



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MACHAKOS**

**ELC CASE NO. 155 OF 2016**

**THE EAST AFRICAN PORTLAND CEMENT COMPANY LIMITED.....PLAINTIFF**

**VERSUS**

**SAMMY KATHILU & 49 OTHERS .....DEFENDANTS**

**CONSOLIDATED WITH**

- 1. PET NO. 40/2016: NAFTARY KARIUKI & OTHERS V EAPCC & ANOTHER**
- 2. JR NO. 90/2016: PATRICK MAINGI NGUKU & OTHERS V EAPCC**
- 3. ELC NO. 1190/2015: SYOKIMAU BRIGHT HOMES & OTHERS V EAPCC**
- 4. MISC. APPL. NO. 428/2015: EAPCC V SAMMY KATHILI & 49 OTHERS**
- 5. JR APPL. NO. 04/2016: PATRICK MAINGI NGUKU & OTHERS V EAPCC**

**AND**

- 1. KYALO NYUMBU KYAKA**
- 2. LAWRENCE MUTUKU**
- 3. CHRISTOPHER MULEI (Suing as Representatives' Group Committee Members on behalf of MASUA SELF HELP GROUP).....INTERESTED PARTIES**

- 1. KENYA URBAN ROADS AUTHORITY**
- 2. THE HON. ATTORNEY GENERAL ...INTENDED PARTIES/RESPONDENTS**

**IN THE MATTER OF CONTEMPT BY THE CONTEMNORS**

- 1. ENG. PAUL KAMANDE (ASSISTANT DIRECTOR KURA)..1<sup>ST</sup> CONTEMNOR**
- 2. OCS ATHI RIVER P.S (RAMADHAN MJOMBA).....2<sup>ND</sup> CONTEMNOR**

**R U L I N G**

By a Notice of Motion application dated the 25<sup>th</sup> August, 2021, brought pursuant to Article 159(2) of the Constitution, Section 1A (3) of the Civil Procedure Act and Section 5(1) and (2) of the Judicature Act, the Interested Parties/Applicants seek the following orders:

1. Spent

2. That Engineer Paul Kamande Assistant Director KURA and Mr. Ramadhan Mjomba OCS Athi River Police Station be committed to Civil Jail for a term of Six months for contempt of Court for having deliberately disobeyed Orders of this Honourable Court issued on 26<sup>th</sup> July, 2021.

3. That an Order that the Respondents do vacate the suit premises and remove all construction materials being used to carry out activities in disobedience of Court Order.

4. That on other of further Orders of the Court geared towards protecting the dignity and authority of the Court.

5. That Costs do abide the application.

The application is premised on the grounds on the face of it and the supporting affidavit of KYALO NYUMBU KYAKA, LAWRENCE MUTUKU and CHRISTOPHER MULEI who swore the same on behalf of Masua Self Help Group. They explain that on 26<sup>th</sup> July, 2021 the Court issued an order of injunction restraining the Respondents, their agents or any other person acting under them from constructing roads within parcel Nos. 104525, 104524, 3784/4 7815/1 and 8786, hereinafter referred to as the 'suit lands'. Further, the order directed the OCS Athi River to ensure its compliance. They claim the order was duly served upon the parties and on 3<sup>rd</sup> August, 2021, the 1<sup>st</sup> Respondent/Contemnor attempted to set aside the same but failed. They contend that the Respondents/Contemnors have continuously disobeyed the Court Order while the OCS instead of enforcing it, ensures the work continues. They aver that more trucks and a contingent of Police personnel has been increased on the suit lands and a perimeter wall has been put up on the site to hide illegal activities.

The 49<sup>th</sup> Defendant filed an affidavit sworn by Paul W Nzei reaffirming that the Respondents had been in contempt of the Order of the Court as on 9<sup>th</sup> July, 2021 KURA descended on the suit lands with heavy machinery and started excising roads through it. It sought for the restraining orders to be sustained.

Most parties did not file a response to oppose the Application except the 1<sup>st</sup> and 2<sup>nd</sup> Contemnors. The 1<sup>st</sup> Contemnor in opposition to the instant application filed a replying affidavit sworn by ENG. PAUL KAMANDE its Assistant Director where he deposes that his Counsel confirmed receiving a Copy of Order dated 26<sup>th</sup> July, 2021 and upon perusal of the same, he noted the Court had proceeded to hear the Notice of Motion application dated 16<sup>th</sup> July, 2021 without according them an opportunity to be heard. Further, the said application is set for inter partes hearing on 27<sup>th</sup> September, 2021. He contends that since he was dissatisfied with the Orders issued on 26<sup>th</sup> July, 2021, he applied to set them aside by filing a Notice of Motion dated the 2<sup>nd</sup> August, 2021 and the Court directed the same to be heard on 16<sup>th</sup> September, 2021. He explains that the Contemnors are in compliance with the Court Order issued on 16<sup>th</sup> July, 2021 and are not in contempt of any Order of Court. He made reference to the Order of Court issued on 16<sup>th</sup> July, 2021 and insists he was acting as the resident engineer for the proposed upgrading of the existing road to Bitumen Standard and there was no construction of new roads, evictions, dispossessions or demolition of buildings. He confirms that the 1<sup>st</sup> Contemnor is no longer on the suit lands, neither does it have any equipment/ construction materials thereon. He reiterates that the instant application is incompetent and an abuse of the court process.

The Applicants filed a supplementary affidavit reiterating their averments insisting the Contemnors are in contempt of the order of the Court. They confirm the Contemnors are in the process of removing vehicles, materials and perimeter wall to evade justice. Further, that the process of removing materials commenced on 11<sup>th</sup> September, 2021.

The Interested Party filed an affidavit sworn by JOHN MWANGI MUTUNGA its Secretary where he confirms they reside on Land Parcel No. 10425 which has been reverted to the government and seek for the same to be removed from the assets claimed by the Plaintiff.

The application was canvassed by way of written submissions.

### **Analysis and Determination**

Upon consideration of the Notice of Motion application dated the 25<sup>th</sup> August, 2021 including the respective affidavits and rivalling submissions, the only issue for determination is whether the Contemnors are in contempt of court order dated the 26<sup>th</sup> July, 2021.

The Applicants in their submissions reiterated their claim and insisted the orders of 26<sup>th</sup> July, 2021 were not set aside. Further, that the orders issued on 19<sup>th</sup> July, 2018 subsist to date and the Contemnors are hence in contempt of the order of the court. To support their arguments, it relied on the case of **Misc Civil Application No. 443 of 2017 Samuel M. N. Mweru & Others V National Land Commission & 2 Others (2020) eKLR.**

The Contemnors in their submissions reiterate their averments above and insist they are not in contempt of any order of the court. Further, the orders issued on 26<sup>th</sup> July, 2021 were issued in absence of the Intended Defendant who later filed an application dated 2<sup>nd</sup> August, 2021 seeking to set them aside. It claims KURA moved out of the suit lands and does not have any materials thereon. They contend that KURA has not been a party to these proceedings and it ought to have been enjoined before adverse orders are issued against it. They aver that the Applicants have failed to prove a case of civil contempt against them. To support their averments, they have relied on the following decision: **Samuel M. N. Mweru & Others V National Land Commission & 2 Others (2020) eKLR.**

The Applicants claim the Contemnors are in contempt of orders of court issued on 26<sup>th</sup> July, 2021.

I wish to reproduce an excerpt of the said orders herebelow:

**‘2, That the Respondents /Interested Defendants by themselves (SIC) agent or any person acting at their behalf be and are hereby restrained by way of interim injunction from constructing roads within parcels Nos. 10425, 10424, 3784/4, 7815/1 and 8786 until 27<sup>th</sup> September, 2021 when the Application will be heard inter partes**

**3. That these orders be served to the OCS Athi River Police Station for compliance.’**

The Contemnors have not disputed service but deny being in contempt of the Court Order.

In the case of **North Tetu Farmers Co. Ltd v. Joseph Nderitu Wanjohi (2016) eKLR** Justice Mativo stated that: **'writing on proving the elements of civil contempt, learned authors of the book Contempt in Modern New Zealand have authoritatively stated as follows:-**

**' there are essentially four elements that must be proved to make the case for civil contempt. The applicant must prove to the required standard (in civil contempt cases which is higher than civil cases - (a) the terms of the order (or injunction or undertaking) were clear and unambiguous and were binding on the defendant; (b) the defendant had knowledge of or proper notice of the terms of the order; (c) the defendant has acted in breach of the terms of the order; and (d) the defendant's conduct was deliberate.'**

While in the case of **Samuel M. N. Mweru & Others V National Land Commission & 2 Others (2020) eKLR**, Justice Mativo while dealing with issues of contempt of Court observed that:’

The test for when disobedience of a civil order constitutes contempt has come to be stated as whether the breach was committed **‘deliberately and mala fide.’**<sup>[40]</sup> A deliberate disregard is not enough, since the non-complier may genuinely, albeit mistakenly, believe he/she is entitled to act in the way claimed to constitute the contempt. In such a case good faith avoids the infraction.<sup>[41]</sup> Even a refusal to comply that is objectively unreasonable may be *bona fide* (though unreasonableness could evidence lack of good faith). These requirements – that is the refusal to obey should be both *wilful* and *mala fides*, and that unreasonable non-compliance, provided it is *bona fide*, does not constitute contempt – accord with the broader definition of the crime, of which non-compliance with civil orders is a manifestation. They show that the offence is committed not by mere disregard of a court order, but by the deliberate and intentional violation of the court’s dignity, repute or authority that this evinces.<sup>[43]</sup> Honest belief that non-compliance is justified or proper is incompatible with that intent. ....  
**It is an established principle of law that<sup>[45]</sup> 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. Upon proof of these requirements the presence of willfulness and bad faith on the part of the Respondent would normally be inferred, but the Respondent could rebut this inference by contrary proof on a balance of probabilities.’**  
*Emphasis Mine.*

Further, in **Civil Appeal, No 95/1988 Mwangi H C Wang’onde v Nairobi City Commission (UR) the Court of Appeal** held as follows: **‘In the present case, according to the affidavit of the appellant sworn on 26th January, 1988, in support of his application, the order alleged to have been disobeyed by the respondent was served on the respondent on 31st August, 1987, and a copy of that order which was annexed to the affidavit did not carry a notice of the penal consequences of disobedience as required by the Rules. It is clear from this that the appellant did not comply with the mandatory provisions of section 5(1) of the Judicature Act with the result that his application was incompetent. It must follow that there was no valid application for contempt of court before the judge.’**  
*Emphasis mine.*

In the instant case, I note the impugned order for interim injunction was granted ex parte on 26<sup>th</sup> July, 2021 when the contemnors were not parties to the suit. The Applicants contend that the Contemnors were indeed served with the Order of the Court dated 26<sup>th</sup> July, 2021 but continue to perform acts which are contrary to the said order and have persisted to do so. The Applicants have even annexed photographs to prove the Contemnors are interfering with the suit lands. I note that the 1<sup>st</sup> Contemnor representing KURA was not a party to the suit at the point when the order dated 26<sup>th</sup> July, 2021 was issued. On perusal of application dated 16<sup>th</sup> July, 2021, I note the 49<sup>th</sup> Defendant confirmed that KURA had already issued a Notice dated 9<sup>th</sup> July, 2021 to commence construction activities or opening roads on the suit lands.

I have had a chance to peruse the annexures to the application for contempt and I am unable to see any construction thereon except for the standing iron sheet fence. It has emerged that the Order that was purportedly disobeyed was granted ex parte as none of the contemnors participated in it. Further, the application for injunction is yet to be heard *inter partes* and determined. The 1<sup>st</sup> Contemnor confirms he was informed of the Order of the Court by his counsel and they removed their equipment from the suit lands. It is trite that Contempt proceedings are criminal in nature and hence the burden of proof should be on the Applicants to prove that the same is ongoing.

From a further perusal of the instant Notice of Motion application including the supporting affidavit as well as the annexures thereon, I note there is no indication if a Penal Notice was attached to the Court Order served upon the Contemnors.

Based on the facts as presented while associating myself with the quoted decisions, I find that the Applicants have failed to tender adequate evidence to prove how the Contemnors are in contempt of an order of the court. Further, it has been confirmed KURA entered suit land on 9<sup>th</sup> July, 2021 before the impugned order was issued. I find that the Applicants failure to attach a Penal Notice to the said Court Order was contrary to the provision of Section 5(1) of the Judicature Act. It is my considered view that the Applicants have failed to demonstrate how there was willful and mala fides disobedience of the Court Order dated 26<sup>th</sup> July, 2021 since they confirmed in their further affidavit that the Contemnors have removed their equipment and left the suit lands. From the averments in the supporting affidavit, there is lack of demonstration that the Contemnors proceeded to disregard the Court Order and proceeded to construct roads thereon as alleged. Further, there is no demonstration of Contemnors deliberate and intentional violation of the court’s dignity or authority. I opine that the Applicants’ allegations herein have not met the threshold required in contempt proceedings as envisaged by the law as the standard of proof in the said proceedings is higher than the balance of probabilities and almost beyond reasonable doubt, which position is well articulated in the case of

**Africa Management Communication International Limited Vs Joseph Mathenge Mugo & Anor (2013) eKLR.**

It is against the foregoing that I find the Notice of Motion application dated the 25<sup>th</sup> August, 2021 unmerited and will proceed to dismiss it.

Costs will be in the cause

**DATED SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 3<sup>RD</sup> DAY OF FEBRUARY, 2022**

**CHRISTINE OCHIENG**

**JUDGE**