



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC SUIT NO. E129 OF 2021

SILVYA MERIE.....PLAINTIFF/APPLICANT

-VERSUS-

JAMES MWANGI GAKUYA..... DEFENDANT/RESPONDENT

REGISTRAR OF TITLES, NAIROBI.....2ND DEFENDANT

THE HON. ATTORNEY GENERAL.....3RD DEFENDANT

RULING

INTRODUCTION

1. The Subject Ruling relates to and/or is in respect of four (4) Applications, namely the Notice of Motion dated 15th April 2021, the Application dated 23rd July 2021, 10th September 2021, all of which have been filed by the Plaintiff and the Application dated the 10th may 2021, the latter which has been filed by the 1st Defendant.

2. Pursuant to the Application dated the 15th April 2021, the Plaintiff has sought for the following Reliefs;

i.(Spent).

ii. *An Injunction be and is hereby issued against the 1ST Defendant/ Respondent from constructing or continuing to construct the Land Reference Number 2785/1120 and also disposing of, alienating, transferring, selling, charging, mortgaging, subdividing, cultivating, occupying, entering upon developing and/or dealing with the suit land whatsoever pending the hearing and disposal of this suit.*

iii. *The 1ST Defendant/ Respondent do remove the building materials he has deposited on the suit Land Reference Number 2785/1120 and demolish the building he is constructing on the suit land as his own cost failing which the Applicant be at liberty to demolish all the structures constructed by the Respondent on the suit land including the perimeter wall and dispose of debris at the Respondents expense.*

iv. *File Number MCELC Number E1486 of 2020 at Nairobi Commercial Court filed by the Respondent herein over the same suit property be and is hereby transferred to this court for consolidation with this file and once transferred be deemed consolidated.*

v. *The Defendant do pay the costs herein.*

3. The 2nd Application filed and/or mounted by the Plaintiff is the one dated 23rd July 2021, and in respect of which the Plaintiff has sought the following Reliefs;

i. *In furtherance to the order of this court issued on the 22nd day of July 2021, the officer in charge of Runda Police Station be and is hereby directed to provide security to Silvya Merie in stopping the 1st Defendant/Respondent from continuing and from dealing with the suit property in any way.*

ii. *In the event that there is resistance by the 1st Defendant and/or his agents, workers or servants from obeying the orders of this court, the Applicant is allowed to break into the premises with assistance of the officer in charge of Runda Police Station to evict them all.*

4. In respect of the 3rd Application dated the 10th September 2021, the Plaintiff has sought for the following Reliefs:

i. James Mwangi Gakuya be and is hereby ordered to pay a fine of Kshs.1, 000, 000/= or be committed to civil jail for a period of six (6) months for blatant disobedience of this Court Order issued on the 22nd day of July 2021, for blatantly continuing to construct L.R No. 7785/1120 and for failing to vacate the suit land.

ii. James Mwangi Gakuya be and is hereby ordered to purge the contempt of continuing with construction on land Reference Number 7785/1120 pending hearing of the Application dated the 15th April 2021.

iii. The 1st Defendant do pay costs of this Application.

5. The 4th Application has been filed by the Defendant herein and same seeks the following Reliefs;

i.(Spent).

ii. This Honourable court be pleased to strike out the Plaintiff's Application and Plaint all dated the 15th April 2021, for being vexatious and abuse of the due process of the court.

iii. The Costs be awarded to the Applicant.

iv. Any other order that this court may deem fit and just in the circumstances.

DEPOSITION BY THE PARTIES:

6. In respect of the Application dated the 15th April 2021, the Plaintiff/Applicant has filed an Affidavit, whereas same has enumerated the manner in which same bought and/or purchased the suit property, namely L.R No. 2785/1120 and thereafter same made payments vide instalments to and/or in favor of the vendor, namely Mae Properties Ltd.

7. The Plaintiff/Applicant has further averred that following the completion of the said payments, same was issued with the requisite Transfer Instrument, culminating into transfer and registration of the suit property in her name.

8. On the other hand, the Plaintiff/Applicant has further averred that the suit property is a free hold land and in respect of which only a certificate of title can issue.

9. Contrarily, the Plaintiff has averred that the suit land has never been part of Government land, to warrant alienation, allocation and issuance of a certificate of lease, either in the manner propagated by the 1st Defendant or at all.

10. Owing to the foregoing, the Plaintiff has therefore contended that the 1st Defendant herein, does not have any lawful and/or legitimate basis, to enter upon and remain in possession of the suit property.

11. Finally, the Plaintiff has averred that the certificate of lease issued to and in favor of the 1st Defendant, was/is fraudulent and thus invalid. In any event, the Plaintiff has averred that the title in respect of the claim by the 1st Defendant, is neither anchored nor supported by any preceding instrument and/or documents, relating to the process which was used to acquire and/or be registered as the owner of the suit property.

RESPONSE BY THE 1ST DEFENDANT:

12. Upon being served with the Application dated the 15th April 2021, the 1st Defendant herein filed a Replying Affidavit sworn on the 21st May 2021, and in respect of which the 1st Defendant has averred as follows;

13. Firstly, that the suit property belongs to and is registered in his name and in respect of this averment, the 1st Defendant has relied on a certificate of lease, which is said to have been issued on the 27th August 2020, as well as certificate of official search, attesting to such ownership.

14. Secondly, the 1st Defendant has also averred that the suit property was duly and lawfully allocated unto him by the Government of Kenya and upon such allocation, same complied with the requisite terms culminating into the transfer and registration of the suit property in the name of the 1st Defendant.

15. It is the 1st Defendant's further averment that upon being issued with the Certificate of Lease and registered as the proprietor of the suit property, same entered upon and took possession of the suit land, wherein same has since constructed a dwelling house.

16. At any rate, the 1st Defendant has also averred that the subject suit, as well as the Application seeking for temporary injunction are bad in law and therefore ought to be struck out for contravening the provisions of Section 6 of the Civil Procedure Act, Chapter 21, Laws of Kenya.

SUBMISSIONS BY THE PARTIES

17. The subject matter came up for hearing of the Notice of Motion Application dated the 15th April 2021, on the 13th October 2021.

18. However, when the said Application was called out, it transpired that there were other Applications which had been filed over and in respect of the said matter and in this regard the court issued directions pertaining to and/or concerning the hearing and disposal of the said Applications.

19. For the avoidance of doubt, it was ordered and/or directed that the 4 Applications shall be heard simultaneously and that same shall be disposed of by way of written submissions. Owing to the foregoing directions, the Plaintiff filed her written submissions dated the 8th December 2021, and in respect of which, the Plaintiff has addressed and/ or canvassed all the 4 Applications.

20. On the other hand, the 1st Defendant herein has filed written submissions dated 14th September 2021, in respect of which the 1st Defendant has addressed the various Applications, namely four (4) in number, which are the Applications that form the basis of the ruling herein.

21. I have read and/or perused the contents of the written submissions and the case law relied upon therein. Consequently, the said submissions have been duly considered and same shall be relied upon in disposing the said Applications on record.

ISSUES FOR DETERMINATION

22. Having considered the various Applications, the Supporting Affidavits, as well as the responses thereto, the following issues are germane for determination;

i. Whether the Plaintiff herein has established a Prima facie case with overwhelming chances of success.

ii. Whether the Plaintiff is likely and/ or disposed to suffer Irreparable loss, unless a Temporary Injunction are granted.

iii. Whether the Plaintiffs suit offends the provision of section 6 of the Civil Procedure Act, Chapter 21, Laws of Kenya, and thus amounts to abuse of the Court process.

iv. Whether the 1st Defendant has contravened the Courts orders issued on the 22nd July 2021, and whether same is Guilty of Contempt.

ANALYSIS AND DETERMINATION

ISSUE NUMBER 1

Whether the Plaintiff herein has established a Prima facie case with overwhelming chances of success.

23. The Plaintiff/Applicant has averred in her a]Affidavit that the suit property herein was hitherto registered in the name of M/s Mae Properties Ltd, who offered the suit property for sale to and in favor of the Plaintiff vide an offer letter dated the 20th July 1998.

24. Upon receipt of the letter of offer, the Plaintiff has averred that same developed and interest over and in respect of the suit property and thereby proceeded to and paid the deposit of Kes.250, 000/= Only, towards the purchase and acquisition of the suit property.

25. The Plaintiff has further contended that upon the payment of the initial payment, same proceeded to and made various payments towards settlement of the agreed Purchase price and/or consideration.

26. On the other hand, the Plaintiff has also averred that after completion of the Purchase price, the vendor executed the requisite transfer instrument and thereby the suit property was transferred and registered in her name.

27. Suffice it to note and/or observe that the Plaintiff/Applicant has availed to the court various, albeit preliminary documents, explaining the process that same went through prior to and/or before the transfer and registration of the suit property in her name.

28. On the other hand, the 1st Defendant, who also claims ownership of the land, has only availed to the court a copy of the certificate of lease and a certificate of official search, confirming that the suit property lawfully belongs to and is registered in his name.

29. Even though the 1st Defendant has stated that the suit land was alienated and/or allocated unto him by the Government of the Republic of Kenya, through the office of the commissioner of lands, the 1st Defendant has not exhibited a copy of the Application Letter seeking to be allocated the suit property, if at all.

30. On the other hand, the 1st Defendant has also not availed to court a copy of letter of allotment if any, that was issued unto him by the allocating authority. In this regard, it is worthy to note that alienation and/or allocation of Government land, where appropriate, is carried out on the basis of a letter of allotment, duly signed and executed by the authorized officer, subject to an appropriate application by the Intended allottee.

31. Other than the foregoing, it is also important to note that upon being issued with a letter of allotment, the allottee of the designated plot is enjoined under the law to write and signify his acceptance of the terms of the allotment letter. For clarity, such acceptance, must be communicated within 30 day from the date of issuance of the letter of allotment.

32. Besides, an allottee, is also required to pay the various statutory levies, including the stand premium, the Ground rent and the rates, where appropriate and such payments must similarly be done within 30 days of the issuance of the letter of allotment.

33. However, in respect of the subject matter, the 1st Defendant has not availed and/or supplied to the Court evidence of any letter of acceptance and revenue receipt, if any, that was issued to him as confirmation that the allotment letter had been duly accepted, paid for and thereby same stood activated.

34. Be that as it may, I must also point out that the 1st Defendant has also not availed to the court a copy of the lease instrument that was executed by the lessor, read the Government of Kenya and which was thereafter submitted for registration at the land registry.

35. Perhaps, I may also need to mention that alienation and/or allocation of land by the Government, can only be undertaken over and in respect of Government land or Public land and not otherwise.

36. Consequent to the foregoing, it was therefore necessary and/or imperative for the 1st Defendant to also show evidence that the suit land herein or any such land in the neighborhood thereof, was hitherto Government or public land, to warrant allocation and/or alienation by the government, through the commissioner of land or at all.

37. I am aware that the court is not obliged to make any final findings on the issues of facts and/or evidence, during an interlocutory Application. Nevertheless, the court is however enjoined to calibrate on the rival facts and evidence presented vide the Affidavits and thereafter form an opinion, one way or the other, about the evidence that appears persuasive.

38. In support of the foregoing observation, it is imperative to rely on the decision in the case of **Mbuthia v Jimba Credit Finance Corporation & another[1988] eKLR** where Justice H.G. Platt, (as he then was) observed as hereunder;

“The correct approach in dealing with an application for the injunction is not to decide the issues of fact, but rather to weigh up the relevant strength of each side’s propositions. There is no doubt in my mind that the learned Judge went far beyond his proper duties, and has made final findings of fact on disputed affidavits. Supposing that the valuation of the plaintiff’s Valuer were to be accepted as showing the true market value of the land in question, after evidence viva voce under cross-examination, how then could the Judge find that the sale at a price of Kshs. 200,000/- was not inconsiderably low? At roughly half the price, how could that be maintained as such an obvious situation, that the plaintiff’s chances of success were found to have less than a possibility of success?”

39. Other than the foregoing, it is also worthy to point out that though a Party may have a certificate of title and/or lease, the certificate of title or lease is not conclusive proof of ownership of land and where the Propriety or legality thereof is in question, it behooves the concerned Party, to lay before the Court some preliminary Documents, relating to the process.

40. At any rate, it is also worthy to recall, that where the certificate of title or lease is challenged, the party whose title is being challenged, is obliged to prove that the certificate of title or lease was acquired vide a formal, lawful and legal process. Simply put, a Party cannot just wave a certificate of title and lease, which is under challenge and expect a court of law to find and hold in his/her favor.

41. In this regard, I am obliged to refer to the decision in **Elizabeth Wanjiru Githinji & 29 others vs Kenya Urban Roads Authority** where Justice Odek, JA, (as he then was) observed as hereunder;

“I am convinced and persuaded by the merits and reasoning in the local and comparative jurisprudence that a title under the Torrens system is defeasible on account of mistake, misrepresentation, fraud and illegality. For this reason, it is not sufficient for the appellants to wave an RLA or RTA title and assert indefeasibility. If a mistake is proved or total failure of consideration or other vitiating constitutional or statutory factors, an RLA or RTA title is defeasible.”

42. In the premises, though both the Plaintiff and the 1st Defendant have exhibited certificates of ownership of the suit property, that is certificate of title by the Plaintiff and certificate of lease by the 1st Defendant, it is worthy to note that the Plaintiff has gone further and deeper to avail the Preliminary Documents informing the process leading to the transfer and registration of the suit property in her name.

43. To the contrary, the 1st Defendant herein, is contented with the certificate of lease and certificate of official search, albeit without showing how the certificate of lease was arrived at and/ or procured.

44. Owing to the foregoing, I am more inclined to believe the Documents filed by and/or on behalf of the Plaintiff as opposed to the ones by the 1st Defendant, which are devoid of any legal anchorage.

45. Consequently, I find and hold that the Plaintiff herein has laid out and/or established a prima facie case with overwhelming chances of success, pertaining to and concerning ownership of the suit property.

46. As pertains to proof and/or establishment of prima facie case, I am obliged to refer to and restate the position that was elucidated vide the decision in the case of **Mrao Ltd. V. First American Bank of Kenya Ltd & 2 others [2003] KLR 125, where the Court of Appeal**

fashioned a definition for “prima facie case” in civil cases in the following words:

“In civil cases, a prima facie case is a case in which on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party to call for an explanation or rebuttal from the latter. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the applicant’s case upon trial. That is clearly a standard, which is higher than an arguable case.”

ISSUE NUMBER 2

Whether the Plaintiff is likely disposed to suffer Irreparable loss, unless a temporary injunction are granted.

47. As pertains to Irreparable loss, it is imperative to take cognizance of the definition provided by the Court of Appeal in the case of **Nguruman v Jan Bonde Nielsen (2014) eKLR**, where the Court of Appeal observed as hereunder;

“On the second factor, that the applicant must establish that he “might otherwise” suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the applicant to demonstrate, prima face, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot “adequately” be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy.”

48. The 1st Defendant herein holds a certificate of lease, over and in respect of the suit property. In this regard, the 1st Defendant, is likely and/or at liberty to alienate, transfer and/or otherwise charge the suit property to any financial institution.

49. For clarity, such a cause of action is more likely to occur and/or accrue, particularly where one is alive to the fact that the title is under dispute and at any rate, awaiting judicial determination, as concerns its validity, propriety, or otherwise.

50. Based on the foregoing, it is important to observe that in the event any of the said actions, occur and/or arise, the Plaintiff is bound to be denied, deprived and/or disinherited of the suit property.

51. In the circumstances and taking into account that the land is situated with the prestigious and leafy suburbs of the City of Nairobi, the loss and/or prejudice, is certainly bound to be Irreparable.

52. In a nutshell, it is my finding and holding, that based on the material availed and/or supplied to the court by and/or on behalf of the Plaintiff, I am inclined to find and hold that Irreparable loss, shall arise and/or accrue, unless the orders sought are granted.

ISSUE NUMBER 3

Whether the Plaintiffs suit offends the provision of section 6 of the Civil Procedure Act, Chapter 21, Laws of Kenya, and thus amounts to abuse of the court process

53. Prior to and/or before the filing and/or lodgment of the subject suit by and/or on behalf of the Plaintiff, it is common ground that the 1st Defendant herein had proceeded to the chief magistrate’s court and filed civil proceedings vide MCELC number E1486/2020, whereby same sought for and obtained temporary orders of injunction.

54. It is worthy to note that the suit in the Chief Magistrates’ Court was filed on the basis of a Valuation Report, which indicated that the Suit property was valued at Kshs 19,900,000 Only. In this regard, the 1ST Defendant thus contended that the lower court was seized of the requisite Monetary and Pecuniary Jurisdiction.

55. Nevertheless, upon the filing of the subject suit, the Plaintiff herein also caused the suit to be valued and the valuation report was filed. For clarity, the valuation report at the instance of the Plaintiff shows that the Market value of the Suit Property was over Kshs 52,000,000 Only.

56. Surface it to say, that the two valuation reports, one filed by the Plaintiff in respect of the subject matter and the other relied upon by the first Defendant in the lower court matter, are seriously in conflict. For clarity, the discrepancy, is huge and/ or wide, beyond basic comprehension.

57. Whereas, the valuation report by the plaintiff shows the value to be over Kshs. 52,000,000 Only, the other Report shows that the same property is valued at Kshs.19,900,000 Only. Clearly, the dicotomy between the two reports, is disturbing and thus suggesting that something is amiss.

58. Be that as it may, the question that needs to be addressed is whether the Plaintiff herein could file a Counter-claim in the lower court to be able to ventilate her claim to and in respect of the Property, noting that her valuation Report clearly depicted that the Property was beyond the jurisdiction of the Lower court.

59. In my humble view, the Plaintiff herein could not approach the lower court and file a counter-claim or such other claim, while duly aware of and/ or conscious to the fact that the Lower court did not have jurisdiction.

60. In the premises, the filing of the subject suit before this court, on the appreciation that the lower court did not have jurisdiction, cannot amount to an abuse of the process of the court. In this regard, I find and hold that the Doctrine of Sub judice does not therefor apply to the subject matter.

61. In any event, before resorting to striking out of a suit and or exercise of summary procedure, the court must satisfy itself that suit is clearly irredeemable. However, the subject matter does not fall within the purview or cluster of what is irredeemable.

62. Perhaps, there is need to mention one more thing, that is, upon the filing of the suit in the lower court, a temporary order of injunction was issued by Hon. E.N Kagoni, Principal Magistrate, touching on the subject matter.

63. Assuming that the valuation report by the first Defendant, which was relied upon in the lower court, held sway, that is that the property was valued at Kshs 19,900,000 only, as alleged, then the order of temporary injunction issued by the principal magistrate, was issued without the requisite monetary jurisdiction.

64. In view of the foregoing, the Orders of temporary injunction issued by the Principal Magistrate were clearly beyond his Jurisdiction and same are thus annulity. **See Section 7 of the Magistrates Court Act, 2015**, which provides as hereunder;

7. (1) A magistrate's court shall have and exercise such jurisdiction and powers in proceedings of a civil nature in which the value of the subject matter does not exceed—

(a) twenty million shillings, where the court is presided over by a chief magistrate;

(b) fifteen million shillings, where the court is presided over by a senior principal magistrate;

(c) ten million shillings, where the court is presided over by a principal magistrate;

(d) seven million shillings, where the court is presided over by a senior resident magistrate; or

(e) five million shillings, where the court is presided over by a resident magistrate.

65. Having come to the conclusion that the value of the suit property, was/is Kshs. 52, 000, 000/= only, in terms of the valuation report availed and relied upon by the Plaintiff/Applicant, it then become apparent that the Chief Magistrates Court, was not seized of the requisite jurisdiction to entertain the suit filed by the Defendant, let alone the claim, which the Plaintiff herein could have mounted thereunder by way of a counterclaim.

66. To the extent that the Chief Magistrate's court was not possessed of the Jurisdiction, the Doctrine of sub-judice, cannot be invoked and/or relied upon, to non-suit the Plaintiff/Applicant herein.

67. In any event, the filing of the suit before this court, by and/or at the instance of the Plaintiff/Applicant, was the only wise decision taken, to avert issues pertaining to Monetary Jurisdiction.

68. Notwithstanding the foregoing, there is one more issue that is also important and this relates to the Orders that were made by the Court and in the presence of the Parties, pertaining to the Value of the Suit Property, whereby it was agreed that the value of the suit Property was more than Kshs. 20,000,000.

69. Based on the aforesaid position, it is evident that the Plaintiff, was right in filing the subject suit before this Honourable and the Decision to do so, cannot now be faulted.

70. In short, the subject suit does not amount to an abuse of the Due process of the court, either as alleged by the Defendant or at all.

ISSUE NUMBER 4

Whether the 1st Defendant has contravened the courts orders issued on the 22nd July 2021, and whether same is Guilty of Contempt.

71. On or about the 19th July 2021, the court proceeded to and issued orders of interim injunction, whereby the 1st Defendant/Respondent was restrained from continuing to construct on L.R No. 7785/1120 and from dealing with the suit property until the 15th September 2021, when the Application dated 15th April 2021 was to be heard.

72. It is instructive to note that the said orders effectively restrained and/or barred the 1st Defendant from continuing to construct onto the suit property. For clarity, the orders of interim injunction have variously been extended up to and including the 8th December 2021.

73. It is contended that despite the existence and/or subsistence of the interim orders of injunction, the 1st Defendant herein, proceeded to and continued with the constructions and/or developments over and in respect of the suit property and thereby breached, the terms of the orders

that were granted.

74. As pertains to the allegations of breach and/or violation of the interim orders of injunction, the Plaintiff/Applicant has exhibited Photographs showing the image of the construction carried out and/or undertaken on the suit property.

75. However, despite the fact that the Photographs annexed and/or exhibited are electronic in nature, the Plaintiff/Applicant has not supplied the details pertaining to the names of the person who took the photographs, the details of the camera, if any, that was used and neither has the Plaintiff/Applicant availed to the court an Electronic certificate in line with **Sections 106A and 106B of the Evidence Act, Chapter 80 Laws of Kenya**.

76. Based on the foregoing, it is difficult to ascertain whether the photographs that have been annexed, are reflective of the actual position on the ground or whether same have been doctored, to suit the narrative being propagated by the Plaintiff/Applicant.

77. In short, what I am saying, is that the Documentary evidence, which has been supplied and/or availed, is Devoid of Probative value and therefore cannot meet the high standard that is required in respect of Proof of Contempt of Court.

78. As pertains to the importance and relevance of the Electronic certificate, it is imperative to take cognizance of the Decision in the case of **Samuel Kazungu Kambi vs Nelly Ilongo & 2 Others [2017] eKLR**, where the court said:

21. Sub-section (4) of Section 106B requires a certificate confirming the authenticity of the electronic record. Such a certificate should describe the manner of the production of the record or the particulars of the device. The certificate could also have the signature of the person in charge of the relevant device or the management of the relevant activities.

22. The source of the photocopies of the photographs annexed to the affidavit sworn by the Petitioner in support of the Petition was not disclosed. The device used to capture the images was unknown. The person who took the photographs was not named. The person who processed the images was not named. The Petitioner was not an eyewitness to the incident and he could not therefore tell the court that the photographs were a true reflection of the incident he witnessed.

23. The conditions set down in Section 106B were not met by the Petitioner. He could not therefore be allowed to produce the photographs. His claim that the respondents were estopped by virtue of Section 120 of the Evidence Act from challenging the evidence having not raised the issue at the pre-trial conference is not valid. The production of evidence did not feature in the pre-trial conference. Knowing the kind of the evidence he intended to rely on, it was upon the Petitioner at that early stage to bring up the discussion. He did not do so. The respondents never gave him any hint that they would not be opposing the production of the photographs. The estoppel envisaged by Section 120 of the Evidence Act is therefore not applicable in the circumstances of this matter.

79. At any rate, before the Court can cite a person for Contempt and proceed to punish same, the person alleging the Contempt, must satisfy the Court to a Standard that is above the balance of probability, but certainly not beyond reasonable doubt. For clarity, the requisite Standard is the Intermediate one.

80. In support of the foregoing legal point/observation, I can do better than to invoke the decision in the case of **Mutitika v Baharini Farm Ltd[1985] eKLR**, where the Court of Appeal observed as hereunder;

Re Breamblevale Ltd [1969] 3 All ER 1062, Lord Denning MR. (as he then was), at page 1063, had this to say,

“A contempt of court is an offence of a criminal character. A man may be sent to prison. It must be satisfactorily proved. To use the time-honoured phrase, it must be proved beyond reasonable doubt”.

With the greatest possible respect to that eminent English judge, that proof is much too high for an offence “of a criminal character” and, ipso facto, not a criminal offence properly so defined.

“We agree with Mr. Khaminwa’s submissions in this respect. In our view the standard of proof in contempt proceedings must be higher than proof on the balance of probabilities, almost but not exactly, beyond reasonable doubt. We envisage no difficulty in courts determining the suggested standard of proof. The standard of proof beyond reasonable doubt ought to be left where it belongs, to wit, in criminal cases. It is not safe to extend it to offence which can be said to be quasi – criminal in nature Winn LJ on page 1064 was in our view right in saying that the guilt has to be proved”

81. Having found and held that the Photographs which have been annexed by the Plaintiff/Applicant, are inadmissible and in any event, devoid Probative of value, there is no any other evidence, that can be relied upon that the Defendant has contravened the orders of the court that were granted on the 19th July 2021.

82. In the premises, the Application for contempt, has not been proven.

83. Perhaps one other issue, that befits being mentioned, is the fact that the Application for Contempt has been brought and/or anchored on the basis of contempt Act, No. 46 of 2016. However, it is common knowledge that the said Act declared unconstitutional and the Declaration to that effect, has not been reversed on Appeal.

84. Consequently, the invocation of and reliance on the said Act, was Erroneous. Simply put, that the said subject Application for Contempt,

would similarly, be stillborn on that account.

FINAL DISPOSITION

85. Having reviewed the four Applications, (*whose details were enumerated herein before*), it is now appropriate to make the relevant dispositive orders, which I do as hereunder.

86. Consequently, I make the following orders;

i. The Motive of motion dated the 15/4/2021 be and is hereby allowed in terms of prayers 2 and 4 thereof.

ii. The Notice of Motion Applications dated the 23 /07/2021 and the 10/09/2021, filed by the Plaintiff/Applicant, be and are hereby dismissed.

iii. The Notice of Motion Application dated the 10th/5/2021, is devoid of merits and same is devoid merits..

iv. Costs cost of the Application dated 15th /4/2021 be and are hereby awarded to the Plaintiff/ Applicant, whereas cost of the said Applications, which have been Dismissed, shall abide the cause.

87. For the avoidance of doubt and in order to avert abuse of the Court Process, the Temporary Order of Injunction that was issued by the Principal Magistrate/ Subordinate Court over and in respect of the Suit Property, be and is hereby Vacated, on account of Lack of Jurisdiction.

88. It is so Ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 10TH DAY OF FEBRUARY 2022.

HON. JUSTICE OGUTTU MBOYA

JUDGE

In the Presence of;

June Nafula Court Assistant

Miss Njeri Kiagayu for the Plaintiff/Applicant

Miss Odongo H/B for Shadrak Wanjiru for the 1st Defendant

Mr. Menge for the 2nd & 3rd Defendant