



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISII**

**ENVIRONMENT & LAND DIVISION**

**ELC NO. 224 OF 2016**

**JOSEPH ONSUMU.....1<sup>ST</sup> PLAINTIFF/APPLICANT**

**PETER OBARA.....2<sup>ND</sup> PLAINTIFF/APPLICANT**

**JEREMIAH MOUKO ONYIEGO.....3<sup>RD</sup> PLAINTIFF/APPLICANT**

**-VERSUS-**

**GIDEON MOKAYA KIBAGENDI.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**NAFTALI RICHARD KIBAGENDI.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**JOHN KIBAGENDI.....3<sup>RD</sup> DEFENDANT/RESPONDENT**

**DICKSON KIBAGENDI.....4<sup>TH</sup> DEFENDANT/RESPONDENT**

**EVANS M. KIBAGENDI.....5<sup>TH</sup> DEFENDANT/RESPONDENT**

**RICHARD NYAKUNDI KIBAGENDI....6<sup>TH</sup> DEFENDANT/RESPONDENT**

**AND**

**KISII COUNTY**

**GOVERNMENT.....PROPOSED INTERESTED PARTY/APPLICANT**

**RULING**

**INTRODUCTION**

1. The Defendants/Applicants filed a Notice of Motion dated 16<sup>th</sup> August, 2019 seeking inter alia that an order of committal to prison be made against the Plaintiffs/Respondents for such period as the honourable court may deem fit and just for being in the contempt of court orders; that the Plaintiff/Respondents be ordered cater for the cost of re-erecting the fence marking the boundaries between parcel WEST KITUTU/MWAMONARI/1433 and WEST KITUTU/MWAMONARI/1454 ; that they be ordered to compensate the Applicants for the economic loss of crops occasioned by the destruction of the boundary between the two properties and that the court be pleased to visit the scene of the boundary between the two properties.

2. In support of their application, Evans Kibagendi the 5<sup>th</sup> Defendant/Applicant swore an affidavit on 16/8/2019 on his own behalf and on behalf of all the Defendants. He averred that the Plaintiff/Respondents were in contempt of court orders issued on 14<sup>th</sup> June 2017 since they completely destroyed the barbed wire fence marking the boundary between parcels WEST KITUTU/MWAMONARI/1433 and WEST KITUTU/MWAMONARI/1454. He stated that the court ordered the County Surveyor to put boundary markings between the two parcels of land. This was done in the presence of all parties including the Market Users Committee members chaired by the 1<sup>st</sup> Plaintiff/Respondent. He averred that the County Surveyor thereafter filed his report in court which was adopted by the court and the matter was marked as settled. He further averred that the family later resolved to build a perimeter wall around their property so as to protect their crops planted thereon. It was his contention that on 24<sup>th</sup> July, 2019 at 3.00 am their workers who were taking care of the property witnessed a Kisii County

caterpillar/tractor which had its plates concealed, destroying the said fence/boundary and in the process, the crops were also destroyed.

3. It is his averment that the incident was reported to the DCIO Rioma Police Station on 19/7/2019. It is his further averment that the Plaintiffs are to blame for the destruction of the Defendants' fence as they actively participated in its destruction, hence they should be held to be in contempt of court orders.

4. The Plaintiffs did not file any response to the application. On 23<sup>rd</sup> September, 2019, the intended interested party filed a Notice of Motion application seeking to be enjoined as a party to the suit. The Intended Interested Party also sought that the orders given by the court on 14<sup>th</sup> June, 2017 and the order dated 26<sup>th</sup> April, 2019 be set aside and the intended interested party be granted leave to defend the suit.

5. In support of the application is an affidavit sworn by Maureen Nyaboke Areba, the Sub-County Administrator Kitutu North Sub-County within Kisii County Government in which she avers that the orders issued on 14<sup>th</sup> June, 2017 and 26<sup>th</sup> April, 2019 affect the rights and privileges of Kisii County Government as the registered owner of land parcel WEST KITUTU/MWAMONARI/1433. She decries the fact that Kisii County Government was not made a party to the suit despite being the registered owner of the said property. She contends that the Plaintiffs were only affected by the instant suit because they were allocated the plots by the County Government. She contends that it was therefore necessary for the County Government to be enjoined as a party so as to be able to defend the suit. She alleges that the boundary affixed on the ground is different from the boundary that has been in place before land adjudication hence it is necessary for the County Government to be enjoined in the suit to enable all the issues in controversy between the parties to be adjudicated once and for all.

6. In response to the application dated 23<sup>rd</sup> September 2019, Evans Kibagendi the 5<sup>th</sup> Defendant swore a Replying Affidavit dated 25<sup>th</sup> October 2019. He avers that the Defendants do not object to the County Government being enjoined in the suit as an Interested Party, as the Defendants family gave the County Government Land Parcel No. WEST KITUTU/MWAMONARI/1433 for free.

7. He avers that he objects to prayers 3 and 4 of the Intended Interested Party's application in which the Intended Interested Party seeks an order of stay of execution of the orders dated 14.6.2017 and 26.4.2019 as well as an order setting aside the order dated 26.4.2019 as the County Government of Kisii was never sued by the Plaintiffs and therefore there is no suit for them to defend.

8. It is his contention that the Defendants were sued by persons who had no *locus standi* as they are merely tenants in parcel no. WEST KITUTU/MWAMONARI/1433 which borders the Defendants' land.

9. He avers that the County Government of Kisii was represented in the matter as Maureen Nyaboke Areba, the Sub-County Administrator was present when the Land Registrar and County Surveyor went to the suit property to effect the court order.

10. It is his contention that the report of the Land Registrar and County Surveyor which was adopted as an order of the court binds the County Government of Kisii.

11. He avers that the Sub-County Administrator was aware of the court case as she went to Rioma Police Station on 22/7/2019 and sought to be provided with security in order to go and destroy the Defendant's fence. The OCS then refused and told her that he had been served with a court order indicating that the report of the Land Registrar and County Surveyor had been adopted as an order of the court. He avers that the County Government being the owners of the plot adjacent to the Defendants' plot did not complain that the beacons had been put in the wrong place.

12. In a Further Supporting Affidavit sworn on 25.10.2019, the 5<sup>th</sup> Defendant implicates one Kenyatta Ombwori who is the market clerk as having confronted the Defendants' workers on 16.7.2019.

13. He avers that on 23.7.2019 the said Kenyatta Ombwori held a meeting with the Plaintiffs and they were seen walking around the fence and demarcating the market.

14. He further avers that on the night of 24/7/2019 at 3.00 am, the Defendants' workers witnessed the destruction of the fence by a County Caterpillar which had its number plates concealed in the presence of some county officials and the Plaintiffs as well as police officers from Kisii town.

15. He reiterates that the Plaintiffs are to blame for the destruction of their fence as they actively participated in the said destruction and they should therefore be held to be in contempt of the court orders.

16. With the consent of the parties the court directed that both applications be canvassed by way of written submissions. The Plaintiff/Applicant filed their written submissions on 23<sup>rd</sup> September, 2020 while the Intended Interested Party filed their written submissions on 14<sup>th</sup> October 2020, which submissions I have considered.

## **ISSUES FOR DETERMINATION**

17. From my analysis of the applications, the response by the Respondents and the submissions filed by both parties, the issues for determination are;

(i) **Whether the Plaintiffs are in contempt of the court order dated 26.4.2019.**

(ii) **Whether the Intended Interested Party should be enjoined as a party to the suit.**

(iii) Whether the court should set aside the orders issued on 14<sup>th</sup> June, 2017 and 26<sup>th</sup> April, 2019 and the Intended Interested Party granted leave to defend the suit.

## ANALYSIS AND DETERMINATION

### Whether the Plaintiffs are in contempt of the court orders dated 26.4.2019.

18. Order 40 rule 3 of the Civil Procedure Rules provides for the consequences of contempt which includes in case of disobedience or breach of any terms of Court Order, an order for 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 6 months. This goes to show that the punishment for contempt is not light, other than attachment of the property of the guilty contemnor; his liberty is also at stake.

19. Black's Law Dictionary, 9th Edition at page 360 defines contempt as follows;

*“Contempt is a disregard of, disobedience to, the rules, or Orders of a legislative or judicial body, or an interruption of its proceedings by disorderly behavior or insolent language, in its presence or so near thereto as to disturb the proceedings or to impair the respect due to such a body.”*

20. Contempt is necessary for maintenance of law and Order and so that the dignity of the Courts is upheld. It is trite law that every person against whom a Court Order is made against has unqualified obligation to obey the Order however unpalatable the Order may be until or unless the Order is discharged or set aside.

21. In the **Teachers Service Commission V Kenya National Union of Teachers & 2 others (2013) eKLR** Justice Ndolo stated as follows;

*“The reason why Courts will punish for contempt of Court is to safeguard the rule of law which is fundamental in the administration of justice. It has nothing to do with the integrity of the judiciary or the Court or even the personal ego of the presiding Judge. Neither is it about placating the Applicant who moves the Court by taking out contempt proceedings. It is about preserving and safeguarding the rule of law. A party who walks through the justice door with a Court order in his hands must be assured that the order will be obeyed by those to whom it is directed.*

*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 every person that this remains the case. To see it any other way is to open the door to chaos and anarchy and this Court will not be the one to open that door. If one is dissatisfied with an order of the Court, the avenues for challenging it are also set out in the law. Defiance is not an option”.*

22. In the case of **Gatharia K Mutikika Vs Baharini Farm Limited** the Court observed;

*“The Courts take the view that where the liberty of the subject is, or might be involved, the breach for which the alleged contemnor is cited must be precisely defined. A contempt of Court is an offence of a criminal character. A man may be sent to prison. It must be satisfactorily provided.... It must be higher than proof on a balance of probabilities, almost, but not exactly, beyond reasonable doubt. 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. However, the guilt has to be proved with such strictness of proof as is consistent with the gravity of the charge. Recourse ought not be had to process of contempt of Court in aid of a civil remedy where there is any other method of doing justice. The jurisdiction of committing for contempt being practically arbitrary and unlimited, should be most jealously and carefully watched and exercised with the greatest reluctance and the greatest anxiety on the part of Judges to see whether there is no other mode which is not open to the objection of arbitrariness, and which can be brought to bear upon the subject. A Judge must be careful to see that the cause cannot be the mode of dealing with persons brought before him. Necessary though the jurisdiction may be, it is necessary only in the sense in which extreme measures are sometimes necessary to preserve men's rights, that is, if no other pertinent remedy can be found....Applying the test that the standard of proof should be consistent with the gravity of the alleged contempt.....it is competent for the Court where a contempt is threatened or has been committed, on an application to commit, to take the lenient course of granting an injunction instead of making an order for committal or sequestration, whether the offender is a party to the proceedings or not.”*

23. It is trite law that the standard of proof in contempt is higher than that of Civil Cases, but lower than the standard required in criminal proceedings which is beyond reasonable doubt.

24. In order to succeed in civil contempt proceedings, the Applicant is duty bound to prove the following 4 elements; -

- 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.

25. From my analysis of the instant application, the Applicants have in their Supporting Affidavit by the 5<sup>th</sup> Defendant given a lengthy

account of how the orders of the court have been breached. The same account is replicated in their written submissions. However, what clearly comes out from my analysis of the said account is that the Applicants have not connected any of the Respondents directly to the breach of the court order. Instead, they have put the County Government of Kisii, the Intended Interested Party herein at the center of the said breach.

26. For instance, at paragraph 27 of the Supporting Affidavit, the 5<sup>th</sup> Applicant avers that on the night of 24<sup>th</sup> July, 2019, at 3:00 HRS their workers witnessed a county caterpillar/tractor which had concealed plates destroying the said fence. He also avers in the said paragraph that at the scene of crime were some officials from Kisii town, the Respondent and some police officers. My attention has also been drawn to paragraph 34 of the said Supporting Affidavit where the 5<sup>th</sup> Applicant avers that it was obvious that the County Government of Kisii was meddling with the operations of Rioma Market.

27. From the above averment it is clear that the Applicants have not been able to prove that the Respondents personally and deliberately acted in breach of the orders of the court. Since it is the County Government of Kisii which has been blamed I do not see any reason why the Respondents should be punished for the ills that were committed by a third party who was not party to suit and who was never served with the court order.

28. The upshot is that the contempt application dated 16<sup>th</sup> August, 2019 is devoid of merit and is hereby dismissed.

#### **Whether the Intended Interested Party should be enjoined in the suit.**

29. The law governing joinder of parties is Order 1 Rule (10) (2) of the Civil Procedure Rules that empowers the court, at any stage of the proceedings, upon application by either party or *suo moto*, to order the name of a person who ought to have been joined or whose presence before the court is necessary to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit, to be added as a party.

30. The record shows that the Respondents sued the Applicants vide a Complaint dated 29<sup>th</sup> July, 2016. In the Complaint, the Respondents averred that they were owners of plots at Rioma Market which had duly been gazetted as a market under the Kisii County Government, the Intended Interested Party herein with defined boundaries established in 1952 for plots 5A, 5B, 6A, 6B, 7A,7B, 8A, 8B, 9A, 9B 10A, 10B, 11A, 11B ,12A and 12B. they further averred that on 26<sup>th</sup> June, 2016 the Applicants violently and unilaterally trespassed into the aforementioned portions, uprooted the boundaries demarcating each of the plots with **PARCEL NO. WEST/KITUTU/MWAONARI 1454**, erected a barbed wire across all the plots and effectively rendered the latrines build on them inaccessible. In the Complaint, the Respondents prayed for an order declaring the Applicants' were illegal, an order for eviction and damages on loss of user and inconvenience caused

31. The complaint was opposed by the Applicants who filed a Preliminary Objection dated 9<sup>th</sup> August, 2020 in which they argued that the Plaintiff did not have *Locus standi* to institute the suit since the portion they occupied belonged to the intended interested property and as such they could not claim any proprietary interests thereon. was not defended by the Respondents.

32. On 11<sup>th</sup> August, 2016, the court issued an order directing the District Land Surveyor and District Land Registrar Kisii to visit **PARCEL NO. WEST/KITUTU/MWAONARI 1454** and **NO. WEST/KITUTU/MWAONARI 1433** and establish the boundaries by placing marks and further file a report on the manner in which the two parcels of land are used especially whether the businesses of the Plaintiff are situated on parcel 1433 or 1454.

33. The two officers did visit the suit property as directed and filed their report dated 20<sup>th</sup> April, 2017 on 21<sup>st</sup> April, 2017. The report was adopted by this court vide an order dated 14<sup>th</sup> June, 2017 and the matter was thus marked as settled vide a further order issued on 26<sup>th</sup> April, 2019.

34. It is against this background that the Intended Interested Party sought to be enjoined in the suit on the grounds set out on the face of its application and which I have hereinabove reiterated. Basically, it is the argument of the Intended Interested Party that it was not a party to the suit and that the orders affected its proprietary interests in parcel 1433. It is also the Intended Interested Party's argument that the Respondents did not have *locus* to file the suit in the first place, and therefore resulting outcome should not affect them. They therefore pray that in the interest of justice, they be allowed to defend the suit and that the orders issued by this court be stayed.

35. Having considered the material placed before the court, I find it necessary to enjoin the Interested Party to the suit. I am guided by the decision of the court in the case of **Standard Chartered Financial Services Limited & 2 Others vs. Manchester Outfitters (Suiting Division) Limited (Now known as King Woollen Mills Limited & 2 Others)(2016) eKLR**, where it was observed that the court has jurisdiction to reopen and rehear a concluded matter where the interests of justice demand.

36. Further, in the case of **James Kanyita Nderitu & another vs. Marios Philotas Ghikas & another [2016] eKLR**, it was noted that the Supreme Court of India underlined the importance of the right to be heard in **Sangram Singh vs. Election Tribunal, Kotah, AIR 1955 SC 664, at 711** where the court observed as follows:

“ [T]here must be ever present to the mind the fact that our laws of procedure are grounded on a principle of natural justice which requires that men should not be condemned unheard, that decisions should not be reached behind their backs, that proceedings that affect their lives and property should not continue in their absence and that they should not be precluded from participating in them.”

**Whether the court should set aside the orders issued on 14<sup>th</sup> June, 2017 and 26<sup>th</sup> April, 2019.**

37. The Interested Party herein has also sought to set aside the orders of this court issued on 14<sup>th</sup> June, 2017 and on 26<sup>th</sup> April, 2019 because it wants to be heard. Given that in the aspect of the contempt of court which I have disposed of hereinabove, the Intended Interested Party has been adversely mentioned as being the perpetrator of the of the ills mentioned therein I allow the Application by the Interested Party. This will enable the dispute that exists concerning the boundary between the two parcels of land to be resolved once and for all by considering the interest of all the parties.

38. Consequently, the application dated 23<sup>rd</sup> September, 2020 is therefore allowed as follows:

- i. *The orders of this court issued on 14<sup>th</sup> June, 2017 and on 26<sup>th</sup> April, 2019 are hereby set aside.*
- ii. *The Intended Interested Party be and is hereby enjoined in these proceedings as a party.*
- iii. *Intended Interested Party shall file and serve its response within twenty-one (21) days.*
- iv. *Costs shall be in the cause.*

**DATED, SIGNED AND DELIVERED AT KISII VIA MS TEAMS THIS 13<sup>TH</sup> DAY OF MAY, 2021.**

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**J.M ONYANGO**

**JUDGE**