



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MERU**

**CONSTITUTIONAL PETITION NO. E003 OF 2021**

***BETWEEN***

**DAVID MUINDI M'LIRIA.....PETITIONER/APPLICANT**

***VERSUS***

**LAND ADJUDICATION OFFICER AMUNG'ENTI**

**“A” ADJUDICATION AND SETTLEMENT.....1<sup>ST</sup> RESPONDENT**

**CHIEF KABULINE LOCATION.....2<sup>ND</sup> RESPONDENT**

**THE ATTORNEY GENERAL.....3<sup>RD</sup> RESPONDENT**

**RULING**

1. Before the court is the application dated 16.9.2021 seeking the court to cite and punish the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents alleged have willfully violated, disregarded and or disobeyed the court orders made and issued on 28.4.2021.
2. The application is supported by an affidavit sworn on 16.9.2021 by David Muindi M'Liria. The grounds are that by a ruling delivered on 28.4.2021 the first respondent was directed to produce and or issue the petitioner with the current map for the suit parcels. A conservatory order was issued restraining the respondents from trespassing, curving out or implementing on the ground the road of access and or in any way interfering with the petitioner's quiet use, occupation and utilization of the suit parcels. It is averred on 13.4.2021 the 1<sup>st</sup> and 2<sup>nd</sup> respondents in company of a rowdy crowd entered into the suit parcels and destroyed developments thereon. That on 30.4.2021 the respondents were served with the court order followed with a letter dated 28.4.2021 seeking for their compliance; That on 31.8.2021 the 1<sup>st</sup> and 2<sup>nd</sup> respondents once again trespassed into the suit land and caused more destruction. That despite visits to the offices of the 1<sup>st</sup> respondent he has refused to supply the maps as ordered.
3. In the supporting affidavit, the petitioner repeats the above grounds attaches the affidavit of service and the letter, photos over the destruction, complaint letters and OB numbers and urges the court to find that the contemnors have disregarded the courts order, that the rule of law and administration of justice has been undermined and brought to ridicule.
4. The application was opposed through replying affidavits sworn by the 1<sup>st</sup> and 2<sup>nd</sup> respondents on 8.11.2021 respectively.
5. Further, following summons to show cause issued on 10.11.2021, Joseph Korir Sawe, the Deputy County Commissioner, Moses Mwangangi the 1<sup>st</sup> respondent and Gedion Mbitiye Samson the 2<sup>nd</sup> respondent, hereinafter the 1<sup>st</sup>, 2<sup>nd</sup> & 3<sup>rd</sup> alleged contemnors and or citees appeared for the formal hearing on 22.2.2022 in which Mr. Kiruai advocate for the petitioner prosecuted the notice of motion.
6. The petitioner's counsel stated the order in issue was served upon the respondents on 30.4.2021 with clear terms not to interfere with the suit land and to supply the required maps to the petitioner.
7. Counsel told the court in total defiance of the order there was interference on 14.4.2021 by the alleged contemnors or citees and specifically the 1<sup>st</sup> cite who ordered for the road to be opened.
8. Mr. Kieti Senior litigation counsel appearing for the respondents took the three citees through their sworn evidence. On the part of the 1<sup>st</sup> respondent hereinafter the 1<sup>st</sup> cite adopted his replying affidavit sworn on 8.11.2021. In cross examination by the petitioner he stated he had visited the suit land before the court order was issued in which he found out there was a narrow path, an access road and to which as guided by the map required to be widened for ease of movement by members of public. He admitted that he was served with a court order on

- 30.4.2021, knew its contents and its implications but was not party to the events of 31.8.2021. Regarding the demarcation maps, he told the court the procedure was to write to an adjudication officer who would then direct him to provide the same. He stated that he had not received such a letter from his in charge though he was aware the order required him to supply the maps. He told the court the petitioner had not come to his office to collect the map which was always available. In any event, he told the court whereas the map was ready, it was not within his powers to issue it and that he had not attached the map to his replying affidavit.
9. The 2<sup>nd</sup> respondent hereinafter the 2<sup>nd</sup> cite adopted his replying affidavit as his evidence in chief to the notice of motion.
10. He confirmed that on 14.4.2021 the 1<sup>st</sup> respondent in company of the 1<sup>st</sup> citee visited the locus in quo and demanded for the opening of the access road and that in the presence of the members of public, the public road of access was allegedly opened.
11. As regards 30.8.2021 the 2<sup>nd</sup> respondent/citee he told the court an incident had occurred though he was not present where members of public removed stones put on the road by the petitioner.
12. On his part the 1<sup>st</sup> citee told the court in his sworn evidence that he was not aware of the pending suit until the warrants of arrest were issued against him where after he made inquiries. He told the court the petitioner had visited his offices on 13.4.2021 complaining about the road of access and that part of his work was to hear issues raised by the members of public.
13. The 1<sup>st</sup> citee also informed the court that he visited the locus in quo on 14.4.2021 together with the 2<sup>nd</sup> and 3<sup>rd</sup> respondents and went through various parcels of land until the petitioner's residence where he found a huge gathering of members of public.
14. The 1<sup>st</sup> citee told the court the petitioner was insisting that there no road of access while members of public were alleging that there was a public road of access. He thereafter ordered for the road to be opened since the adjudication work was still in progress.
15. In cross examination by the petitioner advocate the 1<sup>st</sup> citee told the court he only made an observation after the report was made to him and out of the rival positions by the parties. He confirmed that the 1<sup>st</sup> respondent was present though he did not possess the requisite map at the time. He told the court that both the 1<sup>st</sup> and 2<sup>nd</sup> respondents citees had told him there existed a road of access following which he ordered the same to be opened.
16. As regards the events of 31.8.2021 the 1<sup>st</sup> citee told the court he had received no report that the members of public had caused damage to the petitioner's land. However his evidence was that the 1<sup>st</sup> respondent had not told him the size of the road of access at the time he ordered that the road of access remain in use. Further, said he was aware of the avenues of resolving land disputes and land boundaries and that he visited the locus in quo on official duties as a coordinate of national government departments in the area though he had made no official report on the happenings after the site visit.
17. In re-examination the 1<sup>st</sup> citee told the court his involvement on the issue was out of a complaint by the petitioner.
18. With leave of court parties filed written submissions dated 7<sup>th</sup> February 2022 respectively. The petitioner submitted the issue for determination as whether the citees had violated or disobeyed the orders issued on 28.4.2021. It was submitted Section 5 (1) of Judicature Act granted the court the power to punish for contempt.
19. In this matter it was submitted that the citees had admitted knowledge of the orders but went against it by visiting the locus in quo on and giving orders to re-open the road of access which was contrary to the order given by the court.
20. The petitioner urged the court to be guided by the reasoning in *Miguna Miguna vs Fred Matiang'i Cabinet Secretary Ministry of Interior and Coordination of National Government and 8 others (2018) eKLR* and find the respondents as public officers had acted in a manner demeaning the dignity and or authority of the court and violated Articles 10, 74 and 232 of the Constitution.
21. About compliance with the court orders, the petitioner urged the court to be guided by *AB & Another vs R.B (2016) eKLR* where it was held compliance with court orders was a fundamental value of concern for a society which requires state organs to assist and protect the court.
22. Further the applicant submitted the allegations by the respondents (citees) that they acted on instructions of the 1<sup>st</sup> citee did not hold any basis and shows they assisted each other in committing the contempt as held in *Eliud Muturi Mwangi P/A Muturi & Co Advocates vs LSG Lufthansa Services Europe/Africa GMBH & another (2015) eKLR, Shimmers Plaza Ltd vs NBK Ltd (2015) eKLR*.
23. On their part, the respondents citees submitted the issue of the road had been in existence since 2009 and the 1<sup>st</sup> respondent was served with the court order on 30.4.2021.
24. It was submitted the 1<sup>st</sup> citee visited the locus in quo and ordered for the road of access to be opened for the benefit of the public though at the time he was not aware of the case filed against him. It was submitted the decision by the 1<sup>st</sup> citee was informed by members of the public who were demonstrating on the closure of the access road by the petitioner.
25. Regarding the ingredients of contempt of court the respondents submitted there has to be willful and malafide on a contemnor as held in *Frankel Max Pollack Vinderine Inc. vs Menell Jack Hyman Rosenberg & Co. Inc & others (1996) ZASCA 21, Burchell vs Burchell (2005) Zaech 35, Samuel M.N Mweru & others vs National Land Commission & 2 others (2020) eKLR*. The respondents submitted they

were merely carrying out their statutory duty in relation to the parcel of land for the calm, and peaceful co-existence which was beneficial to the public hence their conduct did not constitute contempt.

26. It was further submitted by the respondents onus was on the petitioner to show beyond reasonable doubt that the respondents failed to comply with the terms of the court order beyond the said 30.4.2021; and that the application herein was said to be thin on factual evidence, was untenable, ill-advised and brought against the respondents who acted in good faith when called upon for the benefit of the general public as driven by peaceful co-existence.

27. The issues commending themselves for determination are:-

(i) *If there was in existence a valid court order against the respondents regarding the suit premises on 14.4.2021.*

(ii) *If the said court orders were brought to the knowledge of the citees with effect from 14.4.2021.*

(iii) *What is the threshold for contempt of court in Kenya.*

(iv) *If the petitioner has proved any contempt of court against the citees.*

(v) *If the citees acted in good faith and in furtherance of their statutory duties.*

28. Through an application dated 10.11.2020 the court on 28.4.2021 issued conservatory orders against the respondents after the latter failed to respond to the application. The said orders were issued in the presence of the respondents counsel Mr. Kiongo.

29. The petitioner has brought this application alleging there was willful violation and or disobedience of the court orders issued on 13.4.2021.

30. In support of the averments the petitioner has attached *DMMO1 (a) (b)* being the ruling and the order, *DMM – 02* a letter dated 19.4.2021, *DMM 03 (a) & (b)* copies of the affidavit of service and a letter and *DMM – 05* a copy of the OB number.

31. The power to punish for contempt of court is provided for under Section 5 of the Judicature Act, Section 29 of the Environment & Land Act, Section 36 (1) of the High Court Organization and administration Act, Order 40 Rule 3 (1) of the Civil Procedure Rules and Section 63 (e) of the Civil Procedure Act.

32. In ***Cecil Miller vs Jackson Njeru & another (2017) eKLR***, the ingredients of contempt of court were stated as; the terms of the order or judgment must be clear, unambiguous and binding on the defendants; the defendant has knowledge or proper notice of the terms of the order or judgment; the defendant has acted in breach of the terms and conditions and lastly, the conduct was deliberate. ***See also North Tetu Farmers Co. Ltd vs Joseph Nderitu Wanjohi (2016) eKLR.***

33. In ***Akber Abdullah Kassin Esmail vs Equip Agencies Ltd and 4 others (2014) eKLR*** the court held the power to punish for contempt of court was never about protecting the feelings, ego or dignity of the judge but to prevent any undue interference with the administration of justice. In ***Econnect wireless (k) Ltd vs Minister for information and Communication of Kenya & another (2005) eKLR*** the court held it was essential for the maintenance of the law and order that the authority and dignity of courts to be upheld at all times and the court shall not condone deliberate disobedience of its orders.

34. Article 159 (1) of the Constitution provides that the judicial authority is delivered from the people and is vested upon the courts while Article 10 (1) provides the rule of law is one of the national values and principles binding on all state organs, public and state officers while implementing public policies and decisions.

35. As regards the burden of proof for contempt of court in ***Shimmers Plaza (supra)*** the court held the party seeking for contempt of court must satisfy beyond any shadow of doubt that the person alleged to be in contempt committed the acts complained about in full knowledge or notice of the existence of the order or judgment forbidding it from doing such acts and that the threshold was high since it involved a possible deprivation of one's liberty and property. In ***Basil Criticos vs A.G & 13 others (2013) eKLR*** the court held knowledge of an order or judgment super ceded personal service where a party clearly acts and shows that he had knowledge of the order.

36. Further in ***Oilfield Movers Ltd vs Zahara Oil & Gas Ltd (2020) eKLR*** the court held a party who had genuine difficulties in implementing a court order should not be punished and that penal consequences for contempt proceedings are to be reserved for truly recalcitrant contemnors.

37. In ***Republic vs County Government of Meru & another Exparte Theresa Stephen Kiunga as the legal representative of the estate of Stephen Michuki M'Kiunga deceased (2022) eKLR*** this court held a party faced with contempt proceedings must place before court succinct evidence that the disobedience was not deliberate or intentional, unlawful, reckless, careless or was accidental or an unavoidable and that he or she made a reasonable attempt to comply with the order.

38. Applying the above principles the court shall now determine if the acts complained about against the citees were deliberate, intentional, adamant, willful, unlawful and lastly if the citees have given any reasonable or genuine explanation to the allegations.

39. It is not in doubt that the court by a ruling on 28.4.2022 issued conservatory orders against the respondents whose effects forestalled any acts of trespass, curving out and the implementation on the ground the road of access over P/No. Amungenti A/6223/Adjudication section.

Similarly an order was made for the 1<sup>st</sup> respondent to produce and issue the petitioner with the current map. The respondents had prior to the issuance of the orders had been served with the petition and the application for conservatory orders. They instructed counsel and came on record through E.M Kieti senior litigation counsel on 11.3.2021 by a notice dated 8.3.2021.

40. Whereas the ruling was delivered on 28<sup>th</sup> April 2021, the formal order was only extracted and issued on 2<sup>nd</sup> July 2021 with a penal notice.

41. The petitioner stated the respondents were served with the ruling and the order hence were fully aware of the contents and implications of the order and or ruling. The affidavit of service sworn by Baylon Mutahi on 3.5.2021 and filed in court on 14.9.2021 indicates the 1<sup>st</sup> & 2<sup>nd</sup> citees were served with the ruling on 30.4.2021 at 11.10 am and 11.21 am respectively. Even though there is no signature at the back of the documents served, the 2<sup>nd</sup> and 3<sup>rd</sup> citees have in their replying affidavits acknowledged the service of the ruling or order on the said date.

42. Consequently my finding is that there was proper service and knowledge of the contents of the ruling or order on the part of the 2<sup>nd</sup> and 3<sup>rd</sup> citees with effect from 30.4.2021.

43. Prior to 28.4.2021, there was in existence no ruling or order against the respondents. My finding therefore is that the complaint against any acts by the citees on 14.4.2021 do not amount to contempt of court for the order or ruling dated 28.4.2021 could not act retrospectively.

44. If at all there was in existence of such orders as at 14.4.2021 which this court has not come across, that petitioners has failed to prove their existence and or knowledge of the same.

45. The 1<sup>st</sup> citee has clearly indicated he was not aware of the existence of the suit and was not notified by the 2<sup>nd</sup> and 3<sup>rd</sup> citees of its existence.

46. As the court has indicated above, given the notice of appointment filed on 11.3.2021 on behalf of the respondents my finding is that the 1<sup>st</sup> and 2<sup>nd</sup> respondents at the very least knew there was a pending suit over the suit premises since they had instructed the Hon. Attorney General to appear for them slightly over a month prior to the aforesaid date.

47. Turning to the acts of 30.4.2021 the 2<sup>nd</sup> citee as indicated above acknowledged service of the order or ruling both in his replying affidavits and testimony before this court.

48. The 2<sup>nd</sup> citee did not comply with the specific order requiring him to supply the demarcation map. Even after being summoned by this court he has not attempted to purge the contempt.

49. A letter dated 28<sup>th</sup> April 2021 was written to the 2<sup>nd</sup> citee respondent in line with Article 35 & 47 of the Constitution as read together with the Access to Information Act and Fair Administrative Actions Act.

50. In *Gladys Boss Shollei vs Judicial Service Commission the Supreme Court of Kenya* held a party who had submitted a request and which was not acted upon discharges the mandate and the burden shifts to the opposite party for a reasonable explanation for non-compliance. The order herein was specific to the 1<sup>st</sup> respondent (citee). He cannot shift the blame or hide under anybody for the willful disobedience of a court order for the supply of vital documents for the furtherance of expeditious disposal of court cases.

51. The 2<sup>nd</sup> citee is therefore found guilty of contempt of court. Coming to the events of 31<sup>st</sup> August 2021, the petitioner averred at paragraph 8 of the supporting affidavit that the 1<sup>st</sup> and 2<sup>nd</sup> respondents visited the locus in quo in company of members of public and committed acts contract to the court order leading the petitioner to lodge an OB no. 68/31/08/2021.

52. In the replying affidavits sworn on 8.11.2021 the 1<sup>st</sup> and 2<sup>nd</sup> respondents failed to specifically state where they were on that day if not at the scene as indicated. On the part of the 2<sup>nd</sup> respondent at paragraph 8 of the replying affidavit he denied he ever went to the locus in quo on that day.

53. However before this court while under cross examination the 2<sup>nd</sup> respondent owned up that indeed there was what he called an incident in which members of public allegedly removed stones allegedly erected on the road by the petitioner.

54. The court has had occasion to observe the demeanor the citees particularly the 1<sup>st</sup> and 2<sup>nd</sup> respondents. While aware of the court case, in the first instance, the two failed to notify the 1<sup>st</sup> citee on 13.4.2021 about this case who proceeded to issue directions contrary to the orders.

55. Secondly the 1<sup>st</sup> & 2<sup>nd</sup> respondents purported to deny the happenings of 31.8.2021 yet they have been positively been placed at the scene on the material day.

56. If indeed they were acting in furtherance of public interest, for the peaceful co-existence and in execution of their statutory duties as submitted by their counsel on record, one would have expected that the rule of law would be one of their core mandate instead of advocating for the rule of the jungle.

57. One would have expected the 2<sup>nd</sup> respondent citee who is not only the area chief with powers under the National Government and Coordination Act but also a party to this suit to be at the forefront in obeying court orders. In his testimony before court the 2<sup>nd</sup> respondent

citee told the court he could not understand why petitioner was complaining before this court.

58. In my considered view the 1<sup>st</sup> and 2<sup>nd</sup> respondent's citees knew the existence of the order, its implications and proceeded to act as if the same did not exist at all or was not binding on them. Instead of letting the dispute to be handled by this court the 1<sup>st</sup> & 2<sup>nd</sup> respondents citees have depicted an attitude undermining the confidence in recourse to law and courts as instruments aimed at resolving land disputes as held in ***AB & another supra***.

59. The 2<sup>nd</sup> and 3<sup>rd</sup> citees cannot purport to state they were obeying any lawful orders by the 1<sup>st</sup> citee who in any event had no powers over such matter before court save for which they may be delegated to him by the Minister under Caps 283 & 284 Laws of Kenya.

60. I come to the finding that the 2<sup>nd</sup> and 3<sup>rd</sup> respondent citees are guilty of contempt of court. The 1<sup>st</sup> citee is hereby discharged from further participation in this matter. The 1<sup>st</sup> and 2<sup>nd</sup> respondents citee are hereby ordered to mitigate before the court can punish them for contempt of court under Section 29 of the Environment and Land Court Act.

Orders accordingly.

**DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT THIS 27<sup>TH</sup> DAY OF APRIL, 2022**

**In presence of:**

Ms. Kendi for the respondent

1<sup>st</sup> contemnor

2<sup>nd</sup> contemnor

3<sup>rd</sup> contemnor

**HON. C.K. NZILI**

**ELC JUDGE**