



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT AT MAKUENI**

**ELC CASE NO.345 OF 2017**

**HELLEN MBATHA KANYANYA.....1<sup>ST</sup> PLAINTIFF**

**ZIPPORAH NDUNGE KANYANYA.....2<sup>ND</sup> PLAINTIFF**

**-VERSUS-**

**RHODA MUVENGI MBITHUKA.....1<sup>ST</sup> DEFENDANT**

**JAMES MUSYOKI KANYANYA.....2<sup>ND</sup> DEFENDANT**

**KILONZO KANYANYA.....3<sup>RD</sup> DEFENDANT**

**RULING**

1. What is before this Court for ruling is the Plaintiffs'/Applicants' notice of motion application dated 26<sup>th</sup> May, 2020 and filed in court on 27<sup>th</sup> May, 2020 for orders: -

**(1) Spent.**

**(2) THAT the Respondents; MRS. RHODA MUVENGI MBITHUKA, MR. JAMES MUSYOKI KANYANYA and MR. KILONZO KANYANYA be and are hereby committed to Civil jail for such period as this Honourable Court may deem fit for contempt of court for willfully failing, neglecting or disobeying the Orders made by this Honourable Court on the 14<sup>th</sup> November, 2017 maintaining the status quo of the suit property.**

The application is expressed to be brought under section 5 of the Judicature Act, Order 52 Rule 3 of the Supreme Court of England, 1965, sections 1A, 1B, 3, 3A and 63(c) of the Civil Procedure Act cap 21 of the Laws of Kenya, Order 40 Rule 3(1), Order 51 of the Civil Procedure Rules, 2010 and all other enabling provisions of the law.

2. The application is predicated on the grounds on its face and is supported by the affidavit of Hellen Mbatha Kanyanya, the 1<sup>st</sup> Plaintiff/Applicant herein sworn on 26<sup>th</sup> May, 2020 with the authority of the 2<sup>nd</sup> Plaintiff/Applicant.

3. The application is opposed by the Defendants/Respondents through the replying affidavit of James Musyoki Kanyanya, the 2<sup>nd</sup> Defendant/Respondent herein, sworn on the 08<sup>th</sup> June, 2020 with the authority of the 1<sup>st</sup> and 3<sup>rd</sup> Defendants/Respondents and filed in court on 09<sup>th</sup> June, 2020.

4. The application was canvassed by way of written submissions.

5. The 1<sup>st</sup> Plaintiff/Applicant has deposed in paragraphs 4, 5, 6, 7 and 8 of her supporting affidavit that on the 14<sup>th</sup> November, 2017 an order was issued by this court to maintain the status quo of the suit property known as Nzau/Nzui/907 pending the hearing and determination of this suit, that the said order was duly served upon the Respondents who are aware that the matter is pending judgement of this court, that despite the court orders issued herein which the Respondents are aware of, they have gone ahead and erected a fence on the suit property as can be seen from copies of photographs annexed and marked as HMK-1(a) & (b), that she is advised by her Advocate on record, which advise she verily believes to be true, that the excavation and ongoing construction works by the Respondents is not only in breach of the court order, but also undermines the role of the courts in adjudicating disputes and defeats the Rule of Law and that she is further advised by her Advocate on record, which advise she verily believes to be true, that indeed if the Respondents were discontented with the court ruling delivered on the 14<sup>th</sup> November, 2017 they ought to appeal or seek review in a court of law, and not to resort to underhand means to seek to set aside the court order.

6. The 2<sup>nd</sup> Defendant/Respondent has deposed in paragraphs 3, 4, 5, 6, 7, 8, 9 and 10 of her replying affidavit that on the 14<sup>th</sup> November, 2017, the court directed that the status quo be maintained in that no construction, cultivated portions be maintained and non-cultivated one to remain as such, that after the court order, everything was frozen and no more construction has taken place and no such allegation has been made, that it is not therefore true that the Defendants/Respondents have disobeyed the court order but on the contrary have fully complied, that the half fence shown in the photo attached by the Applicants has been in existence before the matter came in court and it has remained so up to today a fact well within the knowledge of the Applicants, that the Defendants/Respondents also undertook before the court to continue complying with the court orders until the matter is heard and determined, that the application by the Applicants is thus actuated by malice, bad faith and an attempt to stalk animosity which the Defendants/Respondents are not interested but wish to have the matter heard and concluded expeditiously, that the Defendants/Respondents reiterate that they have not disobeyed the court orders, are ready and willing to continue abiding by the status quo and pray that the application be dismissed with costs and that they also make a plea that the court does give a hearing date on priority basis so that the Applicants do not use these applications to delay the matter or use similar applications in future as a means of intimidation and/or threats.

7. In his submissions, the Counsel for the Plaintiffs/Applicants began by citing **Black's Law Dictionary (Ninth Edition)** which defines contempt of court as: -

***“conduct that defies the authority or dignity of a court. Because such conduct interferes with the administration of justice, it is punishable usually by fine or imprisonment.”***

8. The Counsel further cited **Article 10 of the Constitution of Kenya** which provides: -

***“(1) The national values and principles of governance in this Article bind all state organs, state officers, public officers and all persons whenever any of them --***

***(a) Applies or interprets this Constitution;***

***(b) Enacts, applies or interprets any law; or***

***(c) Makes or implements public policy decisions.***

***(2) The national values and principles of governance include --***

***(a) Patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;***

***(b) Human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized;***

***(c) Good governance, integrity, transparency and accountability; and***

***(d) Sustainable development.”***

9. The Counsel went on to submit that the obedience of court orders is one of the tenets of the rule of law and contempt of court cannot be countenanced in a constitutional democracy. The Counsel added that the Plaintiffs/Applicants submit that the Defendants/Respondents have completely disregarded the orders issued **by this court** (*emphasis are mine*) and sought to use crooked means to illegally force themselves into the suit property.

10. It was further submitted on behalf of the Plaintiffs/Applicants that it is beyond iota of doubt that the Defendants/Respondents having been aware of the court order issued by this court on 14<sup>th</sup> November, 2017, deliberately, blatantly and wantonly disobeyed them by putting up a permanent fence and undertaking construction works. The Counsel termed the act as not only unfortunate, illegal and unlawful but also disdainful and contemptuous. That their action fly in face of the orders of this court, lowers its dignity and standing and prevents the cause of justice. The Counsel added that their deposition in the replying affidavit that the fence has always been there as a blatant lie and pointed out that it should infact be treated as perjury for all and sundry can see that the fence has been erected recently.

11. The Counsel concluded by urging the court to restore its dignity and confidence by finding the Respondents to be in contempt of court, punishing them by committing them to civil jail for a period that this court deems fit for contempt of court, the court to issue orders of injunction barring and or restraining the Respondents either by themselves, their agents or servants from pulling up any other fence and infact to purge contempt by pulling down the fence and further from carrying out any other activity on the property known as LR No.Nzau/Nziu/908, directing the Officer Commanding Makueni Police Station to enforce this order and ensure that law and order is maintained with the costs of the application being borne by the Respondents.

12. On the other hand, the Counsel for the Defendants/Respondents cited the case of **Katsuri Ltd vs. Kapruchand Depar Shar [2016] eKLR** Where Mativo, J stated thus: -

***“Writing on proving the elements of civil contempt, learned authors of the book Contempt in Modern New Zealand [22] 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) that: -

- 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.”

13. Arising from the above the Counsel submitted that on the first issue, it is not in doubt that the court made the orders alleged to have been disobeyed but which is denied by the Defendants/Respondents. That on the second issue, it is not in doubt that the Defendants/Respondents are well aware of the court orders which according to them they have continued to observe and obey. The Counsel pointed out that it is important to note that since the orders were made in the year 2017, there has never been a complaint by either of the parties and this shows goodwill by all litigating parties in having the court orders observed and upheld for good order. The Counsel added that the Defendants/Respondents have also undertaken to continue observing and obeying the said orders.

14. Regarding the issue of proof that the Defendants/Respondents have disobeyed the court orders, the Counsel submitted that the Plaintiffs/Applicants have not proved that the court orders have been disobeyed at all and the Defendants/Respondents deny the allegation. The Counsel added that other than attaching a photo showing a fence done half way, they have not availed any evidence to this court that previously there was no fence on the section of the land in question and now there is a fence which has been erected after the issuance of the court orders and the same has been erected by the Defendants/Respondents or under their instructions. It was further submitted on behalf of the Defendants/Respondents that there is no evidence when the alleged contempt was done and this can only be interpreted in favour of the Defendants/Respondents. The Counsel added that even the fencing posts in the photographs attached are old and dilapidated which corroborates the Defendants/Respondents assertion that they were erected long time ago. The Counsel further cited **Katsuri Ltd vs. Kapruchand Depar Shar** (supra) where the Court stated;

**“Although the proceedings are civil in nature, it is well established that an applicant must prove the elements beyond reasonable doubt, at least higher than the standard in civil cases. The fact that the liberty of the defendant could be affected means that the standard of prove is higher than the standard in civil cases. It is incumbent on the applicant to prove that the defendant's conduct was deliberate in the sense that he or she deliberately or willfully acted in a manner that breached the order.**

***The prayer sought is for committal for contempt. The power to commit for contempt is one to be exercised with great care. An order committing a person to prison for contempt is to be adopted only as a last resort.”***

The Counsel further cited the case of **Woburn Estate Limited vs. Margaret Bashforth [2016] eKLR** where the Court of Appeal stated that:-

***“We reiterate that contempt proceedings being of quasi –criminal in nature and since a person may lose his right to liberty, each stage and step of the procedure must be scrupulously followed and observed. We bear in mind the often-cited passage attributed to Lord Denning In Bramblevale Ltd [1970] 1 CH128 at page 137 that:-***

***A contempt of court is an offence of criminal character. A man may be sent to prison for it. It must be satisfactorily proved showing that when the man was asked about it, he told lies. There must be some further evidence to incriminate him.”***

15. The Counsel concluded by submitting that the Plaintiffs have not proved indeed that the fence was not there and now has been erected. The Counsel added that there are no photos to that effect and the court is unable to ascertain when the alleged fence was erected. He added that the Plaintiffs/Applicants have not adduced any evidence as to when the alleged contempt was done, that the Defendants/Respondents have been categorical that they have not disobeyed court orders and have committed themselves to continue observing the status quo until the case is heard and determined. The Counsel urged the court to dismiss the application with costs.

16. Having carefully considered the submissions filed by the Counsel on record for the parties herein, it is not in dispute or doubt that the court made the orders of 14<sup>th</sup> November, 2017. Further it is not in doubt that the Defendants/Respondents were well aware of the said orders. What is in doubt is whether the Defendants/Respondents have acted in breach of the terms of the order and that their conduct was deliberate. I say so because the Plaintiffs/Applicants in paragraph 7 of their supporting affidavit have not indicated when the fence appearing in photos annexed and marked as HMK-1(a) and (b) was erected. Granted the fencing posts used to erect the fence may be old and dilapidated but the chain link used appears new. However, it was upon the Plaintiffs/Applicants to prove when the fence was erected. The Plaintiffs/Applicants cannot leave it to the court to speculate when this was done. And as was stated by Lord Denning in **Re Bramblevale Ltd [1970] 1 CH 128 at page 137;**

***“A contempt of court is an offence of criminal character. A man may be sent to prison for it. It must be satisfactorily proved showing that when the man was asked about it, he told lies. There must be some further evidence to incriminate him.”***

17. In my view, there is no evidence to incriminate the Defendants/Respondents herein. The upshot of the foregoing is that the application lacks merit and same is hereby dismissed with costs to the Defendants/Respondents.

**Signed, dated and delivered at Makueni via email this 28<sup>th</sup> day of August, 2020.**

**MBOGO C.G.,**

**JUDGE.**

**Court Assistant:** Ms. G. Kwemboi