



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Abdirahman v Radhod & 3 others (Environment & Land Case
145 of 2021) [2023] KEELC 20658 (KLR) (4 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 20658 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 145 OF 2021
LL NAIKUNI, J
OCTOBER 4, 2023**

BETWEEN

HADIJA ABDIRAHMAN PLAINTIFF

AND

BHUPENDRA RADHOD 1ST DEFENDANT

AUTOLAND AUCTIONEERS 2ND DEFENDANT

COUNTY GOVERNMENT OF MOMBASA 3RD DEFENDANT

LAND REGISTRAR MOMBASA 4TH DEFENDANT

RULING

I. Introduction

1. The ruling before this Honourable Court is on the Notice of Motion application dated 23rd February, 2023 brought under a certificate of urgency for its determination. It is brought by Hadija Abdirahman, the Plaintiff/Applicant under the provisions of Sections 1A,1B and 3A of the *Civil Procedure Act*, Cap 21 Laws of Kenya, Order 40 Rule 3 of The *Civil Procedure Rules*, 2010, Section 5 of the *Judicature Act*, Cap 8 Laws of Kenya.
2. The 1st Defendant opposed the application upon service through a Replying affidavit sworn on 2nd June, 2023.

II. The Plaintiff/Applicant's Case

3. The Plaintiff/Applicant sought for the following orders:-
 - a. Spent.
 - b. Spent.



- c. That the 1st Respondent be cited for contempt of Court Orders.
 - d. That this Honourable Court attaches the property of the 1st Defendant/Respondent and Commit him to prison for deliberately and/or willfully disobeying and continuing to disobey the Orders of this Honourable Court issued on the 7th of March, 2022 having been issued in the presence of their Advocates on record and having been served with the same.
 - e. That the Honourable Court be and is hereby pleased to issue an Order of injunction restraining the 1st Defendant/Respondent himself, his agents, servants, employees, assignees, third parties and/or any other party from any further developments, building, fencing and/or dealing or interfering in any other manner with the subject property known as Mombasa/Block XVII/92 pending the hearing and determination of the suit.
 - f. That costs of this Application be provided for.
4. The Application was supported by the grounds, testimonial facts and averments made out under the 17th paragraphed Supporting Affidavit sworn by Hadija Abdirahman, the Plaintiff herein on 23rd February, 2022 where she averred that:-
- a. She instituted suit against the 1st Defendant/Respondent and 3 others, vide Pplaint dated 27th July 2021 together with a notice of motion application and dated 27th July 2021 filed on 28th July 2021.
 - b. Directors on the application were taken first and heard, parties filed their submissions and were given a ruling date of 7th March 2022.
 - c. An Order was made on the 7th March, 2022 by Hon. Justice L. L. Naikuni, when the Honourable Judge delivered by reading out the entire Ruling and and final Orders. A copy of which is annexed and marked as “HA – 1”.
 - d. As per the ruling, in particular the contents of Paragraphs 33 and 34 of the said ruling, the Court issued preservative Orders to preserve the suit property and no party was to do anything until the conclusion of the matter.
 - e. Both the Plaintiff/Applicant and the 1st Defendant/Respondent were present in Court by themselves and/or by their Counsels and/or by agent as captured on page 10 of the ruling.
 - f. The 1st Defendant/Respondent was and is still well aware of the preservative Orders herein.
 - g. The 1st Defendant/Respondent through his employees, servants, agents and or any other persons acting as such has intentionally acted in flagrant and contemptuous breach of valid Orders of this Honourable Court issued on the 7th of March, 2022; in the ruling of the Court having been issued and or delivered in their presence and/or their advocate/agent.
 - h. The 1st Defendant/Respondent had through his employees, servants, agents and /or any other third-party persons acting as such decided to destroy the Plaintiff’s fence that was in place to gain access to the suit property and had started building and or developing the suit property. (Annexed and Marked as ‘HA-2 a & b’ are photos showing the damaged barbed wire fence).
 - i. The 1st Defendant/Respondent through himself and/or third party claiming as such had brought building materials to the suit property and has further brought masons and/



or building personnel's and had started developing and/or building on the suit property. (Annexed and Marked as 'HA - 3 a - e' were photos showing the building materials and the masons/building personnel's).

- j. The 1st Defendant/Respondent had deliberately chosen this time to start building with an aim to collapse the hearing date of 1st March 2023, and or with an aim to deceive the court at the time of hearing that he is the one in possession which was untrue and misleading.
- k. The 1st Defendant/Respondent had conducted himself with the sole aim of frustrating the Plaintiff's/Applicant's claim and his actions had rendered the validity of the Court Orders nugatory.
- l. The 1st Defendant/Respondent and /or any other third-party person acting as such had however gone further to willfully, deliberately and continuously violate the said order by not preserving the suit property as per the Court Orders and decided to develop it.
- m. The blatant disobedience of this Court's Order had put the image of this Court into disrepute and was calculated to bring dishonor in the sight of the public who hold the Court in high regard.
- n. Issuing the orders sought will not prejudice the parties.
- o. The orders sought will not prejudice the parties.
- p. In the interest of justice it is only fair that the orders sought be granted forthwith.

III. The 1st Defendant's/Respondent's Case

- 5. The 1st Defendant, Bhupendra Rathod filed an 11 paragraphed Replying Affidavit dated 2nd June, 2023 opposing the application on the following grounds: -
 - a. Before he purchased this property, there were squatters who were removed by the 3rd Defendant. This was part of the court record.
 - b. After he took possession, he erected a 3rd Defendant. This was part of the court record.
 - c. The Plaintiff/Applicant had never occupied the suit property at any time nor does she have any structure on the suit property. It is a total fabrication for her to allege that he had destroyed her fence.
 - d. He had done any of the alleged acts set out in the affidavit by the Plaintiff/Applicant.
 - e. He was equally not aware of any court order stopping him from using the suit property as a car wash as this never changed the title of the suit property.
 - f. What was on the ground is only the car wash which he had already commenced before he sought the advice from his advocates.
 - g. In any case, the alleged contempt of court order never existed as alleged or at all.

IV. Submissions

- 6. On 1st March, 2023 while all the parties were present in Court, they were directed to have the Notice of Motion application dated 23rd February, 2023 be disposed of by way of written submissions. Subsequently, all the parties complied. On 19th July, 2023 the Honourable Court directed that it would deliver the Ruling on Notice accordingly.



V. Analysis and Determination

7. I have carefully read and considered the pleadings herein and the relevant provisions of the Constitution of Kenya, 2010 and statutes made by the by the Learned Counsels. In order to arrive at an informed decision, the Honorable Court has three (3) framed the following issues for determination.
 - a. Whether the Notice of Motion application dated 23rd February, 2023 holding the 1st Defendant/Respondent being In breach of the orders of this Court delivered on 7th March, 2022 meets threshold required of a temporary injunction under Order 40 Rules 3 of the Civil Procedures Rules, 2010.
 - b. Who will bear the Costs of Notice of Motion application dated 1st August, 2022.

Issue No. a). Whether the Notice of Motion application dated 23rd February, 2023 holding the 1st Defendant/Respondent being In breach of the orders of this Court delivered on 7th March, 2022 meets threshold required of a temporary injunction under Order 40 Rules 3 of the Civil Procedures Rules, 2010.

8. The main substratum of this matter is whether the 1st Defendant/Applicant was in disobedience and/or breach of the Injunction orders granted by this Court under the provision of Order 40 Rules 1, 2 and 3 of the Civil Procedures Rules, 2010 on 7th March, 2022 while in the presence of the parties and their Advocates. Further, what are the consequences of such breaches in law. In so doing, this Court has now carefully considered the instant Notice of Motion application, the general Court records and the annextures thereto.
9. From the nature of this matter herein, the Honorable Court has decided to look into the concept of the Contempt of court in details. It is that conduct or action that defies or disrespects authority of court. Black Law Dictionary 9th Edition defines it as:-

“The act or state of despising the conduct of being despised conduct that defies the authority or dignity of a court or legislature. Because such conduct interferes with administration of Justice”
10. In the cases of:- “*Christine Wangari Gachege v Elizabeth Wanjiku Evans & 11 Others* Civil No. 3 of 2013 and in the “*Gatharia Mutitika v Babarini Farm Limited* Civil Appeal No. 24 of 1985 where Courts held inter alia:-

“A contempt of court is an offence of Criminal Character a man may be sent to prison. The standard of Proof in contempt proceedings must be higher than proof on a balance of probabilities almost but not exactly beyond reasonable doubt. The quilt of a Contemptor has to be proved with strictness of proof as it is consisted with the gravity of charge”.
11. Properly put, contempt is the conduct that impairs the fair and efficient administration of justice. From the very onset, this Court takes cognizance to the fact that the Contempt of Court Act, No. 46 of 2016 was declared constitutionally invalid and nullified in 2018 for lack of public participation as required under Articles 10 and 118 (b) of the Constitution and for encroaching on the independence of the Judiciary as founded in the case of “*Kenya Human Rights Commission v Attorney General & Another* [2018] eKLR. In the given circumstances, this court is compelled to revert to the provision of the law that operated before the emanated of the Contempt of Court Act – the Judicature Act and the Supreme Court Rules of England.



12. Under the provisions of Section 5 of the *Judicature Act*, Cap. 8 of the Laws of Kenya confers jurisdiction on the superior courts to punish for contempt provides thus:-

“The High Court of Appeal shall have the same powers to punish for contempt of court as is for the time being possessed by the High Court of England and that power shall extend to upholding the authorities and dignity of sub - ordinate courts.

Additionally, under Section 27 of the *Environment and Land Court Act* Provides 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 (Kshs. 20,000,000/=) to imprisonment for a term not exceeding two years or to both.

13. To attain the ingredients of Contempt, the Courts of this Jurisdiction and elsewhere have deliberated on the matter extensively and there are a myriad of decisions to that effect. I wish to refer to just but a few of them herein:-

In the case of “*Charity Mpano Ntiyine v China Communication Constructions Company Limited & National Environment and Management Authority* [2017] eKLR. Court held that there are three

- (3) elements that must be proved in contempt proceedings. These are:-
- a. Applicant must demonstrate terms of orders
 - b. Applicant must demonstrate knowledge of terms by the Respondents and
 - c. Applicant must demonstrate failure of Respondent to comply with the court order.

Further to this, another useful case is that of:- “*Kristen Carla Burchell v Barry Grant Burchell*, Eastern Cape Division Case No. 364 of 2005” where it held that in order to succeed in civil contempt proceedings, an 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. In a matter of placing more emphasis onto the expected legal ingredients of Contempt of court, this Court has further relied on the decision of “*Sheila Cassatt Issenberg & another v Antony Machatha* [2021] eKLR, the court held that:-

“.....in cases of Contempt the guilt has to be proved with such strictness of proof as is consistent with the gravity of the charge... Recourse ought not to 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 party of the judge 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... 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 contempt is alleged to or has been committed, and or 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”.



14. Additionally, in the case of: “[Woburn Estate Limited v Margaret Bashforth](#) [2016] eKLR” the Court of Appeal held as follows:

“For many years in the history of the Judiciary of Kenya the Courts have, pursuant to section 5 (1) of the *Judicature Act*, resorted to the prevailing law of England in the exercise of the power to punish for contempt of Court.....

Today that position has drastically changed, starting with the establishment of the Supreme Court which was not envisaged when Section 5 of the *Judicature Act* was enacted. By Act No.7 of 2011, Article 163 (9) of the *Constitution* was operationalized by the enactment of the *Supreme Court Act* (CAP 9A), which among other things, makes express provision for the power of the Supreme Court to punish for contempt.

Under Section 29 of the *Environment and Land Court Act*, it is an offence punishable, upon conviction to a fine of not exceeding Kenya Shillings Twenty Thousand (Kshs. 20,000,000) or to imprisonment for a term not exceeding two years, or to both, if any person refuses, fails or neglects to obey an order or direction of the Court given under the Act.

We have gone to this great length to demonstrate how, before the passage of these legislations the powers of the High Court and this Court to punish for contempt of Court were dynamic and kept shifting depending on the prevailing laws in England. Today each level of Court has been expressly clothed with jurisdiction to punish for contempt of Court. The only missing link is the absence of the rules to be followed in commencing and prosecuting contempt of Court Applications.”

15. Lastly, in the case of “[Samuel M. N. Mweru & Others v National Land Commission & 2 others](#) [2020] eKLR” the Court held that:-

“A Court without contempt power is not a Court.[30] The contempt power (both in its civil and criminal form) is so innate in the concept of jurisdictional authority that a Court that could not secure compliance with its own judgments and orders is a contradiction in terms, an “oxymoron.” Contempt power is something regarded as intrinsic to the notion of Court; even obvious, I would say. In the common lawyer’s eye, the power of contempt “is inherent in Courts, and automatically exists by its very nature.....”

A Court order is binding on the party against whom it is addressed and until set aside remain valid and is to be complied with. Article 159(1) of the *Constitution* provides that judicial authority is derived from the people and vests in, and shall be exercised by, the Courts and tribunals established by or under the *Constitution*. Under Article 10(1) of the *Constitution* the national values and principles of governance in the Article bind all State organs, State officers, public officers and all persons whenever any of them (a) applies or interprets the *Constitution*; (b) enacts, applies or interprets any law; or (c) makes or implements public policy decisions. Under clause (2) (a) of the same Article the national values and principles of governance include the Rule of Law.

It is a crime unlawfully and intentionally to disobey a Court order.

This type of contempt of Court is part of a broader offence, which can take many forms, but the essence of which lies in violating the dignity, repute or authority of the Court. [36] The offence has in general terms received a constitutional ‘stamp of approval, ‘since the Rule of



Law – a founding value of the *Constitution* – ‘requires that the dignity and authority of the Courts, as well as their capacity to carry out their functions, should always be maintained.’

16. From these cases, it is trite law that the contempt of court is such a serious offence which borders on criminality and the consequences are extremely serious. In this case, the Plaintiff/Applicant in its application cited and invoked the provision of under Order 40 Rule 3 of the [Civil Procedure Rules, 2010](#). The application in this matter is anchored under Order 40 Rule 3(1) which states as follows:-

“In cases of disobedience or breach of any such terms, the Court granting an injunction may order the property of the person guilty of such disobedience or breach to be attached and may also order such person to be detained in prison for a term not exceeding six months unless in the meantime, the Court directs his release.”

17. This provision provides that cases of disobedience or of breach of any terms of a temporary injunction the court granting that injunction may order the property of the person guilty of such disobedience or breach to be attached and may also order such person to be detained in prison for a term of not exceeding six (6) months unless the court directs his release. The reason why courts punish for contempt is to uphold the dignity and authority of the court, ensure compliance with directions of the court observance and respect of due process of law, preserve an effective and impartial system of justice and maintain public confidence with administration of justice by court. Without sanctions of contempt there would be a serious threat to the rule of law and administration of justice for a party to be cited for contempt he must have violated and/or disobeyed an order that was directed at him.

18. Clearly, the above provisions of law is applicable when there is disobedience of an order of injunction. Accordingly, and applying these principles to the instant case, .the Plaintiff/Applicant alleges that the 1st Defendant/ Respondent is in contempt of the court orders issued on 7th March, 2022 by this Court where the Honourable Court as per the ruling and as articulated in paragraphs 33 and 34 of the said ruling, the Court issued preservative Orders to preserve the suit property and no party was to do anything until conclusion of the matter. The Court is called upon to determine whether the said 1st Defendant/Respondent is in Contempt of the said Court Order and if so what orders should attach?

19. Therefore, from the above description, it is clear that Contempt of Court is a serious conduct as it undermines the authority of the Court. Indeed, numerous decision have held that Court Orders are not cosmetic nor a formality. They are there to be obeyed. Should a party feel aggrieved by a Court Order the only remedy available s to move Court for it to be set aside, reviewed or varied or discharged. Certainly, not to disobey it. The consequences of disobedience of Court order border on criminality where the liberty of an individual is at stake. Indeed Courts do frown on cases of Contempt of Court because such actions do undermine the authority and dignity of the Court. In the case of “[Teachers Service Commission v Kenya National Union of Teachers & 2 Others](#) [2013] eKLR”, the Court held that:-

“A Court Order is not a mere suggestion or an opinion or a point of view. It is a directive that is issued after much thought and with circumspection. It must therefore be complied with and it is in the interest of any person that this remains the case. To see it in any other way is to open the door to chaos and anarchy”

20. From the sworn affidavits, annexure’s, submissions by the respective parties’ Counsels on record, the applicable law and the decided cases, the following issues stand out for determination:-
- i. Whether there was a valid Court order issued by this Court on the 7th March, 2022 by this Honourable Court



- ii. Whether the 1st Defendant/Respondent herein was served with or was aware of the orders made on 7th March, 2022.
 - iii. Whether the order as sought and extracted was clear and unambiguous
 - iv. Whether the Respondents are guilty of contempt of Court order herein issued.
21. In the instant case, the Plaintiff/Applicant's case is that an order was made on the 7th March, 2022 by Hon. Justice L. L. Naikuni, when the Honourable Judge was delivering his Ruling and read the entire ruling and final Orders that he gave. As per the ruling and as articulated in paragraphs 33 and 34 of the said ruling, the Court issued preservative Orders to preserve the suit property and no party was to do anything until conclusion of the matter. Both parties, the Plaintiff/Applicant and the 1st Defendant/Respondent were physically present in Court by themselves and/or by counsel and/or by agent as captured on page 10 of the ruling. May I correct that as it was page 27 of the Ruling instead. According to the Plaintiff/Applicant, the 1st Defendant/ Respondent has through his employees, servants, agents and/or any other third-party persons acting as such decided to destroy the plaintiff's fence that was in place to gain access to the suit property and has started building and or developing the suit property. The 1st Defendant/ Respondent has deliberately chosen this time to start building with an aim to collapse the hearing date of 1st March 2023, and or with an aim to deceive the court at the time of hearing that he is the one in possession which is untrue and misleading. On the Contrary, the 1st Defendant/Respondent stated that he purchased the suit property at a time which there were squatters who were removed by the 3rd Defendant. He erected a barbed wire fence and out in place his security. The Plaintiff/Applicant has never occupied the suit property at any time nor does she have any structure on the suit property. It is a total fabrication for her to allege that he had destroyed her fence. He had not done any of the alleged acts set out in the affidavit by the Plaintiff/Applicant. And was equally not aware of any court order stopping him from using the suit property as a car wash as this does not change the title of the suit property.
22. On the 1st issue of determination, there is no doubt that on 7th March, 2022, the Court sat for purposes of giving directions on an application before this Honorable Court for hearing and determination is the Notice of Motion dated 27th July 2021. It is brought by the Plaintiff/Applicant under the Provisions of Sections 1A, 1B, & 3A of the *Civil Procedure Act*, Cap. 21 Order 40 Rules 1, 2, & 4, Order 51 Rule 1 of the *Civil Procedure Rules* 2010 and Rule 3 (3) and 23 of the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules* 2013. (Hereinafter referred to as the "The Mutunga Rules"). The Applicant herein in the application sought for an order of injunction restraining the 1st, 2nd and 3rd Defendants/Respondents jointly and severally by themselves, their agents, servants, employees, assignees, third parties and/or any other party from selling, transferring, charging, claiming, building, fencing, taking possession, leasing, demanding rent, auctioning, building, developing, registering transfer, subdividing and/or dealing or interfering in any other manner with the subject property known as Mombasa/Block/XVII/92 pending the hearing and determination of the suit.
23. Indeed the Court had issued an ex parte interim orders in terms of prayer 1 and 2 of the Plaintiff/Applicant's Application that in order to preserve the said subject suit that the parties herein do maintain the status quo as at the moment the Application was filed, pending the hearing of the application inter-parties. Which orders stand dismissed by the ruling delivered on 7th March, 2022 where he held as follows:-

" 34. Having said that much, there will be need to preserve the suit land in the meantime. In a nutshell, I proceed to order the following:-



- i. That the Notice of Motion dated 27th July 2021 by the Plaintiff/Applicant be and is unmerited and is hereby dismissed with costs to the 1st, 2nd and 3rd Defendants/Respondents who participated in the hearing of the application.
- ii. That for the seek of preserving the suit land, pursuant to the provisions of Section 68 of the *Land Registration Act* 2012, there be an Order of Inhibition inhibiting the registration of any dealings with Mombasa/Block XVII/92 until further orders of this court or until this suit is heard and finally determined.
- iii. That the Plaintiff/Applicant be and is hereby ordered to make an application to the Land Registrar, Mombasa, under Regulations 79 of the *Land Registration (General) Regulations*, 2017 for the registration of the Inhibition order issued in (1) within the next thirty (30) days from the date of this ruling at her Costs.
- iv. That for the sake of expediency, this suit should be fixed for hearing and be disposed off within the next ninety (90) days from this date. There should be a mention on 25th April, 2022 for purposes of conducting an intensive Pre – Trial Conference and fixing an appropriate hearing date thereof.
- v. That the Plaintiff/Applicant to bear the costs of the Notice of Motion Application hereof.

It Is So Ordered Accordingly.

24. It is clear that this Honourable Court gave an order only with regard to the preservation of the suit land, pursuant to the provisions of Section 68 of the *Land Registration Act* 2012, inhibiting the registration of any dealings with Mombasa/Block XVII/92 until further orders of this court or until this suit is heard and finally determined. The Court did not give any directions in terms of the dealing of the suit.
25. On the second issue as to whether the 1st Defendant/ Respondent was aware of the orders made, I have previously in this Ruling stated that as per the Court records all parties to the suit were present during the delivery of the Ruling on 7th March, 2022. I find that as a general rule, no order of Court requiring a person to do or to abstain from doing any act may be enforced (by committing him/her for contempt) unless a copy of the order has been served personally on the person required to do or abstain from doing the act in question, or that the person had the knowledge of an order which supersedes personal service.
26. In the old celebrated case of “*Exparte Langely 1879*, 13 Ch D/10 (CA)” Thesiger L.J stated at P. 119 as follows:-

“...the question in each case, and depending upon the particular circumstances of each case, must be, was there or was there not such a notice given to the person who is charged with contempt of Court that you can infer from the facts that he had notice in fact of the order which has been made” And, in a matter of this kind, bearing in mind that the liberty of the subject is to be affected, I think that those who assert that there was such a notice ought to prove it beyond reasonable doubt.”



27. To this end, I am not convinced that there were an orders by this Court disobeyed by the 1st Defendant/ Respondent and I am well aware that he had knowledge of the existence of the Order in question.
28. On the 3rd issue for determination as to whether the order as sought and extracted was clear and unambiguous, I find that pursuant to the issuance of the order for parties to maintain the status quo as herein above captioned, the said order, was only on the registration on the inhibition and the said application seeking injunctive orders was found to lack merit. Clearly from this Court's ruling on 7th March, 2022 there was nothing ambiguous or unclear that was not stated and the parties were all present in Court so they could have sought clarity on issues they had not understood. The Applicant has argued that the 1st Defendant/ Respondent had gone contrary to the orders of the Court. On the other hand, the 1st Defendant/ Respondent had told this court that the only thing he had done on the land was to continue with the running of his car wash which does not in any way affect the title of the land. I find that the terms of the orders given on 7th March, 2022 and the Court will not punish one for an order the party misinterpreted. The Court of Appeal case of:- "[*Shimmers Plaza Limited v National Bank of Kenya Limited*](#) [2015] eKLR" emphasized that:-
- “It is important however, that the Court satisfies itself beyond any shadow of a doubt that the person alleged to be in contempt committed the act complained of with full knowledge or notice of the existence of the order of the Court forbidding it. The threshold is quite high as it involves possible deprivation of a person's liberty.”
29. Contempt proceedings are of a criminal nature and involve, if proved, loss of liberty. The Applicant must therefore endeavor to prove all facts relied on by way of evidence beyond reasonable doubt. It is not like in the case of any other ordinary matter like service of summons to enter appearance or hearing notice upon a party, where, even if service was regular, Courts have found that ex parte proceedings or judgment made in default could still be set aside on terms in the discretion of the Court.
30. In the end, I discern and in my own view that the Plaintiff/Applicant has not proved to the required standard that the 1st Defendant/ Respondent as cited was in brazen disobedience of the court order issued by this Court on 7th March, 2022.

Issue No. b). Who will bear the Costs of Notice of Motion application 23rd February, 2023.

31. It is now well established that the issue of Costs is a discretion of the Court. Costs mean the award a party is awarded at the conclusion of a legal action or proceedings in any litigation. The provision of Section 27 (1) of the [*Civil Procedure Act*](#), Cap. 21 holds that costs follow the events. By event it means the results or outcome of the legal action or proceedings. See the decisions of Supreme Court "[*Jasbir Rai Singh v Tarchalan Singh*](#) eKLR [2014]" and "[*Cecilia Karuru Ngayo v Barclays Bank of Kenya Limited*](#), eKLR [2014]".
32. In this case, as Court finds that the Plaintiff/Applicant has not fulfilled the conditions set out under Order 40 Rule 3 of the [*Civil Procedure Rules*](#), 2010. Thus, this Notice of Motion application dated 23rd February, 2023 shall be deemed to lack merit and is hereby dismissed with costs to be awarded to the 1st Defendant for participating in the application fully.

VI. Conclusion & Disposition

33. In long analysis, the Honorable Court has carefully considered and weighed the conflicting parties' interest as regards to balance of convenience. Clearly, the Applicant has a case against the Respondent.



34. Having said that much, there will be need to preserve the suit land in the meantime. In a nutshell, I proceed to order the following:-
- a. That the Notice of Motion application dated 23rd February, 2023 by the Plaintiff/Applicant be and is hereby found to be unmerited and is dismissed with costs to the 1st Defendant who participated in the hearing of the Application.
 - b. That prayer two which was granted on the interim pending the hearing and determination of this application be and is hereby vacated.
 - c. That I decline to grant the orders sought by the Plaintiff/Applicant and that the 1st Defendant/ Respondent is acquitted of the charge of being in Contempt of Court.
 - d. That for expediency sake, the scheduled hearing dates of 11th & 12th March, 2024 to remain intact as scheduled.
 - e. That the 1st Defendant/ Respondent is hereby awarded the costs of the Notice of Motion application dated 23rd February, 2023.

It is so Ordered Accordingly.

RULING DELIVERED VIA MICROSOFT TEAMS VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA THIS 4TH DAY OF OCTOBER 2023.

.....
HON. JUSTICE L. L. NAIKUNI (JUDGE)

ENVIRONMENT AND LAND COURT AT MOMBASA

Ruling delivered in the presence of:

- a. M/s. Yumna, Court Assistant;
- b. Mr. Lianza Advocate holding brief for Mr. Ondieki Advocate for the Plaintiff/Applicant.
- c. Mr. Munyithya Advocates for the 1st Defendant/Respondent.
- d. No appearance for the 2nd Defendant.
- e. M/s. Kaguri for the 3rd Defendant.
- f. No appearance for the 4th Defendant.

