



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KAJIADO**

**ELC APPEAL CASE NO. 16 OF 2018**

**FATUMA AHMED MOHAMED.....1<sup>ST</sup> APPELLANT**

**MARIAM AHMED MOHAMED.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**CHARLES MWANGI GITUNDU.....RESPONDENT**

**RULING**

What is before Court for determination is the Appellants' Notice of Motion application dated the 17<sup>th</sup> April, 2020. The Appellants seek the following orders:

1. That a declaration is hereby made that the excavation and construction works that are ongoing on the property known as Kajiado/ Ole Kasasi/ 549 are illegal by dint of this Honourable Courts orders issued on 28<sup>th</sup> March, 2019 and as such the same constitutes contempt of this Court Orders.
2. That in the interim and pending the determination of this Application, this Honourable Court be pleased to issued temporal orders of injunction barring and or restraining the Respondent either by himself, his agents or servants from constructing and/or carrying out further construction and/or excavations on the property known as Kajiado/ Ole Kasasi/ 549.
3. That the Officer Commanding Ongata Rongai Police Station, be served with this order to enforce this order and ensure law and order is maintained.
4. That an Order be and is hereby made directing the Respondent to forthwith stop further excavation and construction and to reinstate the suit property to its original state.
5. That the Respondent Mr. Charles Mwangi Gitundu be and is hereby committed to civil jail for such period as this Honourable Court may deem fit for contempt of court for wilfully failing, neglecting or disobeying the Orders made by this Honourable Court on the 28<sup>th</sup> March, 2019 maintaining the status quo of the suit property.
6. That the Honourable Court grants any other order or further orders of the Honourable Court geared towards protecting the dignity and authority of the Honourable Court deemed expedient in the circumstances.
7. That costs of this Application be borne by the Respondents.

The application is premised on the grounds on the face of it as well as the affidavit of the 1<sup>st</sup> Appellant Fatuma Ahmed Mohammed where she contends that on the 28<sup>th</sup> March, 2019, an Order was issued by this Court for maintaining status quo of the suit property known as Kajiado/ Ole Kasasi/ 549 pending the hearing and determination of the Appeal. She confirms the Order was duly served upon the Respondent. She claims despite the existence of the Court Order, the Respondent has proceeded to excavate the suit land and commenced construction works thereon. She insists the Respondent has continued to breach the Orders of this Court.

The Application is opposed by the Respondent Charles Mwangi Gitundu who filed a replying affidavit where he deposes that the Appellants' Application for injunction was dismissed but to preserve the substratum of the Appeal the Court ordered that the obtaining status quo of all that suit property known as Kajiado/ Ole Kasasi/ 549 which was subdivided into 1181, 1182, 1183, 1185, 1186, 1188, 1189, 1190, 1192 and 1193 respectively be maintained pending the outcome of the Appeal. He insists the Ruling observed that he is the registered proprietor of the suit land and was in possession. He contends that the Court did not stop him from utilizing the land but he was to remain in occupation and

not transfer it to third parties. He denies existence of Orders issued on 28<sup>th</sup> March, 2019 which he violated as he has never been served. He denies undertaking construction on the land but admits having cleared it so as to undertake some farming.

Both parties filed their respective submissions to canvass the instant application.

### **Analysis and Determination**

Upon consideration of the Notice of Motion dated the 17<sup>th</sup> April, 2020 including the rivaling affidavits and submissions, the issues for determination is whether the Respondent should be cited for contempt and further restrained from interfering with the disputed parcels of land enumerated above.

The Appellants in their submissions reiterated their claim and relied on the decisions of **Republic V Kombo & 3 Others Ex parte Waweru Nairobi HCMA No. 1648 of 2005 (2008) 3KLR (EP) 478; Muslims for Human Rights (MUHURI) & Another V Inspector General of Police & 5 Others (2015) eKLR; Hadkinson Vs Hadkinson (1952) ALL ER 567; Africa Management Communication International Limited Vs Joseph Mathenge & Another (2013) eKLR; Republic V Kenya School of Law & 2 Others Ex parte Juliet Wanjiru Njoroge & 5 Others (2015) eKLR; Econet Wireless Kenya Ltd Vs Minister for Information & Communication of Kenya & Another (2005) eKLR; Refrigerator & Kitchen Utensils Ltd V Gulabchand Papatlal Shah & Others Civil Application NO. Nairobi 39 of 1990 and Central Bank of Kenya & Another Vs Ratilal Automobiles Limited & Others Civil Application No. Nairobi 247 of 2006** to buttress their arguments. The Respondent in his submissions insisted he had not disobeyed any court order as he had not effected transfer of the disputed parcels of land to third parties. He relied on the decision of **Samwel M. N Mweu & Others Vs National Land Commission & 2 Others (2020) eKLR** to support his averments.

It is not in dispute that the Appellants were evicted from the disputed parcels of land. It is further not in dispute that the Respondent is the current registered proprietor of the disputed parcels of lands. The Appellants claim the Respondent is excavating the disputed parcels of land and commenced construction works thereon despite the existence of a Status Quo Order dated the 28<sup>th</sup> March, 2019. As per the Court Records, there is no Status Quo Order that was issued on 28<sup>th</sup> March, 2019 but I however note that the Ruling alluded to was delivered on 18<sup>th</sup> March, 2019.

Black's Law Dictionary (Tenth Edition) defines contempt of court as:- **"Contempt is a disregard of, or disobedience to, the rules or orders of a legislative or judicial body, or an interruption of its proceedings by disorderly behaviour 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."**

Section 4(1)(a) of the Contempt of Court Act defines civil contempt as **"willful disobedience of any judgement, decree, direction, order, or other process of a court or willful breach of an undertaking given to a court"**,

While Section 29 of the Environment and Land Court Act stipulates that: **' Any person who refuses, fails or neglects to obey an order or direction 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.'**

**In the case of HADKINSON –V- HADKINSON (1952) 2 All ER. 567, it was held that: "It is plain and unqualified obligation of every person against or in respect of, who an order is made by a 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 even void."**

Further, in the case of **North Tetu Farmers Co. Ltd v. Joseph Nderitu Wanjohi (2016) eKLR Justice Mativo** stated thus: **' writing on proving the elements of civil contempt, learned authors of the book Contempt in Modern New Zealand have authoritatively stated as follows:-**

**' there are essentially four elements that must be proved to make the case for civil contempt. The applicant must prove to the required standard (in civil contempt cases which is higher than civil cases - (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.'**

In the instant case, the Appellants claim the Respondent has disobeyed the Court Order and provided the history of the dispute herein. The Respondent denies violating the Court Order and insists he has not transferred the disputed parcels of any third party but admits clearing the disputed land to undertake farming. In the case of **Augustine Marete Rukunga vs. Agnes Njeri Ndungire & Anor, HCCC 2160** the court held that: **"The consequence of a finding of contempt is penal. The standard of proof is beyond reasonable doubt. The applicant therefore had to prove service beyond reasonable doubt and I must be satisfied that the respondents disobeyed the court order made on the 9th December 1998 and that they did so willfully or intentionally"**

Further in the case of **Mutitika Vs Baharini Farm Limited [1985] KLR 229, 234** the Court of Appeal held that: **"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...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 an offence which can be said to be quasi-criminal in nature."**

From a perusal of the photographs which were annexed to the supporting affidavit, except for evidence of clearance of land, there is no indication of construction works thereon as claimed by the Appellants. The Appellants have further not provided Certificates of Official to confirm that the disputed parcels have been transferred to third parties. The Appellants however contend that the Respondent should be

committed to civil jail for failing to obey the Court Order on maintenance of status quo. In reference to the Ruling of this Court dated the 18<sup>th</sup> March, 2019, I note the Court declined to grant injunctive reliefs against the Respondent as he had already evicted the Appellants from the disputed parcels but directed for the maintenance of Status Quo to protect the substratum of the suit. Based on the facts before me, I hold that the Respondent's conduct of clearing the disputed land for farming cannot be deemed to be in contempt of a Status Quo order.

It is against the foregoing and in associating myself with the decisions cited above as well as the legal provisions I have quoted, I find that the Appellants have failed to meet the threshold set to cite the Respondent for contempt.

On the prayer for injunction pending Appeal, I note I had already delivered a Ruling on 18<sup>th</sup> March, 2019 in that respect, which excerpt I have quoted hereunder: *'From the evidence presented and relying on this case, I find that the Appellants claim for an injunction has been overtaken by events and they have not established a prima facie case to warrant it. However, I opine that since the Appellants have lodged an Appeal against the decision of the Senior Principal Magistrate, it is pertinent if the substratum of the suit was preserved pending the outcome of the Appeal.'*

In the circumstances, I decline to grant the said prayer as I had already determined it.

It is against the foregoing that I find the instant application dated the 17<sup>th</sup> April, 2020 unmerited and will disallow it. Costs will be in the cause.

The ex parte orders of injunction granted on 23<sup>rd</sup> April, 2020 be and are hereby vacated.

I direct that this matter be mentioned on 29<sup>th</sup> July, 2020 to fix a Judgement date.

**Dated, Signed and Delivered via email this 8<sup>th</sup> Day of July, 2020.**

**CHRISTINE OCHIENG**

**JUDGE**