



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC CASE NO. 79 OF 2020**

**PEONY MANAGEMENT COMPANY LIMITED.....PLAINTIFF**

**VERSUS**

**DESTERIO OYATSI.....DEFENDANT**

**RULING**

**INTRODUCTION**

1. The Ruling herein is in respect to two Applications, namely the Notice of Motion Application dated the 30<sup>th</sup> March 2021 and the Application dated 31<sup>st</sup> March 2021, respectively.
2. Vide the Application dated 30<sup>th</sup> March 2021, the Plaintiff herein has sought for the following Reliefs:
  - i. ....(Spent)
  - ii. *The Honorable court be pleased to commit the Defendant/Respondent to civil jail for contempt for the Disobedience of court orders.*
  - iii. *Cost of this Application be awarded to the Plaintiff/Applicant.*
3. The subject Application is based and/or premised on the grounds contained and/or enumerated at the foot thereof and same is further supported by the Affidavit of one Innocent Muma Nyagaka, who states that same is the Advocate on record for the Plaintiff/Applicant herein.
4. Upon being served with the said Application, the Defendant herein, who is himself a seasoned Advocate of the High court of Kenya, filed a Replying Affidavit sworn on the 1<sup>st</sup> April 2021, and thereafter filed a Further Affidavit which was sworn on the 4<sup>th</sup> of October 2021, to which the Defendant opposed the Application dated the 30<sup>th</sup> March 2021.
5. Vide the Application dated 31<sup>st</sup> March 2021, the Defendant herein has sought for the following Reliefs;
  - i. *The 1<sup>st</sup> Respondent, Peony Management Company Limited is guilty of contempt.*
  - ii. *The 2<sup>nd</sup> Respondent, Furaha Marwa, is guilty of Contempt of court.*
  - iii. *Peony Management Company limited is liable for punishment for Contempt of court, be punished as the court may deem necessary.*
  - iv. *Furaha Marwa is liable to punishment for his Contempt of court and be committed to civil jail for six months, in addition to paying a fine of two hundred thousand.*
  - v. *The cost of this application be awarded to the Applicant.*
6. The subject Application is premised on the grounds that have been enumerated at the foot thereof and same is further supported by the Affidavit of the Defendant, sworn 31<sup>st</sup> March 2021, and to which the Defendant has annexed two (2) annexures.

7. On the other hand, the Defendant has also filed a Further Affidavit sworn on the 6<sup>th</sup> April 2021 and to which affidavit, the Defendant has attached and/or annexed a total of 6 annexures, including assorted Email correspondence and photographs.

8. Further, the Defendant herein also filed another Affidavit namely, Applicant's Further Affidavit in support of the Notice of Motion Application 31<sup>st</sup> March 2021, which affidavit was sworn on the 4<sup>th</sup> October 2021, and to which the Defendant has finally attached a copy of the decree issued and/or emanating from the judgement rendered on the 30<sup>th</sup> November 2020.

9. Upon being served with the subject Application, the Plaintiff filed a Replying affidavit through one, namely Furaha Marwa, sworn on the 9<sup>th</sup> April 2021, whereby same opposed the subject Application by and/or on behalf of the Defendant.

10. Nevertheless, it is worthy to point out that when the Defendant filed his Application, which is dated the 31<sup>st</sup> March 2021, same included a person who has been described as the 2<sup>nd</sup> Respondent, namely, Furaha Marwa. However, the said person was never a party to the proceedings herein before and his name has just sprouted at this juncture.

#### **SUBMISSIONS BY THE PARTIES:**

11. The subject matter came up for mention on the 27<sup>th</sup> September 2021, whereupon it transpired that there were three (3) Applications that were filed and were pending hearing and disposal before the court. The three Applications were as follows;

*a. The Application dated the 11<sup>th</sup> December 2020.*

*b. The Application dated 30<sup>th</sup> March 2021.*

*c. The Application dated 31<sup>st</sup> March 2021.*

12. Nevertheless, on the same date, the counsel for the Defendant herein sought leave of the court to withdraw the Notice of Motion Application dated the 11<sup>th</sup> December 2020, and to the extent that the request was not opposed by the counsel for the Plaintiff, same was allowed.

13. In the premises, the Notice of motion Application dated the 11<sup>th</sup> December 2020, was duly marked as withdrawn, with costs to the Plaintiff.

14. Owing to the foregoing, there now remains two [2] Applications, being the Application dated 30<sup>th</sup> and 31<sup>st</sup> March 2021, respectively, which Applications were ordered and/or directed to be heard simultaneously.

15. On the other hand, directions were also given that the two Application be canvassed and/or be disposed of by way of written submissions. Consequently, both parties filed their respective submissions.

16. For clarity, the Plaintiff herein filed her submissions on the 17<sup>th</sup> May 2021, in respect of the Application dated the 30<sup>th</sup> of March 2021, and the submissions dated the 21<sup>st</sup> of May 2021, in respect of the Application dated the 31<sup>st</sup> of March 2021.

17. On his part, the Defendant filed his set of written submissions in response to the Application dated 30<sup>th</sup> March 2021. For brevity, the submissions herein are dated the 18<sup>th</sup> November 2021.

18. Other than the said submissions, the Defendant herein also filed submissions in support of his own Application and this is the Application dated the 31<sup>st</sup> March 2021. For clarity, the submissions in this regard, are dated 8<sup>th</sup> October 2021.

19. Be that as it may, it is imperative to note that all the submissions filed by and/or on behalf of the Parties herein, are on record and same have been duly considered.

#### **PLAINTIFF'S SUBMISSIONS**

20. On her part, the Plaintiff has contended that this court differently constituted, namely, **Hon Justice Kossy Bor, Judge**, rendered and/or delivered a judgment on the 30<sup>th</sup> November 2020, whereupon the court made various orders touching on and/or concerning the rights of the parties herein.

21. It was the Plaintiff's further submissions that following the delivery of the judgement under reference, the Defendant herein felt aggrieved and/or dissatisfied and same therefore proceeded to and filed a Notice of Appeal, thus expressing his desire to Appeal to the Honourable Court of Appeal.

22. It was the Plaintiff's further submissions that upon the filing and/or lodgment of the Notice of appeal, the Defendant filed an Application for stay of execution before this court culminating into the issuance of temporary orders of stay of execution of the judgment and decree of this honourable court. For clarity, the orders of stay were issued on the 7<sup>th</sup> January 2021.

23. It is the Plaintiff's further submissions that upon procuring and obtaining the orders of stay, the Defendant herein proceeded to and closed one of the gates which was being used by the tenants and/or occupants of the Plaintiff's premises, to access Hatheru Road, in an effort to provoke and disturb peace.

24. It is the Plaintiff's further submissions that the actions by and/or on behalf of the Defendant herein was in violation of the terms and tenor of the judgment and decree, which have been issued by the court. Consequently, the Plaintiff contended that the Defendant was therefore in Contempt of Court.

25. Based on the foregoing, the Plaintiff has sought for orders that the Defendant herein be committed to jail for being in contempt of the court orders. However, suffice it to note that the details, including the date of the orders allegedly disobeyed, have not been stipulated in the Application dated the 30<sup>th</sup> March 2021.

#### **DEFENDANT'S SUBMISSIONS**

26. On his part, the Defendant has submitted that following the delivery of the judgment by this court, differently constituted, the Defendant felt aggrieved and therefore proceeded to and filed a notice of appeal and thus expressing his desire to appeal to the court of appeal.

27. Besides, the Defendant has further submitted that after the lodgment of the Notice of Appeal, same proceeded to and also filed an Application for stay of execution against the judgment of the court, whereupon the court granted an interim orders of stay, which were issued on the 7<sup>th</sup> January 2021.

28. Nevertheless, the Defendant submits that despite the issuance of the orders of stay of execution of the judgment, the Plaintiff and the person described as the 2<sup>nd</sup> Respondent have disobeyed and/or disregarded the terms of the orders issued on the 7<sup>th</sup> January 2021.

29. The Defendant has further averred that despite the order of stay, which were granted on the 7<sup>th</sup> January 2021, but extracted and sealed on the 13<sup>th</sup> January 2021, the Plaintiff and one, Furaha Marwa have continued to use the Defendant's private property to access Hatheru Road, which should not be the case.

30. Owing to the foregoing, the Defendant now contends that the Plaintiff and the person described as the 2<sup>nd</sup> Respondent, in the Notice of Motion Application dated 31<sup>st</sup> March 2021, ought to be Cited and punished for Contempt of Court.

#### **ISSUES FOR DETERMINATION**

31. Having reviewed the two Applications namely, the Application dated the 30<sup>th</sup> and 31<sup>st</sup> March 2021, together with the various affidavits in support thereof, as well as the written submissions filed by the respective parties, I find that the following issues are germane for determination;

- i. Whether the person, namely Furaha Marwa, who have been described as the 2<sup>nd</sup> Respondent, has been properly impleaded.*
- ii. Whether the judgement and decree issued by the court on the 30<sup>th</sup> November 2020, is capable of being disobeyed and thus attracting contempt proceedings.*
- iii. Whether the orders of stay of execution issued on the 7<sup>th</sup> January 2021, and extracted on the 13<sup>th</sup> January 2021, are capable of being disobeyed.*
- iv. In any event whether the orders of stay were duly served as a precursor to the filing of the contempt application dated 31<sup>st</sup> March 2021.*

#### **ANALYSIS AND DETERMINATION**

##### **ISSUE NUMBER ONE**

***Whether the person, namely Furaha Marwa, who have been described as the 2<sup>nd</sup> Respondent, has been properly impleaded.***

32. From the pleadings that were filed in respect of the subject matter, it is apparent that there was one Plaintiff and one Defendant, who were the principal parties and/or disputants in the subject matter.

33. It is also worthy to note that up to and including the time for delivery of the judgment, on the 30<sup>th</sup> November 2020, no other party had been joined either as a second Plaintiff or otherwise. For clarity, the parties remained as it were from the onset of the proceedings.

34. Nevertheless, at the time when the Defendant filed the Notice of Motion Application dated the 31<sup>st</sup> March 2021, same included and/or impleaded one Furaha Marwa, who was described as the 2<sup>nd</sup> Respondent.

35. However, despite the inclusion of the person described as the 2<sup>nd</sup> Respondent in the subject proceedings, there is no prayer contained in the said Application, whereby the Defendant was seeking leave to join and/or add another person either as an Interested party or Respondent,

whatsoever.

36. On the other hand, there is also no evidence that a previous Application had been made, whereby the Defendant herein had sought for the joinder of any other person, in whatsoever capacity.

37. Notwithstanding the foregoing, I have also perused the court records to confirm and/or authenticate whether the court had made an order for the joinder of a 2<sup>nd</sup> Respondent, but unfortunately, I have not come across any such an order.

38. In my humble view, a person and/or litigant who seeks to join a party who was *hitherto* not a party to the suit, is obliged to file a suitable Application before the court and thereafter persuade the court on the necessity to add and/or join the intended party and if the court is so persuaded, a suitable order shall thereafter be made.

39. For the avoidance of doubt, it is important to take cognizance of the provisions of **Order 1 rule 3 and 10 of the Civil Procedure Rules, 2010**, which provides as hereunder;

***“Who may be joined as plaintiffs [Order 1, rule 3.]***

***All persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if separate suits were brought against such persons any common question of law or fact would arise.***

***Substitution and addition of parties [Order 1, rule 10.]***

***(1) Where a suit has been instituted in the name of the wrong persons as plaintiff, or where it is doubtful whether it has been instituted in the name of the right plaintiff, the court may at any stage of the suit, if satisfied that the suit has been instituted through a bona fide mistake, and that it is necessary for the determination of the real matter in dispute to do so, order any other person to be substituted or added as plaintiff upon such terms as the court thinks fit.***

***(2) The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.***

***(3) No person shall be added as a plaintiff suing without a next friend or as the next friend of a plaintiff under any disability without his consent in writing thereto.***

***(4) Where a defendant is added or substituted, the plaint shall, unless the court otherwise directs, be amended in such manner as may be necessary, and amended copies of the summons and of the plaint shall be served on the new defendant and, if the court thinks fit, on the original defendants.”***

40. Taking into account the foregoing provision, it is apparent that no joinder, addition and/or substitution of a party can be made in respect of a pending proceedings, without an order of the court, sought for and obtained beforehand.

41. In respect of the subject matter, the Defendant herein, has by his own initiative and/or exercise of own *fiat*, chosen to add a party and thereby disregarded the mandate of the court.

42. Certainly, the actions by and/or at the instance of the Defendant of adding and/or joining a party, without a lawful court order, is a nullity ab initio. Consequently, the addition and/or joinder of one Furaha Marwa, has been taken and/or made in vacuum.

43. Besides, to the extent that no court order was ever sought for and/or obtained to facilitate the joinder of Furaha Marwa either as a Respondent or at all, no adverse Order can therefore be sought and/or procured as against same.

44. Nevertheless, it is also important to note that the joinder of parties, whether as Plaintiffs, Defendants and/or interested parties, can only be addressed and/or attended to during the pendency of the proceedings and not after the delivery of judgment.

45. In support of the forgoing position, I adopt and reiterate the decision of the Court of Appeal in the case of **JMK v MWM & ANOTHER [2015] eKLR**, where the Court of Appeal observed as hereunder;

***“We would however agree with the respondent that Order 1 Rule (10)(2) contemplates an application for amendment or joinder of parties where proceedings are still pending before the Court. Sarkar’s Code, (supra) quoting as authority, decisions of Indian Courts on the provision, expresses the view that an application for joinder of parties can be filed only in pending proceedings. In the same vein, the Court of Appeal of Tanzania, while considering the equivalent of Order 1 Rule 10(2) of our Civil Procedure Rules, in TANG GAS DISTRIBUTORS LTD V. SAID & OTHERS [2014] EA 448, stated that the power of the court to add a party to proceedings can be exercised at any stage of the proceedings; that a party can be joined even without applying; that the joinder***

**may be done either before, or during the trial; that it can be done even after judgment where damages are yet to be assessed; that it is only when a suit or proceeding has been finally disposed of and there is nothing more to be done that the rule becomes inapplicable.”**

46. Based on the foregoing, the joinder of the person described as the 2<sup>nd</sup> Respondent was therefore an exercise of futility and otherwise a nullity ab initio. Consequently, the name of the said 2<sup>nd</sup> Respondent be and is hereby struck out.

## **ISSUE NUMBER 2**

**Whether the judgement and decree issued by the court on the 30<sup>th</sup> November 2020, is capable of being disobeyed and thus attracting contempt proceedings.**

47. In respect of the Second issue herein, it is important to appreciate the nature and/or the terms of the decree rendered by the court and thereafter dissect same to see whether the terms thereof are capable of Disobedience.

48. For clarity, the extracted Decree contained the following terms;

***a. The Defendant's Mense profit fails***

***b. The Plaintiffs claim to right of easement or adverse possession over the Defendants land brought up under the limitation of actions fails.***

***c. In light of the nature of the Plaintiffs development on the land and without any other access to Hatheru Road, it would not be fare to grant the relief sought by the Defendant.***

***d. The order that commence itself to the court is for the parties to have an easement created in favor of the Plaintiff for the portion of the defendant land which the Plaintiff has been using to access Hatheru Road in accordance with Section 98 of the land Registration Act. The Plaintiff will pay for the consideration of the easement.***

***e. For the portion of the Defendants land that the Plaintiff development that has encroached on the parties do undertake a valuation within sixty (60) days of the date of this judgment, with a view to determining its value for purposes of the Plaintiff compensating the Defendant. If the parties do not agree on the value of the portion affected within this time frame, they will file submissions for the court determine the reasonable payable to the Defendant.***

***f. The Defendant is awarded cost of the suit.***

***g. The Plaintiff will also meet the cost of the valuation and preparation and registration of the easement.***

49. From the foregoing, it is apparent that the honourable court did not direct the Defendant herein to do and/or abstain from doing anything, whatsoever and/or howsoever.

If anything, the Judgment of the Court found and established that the Plaintiff, was indeed using a portion of the Defendant's Land without the Defendant's authority.

50. On the other hand, the Judgment also directed the Parties to register an Easement over and in respect of the portion of the Defendant's Land. Which the Plaintiff had been using, to access Hatheru Road. In this regard, creation of the Easement, was to be carried out pursuant to Section 98 of the Land Registration Act, 2012.

51. Given the import and tenor of the judgment and by extension the decree, I do not see what act or omission that the Defendant could do to warrant the contempt proceedings. For clarity, the Judgment did not direct the Defendant to do or abstain from anything.

52. In my humble view, the Application by the plaintiff, which in any event, does not even indicate on the face thereof, the date of the orders which are said to be have been disobeyed, is devoid of merits.

53. At any rate, even assuming that the Defendant had committed any acts and/or omission capable of being deemed to amount to contend, a suitable affidavit, would be necessary and/or appropriate. Such affidavit could only be sworn by a Representative of the Plaintiff, duly seized of the Evidential Facts.

54. It also imperative to note, that claims of contempt require proof and/or provision of evidence, which shall establish the commission of the acts complained of to the inter-mediate standard, that is the standard above beyond the balance of probabilities, but not Beyond Reasonable Doubt.

55. However, it is imperative to note that the affidavit in support of the Application dated the 30<sup>th</sup> March 2021, has been sworn by the Plaintiff's advocate, who is not best placed and/or suitable to swear to contentious matters of facts and/or evidence, in the manner in which the advocate has adverted to.

56. In my humble view, the affidavit in support of the Notice of motion Application dated the 30<sup>th</sup> March 2021, is incompetent, to the extent

that same has been sworn by the Plaintiff's Advocate, yet it adverts to contentious evidential issues, including, whether acts complained of, if any, were committed by the Defendant or otherwise.

57. Certainly, unless the Plaintiff's Advocate, is a duly authorized officer of the Plaintiff, or resides, in the said premises, I am afraid, same must desist from walking and/ or wading into the murky waters of the contentious Issues of Evidence, which are not within the domain of the Advocate.

58. In support of the foregoing observation, I invoke and adopt the position of the law as captured in the Decision in the case **Regina Waithira Mwangi Gitau v Boniface Nthenge [2015] eKLR**, where the honourable court of appeal observed as hereunder;

*“On issue number one, the established principle of law is that advocates should not enter into the arena of the dispute by swearing affidavit on contentious matters of fact. By swearing an affidavit on contentious issues, an advocate thus makes himself a viable witness for cross examination on the case which he is handling merely as an agent which practice is irregular. In Simon Isaac Ngugi vs Overseas Courier Services (K) Ltd 1998 e KLR and Kisya Investments Ltd & Others vs Kenya Finance Corporation Ltd, it was held that .*

*“.....it is not competent for a party's advocate to depose to evidentiary fact at any stage of the suit”.*

*In addition, Rule 9 of the Advocates Practice Rules prohibit advocates from appearing as an advocate in a case wherein he might be required to give evidence either by affidavit or even orally. By swearing an affidavit on behalf of his client where issues are contentious, an advocate's affidavit creates a legal muddle with untold consequences.”*

59. Given that the Affidavit sworn in support of the Notice of motion Application dated the 30<sup>th</sup> of March 2021 adverts to issues which are contentious and evidential in nature, the said Affidavit is thus incompetent.

60. Consequently, same be and is hereby struck out and in this regard, the said Application is left bare, that is, without any Evidential anchorage.

61. In my humble view, the fact that the terms and tenor of the decree issued by the court did not command the Defendant to do anything and/or abstain from doing, negates the and/or invalidates the contempt Application by the Plaintiff.

62. Nevertheless, it is also important to note that the said Application is not supported by competent supporting affidavit and on this account the Application, is therefore devoid of any legal foundation.

63. Simply put, that the Application is incompetent.

64. In view of the foregoing, I find and hold that the Notice of Motion dated the 30<sup>th</sup> of March 2021, is premature, misconceived, incompetent and similarly devoid of merits. In this regard, the said Application be and is hereby struck out.

### **Issue Number Three**

**Whether the orders of stay of execution issued on the 7<sup>th</sup> January 2021, and extracted on the 13<sup>th</sup> January 2021, are capable of being disobeyed.**

65. Upon the delivery of the judgment, which was rendered on the 30<sup>th</sup> of November 2020, the Defendant herein having filed and/or lodged a Notice of Appeal, similarly proceeded and filed an Application for stay of execution of the judgment and consequential decree.

66. Besides it is worthy to note, that the said Application was placed before the Honorable Judge on the 7<sup>th</sup> of January 2021, whereupon the Judge granted interim orders of stay and fixed the Application for inter-partes hearing on the 16<sup>th</sup> of March 2021.

67. Suffice it to say, the Order of stay which was granted was meant to stay the implementation of the terms of judgment and decree, whose details I have adverted to herein before.

68. Similarly, I beg to repeat that the terms of the order of stay did not direct the Plaintiff herein to stop doing anything. If anything, the Judgment found that the Plaintiff was indeed in use of a portion of the Defendant's Land and no Order was issued to stop their use and/ or activities, thereon.

69. Be that as it may, what is apparent from the judgment is that the Plaintiff and her tenants and/or occupants of the Plaintiff's premises were found to have been using a portion of the Defendant's land to access Hatheru Road and that kind of situation had persisted for some time.

70. On the other hand, the judgment also found and observed that the Plaintiff had indeed constructed and/or carried out developments on a portion of the Defendant's land. However, the Court declined to grant any orders of eviction or otherwise, and for clarity, declined to grant the Reliefs sought by the Defendant.

71. Be that as it may, what is important to note is that the Plaintiff and her tenants and/or occupants of the Plaintiff's premises have been

using the disputed portion of the Defendant's land and that, same could only be stopped from using the said portion by way of an order of Eviction and a Permanent injunction.

72. Nevertheless, it is imperative to note that the Honorable Court neither granted an order of Eviction nor an order of Permanent injunction as against the Plaintiff, whatsoever and howsoever.

73. The import of the failure and/or refusal by the Court to grant either an order of Eviction or Permanent injunction against the Plaintiff herein, is that the Plaintiff and her tenants and/or occupants of the Plaintiff's premises, were left in situ of the portion of the Defendant's land which was under dispute.

74. Owing to the foregoing, even though the Defendant sought for and obtained an order of interim stay, which also appears to have lapsed and was replaced by an order of status quo, the said Order of Stay cannot operate to Evict, remove and/or injunct the occupation and use of the disputed portions of the Defendant's land.

75. Perhaps it is important to interrogate the meaning and import of an Order of stay. In this regard, I beg to state that an Order of stay, is calculated and/or directed to stop, suspend and/or hold in abeyance the implementation, enforcement and/or execution of a decision of a Court of law and/or such other quasi-judicial authority.

76. The presupposition underlining an Order of stay is that the action intended to be stayed, has not occurred, happened or accrued and therefore same can be suspended, postponed, or kept in abeyance.

77. However, in respect of the instant matter, the occupancy, development and use, had already accrued and the Court found as much. In fact, it is on the basis of the accrued usage of a portion of the Defendant's land by the Plaintiff to access Hatheru Road, which informed part of the direction by the Court for the creation and registration of an easement over the Defendant's land.

78. If that be the position and certainly it is, can an order of stay stop and/or restrain that which has already happened and/or accrued. To my mind, an Order of stay in the manner sought by the Defendant was futile.

79. I hasten to state that the pursuit of an order of stay by the Defendant in respect of the decree of the Court, part of which dismissed the Defendant's counter-claim, is tantamount to closing the staple long after the horse has bolted.

80. But I must state, that the order of stay which was sought for, obtained and extracted by the Defendant herein, did not direct the Plaintiff, Plaintiff's tenants and/or his occupants, to desist and/or refrain from doing any act and/or undertake any action, whatsoever.

81. For clarity, where one and in this case the Defendant, seeks to have the Plaintiff punished for contempt, the Defendant must show that the Court Order which is said to have been disobeyed was clear, explicit and unequivocal and therefore incapable of attracting two or more interpretations.

82. However, in respect of both the judgment rendered on the 30<sup>th</sup> of November 2020, as well as the orders issued on the 7<sup>th</sup> of January 2021, same have inherent ambiguities, which have thus left the parties to their own interpretation.

83. For clarity, whereas the judgment seems to allow the Plaintiff to continue using part of the Defendant's land to access Hatheru Road, pending registration of the easement, the Defendant thinks the order of stay is tantamount to an Injunction, of sorts.

84. Premised on the issues I have alluded to herein before, and taking into account the terms of the judgment and consequential decree, I am afraid that the Defendant has not proven any act by the Plaintiff that constitutes contempt.

85. It must be noted that to prove contempt, the evidence tendered must be credible, sufficient and must rise to the requisite standard, namely the intermediate standard. Unfortunately, the totality of the Evidence tendered has fallen short of the statutory threshold.

86. In support of the foregoing position, I adopt and restate the observations of the Court in the case of **Mutitika v Baharini Farm Ltd[1985] eKLR** where the Honorable Court of Appeal observed as hereunder;

***“With the greatest possible respect to that eminent English judge, that proof is much too high for an offence “of a criminal character” and, ipso facto, not a criminal offence properly so defined.***

***We agree with Mr. Khaminwa's submissions in this respect. In our view the standard of proof in contempt proceedings must be higher than proof on the balance of probabilities, almost but not exactly, beyond reasonable doubt. We envisage no difficulty in courts determining the suggested standard of proof. The standard of proof beyond reasonable doubt ought to be left where it belongs, to wit, in criminal cases. It is not safe to extend it to offence which can be said to be quasi – criminal in nature Winn LJ on page 1064 was in our view right in saying that the guilt has to be proved.***

***“with such strictness of proof ... as is consistent with the gravity of the charge ...”***

87. Based on the foregoing, and taking into account the language of the order of stay, I am unable to agree with the Defendant that the continued usage of the Defendant's land to access Hatheru Road amounts to Disobedience of the said order or at all.

## **Issue Number Four**

### **In any event whether the orders of stay were duly served as a precursor to the filing of the contempt application dated 31<sup>st</sup> March 2021.**

88. It is worthy to recall that the interim order of stay, which was granted on the 7<sup>th</sup> of January 2021, was granted by the Honorable Court in the usual manner when dealing with Applications filed under Certificate of Urgency.

89. For the avoidance of doubt, the order was issued in the absence of both parties. However, the Defendant, who was the originator of the Application, was able to extract and obtain the orders under reference.

90. Nevertheless, given that the orders were not issued in the presence of the Plaintiff or his Advocates, it was thus important for the Defendant or his advocate to serve the duly extracted orders upon the Plaintiff and thereby bring the terms of the order to the attention of the adverse party.

91. One would have expected the Defendant/Defendant's Advocate to advert to, when and how the said order was served upon the Plaintiff or Plaintiff's Advocate. Besides, an Affidavit of service would also be imperative.

92. However, the Defendant herein has failed to capture at the foot of the Application, as well as in the numerous Affidavits filed, whether the duly extracted order of stay (*whose terms are omnibus*) was ever served upon the Plaintiff, and if so, the name of the person who was served.

93. Seriously, the Defendant herein cannot expect the Court to proceed on the basis of hearsay, anticipation, hypothesis and speculation to imagine that service was indeed effected.

94. In any event, a claimant seeking to pursue an order of contempt, must appreciate the pre-conditions and/or ingredients necessary to be established and which include the following;

- i. Existence of a Court order whose terms are clear and explicit.*
- ii. Knowledge of the Court order by the adverse party.*
- iii. Service of the Court order.*
- iv. Acts of proof of disobedience.*

95. Had the Defendant addressed his legal mind to the foregoing, no doubt the grounds at the foot of the Application dated 31<sup>st</sup> of March 2021, as well as the contents of the Supporting Affidavit and subsequent Affidavits would have addressed the pertinent issues, and not the side shows that have been given prominence therein.

96. In my humble view, in the absence of proof of knowledge and/or service of the order under reference (*whose terms are far from clarity*), the order sought by the Defendant cannot issue.

97. In support of the foregoing observation, I can do no better than to restate the position of the law as captured in the case of **Basil Criticos - v- Attorney General [2012] eKLR** where the Court observed as hereunder;

*“We perceived an additional ground for dispensation with the requirement for personal service;*

*“...where a party clearly acts and shows that he had knowledge of a court order, the strict requirement that personal service must be proved is rendered unnecessary”.*

*Similarly, the requirement of notice of the prohibitory judgement or order would also be satisfied where a party is represented counsel who was present in court when the orders were made. Therefore, knowledge of the judgment or order by an alleged contemnor's advocate suffices for contempt proceedings.”*

98. In the absence of evidence showing the existence and satisfaction of the ingredients necessary to prove contempt, the Defendant's Application would similarly have failed.

## **FINAL DISPOSITION**

99. Having addressed all the issues that were enumerated for determination, I am now minded to render the following dispositive orders;

- i. The name of the purported 2<sup>nd</sup> Respondent, namely, Furaha Marwa, be and is hereby struck out from the proceedings.*
- ii. The Affidavit sworn by the Plaintiff's Counsel, and which adverts to contentious evidential issues in proof of contempt be and is hereby struck out.*

*iii. The Notice of Motion Application dated the 30<sup>th</sup> of March 2021 is incompetent and is hereby struck out.*

*iv. The Notice of Motion Application dated the 31<sup>st</sup> of March 2021 is devoid of merits and is hereby dismissed.*

100. The Applications filed by the respective parties have all failed. Consequently, the appropriate order on costs is that each party shall bear own costs.

101. It is so Ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 16TH DAY OF DECEMBER 2021.**

**HON. JUSTICE OGUTTU MBOYA**

**JUDGE**

**ENVIROMENT AND LAND COURT.**

**MILIMANI.**

**IN THE PRESENCE OF;**

**JUNE NAFULA COURT ASSISTANT**

**MS EUNICE AKELLO FOR THE DEFENDANT.**

**N/A FOR THE PLAINTIFF.**