

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT EMBU
MISC ELC CASE NO. 42 OF 2015
IN THE MATTER OF APPLICATION FOR ORDERS OF
MANDAMUS

AND

IN THE MATTER OF ARTICLES 35 AND 47 OF THE
CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE LAND REGISTRATION ACT

REPUBLIC

.....

APPLICANT

VERSUS

THE DISTRICT LAND

REGISTRAR.....

RESPONDENT

AND

PETERSON MURIITHI NTHIGA (the personal
representative of the late GATURI NTHIGA)

EX-PARTE APPLICANT

RULING

1. What is before me for determination is a motion on notice

dated 18.01.2023 and filed on 20.01.2023. It is expressed to be brought under sections 1A, 1B, 3 and 3A of the Civil Procedure Act and all the necessary provisions of the Contempt of Court Act No. 46 of 2016. The Applicant in the motion is the Ex-Parte Applicant in the Judicial Review Application. He is Peterson Muriithi Nthiga and is the personal representative of the late Gaturi Nthiga. The prayers sought are as follows:

1. *Spent.*
2. *That the Court be pleased to determine that the Respondent is in contempt of the Court's orders granted on 27.10.2022.*
3. *That the Court be pleased to punish the contemnor by imprisonment for a period of six months or such other period that the Court shall deem fit.*
4. *That this Court grant any other orders it deems just to grant.*
5. *That the Respondent be condemned to pay costs of the application.*

2. The application is premised on the grounds set out on the face of it and on the supporting affidavit sworn by the Ex-parte Applicant - Peterson Muriithi Nthiga - on 18.01.2023.

Nthiga deposed that on 12.06.2017, judgement was entered against the Respondent wherein he was ordered to supply him with: the mutation form for LR Gaturi/Nembure/2683; consent for transfer of Gaturi/Nembure/3461 to Njue M'miti and transfer forms thereof; consent for transfer of Gaturi/Nembure/3462 to Kinyua Nyandandia and transfer forms thereof; consent for transfer of Gaturi/Nembure/ 3463 to Nicholas Wambugu Njiru and transfer forms thereof.

3. The Applicant averred that on 27.10.2022, he obtained a certified copy of the decree and order emanating from the Court and on 02.11.2022 he caused the same to be served upon the Land Registrar through her appointed agents, the Attorney General, who acknowledged receiving them. He contended that he has visited the land registry on various occasions with a view to be issued with the said documents in vain. He stated that this Court ought to protect and zealously guard its dignity by being firm with the Land Registrar who has deliberately disobeyed valid court orders and attempted to frustrate the justice process. He averred that the application had been brought without undue delay and urged that the same be allowed as prayed.

4. The Applicant annexed to the supporting affidavit a copy of

the limited grant issued on 15.07.2021, a copy of the judgment delivered on 12.06.2017, and a copy of the decree and order.

5. Caroline Kaswii Kitavi, the District Land Registrar, Embu, in opposition to the application filed a replying affidavit dated 21/06/2023. She deposed that the Land Registrar was able to supply some of the original documents cited including; the transfer for land parcel 2683, original profoma for land parcel 2683, application for Land Control Board for subdivision of land parcel 2683, transfers for land parcels 3461, 3462 and 3463. She averred that the Land Registrar tried his best and mobilized all his staff to search for the mutation form for land parcel 2683 and the Power of Attorney dated 14/02/2014 but upto date they have not been able to trace them.

6. She stated that according to the records in the Land Registrar's office, land parcel 2683 was subdivided on 08.04.1975 into four parcels which are Gaturi/Nembure/3461, 3462, 3463 and 3464. That land parcels 3461 were then transferred to one Njue M'miti, 3462 to one Kinyua Njungandia, 3463 to one Nicholas Wambugu Njiru on 08.04.1975 and 3464 to one Peterson Muriithi Nthiga on 19.07.2013. She deposed that the Land Registrar who was in

office then received a letter dated 29.10.2020 from the Directorate of Criminal Investigations (Directorate), Kiambu road indicating that they were investigating an offence involving the said parcels of land and requesting to be supplied with original documents for verification and analysis of fingerprints.

7. She further stated that the Land Registrar forwarded the original documents that could be traced and the documents were returned on 01.04.2021 by the Directorate but the outcome of the investigation was yet to be made available to them despite requesting for the same. She averred that the Respondent had at no time failed to honor court orders as alleged and urged that the present application be dismissed and the documents that have so far been traced from the records and produced in court be accepted. She urged the Court to accept her apology and not punish the Respondent for the wrongs of somebody else, the somebody else being their predecessor, who allegedly failed to keep proper records way back in 1975.

8. The Ex-parte Applicant filed a further affidavit dated 11.10.2023 and deposed that he had never been supplied with the Land Control Board Consent for subdivision of land

parcel 2683. He averred that he had only been supplied with fake transfers for land parcels 3461, 3462 and 3463 and that the purported transfers to Njue M'mwiti, Kinyua Njungandia and Nicholas Wambugu Njiru were fraudulent. He asked the Court to deem it fit to cancel the titles issued and that the land be reverted back to him.

9. The application was canvassed by way of written submissions. Only the Applicant filed written submissions whereas the Respondent chose to rely on their replying affidavit.

10. The Applicant submitted that this Court issued clear orders for the Respondent to supply the documents that were well within the Respondent's knowledge but they failed to do so. He submitted that in making the orders against the Respondent, this Court was clearly seized of facts and the Respondent had a chance to present their case and therefore they cannot say that the documents are not available. He averred that it was evident that the Respondent was unwilling to give out the documents so as to conceal evidence of fraud which was the subject of the Applicants case. He maintained that the Respondent being the custodian of the public documents is obligated to make them

available as and when required. This would be in line with Articles 35 and 47 of the Constitution of Kenya which emphasize the right to information and fair hearing.

11. He contended that the orders of this Court are not made in vain and therefore if the excuses by the Respondent are left to stand, a bad precedent will have been created which will undermine the authority vested in the Court. The case of **Fortunas Charles Kamau -vs- Peris Nyiha Kangethe & 3 others (2021) eKLR** was cited and quoted for guidance. He urged that the application be allowed.

12. I have considered the Application, the response filed to it as well as the applicant's submissions. In my view, the issue falling for determination is whether the Respondent is in contempt of the Court orders issued on 27.10.2022 and, if so, whether the orders sought ought to be granted.

13. The law on contempt of court is now settled. For an Applicant to succeed in an application for contempt, the onus of proof lies on him to prove that the terms of the orders were unambiguous and binding on the Respondents, that the Respondents had proper notice of the orders, and that the Respondents actions are in clear and deliberate violation of the terms of the orders. The burden of proof in cases of

contempt is higher than the one in civil cases but is not beyond reasonable doubt.

14. In the present case, there is no dispute that this Court issued orders on 27.10.2022 requiring the Respondent to supply specific documents relating to land parcel Gaturi/Nembure/2683 and its resultant subdivisions to the Applicant. There is also no dispute that the said orders were served upon the Respondent through the office of the Attorney General. The Attorney General acknowledged receipt. Accordingly, the existence of a valid court order and the Respondent's knowledge thereof have been satisfactorily established.

15. The key issue therefore, is whether the Respondent wilfully disobeyed the said orders. The Applicant contends that despite serving the order to the Respondent, the Respondent has failed and/or refused to supply the required documents. On the other hand, the Respondent avers that they have made reasonable efforts to comply with the Court's orders and have supplied all documents within their possession, save for the mutation form for land parcel 2683 and the Power of Attorney dated 14.02.2014, which could not be traced despite doing a diligent search.

16. The Respondent further explained that the subject parcel was subdivided in 1975 and that the documents now sought pertain to records from that period. It was said that the records may not have been properly maintained by their predecessor. They averred that, despite reasonable efforts, they have been unable to trace all the requested documents. From the material placed before the Court, it is apparent that the Respondent did not disregard the Court's orders. To the contrary, they furnished several of the documents sought and offered an explanation in respect of those that could not be traced. There is no sufficient evidence before this Court to demonstrate that the failure to produce the remaining documents was deliberate or amounted to the kind of willful disobedience necessary to warrant a finding of contempt. In the circumstances, I am not satisfied that the threshold for a finding of contempt of court has been met.

17. The Applicant has further alleged fraud and urged the Court to cancel the titles of the resultant subdivisions of the subject land and revert the land to him. However, these are substantive issues which fall outside the scope of the present application and can only be addressed in appropriate substantive proceedings.

18. Consequently, the Notice of Motion dated 18.01.2023 lacks merit. It is hereby dismissed with no order as to costs.

RULING DATED, SIGNED and DELIVERED virtually at **KITUI** this **30TH DAY OF JUNE, 2026** pursuant to notice dated **17/6/2026**.

In the presence of,

Court Assistant - Musyoki

Plaintiff - Absent

Defendant - Absent

No counsel present

A. KANIARU

JUDGE- ENVIRONMENT & LAND COURT, KITUI