Omanwa v Kanyuku & 2 others; Maina (Plaintiff to the Counterclaim); Omanwa & 4 others (Defendant to the Counterclaim) (Environment & Land Case E078 of 2022) [2022] KEELC 15567 (KLR) (31 October 2022) (Ruling)

Neutral citation: [2022] KEELC 15567 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND CASE E078 OF 2022

JO MBOYA, J

OCTOBER 31, 2022

BETWEEN

HEDRICK MASAKI OMANWA ..... PLAINTIFF

AND

JULIUS KANYUKU ..... 1ST DEFENDANT

CYRUS KIBERA MAINA ..... 2ND DEFENDANT

EMBAKASI RANCHING CO LTD ..... 3RD DEFENDANT

AND

CYRUS KIBERA MAINA ..... PLAINTIFF TO THE COUNTERCLAIM

AND

HEDRICK MASAKI OMANWA ..... DEFENDANT TO THE COUNTERCLAIM

EMBAKASI RANCHING CO LTD .... DEFENDANT TO THE COUNTERCLAIM

NATIONAL LAND COMMISSION ... DEFENDANT TO THE COUNTERCLAIM

CHIEF LAND REGISTRAR ..... DEFENDANT TO THE COUNTERCLAIM

ATTORNEY GENERAL ..... DEFENDANT TO THE COUNTERCLAIM

RULING

1. Vide Notice of Motion Application dated the 16th June 2022, the Plaintiff herein has approached the Honourable Court seeking for the following Reliefs;

   i. (Spent).

ii. That, the 1st and 2nd Defendants be cited for Contempt of Court for disobeying the court order issued on 15th March,2022.

iii. That, upon granting prayer 2, the 1st and 2nd Defendants be punished either by Imprisonment for a period not exceeding six (6) months and/or fined a monetary fine or such other punishment as the court shall deem fit.

iv. That, the Honourable court be pleased to make any other order fit in the circumstances of this matter.

v. Costs of this Application be borne by the 1st and 2nd Defendants.

2. The subject application is anchored and premised on the various grounds which have been enumerated in the body of the application and same is further supported by the affidavit of the plaintiff/Applicant sworn on the 16th June 2022. For clarity, the deponent of the said affidavit has attached a number of annexures which have been serialized HMO 1 to HMO 6, respectively.

3. Further, the subject application is also supported and grounded on the supplementary affidavit sworn on the 8th July 2022, by the same Plaintiff/Applicant.

4. Upon being served with the application herein, the 1st Defendant/Respondent filed a Replying affidavit sworn on the 27th June 2022, whereas the 2nd Defendant/Respondent filed a Replying affidavit sworn on the 20th July 2022.

5. For completeness of record, the various affidavits, which have been sworn and relied upon by the Parties are on record and shall be relied upon by the court in crafting the subject Ruling.

6. On the other hand, it is also appropriate to state that the subject application was canvased vide written submissions which were duly filed by and on behalf of the Parties.

Submissions by the Parties:

Plaintiff's/applicant's Submissions:

7. The Plaintiff/Applicant herein filed written submissions dated the 8th July 2022 and same has highlighted three pertinent issues for determination.

8. First and foremost, counsel for the Plaintiff/Applicant has submitted that upon the lodgment and filing of the subject suit, the Plaintiff/Applicant simultaneously filed a Notice of Motion Application, which was duly certified and dealt with by the court on ex-parte basis, in the first instance.

9. Further, counsel for the Plaintiff/Applicant has submitted that during the ex-parte stage, the court proceeded to and indeed granted an interim orders of Injunction, whose effect and tenor was to prohibit the Defendants/Respondents from continuing with the offensive activities.

10. Nevertheless, counsel for the Plaintiff/Applicant has added that despite being served with the lawful court orders, which were issued on the 2nd March 2022, the 1st and 2nd Defendant continued to and carried out further construction in respect of a perimeter wall fence surrounding the suit property.

11. Secondly, counsel for the Plaintiff/Applicant has submitted that other than orders of injunction which were issued on the 2nd March 2022, the Parties herein also entered into a consent which was adopted and endorsed by the Honourable court on the 15th March 2022.

12. Pursuant to the consent, counsel for the Plaintiff/Applicant has submitted that the Parties herein, the Defendants/Respondents not excepted, were barred from continuing with any development over and in respect of the suit property.

13. At any rate, counsel for the Plaintiff/Applicant has added that the terms of the consent orders, which were issued and entered into on the 15th March 2022, were explicit and clear, to the Parties involved.

14. Thirdly, counsel for the Plaintiff/Applicant has submitted that despite the explicit and unambiguous nature of the consent order, the 1st and 2nd Defendants/Respondents proceeded to and carried out further construction relating to the impugned perimeter wall fence.

15. According to counsel for the Plaintiff/Applicant, by the time the court issued the impugned consent orders of status quo, the perimeter wall fence had not been completed or concluded by the 1st and 2nd Defendants/Respondents.

16. To the contrary, counsel for the Plaintiff/Applicant submitted that the 1st and 2nd Defendants had just commenced the construction of the perimeter wall and hence the activities leading to the completion of the perimeter wall fence were undertaken, conducted and carried out in disobedience of lawful court orders.

17. To buttress his submissions, counsel for the Plaintiff/Applicant invited the Honourable court to take cognizance of and to examine the various photographs which were attached to supporting affidavit and to find and hold that indeed the evident construction was done during the existence of lawful court orders.

18. Premised on the foregoing, counsel of the Plaintiff/Applicant has therefore submitted that there is need for the court to intervene and to punish the 1st and 2nd Defendants/Respondents for disregarding and disobeying lawful court orders.

19. Finally, counsel for the Plaintiff/Applicant has submitted that the conduct of the 1st and 2nd Defendant does not portend well with the cause of justice and hence the necessity to cite and punish the 1st and 2nd Defendants/Respondents.

20. In support of his submissions towards the subject application, counsel for the Plaintiff/Applicant has invited the Honourable court to take cognizance of the holding in the case of *Refrigerators and Kitchen Utensils Ltd versus Gulabehand Popatlal Shah & Another* Court of Appeal Civil Application No. 39 of 1990 (unreported) and *Lucas Nyangweso versus Jackson Ntelele Surum & Another* Nairobi HCC No 1253 of 2008 (unreported).

1st and 2nd Defendants'/respondents' Submissions:

21. The 1st and 2nd Defendants' filed written submissions dated the 21st July 2022 and same has similarly raised, highlighted and canvassed three issues for consideration.

22. The first issue raised and ventilated by counsel for the 1st and 2nd Defendants relates to whether the orders of the court issued on the 15th March 2022 were duly served upon the 1st and 2nd Defendants/Respondents.

23. According to counsel for the 1st and 2nd Defendants, the said orders were never served on the 1st and 2nd Defendants either as alleged by counsel for the Plaintiff or at all.

24. At any rate, counsel for the 1st and 2nd Defendants has submitted that the affidavit of service sworn by one Peter Muendo Keli, purporting to have served the duly extracted orders upon the 1st and 2nd Defendants was replete with conscious and deliberate falsehoods.

25. To the extent that the 1st and 2nd Defendants were not served, counsel therefore pointed out that the contempt proceedings herein, which are meant to cite and punish the 1st and 2nd Defendants, are therefore premature, misconceived and legally untenable.

26. Be that as it may, counsel has added that until and unless the orders that form the basis of the contempt proceedings have been extracted and served, the alleged contemnor cannot be found guilty of contempt and punished, in the manner sought by the Plaintiff/Applicant.

27. In support of the foregoing position, counsel has cited and relied on the case of *James Gachiri Mwangi versus John Waweru Muriuki & 3 Others* (2020)eKLR and *Woburn Estate Ltd versus Margaret Bashforth*, (2020)eKLR.

28. The second point that has been raised and amplified relates to whether or not the 1st and 2nd Defendants have disobeyed the lawful court orders, which were issued by consent of the Parties.

29. To this end, counsel for the 1st and 2nd Defendants has submitted that by the time the consent orders were entered into and endorsed by the Honourable court, the 1st and 2nd Defendants had already put up the perimeter wall fence, that is now complained of or about.

30. In any event, counsel for the 1st and 2nd Defendants has further submitted that upon the issuance of the impugned orders, same did not continue with the building of the Perimeter wall, which is the subject of the instant proceedings.

31. Notwithstanding the foregoing, the counsel for the 1st and 2nd Defendants submitted that the construction complained of relates to what had transpired and been undertaken prior to and before the issuance of the consent order.

32. Nevertheless, counsel for the 1st and 2nd Defendant has added that indeed the impugned wall was standing and concluded as at the 14th March 2022, prior to and before the issuance of the impugned court orders.

33. The third issue raised and amplified by counsel for the 1st and 2nd Defendants concerns whether the Plaintiff has proved and satisfied the court that indeed the impugned orders of injunction has been disobeyed and disregarded, in the manner alleged by the counsel for the Plaintiff/Applicant.

34. In any event, counsel for the 1st and 2nd Defendants has submitted that the photographs which have bee exhibited and displayed by the Plaintiff towards proving and establishing contempt are ex-facie incompetent, invalid and devoid of any probative value.

35. In this regard, counsel for the 1st and 2nd Defendants has invited the court to find and hold that the said photographs are therefore irrelevant and inconsequential.

36. In support of the foregoing submissions, counsel for the 1st and 2nd Defendants has invited the court to take cognizance of the decision in the case of *Peter Ng'ethe Ngari T/a PNN Funeral Services versus Standard Group Ltd PLC & Another* (2020)eKLR and *Samuel Kazungu Kambi versus Nelly Ilongo & 2 Others* (2017)eKLR.

37. Finally, counsel for the 1st and 2nd Defendants has submitted that contempt of court is a serious issue, given its consequences and implications and hence whenever a charge of contempt is raised, it behooves the claimant to prove same to the requisite Standard of proof.

38. However, in respect of the subject matter, counsel for the 1st and 2nd Defendants has submitted that the Plaintiff has failed to establish or prove the commission of the contempt, either in the manner alleged or at all.

39. Consequently and in the premises, counsel for the 1st and 2nd Defendants has therefore invited the court to find and hold that the charge of contempt, has not been duly and sufficiently proved.

Issues For Determination

40. Having reviewed the Notice of Motion Application dated the 16th June 2022, the Supporting affidavit thereto and the Replying Affidavits filed in opposition thereto; and having similarly considered the written submissions filed by the Parties, the following issues do arise and are worthy of determination;

    i. Whether the 1st and 2nd Defendants/Respondents were duly served with the Court orders made on the 15th March 2022 and in any event, whether service of the said orders was still necessary.

    ii. Whether the Plaintiff/Applicant has established and proved Disobedience of the lawful court orders to the requisite standard or at all.

Analysis And Determination

Whether the 1st and 2nd Defendants/Respondents were duly served with the court orders made on the 15th March 2022 and in any event, whether service of the said orders was still necessary.

41. It is common ground that where a court order has been issued albeit in the absence of the adverse party, then it behooves the beneficiary of such court orders to extract and serve the requisite court order upon the adverse party.

42. On the other hand, upon such service, the beneficiary of the court order, would be called upon to craft and generate an affidavit of service, which would then be filed with the court in the usual manner.

43. Perhaps, it is imperative to underscore that where the orders which have been issued are of such a nature to restrain, bar and or prohibit the adverse party from doing any act or omission, then the requirement of service is more often than not, appropriate, mandatory and peremptory.

44. Nevertheless, a distinction must be drawn, where the impugned court orders are issued in the presence of the adverse party or his/her counsel on record. For clarity, where court orders are issued in the presence of the adverse Party or counsel duly retained, it is presumed and deemed that such orders are automatically known to and within the knowledge of the adverse party.

45. In such circumstances, the service of the court order, can and is ordinarily dispensed with, subject to other known statutory requirements.

46. In respect of the subject matter, the impugned orders which were made on the 15th March 2022, were made in the presence and with the participation of counsel for the 1st and 2nd Defendants/Respondents. In this regard, the impugned orders were made by consent of the Parties through their duly appointed advocates.

47. To this end, it is appropriate to adopt and reiterate the holding of the Court in the case of *Brooke Bond Leibig (T) Ltd versus Mallya* [1975] EA 266 wherein it was held that:-

> "Prima facie, any order made in the presence and with the consent of counsel for binding on all parties to the proceedings or action, and on those claiming under them....and cannot be varied or discharged unless obtained by fraud or collusion, or by agreement contrary to the policy of the court.....or if the consent was given without sufficient material facts, or in misapprehension or in ignorance of material facts, or in general for a reason which would enable the court to set aside an agreement.....It is well settled that a consent judgment can be set aside only in certain circumstances, e.g. on the grounds of fraud or collusion, that there was no consensus between the parties, public policy or for such reasons as would enable the court to set aside or rescind a contract."

48. Insofar as the orders of 15th March 2022, were made in the presence and with the participation of counsel for the Parties, it was therefore not necessary for the 1st and 2nd Defendants to be served with the duly extracted order arising from the impugned proceedings.

49. Simply put, the 1st and 2nd Defendants were deemed to be conversant with and knowledgeable of the terms of the impugned orders and were thus obliged to abide by or comply with the terms and tenor of the impugned court orders.

50. Case law abound in respect of the foregoing statement. However, it is appropriate to cite and rely on two such decisions, which have highlighted the principle that where an order is made in the presence of a Party, such a Party is deemed to be conversant with and knowledgeable of the order.

51. First and foremost, it is appropriate to adopt and restate the holding in the case of *Basil Criticos -v- Attorney General* [2012] eKLR, Where it was observed as hereunder:

> "...where a party clearly acts and shows that he had knowledge of a court order, the strict requirement that personal service must be proved is rendered unnecessary". Similarly, the requirement of notice of the prohibitory judgement or order would also be satisfied where a party is represented counsel who was present in court when the orders were made.

52. Additionally, it is imperative to cite, restate and reiterate the decision of the Court of Appeal in the case *Justus Kariuki Mate & another –v- Martin Nyaga Wambora & another* [2017] eKLR), where the Court of appeal similarly stated and observed as hereunder;

> (31) As set out in the affidavit of service, the service of the order was not made personally on the appellants as required under Rule 18.6 of the *Civil Procedure (Amendment No. 2) Rules 2012*. What is the consequence thereof? Rule 18.8 (1) of the *Civil Procedure (Amendment No. 2) Rules 2012* provides for circumstances when the court can dispense with personal service of an order as follows:-
>
> "1. In the case of a judgment or order requiring a person not to do an act, the court may dispense with service of a copy of the judgment or order in accordance with rules 81.5 to 81.7 if it is satisfied that the person has had notice of it—
>
> a. by being present when the judgment or order was given or made; or
>
> b. by being notified of its terms by telephone, email or otherwise".

Atkins Court Forms, *Contempt of Court* Volume 8 (2) at para 320, the learned commentators expressed themselves as herein below:-

> "In the case of an application to commit for breach of an order, judgment or undertaking, the evidence supporting an application for committal must prove:
>
> 1. Personal service of the order, judgment or undertaking duly indorsed in with a penal notice. Where a person is required to do an act, service must be made before the expiry of the time limited for doing the act but where a person is required to abstain from doing an act, the court has a discretion, which may be exercised prospectively or retrospectively, to dispense with service of the order, judgment or undertaking, if the alleged contemnor has had notice of it;...".

Black's Law Dictionary, 9th Ed defines notice as-

> "A person has notice of a fact or condition if that person- Has actual knowledge of it;Has received information about it;Has reason to know about it;Knows about a related fact;Is considered as having been able to ascertain it by checking an official filing or recording."

53. Perhaps for emphasis only, it is also apt to adopt the position taken by the Court of Appeal in the case of *Executive Committee Kisii County Government v Masosa Construction Company Ltd* (2020)eKLR, where the court after reviewing the various case law pertaining to the significance of knowledge of the court order, proceeded and observed as hereunder;

> " Similarly, the requirement of notice of the prohibitory Judgement or order would also be satisfied where a party is represented counsel who was present in court when the orders were made. Therefore, knowledge of the judgment or order by an alleged contemnor's advocate suffices for contempt proceedings. There is a presumption that when an advocate appears in court on instructions of a party, it behoves him to report back to the client all that transpired in court that has a bearing on the client's case. This presumption is in line with the dicta of the Canadian Supreme Court in the case of *Bhatnager - v- Canada*, (Minister of Employment and Immigration 1990] 2 SCR 217 where it was held that a finding of knowledge on the part of the client may be inferred from the fact that the solicitor was informed.
>
> Similarly, in the United States case of *United States –v- Review* 834 F.2d 1198, 1203 (5th Cir. 1987) it was held that a defendant had adequate notice of a show cause order because his attorney was on notice. (See also *Kenya Supreme Court dicta in Justus Kariuki Mate & another –v- Martin Nyaga Wambora & another* [2017] eKLR).

54. Informed by the foregoing jurisprudential position, I find and hold that the arguments raised by and on behalf of counsel for the 1st and 2nd Defendant that same were not served with the court orders relating to the proceedings of the 15th March 2022, are irrelevant, inconsequential and in any event contrary to the obtaining legal position.

55. It is also my finding and holding that the impugned orders having been made in the presence of counsel for the 1st and 2nd Defendants, it behooved the said counsel to disseminate the terms of the impugned orders to the 1st and 2nd Defendants.

56. Finally, I find and hold that the orders having been made in the presence of their counsel, it was deemed and presumed that the 1st and 2nd Defendant were conversant with and knowledgeable of the terms of the orders, without more.

Whether the Plaintiff/Applicant has established and proved Disobedience of the lawful court orders to the requisite standards or at all.

57. Having found and held that the 1st and 2nd Defendants were duly knowledgeable of and conversant with the terms of the impugned orders, arising from the proceedings of 15th March 2022, what remains outstanding is the determination is whether same disobeyed or disregarded the terms of the impugned orders.

58. To this end, it is imperative to take note of the averments alluded to by the Plaintiff and which are contended to be the acts of (sic) disobedience and contempt.

59. According to the Plaintiff, after the impugned orders were made/issued, the 1st and 2nd Defendants went ahead and continued with the erection of the impugned perimeter wall fence and indeed concluded the erection thereof, despite the existence of the orders of status quo.

60. To vindicate the contention that the 1st and 2nd Defendants proceeded to and erected the impugned perimeter wall, the Plaintiff herein has exhibited and attached various copies of Photographs, to show the status of the perimeter wall fence, allegedly as at the 23rd May 2022, long after the issuance of the consent order.

61. In the premises, the Plaintiff/Applicant is keen to rely on and premise the claim of contempt on the basis of the impugned photographs.

62. However, it must be observed that though the photographs have been extracted and attached to the affidavit, counsel for the Plaintiff has however failed to exhibit the requisite Electronic Certificate to verify the manner in which the photographs were generated and produced.

63. In any event, it is common ground that the Photographic evidence that the Plaintiff herein is seeking to rely upon and to propagate the claim of contempt are indeed electronic in nature.

64. Consequently, it was incumbent upon the Plaintiff/Applicant to generate and avail to court an Electronic Certificate. Unfortunately, none has been availed and the consequence of such failure is known to law and otherwise obvious.

65. To my mind, where the Electronic Certificate has not been generated and attached to the Photographic Evidence, the impugned Photographs are rendered invalid, inconsequential and devoid of any probative value.

66. Essentially, the photographic evidence that the Plaintiff/Applicant is keen to rely on are therefore unhelpful. To say the least, same cannot be relied upon by a court of law to anchor a finding on contempt or at all.

67. In this respect, it is appropriate to adopt and reiterate the holding of the Court of Appeal in the case of *County Assembly of Kisumu & 2 others versus Kisumu County Assembly Service Board & 6 others* [2015] eKLR, where the court held as hereunder

> In our view, this is a mandatory requirement which was enacted for good reason. The court should not admit into evidence or rely on manipulated (and we all know this is possible) electronic evidence or record hence the stringent conditions in sub-section 106B(2) of

that Act to vouchsafe the authenticity and integrity of the electronic record sought to be produced. For ease of reference, we wish to reproduce Section 106B of the *Evidence Act* in its entirety:

106B

(1) Notwithstanding anything contained in this Act, any information contained in an electronic record which is printed on a paper, stored, recorded or copied on optical or electro-magnetic media produced by a computer (herein referred to as computer output) shall be deemed to be also a document, if the conditions mentioned in this section are satisfied in relation to the information and computer in question and shall be admissible in any proceedings, without further proof or production of the original, as evidence of any contents of the original or of any fact stated therein where direct evidence would be admissible.

(2) The conditions mentioned in subsection (1), in respect of a computer output, are the following—

(a) the computer output containing the information was produced by the computer during the period over which the computer was used to store or process information for any activities regularly carried out over that period by a person having lawful control over the use of the computer;

(b) during the said period, information of the kind contained in electronic record or of the kind from which the information so contained is derived was regularly fed into the computer in the ordinary course of the said activities;

(c) throughout the material part of the said period, the computer was operating properly or, if not, then in respect of any period in which it was not operating properly or was out of operation during that part of the period, was not such as to affect the electronic record or the accuracy of its content; and

(d) the information contained in the electronic record reproduces or is derived from such information fed into the computer in the ordinary course of the said activities.

(3) Where over any period, the function of storing or processing information for the purposes of any activities regularly carried on over that period as mentioned in paragraph (a) of sub section (2) was regularly performed by computers, whether—

(a) by combination of computers operating in succession over that period; or

(b) by different computers operating in succession over that period; or

(c) in any manner involving the successive operation over that period, in whatever order, of one or more computers and one or more combinations of computers, then all computers used for that purpose during that period shall be treated for the purposes of this section to constitute a single computer and references in this sections to a computer shall be construed accordingly.

(4) In any proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following—

(a) identifying the electronic record containing the statement and describing the manner in which it was produced;

(b) giving such particulars of any device involved in the production of that electronic record as may be appropriate for the purpose of showing that the electronic record was produced by a computer;

(c) dealing with any matters to which conditions mentioned in sub-section (2) relate; and

(d) purporting to be signed by a person occupying a responsible position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate), shall be evidence of any matter stated in the certificate and for the purpose of this subsection it shall be sufficient for a matter to be stated to be the best of the knowledge of the person stating it.

(5) For the purpose of this section, information is supplied to a computer if it is supplied thereto in any appropriate form and whether it is so supplied directly or (with or without human intervention) by means of an appropriate equipment whether in the course of activities carried on by any official, information is supplied with a view to its being stored or processed for the purpose of those activities, that information, if duly supplied to that computer, shall be taken to be supplied to it in the course of those activities."

6. In relation to this case, the relevant conditions in that section are (a) if the computer output was recorded by a person having lawful control over the computer used; (b) if the output was recorded in the ordinary course of that person's activities using a computer or some other electronic devise and fed into a

computer that was properly operating throughout the material period; and (c) if that person gives a certificate that to the best of his knowledge, the output is an electronic record of the information it contains and describes the manner in which it was produced.

7. The *Evidence Act* does not provide the format the certificate required under sub-section 106B(2) thereof should take. The certificate can therefore take any form including averments in the affidavit of the recorder.

68. Additionally, it is also appropriate to adopt and endorse the holding in the case of *Samwel Kazungu Kambi versus Nelly Ilongo the Returning Officer, Kilifi County & 2 others* [2017] eKLR, where the court stated and observed as hereunder;

> 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.

69. Other than the photographic evidence, which was being relied upon by the Plaintiff/Applicant, no other evidence confirming disobedience or disregard of the court order has been made or tendered.

70. Given the foregoing factual situation, it is difficult, nay impossible to find and hold that the allegations of disobedience or disregard of the lawful court orders, have been established nor proven.

71. In any event, there is no gainsaying that a claimant seeking committal of a contemnor on the basis of contempt of court orders, is obliged to tender and or lay before the court sufficient evidence and credible basis, to meet the requisite standard of proof.

72. For coherence, it is trite and established that allegations of Contempt require to be proved to the satisfaction of the Honourable Court. For clarity, same ought to be proved to a standard beyond balance of probabilities.

73. Put differently, the standard of proof has been discerned and established to be the Intermediate standard, that is the standard between balance of probabilities and beyond reasonable doubt.

74. To this end, the decision of the Court of Appeal in the case of *Mututika versus Baharini Farm Ltd* (1985)eKLR, is apt and succinct.

75. For completeness, the Court of Appeal stated and held as hereunder;

> " In, *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 with such strictness of proof ... as is consistent with the gravity of the charge ..."

76. Having analyzed the totality of the evidence supplied vide the supporting affidavit sworn on the 16th June 2022 and the supplementary affidavit sworn 8th July 2022, I come to the conclusion that the averments therein, falls short of meeting the requisite threshold to warrant a finding of guilt on the part of the 1st and 2nd Defendants/Respondents.

77. Consequently and having failed to discharge the requisite burden of proof that was laid upon him, the end result is that the Motion for contempt has neither been proven nor established to the satisfaction of the court or with such strictness of proof as envisaged under the law.

Final Disposition:

78. In conclusion, I find and hold that the Application dated the 16th June 2022, which is anchored on the basis of the Photographic evidence, albeit without the requisite Electronic Certificate, has neither satisfied nor met the requisite standard of Proof.

79. Essentially, the Application beforehand is not merited. Consequently and in the premises, the Application dated the 16th June 2022, be and is hereby Dismissed with costs to the 1st and 2nd Defendants/Respondents.

80. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 31st DAY OF OCTOBER 2022.

OGUTTU MBOYA

JUDGE.

In the Presence of;

Kevin Court Assistant.

Mr. Moindi for the Plaintiff/Respondent.

Mr. Nderitu for the 1st and 2nd Respondent.

N/A for the 3rd Defendant.