



**Green Square Limited & another v Koech & 5 others (Environment & Land Case 66 of 2014) [2024] KEELC 1670 (KLR) (4 April 2024) (Ruling)**

Neutral citation: [2024] KEELC 1670 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KERICHO  
ENVIRONMENT & LAND CASE 66 OF 2014**

**MC OUNDO, J**

**APRIL 4, 2024**

**BETWEEN**

**GREEN SQUARE LIMITED ..... 1<sup>ST</sup> PLAINTIFF**

**DANGAD KIBET KORIR ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**DAVY KIPROTICH KOECH ..... 1<sup>ST</sup> RESPONDENT**

**NATIONAL LAND COMMISSION ..... 2<sup>ND</sup> RESPONDENT**

**CHRISTOPHER KIPRONO NGENO ..... 3<sup>RD</sup> RESPONDENT**

**OCS, KERICHO POLICE STATION ..... 4<sup>TH</sup> RESPONDENT**

**HON. CHARLES BIRECH, CECM FOR ROADS, PUBLIC WORKS AND  
TRANSPORT, KERICHO COUNTY ..... 5<sup>TH</sup> RESPONDENT**

**ENG. PETER KOSKEY, CHIEF OFFICER FOR ROADS, PUBLIC WORKS AND  
TRANSPORT, KERICHO COUNTY ..... 6<sup>TH</sup> RESPONDENT**

**RULING**

1. By a Notice of Motion dated 26<sup>th</sup> March, 2019 brought under the provisions of Article 162 (1) and 2 (b) of *the Constitution*, Section 5 of the Judicator Act, Cap.8 Laws of Kenya, PART 81 (Applications and Proceedings in Relation to Contempt of Court) of the Civil Procedure (Amendment No.2) Rules, 2012 of England, Section 14 of the *Environment and Land Court Act* No. 19 of 2011, Section 3A and 63 *Civil Procedure Act*. Cap. 21 Laws of Kenya and all enabling provisions of law, the 1<sup>st</sup> Defendant/Applicant herein sought for an order of a Notice to Show Cause against the Respondents/Contemnors on why they should not be committed to civil jail for disobedience of the orders of the Honorable court issued on 29<sup>th</sup> October, 2015 and that they be committed to civil jail and detained in prison for six (6) months or such period as the Honorable Court would deem fit, or both fine and imprisonment. He



also sought for such further and/or other consequential orders as the Honourable Court may deem just to grant and for costs of the Application.

2. The said application was supported by the grounds therein as well as the supporting Affidavit of an even date, sworn by Davy Kiprotich Koech, the 1<sup>st</sup> Defendant/Applicant herein.
3. In summary, the basis for seeking the above captioned orders was that vide interim orders of status quo having been granted on the 25<sup>th</sup> March 2015 by the court, in the presence of both the Applicant's and the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents contemnors' Counsel, so as to save the substratum of the suit, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents Contemnors had flagrantly disobeyed those orders.
4. That the 4<sup>th</sup> Respondent whose station was merely few meters from the subject premises and who had been expected to enforce the court's orders, had deliberately failed to do so wherein under his watch, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents, in blatant disobedience of court's orders, had descended on the subject suit with graders and had attempted to create a road access so as to frustrate the just conclusion of the instant matter.
5. That their action had put the authority and dignity of the court to ridicule hence it was only fair and just that the court intervened by granting the orders sought, to assert its authority and protect its dignity and the sanctity of its process, and also to restore public confidence.
6. In opposition to the Applicant's Application, the 1<sup>st</sup> and 3<sup>rd</sup> Respondents/Contemnors filed their statement of opposition dated 25<sup>th</sup> April 2019 under the provisions of Order 51 Rule 14 (1) (c) of the Civil Procedure Rules, to the effect that the Applicant had lost both proprietary and Constitutional right to own and enjoy the suit property and was therefore guilty of material non-disclosure and perjury. That Application had been brought in bad faith and was an attempt to defeat justice and delay the matter. That further, the orders claimed to have been violated had never been served upon the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents. That the application is an abuse of the process of court.
7. On their part, the 5<sup>th</sup> and the 6<sup>th</sup> Respondents Contemnors, in response and in opposition to the application, filed a Notice of Preliminary Objection dated 3<sup>rd</sup> May, 2019 wherein they had urged the court to dismiss the Application for reason that it was incontestably inept for joining strangers to the suit without leave of the Court. That the accusation therein had been wild and baseless allegations.
8. That the 5<sup>th</sup> Defendant was a stranger to the proceedings in the instant matter and had never been served with any court orders that had required his compliance either personally or in his official capacity as the CECM for Roads, Public Works and Transport in the County Government of Kericho.
9. That he had been aware that the suit property, which was the subject matter of the present proceedings, had pursuant to a separate proceeding in the High Court ACEC No. 18 of 2016 (Formerly Civil Case No. 280 of 2010-Kenya Anti-Corruption Commission v Davy Kiprotich Koech) been attached for sale by S.M Gathongo T/A Valley Auctioneers on behalf of the Ethics and Anti-Corruption Commission whereby the sale of the said property was to take place on 10<sup>th</sup> April, 2019 at their offices in Nairobi and for which the intended attachment and sale, the Applicant in the instant application was attempting to defeat.
10. The 6<sup>th</sup> Respondent, one Engineer Peter Koskey, the Chief Officer in charge of roads and public works and transport within the county government of Kericho, had also reiterated the contents of the 5<sup>th</sup> Respondent's in his Replying Affidavit.
11. The 3<sup>rd</sup> Respondent, vide his Replying Affidavit dated 6<sup>th</sup> May, 2019 deponed that the orders that the Applicant was alleged to have been disobeyed had neither been served upon him or the 1<sup>st</sup> Respondent.



- That the Application was a bid to delay the instant matter which was almost at its conclusion as the subject matter, being No. Kericho Municipality Block 4/2, which had not been part of the public access road had been put up for auction on the 10<sup>th</sup> April, 2019 to recover public money from the Respondents.
12. In retort, the 1<sup>st</sup> Defendant/Applicant vide his Further Affidavit dated 20<sup>th</sup> May, 2019 in answer to the 5<sup>th</sup> and 6<sup>th</sup> Respondents' Replying Affidavit and the 1<sup>st</sup> and 3<sup>rd</sup> Respondents' Statement of Opposition, reiterated the contents of his Supporting Affidavit and denied all the allegations set out in the Respondents' various Replying Affidavits stating that they were guilty of distorting facts, erasing and/or classifying information relevant to the title to his property in the instant matter. That it had been strange and appalling that the 5<sup>th</sup> and 6<sup>th</sup> Respondents sought the court to believe that only parties to a suit could be punished for willful disobedience of court's order.
  13. That an Applicant seeking to enforce contempt proceedings in Kenya did not need leave of the court to commence such proceedings and that he was not seeking the joinder of the 5<sup>th</sup> and 6<sup>th</sup> Respondents/Contemnors as substantive parties to the suit but rather, their participation had been limited to contempt proceedings against them.
  14. That the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents had misled the court on an existence of an imagined Nairobi HC Civil Appeal No. 316 of 2010 whose parties were not known. That they had also dishonestly contended that they had never been served with the court's order of 29<sup>th</sup> October, 2015 whereas the court proceeding confirm the presence of their Advocate. Their Statement of Grounds of Opposition was thus a gross abuse of the Court's process and ought to be struck out with costs.
  15. That the Respondents herein had not purged the contempt to date hence they did not deserve to be heard. That it was only fair that the court intervened by granting the orders sought to assert its authority and protect its dignity and the sanctity of its processes, and to restore public confidence.
  16. The 5<sup>th</sup> and 6<sup>th</sup> Defendants further filed an application dated 17<sup>th</sup> May, 2019 seeking for orders to strike out the 1<sup>st</sup> Defendant/Applicant's Notice of Motion Application dated 26<sup>th</sup> March, 2019 with costs for reason, as deponed by their Counsel, that the contempt proceedings had joined them to the suit without the leave of the court which was contrary to the provisions of Order 1 Rule 18 of the Civil Procedure Rules.
  17. That the suit property which was the subject matter of the instant application had since been auctioned at the instance of the Ethics and Anti-Corruption Commission, pursuant to a Judgement and Decree issued by the High Court in High Court ACEC No. 18 of 2016 (Formerly Civil Case No. 280 of 2010)- Kenya Anti-Corruption Commission v Davy Kiprotich Koech) thus the contempt application herein had been filed to cause distress upon the persons whom the 1<sup>st</sup> Defendant/Applicant had associated with his woes.
  18. In response and in opposition Notice of Preliminary Objection dated 3<sup>rd</sup> May, 2019 and Application dated 17<sup>th</sup> May, 2019, the 1<sup>st</sup> Defendant/Applicant filed Grounds of Opposition and a Replying Affidavit both dated 1<sup>st</sup> July 2019 to which he deponed that the Preliminary Objection did not raise any pure point of law and was replete with juristic shortcomings and incompetent, misconceived, bad in law intended to delay the hearing and determination of the his application for contempt. He sought for the same to be dismissed with costs to the 1<sup>st</sup> Defendant/Applicant.
  19. In response and in opposition to the 5<sup>th</sup> and 6<sup>th</sup> Respondents' application herein, the Applicant denied all the allegations set therein stating that their Counsel had descended into the arena of parties by



deponing to the contested matters of fact thereby offending the rules of practice and her status as an officer of the court.

20. That by deponing that the suit property herein had been sold, Counsel could not be an Advocate and a witness at the same time. That the Application was fatally defective, incompetent and calculated to frustrate and scuttle his pending application for contempt dated 26<sup>th</sup> March, 2019.
21. That none of his properties had been auctioned as alleged by the 5<sup>th</sup> and 6<sup>th</sup> Respondents' Counsel as the purported auction had been an illegal exercise conducted by Ethics and Anti-Corruption Commission in blatant disregard of the pending objection proceedings. That he (Objector) had since filed an application for contempt against the said Mr. Muraya, the Auctioneer (one Mr. S.M. Gachongo) among others which application was still awaiting determination.
22. That pursuant to failure by the Ethics and Anti-Corruption Commission to sale the property by public auction, they had in a desperate venture filed an application dated 3<sup>rd</sup> June, 2019 before Nairobi High Court seeking re-advertisement of the said property which application was also still pending before the court.
23. That since then, he had also filled an application dated 22<sup>nd</sup> May, 2019 seeking to review the ruling of the Court of Appeal in Nairobi Civil Application No. 9 of 2019.
24. On 29<sup>th</sup> September, 2023, directions had been taken that both the applications and the Preliminary Objection be canvassed by way of written submissions.

#### **1<sup>st</sup> Defendant/Applicant's Submission.**

25. The 1<sup>st</sup> Defendant/Applicant framed their issues for determination as follows;
  - i. Whether the Respondents/Contemnors had knowledge of the orders of the Honorable court;
  - ii. Whether the Respondents/Contemnors willfully disobeyed orders of the Honorable court;
  - iii. If yes, what are the appropriate orders in the circumstances?
  - iv. Whether the 5<sup>th</sup> and 6<sup>th</sup> Respondents' Preliminary Objection and Application dated 17<sup>th</sup> May 2019 are merited; and
  - v. who should bear the costs hereof?
26. The Applicant then submitted that the jurisdiction to punish for contempt was well settled, and relied on the provisions of Section 5 of the *Judicature Act*, PART 81 (Applications and Proceedings in Relation to Contempt of Court) of the Civil Procedure (Amendment No. 2) Rules, 2012 of England and Sections 3A and 63 Civil Procedure, the Court of Appeal decision in the case of Christine Wangari Gachege vs. Elizabeth Wanjiru Evans & 11 Others [2014] eKLR, and the provisions of Section 14 of the *Environment and Land Court Act*, No.19 of 2011 to submit that the Court had jurisdiction to punish for disobedience of court orders.
27. The Applicant further submitted that the Respondents/contemnors had knowledge of the court orders which knowledge superseded service of court orders as was held in the case of Basil Criticos vs. Attorney General & 8 others & 4 others [2012] eKLR, and in the case of Kenya Tea Growers Association vs. Francis Atwoli & 5 others [2012] eKLR. That the Respondents/Contemnors were present when the orders were granted but knowingly, blatantly, flagrantly and wilfully disobeyed the Court Orders.



28. In submitting that the Respondent/contemnors' had willfully disobeyed the court orders, the Applicant had submitted that after visiting the said suit property, the Honorable court had ordered that all works on the disputed site which included a space under cabro and other works be stopped forthwith and that the Officer Commanding Kericho Station Kericho who was also present to enforce this order. That the orders which stemmed from the need to save the substratum of the subject matter pending hearing and determination of the suit had neither been challenged by the Respondents / Contemnors whether by way of appeal or review and neither had they been set aside, to date but 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> Respondents/Contemnors in blatant disobedience of the said orders, had connived with the 3<sup>rd</sup> to 6<sup>th</sup> Respondents where they had descended on the property and cleared all the vegetation, tree stumps, and objects in the subject premises to create an impression that a road had been in existence for ages.
29. That since the Respondents had blatantly belittled the due process and had not purged contempt, they deserved no mercy from the Honorable court. Reliance was placed on the Court of Appeal decision in *Godie Neeru vs. Republic*, Criminal Appeal No. 200 1993 cited with approval in *Image Apparels Ltd vs. Freight In Time Limited* [2008] eKLR to outline the ingredients forming the basis for punishing for contempt.
30. That in *Johnson vs. Grant* 1923 SC 789, cited with approval in *Trust Bank Ltd (in liquidation) vs. Shanzu Villas Ltd & 3 others* [2004] eKLR it had been held that the law did not exist to protect the personal dignity of the Judiciary nor the private rights of parties or litigants, but the fundamental supremacy of the law which is challenged. That the Respondents intent was to undermine and defeat the enforcement of the orders and if allowed to continue, these actions and/or conducts would render the enforcement of the Honorable court's orders futile.
31. That the 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Respondents/Contemnors were state officers who ought to be at the forefront in upholding the rule of law in the country and were not above the law as was held by the Court of Appeal in *Shimmers Plaza Limited vs. National Bank of Kenya Limited* [2015] eKLR..
32. That the human consequences of the Respondents/Contemnors' contempt was the infringement of the Applicant's very human rights as set out in the Bill of Rights: the right to human dignity (Article 28); right to own property (Article 40); and economic and social rights (Article 43). That the Bill of Rights in *the Constitution* of Kenya applied to all law and bound all persons for every person to enjoy the rights and fundamental freedoms therein so as to preserve the dignity of individuals and communities and to promote social justice and the realization of the potential of all human beings.
33. In stating what the appropriate orders in the circumstances were, the Applicant submitted that the Respondents had acted as if there were no proceedings, no ruling and orders stipulating how the parties should deal henceforth. That were their conduct left to continue, the orders of the court shall be brought into ridicule and rendered worthless /academic unless the court moved with speed to uphold its integrity to ensure that the Respondents did not continue acting with impunity undeterred and this would be achieved by allowing the application for contempt, with costs.
34. The Applicant then submitted that the 5<sup>th</sup> and 6<sup>th</sup> Respondents' Preliminary Objection and their Application dated 17<sup>th</sup> May 2019 were not merited because anyone, whether a party to a suit or not, having had knowledge of court's order but who wilfully choose to disobey the same was liable to be cited for contempt. That the Respondents/Contemnors had knowledge of the orders herein but chose to disobey the same, hence they are liable to be cited for contempt as was held in *Regine Butt vs. Haroon Butt & another* [2016] eKLR.



35. Finally the Applicant submitted that the Respondent/Contemnors' should be condemned to pay costs because costs followed the event and was a soothing balm to cure grievances in legal proceedings.

**The 1<sup>st</sup> and 2<sup>nd</sup> Plaintiff's/Respondent's joint Submissions.**

36. The 1<sup>st</sup> and 2<sup>nd</sup> Plaintiff's/Respondent's joint submissions dated the 6<sup>th</sup> December 2023 while placing their reliance on the Grounds of Opposition dated 25<sup>th</sup> April 2016 was to the effect that there having been a ruling delivered on 21<sup>st</sup> January 2020, the Applicants did not take any steps to prosecute their application dated 26<sup>th</sup> March 2019 until 4 years later.

37. That upon attachment, subdivision and sale by the Ethics and Anti-Corruption Commission (EACC), the Applicant had lost his proprietary and constitutional right to own Land parcel No. Kericho Municipality Block 4/2 which was not part of the public access road and which had subsequently been sub-divided and sold and therefore did not exist.

38. That further the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents were strangers to the suit. The Applicant herein Davy Kiprotich Koech whose property including Kericho Municipality Block 4/2 had been seized by the Ethics and Anti-Corruption Commission (EACC) wherein he himself had been sentenced to an imprisonment of six years in Nairobi (Milimani High Court) Anti-Corruption and Economic Crimes Division Revision No. E016 of 2021 in EACC versus Davy Kiprotich & Another. That the application herein was an abuse of the court process as it was in relation to a non-existent property.

39. The 1<sup>st</sup> and 2<sup>nd</sup> Plaintiff's/Respondents then framed their issues for determination as follows

- i. Whether the Court did issue a valid Court order on the 29<sup>th</sup> October 2015
- ii. Whether the said orders were served upon the Respondents.
- iii. Whether the Respondents were at the site when the orders, if any were issued.
- iv. Whether the Respondents are in contempt of Court orders.
- v. Who should pay costs.

40. On the first issue for determination as to whether the Court had issued a valid Court order on 29<sup>th</sup> October 2015, the Respondents submitted that it had not been in dispute that the court had visited the site wherein after it had given orders. However the Applicant's annexure "DRR-4" to his supporting affidavit dated 26<sup>th</sup> March 2019 was ambiguous and unenforceable and did not state in exact terms or description the site where the Judge had visited and given the orders. There was neither the parcel number nor detailed description and place in the said order.

41. On the issue as to whether the orders had been served upon the Respondents, whether they had been present when the orders were made or whether they were in contempt of the alleged orders, their response was in the negative to the effect that there had been no affidavit of service filed in court to confirm service upon them. That they were not in attendance in the proceedings of the 29<sup>th</sup> October 2015 when the orders were issued and neither had they been on the site when the court visited. That indeed there had been no evidence adduced to support the allegations that they had been made aware of the said orders. That it therefore followed that they were not in contempt of any court orders and therefore the application ought to be dismissed with costs.

42. That the current application was brought in bad faith, the ruling on the EACC application having been delivered on 10<sup>th</sup> February 2019 wherein the Applicant did not prosecute the application for 4 years on an order claimed to have violated stemming over 8 years seeking to find the Respondents who



were neither parties to the suit, present nor served with Court's decision or even made aware of the order, in contempt.

43. The 1<sup>st</sup> and 2<sup>nd</sup> Plaintiff/s/Respondents relied on the following authorities in support of their submissions.
- i. Nairobi High Court Anti-Corruption and Economic Crimes Division ACEC Petition No. 5 of 2020 Davy Kiprotich Koech vs. EACC & Another.
  - ii. Nairobi High Court Anti-Corruption and Economic Crimes Division ACEC No. 18 of 2016, EACC vs. Davy Kiprotich Koech & Another.
  - iii. Nairobi High Court Anti-Corruption and Economic Crimes Division Revision No. E016 of 2021 Davy Kiprotich Koech vs Republic.
  - iv. Nairobi HCCA No. 316 of 2010.KACC vs Dr. Davy Kiprotich Koech & Another.
44. In conclusion the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiff/Respondents submitted that the quasi-criminal proceedings herein were initiated by a convict, that Kericho/Municipality Block 4/2 was auctioned by the Ethics and Anti-Corruption Commission (EACC) and the threshold/standard of proof required in contempt of Court proceedings/application had not been met by the Applicant and therefore his application should be dismissed with costs.

#### **Determination.**

45. Save for the submissions by the Applicant and the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, there had been no other submissions filed by the 3<sup>rd</sup> to 6<sup>th</sup> contemnors which was contrary to the directions issued on the 26<sup>th</sup> September 2023.
46. This matter stems from an application filed by the Applicant dated the 26<sup>th</sup> March 2019 which seeks to have the Respondents herein found in contempt of the court orders issued on 29<sup>th</sup> October, 2015. The said application was opposed by the 1<sup>st</sup> Plaintiff/contemnors' Replying Affidavit sworn on 5<sup>th</sup> May 2019, challenging service of the said orders and the 5<sup>th</sup> and 6<sup>th</sup> Respondents' application dated 17<sup>th</sup> May, 2019 and a Notice of Preliminary Objection dated the 3<sup>rd</sup> May 2019 which had sought to strike out the application for joinder of the 5<sup>th</sup> and 6<sup>th</sup> Respondents to the suit without leave of the court.
47. The gist of the matter as I understand it is to the effect that the Applicant had been sued by the Plaintiffs herein for having fenced off and annexed a portion of the public access road reserve that fell between their respective properties being LR No. 631/1033, No. Kericho Municipality Block 4/469 that belonged to the Plaintiffs and Kericho Municipality Block 4/2 that belonged to the 1<sup>st</sup> Defendant/Applicant. That the Applicant's action had blocked the public access for the Plaintiffs and members of the public. The Plaintiffs had thus sought for orders directing the Applicant to open the said road reserve and thereafter there be a permanent injunction issued restraining him from interfering with the access road reserve.
48. It is on record that on the 29<sup>th</sup> October 2015, the court had made a site visit wherein it had issued the following order.
- “I am issuing an order stopping all works on the disputed site which includes a space under cabro and other works. The supervisor onsite one Alex Munene is so advised and the OCS Kericho who is also present is similarly advised to enforce this order.”



49. This is the order that the Applicant has alleged had been disobeyed by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents/Contemnors who had allegedly descended on the subject suit with graders in an attempt to create an access road, so as to frustrate the just conclusion of the instant matter, while the 4<sup>th</sup> Respondent whose station was merely few meters from the subject premises had deliberately failed to enforce the court's orders.
50. The Black's Law Dictionary (Ninth Edition) defines contempt of court as:-  
“Conduct that defies the authority or dignity of a court. Because such conduct interferes with the administration of justice, it is punishable usually by fine or imprisonment.”
51. The Supreme Court of Kenya in *Republic v Ahmad Abolfathi Mohammed & Another* [2018] eKLR held that;  
“The power, to commit a person to jail, must be exercised with utmost care, and exercised only as a last resort. It is of utmost importance, therefore, for the Respondents to establish that the alleged Contemnor's conduct was deliberate, in the sense that he or she willfully acted in a manner that flouted the Court Order.”
52. It is trite that a court order is binding on the party against whom it is addressed and until it is set aside, it remains valid and is to be complied with. It is thus not in dispute that interim orders had been issued by the court on the 29<sup>th</sup> October 2015 stopping any works on the disputed area.
53. Section 29 of the Environment and Land Court is clear to the effect that;  
“Any person who refuses, fails or neglects to obey an order or direction of the Court given under this Act, commits an offence, and shall, on conviction, be liable to a fine not exceeding twenty million shillings or to imprisonment for a term not exceeding two years, or to both “
54. It is an established principle of law that in order to succeed in civil contempt proceedings, the Applicant has to prove (i) the terms of the order, (ii) Knowledge of these terms by the Respondent, (iii). Failure by the Respondent to comply with the terms of the order.
55. The matter that stands out for determination is whether the Respondents Contemnor's herein were in breach of the court orders issued on 29<sup>th</sup> October 2015.
56. I have looked at the proceedings of the 29<sup>th</sup> October 2015 as well as the pleadings therein as at that date and the same is clear that save for the presence of the Plaintiff/contemnor's Counsel, the rest of the contemnors had neither been parties to the proceedings or present at the site but had only sought to be joined to the suit after they had been cited for contempt in the present Application. Nothing has been exhibited as evidence to show that they had been served with and/or that they had knowledge of the impugned Court orders.
57. Secondly, the court has also noted that the Applicant's subject suit being No. Municipality Block 4/2 had been a subject of attachment wherein it had subsequently been attached, subdivided and sold by the Ethics and Anti-Corruption Commission (EACC), in a different proceedings being Nairobi ACEC NO. 18 OF 2016(FORMERLY HCC NO. 18 OF 2016) reported as *Kenya Anti-Corruption Commission v Davy Kiprotich Koech & another* [2018] eKLR. The land therefore ceased to exist and the Applicant lost his proprietary and constitutional right over it, land which was not part of the public access road.



58. Of interest, I have also looked at the decision by the Court of Appeal sitting at Nairobi in Civil Application No. 92 of 2019 Dr. Davy Kiprotich Koech vs. Kenya Anti-Corruption Commission & another (unreported) herein annexed to the 5<sup>th</sup> and 6<sup>th</sup> contemptors' Response to the Application, which speaks volumes in regard to parcel of land No. Municipality Block 4/2 which was a subject suit in ACEC No. 18 of 2016 (formerly HCC No. 18 of 2016) and also ACEC No. 18 OF 2016 (FORMERLY HCC No. 280 OF 2010) reported as Ethics & Anti-Corruption Commission v DKK & 2 others [2020] eKLR and which matter had been at an execution stage.
59. At paragraph 1 of the said decision, the Court of Appeal had summarized the Applicant's application as one that had sought an injunction to restrain the Kenya Anti-Corruption Commission from selling his properties which included No. Municipality Block 4/2, pending an intended appeal. The Court of Appeal had considered a partial consent judgment that had been entered between the Applicant and the Respondent pursuant to a consent signed by the parties on 16<sup>th</sup> January 2016 which had resulted in the partial judgment against the Applicant for Ksh. 200,000,000/=, wherein in its ruling of 16<sup>th</sup> May 2019 the court of Appeal had stated as follows.
- "Our consideration of these facts leads us to the conclusion that the propriety of the process of execution of the partial judgment entered by the court against the Applicant pursuant to a consent agreed upon the parties cannot be questioned through the intended appeal against the order dismissing the application for leave to appeal against an earlier order dismissing an application to strike out the 1<sup>st</sup> Respondents suit. The fact that there is a judgment of the court which has not been set aside and which is not the subject of the intended appeal then removes the execution process of that judgment from the ambit of rule 5(2)b."
60. The court of appeal then went on to dismiss the application.
61. In *Muchanga Investments Limited v Safaris Unlimited (Africa) Limited & 2 others* (2009)eKLR, the court had cited the decision in *Beinosi v Wiley* 1973 SA 721 [SCA] in which the court had set out the applicable legal principle with respect to abuse of process as follows:
- "What does constitute an abuse of process of the court is a matter which needs to be determined by the circumstances of each case. There can be no all-encompassing definition of the concept of "abuse of process." It can be said in general terms, however, that an abuse of process takes place where the proceedings permitted by the rules of court to facilitate the pursuit of the truth are used for purposes extraneous, to that objective."
62. I find that the current application is devoid of merit. The Applicant who is aware of the position of the suit property in other proceedings pending before both the High Court and Court of Appeal sitting in Nairobi, is out to mislead and/or hoodwink the court to find a determination on a none existent cause of action thereby occasioning miscarriage of justice. I shall not add anything further in regard to the application herein as I find the same to have been made in bad faith, is an abuse of the court process and a waste of precious judicial time and I therefore proceed to dismiss the said Notice of Motion dated 26<sup>th</sup> March 2019 with costs.

**DATED AND DELIVERED VIA TEAMS MICROSOFT AT NAIVASHA THIS 4<sup>TH</sup> DAY OF APRIL 2024**

**M.C. OUNDO**

**ENVIRONMENT & LAND – JUDGE**

