



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MOMBASA

ELC NO. 134 OF 2012

ANIKET PROPERTY

AND INVESTMENT.....PLAINTIFF/APPLICANT

- VERSUS -

HAMADI JUMA MWAKIBIRO.....1ST DEFENDANT

VENTURE HOLDINGS LIMITED.....2ND DEFENDANT

DAVID K. KANDIE.....3RD DEFENDANT

DRIEDRICK ALFONSE JOSEY BRINKMAN.....4TH DEFENDANT

AMANAABDALLA.....5TH DEFENDANT

KHALIFAN MLAI.....6TH DEFENDANT

THE LAND REGISTRAR, KWALE.....7TH DEFENDANT

THE ATTORNEY GENERAL.....8TH DEFENDANT

RULING

I. PRELIMINARIES

1. What is before this Honorable Court for determination is the Notice of Motion application dated the 19th September, 2018 filed by the Plaintiff/Applicant. It was brought three (3) years ago under the provisions of Sections 1, 1B, 3A and 63 of the Civil Procedure Act Cap. 21 and Order 40 of Rule 3 of the Civil Procedure Rules, 2010 of the Laws of Kenya.

II. THE PLAINTIFF'S/APPLICANT'S CASE

2. The afore mentioned application was initiated by the Plaintiff/Applicant with the sole intention to subject the 1st Defendant/Respondent to Contempt of Court and hence have sanctions and penalties meted on him for being in breach, infringement and outright disobedience of this Honorable Court order made on 11th July, 2012 and 5th October, 2012 respectively issued on the 6th August, 2018. Specifically, the Plaintiff/Applicant sought for the following orders:-

(a) Spend;

(b) That the 1st Defendant who infringed upon and/or refused, neglected and/or failed to comply with orders of this Honorable court made on the 11th July 2012 and 5th October, 2012 and issued on the 6th August, 2018 be held in Contempt of Court and appropriate sanctions or penalty be levied on him including an order that the buildings erected on the suit property by him be demolished forthwith at his expense.

3. The said application is premised on the testimony, averments and grounds of the 10 paragraphed Supporting Affidavit of VIJAY

LAKHANI sworn and dated 19th September, 2018 and one annexure marked as “VL - 1” annexed hereto. The deponent deposed that he was the Plaintiff/Applicant’s Caretaker/Manager in the County of Mombasa in so far as its properties were concerned and hence was duly authorized by it and its Board of Directors to make this Affidavit on its behalf. He deposed that on 11th July, 2012, this Honorable Court made certain orders in form of temporary injunction to restrain the Defendants/Respondents whether by themselves or through their agents or servants or employee from trespassing onto or interfering with the Plaintiff/Applicant’s property all that parcel of land known as Land Reference No. KWALE/DIANI BEACH/203 (Hereinafter referred to as “**The Suit Property**”) or any of the purported sub - division namely the Land Reference No. KWALE/DIANI BEACH/1536 to 1543 or interfering with the Plaintiff/Applicant’s possession with a further order made on 5th October, 2012.

4. He averred that the said orders were served on all the Defendants/Respondents as well as their Advocates on record. In other words, he stressed they were all aware of these orders. He held that it had now come to the attention of the Plaintiff/Applicant that the 1st Defendant/Respondent had been in complete disregard and breach of these Court orders, as he had proceeded not only to construct and put up a building on the suit land but also had on 21st January, 2015 obtained a further title to the proposed sub - division of the parcel known as Land Reference No. KWALE/DIANI BEACH BLOCK/1542 thereof.

The Deponent deposed that it was clear that the 1st Defendant/ Respondent had absolutely no regard for the rule of law and/or authority or dignity of this Honorable Court nor for just and due judicial process and it was imperative to prevent the 1st Defendant/ Respondent from conducting himself with absolute impunity and as though he was above the law and without any regard for court orders.

5. His contention was that by this conduct, the 1st Defendant/ Respondent had deliberately disobeyed this court orders and maliciously interfered with the course of justice in a bid to further subvert the court of justice in this matter.

He emphasized that there was need to maintain and uphold the rule of law and good order that the authority and dignity of this court. He held this would be by enforcing the orders made by this Honorable Court. For this reason, he further argued that there was need to have the 1st Defendant/Respondent penalized and ordered to demolish the offending structures put up on the suit land in breach of the orders of this court.

6. He stressed that the conduct by the 1st Defendant/Respondent was a clear testimony to the fact that he had little regard for the rule of law and/or sanctity of Judicial process or the authority and dignity of this Honorable Court. He attached several documents being photo stat copies of documents and photographs taken with regard to the conduct by the 1st Defendant/Respondent marked as “VL-1” annexed hereto. He urged court to allow the application and grant the orders sought thereof.

III. The Replying Affidavit by the 1st Defendant/Respondent

7. On 18th November, 2021 while opposing the application by the Plaintiff, the 1st Defendant/Respondent filed a 10 paragraphed Replying Affidavit sworn by HAMADI JUMA MWAKIBIBO the 1st Defendant/Respondent herein and dated 17th November, 2021. He deposed that he was a resident of Kwale and the 1st Defendant/Respondent held that he had the Notice of Motion application dated 19th September, 2018 read and explained to him. He had fully understood its contents thereof.

He argued that although the Plaintiff/Applicant wished to have him cited for Contempt of orders issued on 6th August, 2018 but the Plaintiff/Applicant had not only failed to annex the said orders in the above filed application but also serve it upon him. He further averred that the Plaintiff/Applicant sought to have the buildings erected on the suit land demolished and more so at his own expenses which was detrimental on him as he was currently without any source of income.

8. Based on the advise by his Advocates on record, he held that the application made under the provisions of Order 40 Rule 3 of the Civil Procedure Rules, 2010 which provided no room for the orders for demolition of property as sought by the Plaintiff/Applicant. In any case, he vehemently denied having caused any construction of any structures whatsoever on the suit property as alleged.

9. It was the contention of the 1st Defendant that, the deponent of the supporting affidavit of the notice of motion application dated 19th September, 2018 was now deceased and by this fact alone it would deny him the right to face his accuser for cross-examination thereby violating his fundamental right to a fair hearing. Finally his contention was that the application was fatally defective, and the prayers sought ungrounded and lacked merit for that reason it ought to be dismissed with costs.

IV. THE SUBMISSIONS

10. On 25th November, 2021 while in the presence of all the parties in Court, this Honorable Court directed that the Notice of Motion application dated 19th September, 2018 be disposed off by way of written submission. Subsequently on 15th December, 2021 all the parties having fully complied, a ruling date was reserved for 19th January, 2022 accordingly.

A. The Written Submissions by the Plaintiff/Applicant.

11. On 15th December, 2021, through the law firm of Messrs. A.B. Patel & Patel Advocates for the Plaintiff/Applicant filed written submission dated 14th December, 2021. The Learned Counsel, Mr. Sanjev Khagram, submitted that on 11th July, 2012 this Honorable Court – by Justice P.M. Mwongo, (then sitting at Mombasa) issued orders that all the Defendants/Respondents including the 1st Defendant/Respondent be restrained whether by themselves or their servants from trespassing onto the Plaintiff/Applicant’s suit Property all that parcel of land known as Land Reference No. KWALE/DIANI BEACH BLOCK/203 and the resultant sub - divisions being parcels being

Land Reference numbers KWALE/DIANI BEACH BLOCK/1536, 1537, 1538, 1539, 1540, 1541, 1542 and 1543 respectively – or interfering with the Plaintiff/Applicant’s possession and from selling, letting, leasing, sub - letting, disposing off, transferring, alienating, charging or in any way transacting and dealing with the said sub-division.

12. The Learned Counsel held that service of the pleadings was effected by substituted means by publishing the advertisement in the Nation Newspapers as ordered by court on 11th July, 2012. It was his contention that it was as a result of the effected service of the pleadings and court order that the 1st Defendant filed a Defence on 23rd July, 2012. Indeed, he argued, on 5th October, 2012 a M/s. Wanjeri Advocate appeared holding brief for the 1st Defendant’s Advocates when the matter was deferred on account of Mr. Otunga Advocates bereavement and the interim orders were extended. The Learned Counsel for the Plaintiff/Applicant held that the 1st Defendant was always aware of these court orders taking that his advocates participated in the proceedings of court on 5th October, 2012 and whereby the said interim orders were extended to 11th July, 2012 which had been served upon the 1st Defendant and his Advocates. It was for these reason that a Defence and a Replying Affidavit by the 1st Defendant were filed. The Learned Counsel argued that, following service of process and the court order, was incongruous of the 1st Defendant and his Advocates to feign ignorance taking that both of them had fully participated in all the subsequent proceedings with full knowledge of these orders as the record of these proceedings showed.

13. The Learned Counsel further submitted that despite of the orders made herein, the 1st Defendant sought approval for development of a boundary wall on all that parcel of land known as Land Reference No. KWALE/DIANI BEACH BLOCK /1542 in contravention of this Honorable Court orders and without any regard thereof of the rule of law. This evidence remained uncontroverted and clearly showed the 1st Defendant was responsible for the contempt.

The Learned Counsel further submitted that it was trite law and long established that a party in contempt ought not to be heard until it purged its contempt, a matter justified by grave public policy consideration. To buttress on this point, the Learned Counsel relied on the decision of **“Ramesh Popatlal Shah & 2 Others – Versus - National Industrial Credit bank Limited (2005) eKLR.**

Additionally, the Learned Counsel submitted that knowledge of an order was sufficient for purposes of Contempt proceedings. He stressed that knowledge of court order could be imputed by virtue of a party’s Advocate being present in court at the time of making of the afore mentioned order. With regard to these points, the Counsels for the Plaintiff relied and cited numerous leading Court decisions including those of:- **“Africa Management Communication International Limited – Versus - Joseph Mathenge Mugo & Another (2015) eKLR; Republic – Versus - Kenya School of Law and 2 Others, Ex - Parte Juliet Wanjiru Njoroge & 5 Others 2015 (eKLR) and Christopher Kurutyon Lonyala & 27 Others – Versus - Cabinet Secretary Ministry of Lands and Settlement & Others (2020) eKLR**

In the long run the Learned Counsel reiterated that, the 1st Defendant had knowledge of the orders of this court and had willfully disobeyed the said orders. They urged that in order to have him purge his contempt, all matters carried out by him in breach of the court order ought to be reversed as they constituted a nullity and were void. The Plaintiff/Applicant therefore prayed that the application to be allowed and prayers sought granted as prayed.

B. The Written Submission by 1st Defendant/Respondent.

14. On 3rd January, 2022, the Law Firm of Messrs. KOUNAH & COMPANY ADVOCATES for the 1st Defendant/Respondent filed written submission dated 31st December, 2021. By and large, the Learned Counsel submitted mainly on one single issue – whether the orders sought in the application by the Plaintiff/Applicant dated 19th September, 2018 was merited.

The Learned Counsel, Mr. James Kounah Advocate submitted by recounting on all the averments made out in Replying Affidavit sworn by the 1st Defendant/Respondent and dated on 17th November, 2021 thereof. The Learned Counsel submitted that from the facts in the pleadings and in this case, it was evident that by the time of the institution of this suit by the Plaintiff/Applicant herein, the 1st Defendant only held the proprietary interest in the portions known as land Reference Numbers KWALE/DIANI/BEACH 1537, 1540 and 1541 respectively. The Learned Counsel for the 1st Defendant/ Respondent argued that when court conducted a site visit on the land on 12th November, 2021 the Court together with all the parties for fact finding mission no evidence was tendered to prove that the 1st Defendant was interfering with parcels No. KWALE/DIANI/BEACH/BLOCK 1537, 1540 and 1541 respectively.

15. The Learned Counsel’s contention was that it was upon being aware of the existence of this case, that the 1st Defendant duly entered appearance and filed his Defence dated 23rd July, 2012. They submitted that it was on 2nd November, 2021 when the Plaintiff/Applicant served the 1st Defendant’s Advocate with the current application despite of it having been filed in Court on 20th September, 2018. They recounted the Plaintiff/Applicant’s Advocate averments to the effect that on 11th July, 2012 Honorable Justice P.M. Mwongo made adverse orders against the Defendants/Respondents. The Learned Counsel recapped that the Plaintiff’s Advocate further claim to the effect that the same orders were extended on 5th October, 2021. As per the Plaintiff’s Advocates submissions the orders were meant to restrain the Defendants:- **“Whether by himself or through his servants, employees, agents or however else from trespassing onto the Plaintiff’s property known as Kwale/Diani Beach Block 203 or any purported sub0division thereof namely KWALE/DIANI BEACH BLOCK 1536, 1537, 1538, 1539, 1540, 1541, 1542, and 1543 or interfering with the Plaintiff’s possession thereof and from selling, letting, leasing, sub-leasing, disposing off transferring, alienating charging or in any other manner transacting and dealing with the alleged sub - division known as KWALE/DIANI BEACH BLOCK 1536, 1537, 1538, 1539, 1540, 1541, 1542, and 1543.**

16. On this issue the Learned Counsel for the 1st Defendant/Respondent disputed the existence of the afore said court order. They argued that if at all the Plaintiff/Applicant’s Advocate were sincere as to the existence of the said court orders, the least that was expected of them was to have either **Served** the 1st Defendant personally or through his agents as elucidated under the provisions of Order 9 of the Civil Procedure Rules, 2010. On the contrary, the Learned Counsel stressed that the Plaintiff/Applicant’s advocate were reluctant to **Produce** any copy of the

alleged orders.

17. This notwithstanding the Learned Counsel submitted that the 1st Defendant/Respondent had no control on what had happened or was happening onto all the parcels of land known as Land reference numbers KWALE/DIANI BEACH BLOCK 1536, 1538, 1542 and 1543 respectively. They were of the view that the only logical explanation, the names of the 1st Defendant/Respondent's kept on popping up in these matters was the fact that the County Government who were the custodians of the land records may not have updated its records accordingly.

The Learned Counsel reiterated that facts that the Plaintiff/Applicant's Advocate had failed to produce a copy of the said order before this court and hence it was clear that it never existed. If at all it existed, then it was never served upon the 1st Defendant/Respondent. Therefore the 1st Defendant/Respondent could not have breached what he was not aware of.

18. Additionally, the Learned Counsel submitted that the Plaintiff/Applicant's Application was grounded under the provisions of Order 40 Rule 3 of the Civil Procedure Rules, 2010. According to them, these provision only laid down the punishment for contempt as stated hereof. They referred to the second prayer in the application by the Plaintiff and which they held was seeking for an order, *to wit:- "the building erected on the suit property by him be demolished forthwith at his own expenses"*. To the Learned Counsel this prayer by the Plaintiff/Applicant was not grounded on either law or equity. They argued that, by so doing, clearly the Plaintiff/Applicant had gone beyond the four corners of the provisions of Order 40 Rule 3 of the Civil procedure Rules, 2010. By the time of the institution of the instant suit, they argued, the 1st Defendant/Respondent had already disposed off some of the sub - divided parcels from the suit property to other third parties.

19. Further, the Learned Counsels for the 1st Defendant opined that the orders were obtained "*ex - parte*" and thus they ought to have been served. Besides, they argued that interim injunction orders automatically lapsed after three (3) clear calendar days. To buttress their argument in this case, the Learned Counsel relied on a battery of the following authorities. These were:- **Gatharia K. Mutitika – Versus - Bhaharini Farm Ltd. (1985); Econet Wireless Kenya Limited – Versus – The Minister for Information and Communication of Kenya & Another (2005) eKLR 828; Shimmers Plaza Limited – Versus - National Bank of Kenya Limited (2015) eKLR and Nicholas Salat – Versus - I.E.B.C. and others 2013 eKLR.**

In the long run, they prayed and urged court to decline in granting the prayers sought in the Plaintiff/Applicant's Application dated 19th September, 2018 by dismissing it with costs.

IV. ANALYSIS AND DETERMINATION

20. I have keenly read and critically analyzed all the pleadings filed by the parties hereof being the Notice of Motion application dated 19th September, 2018 and the Replying Affidavit by the 1st Defendant and the well - articulated written submissions, the relevant provisions of the law and all the cited authorities hereof.

In order to arrive at an informed, just and fair decision on the matter before hand, I have framed the following three (3) salient issues for consideration. These are:-

(a) Whether the Notice of Motion application dated 19th September, 2018 by the Plaintiff/Application meets the well established threshold for citing contempt of court upon disobedience of its orders.

(b) Whether the 1st Defendant has willfully disobeyed court orders and should be cited for contempt of the court orders of 11th July, 2012 and 5th October, 2012 issued on 6th August, 2018 and whether he should be purged before being heard.

(c) Who should bear the costs of the notice of motion application dated 19th September, 2018.

ISSUE No. a). Whether the Notice of Motion application dated 19th September, 2018 by the Plaintiff/Application meets the well established threshold for citing contempt of court upon disobedience of its orders.

Brief Facts:-

21. Prior to proceeding further into the in depth analysis of the issues under this sub – heading, this Honorable Court finds it imperative to expound on the facts of the case briefly. From the pleadings filed by the parties and the records herein, it is indicated that in the year 2005, the 1st Defendant was the legal and absolute registered owner to all that parcel of land known as Land Reference KWALE/DIANI BEACH BLOCK 25. In the course of time – the year 2005, he was informed that there was need to compulsory acquire part of his land for curving it out for public use specifically being the construction of the Diani – Kalu – Kinondo road to Tanga in Tanzania. As a result of this, he surrendered the original Certificate of Lease to the relevant Implementing Entity within the Government of Kenya to hive off the portion desired. The said sub - division of the land into two portions was caused – namely:- (a) Land Reference number Kwale/Diani Beach – 203 and (b) Land reference Number Kwale Diani Beach 204 respectively. The 1st Defendant retained the parcel No. Kwale/Diani Beach Block/203 while Land Reference No. Kwale/Diani Beach Block 204 was utilized by the Government and is what became part of the aforesaid road.

Subsequently, upon the expiration of the Certificate of Lease to Parcel No. KWALE/DIANI Beach Block/203, the 1st Defendant surrendered his title No. 203 for extension through his appointed Advocates he was issued with new title deed on 18.10.2007 with a further 99 years lease.

22. Nonetheless, it is from here that some of the matters in this case emerge but still to be fully appreciated and determined. It is alleged the parcel No. 203 was sold off to the Plaintiff. For the reason of safeguarding the rule of *sub - judice* and not wanting to prejudice the case by the parties hereof, taking that the hearing is still work in progress, this Honorable Court shall not wish to devolve further and instead defer on this aspect for the time being until this case is fully heard and determined.

However, from the pleadings hereof, there appears to be sub -division of the parcel No. 203 into eight (8) parcels namely Land Reference numbers KWALE/DIANI BEACH BLOCK 1536, 1537, 1538, 1539, 1540, 1541, 1542, and 1543 all issued on 3rd October, 2011.

23. 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 9th 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. From the very onset, this Court takes cognizance to the fact that the Contempt of Court Act, No. 46 of 2016 was declared constitutionally invalid and nullified in 2018 for lack of public participation as required under Articles 10 and 118 (b) of the Constitution and for encroaching on the independence of the Judiciary as founded in the case of **“Kenya Human Rights Commission – Versus - Attorney General & Another (2018) eKLR**. In the given circumstances, this court is compelled to revert to the provision of the law that operated before the emanated of the Contempt of Court Act – the Judicature Act and the Supreme Court Rules of England.

Under the provisions of Section 5 of the Judicature Act, Cap. 8 of the Laws of Kenya confers jurisdiction on the superior courts to punish for contempt provides thus:-

“The High Court of Appeal shall have the same powers to punish for contempt of court as is for the time being possessed by the High Court of England and that power shall extend to upholding the authorities and dignity of sub - ordinate courts.

24. Additionally, under Section 27 of the Environment and Land Court Act Provides 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 (Kshs. 20,000,000/=) 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.

25. Under Order 40 Rule 3 of Civil Procedure Code provides that cases of disobedience or of breach of any terms of a temporary injunction the court granting that 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 of not exceeding six (6) months unless the court directs his release.

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.

26. In the instant case, the Plaintiff/Applicant has sought for the following specific orders from this court. They are summarized as follows:-

I) **The infringement/breach:-** the 1st Defendant infringed upon and/or refused, neglected and/or failed to comply with orders of this Honorable court;

II) **The Orders of the Court:-** The orders infringed were made on the 11th July 2012 and 5th October, 2012 and issued on the 6th August, 2018;

III) **The Sanctions and/or penalties:-** The 1st Defendant to be held in Contempt of Court and appropriate sanctions or penalty be levied on him;

IV) **Demolition of buildings/Structures:-** The sanctions or penalty to be levied against the 1st Defendant to include an order that the buildings erected on the suit property by him be demolished;

V) **Expenses by 1st Defendant:-** The demolition of the buildings to be at the expense of the 1st Defendant.

27. From the above summary, the fundamental issue at hand is whether the Plaintiff/Applicant has demonstrated the fulfilment of the infringement, breach and/or refusal to obey the terms of the order of this Honorable Court. It is quite clear that the Plaintiff/Applicant has not extracted and attached a copy of the said orders issued by this court on 11th July, 2018 and 5th October, 2018 and issued on 6th August, 2020. The Plaintiff/Applicant has insisted that the all the Defendants and in particular the 1st Defendant Advocates were aware of the orders as they were in court and then the same were extended on 11th July, 2018 and therefore it's the respect, dignity, decorum and integrity of the Court that is at stake here. While this is trite law and I fully concur with the Plaintiff/Applicant and indeed the more reason the 1st Defendant filed a Defence and a Replying/Affidavit on 23rd July, 2012, but can this assumption be supposedly be imputed on the Defendants and in particular the 1st Defendant having the knowledge and hence appreciated the terms of the said court orders? The answer to me is in the negative.

Further, on whether the Plaintiff/Applicant has demonstrated knowledge of the terms of the order – there is a possibility that the Defendants and in particular the 1st Defendant/Respondent were aware of the orders – I state it being a possibility as despite of the assertion service was effected through Substituted means from the sworn supporting affidavit of the Plaintiff's Deponent, Mr. Lakhani deponed thus:- **“..... that service of the pleadings was effected by substituted means by publishing the advertisement in the Nation Newspapers as ordered by court on 11th July, 2012.....”**. For unclear reason, I reiterate, no such evidence – such as an affidavit of service is on record or attached to the application to demonstrate that the service was duly effected and even that indeed it was by the said service by substituted means as stated. Therefore, this Honorable Court is not satisfied that there was proper service of the contents of court order upon the Defendants and in particular the 1st Defendant/Respondent to warrant the orders sought being granted thereof.

ISSUE No. b). Whether the 1st Defendant has willfully disobeyed court orders and should be cited for contempt of the court orders of 11th July, 2012 and 5th October, 2012 issued on 6th August, 2018 and whether he should be purged before being heard.

28. On whether the Plaintiff/Applicant must demonstrate failure of the Respondent to comply by the court order. Under this Sub – heading, outrightly, 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 consisted with the gravity of charge”.

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 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”.

It is trite law that the contempt of court is such a serious offence which borders on criminality and the consequences are extremely serious. In this case, the Plaintiff/Applicant in its application cited and invoked the provision of under Order 40 Rule 3 of the Civil Procedure Rules, 2010. The Honorable Court refers to The deponent, Mr. Vijay Lakhani from the Plaintiff/Applicant's pleadings, in his sworn Supporting Affidavit dated 19th September, 2018 stated verbatim:- **“.....he proceeded not only to construct and put up a building on the suit land but also obtained a further title to the proposed sub - division No. KWALE/DIANI BEACH BLOCK/1542 on 21st January, 2015.....”** This Honorable Court holds with great respect to the Plaintiff/Applicant these averments deposed by Mr. Lakhani are certainly not factual at all and may border on willful mis – representation of facts or misleading this Honorable Court. In saying so, the Honorable Court on without prejudice basis, confidently and strongly holds its assertion on three aspects.

29. Firstly, pursuant to the provisions of Order 18 Rule 11 of the Civil Procedure Rules, 2010 and the full consensus of the parties, on 12th November, 2021 this court conducted an elaborate, intense and thorough site visit (*“Locus in quo”*) of the suit property, The sole purpose for the said Site Visit was for the inspection and examination of facts on the ground as pertains and or in connection with the part heard case and the suit property. The extremely successful site visit was in the presence of all the parties herein. In the course of the exercise, the Honorable Court was able to pragmatically and practically take judicial notice and on first hand basis by itself able to deduce that there has been not only numerous resultant sub - divisions of the suit land from the original land reference number KWALE/DIANI BEACH 203 to other parcels Nos. 1542 to 1547 but the existence of several physical possession and already constructed permanent expensive structures on the land by other owners. On conducting indepth personal interrogation from the workers, agents and/or Caretakers found on the respective parcels, this court established that the occupants onto these parcels were namely:-

i). Plot no. 1542, approximately measures 1.0 acres Plot or thereabout. There was an already and almost completed construction of a 500 worshippers ultra modern story Mosque. The caretakers informed this Court that owner to this parcel of land was one Mr. Amedo Noor, whom it was learnt died recently. He is survived by his children - Mr. Mohamed Noor and M/s. Fardos.

ii). Plot No. 1543 is owned by the 1st Defendants, the Venture Investment Limited. There was no construction taking place there.

iii). Plots numbers 1541 & 40 – there existed a well done 5 -6 feet concrete perimeter wall. The Honorable court was informed by the caretaker – One Mr. Milton Lekalesoi that the owner of the land was a company operating in the name and style of “Daylun Company Limited”.

iv). Plot No. 1539 – it was stated to belong to the 3rd Defendant. She was present but held she was not aware who had taken over and even caused massive development on it. It was a resort trading in the names and style of “Horizon Star Beach Resort” and a swimming pool. The owner is called Kabiru Ndiritu but was rarely there from the time of the outbreak of the global Corona/Covid – 19 Pandemic.

v). Plot numbers 1537 & 1538:- There is a 5 1/2 meter access road to this plot. The 1st Defendant e Mr. Mwakibibo indicated he sold it to Mr. Brinkman, the 4th Defendant.

vi). Plot NO. 1540 – It is meant to belong to Mr. David Kandie, the 3rd Defendant. He was present. It has a perimeter wall and a gate.

vii). Plot Number 1536 - There was a caretaker Mr. Francis Ora Charo. He indicated the plot belonged to – Mr. Frank Peter Anhorn of the Germany nationality.

30. Certainly the above mentioned new and beneficial owners and who includes some of the Defendants in this case were not the 1st Defendant. To proceed to cite the 1st defendant alone as urged would be not only discriminatory but also taking a premature decision prior to conducting a full trial. Additionally, there was no evidence to demonstrate that the 1st Defendant was and/or had undertaken any of the constructions on the suit property as alleged to warrant this Court grant the orders as prayed. The Honorable court still wonders loudly and has been extremely anxious to know the reason the Plaintiff/Applicant has to date never taken any tangible and legal steps to have these beneficial land occupants or in possession enjoined in this suit in order to add value and to assist the court in arriving at an informed adjudication and complete decision in the final analysis. In reality, then it would be fair and proper to have the orders affecting all these persons named hereof. Be that as it may, will leave that to the Plaintiff/Applicant being its case. In the meantime, the Honorable Court will be eager and with legitimate expectation to attain valuable information from the evidence to be adduced by the 1st Defendant, the Land Surveyor and the Land Registrar Kwale the main custodian of the land records who are all witnesses in the case, on how these peculiar development took place, the prime movers, the benefactors and who exactly were the current land owners during the trial. In other words, the root of the title deed, as the pith and substance of this case will be extremely significant after the full trial.

Secondly, the Plaintiff/Applicant has not yet demonstrated that apart from the alleged applying for approvals into Plot No. 1542 that the 1st Defendant indeed is the person behind the alleged construction of the perimeter wall and the construction of the permanent structure on the suit land.

The Honorable Court is strongly persuaded that granting any orders at this stage would be pre - mature and may further jeopardize the main substratum of this case and the full trial which is scheduled for two consecutive days – the 19th and 20th January, 2022 respectively without failure.

31. Thirdly, the orders sought from the afore stated application by the Plaintiff/Applicant under the provision of Order 40 (3) of the Civil procedure Rules, 2010 for the demolition of the structures on the suit property were made “*Ex – Parte*” three years (3) ago are not only unfathomable, unsustainable but not backed up by equity. A quick reference to the provisions of Order 40 Rule 4 (2) which holds provides:

“An ‘ex – parte’ injunction may be granted only once for not more than fourteen days and shall not be extended thereafter except once by consent of parties or by the order of the Court for a period not exceeding fourteen days”.

My quick reading and understanding of the above provision of the law, is that the injunction orders do have a specific time line. They can never subsist interminably. In the instant case, the injunction orders were made on the 11th July 2012 and 5th October, 2012 and issued on the 6th August, 2018.

The Honorable court holds on the position that the orders sought which includes the demolition of the structures erected on the suit land at the expense of the 1st Defendant/Respondent may not be attainable as yet at this interlocutory stage. It is imperative that the matter is heard first and foremost where all the fundamental evidence is adduced, tested, analyzed and finally determined before the issuance of such drastic and draconian direction which may be contrary to the fundamental rights to private property under Article 40 (1) & (2) of the Constitution of Kenya and public order and interest thereof. For these reasons, I decline and instead defer this particular prayer and/or order until after the actual main hearing.

V. DETERMINATION

32. Ultimately, the upshot of the foregoing, this Honorable Court states that it is not satisfied at all that the Plaintiff/Applicant has proved its case to the required standards of such given applications. Therefore, for avoidance of doubt, I do hereby direct as follows:-

a) **THAT** I hereby decline to grant the orders made under the Notice of Motion dated 19th September, 2018. Instead, the Honorable Court holds that the said application be and is hereby dismissed.

b) **THAT** as directed before the part heard has to continue and shall be heard consecutively on 19th and 20th January, 2022 without failure.

c) **THAT** each party to bear their own costs.

RULING DELIVERED, DATED AND SIGNED IN OPEN COURT THIS 19TH DAY OF JANUARY, 2022.

HON. JUSTICE L.L. NAIKUNI

JUDGE

(ELC- MOMBASA)

In the presence of:-

M/s. Yumna Hassan – the Court Assistant.

Mr. Sanjiv Khaghram Advocate for the Plaintiff/Applicant.

Mr. James Kounah Advocate for the 1st Defendant.

Mr. Ndambiri Advocate for the 2nd and 4th Defendants.

Mr. Ondabu Advocate for the 3rd & 5th Defendants.

Mr. Ondabu holding brief for Siminyu Advocate for the 5th Defendant

Mr. Makuto Advocate for the 7th & 8th Defendants.