



Musa & 6 others v Kassam & 4 others (Environmental and Land Originating Summons 133 of 2015) [2023] KEELC 21590 (KLR) (7 November 2023) (Ruling)

Neutral citation: [2023] KEELC 21590 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENTAL AND LAND ORIGINATING SUMMONS 133 OF 2015
LL NAIKUNI, J
NOVEMBER 7, 2023**

BETWEEN

**ALI MOHAMED MUSA 1ST PLAINTIFF
ALEX MASA GWEDE 2ND PLAINTIFF
GEORGE OKUMU WANYAMA 3RD PLAINTIFF
TUKO KADZOYO TUKU 4TH PLAINTIFF
CHARLES RAMA AMOS 5TH PLAINTIFF
RASHID NASORO GANZORI 6TH PLAINTIFF
MOHAMED MVOO MUSA 7TH PLAINTIFF**

AND

**MAHMOOD KASSAM 1ST DEFENDANT
JAFFER KASSAM 2ND DEFENDANT
ESMAIL KASSAM 3RD DEFENDANT
MUSA KASAM 4TH DEFENDANT
ESSAK KASSAM 5TH DEFENDANT**

RULING

I. Introduction

1. The application before this Honorable Court for hearing and determination of the Notice of Motion application dated 10th March, 2023. It is brought by the Applicant under the provisions of Sections



1A, 1B and 3A of the Civil Procedure Act, Sections 3, 4 & 5 of the Contempt of Court Act and Article 40 Constitution of Kenya, 2010.

2. The Defendants opposed the application upon service through Grounds of objection dated 8th May, 2023.

II. The Applicants' case

3. The Applicants sought for the following orders:-
 - a. That this Honourable Court be pleased to issue an Order to the Plaintiff/Respondent to attend Court and show Cause why he should not be punished for Contempt of a Court Order issued upon him on 16.06.2022 directing that status quo should be maintained meaning that there should be no construction, harassment of the habitants on the suit land or any other activity until the matter is heard and fully determined.
 - b. That this Honourable Court be pleased to hold the Defendants/Respondents in contempt of the Court Orders issued on 16.06.2022.
 - c. That this Honourable Court be pleased to issue an Order enforcing the Court Order issued on 16.06.2022.
 - d. That the Honourable Court be pleased to issue an Order to the Officer Commanding Station at Bamburi Police station to assist in enforcement of the said Orders.
 - e. That the costs be in the cause.
4. The Application was supported by the 7 paragraphed affidavit sworn by Alex Masa Gwede, the Plaintiffs herein on 10th March, 2023 where he averred that:
 - i. There was a dispute on who is the registered proprietor of all that parcel of land known as L.R. No. 819/II/MN measuring 314 Hectares.
 - ii. This Honourable Court gave directions and an Order dated 17.06.2022 that status quo should be maintained on the suit property to prevent a party from being prejudiced.
 - iii. The Defendants/ Respondents have proceeded to start construction of a wall in total disobedience of the said orders.
 - iv. The Defendant should be cited for Contempt of Court Orders and should be committed to civil jail.
 - v. It will be in the interest of justice if the application is allowed as prayed.

III. The Defendants' case

5. The Defendants/ Respondents through a 3 paragraphed grounds of opposition dated 8th May, 2023 opposed the Plaintiff's Notice of Motion dated 10th March, 2023 on the following grounds: -
 - a. The annexure marked AMG-2 has failed to comply with the mandatory conditions of Section 65 (5) (6) (8 and (9) of the Evidence Act
 - b. The Application refers to Parcel No. L.R. No.819/II/MN while the Plaintiffs claim in reference to Land Title No. CR. 324/III/MN.



- c. That the application has been filed by a Firm of Advocates that is not properly on record considering that the Firm of Barayan & Associates Advocates filed a Notice of Change of Advocates on 9th November, 2020 and the Plaintiffs filed and served a Notice to Act in person on 27th September, 2021.

IV. Submissions

6. On 12th June, 2023 while all the parties were present in Court, they were directed to have the Notice of Motion application dated 10th March, 2023 be disposed of by way of written submissions and all the parties complied. Pursuant to that all the parties obliged but none of the parties filed submissions and on 27th July, 2023 a ruling date was reserved on Notice by the Honourable Court accordingly.

V. Analysis and Determination

7. I have carefully read and considered the pleadings herein and the relevant provisions made by the by the Learned Counsels. In order to arrive at an informed decision, the Honorable Court has five (5) framed the following issues for determination.
8. The court is of the opinion that a notice to show cause under Order 17 Rule 2 of the Rules need not be served personally upon the concerned parties in the same manner as a summons to enter appearance under Order 5 of the Rules. The court concurs with the decision of the High Court in Fran Investments Ltd Vs G4S Security Services Ltd [2015] eKLR that a notice to show cause only needs to be brought to the “notice” of the parties concerned as opposed to being “served” upon them. The court is thus satisfied that the notice to show cause was brought to the notice of the Plaintiff in the manner prescribed by the court, that is, through registered post which was adequate notice for purposes of Order 17 Rule 2 of the Rules.
 - a. Whether the firm of Barayan & Associates Advocates is properly on record?
 - b. Whether the annexure marked AMG – 2 has failed to comply with the mandatory conditions of Section 65 (5) (6) (8 and (9) of the Evidence Act?
 - c. Whether the Plaintiffs are seeking possession in Parcel No. LR. No.819/II/MN or the Land Title No. CR. 324/III/MN which is the suit property reference in the judgment?
 - d. Whether the Defendants/ Respondents are in contempt of the Court Orders issued on 16th June, 2022.
 - e. Who will bear the Costs of Notice of Motion application dated 10th March, 2023.

ISSUE a). Whether the firm of Barayan & Associates Advocates is properly on record

9. Order 9 Rule 5 of the Civil Procedure Rules, 2010 provides for change of Advocates as follows:

“A Party suing or defending by an Advocate shall be at liberty to change his Advocate in any cause or matter, without an order for that purpose, but unless and until notice of any change of Advocate is filed in Court in which such cause or matter is proceedings and served in accordance with Rule 5, the former Advocate shall, subject to rules 12 and 13 be considered the Advocate of the party until the final conclusion of the cause or matter, including any review or appeal.”
10. Unless and until a notice of change of Advocate is filed and duly served an Advocate on record for a party remains the Advocate for that party subject to removal from record at the instance of another



party under Rule 12 of the same Order or withdrawal of the Advocate under Rule 13 of the same Order.

11. Order 9, rule 9 of the [Civil Procedure Rules](#) provides as follows;

“When there is a change of Advocate, or when a party decides to act in person having previously engaged an Advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the Court—

- (a) upon an application with notice to all the parties; or
- (b) upon a consent filed between the outgoing Advocate and the proposed incoming Advocate or party intending to act in person as the case may be.”

12. Order 9, rule 10 provides;

“An application under rule 9 may be combined with other prayers provided the question of change of Advocate or party intending to act in person shall be determined first.”

13. In this particular case the Plaintiffs’ advocate on record was Barayan & Associates filed a Notice of Change of Advocate to Ameli Inyangu & Company Advocates on 9th November, 2020. On 24th September, 2021 the Plaintiffs filed a Notice to Act in Person. On 24th May, 2022 the Plaintiffs’ Advocate Ameli Inyangu & Partners Advocates filed a chamber summons dated 24th May, 2022 seeking to be allowed to cease from acting for the Plaintiffs for want of instructions. Barayan & Company advocates appeared for the 2nd and the 7th Plaintiffs.

14. As per order 9 rule 9 the correct procedure to be followed in case of a dismissed suit was to seek leave to come on record, then file and serve the notice of change of Advocates and then file the application to set aside the orders of the Court. In the present case the Counsel for the 2nd and 7th Applicant has not filed a notice with leave of Court to show that he is representing the remaining Plaintiffs. This clearly offends the express provisions of order 9 rule 9. The procedure set out above is mandatory and thus cannot be termed as a mere technicality.

15. Order 9 does not impede the right of a party to be represented by an Advocate of his choice. It only provides rules to impose orderliness in civil proceedings. Any change of Advocate should comply with the rules. Chaos would reign if parties can change Advocates at will without notifying the Court and the other parties. I have noted that the Applicant did not comply with order 9 rule 5 as well. There is no evidence of service to the former Advocate of the change of Advocates filed on record.

16. An Objection raises a point of law that prescribes a mandatory procedure to be followed in matters where a judgment of the Court has since been delivered. Ground 3 on the Notice of Preliminary objection dated 8th May, 2023 by the Defendants is hereby allowed. The firm of Barayan & Associates is only allowed to conduct themselves within the claim of the 2nd and 7th Plaintiffs.

ISSUE b). Whether the annexure marked AMG – 2 has failed to comply with the mandatory conditions of Section 65 (5) (6) (8 and (9) of the [Evidence Act](#).

17. The [Evidence Act](#) provided that documentary evidence could be either primary or secondary. Section 65 of the [Evidence Act](#) provides as follows:-

65.

- (1) Primary evidence means the document itself produced for the inspection of the court.



- (2) Where a document is executed in several parts, each part is primary evidence of the document.
- (3) Where a document is executed in counterpart, each counterpart being executed by one or some of the parties only, each counterpart is primary evidence as against the parties executing it.
- (4) Where a number of documents are all made by one uniform process, as in the case of printing, lithography or photography, each is primary evidence of the contents of the rest; but where they are all copies of a common original they are not primary evidence of the contents of the original.
- (5) Notwithstanding anything contained in any other law for the time being in force-
 - a. a micro-film of a document or the reproduction of the image or images embodied in such micro-film; or
 - b. a facsimile copy of a document or an image of a document derived or captured from the original document; or
 - c. a statement contained in a document and included in printed material produced by a computer (hereinafter referred to as a “computer print-out”) shall, if the conditions stipulated in subsection (6) of this section are satisfied, be deemed to also be a document for the purposes of this Act and shall be admissible in any proceedings without further proof of production of the original, as evidence of any contents of the original or of any facts stated therein of which direct evidence would be admissible.
- (6) The conditions referred to in subsection (5) in respect of a computer print-out shall be the following, namely-
 - (a) the computer print-out containing the statement must have been produced by the computer during the period in which the computer was regularly used to store or process information for the purposes of any activities regularly carried on over that period by a person having lawful control over the use of the computer;
 - (b) the computer was, during the period to which the proceedings relate, used in the ordinary course of business regularly and was supplied with information of the kind contained in the document or of the kind from which the information so contained is derived;
 - (c) the computer was operating properly or, if not, that any respect in which it was not operating properly was not such as to affect the production of the document or the accuracy of its content;
 - (d) the information contained in the statement reproduces or is derived from information supplied to the computer in the ordinary course of business.
- (7) 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 subsection (6) was regularly performed by computers, whether -
 - a. by a combination of computers operating over that period;



- b. by different computers operating in succession over that period; or
- c. by different combinations of computers operating in succession over that period; or
- d. in any other manner involving the successive operation over that period, in whatever order, of one or more computers and one or more combination of computers, all computers used for that purpose during that period shall be treated for the purposes of this section as constituting a single computer; and references in this section to a computer shall be construed accordingly.

(8) In any proceedings under this Act where it is desired to give a computer print-out or statement in evidence by virtue of this section, a certificate doing any of the following things, that is to say-

- (a) identifying a document containing a print-out or statement and describing the manner in which it was produced;
- (b) giving such particulars of any device involved in the production of that document as may be appropriate for the purpose of showing that the document was produced by a computer;
- (c) dealing with any of the matters to which the conditions mentioned in the subsection (6) relate, which is certified by a person holding a responsible position in relation to the operation of the relevant device or the management of the activities to which the document relates in the ordinary course of business shall be admissible in evidence.

(9) For the purposes of this section -

- (a) information shall be deemed to be supplied to a computer if it is supplied in any appropriate form and whether it is so supplied directly or (with or without human intervention) by means of any appropriate equipment;
- (b) information shall be deemed to be supplied in the ordinary course of business if the information was obtained, received or supplied with a view to it being processed, stored or retrieved in the ordinary course of business; and
- (c) a document shall be deemed to have been produced by a computer whether it was produced by it directly or (with or without human intervention) by means of any other appropriate equipment connected to such computer.

18. Primary evidence had been defined as the document itself. Section 65 (1) provided that primary evidence meant the document itself produced for the inspection of the court.

19. Technology had made it easy for hearings of matters to move from the conventional physical court sittings to virtual ones. The Covid-19 Pandemic revolutionized the manner in which, in Kenya and many other parts of the world, court sessions and filing of documents were done. Where then courts use technology to conduct hearings in which there was need to rely on documentary evidence, the procedure of producing the document itself for inspection by court could not be the only way of doing things. In some cases, the evidence could be presented electronically, by a simultaneous display to all parties via courtroom monitors, thereby ensuring that all involved were looking at the same item of evidence at the same time. Thus, even where the document was not produced physically in court



for inspection, the original document should have been displayed by monitors to the court for it to appreciate its state. Where it required that documents were to be filed online in court it was advisable that a colour scan be used for the documents.

20. Section 106 A provides that electronic records may be proved in accordance with the provisions of section 106B. Section 106B of the *Evidence Act* states that:

- “(1) Notwithstanding anything contained in this Act, any information contained in an electronic record which is printed on 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 the 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 subsection (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) ...”

21. On the other hand, Section 65 (8) of the [Evidence Act](#) states:

- “(8) In any proceedings under this Act where it is desired to give a computer print-out or statement in evidence by virtue of this section, a certificate doing any of the following things, that is to say —
 - (a) identifying a document containing a print-out or statement and describing the manner in which it was produced;
 - (b) giving such particulars of any device involved in the production of that document as may be appropriate for the purpose of showing that the document was produced by a computer;
 - (c) dealing with any of the matters to which conditions mentioned in the subsection (6) relate, which is certified by a person holding a responsible position in relation to the operation of the relevant device or the management of the activities to which the document relates in the ordinary course of business shall be admissible in evidence.”

22. On a plain reading, the above sections impose similar conditions for the production of documentary and electronic record evidence. Secondly section 106 A as read with section 106B (4) require that the certificate envisaged be produced where it is desired to produce electronic records as evidence. This Honourable Court takes note that no certificate has been filed to support annexure marked AMG – 2 which is a computer printout which constitutes electronic evidence and the Plaintiff is required to tender the certificate envisaged in section 106B (4) in order to do so.



23. The Court of Appeal in “*County Assembly of Kisumu & 2 others v Kisumu County Assembly Service Board & 6 others* [2015] eKLR” while discussing the application of Section 106 (B) observed that:

“Section 106B of the *Evidence Act* states that electronic evidence of a computer recording or output is admissible in evidence as an original document “if the conditions mentioned in this section are satisfied in relation to the information and computer.”

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”.

24. The court proceeded to consider the requisite contents of a certificate meeting the conditions in the section before stating that:

“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.”

25. Similarly, in “*John Lokitare Lodinyo vs I.E.B.C and 2 Others* [2018] eKLR” the Court of Appeal in reiterating its above decision stated that:

“Essentially, the sections provide that electronic evidence which is printed out shall be treated like documentary evidence and will be admissible without production of the computer used to generate the information. The appellant claimed that his technical team downloaded the forms and had them printed. He admitted that the forms were from the IEBC public portal. Ordinarily, this would have meant accessing the IEBC portal, which one could only do if they had access to the internet, proceeding to log onto the IEBC portal page, clicking on the Forms 35A uploaded on Kacheliba Constituency, downloading the Forms 35A onto the computer’s hard disk and finally printing the documents via a printer connected to the computer... It is at this juncture that the provisions of Section 106B of the *Evidence Act* come into play as the section sets out the conditions to be fulfilled to have this evidence admissible since evidence shall only be admissible if a certificate is presented identifying the electronic record and a description of the manner in which the electronic evidence was produced, together with any particulars of any device involved in the production of that document, which the appellant did not do.”

26. The Plaintiff in this case cannot run away from the requirements of section 106 A and B of the *Evidence Act*, however the electronic evidence was retrieved. In this regard, the annexure marked as AMG – 2 was filed without compliance of the mandatory conditions of Section 65 (5) (6) (8 and (9) of the *Evidence Act* as a result of which it has been expunged from the records of the Court.

Issue c). Whether the Plaintiffs are seeking possession in Parcel No. LR. No.819/II/MN or the Land Title No. CR. 324/III/MN which is the suit property reference in the judgment.

27. The Defendant have in their Notice of Objection has argued that the Application refers to Parcel No. LR. No.819/II/MN while the Plaintiffs claim in reference to Land Title No. CR. 324/III/MN which refers to a different suit as regards to the one quoted in the judgment dated 17/1/18. I have gone through the notice of motion application and the supporting affidavit and I find that the said quoting



of the number may have been a typographical mistake therefore this ground of the objection fails as looking at the grounds.

ISSUE d). Whether the Defendants/ Respondents are in contempt of the Court Orders issued on 16th June, 2022.

28. Contempt of Court is defined by *Black Law dictionary* (Ninth Edition) as:-

“Conduct that defies the authority or dignity of a Court. Because such conduct interfere with the administration of justice, it is punishable usually by a fine or imprisonment.”

29. 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 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 Vs 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”

30. In the case of “*Woburn Estate Limited vs 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 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.”

31. Section 5(1) of the *Judicature Act* which provided that:

“The High Court and the Court of Appeal shall have the same power to punish for contempt of Court as is for the time being possessed by the High Court of Justice in England, and that power shall extend to upholding the authority and dignity of subordinate Courts.”



32. 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

33. 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.’

34. It is an established principle of law as was held in the case of “*Kristen Carla Burchell vs Barry Grant Burchell*, Eastern Cape Division Case No. 364 of 2005” 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.

35. 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 16th June, 2022 by this Honourable Court
- ii. Whether the 1st Respondent herein was served with or was aware of the orders made on 16th June, 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.
36. In the instant case, the Applicant's case is that an order was made on the 16th June, 2022 by this Honourable Court where it opined itself as follows:-
- " a). That matter adjourned to 14th October, 2022 as Environment and Land Court No. 3 has to travel to Nairobi for Election of ELC presiding judge.
 - b). That the status quo on the property to be maintained meaning that there will be no construction, harassment of the habitants on the suit land or any other activity until the matter is heard and fully determined.
37. On the 1st issue of determination, there is no doubt that on 16th June, 2022, the Court sat for purposes of giving directions for adjournment. Indeed the Court had issued the order in the presence of all parties.
38. It is clear that this Honourable Court gave an order only in regards to preserving the suit land, pursuant to the provisions of Section 68 of the *Land Registration Act* 2012 with regards to Parcel No. LR. No.819/II/MN until further orders of this court or until this suit is heard and finally determined. The Court gave preservatory orders with regards to the adjournment sought.
39. On the second issue as to whether the Defendants were 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 when the order was made on 16th June, 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.
40. 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."
41. To this end, being that the Court previously expunged annexure AMG – 2 for Plaintiffs having failed to comply with the mandatory conditions of Section 65 (5) (6) (8 and (9) of the *Evidence Act*, the Plaintiffs have not produced any evidence to support that the Defendants have been in contempt of the court orders by this Honourable Court on 16th June, 2022.
42. 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 16th June, 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 Applicants have



argued that the Defendants had gone contrary to the orders of the Court. I find that the terms of the orders given on 16th June, 2022 and the Court will not punish one for an order the party misinterpreted. The Court of Appeal in “*Shimmers Plaza Limited vs 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.”

43. Contempt proceedings are of a criminal nature and involve, if proved, loss of liberty. The Applicants 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.
44. In the end, I find that the Applicants have not proved to the required standard that the Defendants as cited were in brazen disobedience of the court order issued by this Court on 16th June, 2022.

ISSUE e). Who will bear the Costs of Notice of Motion application dated 10th March, 2023.

45. 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 vs Tarchalan Singh* eKLR (2014)” and “*Cecilia Karuru Ngayo vs Barclays Bank of Kenya Limited*, eKLR (2014)”.
46. In this case, as Court finds that the Applicants have failed to convince the court on their Notice of Motion application dated 10th March, 2023 therefore the costs of the suit are awarded to the Defendants to be paid jointly by the Plaintiffs.

VI. Conclusion & Disposition

47. 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.
48. 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 10th March, 2023 by the Plaintiffs/Applicants be and is hereby found to be unmerited and is dismissed with costs to the Defendants who participated in the hearing of the Application.
 - b. That the annexure marked AMG-2 has failed to comply with the mandatory conditions of Section 65 (5) (6) (8 and (9) of the *Evidence Act* and is hereby expunged from the records of this Honourable Court.
 - c. That I decline to grant the orders sought by the Applicants and that the Defendants are hereby found not to be in Contempt of this Honourable Court orders given on the 16th June, 2022.



- d. That an order that there shall be a further hearing of the matter on 15th May, 2024. During the hearing date, directions and the date for conducting a Site Visit (“Locus in Quo”) under the provision of Order 18 Rule 11 of the Civil Procedure Rules, 2010 shall be taken thereof.
- e. That the Defendants/Applicants are hereby awarded the costs of the Notice of Motion application dated 10th March, 2023.

It Is So Ordered Accordingly.

RULING DELIVERED VIA MICROSOFT TEAMS VIRTUAL MEANS SIGNED AND DATED AT MOMBASA THIS 7TH DAY OF NOVEMBER 2023.

.....

HON. MR. JUSTICE LL. NAIKUNI (JUDGE)

ENVIRONMENT AND LAND COURT AT MOMBASA

