



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**CIVIL SUIT NO. 199 OF 2010**

**GEORGE MULI MUTUA & 19 OTHERS.....PLAINTIFFS**

**VERSUS**

**DAVID WAWERU NDUNGU.....1<sup>ST</sup> DEFENDANT**

**JEREMIAH GATHIRUMU GIKONYO.....2<sup>ND</sup> DEFENDANT**

**PATRICK FREDRICK KIRUGU.....3<sup>RD</sup> DEFENDANT**

**NATIONAL BANK OF KENYA.....4<sup>TH</sup> DEFENDANT**

**RULING**

On 7<sup>th</sup> July 2015, the 3<sup>rd</sup> Defendant herein, Patrick Fredrick Kirugu filed an application by way of Notice of Motion of the same date seeking among others, an order that the plaintiffs herein either by themselves or through their servants, employees, agents, assigns or any other person claiming under them be restrained by a temporary injunction from harvesting or excavating building materials, blocks, soil, stones or in any other manner wasting, damaging, pillaging, tilling or interfering with all that parcel of land known as LR. No. 4929/1 (I.R No. 3854/30) Makuyu Kuoka Farm,(herein after referred to as “the suit property”) pending the hearing and determination of this suit. The 3<sup>rd</sup> Defendant’s application was certified as urgent on 8<sup>th</sup> July 2015 and fixed for hearing inter-partes on 22<sup>nd</sup> July 2015.

The matter came up for hearing *inter partes* before Mutungi J. on 22<sup>nd</sup> July 2015 when Mr. Maina appeared for the Plaintiffs, Mr. Ndegwa for the 3<sup>rd</sup> Defendant and Mr. Odhiambo for the 4<sup>th</sup> Defendant. On the day, Mr. Maina asked for leave to respond to the application. Mutungi J. granted the plaintiffs leave to respond to the application within 21 days and adjourned the application to 28<sup>th</sup> September 2015 for hearing. The judge made a further order that pending the hearing of the application; all the parties were to maintain the status quo which he explained to mean that there was to be no further excavation and/or wastage on the suit property. The order by Mutungi J. was extracted and issued by the Deputy Registrar on 29<sup>th</sup> July 2015.

What is now before me is the 3<sup>rd</sup> defendant’s application by way of Notice of Motion dated 17<sup>th</sup> August 2015 seeking an order that all the Plaintiffs save for the 14<sup>th</sup> Plaintiff be cited for contempt of the court order that was issued herein by Mutungi J. on 22<sup>nd</sup> July 2015 aforesaid and that they be arrested and committed to civil jail for a period of 6 months or such lesser period as the court may deem fit. The

application was made on the grounds that; the order that was made herein on 22<sup>nd</sup> July 2015 by Mutungi J. directed the parties to observe status quo by ensuring that there was no further excavation or wastage being carried out on the suit property. The said order was served upon the plaintiffs and their advocates on 30<sup>th</sup> July 2015 and 31<sup>st</sup> July 2015 respectively. The same has not been varied, reviewed or set aside. During the pendency of the said order, the plaintiffs in disobedience thereof continued with the process of mining of building stones and other construction materials on the suit property. The activities aforesaid amount to contempt of the aforesaid court order and should be punished by the court so as to uphold the dignity and respect for the court. In his affidavit filed in support of the application, the 3<sup>rd</sup> defendant annexed as exhibits, a copy of the court order said to have been breached, a copy of the affidavit of service of the said order upon the plaintiffs and their advocates on record and photographs said to have been taken on the suit property on 12<sup>th</sup> August 2015 showing the activities that were taking place thereon as at that date.

The 3<sup>rd</sup> defendant's application was opposed by the plaintiffs through a replying affidavit sworn by the 1<sup>st</sup> plaintiff George Muli Mutua on 2<sup>nd</sup> September 2015. In his affidavit, the 1<sup>st</sup> Plaintiff admitted that the plaintiffs and their advocates on record were served with the court order made herein on 22<sup>nd</sup> July 2015 as stated in the 3<sup>rd</sup> defendant's affidavit in support of the application. He denied however that the plaintiffs have disobeyed the said order. To demonstrate that the 3<sup>rd</sup> defendant's allegation has no basis, the 1<sup>st</sup> plaintiff stated that the 3<sup>rd</sup> and 16<sup>th</sup> plaintiffs are deceased and as such could not have carried out the alleged acts of disobedience complained of by the 3<sup>rd</sup> defendant. The 1<sup>st</sup> plaintiff has stated that the 3<sup>rd</sup> defendant has made blanket allegations in his affidavit without specifying with clarity as to who among the plaintiffs has disobeyed the court order aforesaid. The 1<sup>st</sup> plaintiff has stated that of the surviving plaintiffs, only the 11<sup>th</sup> and 12<sup>th</sup> Plaintiffs were engaged in quarrying activities which activities they stopped awaiting further orders from this court upon being served with the court order of 22<sup>nd</sup> July 2015. The 1<sup>st</sup> Plaintiff has stated that the other plaintiffs have never engaged in quarrying activities and the portions of the suit property under their occupation have no quarries. The 1<sup>st</sup> plaintiff has contended that the photographs annexed to the 3<sup>rd</sup> defendant's affidavit were taken elsewhere most probably in the neighbouring parcel of land known as Kwega Farm. The 1<sup>st</sup> plaintiff has annexed to this affidavit photographs which he claims to have taken on the suit property which are at variance with those which are annexed to the 3<sup>rd</sup> defendant's affidavit.

On 17<sup>th</sup> August 2015, the court directed that the 3<sup>rd</sup> defendant's application be heard by way of written submissions. Both parties filed their submissions and the same are on record. I have considered the 3<sup>rd</sup> defendant's application and the replying affidavit that was filed by the plaintiffs in opposition thereto. I have also considered the parties' respective submissions and the authorities cited in support thereof. What I need to determine in the application before me is whether the plaintiffs have disobeyed the order that was made herein by Mutungi J. on 22<sup>nd</sup> July 2015 and if so, whether they should be punished and the appropriate punishment to impose. To establish a charge of contempt of court, the onus was on the 3<sup>rd</sup> defendant to prove that:-

- (i) The court had issued the subject order;
- (ii) The order was extracted and served upon the alleged contemnors or that it was within their knowledge and;
- (iii) The alleged contemnors disobeyed the order.

In the case before me, there is no dispute that the court did issue an order on 22<sup>nd</sup> July 2015 directing the parties not to continue with the quarrying activities or any other form of wastage on the suit property. There is also no dispute that the order was extracted and served upon the plaintiffs/respondents and their advocates on record. What is disputed is whether or not the Plaintiffs disobeyed the said order.

In the case of **Duncan Manuel Murigi Vs. Kenya Railways Corporation (2008) eKLR**, the court cited with approval the case of **Bramblevale Ltd. (1970) CH 128 at page 137 in which Lord Denning** stated that:-

***“A contempt of court is an offence of a criminal character. A man may be sent to prison for it. It must be satisfactorily proved .....*”**

In the case of **Mutitika Vs. Baharini Farm Ltd (1985) KLR 227**, it was held that contempt of court is quasi criminal in nature and as such the standard of proof required is more than a balance of probability but not beyond reasonable doubt. I am in agreement with the submission by the plaintiffs’ advocates that the 3<sup>rd</sup> defendant has failed to prove that any of the plaintiffs disobeyed the order that was issued herein on 22<sup>nd</sup> July 2015. I am in agreement that the 3<sup>rd</sup> defendant has made general claims which have no evidential value. The 3<sup>rd</sup> defendant has not stated in his affidavit when the plaintiffs were found mining stones on the suit property after the order of 22<sup>nd</sup> July 2015, whether they were together all at once or in groups and how they were identified and by who. The 3<sup>rd</sup> defendant has also not responded to the 1<sup>st</sup> plaintiff’s contention that the 3<sup>rd</sup> and 16<sup>th</sup> plaintiffs are in fact deceased and could not have been engaged in the activities which have given rise to the present application.

The photographs annexed to the 3<sup>rd</sup> defendant’s affidavit may be showing that there were still some forms of stone mining activities on the suit property as at 12<sup>th</sup> May 2015. Their evidential value however just ends there. They have fallen short of showing the identities of the miners which is the central issue in these proceedings. I am of the view that the 3<sup>rd</sup> defendant should have done more than merely taking photographs. This court cannot assume that since the plaintiffs had been accused of carrying out quarrying activities on the suit property and were ordered to stop such activities on 22<sup>nd</sup> July 2015, the quarrying activities which were taking place on the suit property on 12<sup>th</sup> August 2015 must have been by the Plaintiffs. Contrary to the 3<sup>rd</sup> defendant’s submission, the onus was upon the 3<sup>rd</sup> defendant to prove the alleged disobedience of the order of 22<sup>nd</sup> July 2015. The plaintiffs had no duty as claimed by the 3<sup>rd</sup> defendant to lead evidence showing that they had complied with the said court order.

For the foregoing reasons, it is my finding that the 3<sup>rd</sup> defendant’s application dated 17<sup>th</sup> August 2015 has no merit. The same is accordingly dismissed with costs to the plaintiffs.

**Delivered, Dated and Signed at Nairobi this...15<sup>th</sup> ....Day of .....January.....2016**

**S. OKONG’O**

**JUDGE**

**In the presence of**

**N/A** **for the Plaintiffs**

**Mr. Wairegi h/b for Ndegwa** **for the Defendants**

**Mr. Odhiambo** **for the 4<sup>th</sup> Defendant**