



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENTAL AND LAND COURT**

**AT MOMBASA**

**ELC NO. 17 OF 2020**

**1. FITINA RUNYA**

**2. NG'OA MWACHOMBO**

**3. CHARO FIRIKI**

**4. YUSUF MWANGIRA.....PLAINTIFFS/APPLICANTS**

**- VERSUS -**

**1. DAVID MUCHIRI MUGO**

**2. ATHMAN SWALEH.....DEFENDANTS/RESPONDENTS**

**RULING**

**I. PRELIMINARIES**

1. The Plaintiffs/Applicants filed a Notice of Motion application dated 19<sup>th</sup> July 2021 before this Honorable Court for its determination. It is brought under the provisions of Sections 1A (3) and 63 of the Civil Procedure Act, Cap. 21 and Order 40 Rule 3(1), (3) and 4 (1) of the Civil Procedure Rules, 2010.

**II. THE PLAINTIFFS/APPLICANTS CASE**

2. Vide the aforesaid application, the Plaintiffs/Applicants seek for the following orders that:

***a) Spent.***

***b) This Honorable court be pleased to commit the 1<sup>st</sup> Defendant/Respondent to civil jail for a period of six months or for such period as this Honorable court may deem.***

***c) Costs of this application be provided for.***

3. The aforesaid application is founded on the testimony, grounds and averments of the 9 Paragraphed Supporting Affidavit of FITINA RUNYA sworn and dated 19<sup>th</sup> January, 2021 and the two (2) annexures marked as "A" and "B" annexed thereof. The deponent holds to be the 1<sup>st</sup> Plaintiff/Applicant herein and hence is competent and duly authorized to make the said affidavit and fully conversant with the facts of this case hereof.

4. From the application, the Plaintiffs/Applicants' contend that, this Honorable court issued orders emanating from the Notice of Motion Application dated 24<sup>th</sup> march, 2021 whereupon the Defendants and their agents were restrained from selling, sub – dividing, excavating or undertaking any construction or damage waste by excavation and/or in any manner interfering with all the suit land known as Land reference PLOT Nos. 289/II/MN, 14119, PLOT Nos. 14110/II/MN (Original PLOT Nos. 286/II/MN) situated at Utange in the County of Mombasa. The said courts were direct at the OCPD Kisauni Division and the OCS Kiambeni Police Station be to ensure peace and order prevailed there pending the hearing and determination of the suit.

5. The 1<sup>st</sup> Plaintiffs/Applicant holds that the orders were served upon the 1<sup>st</sup> Defendant's Advocates. He stated that the Defendants were

ordered by court to desist from causing any further construction on the suit premises pending the hearing and determination of the suit. He claimed that the 1<sup>st</sup> Defendant was aware of the terms, effect of the said orders which were served upon his Counsel. Despite of this, the 1<sup>st</sup> Defendant/Respondent had continued to disobey the said Court Orders by continuously constructing on the said suit property. He annexed a set of Photographs to that effect marked as "A". Therefore, the Deponent urged Court to have the 1<sup>st</sup> Defendant and his servants/agents punished for being in continuous breach of the said orders.

### **III. THE 1<sup>ST</sup> DEFENDANT'S REPLYING AFFIDAVIT**

6. On 16<sup>th</sup> August 2021, while opposing and in response to the Plaintiffs/Applicants' application, for contempt, the 1<sup>st</sup> Defendant/Respondent swore a 19 Paragraphed Replying Affidavit by DAVID MUCHIRI MUGO, the 1<sup>st</sup> Defendant/ Respondent himself. He held that he was the registered and legal owner of only two of the suit properties. He insisted that he never owed the whole of it as was erroneously pointed out by the Plaintiffs/Applicants.

7. Besides, he held that, the Court order related to many other Plots. His argument was that from the onset, it was unclear and ambiguous as to which particular Plot the ostensible construction was being carried out. He held that the alleged Plot where the construction was allegedly taking place could not be ascertained from a mere sets of photographs. All in all, he denied personally carrying out any construction there at all. He stated that there was no evidence from the meted photographs himself and the purported construction whatsoever. He, stressed he never appeared in any of them. Besides he opined he was a stranger to the people on the photographs. According to him, if anything was happening at all, the people in the photographs were by the land agents who illegally sold portions of the 1<sup>st</sup> Defendant/Respondent's land. It was his evidence they were the ones involved in the alleged constructions. Indeed, when he averred that upon confronting them they confessed having bought the land from the Plaintiffs/Applicants. As a matter of fact, he stated that some of them were even arrested by the Police and investigation is pending.

8. He asserted that there existed bad blood between the Plaintiffs and him whereby they vowed to have him arrested by all means. His contention was that, they had been intimidating, harassing and harming him in order to deprive him of his land. He stated that they had written numerous letters to various authorities lodging complaints and wanting to have him arrested. Additionally, they had filed many cases before different courts against him though luckily they were all dismissed. For instance these were ELC No. 201 of 2019; ELC No. 15 of 2021, ELC 122 of 2021 and ELC. No. 49 of 2020.

9. He denied ever being served with the said Court orders. He stated that when he served with this application through his advocate on record, his Advocate informed him the said order was the one entered by consent. His advocate advised him that he could not breach a Consent Order. He swore he could not breach a consent order. He further claimed that the photographs were not prove of disobedience to the court order and stated that contempt application required a very high standard of proof which was not met by the Plaintiff. In the long run, he urged court to dismiss the application with costs.

### **IV. SUBMISSIONS**

10. On 18<sup>th</sup> October 2021, when all the parties appeared before this Honorable Court, they were directed to have the afore stated application be canvassed by way of written submissions. Pursuant to that, on 16<sup>th</sup> November, 2021 all the parties complied and this court reserved a ruling date for 20<sup>th</sup> January, 2022.

#### **A. THE SUBMISSIONS BY THE PLAINTIFFS/APPLICANTS**

11. On 15<sup>th</sup> November 2021, the Learned Counsel for the Plaintiffs/Applicants the Law firm of Messers. Paul Kenneth Kinyua & Associates Advocates filed their written submissions on behalf the Plaintiff/Applicants dated 11<sup>th</sup> November, 2021. In their submission, the Learned Counsel posed only one single issue to be considered for determination by this court— whether the 1<sup>st</sup> Defendant/Respondent was in contempt of Court Order. In answer to that query, the Learned Counsel started by putting great emphasis on the importance of the Judicial authority as provided for under the provisions of Article 159 (1) and (2) of the Constitution of Kenya and Court orders which were to be obeyed at all costs and hence binding to all parties. To support their point they relied on the case of **"Samuel N. Mweru & Others – Versus – National Land Commission & 2 Others (2020) eKLR"**. They submitted that the 1<sup>st</sup> Defendant/Respondent had all along been fully aware of the orders of this court but willfully contravened and disobeyed them. The Learned Counsel contended that the attached set of photographs were proof enough of the ongoing developments on the suit property and the 1<sup>st</sup> Defendant/ Respondent's involvement.

12. On this point, the Learned Counsel relied on the case of:- **"Thrift Estates Limited & another - Versus - Equitorial Commercial Bank Ltd (2016)eKLR"** where the court held that a Consent order arose from the agreement by the parties and the same were enforceable by enforcing contempt proceedings. The Learned Counsel argued that there was no requirement in law that the Applicants was expected to demonstrate with precision the particulars of the contempt. In other words all that was needed was one to demonstrate that the 1<sup>st</sup> Defendant/Respondent was truly engaging in actions that were in contravention of the Court orders granted. They urged the Honorable court to grant the orders as prayed in their application.

#### **B. The 1<sup>st</sup> Defendant/Respondents Written Submissions.**

13. On 25<sup>th</sup> October, 2021, the Learned Counsel, the Law firm of Messrs. Mutisya & Associates for the 1<sup>st</sup> Defendant filed their written submissions dated 22<sup>nd</sup> October, 2021 in opposition of the application filed by the Plaintiff/Applicant. The Learned Counsel first and foremost re capped in details all the averments already set out in the afore mentioned Replying Affidavit of the 1<sup>st</sup> Defendant/Respondents. They further submitted that the Plaintiffs/Applicants had not filed nor attached any return of service of the said Court Order nor had any attached or affixed penal notice upon the 1<sup>st</sup> Defendant/Respondent who was the alleged contemnor.

14. Although, this requirement was now outdated, they insisted, there being personal service of court order on the person who was required to do or abstain from doing the act. On this point the Learned Counsel for the 1<sup>st</sup> Defendant/Respondent relied on the old case of :- **“Jacob Zedekiah Ochino - Versus - George Aura Okombo”** where the court then held thus:- **‘as a general rule, no order of court requiring a person to do or abstain from doing any act may be enforced (by committing him 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... This requirement is important because the court will only punish as a contempt a breach of injunction if satisfied that the terms of the injunctions are clear and unambiguous, that the defendant has proper notice of the terms and that breach of the injunction has been proved beyond reasonable doubt.’**

15. The Learned Counsel admitted that this was a consent order. Thus, he further argued and found it contradictory that the 1<sup>st</sup> Defendant/Respondent could disobey orders which he consented to. They further opined that the Court order related to several suit premises. To them it was not clear which parcel of land in particular the alleged construction was taking place and hence disobeyed by the Defendant. They insisted from the set of photographs the exact parcel could not be depicted. The Learned Counsel maintained that the Plaintiffs/Applicants had to prove their case and the burden of proof was above the balance of probability. It was almost beyond reasonable doubt they averred. They contended that a mere set of photographs attached to the application as annexures marked “B” could not be proof of alleged contempt and could not be used to find the 1<sup>st</sup> Defendant/Respondent liable to contempt of court which bordered to a criminal offence. On this aspect, the Learned Counsel relied on the case of **“Re Bramblevale Ltd (1969) 3 All ER 1062** where it was held by Court that:- **‘Contempt of court is an offence of a criminal character. A man may be sent to prison. It must be satisfactory proved. To use time - honored phrase, it must be proved beyond reasonable doubt.’** The Learned Counsel submitted that if any doubt existed in proving contempt, the application ought to fail. They imputed the application was filed in bad faith abuse of court process and as intimidation to scare off the 1<sup>st</sup> Defendant and in order to illegally dispossess and deprive him of his land. In the long run, they prayed to court to dismiss the application with costs.

## **V. ANALYSIS AND DETERMINATION**

16. I have read and keenly assessed all the pleadings filed herein being the Notice of Motion Application dated 19<sup>th</sup> July, 2021 by the Plaintiffs/Applicants herein, the Replying Affidavits by the 1<sup>st</sup> Defendants/Respondent, the well written submissions by all the parties, the cited authorities and the relevant provisions of the law.

In order to arrive at an informed, just and fair decision, this Honorable Court has relied on the following issues for its determination. These are:-

- a) *Whether the Plaintiffs/Applicants have met the fundamental and well established threshold of being granted Contempt of Court orders.*
- b) *Whether the 1<sup>st</sup> Defendant/Respondent is in contempt of the orders issued by this Court on 23<sup>rd</sup> June 2021.*
- c) *Who will bear the Costs of the Application.*

### **ISSUE No. a). Whether the Plaintiffs/Applicants have met the fundamental and well established threshold of being granted Contempt of Court orders.**

17. The concept of contempt of court is detailed and rather scientific in nature. It is that conduct or action that defies or disrespects the authority of court.

The Black Law Dictionary 9<sup>th</sup> Edition defines to mean:-

***“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 the administration of justice”***

This court recognizes the fact that the contempt of court Act, No. 46 of 2016 was declared unconstitutional and nullified in 2019 for lack of public participation as required under Article 10 and 118 (b) of the Constitution of Kenya – **See The Kenya Human Rights Commission – versus- Attorney General & Another (2108) eKLR.**

In the given circumstances therefore the law that still operates, governs and provides for the procedure for instituting Contempt of Court proceedings is still the Provisions of the Supreme of Court of England Act Section 5 of the Judicature Act Cap. 8

Section 5 of the Act states that:

- (1) 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 such power shall extend to upholding the authority and dignity of subordinate courts.**
- (2) An order of the High Court made by way of punishment for contempt of court shall be appealable as if it were a conviction and sentence made in the exercise of the ordinary original criminal jurisdiction of the High Court.**

18. Additionally, Under the Provisions of Order 40 Rule 3 (1) of the Civil Procedure Rules 2010 it provides that court may order a person who disobeys court orders to be detained in prison for a term not exceeding six months. In the case of **Samuel M. N. Mweru & Others –**

**Versus - National Land Commission & 2 others (2020)eKLR** Justice Mativo held thus:- *‘A court without contempt power is not a court. The contempt power both in civil and criminal form is so innate in the concept of jurisdictional authority that a court that cannot secure compliance with its own judgement and orders in contradiction in terms an ‘oxymoron’.... It is the duty of the court not to condone deliberate disobedience of its orders nor waiver from its responsibilities to deal decisively and firmly with contemnors. The court does not and ought not be seen to make orders in vain; otherwise the court would be exposed to ridicule and no agency of the constitutional order would then be left in place to serve as a guarantee for legality, and for the rights of all people.’*

19. Having set out the law and fundamental principles pertaining to contempt of court, I wish to point out that it is trite law that in contempt proceedings, the applicant ought to establish the following; the terms of the order should be clear, unambiguous and binding on the contemtor, proper notice and knowledge of the terms of the order by the contemtor, the contemtor has acted in breach of the terms of the order and the disobedience was a deliberate action by the contemtor.

Therefore, under this sub-heading, the Honorable Court is content that the Plaintiff/Applicant has brought the ingredients for citing a contemtor save to state from the very onset the Preliminary Objection may not be in tandem to the facts in the instant case.

**ISSUE b). Whether the 1<sup>st</sup> Defendant/Respondent is in contempt of the orders issued by this Court on 23<sup>rd</sup> June 2021.**

20. In the instant case, the orders herein were clear, and unambiguous. Indeed, at some point, the Defendants were ordered to refrain from selling, subdividing, excavating or undertaking any construction on the following suit properties, Plot No. 289/II/MN, 14119/II/MN, 14110/II/MN, (Original No. 286/II/MN). The issue on contention is whether the 1<sup>st</sup> Defendant/Respondent was aware of the terms of the orders. The Plaintiffs/Applicants claim that 1<sup>st</sup> Defendant/Respondent was aware of the orders since service was effected upon his Advocates on record.

21. **Sheila Cassatt Issenberg & another – Versus - Antony Machatha Kinyanjui [2021] eKLR, the court held that**

*‘Contempt of Court is in the nature of criminal proceedings and, therefore, proof of a case against a contemnor is higher than that of balance of probability. This is because liberty of the subject is usually at stake and the applicant must prove willful and deliberate disobedience of the court order, if he were to succeed. This was aptly stated in Gatharia K. Mutikika – Versus - Baharini Farm Limited [1985] KLR 227, that:*

*A contempt of court is an offence of a criminal character. A man may be sent to prison. It must be proved satisfactorily.... It must be higher than proof on a balance of probabilities, almost but not exactly, beyond reasonable doubt. The standard of proof beyond reasonable doubt ought to be left where it belongs, to wit criminal cases. It is not safe to extend it to offences which can be said to be quasi - criminal in nature.*

*However, 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 party 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”.*

22. Under this sub heading, this court directly attempts to apply the above principles into the instant case. While doing so, from the very onset the Honorable Court strongly holds that the Plaintiffs/Applicants have failed to demonstrate to court that they should be granted the orders sought. In saying so, the Honorable Court has arrived at that decision for the following reasons. These are:

Firstly, on the issue of service of the Orders. how the service was effected through filing or attaching a filed copy of the return of service on the person of the 1<sup>st</sup> Defendant/Respondent is rather wanting and not convincing at all. Clearly, the Court reiterates that there is no affidavit of service prepared and filed by the Plaintiffs/Applicants that demonstrates the 1<sup>st</sup> Defendant/Respondent was served personally with the Court orders.

The assumption that since the 1<sup>st</sup> Defendant’s Advocates knew about this order hence he too or automatically ought to have known about is a rather dangerous one in the given circumstances. Thus in short I conclude there was no proper service.

Secondly, there is nothing to show that the 1<sup>st</sup> Defendant willfully failed or refused or neglected to obey the court order. The Plaintiffs/Applicants have annexed a set of photographs of some people constructing some structures onto the site property. However, from the photographs the court cannot establish if they were taken from the suits properties indicated in the orders or the filed pleadings. There is no correlation at all. Besides, as it is common knowledge matters of document any evidence based on photographs are myriad and complex. For instance, there would be need to establish who took the photos from where they were taken and production of a certificate of evidence for that matter. The court cannot determine all these fundamental information merely from the evidence adduced before it on affidavits whether the alleged contempt was deliberate or unintentional.

Thirdly, from the pleadings, it is indicative that there are several suit parcels pertaining to and/or in connection with this suit. It’s for this reason that the Honorable Court holds that the prayer sought by Plaintiffs/Applicants are unclear, ambiguous and vague as they fail to pin point directly on which particular suit parcel the 1<sup>st</sup> Defendant/Respondent is alleged to have been or the illegal construction took place. Be that as it may, this calls for further interrogation which may only be undertaken thoroughly during a full trial of the suit. From these doubts, therefore it could be defective, wrongful and erroneous to commit 1<sup>st</sup> Defendant to civil jail in the given circumstances.

23. Finally, this Court finds it rather peculiar and hard to fathom how one would breach a Consent Order as is the case in this instant suit. In the ordinary circumstances, where parties feel aggrieved to the terms of or any aspects of the Consent orders which the Court fully concurs with the Plaintiffs/Applicants and in the cited case of “**Thrift Estates Limited & another - Versus - Equitorial Commercial Bank Ltd (2016)eKLR**” (**Supra**)” and I add the famous cases of “**Court of Appeal (Kisumu) No. 18 of Flora N. Wasike - Versus – Destimo Wamboko (1988) KLR 429**” & **Kitale Industries - Versus – Attorney General & County of Trans Nzoia (2020) eKLR** which is in fours to this principles where Consent orders have contractual effect. They could only be set aside on grounds which would justify setting aside a Contract on grounds of misrepresentation of facts, mistake, misrepresentation of facts omission and fraud. Certainly, not to disobey it.

Suffice it to say, though this are matters of facts to be adduced during the full trial, but the Plaintiffs/Applicants would need to explain the reason for the institution of the multiplicity of suits before this Court over the same parties and subject matter before this Court.

#### **VI. DETERMINATION.**

24. In view of the foregoing, therefore, the Plaintiffs/Applicants have not persuaded this Honorable Court that there was any willful disregard to the orders of the court by the 1<sup>st</sup> Defendant/Respondent. From the above analysis of the facts and evidence adduced before this Honorable Court, the Plaintiffs/Applicants have failed to establish the requirements beyond reasonable doubt and as such the prosecution of the alleged contemnor fails. Accordingly, it is directed as follows:-

a) **THAT the Notice of Motion dated 19<sup>th</sup> July 2021 is dismissed with costs to the 1<sup>st</sup> Defendant.**

b) **THAT for the sake of expediency this matter be fixed for pre trial conference session to be mentioned on 1<sup>st</sup> March, 2022.**

**IT IS ORDERED ACCORDINGLY.**

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 20<sup>TH</sup> DAY OF JANUARY 2022**

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

**ENVIRONMENT AND LAND COURT**

**MOMBASA**

**In the presence of:**

M/s. Yumna Court Assistant;

No appearance for the Plaintiffs/Applicants;

Mr. Mutisya Advocate for the Defendant/Respondent