



REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT AT MOMBASA

ELC CASE NO 103 OF 2007

CONSOLIDATED WITH HCCC NO 352 OF 1998

TEITA ESTATE LIMITED.....PLAINTIFF/RESPONDENT

VERSUS

MNJALA MWALUMA.....1ST DEFENDANT/APPLICANT

GIBSON MWABILI LEMBO & 90 OTHERS.....2ND DEFENDANT

RULING

1. This Ruling is in respect to the Application dated 16th March 2020 filed by the 1st Defendant. The Application is supported by the Affidavit of Mnjala Mwaluma and it seeks the following orders;

a) Spent

b) Spent

c) That the directors of the Plaintiff's company be cited for contempt of Court orders issued herein for maintenance of status quo.

d) That the directors of the Plaintiff's Company be committed to civil jail for a period of six (6) months or any other period or any other sanction as this honorable Court may deem fit and appropriate.

e) That the cost of this Application be provided for.

2. The Application is opposed by the Respondent vide a Replying Affidavit of Phillip Kyriazi dated 12th November 2020, a Replying Affidavit of Benson Muthusi dated 18th November 2020 and Ground of Opposition dated 5th November 2020.

3. The Application came up on 17th November 2020 for hearing, where parties gave their oral submissions.

The Applicant's submission

4. The Applicant stated that the Application is based on Article 159 (1) of the Constitution of Kenya, Section 3 and 5 of the Judicature Act and it seeks to cite the directors of the Respondent for contempt of orders issued by this Court that have been extended time and again. The purpose of the status quo was to preserve the subject matter pending the hearing and determination of the suit.

5. The Applicant further stated that the Respondent has been colluding with the county government to subdivide the land and issue titles to squatters. The Applicant also alleged that the Respondent has been ploughing the unused land up to the doorsteps of the Defendants' houses and when the Defendants try to leave their houses they are arrested. The Applicant continued to state that the Respondent in its Replying Affidavit is trying to interpret what the orders meant.

The Respondents' submissions

6. The Respondent submitted that the photographs used to support contempt were inadmissible as they have failed to comply with Section 106B of the Evidence Act which requires a certificate of the person introducing the electronic evidence. That Applicant having not filed a certificate the photographs should be struck out both in the Application and Affidavit.

7. The Respondent further submitted that the directors of the Plaintiff cannot be found in contempt of Court as they are not parties to the suit and if the Defendants wanted the directors to be held in contempt they should have lifted the corporate veil.

8. The Respondents stated that the status quo that should be maintained is as at 8th October 2014 when parties agreed to maintain status quo. At the time of filing the suit the Plaintiff alleged the Defendants had trespassed and ought to be evicted. The status quo was that the Defendants should not further encroach and that they should be not evicted or their structures demolished.

9. The Respondents further stated that the settlement were still there, no house had been demolished. No person shown in the photographs worked for the Plaintiff's and the vehicles in the picture belong to government of Kenya and not to the Plaintiff.

10. The Respondent referred to the parliamentary report that looked into the matter and concluded that the Plaintiff was the owner of the property and it's the Defendants who had encroached. The report recommended the Plaintiff to excise part of its land to settle the squatters and that is what the Plaintiff is doing.

The Applicant response

11. The Applicant responded to the Respondent's submissions and stated that the issue before Court was not ownership but contempt and that the issue of lifting of the corporate veil to hold the plaintiff's directors liable for contempt of Court orders doesn't apply. The 250 acres being excised are subject to these proceedings and that is contempt.

12. The Applicant further stated that Section 106B of Evidence Act is not applicable where evidence is being introduced by way of affidavit. Further to that one doesn't need to be part of the proceedings in order to respect Court orders.

13. Having considered the Application and its supporting affidavit and the grounds of opposition and replying affidavits from the Respondents as well as the oral submissions made in Court,

Issues for consideration are;

- *What was the status quo at the time the order was made on 4th February 2020.*
- *Whether the Applicant/1st Defendant has met the standard of proof required in contempt of Court.*

Determination of the issues

14. What was the status quo at the time the order was made on 4th February 2020.

On 4th February 2020 both parties appeared before Court to highlight submissions in the Application dated 2nd November 2018. The Applicant stated that the parties have agreed to have the Application held in abeyance to enable the parties explore an out of Court settlement. The parties would have a meeting within one month and thereafter come back to Court to record a settlement if one would have been reached. The Applicant further asked for the status quo to be maintained. The Respondent went ahead to confirm this position.

The Court made an order out of the submissions made by the parties in Court. The order of Court is clear and unambiguous. However both parties have different interpretation of what was the status quo at the time the order was made on 4th February 2020. Each party is interpreting the order to their own benefit.

15. Whether the Applicant/1st Defendant has met standard of proof required in contempt of Court.

The law on contempt of Court is now settled.

In the case of **North Tetu Farmers Co. Ltd v. Joseph Nderitu Wanjohi (2016) eKLR Justice Mativo stated thus:**

'writing on proving the elements of civil contempt, learned authors of the book Contempt in Modern New Zealand have authoritatively stated as follows:-

'there are essentially four elements that must be proved to make the case for civil contempt. The Applicant must prove to the required standard (in civil contempt cases which is higher than civil cases –

(a) the terms of the order (or injunction or undertaking) were clear and unambiguous and were binding on the defendant;

(b) the Defendant had knowledge of or proper notice of the terms of the order;

(c) the Defendant has acted in breach of the terms of the order; and

(d) the defendant's conduct was deliberate.

Although the order made by the Court appears clear and unambiguous, as the same was made after an understanding as reached by the parties, it is apparent that both parties have different interpretation of that 'status quo' that was to be maintained. Probably the parties ought to have come out clearly and defined the 'status quo' that was to be maintained.

The Respondent cannot be said to have acted in breach of the orders of Court when both parties have different interpretation of what the orders meant. The order was for parties to hold negotiations with a view to reach a settlement. How parties choose to hold negotiations is entirely up to them. It could be holding physical or virtual meetings, letters of engagement or the use of any other negotiation avenue that is available to the parties.

The Applicant is required to prove that the acts of the Respondent amount to contempt and the standard of proof is higher as stated by the Court of Appeal in *Mutiika Vs Baharini Farm Limited [1985] KLR 229, 234*

“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...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 an offence which can be said to be quasi-criminal in nature.”

This Court has examined all the photographs that have been annexed to the supporting affidavit. There is no clear evidence of subdivision of land. The Applicant has not provided minutes of the meetings that allegedly took place to discuss subdivision. Holding a meeting by either party doesn't prove contempt of Court. More so the Court had ordered parties to negotiate with intention of reaching a settlement. Furthermore the Applicant has not provided Court with any certificate of title deed that has been issued to the Defendants by the Respondent.

The Applicant has failed to meet the threshold set to cite the Respondent for contempt. I therefore find the Application dated 16th March 2020 lacks merit and I will disallow it.

The same is dismissed. Costs will be in the cause.

DATED, SIGNED and DELIVERED at MOMBASA this 9th day of February, 2021

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Yumna Court Assistant

C.K. YANO

JUDGE