1 year. In such a case both counsels for the plaintiff and defendant have a duty to ask the court whether the Order should still subsist, or should be deemed as having lapsed, before one party proceeds to violate it on the basis of Order 40 Rule 6. This is purely for good order and decorum and to avoid a situation of anarchy. The person against whom an order of injunction has been made can indeed invoke the provisions of Order 40 Rule 7, which provides as follows :-

*Order 40 Rule 7 :- Any order for an injunction may be discharged, or varied, or set aside by the court on application made thereto by any party dissatisfied with such order.*

I do not think that the correct avenue is now to steal a march on the party in favour of whom the order of injunction was given, and proceed to violate it. Litigation should not be deemed to be a cat and mouse game. Orders of injunction made during litigation are not aimed at punishing any litigant, but are principally aimed at ensuring that the subject matter of litigation is preserved. I do not think the intention of Order 40 Rule 6 was to have a party start counting down to one year after the order of injunction was given, and thereafter, proceed to assume that the order of injunction can now be violated. Parties need to be a bit more mature. If a party is of the view that an order of injunction has lapsed, then the appropriate avenue is to apply to the court to have it considered as discharged, rather than to proceed to violate it. As I have said earlier, it is time that parties stopped viewing litigation as a Tom and Jerry episode.

Let me now get straight to the issue of whether or not the Order of 27 July 2012 was violated. I have seen the affidavit of Ruth Njeri which spells out in detail how the 2nd respondent sold to her a plot falling within the suit lands. That has not been denied by the 2nd respondent. The 3rd respondent has mentioned that some of his agents were illegally selling land and that they have been charged in court with various criminal offences. That may be so, but the transaction of 12 July 2013 is not one of the subject matters in the said criminal cases nor has it been demonstrated to me that it is the subject of any criminal investigation. It is apparent to me that an agreement for sale for part of the suit lands was entered into while an order stopping any sale of the suit lands was in existence. This is a clear violation of the order of court issued on 27 July 2012. There is ample evidence that the 2nd defendant engaged in the violation of the said order. He is guilty. I am however not too sure whether there was any violation by the other respondents. It is the 2nd defendant alone who entered into the agreement of sale. It is he who received the purchase price and it is him who issued Ruth Njeri with the receipt. Although the receipt bears the name of the 4th respondent, the evidence on the involvement of the 4th respondent is rather thin. I have my own suspicions that the 3rd respondent through the 4th respondent may have been involved, but suspicion alone, without the backup of evidence is not enough.

My conclusion therefore is that the plaintiff has demonstrated that the 2nd respondent violated the Order of 27 July 2012. The application therefore succeeds against the 2nd respondent with costs.

The money that the 2nd respondent received must be returned forthwith to Ruth Njeri as the sale agreement is null and void having been entered into in violation of an order of court. The 2nd respondent is also liable to be punished by this court. I will proceed to punish him after I give him a chance to mitigate.

It is so ordered.

**DATED AND DELIVERED AT ELDORET THIS 8TH DAY OF OCTOBER 2014**

**JUSTICE MUNYAO SILA**

**ENVIRONMENT AND LAND COURT AT ELDORET**

***Delivered in the presence of:***

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