



**Ndatani Enterprises Company Ltd & another v Railway Housing Co-operative Society Ltd  
(Environment & Land Case 224 of 2009) [2024] KEELC 3387 (KLR) (24 April 2024) (Ruling)**

Neutral citation: [2024] KEELC 3387 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 224 OF 2009**

**LN MBUGUA, J  
APRIL 24, 2024**

**BETWEEN**

**NDATANI ENTERPRISES COMPANY LTD ..... 1<sup>ST</sup> PLAINTIFF**

**TAITA CONSULTANTS COMPANY LTD ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**RAILWAY HOUSING CO-OPERATIVE SOCIETY LTD ..... DEFENDANT**

**RULING**

1. Before me is the Defendant's Notice of Motion Application dated 17.4.2023 which seeks to cite one Alex Muema Muthengi T/a Ndatani Enterprises Company LTD for contempt for none compliance with the consent judgment dated 31.10.2017.
2. The application is premised on the grounds on the face of the application and the supporting affidavit of Aggrey Ogotu, who introduces himself as the treasurer for the plaintiff (must be for defendant). The defendants contend that vide the aforementioned consent, the plaintiff was required to execute conveyance documents and hand over such completion documents including original titles for parcels; LR. Embakasi 7340/90, kinane 10426/11 and New Valley 2209 & 2217. The plaintiff however failed, refused and neglected to comply with the said orders. They aver that the plots may have fraudulently been transferred to 3<sup>rd</sup> parties. Thus the contemnor is in willful and blatant contempt of the aforementioned orders.
3. The contemnor Alexander Muema Muthengi opposes the application vide his Replying Affidavit dated 28.10.2023. He introduces himself as a director of the plaintiff. He contends that he was not a party to this suit, and that the plaintiff is a legal entity, yet the corporate veil was not lifted, thus he should not be dragged into the matter in his personal capacity.
4. It is further averred that it is the defendants who failed to comply with clause (f) in the decree which stipulated that the defendants were to pay costs of transfer for each plot at Sh.120,000. At paragraph



- 8 of the replying affidavit, the deponent has outlined the steps which were to be taken by the parties, while at paragraph 10, he has given the particulars of the persons who have received titles.
5. He contends that he is ready to effect transfer upon receipt of the transfer monies Sh.120,000 or appropriate. He contends that he cannot furnish the original titles of the three parcels because as at the time of the judgment, the said titles did not exist, the same having been subdivided into individual plots.
  6. He denies that the plots have been transferred to third parties.
  7. In rejoinder, the defendants filed a further affidavit sworn by Aggre Ogutu on 17.11.2023. He contends that contrary to the averments set out in paragraph 8 of the replying affidavit, the defendant as the sole agent in the project was the one mandated to lodge the completion documents to the respective land registries and ascertaining payments and identity of the intended transferees. Thus once the plaintiffs received and executed the completion documents, they were to forward the same to the defendants to process the respective titles. And the transferees collect their respective titles from the defendant as captured in paragraph D of the decree.
  8. To this end, the applicant only forwarded 19 transfers as outlined in paragraph 8 of the affidavit.
  9. It is averred that the plaintiffs are the ones who have been frustrating the implementation of the consent by demanding Sh. 280,000 from the transferees. The transfer was to be effected through the concerted efforts of both the plaintiff and the defendants. To this end, the amount of sh. 120,000 paid by each of the 19 transferees was shared between the defendants and the plaintiffs.
  10. In their submissions dated 6.6.2023, the defendants reiterated that the plaintiffs have refused to comply with the consent judgment, which has neither been stayed nor set aside. Thus the respondents are not allowed to issue titles at their own whims. To this end, reference was made to the cases of; Christine Wangari Gachege v Elizabeth Wanjiru Evans & 11 Others [2014], DKG v EG [2021] eKLR, Joseph Kabugi Karanja v Benson Mugo Mukunya & 3 Others [2021] eKLR and Republic v Ahmad Abolfathi Mohammed & Another [2018] eKLR.
  11. The submissions of the plaintiff are dated 25.11.2023. They contend that the prayer to compel the Nairobi Land Registrar to effect transfers is an abuse of the court processes as the suit parcels are situated in Machakos and Kajiado Counties. They aver that the transfer must be initiated by the defendants of which the plaintiffs acted on all the documents forwarded to them. The plaintiffs rely on the case of; Katsuri Limited v Kapurchand Debar Sash [2016] eKLR. Koiti & Another v Afrison Export Import Limited & 5 others; Continental Credit Finance Limited (In Receivership) & 5 Others (Interested Party) (Petition 1488 of 2016) [2022] KEELC 2211 (KLR) (28 April 2022).

### **Determination**

12. I have considered all the issues raised herein. The question falling for determination is whether one Alexander Muema should be cited for contempt of the consent judgment. The contemnor avers that he has no capacity to be cited, and that it is the defendant who failed to comply with the said judgment. On the other hand, the defendants assert that the plaintiffs violated the court order by failing to hand over the relevant completion documents, and that the director of the plaintiff is the proper person to be cited for contempt.



13. On the issue of lifting the corporate veil, the Court of Appeal in the case of Stephen Njoroge Gikera & another v Econite Mining Company Limited & 7 others [2018] eKLR stated that;

“The corporate persona of a company will be dispensed with in cases where it is apparent that the company is being used as ‘A creature of [the controlling director], a device and a sham, a mask which he holds before his face in an attempt to avoid recognition by the eye of equity.....”

It was an absurdity that the learned Judge rightly addressed by lifting the veil of incorporation. It was also a case of proceedings taken out to abuse the court process; where a party tries their luck to gain an advantage in a company as a director, but when ordered to comply with certain court orders it becomes convenient for the party, who is a majority shareholder and a director of the company, to feign lack of instructions”.

14. Similarly, the Court of Appeal in Zingo Investment Limited v Miema Enterprises Limited [2015] eKLR stated that:

“Notwithstanding the effect of a company’s incorporation, in some cases the court will ‘pierce the corporate veil ’ in order to enable it to do justice by treating a particular company, for the purpose of the litigation before it, as identical with the person or persons who control that company.”

15. I find that the contemnor has admitted to being the director of the company and is the one who is speaking for the said company. As such, he cannot hide behind the corporate veil to avoid legal obligations. Such veil is hereby pierced to enable the court to do justice.

16. On contempt, I make reference to the case of Christine Wangari Gachege vs. Elizabeth Wanjiru Evans & 11 Others, [2014] eKLR, where the court found that the English law on committal for contempt of court was applied 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.”

17. In the case of Samuel M. N. Mweru & Others v National Land Commission & 2 others [2020] eKLR Mativo J (As he then was) stated that;

“...The test for when disobedience of a civil order constitutes contempt has come to be stated as whether the breach was committed ‘deliberately and mala fide.’”

18. There are accusations and counter accusations as between the parties as to who violated the consent judgment of 31.10.2017. The litigation history of this dispute is well captured in the ruling of this court delivered on 26.1.2023 and I need not rehash the same. There is no rocket science needed to discern that the elephant in the room is the “sum of ksh.120,000 or appropriate amount to be paid by each transferee”. The transferees are in their hundreds, meaning that the sum of sh.120,000 or appropriate amount translates to millions of shillings.

19. It is not the place of this court to state how the mentioned figure was to be paid taking into account that parties are bound by their agreements.



20. A consent order is binding upon the parties more or less like a contract; See *Flora N. Wasike vs. Destino Wamboko* [1988] eKLR, where the court cannot step in to rewrite the said consent; also see *National Bank of Kenya Ltd V PipePlastic Samkolit (K) and Another* (2001) eKLR.

21. For the sake of clarity, I deem it fit to recapture the contents of Clause D in the consent of 31.10.2017 where it is stated as follows;

“That it is agreed for the purposes of transfers; Ms Ndatani Enterprises Company Limited shall sign all the completion documents and submit them to their Advocates Ms Kang’oli & Company Advocates for onward transmission to Ms Albert Kamunde Company the Advocates for Railways Housing Cooperative Society Limited who will proceed to execute transfers to the rightful owners. Emphasize added.

That ELC 224 of 2009, ELC 352 of 2009 and ELC 353 of 2009 be and are hereby marked as settled. That each party to bear its own costs.

That the cost of transfer of each plot shall be borne by respective transferee at a sum of Kshs. 120,00/= or as appropriate.”

22. No where in that clause are the events set out in paragraph 8 of the replying affidavit of Alexander Muema captured. In particular, the said Clause D does not indicate that the plaintiffs were the ones who were to process the titles! Their role was to transmit the signed completion documents to their advocates for onward transmission to the advocates for the defendants “ who would then proceed to execute transfers to the rightful owners”.

23. The fact that the plaintiffs had apparently processed titles for some of the beneficiaries of the suit plots as indicated at paragraph 10 of the replying affidavit, does not in any way amount to compliance with the consent. What the plaintiff was doing was to vary the consent by dislodging the role of the defendants and their advocates, yet as rightly put by the defendants, the defendants were the sole agents of the plot owners and they are the ones who could identify those plot owners.

24. What emerges from the contents of Clause D in the consent, and as rightly articulated by the defendants is that the whole process of transfer was to be undertaken by both parties (plaintiffs and defendants) depending on the stage of transfer. Thus the plaintiffs cannot claim that they will only effect the transfer upon payment of the Sh.120,000 or the appropriate sum.

25. The Court of Appeal in *Fred Matiangi the Cabinet Secretary, Ministry of Interior and Co-ordination of National Government v Miguna Miguna & 4 others* [2018] eKLR had this to say in relation to disobedience of court orders;

“When courts issue orders, they do so not as suggestions or please to the persons at whom they are directed. Court orders issue ex cathedra, are compulsive, peremptory and expressly binding... This Court, as must all courts, will deal firmly and decisively with any party who decides to disobey court orders and will do so not only to preserve its own authority and dignity but the more to ensure and demonstrate that the constitutional edicts of equality under the law, and the upholding of the rule of law are not mere platitudes but present realities.”

26. It is clear beyond peradventure that greed “of the Sh.120,000 or appropriate amount” and nothing more is the driving factor in the move by the plaintiff to usurp all the roles appertaining to the transfer of the plots contrary to what was stipulated in the consent judgment. This far, I find that the plaintiff, and by extension, the contemnor are in contempt of the court orders of 31.10.2017.



27. I note that what was to be transferred in so far as the consent is concerned were the various plots and not the mother titles. In that regard, the claim set out in prayer no.3 of the application is not tenable.
28. In the end, the application dated 17.4.2023 is allowed in terms of the prayers set out there in save prayer No. 3. The Respondent is condemned to bear the costs of the application.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 24<sup>TH</sup> DAY OF APRIL, 2024 THROUGH MICROSOFT TEAMS.**

**LUCY N. MBUGUA**

**JUDGE**

In the presence of:-

Osoro for Plaintiff

Court assistant: Eddel

