**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT MOMBASA**

**CIVIL APPEAL NO.12 OF 2020**

**JOSEPH TOLE MAGANGA.....APPELLANT**

**VERSUS**

**EVANS MWARABU & 4 OTHERS.....RESPONDENTS**

**JUDGMENT**

**(Being an appeal against the ruling of Hon. F.M. Nyakundi, Senior Resident Magistrate,**

**delivered on 11 June 2020 in Voi Chief Magistrate's Court**

**Civil Suit E & L No. 13 of 2019)**

*(Appeal against a finding that the appellant disobeyed an order of injunction; orders issued to bar the appellant from constructing or wasting the disputed property; development apparently continuing; respondents claiming that the appellant is the one who undertook the development; save for the mere statement that it was the appellant developing, no other supporting evidence; standard of proof in an application for contempt; bare allegation that it was the appellant developing not sufficient to find him culpable; appeal allowed)*

1. This is an appeal against the ruling delivered on 11 June 2020 in the Voi Magistrate's Court. In that ruling, the appellant was held to be in contempt of court having been found to have disobeyed an order of injunction. Aggrieved, the appellant has filed this appeal seeking the setting aside of that ruling.

2. To put matters into context, the respondents (as plaintiffs) filed the suit Voi CMCC E&L No. 13 of 2019, vide a plaint filed on 31 July 2019. In that plaint, they pleaded that they are beneficiaries of the Plot No. 1133 Wundanyi, which they said is their ancestral land held in trust by one Edward Maganga (deceased), who was their paternal uncle. They contended that the appellant (sued as the defendant and who is a son of the deceased) , had invaded the land and destroyed the respondents' crops and trees, and forcefully commenced construction in the month of February 2019. In the suit, which is still pending, they seek orders of mandatory injunction against the appellant to prevent him from destroying their crops, or constructing, or alienating the land. They also seek orders of a declaration that they are beneficiaries of the suit land held in trust by the late Edward Maganga. The appellant filed a defence vide which he basically denied the claims of the respondents.

3. On 29 September 2019, the respondents filed an application seeking orders of injunction to restrain the appellant from constructing, alienating, selling, cutting down trees and crops on the suit land, pending hearing and determination of the suit. Within the application, the respondents averred that the appellant had commenced construction on the suit land and had cut down the respondents' mature trees. Interim orders were given and the application fixed for inter partes hearing on 17 October 2019. On that day, counsel for the appellant sought time to respond to the application, which was granted, and the application fixed for mention on 24 November 2019. Interim orders were extended. On 24 October 2019, counsel for the appellants again sought more time to file the replying affidavit and the court directed the matter to be heard on 31 October 2019. On the same day, that is 24 October 2019, the application dated 23 October 2019 was filed by the respondents. It was filed pursuant to the provisions of Order 40 Rule 2 of the Civil Procedure Rules. In it, the respondents complained that the appellant had disobeyed the interim orders by continuing to construct and develop the suit property. They thus sought for the appellant to be committed to civil jail for breach of the court orders.

4. The reply by the appellant, to both the application for injunction and to the application for disobedience, was that the suit land is registered in the name of his deceased father and that his father's estate is yet to be distributed and is subject to the succession suit Mombasa Cause No. 215 of 1995. He deposed that it was not him who was undertaking the developments on the suit land as alleged and asserted that the respondents have sued the wrong person.

5. The application was heard and ruling delivered on 26 March 2020. In the said ruling, the Honourable Magistrate found that the appellant

was in disobedience of the order of injunction. In assessing the defence of the appellant, that it was not him who was undertaking the construction, the Honourable Magistrate held as follows :-

> *"I have looked at the statement of the plaintiff (sic) in this case. He has stated that the respondent is his cousin. Both the respondent and the second plaintiff stay at Mwatate and hence at their ages they know each other very well and the applicants knew that it was the defendant who was carrying out such activities and brought the case against him. He has also indicated that it is the respondent who has committed the alleged activities as the land is in the name of his late father.*
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> *The respondent has stated that the suit land is a subject in Mombasa in administration cause no. 215 of 1995 which is still bending (sic) in Mombasa and he never produced any annextures to that effect that indeed, there is a pending matter over the subject suit land in Mombasa. In the defence of the respondent, he agreed with the content in paragraph 8 of the plaint by the applicants that indeed, there is no pending suit and/or previous proceedings over the same subject matter.*
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> *The respondent has also indicted (sic) that he is not the administrator of the estate of his father and has not pointed to court with documentary evidence that he is not the one but the other person whether mother or any one of his sibling is the administrator and hence the one who is carrying out the said activities in the said land which had been prohibited by an order of this court.*
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> *The parties in this case both stay at Mwatate where the suit land is and hence the applicants have stated that it is the defendant who has been carrying out such activities in the said land and given the fact that they all come from the same place, the plaintiff could not have sued a wrong person. The plaintiffs have even annexed photos of the construction of the house and some workers who of course could have been able to state the person who gave them work to do and by virtue of the fact that the plaintiffs and the defendants are cousins, there is no way that they could have failed to sue the right person who is the defendant as per their statements took over the land that they have been using for the last 40 years.*
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> *I have no doubt in my mind that it could not have been that the defendant (sic) sued a wrong party. The defendant is lightly (sic) sued and that is why the order was directed to him. It was upon him to obey the order and appear in court to oppose the same or make any other applications on capacity of the plaintiff to sue (sic). He could also have directed the court the right party to sue in his supporting affidavit…"*

6. Mainly pursuant to the above findings, the court concluded that the appellant was well aware of the order of injunction and that he had disobeyed it. A date was thus set for his sentence. Before that date, the appellant filed this appeal, and I issued an order staying the sentencing pending hearing of the appeal.

7. The Memorandum of Appeal raises the following grounds :-

> *(1) That the learned magistrate erred in both law and fact in finding that the appellant was in contempt of the court order of 26th September 2019.*
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> *(2) That the learned magistrate erred in both law and fact when he shifted the burden of providing information on who was developing the suit land to the respondent.*
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> *(3) That the learned magistrate erred in both law and fact in convicting the appellant without any evidence that he was the one engaged in the acts sought to be stopped by the court order.*
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> *(4) That the learned magistrate erred in both law and fact when he relied on unsubstantiated allegations against the appellant.*
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> *(5) That the learned magistrate erred in both law and fact when he relied on extraneous matters to arrive at his findings.*
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> *(6) That the learned magistrate erred in both law and fact when he failed to appreciate that the defendant was incapable of obeying the said order from the facts of the case.*
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> *(7) That the learned magistrate erred in both law and fact when he entertained contempt proceedings before hearing testing (sic) the veracity of the respondent's allegations through inter partes hearing of the application for injunction.*
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> *(8) That the learned magistrate erred in both law and fact when he drew inferences from the parties' relationship without evidence to support the said inferences.*

8. Counsel agreed to argue the appeal by way of written submissions and I have taken note of the submissions of Ms. Isika, learned counsel for the appellant, and Mr. Okanga, learned counsel for the respondents.

9. What was before court was an application for disobedience of a court order which is akin to an application for contempt. It was thus a quasi-criminal application. Ms. Isika referred me to the case of *North Tetu Farmers Co. Ltd vs Joseph Nderitu Wanjohi (2016) eKLR*, where Mativo J, stated as follows :-

> "Contempt proceedings are *quasi-criminal* in nature and since the liberty of a person is at stake, the standard of proof is higher than in civil cases. This principle was reiterated in the case of *Gatharia K. Mutikika vs Baharini Farm Ltd* where it was held as follows:-
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> *"The Courts take the view that where the liberty of the subject is, or might be involved, the breach for which the alleged contemnor*

*is cited must be precisely defined. A contempt of court is an offence of a criminal character. A man may be sent to prison. It must be satisfactorily proved... I must be higher than proof on a balance of probabilities, almost, but not exactly, beyond reasonable doubt. 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. However, the guilt has to be proved with such strictness of proof as is consistent with the gravity of the charge... Recourse ought not be had to process of contempt of court in aid of a civil remedy where there is any other method of doing justice. The jurisdiction of committing for contempt being practically arbitrary and unlimited, should be most jealously and carefully watched and exercised with the greatest reluctance and the greatest anxiety on the part of judges to see whether there is no other mode which is not open to the objection of arbitrariness, and which can be brought to bear upon the subject. A judge must be careful to see that the cause cannot be mode of dealing with persons brought before him. Necessary though the jurisdiction may be, it is necessary only in the sense in which extreme measures are sometimes necessary to preserve men's rights, that is, if no other pertinent remedy can be found... Applying the test that the standard of proof should be consistent with the gravity of the alleged contempt..... it is competent for the court where a contempt is threatened or has been committed, and on an application to commit, to take the lenient course of granting an injunction instead of making an order for committal or sequestration, whether the offender is a party to the proceedings or not."*

10. I am in full agreement with the above dictum. The standard of proof in an application for contempt, and that would also apply in an application for disobedience of an order of injunction, is higher than a balance of probabilities, almost, but not exactly, beyond reasonable doubt. The question we have to ask ourselves is whether there was proof to the required standard that the appellant actually violated the order of interim injunction issued by the court.

11. I have gone through the affidavit in support of the application claiming that the appellant violated the order of injunction. There was actually only one paragraph that pointed at the disobedience and it was drawn as follows :-

*That the respondent with impunity has continued to build on the suit land despite the Honorable Court's orders directing, that the construction to stop. (Hereto annexed and marked NMR-3 are the photographs evidencing the on-going construction by the respondents).*

12. Would this statement be sufficient for one to say that it has been proved that the respondent is the one who was constructing ? I wouldn't say so. Apart from the bare allegation that it was the appellant constructing on the land, there was nothing else that was tendered to support this assertion. The photographs annexed did not show the appellant on site; they only showed a structure that had been constructed; none of the respondents stated that they saw the appellant on site; nobody gave any specific day or time that the appellant was seen on the building site; none of the workers who built the structures swore any affidavit to say that it is the appellant who had instructed them to continue with the developments; no building plan or any document was annexed to show that the development was being undertaken by the appellant. In fact, there was absolutely nothing tabled that would tie the appellant to the structure. In my view, a mere statement, with nothing to back that up, that it was the appellant undertaking the construction, was not sufficient to find the appellant culpable. More was required to meet the standard of proof.

13. The Honourable Magistrate appears to have placed much weight on the fact that the parties were relatives, but this was completely immaterial. The burden of proof was not going to be less, merely because the parties were relatives. And the burden of proof was never upon the appellant. It was always upon the respondents, such that it was erroneous for the Honourable Magistrate, to impose a burden on the appellant for him to disclose who was undertaking the development. It was the respondents who claimed that the appellant was the one constructing, so it was them who bore the burden of proving as much.

14. It was actually not hard for the respondents to gather evidence of who was developing the property for it must have been done by some people. These people knew who was paying them, and the person paying them, if he was not the developer himself, must have had a direct connection to the developer. None of these persons swore any affidavit.

15. It was also immaterial that the appellant had not presented the succession proceedings, nor demonstrate who was the administrator of the estate of his father. The fact that he is son to the deceased owner of the land cannot be equated to mean that he can be the only person who can undertake development on the land.

16. The long and short of the above is that there was insufficient evidence, to the required standard, to declare that it was the appellant who was constructing.

17. I have no option but to allow this appeal, and it is hereby allowed. I proceed to substitute the decision that held the appellant guilty of disobedience with an order that the application dated 23 October 2019 is dismissed. The appellant will have the costs of that dismissed application and also the costs of this appeal.

18. Judgment accordingly.

**DATED AND DELIVERED THIS 18TH DAY OF FEBRUARY 2021**

**JUSTICE MUNYAO SILA**

**JUDGE, ENVIRONMENT AND LAND COURT OF KENYA**

**AT MOMBASA**