



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KITALE**

**SUCCESSION CAUSE NO. 67 OF 2012**

**IN THE MATTER OF THE ESTATE OF THE LATE FRANCIS MUTHUI ALIAS JOHN  
NDUMA MUTHUI - (DECEASED)**

**PRISCILLA NAFULA NDUMIA.....1<sup>ST</sup> PETITIONER/APPLICANT**

**KEDIUS KEZZA NDUMIA.....2<sup>ND</sup> PETITIONER/APPLICANT**

**VERSES**

**NJOROGE MUNGAI & OTHERS.....RESPONDENTS**

**RULING**

1. In their Notice of Motion dated **28<sup>th</sup> May, 2019** the Applicants pray that the Respondents namely **NJOROGE MUNGAI, WYCLIFFE SIMIYU WAMALWA and NICODEMUS NGARARI** be cited for contempt for disobedience of the court orders dated 16<sup>th</sup> October, 2018 and that they should be punished. The affidavit of **KEDIUS KEZZA NDUMIA** in support of the same is dated 28th May, 2019.
2. The Applicants have attached a copy of the consent order dated 24<sup>th</sup> October, 2018 in which the surveyors were to go on land parcel number **UASIN GISHU/ELLAHRE SETTLEMENT SCHEME/124** and carry out a subdivision exercise as agreed by the parties. It then appears that despite the said exercise which was consented by the parties on record the respondent flagrantly disobeyed the boundaries which were placed and proceeded to plough the land as well as removing the beacons placed therein.
3. There is as well a criminal charge facing some of the Respondents as per the charge sheet annexed to the application. The outcome of the said criminal proceedings has however not been attached.
4. The Respondents through the replying affidavit of **WYCLIFE SIMIYU** sworn on 18<sup>th</sup> July, 2019 on his own behalf and on behalf of the rest of the Respondents have denied any knowledge of the consent order that they breached. They have gone ahead to blame their counsel on record who recorded the consent. They have also denied the criminal charges which in any event were not related to the case at hand.
5. The court has perused the application as well as the submissions by counsel on record. The contempt proceedings are ordinarily serious for they are quasi criminal in nature and the prove is always high.
6. It is the position of this court that the Respondents were aware of the court order as the same was entered voluntarily with their then counsel on record present. They have admitted as much and if they had any problem they should at least at the earliest opportunity have applied to set it aside or have it reviewed.

7. The only saving grace for the Respondents is that although the survey report is on record, there is no evidence that they were present during the exercise. The Surveyors did not indicate that during the exercise the Respondents were present as there are no notes. The letter to the area Chief dated 3<sup>rd</sup> December, 2018 by the County Surveyor suggest that he went to the ground.

8. The court takes cognisance that several times the matter came up before the court and there was no objection raised by the Respondents. None of the parties voiced their concerns about the survey report. It would have been necessary though for the surveyor to have included the minutes of what transpired on the day he went to the scene beside the production of the sketch map.

9. Be it as it may, this court shall grant the Respondents the benefit of doubt. They shall not be cited for contempt for now. Nonetheless, each of the parties should remain on the portion as shown by the surveyors and any beacons removed should be replaced at the cost of the Respondents. Should they have any problems with the report then they shall be at liberty to apply.

10. The Applicants shall have the costs of this application.

**Dated, signed and delivered at Kitale in open court this 10<sup>th</sup> day of March, 2020.**

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**H. K. CHEMITEI**

**JUDGE**

**10/03/2020**

**In the presence of:-**

**Nakitare holding brief for Khaoya**

**Kibe holding brief for Simiyu for Applicant**

**Court Assistant- Silvia**

**Ruling read in open court**