



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 81 OF 2019**

**JINAANI NZIOKI MBIUVA.....PLAINTIFF**

**-VERSUS-**

**THE CABINET SECRETARY**

**MINISTRY OF LANDS AND PHYSICAL PLANNING.....1<sup>ST</sup> DEFENDANT**

**THE HONOURABLE ATTORNEY GENERAL.....2<sup>ND</sup> DEFENDANT**

**CHIEF LAND REGISTRAR.....3<sup>RD</sup> DEFENDANT**

**DIRECTOR OF SURVEYS.....4<sup>TH</sup> DEFENDANT**

**JOSHUA WAMBUA MUTUNGA.....5<sup>TH</sup> DEFENDANT**

**JAMES MUTHINI MWAU.....6<sup>TH</sup> DEFENDANT**

**JOHNSON NZUI MUKULA.....7<sup>TH</sup> DEFENDANT**

**R U L I N G**

1. On the 27<sup>th</sup> September, 2020, Joshua Wambua Mutunga (5<sup>th</sup> Respondent) and Johnson Nzui Mukula (7<sup>th</sup> Respondent) were committed to civil jail for six (6) months after having been cited for contempt of court. And on the 28<sup>th</sup> September, 2020, the two contemnors filed a notice of motion application of even date seeking for: -

**1. Spent.**

**2. This Honourable Court be pleased to discharge, set aside, and/or stay its order of 25/9/2020 committing the 5<sup>th</sup> and 7<sup>th</sup> Defendant/Applicants to Civil Jail by admitting them to personal bond/cash bail pending the interpartes hearing and of this application.**

**3. THAT this Honourable be pleased to discharge, set aside, vary and/or stay the order of 25/9/2020 committing the 5<sup>th</sup> and 7<sup>th</sup> Defendants/Applicants to Civil Jail pending the hearing and determination of this application.**

**4. THAT this Honourable Court do visit the disputed properties together with Land Registrar – MAKUENI, District Surveyor – MAKUENI to ascertain whether the 5<sup>th</sup> and 7<sup>th</sup> Defendants/Applicants have blocked the alleged access road and the Land Registrar –MAKUENI in conjunction with the District Surveyor – MAKUENI to file a report within reasonable time.**

**5. THAT costs be borne by the Respondent.**

2. Upon hearing Mr. Muthiani and the late Mr. Masaku who were then on record for the two Respondents, this court expressed itself as follows: -

*“Having read the notice of motion application dated 28/09/2020 and filed in court today and having heard the Counsel on record for the 5<sup>th</sup> and the 7<sup>th</sup> Defendants/Applicants, I do note that due to the age of the 5<sup>th</sup> and 7<sup>th</sup> Defendants/Applicants and particularly*

the medical condition of the latter which is well captured in paragraph 6 of the supporting affidavit and marked JMN-3, it is only fair that the two Applicants be admitted to bond as they have also expressed their willingness to purge the contempt within 7 days from today.

Consequently, I hereby proceed to admit the 5<sup>th</sup> and the 7<sup>th</sup> Defendants/Applicants to personal bond of Kshs. 100,000/= each for them to appear before this court on 12/10/2020 at 10:00 am for interpartes hearing. The Defendants/Applicants to serve the Plaintiff/Respondent.”

3. The application was fixed for interpartes hearing on the 12<sup>th</sup> October, 2020. In the meantime, on the 30<sup>th</sup> September, 2020 the Plaintiff herein filed a notice of motion application dated 29/09/2020 seeking for orders that: -

- 1. THAT this application be certified urgent and fit to be heard on priority basis and service thereof to be dispensed with.**
- 2. That this Honourable Court be pleased to lift, vacate, discharge and or set aside its orders issued on the 28<sup>th</sup> September, 2020 *in limine* and in its place reinstate its orders of 25<sup>th</sup> September, 2020 committing JOSHUA WAMBUA MUTUNGA and JOHNSON NZUI MUKULA, the 5<sup>th</sup> and 7<sup>th</sup> Defendants/ Respondents herein to imprisonment for 6 months for disobeying the orders given and issued on 10<sup>th</sup> December, 2019 and 24<sup>th</sup> December, 2019 respectively pending the hearing and determination of this Application.**
- 3. That this Honourable Court do issue an order to the Officer Commanding Station, Makueni Police Station to explain to court when he escorted the 5<sup>th</sup> and 7<sup>th</sup> Defendants/ Respondents to Nairobi for commissioning of the Affidavit in support of the application dated 28<sup>th</sup> September, 2020 herein pending the hearing and determination of this Application.**
- 4. That this Honourable Court do issue an order to the Officer Commanding Station, Makueni Police Station to explain to court when he escorted the 5<sup>th</sup> and 7<sup>th</sup> Defendants/ Respondents to court for release on personal bond upon service of the court order of 28<sup>th</sup> September, 2020 pending the hearing and determination of this Application.**
- 5. That this Honourable Court do issue an order to JOYCE KAMAU, the Commissioner for Oaths who commissioned the Supporting Affidavit of Johnson Nzui Mukula for cross-examination on where and when the deponent thereof appeared before then pending the hearing and determination of this application.**
- 6. That this Honourable Court be pleased to grant any other order that is fit and just to grant herein;**
- 7. That in any event, the costs hereof be awarded for the Plaintiff/Applicant.**

4. The Court proceeded to certify the application as urgent and directed that the same be served upon the Defendants/Respondents who include the Hon. The Attorney General. The Court further directed that the application be heard on 12<sup>th</sup> October, 2020 together with the application earlier on filed by the 5<sup>th</sup> and 7<sup>th</sup> Defendants/Respondents on the 29<sup>th</sup> September, 2020.

5. Come the 29<sup>th</sup> September, 2020, the Counsel for the Plaintiff sought to have the court address the issue of audience of the 5<sup>th</sup> and the 7<sup>th</sup> Defendants pursuant to the ruling and order of 22<sup>nd</sup> January, 2020 and subsequently the court order of 25<sup>th</sup> September, 2020 dismissing the application dated 03<sup>rd</sup> February, 2020. The Counsel went on to submit that the Plaintiff would like to know the reasons why the court on its own motion requested that they serve the Attorney General.

6. On the other hand, the Counsel for the 5<sup>th</sup> and 7<sup>th</sup> Defendants submitted that this is a court of law whose overriding objective is to do justice between the parties. The Counsel went on to submit that the question of who has audience at what stage is a prerogative of the court and a judicial function. The Counsel further submitted that for this court to even venture into the question of what is fair and right, it must hear all the parties who may be affected by the eventual decision of the court. The Counsel cited Article 25 of the Constitution which guarantees the right to a fair hearing as one of the few rights which cannot be taken away not even by Parliament or Rules of Procedure. The Counsel added that fair hearing encumbrances the right to reply to any allegation made against a party and that there can be no fairness if a party is prevented from saying what it wishes to say in court. The Counsel also submitted that the question of audience of the 5<sup>th</sup> and 7<sup>th</sup> Defendants was determined by the Court one way or the other on 28<sup>th</sup> September, 2020 whether the Court was right or wrong. The Counsel added that if a party is dissatisfied with an order given by the court, it knows what to do which is to challenge the order in the usual forum available. The Counsel further submitted that in giving directions in this matter, the Court has to bear in mind the real issue in controversy between the parties and that the same is well set out in the plaint which the Counsel was able to peruse. The Counsel submitted that as the court determines the issue of audience, it would be important for it to bear in mind the consequences, the allegation and the desired outcome of what the Plaintiff intends to achieve if the 5<sup>th</sup> and 7<sup>th</sup> Defendants are denied audience and pointed out that the consequences are extremely dire.

7. In reply, the Counsel for the Plaintiff submitted that the issue of audience is a matter that is *res judicata* in that vide an application dated 03<sup>rd</sup> January, 2020, the Applicant sought before court the attachment of the properties of the 5<sup>th</sup> and 7<sup>th</sup> Defendants and also their imprisonment for six (6) months for disobeying a court order issued on 10<sup>th</sup> December, 2019. That the application was heard and the Court gave a ruling denying the 5<sup>th</sup> and 7<sup>th</sup> Defendants audience. As for the submissions by the Counsel for the 5<sup>th</sup> and 7<sup>th</sup> Defendants that a party aggrieved by an order of the court knows what to do, the Plaintiff's Counsel pointed out that they (5<sup>th</sup> and 7<sup>th</sup> Defendants) filed an application dated 03<sup>rd</sup> February, 2020 that sought review and or setting aside of the orders of 22<sup>nd</sup> January, 2020 which orders had denied them audience.

8. On the issue of this being a judicial process as stated by the Counsel for the 5<sup>th</sup> and 7<sup>th</sup> Defendants, the Counsel for the Plaintiff submitted that this Court made an order exercising its jurisdiction on the 22<sup>nd</sup> January, 2020 where it denied the 5<sup>th</sup> and the 7<sup>th</sup> Defendants audience. The Counsel added that it cannot be convenient for the 5<sup>th</sup> and 7<sup>th</sup> Defendants to say that the Court needs to lift that order. The Counsel further submitted that this being a court of law, it must ensure that the orders it issues are not in vain. The Counsel further submitted that by finding that the Defendants had disobeyed a court order and by denying them audience the purpose was to ensure the overriding objective is to do justice which cuts both ways between the parties. As for Article 25 of the Constitution, the Counsel submitted that the Counsel for the 5<sup>th</sup> and 7<sup>th</sup> Defendants selectively chose one right which is fair trial and pointed out that Article 25(a) is with regard to inhuman and degrading treatment or punishment. The Counsel pointed out that the actions complained of by the Plaintiff and the subsequent order was to ensure access to property. The Counsel added that under Article 47(2), they have a right to be given reasons on why the court *suo moto* decided to lift audience.

9. It was also the Counsel's submissions that by the order of 28<sup>th</sup> September, 2020, the Court summarily reversed the orders of 25<sup>th</sup> September, 2020. The Counsel pointed out that they are seeking for the reversal of the decision made *exparte*.

10. Regarding the submissions by the Counsel for the 5<sup>th</sup> and the 7<sup>th</sup> Defendants that the Court should bear in mind the consequences and allegations and desired outcome of what the plaintiffs intends to achieve if the two defendants are denied audience, the Plaintiff's Counsel submitted that first and foremost, the two had been denied audience. The Counsel submitted that the same was weighed upon what the consequences that they themselves intended to achieve by blocking the access of road to the Plaintiff's property, which order of 10<sup>th</sup> December, 2020 came to cure. The Counsel submitted that there could be dire consequences for a party who has chosen to blatantly and knowingly to disobey a court order. The Counsel pointed out that this Court has sent a message to the 5<sup>th</sup> and 7<sup>th</sup> Defendants that one can be denied audience and the same can be reinstated and thus the Plaintiff has a court order in paper.

11. Having heard the Counsel for the Plaintiff and the Counsel for the 5<sup>th</sup> and 7<sup>th</sup> Defendants, my finding is as follows: -

a. Firstly, whereas, I agree with the Counsel for the Plaintiff that under Article 47(2) of the Constitution a person has a right to be given written reasons for administrative action taken if a right or fundamental freedom of a person has been affected or is likely to be adversely affected, we must not lose track of the fact that the action that the Court took on the 28<sup>th</sup> September, 2020 was a judicial function and not an administrative one. The Court therefore cannot give further reasons over and above the decision it arrived at on the material day since those reasons are contained in the proceedings and the action or order that the Court made on the material day. I would therefore agree with the 5<sup>th</sup> and 7<sup>th</sup> Defendants' Counsel that any party that is aggrieved by the Order that the Court made on the 28<sup>th</sup> September, 2020 knows what to do.

b. Secondly on the issue of the Court's directive on 30<sup>th</sup> September, 2020 that the Attorney General be served with the notice motion application dated 29<sup>th</sup> September, 2020, the latter is a party to these proceedings notwithstanding the fact the Attorney General indicated that he was not opposed to the application by the Plaintiff. In any case, the directive of 30<sup>th</sup> September, 2020 is not cast in stone and the same can be varied and or amended upon the application by either of the parties herein so as to meet the ends of justice.

c. Lastly, we should not lose focus of the fact that the order of 25<sup>th</sup> September, 2020 committing the 5<sup>th</sup> and the 7<sup>th</sup> Defendants to civil jail for six (6) months has not been set aside or summarily reversed. It still hangs over their heads like a sword of damocles since the two contemnors (defendants) are out on bond which can be cancelled at the stroke of the pen if it is shown that they did not purge the contempt within 7 days from the 28<sup>th</sup> September, 2020 as they had undertaken to do and the same remains unpurged.

12. From the foregoing reasons, my finding is that the application by the Plaintiff has no merit and same is dismissed with no orders as to costs.

Signed, dated and delivered in open court at Makeni this 23<sup>rd</sup> day of November, 2020.

**MBOGO C.G.,**

**JUDGE.**

**In the presence of: -**

Ms. Kamende for the Plaintiff

Mr. D. Mungata for the 5<sup>th</sup> and 7<sup>th</sup> Defendants

Mr. Kwemboi – Court Assistant

In the absence of Mr. Muthiani for the 6<sup>th</sup> Defendant

**MBOGO C.G., (JUDGE),**

**23/11/2020.**