



**Abdullahi Ahmed Gele t/a Buxton Filling Station v County Government of Mombasa & 5 others  
(Environment & Land Petition 44 of 2021) [2023] KEELC 17331 (KLR) (27 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 17331 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND PETITION 44 OF 2021**

**LL NAIKUNI, J  
MARCH 27, 2023**

**BETWEEN**

**ABDULLAHI AHMED GELE T/A BUXTON FILLING STATION .. PETITIONER**

**AND**

**COUNTY GOVERNMENT OF MOMBASA ..... 1<sup>ST</sup> RESPONDENT  
BUXTON APARTMENT OF MOMBASA ..... 2<sup>ND</sup> RESPONDENT  
SULEIMAN SHAHBAL ..... 3<sup>RD</sup> RESPONDENT  
RONTON CONSTRUCTION CO. LTD ..... 4<sup>TH</sup> RESPONDENT  
CHIEF REGISTRAR ..... 5<sup>TH</sup> RESPONDENT  
ATTORNEY GENERAL ..... 6<sup>TH</sup> RESPONDENT**

**RULING**

**I. Brief Background of the Petition**

1. The Petitioner/Applicant, “Abdullahi Ahmed Gele T/A Buxton Filing Station” moved this Honorable Court for determination of a filed a Notice of Motion application dated 4<sup>th</sup> February, 2022. (Hereinafter referred to as “The Application”). In order to fully appreciate the issues being raised from the filed application, its pertinent that the Honorable Court expends a little time on the background of this matter based on the records hereof.
2. Initially, the Petitioner/Applicant herein instituted this Constitution Petition by filling a Petition dated 5<sup>th</sup> October 2021. It was accompanied by a certificate of urgency, a Notice of Motion application dated 4<sup>th</sup> February, 2022 together with the affidavit in support and sworn by one Abdullah Ahmed Gele. The said Notice of Motion application dated 5<sup>th</sup> October, 2021 sought the following prayers:
  - a. Spent.



- b. That pending the hearing and determination of this application inter-parties, the honorable court be pleased to grant a conservatory order restraining the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, and 6<sup>th</sup> Respondents from further demolishing, destroying, digging, constructing or in any way interfering with the suit property know as Buxton Filling Station erected on Land Reference Number Mombasa/Block XVII/1443.
  - c. That pending the hearing and determination of the Petition the honorable court be pleased to grant a conservatory order restraining the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, and 6<sup>th</sup> Respondents, their servants, agents and/or workmen from further demolishing, destroying, digging, constructing or in any way interfering with the suit property know as Buxton Filling Station erected on Land Reference Number Mombasa/Block XVII/1443.
  - d. That pending the hearing and determination of this application inter - partie, the honorable court be pleased to grant an order allowing the Petitioner free access to his property for purposes of removing all the fuel, tank and pumps without interference from the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, and 6<sup>th</sup> Respondents' officers, servants and/or agents and workmen.
  - e. That this honorable court is pleased to grant any other orders and directions that it may deem fit and just to issue under the circumstances.
  - f. That the costs of this application be borne by the 1<sup>st</sup> to 6<sup>th</sup> Respondents.
3. The afore said application of 5<sup>th</sup> October, 2021 was certified urgent on 6<sup>th</sup> October 2021. The Honorable Court directed that there be an "Inter - Parties" hearing on 27<sup>th</sup> November 2021. On 27<sup>th</sup> October 2021, the Honorable Court ordered that the suit premises be preserved by ensuring that the status quo is maintained. Which meant that nothing such as construction, alienation and/or sub - division would be allowed to take place until 1<sup>st</sup> December 2021 when the matter would be mentioned for directions. On 1<sup>st</sup> December 2021 when the application came up for mention the court ordered and caused the earlier orders to wit that "the status quo to be maintained" were extended. It from this brief background that the Petitioner/Applicant alleging that there was blatant and willful disobedience of these two Court orders by the Respondents herein and thus wished that they be cited for contempt by instituting the Notice of Motion application dated 4<sup>th</sup> February, 2022 and which now is the main gist of this Ruling hereof.

## **II. The Contempt application dated 4<sup>th</sup> February 2022**

4. Subsequently, and clearly stated above, the Petitioner/Applicant herein proceeded to make this application dated 4<sup>th</sup> February 2022, seeking for the Honorable Court to find that the Respondents herein were in contempt of court orders issued on diverse dates of 27<sup>th</sup> October 2021 and extended on 1<sup>st</sup> December 2021 respectively.
5. The said application for contempt of Court orders was brought under dint of Order 40 Rule 3 (1), (3) and Order 51 Rule 1 of the Civil Procedure Rules 2010 and Sections 1A, 1B, 3, and 3A of the [\*Civil Procedure Act\*](#), Cap. 21. The Petitioner/Applicant sought for the following prayers:
  - a. Spent.
  - b. That this Honorable Court be pleased to find one, The Chief Officer Department of Lands, Housing and Physical Planning, Ms. Rose Mbaika Munupe, H.E The Governor Hassan Ali Joho, the Directors of the 4<sup>th</sup> Respondent Mr. Suleiman Said Shahbal and Ahmed Alwy Ahmed Badawy; the Directors of the 6<sup>th</sup> Respondent Mr. Yasir Noor Mohamed Noor, Omar



Karadeli, Ahmed Karedeli and Martin Mbugua Kariuki respectively in contempt of this Honorable court for disobedience of its orders dated 27<sup>th</sup> October 2021 and 1<sup>st</sup> December 2021.

- c. That upon grant of prayer (2) above, this Honorable Court be pleased to impose the penalty of a hefty fine on one The Chief Officer, Department of Lands, Housing and Physical Planning, Ms. Rose Mbaika Munupe, H.E The Governor Hassan Ali Joho, the Directors of the 4<sup>th</sup> Respondent Mr. Suleiman Said Shahbal and Ahmed Alwy Ahmed Badawy; the Directors of the 6<sup>th</sup> Respondent Mr. Yasir Noor Mohamed Noor, Omar Karadeli, Ahmed Karedeli and Martin Mbugua Kariuki in execution of this order to satisfy the penalty for contempt.
  - d. That upon grant of prayer (3) above this Honorable Court do issue an order that the said 1<sup>st</sup> Respondent, The Chief Officer Department of Lands, Housing and Physical Planning, Ms. Rose Mbaika Munupe, H.E The Governor Hassan Ali Joho, the Directors of the 4<sup>th</sup> Respondent Mr. Suleiman Said Shahbal and Ahmed Alwy Ahmed Badawy; the Directors of the 6<sup>th</sup> Respondent Mr. Yasir Noor Mohamed Noor, Omar Karadeli, Ahmed Karedeli and Martin Mbugua Kariuki be committed to civil jail for a period of 6 months for the disobedience of the court orders dated 18<sup>th</sup> October 2021.
  - e. That the said contemnors Ms. Rose Mbaika Munupe, Hon. Hassan Ali Joho, Mr. Suleiman Said Shahbal, Ahmed Alwy Ahmed Badawy, Mr. Yasir Noor Mohamed Noor, Omar Karadeli, Ahmed Karedeli and Martin Mbugua Kariuki herein do personally meet the costs of this application.
6. The said Application dated 4<sup>th</sup> February, 2022 was premised on the grounds, testimonial facts and averments made out under the 16 Paragraphed Supporting Affidavit of Abdullahi Ahmed Gele sworn and dated 4<sup>th</sup> February, 2022 and the two (2) annexures marked as “AAG – 1 and 2” annexed hereto. He averred that:-
- a. He filed the Petition together with the application before the Court under the Certificate of Urgency on 5<sup>th</sup> October, 2021 seeking Conservatory orders.
  - b. The Court issued the orders on 27<sup>th</sup> October, 2021 and further extended the same on the 1<sup>st</sup> December, 2021.
  - c. The said orders were duly served upon the Respondents on 28<sup>th</sup> October, 2021 and 3<sup>rd</sup> December, 2021 by the Petitioner/Applicants’ Advocates on record which the Respondents and their Advocate on record received and acknowledged.
  - d. However the 1<sup>st</sup> to 6<sup>th</sup> Respondents and their officers had proceeded to fence off, dig up and commenced construction in a clear and flagrant breach of the order of Honorable Court.
  - e. The 1<sup>st</sup> to 6<sup>th</sup> Respondents had employed workers and workmen in bid to construct units of house on the suit premises and had interfered with the subject matter of the premises in clear and blatant breach of the status quo orders.
  - f. The Respondents were in a rush to complete the construction of the premises and had completely fenced off the whole suit premises making it inaccessible to the Applicant and members of the public at large.
  - g. He was advised by the Advocate that to preserve the dignity and integrity of this Honorable Court it was imperative that this Honorable Court found the said 1<sup>st</sup> Respondent, Chief Officer, Lands, Housing and Physical Planning, Ms. Rose Mbaika Munupe, H.E The



Governor Hassan Ali Joho, the Directors of the 4<sup>th</sup> Respondent Mr. Suleiman Said Shahbal and Ahmed Alwy Ahmed Badawy; the Directors of the 6<sup>th</sup> Respondent Mr. Yasir Noor Mohamed Noor, Omar Karadeli, Ahmed Karedeli and Martin Mbugua Kariuki in contempt of its orders and commit the named persons to Civil Jail for a period not exceeding six (6) months and impose such fines as the Court may deem fit so that the sanctity of the orders of the Court could be upheld and the rule of Law observed and preserved. These persons had continued to act in willful and flagrant and contravention of the Court orders issued on 27<sup>th</sup> October, 2021 and extended on 1<sup>st</sup> December, 2021.

- h. They continued to act in knowledge of the said orders but willfully disobey it in great defiance.
  - i. They have failed to act within the law and had chosen to act with impunity and outside the provisions of the law and express orders of the Court thereby being in contempt.
  - j. Unless the Honorable Court heard this application urgently and came in aid of the Applicant in preserving the subject matter with the Respondents and uphold the Rule of Law, the Respondents would continue to defy the orders of this Court with impunity.
7. He urged the Court to take a decisive step to stamp its authority and allow the orders as sought with Costs.

### III. The Responses by the 4<sup>th</sup> 5<sup>th</sup> and 6<sup>th</sup> Respondents

8. On 30<sup>th</sup> March, 2022, the 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Respondents filed their responses to the Notice of Motion application dated 4<sup>th</sup> February, 2022 by the Petitioner/Applicant being a 28 paragraphed Replying Affidavit sworn and dated 28<sup>th</sup> March, 2022 by Ahmed Alwy Ahmed Badawy together with Nine (9) annexures marked as “BPL – 1 to 9” annexed thereto. He averred as follows:-
- a. The 4<sup>th</sup> Respondent was the freehold and absolute proprietor of all part that parcel of the land Known as MSA/Block/XVII/1821 since the 28<sup>th</sup> May, 2021.
  - b. By an agreement of lease dated 11<sup>th</sup> June 2021, the 3<sup>rd</sup> Respondent let to the 4<sup>th</sup> Respondent for a term of 99 years all that parcel of land known as Land Registrar No. MSA/Block/XVII 1821 in terms and condition contained therein more particularly after the joint venture agreement dated 15<sup>th</sup> January, 2020 between the 3<sup>rd</sup> and 4<sup>th</sup> Respondents.
  - c. Pursuant to the said agreement the 4<sup>th</sup> Respondent was on 6<sup>th</sup> July, 2021 issued with a certificate of lease for plot No. MSA/Block/XVII/1821 for 99 years with effect from 15<sup>th</sup> January, 2021.
  - d. As at the time of the execution of the lease agreement, Plot MSA/Block/XVII/1821 was vacant with vacant block of flats which were unoccupied and after which the 3<sup>rd</sup> Respondent commenced the process of demolishing those empty flats which it has not completed and fenced off the entire land and had after taking possession thereof commenced building of affordable houses thereon in accordance with the joint venture agreement dated 15<sup>th</sup> January, 2020 between the 3<sup>rd</sup> and 4<sup>th</sup> Respondent.
  - e. Whereas it was time that this Honorable Court issued Interim Orders on 27<sup>th</sup> October, 2021 it was not time that the 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Respondents were in contempt of the said orders as at the time of the order of status quo – the Applicant was not on the ground as the 4<sup>th</sup> Respondent had already fenced off the entire suit property and started building affordable houses thereon in accordance with the joint venture agreement dated 15<sup>th</sup> January, 2020 between the 3<sup>rd</sup> and 4<sup>th</sup> Respondents. This was a fact even admitted by the Petitioner/Applicant that to wit by the



time of filing the application the Respondent had already taken possession by the property by fencing and started building houses thereon.

- f. What had been done on the ground so far was after the status quo order was issued as the project had to stop after issuance of the said orders.
- g. The 4<sup>th</sup> Respondent's development were strictly confined to the boundaries of the Plot No. MSA/Block/XVII/1821 and not onto the plot claimed by the Petitioner/Applicant known as Plot No. MSA/Block/XVII/1443 which was not within the 4<sup>th</sup> Respondent's leased property.
- h. He was informed by his Advocate the Petitioner/Applicant has not brought to court a surveyor's report to prove indeed that the development by the 3<sup>rd</sup> Respondent were on the Petitioner/Applicant alleged parcel of land MSA/Block/ XVII/1443 hence the application dated 4<sup>th</sup> February, 2022 should be dismissed with costs to the Respondents.
- i. That his Advocates had conducted an official search for Plot No. MSA/Block/XVII/1443 claimed by the Petitioner/Applicant and which had revealed that it did not exist on the ground as according to the search dated 4<sup>th</sup> November, 2021, Plot No. MSA/Block/ XVII/1443 was amongst other plots being Numbers MSA/Block/XVII/1418, 1403, 1447, 1518, 1468, 1444, 1519, 1473 and 1435, 1436, 1475 and 1476 that were cancelled and consolidated into a single plot No. Plot No. MSA/Block/XVII/1819 which was without any encumbrances in favour or any third party and was owned by the Municipal Council of Mombasa absolutely.
- j. By a letter dated 2<sup>nd</sup> November, 2021 addressed to the Director Lands Housing and Physical Planning office of the 3<sup>rd</sup> Respondent the Advocates for the 4<sup>th</sup> Respondent sought to know about the allegation by the Petitioner/Applicant in this Petition that it was the registered proprietor of Plot No. MSA/Block/XVII/1443 as well as to know about the alleged lease between the Petitioner/Applicant and the Defunct Municipal Counsel of Mombasa.
- k. In response to the letter stated in Paragraph 6 therein the 3<sup>rd</sup> Respondent by a letter dated 2<sup>nd</sup> November, 2021 confirmed that the alleged Petitioner's lease number MSA/Block/ XVII/1443 did not exist as the lease had been cancelled due to irregularity in allocation and breach of the terms of the lease by the Lessee.
- l. The 4<sup>th</sup> Respondent further obtained a verified copy of the Register for the alleged Petitioner/Applicant's plot No. MSA/Block/XVII/1443 which showed that the alleged lease was first created in favour of Mohamed Bohero for a term of 99 years from 1<sup>st</sup> July, 1947 on the 17<sup>th</sup> July, 1996 by the then defunct Municipal Council of Mombasa for an annual rent of Kenya Shillings Four Thousand Nine Hundred and Twenty (Kshs. 4,920/=). The said Mohamed Bohero later transferred his leasehold interest to Jiviben Lalji Shah for a consideration of Kenya Shillings One Million Five Hundred Thousand (Kshs. 1, 500, 000.00/=). Later the said Jiviben Lalji Shah let the property to Abdul Kadir Rashid Mohamed and Abdullahi Ahmed Gele on 19<sup>th</sup> January, 2001 for a term of six (6) years from 1<sup>st</sup> March, 2001 at a monthly rent of Kenya Shillings Twenty Three Thousand (Kshs. 23,000/=) revisable. The said lease was to expire on 2<sup>nd</sup> March, 2007 and records showed that there was no renewal of the same. Further the register showed that no disposition by the proprietor of the lease should be registered without the written consent of the lessor.
- m. The 3<sup>rd</sup> Respondent further gave the 4<sup>th</sup> Respondent's advocates correspondences to the Registrar of Lands to cancel the leases as a result of their irregular alienation and contravention



of the lease terms which inter alia included the Petitioners/alleged lease for Plot No. MSA/Block/XVII/1443.

- n. The 3<sup>rd</sup> Respondent further supplied the Advocate for the 4<sup>th</sup> Respondent with a letter dated 4<sup>th</sup> November, 2019 written by the 3<sup>rd</sup> Respondents to the Chief Executive Officer NLC to revoke title deed irregularly excised off within Buxton Housing Estate Mombasa and which “inter alia” comprised of Plot No. MSA/Block/XVII/1443.
- o. The 3<sup>rd</sup> Respondent further gave the Advocate for the 4<sup>th</sup> Respondent a letter dated 5<sup>th</sup> February, 2020 by the 3<sup>rd</sup> Respondent to the Chief Executive Officer, Ethics and Anti-Corruption calling for the investigations on the titles allegedly sublet irregularly by the then Mombasa Municipal Council which included the lease which the Petitioner sought to protect in this suit.
- p. The 4<sup>th</sup> Respondent was aware that by a Gazette Notice No. 4671 dated 26<sup>th</sup> April, 2021 published on 13<sup>th</sup> May, 2021 in Vol.CXXII NO. 104 the 3<sup>rd</sup> Respondent notified the public of the invalidity of the irregularity of the created leases including that of Plot No. MSA/Block/XVII/1443 subject in this suit.
- q. The alleged Plot No. MSA/Block/XVII/1443 had its lease lawfully determined by the 3<sup>rd</sup> Respondent and the lease thereof cancelled by the Registrar of Lands Mombasa, the Petitioner/Applicant could not hold the Respondents in contempt of Court as the Petitioner/Applicant had not proved that the development as described in the application by the Petitioner/Applicant dated 5<sup>th</sup> October, 2021 and 2<sup>nd</sup> February, 2022 herein the Petitioner/Applicant alleged parcel of Land.
- r. The Petitioner/Applicant had justifiable cause of action against the 4<sup>th</sup> Respondent founded on equity as the substance lease was irregularly created and did not at any moment exists in any land’s and survey records.
- s. The order issued on 27<sup>th</sup> October, 2021 was in reference to Plot No. MSA/Block/XVII/1443 which was not in any way related to the Respondents as the Respondents development was confined to Plot No. MSA/Block/XVII/1821.
- t. He was informed by his Advocate that the order for 27<sup>th</sup> October, 2021 was in relation to a non-existent plot that had already been cancelled by the Registrar of Lands due to irregularity in allocation and breach of the terms of the lease.
- u. He was informed by the 1<sup>st</sup> Respondent, Dr. Mwijuma that the lease of the Petitioner/Applicant was lawfully cancelled by the Registrar for reasons set in the attachment herein at particularly having been created unlawfully and irregularly and the Lessee’s transferring their successive interest without the written authority of the head Lessor.
- v. He was further informed by the 1<sup>st</sup> Respondent, Mrs. Mwajuma that the alleged lease of the Petitioner was an invalid and illegal one because the user was residential and not commercial.
- w. The Petitioner/Applicant had not demonstrated the parameters for the grant of the contempt of court orders sought in the instant application.

### **B. The Responses by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents**

- 9. On 30<sup>th</sup> March, 2022 the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents filed 40 Paragraphed Replying Affidavit sworn and dated 18<sup>th</sup> March, 2022 by Rose Mbaika Munupe together with twelve (12) annexures marked as



“RMN- 1 to 12” annexed thereto. She indicated being the Director, department of Lands, Housing and Physical Planning in the 3<sup>rd</sup> Respondent and hence fully conversant and competent to swear the Affidavit she averred that:-

- a. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents were not judicial bodies capable of being sued or held in contempt in the manner sought as officers of the 3<sup>rd</sup> Respondent had no legal liability in relation to acts or omissions done by virtue of their officers by dint of section 133 of the County Government Act and Section 22 of the National Coordination Act 2013. Hence the Petitioner actions against the 1<sup>st</sup> and 2<sup>nd</sup> Respondent and their names should be struck out by the court from these proceedings.
- b. The 3<sup>rd</sup> Respondent was the registered proprietor absolute of all that parcel of land known as Plot No. MSA/Block/XVII/1821 measuring 4.905 Hectares or thereabouts.
- c. By a lease dated 11<sup>th</sup> June, 2021 between the 3<sup>rd</sup> Respondent and the 4<sup>th</sup> Respondent, the 3<sup>rd</sup> Respondent and the 4<sup>th</sup> Respondent, the 3<sup>rd</sup> Respondent leased to the 4<sup>th</sup> Respondent all that parcel of land known as Plot No. MSA/Block/XVII/1821 for a term of 99 years with effect from the 15<sup>th</sup> January, 2020 for a consideration, terms and condition contained in the said lease agreement and the terms of the Joint Venture Agreement dated 15<sup>th</sup> January, 2020 between the 2<sup>nd</sup> and 4<sup>th</sup> Respondents for the Urban Renewal and the Redevelopment of the Buxton Estate.
- d. The lease was under the joint venture agreement the Public Private Partnerships Act under the 3<sup>rd</sup> Respondents Urban Renewal and Regeneration Programme which aimed to upgrade ten (10) of the 3<sup>rd</sup> Respondent dilapidated estates to realize and actualize the right to adequate and affordable housing to the residents of Mombasa County as per Article 43 of Constitution of Kenya and the National Government of Kenya affordable Housing Programme Framework Guidelines 2018.
- e. Pursuant to the lease the 4<sup>th</sup> Respondent was issued by the Registrar of Lands Mombasa with a Certificate of Lease for all that portion of land known as Plot No. MSA/Block/XVII/1821 for a term of 99 years with effect from 15<sup>th</sup> January, 2020 – the date for the joint venture agreement.
- f. The Petitioner’s alleged lease for MSA/Block/XVII/1443 was amongst several plots which were cancelled by the defunct Municipal of Mombasa housing been issued irregularly and having been hired off and excised from public parking playground and recreation land lawfully set aside at Buxton Housing Estate in Mombasa Island.
- g. By a Letter dated 4<sup>th</sup> November, 2019 the then County Land Planning and Housing Committee Executive Member wrote to the NLC requesting for the revocation of those irregularly excised plots from the 3<sup>rd</sup> Respondent Buxton Housing Estate. By then the plots including plot No. MSA/Block/XVII/1443 were vacant.
- h. On 5<sup>th</sup> February 2020 the 3<sup>rd</sup> Respondent wrote to the Ethics and Anti-Corruption Commission (EACC) requesting for investigations of the Leases irregularly hired from Buxton Housing Estate Land and bring the culprits for book but NLC and EACC never assisted the 3<sup>rd</sup> Respondent leading it to seek assistance from the Registrar of Lands and asking for a copy of the Green and While Card for the lease created.
- i. Upon examination of the register at the Land Registry it revealed that there were several irregularities in it and hence as result the transfer of the leasehold interest of Mohamed Bohero to Jiviben Lalji Shah and from Shah to the Petitioner was without the written authority of the



defunct Municipal Council of Mombasa – making the transfer illegal, wrongful and null and void ab inito.

- j. From the records, the transfer of Plots No. MSA/Block/XVII/1443 could never have been created without the following documents: -
  - a. Minutes of the Land Allocation Committee of the Municipal Council.
  - b. The application for the plot allocation from Mohamed Bohero.
  - c. The Part Development Plan (PDP) prepared before the said allocation.
  - d. The survey and cadastral Plans prepared before the said lease.
- k. The lease for plot No. MSA/Block/XVII/1443 expired on 3<sup>rd</sup> March, 2010 being for the terms of six (6) years.
- l. No Lessee ever paid the 3<sup>rd</sup> Respondent any reserved annual rent for the irregularly created leases.
- m. As a result of these irregularity a meeting was convened on 19<sup>th</sup> January, 2021 for all the irregularly created leases whereby the Committee recommended for the cancellation of the said leases. See Annextures marked as “RNM-7” are the minutes.
- n. Pursuant to the said meeting and minutes the County Execution Committee member for Land Planning Housing and Urban Renewal on 21<sup>st</sup> April, 2021 wrote to the Land Registrar Mombasa to cancel all those leases which were irregularly and illegally created and which the Land Registrar obliged accordingly and issued new certificate of title – whereby the 3<sup>rd</sup> Respondent became the legal owner to all that parcel of land MSA/Block/XVII/1443 and after the cancellation led to the consolidation into one plot being Plot No. MSA/Block/XVII/1819 vide the Gazette Notice Vol/CXXIII No. 104 dated 13<sup>th</sup> May, 2021 notified of the general public of the cancellation. Therefore, currently there was no register for the alleged Plot No. MSA/Block/XVII/1443 claimed by the Petitioner/Applicant.
- o. The 4<sup>th</sup> Respondent had a lease to develop in a joint venture with the 3<sup>rd</sup> Respondent on Plot No. MSA/Block/XVII/1821 and not MSA/Block/XVII/1819.
- p. After the cancellation the 3<sup>rd</sup> Respondent took possession of the now consolidated Plot MSA/Block/XVII/1819 by evicting illegal occupants and fencing the suit property. The 4<sup>th</sup> Respondent was occupying Plot No. MSA/Block/XVII/1821 and had a lease from the 3<sup>rd</sup> Respondent.
- q. On 2<sup>nd</sup> November, 2021, the Advocate for the 3<sup>rd</sup> Respondent sought to know the status of the plot and which it was responded to the effect that the Petitioner’s alleged lease never existed the register having been closed after the cancellation of the lease and consolidation of other cancelled leases to form a large Plot No. MSA/Block/XVII/1819.
- r. The Plot No. MSA/Block/XVII/1443 had been set aside for residential purposes and not a commercial user purposes of a Petrol Station – for the Petitioner having admitted it was for commercial purposes he automatically loses any proprietary interest on it under the Provisions of Section 1298) and (9) of the Land Act.
- s. The order issued by Court on 27<sup>th</sup> October, 2021 was in reference to Plot No. MSA/BLOCK/XVII/1443 which was not in any way related to the Respondents as the development undertaken by the Respondents were for Plot No. MSA/Block/XVII/1821.



- t. The Petitioner had no protection in law under Act 40 (b) of *the Constitution* of Kenya and Section 26 (a) and (b) of *Land Registration Act* No. 3 of 2012 taking that his lease was unlawfully and irregularly created.
- u. Under Section 152 A and 152B of the *Land Act* No. 6 of 2012, the Petitioner all along was an unlawful occupant Plot No. MSA/Block/XVII/1443 as he had invalid lease and hence it was terminated and thereafter evicted by the 3<sup>rd</sup> Respondent.
- v. Pursuant Joint Venture Agreement between the 3<sup>rd</sup> and 4<sup>th</sup> Respondent the 3<sup>rd</sup> Respondents had already taken possession of Plot No. MSA/Block/XVII/1821 fenced it and started constructing a permanent house thereof and according to the deponent these happened before the order of 27<sup>th</sup> October, 2021 was issued as alleged.
- w. The Petitioner had admitted from its filed Petition that it had been already evicted from plot No. MSA/Block/XVII/1443 by the time of filing the Petition. The Deponent denied that these developments took place after the status quo orders were granted.
- x. The Petitioner failed to bring a report by the Land Surveyor to prove indeed the development by the 3<sup>rd</sup> Respondent were on the Petitioner's Plot No. MSA/Block/XVII/1443 nor demonstrated that the Respondents had acted in contravention of the applicable principles with respect to Contempt of Court.

### **C. Further Affidavit by the Petitioner/Applicant**

10. On 5<sup>th</sup> April, 2022 upon obtaining the leave of court, the Petitioner/Applicant filed a 17 Paragraphed further Affidavit sworn by Abdullahi Ahmed Gele dated even date and four (4) annexures marked as "AAG – 1 to 4" annexed thereto. He averred as follows:-
  - a. On 29<sup>th</sup> September, 2021 at 11.00 P.M. the 1<sup>st</sup> to 6<sup>th</sup> Respondent sent their officers accompanied by goons allegedly from the office of the 2<sup>nd</sup> Respondent illegally without lawful authority and right. Stormed and fenced off the property and put guards to watch for them overnight.
  - b. On 30<sup>th</sup> September, 2021 at about 8.00 p.m. the said officers started demolishing the property without giving any notices to enable him remove his fuel. As a result of the demolition, he filed a Petition together with the application on 5<sup>th</sup> October, 2021 seeking conservatory orders. On 27<sup>th</sup> October, 2021 the court granted the said orders and which were further extended on 1<sup>st</sup> December, 2021.
  - c. The orders were served on all the Respondents on 28<sup>th</sup> November, 2021 and 3<sup>rd</sup> December, 2021 and a Return of Service duly filed. Despite of the order for the status quo to be maintained the 1<sup>st</sup> to 6<sup>th</sup> Respondent and their officers proceeded to fence off, dig up and commenced construction in breach of Court Order and which todate continue being in breach.
  - d. Therefore, the Petitioner/Applicant filed an application for contempt for the Respondents to be punished for their acts of contempt.
  - e. The Petitioner/Applicant at all material times before the illegal demolition, had been the legal tenant on the Plot No. MSA/Block/XVII/1443 carrying out the business of Petrol Station duly licensed by the Energy and Petroleum Regulatory Authority. He urged court to grant the orders sought from the filed application.
11. Nonetheless, the Court proceeded to issue a Ruling on the application dated 5<sup>th</sup> October 2021 and made the following orders:



- a. That the Notice of Motion application dated 5<sup>th</sup> October 2021 be and is hereby found to be meritorious and hence allowed with costs.
- b. That the Petitioner be and is hereby granted conservatory orders restraining the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Respondents from further demolishing destroying, digging, constructing or in way interfering with the suit property known as Buxton Filling Station erected on the parcel of land known as Land Reference No. Mombasa/Block XVII/1443 pending the hearing and determination of this petition.
- c. That an order be and is hereby granted allowing the Petitioner free access to the suit property for removing all fuel tank and pumps without interference from the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> respondents, their officers, servants and/or agents pending the hearing and determination of the petition.
- d. That an order of this honorable court be and is hereby made to the effect that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents herein cannot be sued in their personal capacity as they are not juridical bodies being the officers of the 3<sup>rd</sup> Respondent by dint of the provisions of Section 133 of the County Government Act of 2013 and Section 22 of the National Co - ordination Act of 2013 and therefore their names should be struck out and/or expunged from the records of these proceedings forthwith.
- e. That for the sake of expediency, the petitioner be heard by way of both viva voce evidence and affidavits on 29<sup>th</sup> July 2022.
- f. That the costs of the notice of motion dated 5<sup>th</sup> October 2021 to be borne by the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Respondents herein.

## **VI. Submissions.**

11. On 16<sup>th</sup> December, 2022, while all the parties were present in Court, it was directed that the Notice of Motion application dated 4<sup>th</sup> February, 2022 be disposed off by way of written submission herein. Pursuant to that all the parties fully complied and the Court reserved a date for delivering of its Ruling accordingly.

### **A. The Written Submissions by the Petitioner/Applicants**

12. On 5<sup>th</sup> April, 2022 the Learned Counsel for the Petitioner/Applicant the Law firm of Messrs. Abdi Aziz & Co. Advocates filed their written submissions dated 4<sup>th</sup> April, 2022. Mr. Abdi Aziz Advocate submitted that the 1<sup>st</sup> to 6<sup>th</sup> Respondents were in contempt of the orders of this court granted on 27<sup>th</sup> October, 2021 and extended on 1<sup>st</sup> December, 2021. They had done that by causing interference with the subject matter and construction on the suit premises and the breach the orders meant and had the long term effect of completely dismembering, alienating and wiping off to the earth what used to be a Petrol Station. The Learned Counsel held that the orders basically stated that:-
  - a. There was need to preserve the suit property
  - b. Thus status quo be maintained meaning no digging construction alienating and sub-division of the suit land.
  - c. To buttress its point and the meaning of status quo the counsel relied on the cases of Shimmers Plaza Ltd. –Versus- National Bank of Kenya 92015) eKLR, Thugi River Estate Limited and Another –Versus - National Bank of Kenya (2015) eKLR



12. He held that the 1<sup>st</sup> to 6<sup>th</sup> Respondents had the full knowledge of these Court Orders the same having been made in the presence of the Advocates. He refuted that by the time the orders were served the demolition had already taken place as by then they had not dug the ground and mounted the hoarding on the premises.
13. Further to this, he relied on the cases of “Hadkinson – Versus- Hadknsn (1952) C.A. 258”, “Smith –Versus- East Ello Rutal District Council and Others (1956) A736, 769 1 ALL ER 855, 871 Civil Application No. Nbi of 2017; “Fred Matiang’i the Cabinet Secretary Ministry of Interior and Coordination of National Government –Versus - Miguna Miguna and others Commercial Bank of Africa Ltd. –Versus- Isaac Kamau Ndirangu 1990-1994 E.A. 69 and Gatharia K. Mutilika & Others –Versus- Baharini Farm Ltd. (1995) eKLR 227.
15. In conclusion the Learned Counsel held that disobedience of court order undermined the Rule of Law and the judicial authority and hence he urged action to be taken against the contemnors.

### **B. The Written Submissions by the 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Respondents**

16. On 14<sup>th</sup> June, 2022 the Learned Counsel Fadhil & Kilonzo Advocates for the 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Respondents, filed their written submissions dated 31<sup>st</sup> May, 2022. M/s. Thuku Advocate 4<sup>th</sup> and 5<sup>th</sup> Submitted that the Respondent were vehemently in opposition of the application filed by the Petitioner for being in contempt for disobedience of the court order issued by this court on 27<sup>th</sup> October, 2021 and extended on 1<sup>st</sup> December, 2021. The Counsel provided a brief history of the matter.
17. The Learned Counsel held that contempt of Court was in the nature of criminal proceedings and therefore the proof of a case against a contemtor was higher than that of a balance of probability. This was because liberty of the subject was usually at stake and the Applicant must prove willful deliberate disobedience of the court order, if it were to succeed. The counsel relied on the decision of Gatharia K. Mutikika (Supra)  
The Learned Counsel raised five (5) issues as follows:-
18. Firstly, whether Mr. Suleiman Said Shahbal and Ahmed Alwy Ahmed Badaway the directors of the 6<sup>th</sup> Respondent, Mr. Yasir Noor Mohamed Noor, Omar Karadeli Ahmed Karadeli and Martin Mbugua Kariuki were rightly cited in the instant case. He held that they were neither directors of the 4<sup>th</sup> Respondent and had no relationship with it whatsoever and hence should not be cited for action or omission they never committed. The Counsel held that it was Buxton Point Apartment Limited. The 4<sup>th</sup> Respondent that was engaging in the construction of the house on the parcel of land known as Plot No. MSA/Block/XVII/1819.
19. Secondly, the court granted Interim Orders directing that status quo be maintained on 27<sup>th</sup> October, 2021 and extended on 1<sup>st</sup> December, 2021 there was to be a ruling on 10<sup>th</sup> February, 2022 on this date these orders were never extended – on all the dates of 16<sup>th</sup> February, 2022, 5<sup>th</sup> April, 2022 and 10<sup>th</sup> April, 2022 when parties appeared in court.  
Hence, the said orders of 27<sup>th</sup> October, 2021 and 1<sup>st</sup> December, 2021 were not valid anymore.
20. Thirdly, the Learned Counsel held that the Respondents were never personally served with the said orders. The affidavit of service attached and marked as A Plot No. MSA/Block/XVII/1821 “AAG - 2” was in relation to service of Certificate of Urgency, Notice of Motion application dated 5<sup>th</sup> October, 2021 and not for the order of 12<sup>th</sup> October, 2021. Clearly then they had no knowledge of the orders.



To buttress on this point, she relied on the decision of Sheilla Assatt Issenberg & Another –Versus- Antony Machatha Kinyanjui (2021) eKLR

21. Fourthly, the Learned Counsel held that from the order of 27<sup>th</sup> October, 2021 there was ambiguity as to which particular suit property was being referred to. The petitioner/Applicant had been making a claim for the property known as MSA/Block/XVII/1443 which was according to records had been cancelled having been given irregularly and consolidated with other parcels to be MSA/Block/XVII/1819. The said parcel was nonexistent. To support her point she relied on the decisions of “Ex-parte Peter Nyamu Karaguri Muhuri Karaguri –Versus - Attorney General of Kenya and 5 Others in (2013) eKLR where court held:-

“It is trite law where committal is sought for breach of injunction, it must be clear what the Defendant is alleged to have done and that it is breached. The slightest ambiguity to the order can invalidate an application for committal as ambiguity can in turn lead to the standard of proof which is the criminal standard not being attained especially on Affidavit evidence”

And James Gachiri Mwangi –versus- John Waweru Muriuki & 3 Others (2020) eKLR and Margaret Mamguye Ikong –versus- Justus Etyang Orodí & Another (2021) eKLR.

22. Finally, the Learned Counsel submitted that the 4<sup>th</sup> 5<sup>th</sup> and 6<sup>th</sup> Respondent were not guilty of contempt of court order issued herein as they had never disobeyed the court order of 27<sup>th</sup> October, 2021. They argued that the petitioner had admitted that the petrol station had already been demolished and the Respondents fenced off the parcel of land and started construction of permanent structures by the time he was filing the Petition and the application for injunction. She referred to the Petition dated 5<sup>th</sup> October, 2021. Page 6 to this effect. The injunction was never granted but fixed for “inter parte” on 27<sup>th</sup> October, 2022 and it was on this day that the orders of status quo was granted. To support her point she relied on the cases of “Richard Lanet Koonyo –Versus- Saleone Korongo & 3 Others (2017) eKLR, Kiprotich Langat & 8 Others –Versus- Socila Service Officer Londiani & 9 others (2020) eKLR and Stephen Mutha.....Mbau & 11 others –Versus Kenya Railways Corporation National Land Commission & 9 Others (2020) eKLR
23. In conclusion, the Learned Counsel urged the court to dismiss the application by the Petitioner/Applicant as he had failed to prove the required standard for granting orders for contempt for disobedience of court order.

## **VI. Analysis and Determination.**

24. I have keenly assessed the filed Notice of Motion application dated 4<sup>th</sup> February, 2022 filed by the Petitioner/Applicant herein, the supporting affidavits, the responses, the written submissions, the cited authorities by all the parties and the appropriate and relevant provisions of *the Constitution* and statutes.
25. In order for the Honorable Court to reach an informed, fair and reasonable decision on the subject matter, it has framed three (3) issues for its consideration and determination. These are:-
- a. Whether the Notice of Motion application dated 4<sup>th</sup> February, 2022 by the Petitioner/Applicant meets the threshold for finding the Respondents being in breach of the Court Orders issued on 27<sup>th</sup> October, 2021 and 1<sup>st</sup> October, 2021 respectively.
  - b. Whether the Respondents should be committed for being in disobedience of Court orders.
  - c. Who will bear the Costs of the Application.



**Issue No. a). Whether the Notice of Motion application dated 4<sup>th</sup> February, 2022 by the Petitioner/ Applicant meets the threshold for finding the Respondents being in breach of the Court Orders issued on 27<sup>th</sup> October, 2021 and 1<sup>st</sup> October, 2021 respectively.**

26. Fundamentally, and as a starting point, it needs to be appreciated that Court orders are not cosmetic nor a formality. Courts guard their orders so jealously. They never issue orders in vain. They are to be obeyed. Thus, for their disobedience the consequences are very severe. The Court punish for that. This may lead to one curtaining his/her freedom. The reason why courts punish for contempt is to uphold the dignity and authority of the court, ensure compliance with directions of the court observance and respect of due process of law, preserve an effective and impartial system of justice and maintain public confidence with administration of justice by court. Without sanctions of contempt there would be a serious threat to the rule of law and administration of justice for a party to be cited for contempt he must have violated and/or disobeyed an order that was directed at him.
27. Therefore, with that preamble beginning, its imperative that the Honorable Court provides the main concept and starting with definition of the term “Contempt”. The Black’s Law Dictionary (Ninth Edition) defines contempt of court as:-

“Conduct that defies the authority or dignity of a court. Because such conduct interferes with the administration of justice, it is punishable usually by fine or imprisonment.”

The latest edition of Brian A. Garner in Black’s Law Dictionary (Eleventh Edition) Thompson Reuters, 2019 defines contempt of court as:-

“Contempt is a disregard of, or disobedience to, the rules or orders of a legislative or judicial body, or an interruption of its proceedings by disorderly behavior or insolent language, in its presence or so near thereto as to disturb the proceedings or to impair the respect due to such a body.”

In the case of “Johnson – Versus - Grant (1923) SC 789 at 790 Clyde L J noted:-

“The phrase ‘contempt of court’ does not in the least describe the true nature of the class of offence with which we are here concerned.... The offence consists in interfering with the administration of the law; in impeding and perverting the course of justice..... it is not the dignity of court which is offended – a petty and misleading view of the issues involved, it is the fundamental supremacy of the law which is challenged.”

28. The law guiding the present Application is Order 40 Rule 3(1) of the Civil Procedure Rules, 2010 which stipulates as follows:-

‘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.



In the case of “Woburn Estate Limited – Versus - Margaret Bashforth [2016] eKLR the Court of Appeal held as follows:

”For many years in the history of the Judiciary of Kenya the Courts have, pursuant to section 5 (1) of the Judicature Act, resorted to the prevailing law of England in the exercise of the power to punish for contempt of Court.....

Today that position has drastically changed, starting with the establishment of the Supreme Court which was not envisaged when Section 5 of the Judicature Act was enacted. By Act No.7 of 2011, Article 163 (9) of the Constitution was operationalized by the enactment of the Supreme Court Act (CAP 9A), which among other things, makes express provision for the power of the Supreme Court to punish for contempt.

Under Section 29 of the Environment and Land Court Act, it is an offence punishable, upon conviction to a fine of not exceeding Kenya Shillings twenty Thousand (Kshs. 20,000,000) or to imprisonment for a term not exceeding two years, or to both, if any person refuses, fails or neglects to obey an order or direction of the Court given under the Act.

We have gone to this great length to demonstrate how, before the passage of these legislations the powers of the High Court and this Court to punish for contempt of Court were dynamic and kept shifting depending on the prevailing laws in England. Today each level of Court has been expressly clothed with jurisdiction to punish for contempt of Court. The only missing link is the absence of the rules to be followed in commencing and prosecuting contempt of Court Applications

27. It is instructive to note that the Contempt of Court Act commenced on the 13<sup>th</sup> January, 2017 but had been declared invalid by the High Court in the case of ”Kenya Human Rights Commission – Versus - Attorney General & Another [2018] eKLR. I am therefore obliged to revert to the provisions of the law that operated before the enactment of the Contempt of Court of Act, to avoid a lacuna in the enforcement of Court’s orders.
28. It was in this respect as observed in the case of ”Republic – Versus - Returning Officer of Kamkunji Constituency & The Electoral Commission of Kenya HCMCA No. 13 of 2008, that the High Court (read Environment and Land Court) has the responsibility for the maintenance of the rule of law, hence there cannot be a gap in the Application of the rule of law. In addition, in the case of ”Republic – Versus - Principal Secretary, Ministry of Defence Ex parte George Kariuki Waithaka [2019] eKLR, it was held that where there is a lacuna with respect to enforcement of remedies provided under the Constitution or an Act of Parliament, or if, through the procedure provided under an Act of Parliament, an aggrieved party is left with no alternative but to invoke the jurisdiction of the Court, the Court is perfectly within its rights to adopt such a procedure as would effectually give meaningful relief to the party aggrieved, in exercise of the inherent jurisdiction granted to the Court by the provision of Section 3A of the Civil Procedure Act, Cap. 21 to grant such orders that meet the ends of justice and avoid abuse of the process of Court.
29. The power to punish for contempt of Court, in courts of this level, is provided for under the Section 5 of the Judicature Act, Chapter 8 of the Laws of Kenya. A number of other legislations provide for the power to punish for contempt of Court. Under the provision of Section 5(1) of the Judicature Act which provided 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.”



There exists an avalanche of case law on the powers of the Court to punish such conduct. I will not go to the history and import of the entire process and reasons behind the exercise of such power but it is rich in history. However, it is worth noting that under the parent statute that establishes this Court, power is given to it to punish for the offence of contempt of Court.

Under the provision of Section 29 of the Environment and Land Court No. 19 of 2011 is clear to the effect that;

“ Any person who refuses, fails or neglects to obey an order or direction of the Court given under this Act, commits an offence, and shall, on conviction, be liable to a fine not exceeding twenty million shillings or to imprisonment for a term not exceeding two years, or to both

In the case of “Charity Mpano Ntiyine – Versus - China Communication Constructions Company Limited & National Environment and Management Authority (2017) eKLR. Court held that there are three elements that must be proved in contempt proceedings. These are:-

- a. Applicant must demonstrate terms of orders
- b. Applicant must demonstrate knowledge of terms by the Respondents and
- c. Applicant must demonstrate failure of Respondent to comply with the court order.

In the case of ”Hadkinson – Versus - Hadkinson (1952) 2 All ER. 567, it was held that:

“ It is plain and unqualified obligation of every person against or in respect of, who an order is made by a court of competent jurisdiction to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or even void.” (Also see the case of Katsuri Limited – Versus - Paurchand Devar Shah (2016) eKLR).

I agree with the holding in the above mentioned decisions. It is well settled that every court order should to be obeyed by the person to it is directed. One obeys it, regardless of whether it was irregular, and then raises a challenge to it, and unless it is set aside, it has to be obeyed.

30. The Honorable Court has been compelled to rely on the decision of:- “Christine Wangari Gachege – Versus - Elizabeth Wanjiku Evans & 11 Others Civil No. 3 of 2013 and In the Gatharia Mutitika – Versus - Baharini Farm Limited Civil Appeal No. 24 of 1985 where it was held inter alia:-

“ A contempt of court is an offence of Criminal Character a man may be sent to prison. The standard of Proof in contempt proceedings must be higher than proof on a balance of probabilities almost but not exactly beyond reasonable doubt. The guilt of a Contemptor has to be proved with strictness of proof as it is consistent with the gravity of charge”.

31. In a matter of placing more emphasis onto the expected legal ingredients of Contempt of court, this Court has further relied on the decision of “Sheila Cassatt Issenberg & another – Versus - Antony Machatha Kinyanjui [2021] eKLR, the court held that:-

“ .....in cases of Contempt the guilt has to be proved with such strictness of proof as is consistent with the gravity of the charge... Recourse ought not to be had to process of contempt of court in aid of a civil remedy where there is any other method of doing justice. The jurisdiction of committing for contempt being practically arbitrary and unlimited, should be most jealously and carefully watched and exercised with the greatest reluctance and the greatest anxiety on the part of the judge to see whether there is no other mode which



is not open to the objection of arbitrariness and which can be brought to bear upon the subject... applying the test that the standard of proof should be consistent with the gravity of the alleged contempt... it is competent for the court where contempt is alleged to or has been committed, and or an application to commit, to take the lenient course of granting an injunction instead of making an order for committal or sequestration, whether the offender is a party to the proceedings or not”.

32. It is an established principle of law as was held in the case of:- “Kristen Carla Burchell – Versus - Barry Grant Burchell, Eastern Cape Division Case No. 364 of 2005 in order to succeed in civil contempt proceedings, an Applicant has to prove (i) the terms of the order, (ii) Knowledge of these terms by the Respondent, (iii). Failure by the Respondent to comply with the terms of the order. My view is that this adequate on the concept on Contempt of Court.

**Issue No. b). Whether the Notice of Motion application dated 15<sup>th</sup> February, 2022 by the Respondent/Applicant herein meets the fundamental threshold of breach of Contempt of Court by the Appellant?**

33. Having laid the basis for understanding why courts in Kenya can punish for contempt of court orders, I now turn to address the issues raised in the Application and the necessary pleadings. In order to find out whether the application was merited, three quick important points need to be considered first: was there an order to be obeyed? If so, was it served? If the answer to the two is in the affirmative, was it obeyed? As I stated in the introduction to this ruling, the Application relates to alleged disobedience of a court order issued on 13<sup>th</sup> October, 2021. The Applicant asked this Court to cite the Appellant/ Respondent for contempt of the order. The order was issued in the interim and the Court directed that the matter was to be mentioned on 15<sup>th</sup> November, 2021. The orders were to be in place from the date of issue to 15<sup>th</sup> November, 2021 when they were extended again for Seven (7) days.
34. In my own view, I discern that indeed the Respondents who had their Advocates present on the two occasions when these orders were made were fully aware of the said orders. Thus, the argument of them not having any knowledge of the orders of this Court would not only be deceit, unfounded but also mischievous to say the least. Having stated that, the other issues to be determined was whether the Respondents deliberately disobeyed these orders issued by the Honorable Court. Before From the surrounding facts, there are number of factual aspects to be considered herein. I am guided by the Scottish case of “Stewart Robertson – Versus - Her Majesty’s Advocate, 2007 HCAC 63, Lord Justice Clerk stated that:

“contempt of court is constituted by conduct that denotes willful defiance of or disrespect towards the court or that willfully challenges or affronts the authority of the court or the supremacy of the law, whether in civil or criminal proceedings”

35. Further, Romer L.J in “Hadkinson - Versus - Hadkinson(1952) ALL ER 567 stated that:

“It is the plain and unqualified obligation of every person, against, or in respect of, whom an order is made by a court of competent jurisdiction to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or even void”

36. From the foregoing, it is trite that contempt of court proceedings and applications are subtle and criminal in nature and would impose criminal sanctions if a conviction followed. I find that the



Appellant/Respondent defied orders of this Court despite having knowledge of the said orders. The Respondents are indeed entitled to all the remedies sought from their application.

To protect the dignity and authority of the court of law, this court, shall be firm on any person who deliberately disobeys court orders or attempts to scuttle the court process.

### **Issue No. c). Whether the parties were entitled to the orders sought**

37. Now turning to the issues under this Sub heading. The Honorable Court has decided to look into the concept of the Contempt of court in details. It is that conduct or action that defies or disrespects authority of court. Black Law Dictionary 9<sup>th</sup> Edition defines it as:-

“The act or state of despising the conduct of being despised conduct that defies the authority or dignity of a court or legislature. Because such conduct interferes with administration of Justice”

Properly put, contempt is the conduct that impairs the fair and efficient administration of justice.

38. By virtue of determining the application dated 5<sup>th</sup> October 2021, the court essentially disposed with the orders issued on 27<sup>th</sup> October 2021 and 1<sup>st</sup> December 2021. Basically the orders which were said to be in contempt, were interim in nature, and were granted by court pending the hearing and determination of the main application dated 5<sup>th</sup> October 2021. From the pleadings, there are a few issues that need to be critically assessed. For instance, the Respondents have ably argued that the application was determined by court on 9<sup>th</sup> May 2022 and the orders dated 27<sup>th</sup> October 2021 and 1<sup>st</sup> December 2021 were no longer in force, since they were issued pending the hearing and determination of the main application. Additionally, the Learned Counsel argued that by the time of issuing the Orders, the Petitioner/ Applicant had already vacated the suit premises and indeed the site was vacant an issue which the Petitioner has vehemently refuted. All these are matters of conjecture and require further interrogation by Court from the parties themselves and perhaps to deduced during the Site Visit by Court.

39. I reiterate that for the dignity and authority of the court, this court has to ensure there is respect of the due process of the law, the preservation of an effective system of justice and maintenance of public confidence in the administration of justice by the courts. The Honorable Court issued orders on 9<sup>th</sup> May 2022 and it's up to the Petitioner to present before court evidence that the said orders were being violated by the Respondents.

40. It is imperative and invariable that court orders have to be followed and complied with, to ensure that is done, the court has powers to summon the Respondents to show cause as to the status of their compliance with the orders issued on 9<sup>th</sup> May 2022. This was quite important as this court had directed parties to prepare for a site visit to the suit property. There are numerous issues that all the parties have raised from their pleadings and this Court would wish to cause more interrogation before it arrives at any conclusion where there was disobedience of the Court orders or not. It for these reasons therefore that the Honorable Court is of the view that the Respondents be summoned to court to issue a detailed explanation as to their compliance before the said site visit can take place.

### **Issue No. c). Who will bear the costs of the application.**

41. It is now well established that and from Rule 26 (1) and (2) of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedom) Practice and Procedure Rules 2013, the award of costs is at the discretion of the Cost.



42. In exercising its discretion to award costs, the court shall take appropriate measures to ensure that every person has access to court to determine their rights and fundamental freedoms.

The Proviso of the Provisions of Section 27(1) of the *Civil Procedure Act* Cap 21 holds that costs follow the event. By event it means the results of the legal action or process in any litigation (see the Supreme Court Case of Jasbir Rai Singh Rai – Versus- Tarhochan Singh (2014) eKLR and Mary Wambui Munene –Versus- Ihururu Dairy Cooperative Societies eKLR (2014)

43. In the instant case the Petitioner/Applicant herein has partially succeeded in prosecuting its notice of motion application herein dated 4<sup>th</sup> February, 2022. Undoubtedly, the Respondents were all fully aware of these orders by the Court. The only issue that needs to be clarified is whether they disobeyed the said Court Orders or not before a decision is made. Ideally, they would be entitled to costs to be borne by the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents herein taking that the matter is still progressing to full trial to its logical conclusion, its just fair, reasonable and equitable that the Costs be in the cause thereof.

#### **IV. The Conclusion & Directions of the Court**

44. In conclusion having caused an elaborate analysis of the framed issues herein, the Honorable Court is of the view that the application by the Petitioner/Applicant has partially succeeded in that all the Respondents were in full knowledge of the orders made out by this Court. In the given circumstances, the Court will still need to cause more interrogation on the aspects of the disobedience of the orders and the consequences thereof. For that reason, the Court proceed to make the following Orders.

- a. That the Notice of Motion application dated 4<sup>th</sup> February 2022 is hereby partially allowed with no orders as to costs.
- b. That Summons are hereby issued to the 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Respondents to physically and personally appear before Honorable Court on 22<sup>nd</sup> May, 2023 for an explanation as to the status of their compliance with the orders issued on 9<sup>th</sup> May 2022.
- c. That for the sake of expediency, the Petition to be heard by way of both viva voce evidence and affidavits on 2<sup>nd</sup> October, 2023. There be a mention on 22<sup>nd</sup> May, 2023 for further direction on how to proceed on with this matter.
- d. That an order be and is hereby made that there shall be conducted a Site Visit on site pursuant to the provisions of Order 18 Rule 11 of the Civil Procedure Rules, 2010. For good orders the following to happen:-
  - i. The parties to ensure that there is adequate arrangement on security to be provided for by the offices of the County Commander of Police Coast, Region.
  - ii. The matter to be mentioned at 9.30am through Virtual means.
- e. That the Costs of the application dated 4<sup>th</sup> February, 2022 to be in the cause.

It is so ordered accordingly

**RULING DELIEVERD VIDE MICROSOFT TEAMS VIRTUAL MEANS ,SIGNED AND DATED AT MOMBASA THIS 27<sup>TH</sup> DAY OF MARCH 2023.**

.....

**HON. JUSTICE L. L NAIKUNI (JUDGE),**

**ENVIRONMENT & LAND COURT AT**



## **MOMBASA**

### **In the presence of:**

- a. M/s. Yumnah, the Court Assistant.
- b. Mr. Abdi Aziz Advocate for the Petitioners/Applicants.
- c. M/s. Thuku Advocate holding brief for Mr. Kilonzo for the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents.
- d. M/s. Sultan Advocate for the 4<sup>th</sup> and 5<sup>th</sup> Respondents.
- e. M/s. Waswa Advocate for the 7<sup>th</sup> Respondent.

