



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MACHAKOS**  
**SUCCESSION CAUSE NO. 100 OF 1990**  
**IN THE MATTER OF THE ESTATE OF MWANZINA**  
**MUKUVA (DECEASED)**

**DAVID JUMA MWANZINA**

**ABEDNEGO MUIWA JUMA.....APPLICANTS/RESPONDENTS**

**VS**

**DAVID N. MAVINDU**

**MULUKA KITHEKO**

**GEORGE IVITO**

**ROSE NDUKU NDUSO**

**RAPHAEL MUIWA NDUSO.....RESPONDENTS/APPLICANTS**

**RULING**

1. Before this court is an application dated 18/02/2016 filed by the 2<sup>nd</sup> defendant/ applicant, supported by his affidavit. The application was brought to this Court under certificate of urgency. They sought for the following orders:

- 1. That this application be certified as urgent and service of the same be dispensed with in the 1<sup>st</sup> instance.*
- 2. That orders do issue citing the plaintiffs/ respondents for contempt of Court for non- compliance with the Court orders issued on 15/2/2016.*
- 3. That the court to issue to the plaintiffs/ respondents a notice to show cause why they should not be committed to Civil jail for non-compliance with the Court order.*
- 4. That the costs of this application be by the plaintiffs/ respondents.*

2. In the affidavit, he deponed that the plaintiff/respondent had filed an application dated 28/1/2016 seeking a temporary injunction restraining the defendants from encroaching or entering or interfering with parcel no. UKIA /KILALA /2 and the court had issued orders on 15/2/2016 in particular that status quo be maintained. The plaintiffs are the same parties who had filed the application dated 28/1/2016 yet they had failed to honor the court order by constructing a permanent house. He averred that he would suffer irreparable damage if the court doesn't grant him the orders sought.

**Responses**

**2<sup>nd</sup> applicant/respondent**

3. The 2<sup>nd</sup> applicant/ 2<sup>nd</sup> respondent filed a replying affidavit dated 26/02/2016 filed in Court on 29/2/2016 denying the allegations raised in the application. He averred that he has never breached any court order. The applicant in this instant application was a stranger to the estate of Mwanzina Mukuva who had died on 19/1/1976 and was therefore not entitled to any order granting the status quo.

4. The late Mwanzina Mukuva was survived by Princilla Kalulu Mwanzina, David Juma Mwanzina and Katau Mwanzina as the only beneficiaries. He was born and had lived on that land for over 50 years; the applicant had his land in Kitengela.
5. The applicant was a descendant of Kitheko who claimed their father's land after 40 years and he had never seen the applicant. The deceased Mwanzina Mukuva had three parcels of land, which were shared amongst his beneficiaries in land, parcel no. OKIA/KILALA/26, OKIA/KILALA /116 and OKIA /KILALA/2. The applicant ought to produce evidence on the ownership of land. The bricks to build a house had been made since January 2015 and construction has had started in the middle of 2015.
6. He further urged that the applicant had no legal capacity to file this application and it should be dismissed with costs.

#### **Further Replying Affidavit**

7. The 2<sup>nd</sup> defendant/applicant filed a further affidavit on 4/03/2016 averring that the suit land UKIA/KILALA/2 was their grandfather's property who was known as Muiwa Makuva who had 3 children namely Mwanzina Mukuva, Ivuto Muiwa and Kitheko Muiwa. Kitheko Muiwa was his biological father and hence was entitled to the estate. The late Mwanzina Mukuva registered land parcel no. UKIA/KILALA/2 in his name on the understanding that he held the same in trust but the family of the deceased herein have taken on their deceased's father's estate.
8. The 2<sup>nd</sup> defendant/respondent is a grandson to the deceased who moved to the 2<sup>nd</sup> applicant's portion of land, he even interfered with the grave of his father William Kitheko after the status quo order had been issued.
9. He urged the court to allow his application since court orders are not issued in vain.

#### **6<sup>th</sup> respondent**

10. Raphael Muiwa Nduso the 6<sup>th</sup> respondent also filed a replying affidavit alleging that the 2<sup>nd</sup> applicant's affidavit is composed of falsehoods and he was concealing important information from the Court. That the deceased Mwanzina Mukuva had two parcels of land UKIA/KILALA/2 and UKIA/KILALA/116 measuring 5.6 ha and 0.17 ha respectively which were the assets to be distributed amongst the deceased 3 households. Parcel No. UKIA/KILALA/26 never belonged to Mwanzina Mukuva but was owned by his late father Fredrick Nduso Mwanzina.
11. Two administrators of the estate died leaving the 1<sup>st</sup> applicant who is mentally and physically incapable of carrying out duties of an administrator. He averred he was the son to the late Fredrick Nduso who was child to one of the wives of Mwanzina Mukuva. His father Fredrick Nduso had not settled on the parcels of land. The 2<sup>nd</sup> respondent Mutuku Kitheko was a son of William Kitheko Mukuva a brother to Mwanzina Mukuva and also license of parcel no. UKIA/KILALA/2.
12. The 2<sup>nd</sup> applicant has encroached upon areas occupied by the respondents and put up permanent dwelling houses in order to defeat any adverse orders. He urged the 2<sup>nd</sup> respondent application for contempt be allowed.
13. The Court has referred to the application dated 18/2/2016 the responses and the issue for determination is whether the 2<sup>nd</sup> applicant is in contempt of the Court orders issued on 3/2/2016.
14. The 1<sup>st</sup> applicant had earlier on moved the Court under certificate of urgency application dated 28/1/2016 asking this Honorable Court to issue an order restraining the respondents or their agents from trespassing into parcel no. OKIA/KILALA/2. The Court heard the said application and issued orders on 2/2/2016 which read as follows:

*“Upon perusal of the Summons to restrain from intermeddling the estate of the late Mwanzina Mukuva coming under certificate of Urgency together with the Supporting Affidavit and annexures attached thereto”.*

*It is hereby ordered*

- 1. That the application dated 29/1/2016 to be served for hearing on 9/2/2016.*
- 2. That status quo to be maintained.*

These orders were issued on 3/2/2016.

15. The 1<sup>st</sup> applicant is the father to the 2<sup>nd</sup> applicant whom the application of contempt is against. They deny any breach of order of 2/2/2016. The 2<sup>nd</sup> respondent/applicant in his application cited non-compliance by the applicant and urged they be committed to Civil Jail since the application that led to issuance of the order was made by them. In the 2<sup>nd</sup> respondent's affidavit he averred the 2<sup>nd</sup> applicant had constructed a permanent house and annexed photos which at the back is dated 9/2/2016, the photo shows a house. The 2<sup>nd</sup> applicant averred that construction of that house began in the year 2015. The Court had asked parties to maintain status quo on 2/2/2016 and the same was re-issued on 15/2/2106.
16. This Court finds that the house as shown in the Photo (MK No. 4) could not have been constructed within 7 days if the date of 9/2/2016 is what to go by.

According to Blacks Law Dictionary contempt is defined as:

*“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 impair the respect due to such a body”.*

In *Econet Wireless Kenya Ltd v. Minister for Information & Communication of Kenya & Anor* [2005] 1 KLR 828 Ibrahim J. (as he then was) stated as follows:

*“It is essential for the maintenance of the Rule of Law and order that the authority and the dignity of our courts are upheld at all times .The court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors. It is the pain and unqualified obligation of every person against or in respect of whom, an order is made by Court of competent jurisdiction, to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or void”.*

In view of this, the Court finds that the applicants are not in contempt of the Court’s order.

17. On the issue of the land, the 2<sup>nd</sup> and 6<sup>th</sup> respondents have elaborated in their affidavits. This Court shall not go to the merits on ownership and or entitlement to the land. This shall be determined in the initial application dated 29/1/2016.

### **ORDER**

18. Accordingly, for the reasons set above, the Court makes the following specific orders:

1. The application dated 18/2/2016 is dismissed.
2. Costs in the cause.

19. The matter shall proceed to the hearing of the Applicants’ application by summons dated 29/1/2016 on the merits.

*Order accordingly.*

**EDWARD M. MURIITHI**

**JUDGE**

**DATED AND DELIVERED THIS 5<sup>TH</sup> DAY OF FEBRUARY 2019.**

**G.V. ODUNGA**

**JUDGE**

**Appearances**

M/S P.T.M Kisongoa & Co. Advocates for the applicants

Mutuku Kitheko in person