



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**ELC CASE NO. 231 OF 2017(OS)**

**IN THE MATTER OF: LAND PARCEL NO. 151/IV/MN-CR 13079, 523/IV/MN, 1524/IV/MN AND ANY OTHER SUBDIVISIONS  
CREATED FROM 151/IV/MN, THE MOTHER TITLE**

**IN THE MATTER OF: AN APPLICATION FOR DECLARATION THAT THE PLAINTIFFS HAVE OBTAINED OWNERSHIP  
OF ALL OF 100 ACRES OF THE ABOVE PARCELS OF LAND BY WAY OF ADVERSE POSSESSION**

**BETWEEN**

**NICHOLAS MKOMA MKALI & 253 OTHERS.....PLAINTIFFS**

**VERSUS**

**YAHYA MOHAMED SULEIMAN**

**KARISA KITSAO KITI**

**CHAIRMAN, NATIONAL LAND COMMISSION.....DEFENDANTS**

**RULING**

1. I have before me for determination a Notice of Motion dated 17<sup>th</sup> February 2020. By the said Motion Yahya Mohamed Suleiman and Karisa Kitsao Kiti (the 1<sup>st</sup> and 2<sup>nd</sup> Defendants respectively) pray for orders: -

***2. That the Court be pleased to order the 1<sup>st</sup> Plaintiff and ten other listed persons to attend Court at the hearing of this application.***

***3. That the Court be pleased to find the 1<sup>st</sup> Plaintiff and the ten other listed persons to be in contempt of Court Orders dated 21<sup>st</sup> February 2019 and punish them accordingly.***

***4. That the Court be pleased to issue an order to the 1<sup>st</sup> Defendant to demolish all the new structures and or buildings put up between March 2019 to date and or currently under construction on Plots Nos 1524/IV/MN, 1523/IV/MN and 1522/IV/MN (now subdivided) and allow the fencing of the said plots to preserve the properties pending the hearing and determination of this suit.***

***5. That the Station Commander Kijipwa Police Station to give security during the fencing exercise for maintenance of law and order.***

***6. That the Court be pleased to give any other order it deems fair and just in the circumstances; and***

***7. That the Costs of this application be provided for.***

2. The application which is supported by an affidavit sworn by the 1<sup>st</sup> Defendant Yahya Mohamed Suleiman is premised on the grounds: -

***a) That the Plaintiffs and some other persons filed this suit together with an application for injunction. On 21<sup>st</sup> February 2019, this Court gave its ruling and issued a conditional injunction as regards the suit property;***

***b) The 1<sup>st</sup> Plaintiff together with others have disobeyed the Court orders and have since continued with building of new***

*structures on the property in total disregard of the orders issued.*

*c) That the suit property is now going to waste due to the persistent disregard of the orders;*

*d) That the contemnors mentioned herein are selling the land and allowing new buildings to be put up and have now began making access roads thereon in a manner not envisaged in the property's plans;*

*e) The Court has a duty to protect the suit property pending the hearing and determination of the suit;*

*f) That it is important that the Court deals with the matters raised herein as regards contempt of its orders since the same touches on the very authority of this Court; and*

*g) That the property needs to be preserved and as such the prayers for fencing off the land is reasonable in the circumstances.*

3. The application is opposed. In a Replying Affidavit sworn by the 1<sup>st</sup> Plaintiff- Nicholas Mkoma Mkali, he avers that the instant application is not borne of any new facts as no new material has been placed before the Court to enable it reach a new finding distinct from the orders granted on 21<sup>st</sup> February 2019. The 1<sup>st</sup> Plaintiff asserts that no new structures have been erected on the suit property and that the photographs exhibited by the 1<sup>st</sup> Defendant are of old structures existent at the point of the filing of the Originating Summons herein.

4. The 1<sup>st</sup> Plaintiff further avers that he has neither commissioned any third party to erect structures or to commence construction of roads on the suitland nor has he erected any such structures personally or engaged in any road construction thereon. The 1<sup>st</sup> Plaintiff asserts that the application herein is mischievous and cunningly intended to alter the prevailing status quo in the subject properties prior to the determination of this suit and urges the Court to dismiss the same with costs.

5. I have perused and considered the application by the Defendants as well as the response thereto by the 1<sup>st</sup> Plaintiff. While there was another Replying Affidavit sworn by one James Rodgers Suleiman on behalf of some Interested Parties, I was unable to see how and when the alleged Interested Parties were enjoined in these proceedings.

6. By way of background, the 254 Plaintiffs herein had by a Notice of Motion application dated 23<sup>rd</sup> November 2017 sought an order of mandatory injunction to issue restraining the Defendants from removing/destroying houses/structures, erecting fences, threatening the Plaintiffs and eviction or evicting them from the subject properties situated at Mwatundo in Kanamai within Kilifi County.

7. Having considered the said application as well as a Notice of Preliminary Objection dated 8<sup>th</sup> December 2017 as lodged by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, this Court granted not a mandatory but a prohibitory injunction against the two Defendants in terms of the prayers sought by the Plaintiffs on 21<sup>st</sup> February 2019. In addition, this Court restrained the Plaintiffs themselves from constructing and/or establishing any new house on the suit properties pending the hearing and determination of this matter.

8. By this present application the two Defendants now contend that in total disregard of the said orders, the 1<sup>st</sup> Plaintiff working in cahoots with some ten named individuals have continued to sell and dispose of various portions of the suit property, to make access roads thereon as well as put up new houses and structures.

9. It is the two Defendants' case that despite notices sent to the Plaintiffs, the 1<sup>st</sup> Plaintiff did meet in February 2020 together with other contemnors whereupon they agreed to and proceeded to hire a grader to make access roads into the suit property for purposes of making the property more attractive to other buyers. It is the Applicants case that all the parties mentioned herein are aware or ought to have been aware of the said Court orders and hence this Court needs to assert its authority by punishing the 1<sup>st</sup> Plaintiff and the other listed individuals.

10. Black's Law Dictionary 9<sup>th</sup> 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 a fine or imprisonment.”***

11. Bearing that definition in mind, Order 40 Rule 3(1) of the Civil Procedure Rules empowers this Court to deal with such defiance of its authority as follows: -

***“In cases of disobedience, or of 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.”***

12. Section 29 of the Environment and Land Court Act, however enhances the consequences for would-be offenders and provides thus: -

***“Any person who refuses, fails or neglects to obey an order or directions 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.”***

13. Arising from the consequences thereof, an application for contempt of Court is therefore a unique amalgam of civil proceedings that

invokes criminal sanctions and may have effects on the liberty of an individual. That being the case, it is an established principal of law that in order to succeed in civil contempt proceedings such as those before me, the applicant has to prove (i) the terms of the order, (ii) knowledge of these terms by the Respondent and (iii) failure by the Respondent to comply with the terms of the order.

14. In the matter before me, the Defendants/Applicants have urged this Court to punish the eleven (11) individuals named herein as follows: -

**1. Nicholas Mkoma Mkali (1<sup>st</sup> Plaintiff)**

**2. Yolanda Buckle a.k.a Mama Yolanda**

**3. Cosmus Mwangombe**

**4. James Rodgers Suleiman**

**5. Benard Mwatata**

**6. Daniel Mwamjaje**

**7. Charles Karisa Ngala**

**8. James Chituto Lewa**

**9. James Kato**

**10. Omar Kimwario; and**

**11. Juma Ali Muriani**

15. The basis for those prayers are set out at paragraphs 6 to 13 of the 1<sup>st</sup> Defendant's Supporting Affidavit in which he avers that he was informed by some two unnamed residents on the ground that on Saturday 9<sup>th</sup> February 2020 the 1<sup>st</sup> Plaintiff and the other ten named individuals raided the suitland and are now in the process of putting up an access road with a view to further sub-dividing the land and selling the same.

16. The 1<sup>st</sup> Defendant does not name his informants and those informants have not sworn any affidavits as to how they came to learn that the 1<sup>st</sup> Plaintiff had engaged in a meeting with the said individuals where they agreed and did invade the suit property. Indeed, other than the 1<sup>st</sup> Plaintiff, the individuals listed from No. 2 to 11 in the application for contempt are not parties to this suit. The Defendants have not demonstrated that they were served and/or that they were aware of the orders issued by this Court on 21<sup>st</sup> February 2019.

17. That being the case, I am in agreement with the 1<sup>st</sup> Plaintiff that the present application is highly speculative and misconceived. The Prayer to allow the 1<sup>st</sup> Defendant to demolish the alleged new structures on the land is nothing but an attempt to mischievously and cunningly alter the prevailing status quo in the subject properties.

18. Accordingly, I find no merit in the Motion dated 17<sup>th</sup> February 2020. It is dismissed with costs.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 16TH DAY OF JULY, 2021.**

**J.O. OLOLA**

**JUDGE**