



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENTAL AND LAND COURT**

**AT MOMBASA**

**ELC MISC APPL. CASE NO. 220 OF 1999**

**ELINOR KADZO**

**THOMAS KARISA NDURYA**

**BEATRICE CHAUREMBO NDURYA.....APPLICANTS**

**VERSUS**

**MUNICIPAL COUNCIL OF MALINDI**

**THE CHAIRMAN GEDE PRIMARY SCHOOL.....RESPONDENTS**

**AND**

**LUKA OMNDI & 12 OTHERS.....AFFECTED PARTIES**

**RULING**

The application is dated 20<sup>th</sup> July 2022 and is brought under section 1A, IB, 3A and 63 of the Civil Procedure Act; Order 40 Rule 3 of the Civil Procedure Rules; Part 81.4 of the Civil Procedure Rules, 1999 of the Supreme Court of England seeking the following orders;

1. That this application be certified as urgent and be heard as a matter of priority.
2. That pending the hearing and determination of this application the court be pleased to direct that no beacons shall be placed on Plot No.Kilifi/Mbaraka/Chembe/44 and Kilifi/Mbaraka/Chembe/2 and the said order be enforced by the OCS, Gede/Watamu Police Station.
3. That pending the hearing and determination of this application inter parties, a notice to show cause be issued against Luka Omondi, Malindi District Land Surveyor Boaz Otieno, District Land Registrar, Kilifi, Anderson Kahindi Mwalimu, the Headmaster, Gede Primary School, Kahindi Kazungu Ruwa, Chairman BOM, Gede Primary School, Josphat Juma Ngumi, Sub County Director of Education, Malindi, Thuo Wangugi, Deputy County Commissioner, Malindi, Waini Geoffrey, Assistant County Commissioner, Malindi, Stanslous Ngala Sirya, Chief, Aaron Watamu Location, Chengo Lengo, Assistant Chief Mbarakachembe Sublocation, Hon. Owen Yaa Baya, Member Of National Assembly Kilifi North Constituency, Emmanuel Yongo, Manager, Constituency Development Fund, Kilifi North Constituency, Rev. Captain Bonifas Chiriba Mwinga & The Church Council, ACK St. James Church Gede and Rev. Canon John Ruwa Mwambire, Archbishop's Commissary, Ack Diocese of Malindito show-cause why they should not be punished for contempt of the orders issued by the court on 12<sup>th</sup> January, 2000.
4. That Luka Omondi, Malindi District Land Surveyor Boaz Otieno, District Land Registrar, Kilifi, Anderson Kahindi Mwalimu, the Headmaster, Gede Primary School, Kahindi Kazungu Ruwa, Chairman BOM, Gede Primary School, Josphat Juma Ngumi, Sub County Director of Education, Malindi, Thuo Wangugi, Deputy County Commissioner, Malindi, Waini Geoffrey, Assistant County Commissioner, Malindi, Stanslous Ngala Sirya, Chief, Watamu Location, Aaron Chengo Lengo, Assistant Chief, Mbarakachembe Sublocation, Hon. Owen Yaa Baya, Member Of National Assembly Kilifi North Constituency, Emmanuel Yongo, Manager, Constituency Development Fun Kilifi North Constituency, Rev. Captain Bonifas Chiriba Mwinga & The Church Council, ACK St. James Church Gede and Rev. Canon John Ruwa Mwambire, Archbishop's Commissary, Ack Diocese of Malindi, be held in contempt of the orders issued by the court on 12<sup>th</sup> January, 2000 for their act of interfering with the said court orders by unlawfully deciding to install beacons on the suit properties without having obtained a prior court order to vary the effects of the said order dated 12<sup>th</sup> January, 2000.

5. That the court be pleased to order that the said Luka Omondi, Malindi District Land Surveyor Boaz Otieno, District Land Registrar, Kilifi, Anderson Kahindi Mwalimu, the Headmaster, Gede Primary School, Kahindi Kazungu Ruwa, Chairman BOM, Gede Primary School, Josphat Juma Ngumi, Sub County Director of Education, Malindi, Timo Assistant County Commissioner, Malindi, Stanslous Ngala Sirya, Chief, Aaron Watamli Location, Chengo Lengo, Assistant Chief, property known Mbarakachembe Sublocation, Hon. Owen Yaa Baya, Member of National Assembly Kilifi North Constituency, Emmanuel Yongo, Manager, Constituency Development Fund, Kilifi North Constituency, Rev. Captain Bonifas Chiriba Mwinga & The Church Council, ACK St. James Church Gede and Rev. Canon John Ruwa Mwambire, Archbishop's Commissary, Ack Diocese of Malindi committed to prison for a period of 6 months for contempt of orders issued by this Honourable court on 12<sup>th</sup> January, 2000, or any other appropriate sanction or penalty against the said parties.

6. That the court be pleased to direct the OCS, Gede/Watamu Police Station to ensure the orders that maybe issued herein are complied with.

7. That the costs of this application be provided for.

It is based on the grounds that at all material times, the Applicants family has always occupied the said Kilifi/Mbaraka/Chembe/2 which neighbours Kilifi/Mbaraka/Chembe/44. That the said Kilifi/Mbaraka/Chembe/44 is occupied by Gede Primary School, which institution has always attempted to encroach on the Applicants property, which attempt was thwarted as a result of the injunction order that was issued by Hon. Commissioner of Assiz, Mrs. Joyce Khaminwa (as she then was), which position has been prevailing up to date. That the parties herein have been trying to resolve the matter amicably whereby it was agreed that the parties would jointly appoint their respective surveyors to jointly survey the suit properties and if possible, agree on the exact boundary of the suit properties. However, if no such an agreement was arrived at, the court will determine the issue of the said boundary conclusively. The two surveyors were unable to agree but the Respondent insists on unilaterally installing the beacons which will result in rendering the Applicants as squatters as the property that they currently occupy would after such beacons being placed belong to Gede Primary School. The Respondents are abusing the power given to them in doing the above acts. That in this regard, the Respondents key players are Luka Omondi, Malindi District Land Surveyor Boaz Otieno, District Land Registrar, Kilifi, Anderson Kahindi Mwalimu, the Headmaster, Gede Primary School, Kahindi Kazungu Ruwa, Chairman BOM, Gede Primary School, Josphat Juma Ngumi, Sub County Director of Education, Malindi, Thuo Wangugi, Deputy County Commissioner, Malindi, Waini Geoffrey, Assistant County Commissioner, Malindi, Stanslous Ngala Sirya, Chief, Watamu Location, Aaron Chengo Lengo, Assistant Chief, Mbarakachembe Sublocation, Hon. Owen Yaa Baya, Member of National Assembly Kilifi North Constituency, Emmanuel Yongo, Manager, Constituency Development Fund, Kilifi North Constituency, Rev. Captain Bonifas Chiriba Mwinga & The Church Council, ACK St. James Church Gede and Rev. Canon John Ruwa Mwambire, Archbishop's Commissary, ACK Diocese of Malindi who insist that the said beacons will be installed on Tuesday, 21<sup>st</sup> September, 2021. That the Affected parties namely Luka Omondi, Malindi District Land Surveyor Boaz Otieno, District Land Registrar, Kilifi, Anderson Kahindi Mwalimu, the Headmaster, Gede Primary School, Kahindi Kazungu Ruwa, Chairman BOM, Gede Primary School, Josphat Juma Ngumi, Sub County Director of Education, Malindi, Thuo Wangugi, Deputy County Commissioner, Malindi, Waini Geoffrey, Assistant County Commissioner, Malindi, Stanslous Ngala Sirya, Chief, Watamu Location, Aaron Chengo Lengo, Assistant Chief, Mbarakachembe Sublocation, Hon. Owen Yaa Baya, Member Of National Assembly Kilifi North Constituency, Emmanuel Yongo, Manager, Constituency Development Fund, Kilifi North Constituency, Rev. Captain Bonifas Chiriba Mwinga & The Church Council, Ack St. James Church Gede and Rev. Canon John Ruwa Mwambire, Archbishop's Commissary, Ack Diocese of Malindi acting in contempt of the said court order and should be punished as such. That for the avoidance of any doubt, and considering all the circumstances, an order ought to be made to the effect that pending the determination of this application, there shall be no interference by either the Respondent or by Luka Omondi, Malindi District Land Surveyor Boaz Otieno, District Land Registrar, Kilifi, Anderson Kahindi Mwalimu, the Headmaster, Gede Primary School, Kahindi Kazungu Ruwa, Chairman BOM, Gede Primary School, Josphat Juma Ngumi, Sub County Director of Education, Malindi, Thuo Wangugi, Deputy County Commissioner, Malindi, Waini Geoffrey, Assistant County Commissioner, Malindi, Stanslous Ngala Sirya, Chief, Aaron Watamu Location, Chengo Lengo, Assistant Chief, Mbarakachembe Sub location, Hon. Owen Yaa Baya, Member Of National Assembly Kilifi North Constituency, Emmanuel Yongo, Manager, Constituency Development Fund, Kilifi North Constituency, Rev. Captain Bonifas Chiriba Mwinga & The Church Council, ACK St. James Church Gede and Rev. Canon John Ruwa Mwambire, Archbishop's Commissary, ACK Diocese of Malindi, with the status of the properties by way of placing any beacons thereon. Further, that the OCS, Gede/Watamu Police Station shall ensure full compliance with the said order. That it is only fair and in the interest of justice and to prevent the integrity and respect of this Honourable court as well as the rule of law that this application be heard expeditiously and allowed.

The respondents through the Assistant County Commissioner Malindi stated that he is aware of the Court Order issued in Civil Suit No.220 of 1999 on 12<sup>th</sup> January 2000 by Hon. Lady Justice Joyce Khaminwa which was served on the School. That his mandate is to provide security and ensure law and order is maintained in the area where the suit property is located including in exercises such as the survey and when the same is sought but neither him nor any of his officers attached to him have participated in placement of beacons on the suit property organized by the school. That the Application is void and misconceived as there is no demonstration of proof of action taken to establish whether there was any contempt on his part or any officers who report to him.

The 2<sup>nd</sup> respondent submitted that he is aware of the Court Order issued in Civil Suit No. 220 of 1999 on 12<sup>th</sup> January, 2000 by Hon. Lady Justice Joyce Khaminwa which was served on the School. That on behalf of A.C.K St. James Church Gede, his mandate is to serve as the Chaplain to Gede Primary School students and teachers and the surrounding community. That A.C.K St. James Church Gede is in occupation of the suit property as a licensee as the property is registered in the name of the Permanent Secretary to the Treasury, who holds a leasehold interest of ninety-nine (99) years from 1<sup>st</sup> September, 2004. That the church has not participated in the placement of beacons on the suit property. That there is no demonstration of proof of action taken to establish whether there was any contempt on the part of the church or any of its members.

This court has considered the application and the submissions therein. This court has carefully perused the court file and has noted that the said injunction was issued in the year 2000! This matter has never proceeded to hearing. **Under Order 40 Rule 6 and 7 of Civil Procedure Rules 2010** it is provided:

*"Order 40 Rule 6 - Where a suit in respect of which an interlocutory injunction has been granted is not determined within a*

*period of twelve months from the date of the grant, the injunction shall lapse unless for any sufficient reason the court orders otherwise.*

***Order 40 Rule 7- Any order for an injunction may be discharged, or varied, or set aside by the court on application made thereto by any party dissatisfied with such order. "***

The court is alive to the fact that an interlocutory injunction, being an equitable remedy, would be discharged, upon being shown the person's conduct with respect to matter, pertinent to the suit does not meet the approval of the court which granted the orders which is the subject matter and especially where a party upon getting the injunction orders sits on the matter and uses the orders to the prejudice of the opponent. The orders of injunction are mainly intended to preserve the subject matter with a view to have expeditious determination but not to oppress another party. Be that as it may, I see no evidence of contempt and none has been adduced before this court and hence the orders sought cannot be granted. Justice delayed is justice denied and the plaintiffs are advised to take a hearing date on a priority basis. For those reasons I find that this application is not merited and is dismissed. Costs to be in the cause.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT MOMBASA THIS 18<sup>TH</sup> JANUARY 2022.**

**N.A. MATHEKA**

**JUDGE**