



**Ladha & another v Abdulrehman & 4 others (Environment & Land Case 282 of 2008) [2023] KEELC 22025 (KLR) (5 December 2023) (Ruling)**

Neutral citation: [2023] KEELC 22025 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND CASE 282 OF 2008  
LL NAIKUNI, J  
DECEMBER 5, 2023**

**BETWEEN**

**KHAIRUNISSA HUSSEIN HAJI LADHA ..... 1<sup>ST</sup> PLAINTIFF**

**SHEHNAZ HUSSEIN HAJI LADHA ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**SULEIMAN ABDULREHMAN & 4 OTHERS ..... DEFENDANT**

**RULING**

1. The Ruling by this Honorable Court pertains the hearing and determination of the Notice of Motion application dated 10<sup>th</sup> July, 2023. It was moved by the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs/Applicants herein, Khairunissa Hussein Haji Ladha and Shehnaz Hussein Haji Ladha and against the Defendants/ Respondents herein. The application was based on the provisions of Section 5 (1) of *Judicature Act* Cap 8, Section 3A of *Civil Procedure Act* Cap 21.
2. Upon service, the Application was opposed by the Respondents' Replying Affidavit sworn by Salim Haji Essak sworn on 18<sup>th</sup> July 2023.

**II. The Plaintiffs/Applicants' case**

3. The Plaintiffs/Applicants sought for the following orders:-
  - a. Spent.
  - b. Spent.
  - c. That Salim Haji Essack and Bilquis Salim Suleiman the 4<sup>th</sup> & 5<sup>th</sup> Respondents respectively be held in contempt of Court Orders given on 18<sup>th</sup> November 2021 for refusing to pay costs for registration of inhibition into the land known as Plot No Msa/block Xxii/155 Ganjoni and be committed to civil jail for six months.



- d. That the Orders of Court issued on 18<sup>th</sup> November 2021 directing the Land Registrar to register an inhibition of the land No. Msa/block Xxi/155 at the expense of the Respondents be set aside and or vacated and the Title Deed of the suit property be issued to the Plaintiff henceforth.
  - e. Costs of the Application be paid by Respondent.
4. The Application was premised on the grounds, testimonial facts and the averments made out under the 14 Paragraphed Supporting Affidavit sworn by Shehnaz Hussein Haji Ladha, the 2<sup>nd</sup> Plaintiff/Applicant herein together with four (4) annexures marked as 'SHHL - 1 to 4' on 10<sup>th</sup> July, 2023. He deposed as follows that:-
- a. The Plaintiff filed this suit and obtained Judgment in her favour against the Defendant in respect of the suit property herein whereby the Court vested the property to the Plaintiff.
  - b. Aggrieved by the Judgment, the Defendants/Respondents filed an application for stay pending Appeal. On 18<sup>th</sup> November 2021 the Court dismissed the Application and directed that an inhibition be registered against the title at the expense of the Defendant/Respondent pending determination of the Appeal.(Annexed in the affidavit are copies of Notice of Appeal and the Ruling of 18<sup>th</sup> November 2021 marked as "SHHL – 2" and "SHHL – 3" respectively).
  - c. In breach of the order the Defendant/Respondent refused to effect registration.
  - d. On 7<sup>th</sup> July 20223, the Plaintiff/Applicant was ambushed and evicted from the suit property by the 4<sup>th</sup> and 5<sup>th</sup> Defendant/Respondents in execution of an Order issued by Court on 13<sup>th</sup> November, 2020 between "Salim Haji & Bilqis Salim - Versus - Shehnaz Hussein Haji" and were now demolishing the suit property.
  - e. The Plaintiffs/Applicants herein were not a party to that suit and had never been served with any pleadings or any notice in respect of the aforesaid suit.
  - f. The 4<sup>th</sup> and 5<sup>th</sup> Defendants/Respondents herein who refused to comply with Court Order, then proceeded to evict the Plaintiff using another Order which amount to abuse of Court process. (Annexed in the affidavit was a copy of the Decree in CMCC No. 956 of 2020 marked as "SHHL – 4").
  - g. The Plaintiffs/Applicants had been evicted from a house in execution of a Judgment delivered by the Lower Court while she had a Judgment of this Court being a Superior high Court.
  - h. The eviction of the Plaintiffs/Applicants was an abuse of Court process and it amounted to contempt of Court and unless the Plaintiffs/Applicants were reinstated to the house, the Judgment by this Court shall be rendered nugatory
  - i. Since the 6<sup>th</sup> July 2023 when the Plaintiffs/Applicants were evicted they had been staying in hotels without their basic items which were left outside the house by the 4<sup>th</sup> and 5<sup>th</sup> Defendants/Respondents.
  - j. The Defendants/Respondents shall not suffer any prejudice if the Orders sought were granted.

### **III. The Replies by the 1<sup>st</sup> Defendant/Respondent.**

5. On 18<sup>th</sup> July, 2023 the 4<sup>th</sup> and 5<sup>th</sup> Defendants/Respondents herein filed a 16 Paragraphed Replying Affidavit sworn by Salim Haji Essak together with four (4) annexures marked as "SHE 1 to 4" annexed thereto. He deposed as follows:-



- a. He was the 4<sup>th</sup> Defendant/Respondent in the suit and therefore competent to swear this affidavit both on his behalf and on behalf of his Co - Defendants in response to the Plaintiffs' Application.
- b. In response to the contents of Paragraph 4 of the Supporting Affidavit, it was not true that they had refused to pay the registration of the inhibition because:
  - i. The Order for registration was directed at the Land Registrar, Mombasa and not ourselves;
  - ii. The said order has not even been extracted for purposes of service and enforcement;
  - iii. Even in the event the same was extracted, there was no proof that the same was effected upon whom it was directed at; the Land Registrar, Mombasa.
  - iv. The order had not been served upon them personally as was pre-requisite before instituting contempt proceedings;
- c. At no point had they been issued with an assessment of the registration costs or invoice for settlement of the registration costs and declined to settle the same.
- d. They had always been ready and willing to make any payments that would arise from the registration of the inhibition by the Land Registrar as order by this Honourable Court.
- e. From the foregoing, he held that that these contempt proceedings were pre-mature, not based on any breach of court order and the alleged breach had not been occasioned by the contemnors as the subject order was directed at a third party.
- f. The eviction of 6<sup>th</sup> July 2023 was on account of the pending rent arrears owed by the Applicant to the Respondent who was at the time the landlord (the Applicant had sub-let tenants and continued enjoying rent to their exclusion and without their consent) but also the registered owner (Annexed and marked as "SE -1" was an extract of the Plaint filed in "Mombasa CMCC 956 of 2020; Salim Haji Essak & Bilqis Salim Suleiman – Versus - Shenaz Hussein Haji Ladha).
- g. The eviction was to enforce the Judgment of the court delivered on 13<sup>th</sup> November 2020 before this Honourable Court made a determination of the owner of the suit property.
- h. The rent arrears remained due and owing to date having crystallized before the Judgment of this Court delivered on 3<sup>rd</sup> June 2021 by Justice C.K. Yano and the Judgment in 956 of 2020 had never been set aside, varied or quashed.
- i. The second reason for effecting the eviction was to enable them to refurbish the house which was in deplorable and uninhabitable condition and had obtained a renovation approval from the County for that purpose (Annexed and mark as "SE – 2" & "SE – 3" were a true copy of the County Approval dated 7<sup>th</sup> July 2023 in respect of proposed repair works over the house erected on XXII/155 and photographs of deplorable condition of the subject house).
- j. In response to the contents of Paragraph 6 of the Supporting Affidavit, it was not true that the Plaintiffs/Applicants were not aware of CMCC 956 of 2020 as they had been extensively involved in the matter to the point of proffering an appeal in "Mombasa ELCA E011 OF 2023: Shenaz Hussein Haji Ladha – Versus - Salim Haji Essak & Bilqis Salim Suleiman and an application which came up on 17<sup>th</sup> July 2023 before Justice N. Matheka (Annexed and marked as "SE – 4" was a copy of the Daily Cause list for 17<sup>th</sup> July, 2023 & an extract of the application dated 10<sup>th</sup> July, 2023.



- k. In response to the contents of Paragraphs 7 and 12 of the Supporting Affidavit, it was not true that the subject house was being demolished and no such evidence had been produced by the Plaintiffs/Applicants. They only sought to renovate after verbally pleading with the Plaintiffs/Applicants to let them gain access to the premises.
- l. In good faith, he had personally offered the Plaintiffs/Applicants alternative accommodation at his own cost for the period that the house shall be undergoing renovation back to a habitable condition which offer they declined.
- m. In response to the prayer to vacate, he stated that the registration of the inhibition as ordered by the Court was only meant to safeguard the interests of all parties pending hearing and determination of the already filed appeal.
- n. Therefore, no prejudice had befallen the Plaintiffs/Applicants because:
  - i) The house was being put in a more habitable condition than it was;
  - ii) The Plaintiffs/Applicants had been offered alternative accommodation at my expense in respect of rent for the meantime;
  - iii) They were ready and willing to pay for the registration of the inhibition once served with a breakdown of the costs or invoice;
  - iv) No order had been extracted and/or served upon the Land Registrar Mombasa.
- o. The basis upon which the Plaintiffs/Applicants based their prayer for vacation of that order was the alleged and unproved contempt of the court order by ourselves and up an until the Plaintiffs/Applicants could lay a proper basis for a finding that they breached the directive issued to the Land Registrar, Mombasa, it would be imprudent to vacate the said court directions through this application.
- p. Their prayer was that the instant application be deemed to have been filed in haste, whilst misrepresenting various facts, can be compromised by parties amicably and ought to be dismissed.

#### **IV. The Further Affidavit by the Plaintiffs/Applicants.**

- 6. The Plaintiffs/Applicants filed a Further Affidavit sworn by SHEhnaz Hussein Haji Ladhia. She deposed as follows:-
  - a. She was the 2<sup>nd</sup> Plaintiff/Applicant herein hence competent to swear this affidavit.
  - b. On 11<sup>th</sup> July 2023 she filed the instant application under Certificate of Urgency seeking among others that she be reinstated back to the suit property and an Order to lift the inhibition issued by this Court in respect of the suit property in favour of the Defendants/Respondents.
  - c. The Court never issued any Order in respect of status quo to maintain the suit property and on 12<sup>th</sup> July 2023 the Respondents herein commenced demolition of the suit property. (Annexed hereto are copy of photographs of the demolition ongoing marked as SHHL – 1”.
  - d. It was apparently clear that the Defendants/Respondents were likely to destroy the suit property before the application was heard and determined which would render the application to be nugatory in nature.



- e. the Defendants/Respondents evicted her from the suit property pursuant to a Judgment delivered by a Lower Court which could not supersede a High Court's Judgment. Be that as it may, the destruction of the property would defeat the purpose of this suit and the pending appeal at the Court of Appeal lodged by the Plaintiffs/Applicants.
- f. In the circumstance it was just and fair that the Court do issue interim orders to maintain the status quo of the suit property pending 'the inter - partes hearing and determination of the suit.

## **V. Submissions**

7. While all the parties were present in Court, they were directed to have the Notice of Motion application dated 10<sup>th</sup> March, 2023 be disposed of by way of written submissions and all the parties complied. Pursuant to that all parties obliged. Thus, a ruling date was reserved on Notice by the Honourable Court accordingly.

### **A. The written submissions of the Plaintiffs/Applicants**

8. The Plaintiffs/Applicants through the Law firm of Messrs. Khatib & Company Advocates filed their written submissions dated 2<sup>nd</sup> August, 2023. M/s. Omondi Advocate submitted that the Plaintiffs/Applicants filed a Notice of Motion Application dated 10<sup>th</sup> July, 2023 seeking the afore - stated orders. The Application was supported by the affidavit and a further one of Shenaz Hussein Haji Ladha sworn on 10<sup>th</sup> July, 2023 on 10<sup>th</sup> July, 2023 and 18<sup>th</sup> July, 2023 respectively. The Application was opposed by the Respondents' Replying Affidavit sworn by Salim Haji Essack sworn on 18<sup>th</sup> July 2023. The Application dated 10<sup>th</sup> July, 2023 was certified urgent and the Honourable Court granted prayer number 2 in the interim. The issue for determination is whether the Plaintiffs/Applicants had proved a case for the orders sought.
9. The Learned Counsel was guided by the case of:- "Republic – Versus - County Chief Officer Finance & Economic Planning, Nairobi (2018) eKLR", where the Honourable Court held that:-

"Court Orders are not meant for cosmetic purposes. They are serious decisions that are meant to be and ought to be complied with strictly."
10. The Learned Counsel submitted that this Honorable Court made its orders via its Judgment dated 3<sup>rd</sup> June 2021 when this Honorable Court allowed the Applicant's originating summons and ordered the Applicants to be registered as proprietors of the property known as Plot No. Mombasa/block Xxii/155 by virtue of Adverse possession. This Honourable Court made its orders in its ruling dated 18<sup>th</sup> November, 2021 when this Honorable Court directed the Land Registrar Mombasa to register an Inhibition onto the property known as Mombasa/Block XXII/155 within thirty (30) days of the ruling dated 18<sup>th</sup> November, 2021 at the cost of the 1<sup>st</sup> to 5<sup>th</sup> Defendants.
11. The 1<sup>st</sup> to 5<sup>th</sup> Defendants blatantly disobeyed this Honorable Court's Orders as stated above. Specifically the 4<sup>th</sup> and 5<sup>th</sup> Defendants Salim Haji Essack and Bilquis Salim Suleiman knowing very well that the proceedings before this Honorable Court that were filed in the year 2008 that is in ELC NO. 282 OF 2008 as between the Plaintiff/Applicant and the Defendants/Respondents, the 4<sup>th</sup> and 5<sup>th</sup> Respondents herein filed another suit in the lower Court Chief Magistrate's Court at "Mombasa Civil Suit no. 956 of 2020 Salim Haji Essack & Bilquis Salim Suleiman - Versus - Shenaz Hussein Haji Ladha. This suit was filed by the 4<sup>th</sup> and 5<sup>th</sup> Defendants/Respondents herein and it proceeded ex parte. The 4<sup>th</sup> and 5<sup>th</sup> Defendants/Respondents made sure they never served the Plaintiffs/Applicants and



obtained an adverse order against the Plaintiffs/Applicants in regard to the suit property - Mombasa/Block XXII/155.

12. The Learned Counsel submitted that the 4<sup>th</sup> and 5<sup>th</sup> Defendants/Respondents had used the lower Court Order in Civil Suit No. 956 of 2020 to evict the Plaintiffs/Applicants from the suit property despite this Honorable Court's Judgment and ruling being rendered in favour of the Plaintiffs/Applicants and the lower Court proceedings being irregular. The 4<sup>th</sup> and 5<sup>th</sup> Defendants/Respondents acts amounted to willful disobedience of this Honorable Court's Orders by failing to comply with this Court's orders by failing to comply with this Court's Orders and ought to be punished by committal to civil jail for a period of (6) six months. To buttress on this point, the Learned Counsel relied on the case of: "Republic – Versus - County Government of Kitui Ex Parte Fairplan Systems Limited (2022) eKLR", where the Court allowed an application to commit the Defendant/Respondent to civil jail and in default of appearance a warrant of arrest to issue. The Court found the Respondent in contempt of the Orders.
13. The Learned Counsel further was guided by the case of:- "Econet Wireless Kenya Limited – Versus - Minister for Information and Communication of Kenya & Another (2005) eKLR", where the Learned Justice Ibrahim (as he was) stated:-

“It is essential for the maintenance of the rule and order that the authority and the dignity of our Courts are upheld at all times. The Court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal with firmly with proved contemnors. 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.”
14. The Learned Counsel asserted that this Honorable Court being Court of competent jurisdiction made its orders in the Judgment dated 3<sup>rd</sup> June 2021 and in its ruling dated 18<sup>th</sup> November 2021 were all in favour of the Plaintiff/Applicant as against the Defendants/Respondents. The Defendants/Respondents had deliberately chosen to disobey the said order despite the Orders being validly in place (not discharged). The Counsel held that not only had the Defendants/Respondents willfully disobeyed these orders but also on 11<sup>th</sup> July 2023 even went ahead and evicted the Plaintiff/Applicant from the suit property using a lower Court order that they obtained irregularly. The Defendant/Respondent willfully acted in contempt by not obeying this Court orders as this Honorable Court had made clear orders in terms of registration of the suit property in the Applicant's name at the Respondents' cost.
15. The Learned Counsel urged the Honourable Court to deal with the Respondents firmly who are proved contemnors. The Learned Counsel prayed that this Honorable Court commit the 4<sup>th</sup> and 5<sup>th</sup> Respondents to civil jail for six months as it was stated in "Wildlife Lodges Limited – Versus - County Council of Narok & Another (2005) eKLR", that:-

“.....disobedience of Court orders would as a general rule result in the person disobeying it being in contempt and punishable by committal or attachment and is an application to the Court by him not being entertained until he had purged his contempt.”
16. The Learned Counsel submitted that the Plaintiff/Applicant had proved her case for the orders sought. The Learned Counsel prayed that the orders of this Court issued on 18<sup>th</sup> November, 2021 directing the Land Registrar to register an inhibition of the land No. Msa/block Xxii/155 at the expense of the



Defendants/Respondents be set aside and or vacated and the Title Deed of the suit property be issued to the Plaintiffs/Applicants.

17. In conclusion, the Learned Counsel prayed that the Application dated 10<sup>th</sup> July, 2023 be allowed by having the Respondents to be committed to civil jail six months for disobeying this Court's orders and the title deed in respect to the suit property be issued in the Plaintiffs/Applicants' name. The Learned Counsel was guided by the principle that litigation had to come to an end and that the winning Party had to enjoy the fruits of its Judgment. The Learned Counsel submitted that the lower Court had no jurisdiction to determine this matter as this Honorable Court had already decided this matter in favour of the Plaintiffs/Applicants.

## **B. The Written Submissions by the Defendants/Respondents**

18. The Learned Counsel for the Defendants/Respondents the Law firm of Messrs. Muthee Kihiko & Associates LLP filed their written Submissions dated 13<sup>th</sup> October, 2023. Mr. Mutugi Advocates commenced by providing a brief introduction of the matter. He stated that the application sought to have the 4<sup>th</sup> and 5<sup>th</sup> Defendants/Respondents herein committed to civil jail for alleged refusal to pay costs for registration of a restriction against the subject title. The Plaintiffs/Applicants further sought for the vacation of the stay order issued on account of the alleged contempt of the court order. The instant application was opposed by a Replying Affidavit sworn by the 5<sup>th</sup> Defendant Salim Haji Essak.
19. By and large, the 4<sup>th</sup> and 5<sup>th</sup> Defendant refuted the allegation of contempt on the basis that the referred order was directed at the Land Registrar Mombasa and further maintained that there was no sufficient reason given to vacate the stay order issued on 18<sup>th</sup> November 2021. The 4<sup>th</sup> & 5<sup>th</sup> Defendants maintained that the instant contempt application/proceedings are defective and a non-starter.
20. The Learned Counsel identified the following two (2) issues for the consideration and determination by Court:

Firstly, whether the Instant Contempt Application had merit. For starters, the Learned Counsel held that it was instructive to note that the Plaintiff/Applicant had not sought an order that the 4<sup>th</sup> and 5<sup>th</sup> Defendants/Respondents show cause why they should not be held in Contempt of Court for having allegedly breached, and acted in violation of the aforesaid order. The Plaintiff/Applicants directly urged the court to proceed and issue a committal order against the 4<sup>th</sup> and 5<sup>th</sup> Defendants/Respondents.
21. Considering and/or issuing the order for committal of the 4<sup>th</sup> and 5<sup>th</sup> Defendants/Respondents without allowing them a chance to show cause, in person, why the committal orders ought not be issued is an affront to their constitutional right to be heard before being condemned. On this point the Counsel relied on the decision of "Alfred Mutua – Versus - Boniface Mwangi [2022] eKLR, enunciated the procedure to be adopted in contempt proceedings as per Rule 81.4 (2) of the English Civil Procedure (Amendment No.3), Rules 2020 thus:-

- “(2) A contempt application must include statements of all the following, unless (in the case of (b) to (g)) wholly inapplicable-
- (a) the nature of the alleged contempt (for example, breach of an order or undertaking or contempt in the face of the court);
  - (b) the date and terms of any order allegedly breached or disobeyed;
  - (c) confirmation that any such order was personally served, and the date it was served, unless the court or the parties dispensed with personal service;



- (d) if the court dispensed with personal service, the terms and date of the court's order dispensing with personal service;
- (e) confirmation that any order allegedly breached or disobeyed included a penal notice; (f the date and terms of any undertaking allegedly breached..."

22. The Learned Counsel argued that the instant contempt application was in violation of the above because:

- a) The Order for registration was directed at the land registrar, Mombasa and not the 4<sup>th</sup> and 5<sup>th</sup> Defendants/Respondents:
- b) The said order had not even been extracted for purposes of service and enforcement;
- c) Even in the event the same was extracted, there was no proof that the same was effected upon whom it was directed at; the Land Registrar, Mombasa.
- d) The order had not been served upon the 4<sup>th</sup> and 5<sup>th</sup> Defendants personally as was the pre-requisite before instituting contempt proceedings.

23. On the required standard of proof attaching to contempt proceedings, the Court in the case of:- MNN – Versus - JMM [2022] eKLR stated that:

“The standard of proof required in cases of contempt is higher than that acquired in an ordinary civil case. Before a finding of contempt can be made, there must a demonstration of willful and deliberate disobedience of a court order.”

The Court also adopted the finding in the case of:- ”Oilfield Movers Limited – Versus - Zahara Oil & Gas Limited [2020] eKLR where that court stated:-

“It is important however that the court satisfies itself beyond any shadow of a doubt that the person alleged to be in contempt committed the act complained of with full knowledge or motive of the existence of the order of the court forbidding it. The threshold is quite high as it involves possible deprivation of a person's liberty...”

“In my view, considering the seriousness with which the Court takes contempt of court proceedings, every stage of the hearing quasi-criminal in nature, otherwise a benefit of doubt would injure to the benefit of the Defendant” Emphasis ours.

24. The Learned Counsel submit that even in the event the contempt proceedings were invoked properly which was not, that it was not true that the 4<sup>th</sup> and 5<sup>th</sup> Defendants/Respondents refused to pay the registration of the inhibition because:

- a) At no point have they been issued with an assessment of the registration costs or invoice for settlement of the registration costs and declined to settle the same;
- b) They have always been ready and willing to make any payments that would arise from the registration of the inhibition by the land registrar as order by this Honourable Court.

25. He averred that these contempt proceedings were pre-mature, not based on any breach of court order and the alleged breach has not been occasioned by the contemnors as the subject order was directed at a third party.



26. Secondly, whether the Orders of 18<sup>th</sup> November 2021 ought to be vacated. The Learned Counsel contended that the eviction of 6<sup>th</sup> July 2023 was pursuant to a court order in Mombasa CMCC 956 of 2020 delivered on 13<sup>th</sup> November 2020 and on account of the pending rent arrears owed by the Plaintiff/Applicant to the Defendant/Respondent who was at the time the landlord (the Applicant had sub-let tenants and continued enjoying rent to our exclusion and without our consent) but also the registered owner.
27. He held that the Plaintiffs/Applicants had since moved on appeal against the said order in Mombasa ELCA E011 of 2023: Shenaz Hussein Haji Ladha – Versus - Salim Haji Essak & Bilqis Salim Suleiman. His contention was that the Plaintiffs/Applicants having filed an appeal against the eviction order on account of rent arrears owed to the 4<sup>th</sup> and 5<sup>th</sup> Defendants/Respondents, could not use this Court to overturn a court order issued by a competent court and which was subject of adjudication before this same Court - Honourable Lady Justice Matheka.
28. A fact that had not been disputed was that the 4<sup>th</sup> and 5<sup>th</sup> Defendants/Respondents, being the Plaintiffs/Applicant's relatives, intended to refurbish the house which was in deplorable and uninhabitable condition and had obtained a renovation approval from the County for that purpose (see annexures "SE - 2 & SE -3" being the County house erected on XXII/155 and photographs of deplorable condition of the subject house).
29. The Plaintiffs/Applicants never revealed to this Honourable Court that they were only in occupation of one house out of the entire building erected on the suit property. The order of reinstatement therefore, ought to be specific that the Plaintiffs/Applicants were only allowed access to where they occupied which in any event they were still in occupation hence there was no order capable of being granted.
30. By and large, the 4<sup>th</sup> and 5<sup>th</sup> Defendants/Respondents ought to be allowed access to the remainder of the houses for purposes of refurbishment and correcting the deplorable condition that the building has been left in. Indeed, it would be to the advantage of the Applicant if the same was refurbished. The Learned Counsel asserted that the Plaintiffs/Applicants had not been candid in so far as claiming that the 4<sup>th</sup> and 5<sup>th</sup> Defendants had moved to demolish the building erected on the suit property. There was not a single iota of evidence had been provided to substantiate the allegation of demolition. What the 4<sup>th</sup> and 5<sup>th</sup> Defendants procured from the County were approvals to refurbish the building erected on the suit property.
31. The Plaintiffs/Applicants had not refuted that in good faith, the 5<sup>th</sup> Defendant/Respondent personally offered the Plaintiffs/Applicants alternative accommodation at his own cost for the period that the house shall be undergoing renovation back to a habitable condition which offer they declined.
32. The Counsel submitted that that the registration of the inhibition as ordered by the Court on 18<sup>th</sup> November 2021 was only meant to safeguard the interests of all parties pending hearing and determination of the already filed appeal. The Counsel further argued that it would serve no good purpose to lift the orders of 18<sup>th</sup> November 2021 chiefly because no prejudice had befallen the Plaintiffs/Applicants so far because:
  - a) The house was being put in a more habitable condition than it was;
  - b) The Plaintiffs/Applicants had been offered alternative accommodation at the Defendants' expense in respect of rent for the meantime;
  - c) The 4<sup>th</sup> and 5<sup>th</sup> Defendants/Respondents were ready and willing to pay for the registration



- d) No order had been extracted and/or served upon the Land Registrar Mombasa.
33. Thirdly, who would bear the costs of the Application? The Learned Counsel opined that this Court had discretion to grant costs. However, it was trite law that costs usually follow the events unless special circumstances present themselves. He stated that the special circumstances in this matter was that the parties were relatives who were embroiled in a misunderstanding. The order that would befit the circumstances was that each party bear their own costs of the instant Application which in any event lacked merit as illustrated herein.
34. In conclusion, the Learned Counsel asserted that instant contempt application/proceedings lacked merit for failure by the Plaintiffs/Applicants to extract the impugned order; failure to satisfy personal service, failure to prove that the impugned order was not only directed at but also implementable by the 4<sup>th</sup> and 5<sup>th</sup> Defendants/Respondents as opposed to the Land Registrar in respect of the restriction, and failure to prove that upon service with the impugned order, that the 4<sup>th</sup> and 5<sup>th</sup> Defendants/Respondents wilfully declined to comply with the same.
35. The basis upon which the Plaintiffs/Applicants based their prayer for vacation of that order was the alleged and unproved contempt of the court order by the 4<sup>th</sup> and 5<sup>th</sup> Defendants and up until the Applicant could lay a proper basis for a finding that breached the directive issued to the Land Registrar, Mombasa, it would be imprudent to vacate the said court directions through this application.
36. To him, the instant application was pre mature. Various facts, could be compromised by parties amicably. Owing to the close relations of the parties involved, each party being their own costs of the Application.

## VI. Analysis and Determination

37. I have carefully read and considered the pleadings herein, the Replies, the written submissions and the cited authorities, the provisions of *the Constitution* of Kenya, 2010 and the statures by the Learned Counsels.
38. In order to arrive at an informed, fair, and just decision, the Honorable Court has framed the following two (2) issues for its determination:-
- a. Whether the Notice of Motion application dated 10<sup>th</sup> July, 2023 has any merit – to wit that the 4<sup>th</sup> & 5<sup>th</sup> Respondents are in contempt of Court Orders given on 18<sup>th</sup> November 2021 for refusing to pay costs for registration of inhibition into the land known as Plot No Msa/block Xxii/155 Ganjoni?
  - b. Who will bear the Costs of Notice of Motion application dated 10<sup>th</sup> July, 2023.

### **ISSUE No. a). Whether the Notice of Motion application dated 10<sup>th</sup> July, 2023 has any merit – to wit that the 4<sup>th</sup> & 5<sup>th</sup> Respondents are in contempt of Court Orders given on 18<sup>th</sup> November 2021 for refusing to pay costs for registration of inhibition into the land known as Plot No Msa/block Xxii/155 Ganjoni**

39. Under this this Sub heading the main substratum is on contempt proceedings for parties being in breach of the Court orders and its consequences thereof. To begin with is to appreciate the main concept of the Contempt of Court orders. The Black's Law Dictionary 11<sup>th</sup> Edition, defines contempt as:-



‘The act or state of despising; the quality, state or condition of being despised. Conduct that defies the authority or dignity of a court or legislature. Because such conduct interferes with the administration of justice, it punishable by fine or imprisonment.

40. The legal framework that governed contempt of court was the [Contempt of Court Act](#) until it’s nullification in the case of “Kenya Human Rights Commission – Versus - Attorney General & another [2018] eKLR Constitutional Petition No. 87 of 2017”. Additionally, the court in the case of “Samuel M. N. Mweru & Others – Versus - National Land Commission & 2 others [2020] eKLR” while discussing the legal framework on contempt of court stated as follows;

“The applicable law as regards contempt of court existing before the enactment of the [Contempt of Court Act](#) was restated by the Court of Appeal in Christine Wangari Gachege – Versus - Elizabeth Wanjiru Evans & 11 Others, [2014] eKLR. In that case the Court found that the English law on committal for contempt of court under Rule 81.4 of the English Civil Procedure Rules, which deals with breach of judgment, order or undertakings, was applied by virtue 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.”

This section was repealed by section 38 of the [Contempt of Court Act](#) of 2016, and as the said Act has since been declared invalid, the consequential effect in law is that it had no legal effect on, and therefore did not repeal section 5 of the [Judicature Act](#), which therefore continues to apply. In addition, the substance of the common law is still applicable under section 3 of the [Judicature Act](#). This Court is in this regard guided by the applicable English Law which is Part 81 of the English Civil Procedure Rules of 1998 as variously amended, and the requirement for personal service of court orders in contempt of Court proceedings is found in Rule 81.8 of the English Civil Procedure Rules.”

41. As restated in the above case law, the law then applicable in contempt of court proceedings is Section 5(1) of the [Judicature Act](#) which mandates that the court relies on the applicable law in England at the time the alleged contempt is committed. In the case of “Samuel M. N. Mweru & Others – Versus - National Land Commission & 2 others [2020] eKLR” the court dealing with an application for contempt of court based on disobeyed of a court order stated:

“An application under Rule 81.4 “(breach of judgement, order or undertaking) now referred to as "application notice" (as opposed to a notice of motion) is the relevant one for making the application now under consideration. The application notice must set out fully the grounds on which the committal application is made and must identify separately and numerically, each alleged act of contempt and be supported by affidavit(s) containing all the evidence relied upon”.

42. A claim on contempt of court is a grave issue that the court treats with a lot of seriousness as it goes to the core of undermining the authority of the court. It is a fundamental principle of law that court orders are meant to be obeyed to the letter as they are not issued in vain. Failure to obey court orders would then result in contempt of court.

43. The importance of obedience of court orders was restated in the case of “Econet Wireless Kenya Ltd – Versus- Minister for Information & Communication of Kenya & another [2005] eKLR” where the



court cited with approval the case of “Gulabchand Popatlal Shah & Another Civil Application No. 39 Of 1990”, (unreported). The Court of Appeal held, inter alia,

“..... It is essential for the maintenance of the Rule of Law and good order that the authority and dignity of our courts are upheld at all times. This court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors .....”

44. The court needs to ascertain whether the applicant herein has met the basic elements set out to prove a case for contempt of court. In the case of “Katsuri Limited – Versus - Kapurchand Depar Shah [2016] eKLR” as relied upon by the Respondents, the court stated that:

“The applicant must prove to the required standard (in civil contempt cases which is higher than in criminal cases) that:-

- (a) the terms of the order (or injunction or undertaking) were clear and unambiguous and were binding on the defendant;
- (b) the defendant had knowledge of or proper notice of the terms of the order;
- (c) the defendant has acted in breach of the terms of the order; and
- (d) the defendant’s conduct was deliberate.”

45. Based on the above stated legal principles, I will therefore analyze each element as set out above. The Plaintiffs/Applicants contend that this Honorable Court made its orders via its Judgment dated 3<sup>rd</sup> June, 2021 when this Honorable Court allowed the Applicant’s originating summons and ordered the Applicants to be registered as proprietors of the property known as PLOT No. Mombasa/block Xxii/155 by virtue of Adverse possession. Furthermore, this Honorable Court made its orders in its ruling dated 18<sup>th</sup> November 2021 when this Honorable Court directed the Land Registrar Mombasa to register an Inhibition onto the property known as Mombasa/Block XXII/155 within thirty (30) days of the ruling dated 18<sup>th</sup> November 2021 at the cost of the 1<sup>st</sup> -5<sup>th</sup> Defendants. The 1<sup>st</sup> - 5<sup>th</sup> Defendants blatantly disobeyed this Honorable Court’s Orders as stated above. Specifically the 4<sup>th</sup> and 5<sup>th</sup> Defendants Salim Haji Essack and Bilquis Salim Suleiman knowing very well that the proceedings before this Honorable Court that were filed in 2008 that is in ELC NO.282 OF 2008 as between the Plaintiffs/Applicants and the Defendants/Respondents, the 4<sup>th</sup> and 5<sup>th</sup> Defendants/Respondents herein proceeded to file another suit in the lower Court Chief Magistrate’s Court at Mombasa Civil Suit No. 956 of 2020 Salim Haji Essack & Bilquis Salim Suleiman versus Shenaz Hussein Haji Ladha.

46. I have looked at the court order issued by this court. Certainly, the order issued by the court was as clear as day and night and unambiguous and was addressed to the Defendants/Respondents, hence binding upon them. I have stated umpteenth times in this Honourable Court and so have other Courts that Court orders are not a formality neither are they cosmetics. They are to be obeyed at all costs. Should any party feel so aggrieved as its is expected the only available option is to revert back to Court which issued its order for it to either set aside or discharged or varied. But not to disobey it as the same has severe consequences which border on criminality and having ones fundamental rights and freedoms deprived.



47. The provision of Section 29 of the Environment and Land Court 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
48. 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.
49. From the sworn affidavits, annexure’s, submissions by the respective parties’ Counsels on record, the applicable law and the decided cases, the following issues stand out for determination:-
- i. Whether there was a valid Court order issued by this Court on the 18<sup>th</sup> November, 2021 by this Honourable Court
  - ii. Whether the 4<sup>th</sup> and 5<sup>th</sup> Respondent herein was served with or was aware of the orders made on 18<sup>th</sup> November, 2021.
  - iii. Whether the order as sought and extracted was clear and unambiguous
  - iv. Whether the 4<sup>th</sup> and 5<sup>th</sup> Respondents are guilty of contempt of Court order herein issued.
50. In the instant case, the Plaintiffs/Applicants’ case is that an order was made on the 18<sup>th</sup> November, 2021 by this Honourable Court where it opined itself as follows:-
- “2. That it is directed that the Land Registrar, Mombasa to register an inhibition onto all that property known as Land Reference Numbers Plot No. Mombasa/Block XXII/155 by invoking the provision of Section 68 (1) and (2) of the [Land Registration Act](#) No. 3 of 2012 and Rule 79 of the Land Registration (General) Regulations, 2017 within the next 30 days from the date of this ruling at the costs of the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants/Applicants..”
51. On the second issue the alleged contemnor ought to have knowledge of or proper notice of the terms of the order. The 4<sup>th</sup> and 5<sup>th</sup> Defendants/Respondents had knowledge of the court order. Their advocate, Mr. Mutugi Advocate, was in Court on the day when the ruling was delivered.
52. I have previously in this Ruling stated that as per the Court records all parties to the suit were present when the order was made on 18<sup>th</sup> November, 2021. I find that as a general rule, no order of Court requiring a person to do or to abstain from doing any act may be enforced (by committing him/her for contempt) unless a copy of the order has been served personally on the person required to do or abstain from doing the act in question, or that the person had the knowledge of an order which supersedes personal service.



53. In the old celebrated case of “Exparte Langely 1879, 13 Ch D/10 (CA)” Thesiger L.J stated at P. 119 as follows:-

“...the question in each case, and depending upon the particular circumstances of each case, must be, was there or was there not such a notice given to the person who is charged with contempt of Court that you can infer from the facts that he had notice in fact of the order which has been made” And, in a matter of this kind, bearing in mind that the liberty of the subject is to be affected, I think that those who assert that there was such a notice ought to prove it beyond reasonable doubt.”

54. The Learned Counsel for the Plaintiffs/Applicants submitted that this Honorable Court being Court of competent jurisdiction made its orders in the judgment dated 3<sup>rd</sup> June 2021 and in its ruling dated 18<sup>th</sup> November 2021 in favour of the Applicant as against the Respondents. The Defendants/ Respondents have deliberately chosen to disobey the said order despite the Orders being validly in place (not discharged). The Respondents have willfully disobeyed these orders and even went ahead on 11<sup>th</sup> July 2023 and evicted the Plaintiffs/Applicant from the suit property using a lower Court order that they obtained irregularly. The Defendants/Respondents willfully acted in contempt by not obeying this Court orders as this Honorable Court had made clear orders in terms of registration of the suit property in the Plaintiffs/Applicants name at the Defendants/Respondents’ cost.

55. To this end, there is no doubt in my mind that the Plaintiffs/Applicants have proved that the Defendants/Respondents have been in contempt of the court orders by this Honourable Court on 18<sup>th</sup> September, 2021.

56. On the 3<sup>rd</sup> issue for determination as to whether the order as sought and extracted was clear and unambiguous, I find that pursuant to the issuance of the order for parties to maintain the status quo as herein above captioned, the said order, was only on the registration on the inhibition and the said application by the Defendants was found to lack merit. Clearly from this Court’s ruling on 18<sup>th</sup> November, 2021 there was nothing ambiguous or unclear that was not stated and the parties were all present in Court so they could have sought clarity on issues they had not understood. The Applicant has argued that the Defendants had gone contrary to the orders of the Court. The Court of Appeal in “Shimmers Plaza Limited – Versus - National Bank of Kenya Limited [2015] eKLR” emphasized that:-

“It is important however, that the Court satisfies itself beyond any shadow of a doubt that the person alleged to be in contempt committed the act complained of with full knowledge or notice of the existence of the order of the Court forbidding it. The threshold is quite high as it involves possible deprivation of a person’s liberty.”

57. Contempt proceedings are of a criminal nature and involve, if proved, loss of liberty. The Applicants must therefore endeavor to prove all facts relied on by way of evidence beyond reasonable doubt.

58. In the end, I reiterate and find that the Plaintiffs/Applicants have proved to the required standard that the Defendants/Respondents herein as cited were in brazen disobedience of the court order issued by this Court on 18<sup>th</sup> November, 2021.

#### **ISSUE b). Who will bear the Costs of Notice of Motion application dated 10<sup>th</sup> July, 2023.**

59. It is now well established that the issue of Costs is a discretion of the Court. Costs mean the award a party is awarded at the conclusion of a legal action or proceedings in any litigation. The provision of Section 27 (1) of the *Civil Procedure Act*, Cap. 21 holds that costs follow the events. By events



it means the outcome or result of the said legal action. See the cases of: “Hussein JanMohammed & Son – Versus Tweentche Overseas Trading Company 1967 EA 28 and “Deepar Limited – Versus – County Executive Committee member for Lands Physical Planning, Housing & Urbansation & Another (2021 eKLR which held:-

“A successful party should ordinarily be awarded costs of an action unless the Court for good directs otherwise”

60. In the instant case, the Court finds that the Plaintiffs/Applicants have convinced it on their Notice of Motion application dated 10<sup>th</sup> March, 2023. By all means, it has merit. Therefore the costs of the suit are awarded to the Plaintiffs/Applicants to be paid jointly by the 5<sup>th</sup> and 6<sup>th</sup> Defendants.

## **VI. Conclusion & Disposition**

61. In long analysis, the Honorable Court has carefully considered and weighed the conflicting parties’ interest as regards to balance of convenience. Clearly, the Applicant has a case against the Respondents. Having said that much, there will be need to preserve the suit land in the meantime. In a nutshell, I proceed to order the following:-

- a. That the Notice of Motion application dated 10<sup>th</sup> July, 2023 by the Plaintiff/Applicant be and is hereby found to have merited hence it allowed in its entirety.
- b. That this Honourable Court hereby find Salim Haji Essack And Bilquis Salim Suleiman the 4<sup>th</sup> and 5<sup>th</sup> Defendants/ Respondents respectively in contempt of Court Orders given on 18<sup>th</sup> November 2021 for refusing to pay costs for registration of inhibition into the land known as Plot No Msa/block XXII/155 Ganjoni;
- c. That an order for Notice to Show Cause issued against Salim Haji Essack And Bilquis Salim Suleiman the 4<sup>th</sup> and 5<sup>th</sup> Defendants/ Respondents to physically appear in Court on 18<sup>th</sup> January, 2024 to show why they should not be committed to serve Civil jail for a period of Six (6) months at their own cost.
- d. That the Orders of Court issued on 18<sup>th</sup> November 2021 directing the land registrar to register an inhibition of the land No. Msa/block XXI/155 at the expense of the Respondents be and is hereby set aside and vacated and instead the Certificate of Title Deed of the suit property to be henceforth issued in the names of the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiff herein henceforth.
- e. That the 4<sup>th</sup> and 5<sup>th</sup> Defendants shall bear the costs of the Notice of Motion application dated 10<sup>th</sup> July, 2023 payable to the Plaintiff/ Applicant.

It is so ordered accordingly.

**RULING DELIVERED VIA EMAIL AS PER THE NOTICES DISPATCHED TO THE PARTIES SIGNED AND DATED AT MOMBASA THIS 5<sup>TH</sup> DAY OF DECEMBER 2023.**

**HON. JUSTICE L.L. NAIKUNI (MR.)**

**ENVIRONMENT AND LAND COURT AT MOMBASA**

