



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**Miscellaneous Application 514 of 2008**

**LEISURE LODGES LIMITED.....PLAINTIFF**

**VERSUS**

**MR. MOFFAT M. KANGI (D.C. KWALE).....1<sup>ST</sup> RESPONDENT**

**GILBERT KITIYO (DC MSAMBWENI).....2<sup>ND</sup> RESPONDENT**

**MAINA KING'ORI (AP BASE COMMANDER KWALE)...3<sup>RD</sup> RESPONDENT**

**J.M. CHIVATSI (PROV. SURVEYOR-COAST).....4<sup>TH</sup> RESPONDENT**

**O. ESHIWANI (DIST. SURVEYOR – KWALE).....5<sup>TH</sup> RESPONDENT**

**PETER KIEMA (OCS, DIANI) .....6<sup>TH</sup> RESPONDENT**

**RULING**

Leisure Lodges Ltd., the applicant herein, filed the application notice dated 2<sup>nd</sup> September 2008, in which it sought for Moffat M. Kangi, Gilbert Kitiyo, Maina King'ori, J.M. Chivatsi, O. Eshiwani and Peter Kiema being the 1<sup>st</sup> to the 6<sup>th</sup> Respondents, to be committed to Civil jail for 6 months for willful disobedience and contempt of the court orders issued on the 21<sup>st</sup> day of April 2008 and extended on 5<sup>th</sup> May 2008. The applicant further prayed for the personal property of the aforesaid respondents to the tune of Kshs.400,000,000/- to be sequestered for willful contempt. Each of the above-named respondents filed a replying affidavit to oppose the application notice.

When the application came up for hearing Mrs. Kibe, learned advocate for the applicant urged this court to allow the application as prayed. She pointed out the fact that each of the Respondents was served with the court order issued on 21.4.2008 which was extended to 25.5.2008. It is said that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents blatantly disobeyed the court order by directing the 4<sup>th</sup> and the 5<sup>th</sup> Respondents and their juniors to visit the parcel of land known as Kwale/Diani Beach Block/856 on 21<sup>st</sup> May 2008 and on 1<sup>st</sup> August 2008 to carry out a survey. The applicant relied heavily on the affidavit of Ezekiel Shivachi. Photographs were also taken, developed and annexed to the supporting affidavit of Ezekiel Shivachi. It is said the surveyors who visited the land were provided security by Administration Police Officer under the command of the District Commissioners Msambweni and Kwale Districts. The 6<sup>th</sup> Respondent is said to have sent police officers as the in charge of Diani Police Station who visited the land and intimidated the security guards manning the land in dispute.

Mr. Njoroge, learned litigation counsel appeared for all the Respondents to oppose the application notice. He relied on the replying affidavits filed by each respondent. It is his submission that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents did not issue instructions to anybody to enter into the suit premises. It is also argued that the affidavit evidence given by John Mutua are hearsay. He stated that no instructions given to the police to enter into the suit premises. It is also alleged that the person who took the photographs annexed to the affidavit of John Mutua was not called upon to swear any affidavit hence it is possible the photographs were computer generated.

I have taken into account the grounds set out on the face of the application notice. I have also considered the facts

deponed in the affidavits filed for and against the application notice. I have further taken into account the oral submissions made by learned counsels from both sides. The Court of Appeal restated the principles applicable in such applications in **Gatharia K. Mutitika and Two Others =Vs= Baharini Farm Ltd (Now Called Nakuru House Development Co. Ltd) [1982 – 88] 1 K.A.R 863**. Where upon it held *inter alia* as follows:

**“In cases of alleged contempt, the breach for which the alleged contemnor is cited, must not only be precisely defined, but also proved to a standard which is higher than proof on a balance of probabilities but not as high as proof beyond reasonable doubt.”**

Let me apply the above principles to this case. It is alleged that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents were served on 23<sup>rd</sup> April 2008 with the court order. That service is not denied. What is in dispute is whether or not the duo breached the court orders. It is the averment of Ezekiel Shivachi that he saw motor vehicle registration No. G.K. A 104 E full of armed administration police officers with some people who claimed to be surveyors from Kwale District Survey Office enter parcel no. Kwale/Diani Beach Block/856. Ezekiel Shivachi had been assigned to guard the aforesaid parcel of land. He deponed that he demanded that those people leave the land in dispute. Some of them told him they had been instructed by Mr. Moffat Kangi, the District Commissioner, Kwale and Mr. Gilbert Kitiyo, district Commissioner, Msambweni to chase him away. It is said Mr. William Mukinka, the security Manager took a few photographs which were annexed to the affidavit of Ezekiel Shivachi. Those activities happened on 21.08.2008. There is also evidence of photographs taken on 1<sup>st</sup> August 2008 showing that surveyors boarding Motor Vehicle registration No. GKA883H together with armed Police Officers and administration Police officers entered the land in dispute to carry out survey works. The surveyors claimed they were sent by the aforementioned district Commissioners. I have perused at those photographs and it is clear that there were survey equipments and Government motor vehicles used to visit and survey the land in dispute. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents have denied issuing such instructions. None of them addressed the specific issues raised against them. They each claimed they had no control over Surveyors and Police Officers. It is a matter of common notoriety that District Commissioners have control over administration Police Officers. There is evidence that administration police officers visited the land in dispute. The 5<sup>th</sup> Respondent admits that his officers visited some land next to the suit premises to identify beacons of Plot owners. He does not mention the names of those land owners and the reference numbers of those parcels of land visited by the surveyors.

In the end I am convinced that the applicant has established the allegations against the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 5<sup>th</sup> and 6<sup>th</sup> Respondents to the required standard in contempt proceedings. I am however not convinced that the allegations against the 4<sup>th</sup> Respondent were established. I find the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 5<sup>th</sup> and 6<sup>th</sup> Respondents to be in contempt of court orders issued on 21<sup>st</sup> April 2008 and extended on 5<sup>th</sup> May 2008. I sentence each to pay a fine of Kshs.100,000/- within 10 days in default to serve three (3) months in civil jail. Costs is awarded to the applicant. The application against the 4<sup>th</sup> Respondent is dismissed with costs.

**Dated and delivered at Mombasa this 22<sup>nd</sup> day of July 2009.**

**J. K. SERGON**

**J U D G E**

In open court in the presence of Mrs. Kibe for Applicant and Mr. Maalim h/b Njoroge for Respondent