



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT BUSIA**

**CIVIL CASE NO. 82 OF 2014 (FORMERLY HCC 24 OF 2012)**

**1. ODINGA MAKAKA**

**2. ROBERT MAKAKA**

**3. HESBORN MAKAKA**

**4. ROSE WERE.....PLAINTIFFS**

**VERSUS**

**1. LUCILE NAMBO PAMBA**

(Suing as the administrator of the estate of

**HANNINGTON OUMA PAMBA & 8 OTHERS.....DEFENDANTS**

**2. WILBERFORCE ONYANGO PAMBA.....RESPONDENT**

**R U L I N G**

1. The plaintiffs'/decree holders moved the court vide their application dated 4<sup>th</sup> April 2019. The application is premised on Section 3A of the Civil Procedure act and Order 12 rule 17 of the Rules. The applicants seek for orders;

**(a) That leave be granted to the plaintiffs to commence contempt of court process against Wilberforce Onyango Pamba for disobeying the court order issued by consent on 6/8/2018 on both parties.**

**(b) That the respondent Wilberforce Onyango Pamba be punished for contempt of court.**

**(c) That costs of this application be provided for.**

2. The application is premised on the grounds listed on its face *inter alia*;

**(i) That the plaintiffs herein filed an application dated 24<sup>th</sup> August 2017 and filed on the same date seeking stay of the execution of the judgment dated 19<sup>th</sup> July 2017 and also maintain the status quo.**

**(ii) That this honourable court granted a stay of execution of the judgment rendered by Hon. Justice A. K. Kaniaru dated 19<sup>th</sup> July 2017 pending appeal when the parties filed a consent on 6/8/2018.**

**(iii) That vide consent order dated 30<sup>th</sup> July, 2017 and filed on the 6<sup>th</sup> August, 2018, the parties consented to the orders that the status quo obtaining on land parcel No. SAMIA/BUDONGA/22 and/or SAMIA/BUDONGA/2051, 2052, 20153, 20154, 2055, 2056, 2057 AND 2058 prior to 19<sup>th</sup> July 2017 be maintained pending hearing and determination of the appeal.**

3. The application is further supported by the affidavit of Hesbon Makaka sworn on the 4<sup>th</sup> of April 2019. He deposed that being dissatisfied with the judgment delivered on 19<sup>th</sup> July 2017, he lodged an appeal to the Court of Appeal. Subsequently the parties filed a consent on 6<sup>th</sup> August 2018 that the status quo obtaining on L.R. No. Samia/Budonga/22 and/or Samia/Budonga/2051, 2052, 20153, 20154, 2055, 2056, 2057 and 20158 prior to 19/7/2017 be maintained pending hearing and determination of the appeal. That the respondent who is a family member of the defendant has blatantly refused to follow the stay orders and has started building and cultivating a portion hitherto used by the applicants' herein. That the appeal will be rendered nugatory if further dealings on the land are not stayed.

4. The application is opposed by the grounds of opposition that;

1. *There exists no Consent Order on court record.*
2. *The court is functus officio as far as this suit is concerned.*
3. *The application is grounded on wrong provisions of the law.*
4. *The appeal filed has no chance of succeeding.*
5. *The applicants have not shown any reasonable grounds for contempt proceedings to ensue.*

5. The application was argued through the filing of written submissions. The applicants opened their submissions by giving the definition of contempt as **"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."**. The applicants submit that their application dated 24/8/2017 pursuant to which a consent was reached was served on the Counsel for the defendants.

6. That the 5<sup>th</sup> defendant/respondent was aware of the consent order as his advocate was present. They cited the Case of **Sam Nyamweya & 3 others Vs Kenya Premier League Ltd & 2 others (2015) eKLR** which made reference to the case of **Justus Kariuki Mate & Ano Vs Martin Wambora & Ano (2014) eKLR**. The applicants submit that they have proved that the 9<sup>th</sup> defendant is in breach of court order therefore ought to be punished.

7. The respondent on his part submitted that the application lacks merit for;

- (a) *Having been brought under the wrong provisions of law.*
- (b) *The terms of the order was not clear to the respondent.*
- (c) *The 5<sup>th</sup> respondent was not served with the order.*

8. The person sought to be punished for disobeying a court order is referred to as the 5<sup>th</sup> respondent in the judgement delivered on 19<sup>th</sup> July 2017. The order the applicants complain has been disobeyed was recorded by the deputy registrar of this court and signed on 6/8/2018 stated thus;

**"Upon receipt of a letter dated 30/7/2017 under reference JWN/CC/2013 and signed by advocates on record for the parties, it is hereby ordered that;**

1. **The statusquo obtaining on L.R. No. Samia/Budonga/22 and/or Samia/Budonga/2051, 2052, 20153, 20154, 2055, 2056, 2057 and 20158 prior to 19/7/2017 be maintained pending hearing and determination of the appeal**
2. **The plaintiffs do liquidate the defendants' costs as taxed in instalments of Kshs 30000 on the 20<sup>th</sup> of every month till payment in full.**
3. **Upon default of any one instalment the orders herein lapse and execution to issue."**

9. In the case of **Katsuri Ltd vs Kapurchand Shah (2016)eKLR** cited by both parties, it was stated that Contempt proceedings are *quasi-criminal* in nature and since the liberty of a person is at stake, the standard of proof is higher than in civil cases. The principle was reiterated in the case of **Gatharia K. Mutikika vs Baharini Farm Ltd** [where it was held as follows:-

**"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 proved... I 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 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, and 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."**

10. The order on its face does not give the particulars of the status quo obtaining prior to 19<sup>th</sup> July 2017. In the affidavit in support of the motion, the applicants annexed a photograph marked as “HMI”. The photograph shows a structure that is halfway built. The photograph is however undated. The applicants said nothing more to link this photograph to the acts of the 5<sup>th</sup> respondent complained of.

11. The applicants have correctly submitted that **Section 109** of the Evidence Act imposed the burden of proof upon them to discharge. Neither the grounds on the face of the application nor the affidavit in support has elaborated to the court the status quo of the suit land prior to the recording of the consent. Given that the consent itself was also not specific in describing the status quo prior to July 2017, I do agree with the respondent’s submission that a person should not be punished for contempt where the order is unclear. This was the position taken by the Court of Appeal in the case of **Jihan Freighters Ltd v. Hardware & General Stores Ltd** and in **A.B. & Another v. R. B. [2016] eKLR**, that **to sustain committal for contempt of court, the order of the court that is alleged to have been deliberately disobeyed must be clear and precise so as to leave no doubt as to what a party was supposed to do or to refrain from doing.**

12. Consequently, it is my finding that the order breached was not clear. Secondly the applicants failed to prove within a higher standard than in Civil Cases that indeed Mr. Wilberforce Onyango Pamba disobeyed the impugned Order. The result of this finding is that the application be and is hereby dismissed for want of merit with no order as to costs.

**Dated, signed and delivered at BUSIA this 15<sup>th</sup> day of April, 2020.**

**A. OMOLLO**

**JUDGE**