



**REPUBLIC OF KENYA**

**High Court at Malindi**

**Environmental & Land Case 22 of 2012**

**1. LUCAS MBARU MUNGA**

**2. CHARO BAYA .....APPLICANTS**

**VERSUS**

**1. PANCRAS MBARU RONDO**

**2. MARTIN TUNJE RONDO**

**3. JUSTINE MANENO RONDO .....RESPONDENTS**

**RULING**

1. The application before the court is dated 25<sup>th</sup> June, 2012 in which the applicants are seeking for one substantive order; that Pancras Mbaru Rondo, Martin Tunje Rondo and Justine Maneno Rondo be committed to jail for a period not exceeding 6 months for willful and deliberate disobedience of judgment/award made by the Chonyi Land Disputes Tribunal in Land Dispute Case No. 25/5/2005.
2. The award by the said Tribunal stopped the 1<sup>st</sup> Respondent from interfering with the applicants' piece of land known as plot number Kilifi/Badrasalama/24. The award was subsequently adopted as a judgment of the court by the Resident Magistrate's court at Kilifi on 4<sup>th</sup> November, 2008.
3. The Applicants have relied on the following grounds to support the above prayer:
  - (i) **That the applicants obtained a judgment/award before the Chonyi Land Dispute Tribunal in land dispute case no. 25/5/2005, stopping the 1<sup>st</sup> Respondent from interfering with their piece of land known as plot no. Kilifi/Badarasalama/24.**
  - (ii) **That the said judgment was adopted by the Resident Magistrate's Court at Kilifi as was required by the law on the 4<sup>th</sup> November, 2008.**
  - (iii) **That the 1<sup>st</sup> Respondent managed to obtain a stay order of the said adopted judgment, but the same was set aside by this Honourable court in civil appeal No. 36 of 2009.**
  - (iv) **With the foregoing in mind, the 1<sup>st</sup> Respondent, accompanied by his two brothers, the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents herein, on the 12<sup>th</sup> day of May, 2012, went into the property**

herein, brought down trees, and started cultivating the same, in complete disregard of the judgment.

**(v) The Respondents are therefore clearly in contempt of court, and have not shown any inclination to comply with the subject judgment, and hold the court in contempt, and unless they are punished by way of committal to civil jail for a term not exceeding six (6) months they will continue with the said contempt of the court and the dignity and authority of this court will be at risk in all cases that come before it in view of the Respondent's disobedience.**

**(vi) This Honourable court is mandated, in the exercise of its powers under section 5(1) of the Judicature Act Cap 8 of the Laws of Kenya, to uphold the authority and dignity of the subordinate courts.**

4. Before filing the present application, the Applicants filed an application in which they sought the leave of this court to commence contempt of court proceedings against the Respondents. The said application was filed on 13<sup>th</sup> June, 2012 while the notice to the Attorney General, the Statement and the Verifying Affidavit were filed on 12<sup>th</sup> June, 2012. The averments in the Statement and the Verifying Affidavit are the same as the grounds on the face of the application which I have reproduced above.

5. The applicants' counsel appeared before Hon. Lady Justice Meoli on 13<sup>th</sup> June, 2012 with the application dated 13<sup>th</sup> June, 2012 for leave to commence contempt proceedings pursuant to provisions of Order 52 of the Supreme Court Practice Rules in England. Under these Rules, the applicant must begin by giving a day's notice to the Registrar and accompany the same with a statutory Statement and a Verifying Affidavit before seeking the leave of the court to file a motion as the main part of the contempt of court proceedings.

6. The Court certified the Applicant's application dated 13<sup>th</sup> June, 2012 as urgent and granted the Applicants leave to commence contempt proceedings as prayed in their application.

7. The Applicants' advocate filed the current application under a certificate of urgency and again, the same was certified as urgent by the Hon. Lady Justice Meoli. The application was fixed for *inter partes* hearing on 12<sup>th</sup> July, 2012.

8. In opposition to the application dated 25<sup>th</sup> June, 2012, the Respondents through the firm of Kenga & Company Advocates filed their Grounds of Opposition on 13<sup>th</sup> November, 2012 and stated as follows:

**(a) That the applicant's application is misconceived and non-meritorious.**

**(b) That the applicant's application is frivolous and or scandalous and or vexatious and or otherwise an abuse of the process of the court as there is no court order which is existing.**

**(c) That to be precise, the court order said to have been disobeyed by the Respondents, the one issued on 13<sup>th</sup> August, 2009, being the applicant's annexure B was automatically set aside or discharged through the High Court ruling of 8<sup>th</sup> July, 2011.**

**(d) That when an appeal has been filed against the judgment, there can never be allegations of contempt of court.**

**(e) That the applicants' application is bad in law and/or incompetent.**

**(f) That for the above reasons, the applicants' application dated 25<sup>th</sup> June, 2012 ought to be dismissed with costs.**

9. The Respondents did not file a Replying Affidavit. The parties agreed to dispose of the application by

way of written submissions. The Applicants' counsel filed his written submissions on 31<sup>st</sup> October, 2012 while the Respondents' counsel filed his submissions on 22<sup>nd</sup> November, 2012.

10. The two Applicants have deponed in their Verifying Affidavit that they instituted a dispute with the Chonyi Land Disputes Tribunal being no. 25/3/2005 between themselves and Pancras Mbaru Rondo, the 1<sup>st</sup> Respondent when the 1<sup>st</sup> Respondent led his family and brothers to invade their land.

11. The Tribunal heard the dispute and gave its award in favour of the applicants on 7<sup>th</sup> August, 2008. The said award, was adopted by the Kilifi Resident Magistrate's Court on 4<sup>th</sup> November, 2008 vide SRMCC No. 36 of 2008. The Applicants have annexed on their Verifying Affidavit the award by the Tribunal and the order of the Kilifi Resident Magistrate adopting the award.

12. The Applicants have further deponed that the 1<sup>st</sup> Respondent filed an application in the Senior Resident Magistrate's Court in Kilifi in SRMCC No. 36 of 2008 and obtained a stay of execution of the adopted judgment. The stay of execution of the adopted judgment by the Resident Magistrate was overturned in the appeal that was filed by the Applicants in HCCC No. 36 of 2009. The order of stay by the Magistrate's Court and the High Court's Ruling overturning it has been annexed on the Verifying Affidavit as annexure "B". The order of stay of execution of the adopted judgment by the Magistrate was issued on 23<sup>rd</sup> June 2009 but was not extracted until 13<sup>th</sup> August, 2009. However, the said order was set aside by the High Court on 8<sup>th</sup> July, 2011.

13. According to the Applicants, the 1<sup>st</sup> Respondent, together with the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents who are his brothers deliberately moved again into the subject land on 12<sup>th</sup> May, 2012 and started cultivating it. They chased the Applicants with pangas when they went to inquire from them why they were cultivating the land despite the award by the Tribunal which was adopted by the court barring them from doing so.

14. This incident was reported to the Kilifi Police Station vide OB No. 9/12/05/2012 but the police advised the applicants to seek for warrants of arrest from the court to enable them act.

15. The Applicants have annexed on their Verifying Affidavit copies of photographs showing the maize that the Respondents planted on 12<sup>th</sup> May 2012 which have since sprouted and swore that the 1<sup>st</sup> Respondent and his brothers are not ready to respect the subject court decision.

16. In his submissions, the Applicants' advocate repeated the averments in the Applicants Verifying Affidavit. Counsel submitted that there is a valid judgment of the court which clearly stopped Pancras Mbaru Rondo, the 1<sup>st</sup> Respondent from interfering with the Applicants' piece of land, to wit, Kilifi/Bandrasalama/24.

17. Applicants' counsel further submitted that the Respondents disobeyed the said judgment by violently moving into the subject plot, cleared the same by harvesting the maize which was on the land and started cultivating. Counsel relied on the case of **Refrigerator & Kitchen Utensils Ltd vs Gulabahard Popatlal Shah & Others; Civil Application No. 39 of 1990** in which it was held that the standard of proof in contempt proceedings must be higher than proof on a balance of probabilities and almost but not exactly beyond reasonable doubt. It was the Applicants' advocate's view that the Applicants herein have proved their case beyond a balance of probability.

18. The Respondents did not file a Replying Affidavit to rebut or explain away the averments by the Applicants. They however filed Grounds of Opposition which I have reproduced above.

19. The Respondents' counsel filed half a page of submissions in which he submitted that ***"where a party has filed an appeal in the Provincial Land Appeal Committee, being case no. 89 of 2008, Mombasa, which has not been heard and determined and therefore they cannot file contempt proceedings as that would be an abuse of the court process."*** On that ground alone, counsel submitted, this court should dismiss the application and the entire suit.

20. I have looked at the pleadings and the annexures which have been placed before me in their totality. I have also read the Applicants' and the Respondents' advocates brief submissions.

21. There is no dispute that on 7<sup>th</sup> August 2008 an award was made by the Chonyi Land Disputes Tribunal in case No. 25/3/05 – as follows:

***“Therefore with effect from (sic) this panels judgment it is hereby ordered that Mr. Pancras Mbaru Rondo not to interfere with that shamba title deed no. Kilifi/Bandrasalama/24 for Martin Dzombo Munga, Constantine Munga, Lucas Munga and Alex Munga. If Pancras Mbaru Rondo the Defendant is not satisfied with this judgment awarded to Lucas M. Munga and brothers this panel of elders with one voice is giving him 30 days to appeal against it.”***

22. The award by the Chonyi Land Disputes Tribunal in case No. 25/3/05 was placed before the Kilifi Resident Magistrate on 4<sup>th</sup> November, 2008 in land dispute case no. 36 of 2008 and the same was adopted by the court in the following words:

***“The judgment read in the presence of the plaintiffs and the defendant. It is hereby adopted as a judgment of this court under Section 7 of the Lands Disputes Tribunal Act.”***

23. On 15<sup>th</sup> April, 2009 Pancras Mbaru Rondo, the 1st Respondent herein filed a Notice of Motion in the Senior Resident Magistrate's Court in Kilifi in land dispute case number 36 of 2008 (in the same court that adopted the Tribunal's award) praying for the stay of execution of the judgment of the court dated 4<sup>th</sup> November, 2008 pending the hearing and determination of his appeal by the Provincial Land Appeals Committee. The said application has been annexed on the Applicants' Verifying Affidavit at annexure B. After hearing the parties, the Resident Magistrate stayed the execution of his order of 4<sup>th</sup> November, 2008 ***“pending the hearing and determination of the Land Appeal No. 89 of 2008.”***

24. Aggrieved by the decision of the Magistrate to stay the execution of the Tribunal's award which had been adopted by the same court on 4<sup>th</sup> November, 2008, the Applicants' herein filed Civil Appeal No. 36 of 2009 in the High Court and challenged the order of stay.

25. On 8<sup>th</sup> July, 2011, Hon. Lady Justice Omondi set aside the order of stay of execution of the Tribunal's decision which had been adopted by the same court on 4<sup>th</sup> November, 2008 in following words:

***“I think all the other issues raised by Mr. Odongo find their landing ground on what I have observed above – which is to the effect that magistrates court is only clothed with power under the Land District Tribunal Act to adopt the decision of the Tribunal and nothing more. Where parties wish for the orders of the tribunal to be stayed, then the same cannot be entertained in the magistrate's court. My finding is that the application is merited and is allowed with costs to the applicants.”***

26. Nothing was heard about the matter again until the Applicants moved this court with the current application for contempt.

27. The 1<sup>st</sup> Respondent has not denied that he was aware of the Tribunal's award and the order of the court adopting the said award on 4<sup>th</sup> November, 2008. Indeed, the proceedings of 4<sup>th</sup> November, 2008 in the magistrate's court shows that the 1st Respondent was present in court when the judgment of the Tribunal was read and adopted.

28. Being dissatisfied with the said order, the 1<sup>st</sup> Respondent filed an application in the same court for the stay of execution of the order. In the Affidavit sworn on 14<sup>th</sup> April, 2009 in support of the application for stay of execution, the 1st Respondent depones that ***“the plaintiffs/respondents herein obtained judgment against me on the 4<sup>th</sup> November, 2008.”***

29. The 1st Respondent has therefore being aware of the court order stopping him from interfering with

the Applicants' parcel of land number Kilifi/Bandrasalama/24 since 4<sup>th</sup> November, 2008.

**HALSBURY'S LAWS OF ENGLAND 4th Edition, Vol.9** Paragraph 65 states as follows:

***“Where an act requires a person to abstain from doing an act, it may be enforced, notwithstanding that service of a duly endorsed copy of the order has not been served if the court is satisfied that pending the said service, then against whom enforcement is sought has had notice of the terms of the order either by being present when the order was made or by being notified of the terms of the order.”***

30. The Respondents have also not denied that they were not aware that the stay order that was granted by the magistrate on 23<sup>rd</sup> June, 2009 was overturned by the High Court on 8<sup>th</sup> July 2011. Indeed, the 1<sup>st</sup> Respondent was represented by an advocate in the High Court proceedings.

31. The Respondents have also not denied that on 12<sup>th</sup> May, 2012 they moved in the subject land, to wit, Kilifi/Bandrasalama/24 and started cultivating it contrary to the award of the Chonyi Land Dispute Tribunal of 7<sup>th</sup> August, 2008 that was adopted by the court on 4<sup>th</sup> November, 2008. They have also not denied that on 12<sup>th</sup> May, 2012 they planted maize on the subject land, to wit, Kilifi/Bandrasalama/24 which maize has since sprouted contrary to the court order of 4<sup>th</sup> November, 2008 and that indeed they chased the Applicants from the suit property with pangas.

32. The only defense that has been raised by the Respondents in their Grounds of Opposition to the Applicants' allegations is that the court order which is said to have been disobeyed by the Respondents was issued on 13<sup>th</sup> August, 2009 and that the same was automatically set aside or discharged through the High Court Ruling of 8<sup>th</sup> July, 2011 (annexture B). I am not sure if the Respondents or their advocate read the Ruling of the High Court of 8<sup>th</sup> July, 2011 before filing their Grounds of Opposition.

33. The Ruling of the High Court dated 8<sup>th</sup> July, 2011 by Hon. Lady Justice Omondi and which is annexture B of the Applicants' Verifying Affidavit set aside the order of the Resident Magistrate staying the execution of the judgment of the court. That Ruling did not set aside, discharge or stay the orders of 4<sup>th</sup> November, 2008 which the contemnors are said to have disobeyed. In setting aside the orders of stay of execution of the orders of 4<sup>th</sup> November, 2008, Hon. Lady Justice Omondi stated as follows:

***“If the magistrate's court were to order for the stay of the decision of the tribunal, then the effect of the adoption as a judgment of the court would be compromised and I doubt that any single decision by the tribunal would ever progress – in fact what would happen is that there would be stagnation and delay of justice. What is available to the respondents is to file for orders of stay either before the High Court or the Provincial Land Appeals Committee.”***

34. No evidence has been placed before the court to show that the Respondents, who were represented by an advocate all along, obtained orders of stay of the orders of 4<sup>th</sup> November, 2008 from the High Court or the Provincial land Appeals committee.

35. The fact that the Respondents have filed an appeal challenging the award of the Tribunal which was adopted as an order of the court cannot in itself be a stay of those orders. It is therefore a fallacy for the Respondents to state in their Grounds of Opposition that *“when an appeal has been filed against a judgment, there can never be allegations of contempt of court.”* A court order, however unpalatable and oppressive it is to a litigant must always be obeyed until it is set aside or stayed by a court of competent jurisdiction.

36. As I have stated above, court orders must always be obeyed. In the English case of **Clarke vs Chadburn [1985]1 ALLER 211** Sir Robert Megarry had this to say about contempt of Court at page 213:

***“I need not to cite authority for the proposition that it is of high importance that orders of the court***

***should be obeyed. Willful disobedience to an order of the court is punishable as a contempt of court, and I feel no doubt that such disobedience may properly be described as being illegal. If by such disobedience the persons enjoined claim that they have validly effected some change in the rights and liabilities of others, I cannot see why it should be said that although they are liable to penalties for contempt of court for doing what they did, nevertheless those acts were validly done. Of course, if an act is done, it is not undone merely by pointing out that it was done in breach of the law.***

37. As to whether the Respondents herein have deliberately disobeyed the order of 4<sup>th</sup> November, 2008 and therefore liable to be punished by this court, I am alive to what the Court of Appeal stated in **Mutitika Vs. Baharini Farm Ltd (1985) KLR 227** regarding the standard of proof in contempt proceedings, that it must be higher than proof on a balance of probabilities and almost but not exactly beyond reasonable doubt. I am also aware of the decision in **Mwangi Wangondu vs Nairobi City Council, Civil Appeal no. 95 of 1988** which decided as follows:

***“A contempt of court is an offence of a criminal character, a man may be sent in prison for it. It must be satisfactorily proved.”***

38. In the instance case, the invasion, cultivation and planting of maize on the suit property by the Respondents was done in contemptuous defiance of a valid court order. The Respondents even had the audacity of chasing away the Applicants with pangas when the Applicants went to inquire from them why they were cultivating the suit property.

39. In the totality of the circumstances of this case, the acts of the Respondents are a direct challenge to the authority of the court. The rule of law and order which we all subscribe to requires that orders of the courts must be respected at all times.

40. I find that it is only the 1<sup>st</sup> Respondent who was aware of the court order of 4<sup>th</sup> November, 2008 and that he had acted in contempt of court by invading, cultivating and planting maize on the suit property. The 1st Respondent should have patiently waited for the outcome of his appeal before dealing with the suit property in the manner that he has done.

41. The Applicants’ counsel has urged that I should commit the Respondents to jail for a period not exceeding six months for willful and deliberate disobedience of the award of the tribunal and which was adopted by the Resident Magistrate at Kilifi on 4<sup>th</sup> November, 2008.

42. In deciding on this issue, I have in mind the principle that was espoused in the case of **REMARIA ANNE DAVIES (1889) 21 GQD 236 at page 239** that:

***“Recourse ought not to be held to process of contempt in aid of a civil remedy where there is any other method of doing justice. The observations of the later Master of the Rolls in the case of RE CLEMENT seem much in point: it seems to me that this jurisdiction of committing for contempt being practically arbitrary and unlimited, should be most jealously and carefully watched, and exercised, if I may say so, with greatest reluctance and the greatest anxiety on the part of the judges to see whether there is not other mode which is not open to the objection of arbitrariness, and which can be brought to bear upon the subject.”***

43. I am persuaded in the circumstances of this case that there is no other method of doing justice to the Applicants who have been prevented from enjoying the fruits of their judgment by the 1<sup>st</sup> Respondent with his agents. An order of committal would be the most appropriate in the circumstances of this case and I now order that the 1st Respondent, Pancras Mbaru Rondo, be committed to jail for a period of three (3) months.

44. The OCPD, Kilifi should ensure that this order is complied with.

Dated, signed and delivered at Malindi this 17<sup>th</sup> day of **December**, 2012.

**O. A. Angote**

**JUDGE**