



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT OF KENYA**  
**AT ELDORET**  
**PETITION NO. 13 OF 2018**

**IN THE MATTER OF VIOLATION AND/OR INFRINGEMENT OF THE PETITIONERS'**  
**CONSTITUTIONAL RIGHTS UNDER ARTICLES 19,20, 21, 22, 23, 35, 40, 47, 63, 162**  
**AND 165 OF THE CONSTITUTION OF KENYA, 2010**

**DAVID K. KAITANY & 18 OTHERS.....PETITIONERS**  
***REPRESENTATIVES OF KABOMOTI AREA RESIDENTS AND/OR COMMUNITY***

**VERSUS**

**THE HEAD TEACHER/SECRETARY**

**THE SCHOOL MANAGEMENT COMMITTEE, NG'OLONG PRIMARY SCHOOL.....1<sup>ST</sup> RESPONDENT**

**THE COUNTY DIRECTOR OF EDUCATION, BARINGO COUNTY.....2<sup>ND</sup> RESPONDENT**

**THE LAND ADJUDICATION AND SETTLEMENT OFFICER, BARINGO COUNTY....3<sup>RD</sup> RESPONDENT**

**MR. WILSON KAPKWANG, THE ASSISTANT CHIEF,**

**MOLOI SUB-LOCATION OROKWO LOCATION, BARINGO COUNTY.....4<sup>TH</sup> RESPONDENT**

**THE MEMBER OF THE COUNTY ASSEMBLY (MCA)**

**KABARNET WARD, BARINGO COUNTY.....5<sup>TH</sup> RESPONDENT**

**THE COUNTY LAND REGISTRAR, BARINGO COUNTY.....6<sup>TH</sup> RESPONDENT**

**THE COUNTY SURVEYOR, BARINGO COUNTY.....7<sup>TH</sup> RESPONDENT**

**THE COUNTY LANDS OFFICER, BARINGO COUNTY.....8<sup>TH</sup> RESPONDENT**

**THE COUNTY GOVERNMENT OF BARINGO.....9<sup>TH</sup> RESPONDENT**

**THE NATIONAL LAND COMMISSION.....10<sup>TH</sup> RESPONDENT**

**THE HON. THE ATTORNEY GENERAL.....11<sup>TH</sup> RESPONDENT**

**RULING**

**[NOTICE OF MOTION DATED 2<sup>ND</sup> NOVEMBER, 2018]**

1. The Petitioners filed the application dated the 2<sup>nd</sup> November, 2018 seeking for the 1<sup>st</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents to be arrested and committed to civil jail for a period the Court shall determine for contempt of court in that they ***“flagrantly, openly and blatantly disobeying the Court order issued on the 11<sup>th</sup> October, 2018 and dated 12<sup>th</sup> October, 2018 which was served upon them restraining them, their servants, agents or any other persons whatsoever from, invading, constructing or dumping materials or doing any act on the land Ewalel/Seretunin/632, pending the hearing and determination of the Motion inter-partes.”*** The application is based on the eleven grounds on its face marked (i) to (xi) and supported by the affidavit sworn by **David K. Kaitany** on the 2<sup>nd</sup> November, 2018. The Petitioners’ case is that after the Court issued the order on 11<sup>th</sup> October, 2018, the same was extracted and served upon the 1<sup>st</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents on the 13<sup>th</sup> October, 2018. That however, they have disregarded the order and proceeded to construct buildings for a purported secondary school on the disputed land parcel **Ewalel/Seretunin/632**, while claiming the construction was on land parcel **Baringo/Kapchomuswo “A”/2100**. That the 1<sup>st</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents are in contempt of Court and should be arrested and committed to civil jail as the order of 11<sup>th</sup> October, 2018 had restrained them, their servants, agents or any other persons from invading, constructing, dumping materials or doing any other thing or act on the said land pending the hearing and determination of the application.

2. The application is opposed by the 1<sup>st</sup> Respondent through the Replying affidavit sworn by **Solomon K. Limo** who is the school’s head teacher and secretary to the Board of Management, sworn on the 13<sup>th</sup> November, 2018. It is the 1<sup>st</sup> Respondent’s case that it is not involved in any construction. That 1<sup>st</sup> Respondent was never served with any court order by the Petitioners that it could be said to have disobeyed. That he only saw the order dated 11<sup>th</sup> October, 2018 on the 12<sup>th</sup> November, when he visited his advocate to swear this affidavit. That 1<sup>st</sup> Petitioner, who has sworn the supporting affidavit, has not demonstrated that he is a beneficiary of the land parcel Ewalel/Seretunin/632. That the alleged construction is for a secondary school which is a separate legal entity from the 1<sup>st</sup> Respondent. That the order dated 11<sup>th</sup> October, 2018 is not based on any application, is ambiguous and incapable of being obeyed by the 1<sup>st</sup> Respondent.

3. That Motion dated the 2<sup>nd</sup> November, 2018 was mentioned on the 6<sup>th</sup> November, 2018, 16<sup>th</sup> November, 2018, 1<sup>st</sup> April, 2019 and 11<sup>th</sup> November, 2019 and directions on filing and exchanging submissions given among others. The matter was again mentioned on the 17<sup>th</sup> February 2020, 12<sup>th</sup> March 2020, 26<sup>th</sup> May 2020 and 28<sup>th</sup> September, 2020 and only Counsel for the Petitioners, and 1<sup>st</sup> and 4<sup>th</sup> Respondents filed written submissions dated 4<sup>th</sup> May, 2020 and 14<sup>th</sup> February, 2020 respectively.

4. The following are the issues for the Court’s determinations;

(a) ***Whether the Petitioners have proved that the 1<sup>st</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents had disobeyed the court order as alleged.***

(b) ***Who pays the costs of the application?***

5. The Court has carefully considered the grounds on the Motion, the affidavit evidence, the written submissions, the record and come to the following conclusions;

(a) That the record confirms that the Petition dated the 24<sup>th</sup> September, 2018 was filed contemporaneously with the Motion of even date that seeks for among others temporary injunction orders restraining ***“the 1<sup>st</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents their servants, agents and or any of the residents of Orokwo location from interfering with, trespassing onto, alienating, placing building materials on site, selling, claiming an interest, subdividing, or in any way whatsoever affecting all those parcels demarcated as L. R. Nos. Ewalel/Seretunin/632 reserved for Kabomoti Area Residents, and Baringo/Kapchomuswo “A”/2100 purportedly reserved for Ngolong Primary School”, “pending the hearing and determination of this suit.”*** The application was mentioned on the 25<sup>th</sup> September, 2018, 2<sup>nd</sup> October, 2018 and 11<sup>th</sup> October, 2018 when interim order restraining the Respondents and their agents, from invading, constructing or dumping materials or doing any act on the land Ewalel/Seretunin/632, pending the hearing of the application was issued. That the order was extracted and issued on the 12<sup>th</sup> October, 2018. That from the affidavit of service sworn by **Obed Ingalula Wandera** on the 23<sup>rd</sup> October 2018, the order was served upon one **Cynthia Kipruto**, a female security guard at the County Offices on behalf of the 5<sup>th</sup> Respondent on the 13<sup>th</sup> October, 2018. That on the same date, service was effected upon one **Jane Tomno**, wife to the 4<sup>th</sup> Respondent, who however declined to sign in acknowledgement. That service on the 1<sup>st</sup> Respondent was done upon one **Samwel Kimeto**, a watchman, by throwing a copy under the Headmaster’s office door after he declined to sign for it. That day of effecting the service, the 13<sup>th</sup> October, 2018 was a Saturday.

(b) That during the Court mention of 16<sup>th</sup> November, 2018, the Court was told of the three (3) applications dated the 11<sup>th</sup> October, 2018, 2<sup>nd</sup> November, 2018 and 12<sup>th</sup> November, 2018. The Court has perused the record and has not seen any application dated 11<sup>th</sup> October, 2018 and probably the Counsel intended to refer to the one dated the 24<sup>th</sup> September, 2018. That the Motion dated the 12<sup>th</sup> November, 2018 is also by the Petitioners, and seeks for among others injunction order restraining the 1<sup>st</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents, their servants, agents or any other person from placing materials, constructing, digging trenches and or foundations, fencing, demarcating, subdividing, selling or sub-letting or doing anything whatsoever on all those parcels of namely ***“Baringo/Kapchomuswo “A”/2100 and Ewalel Seretunin/632, pending the hearing of this application interpartes.”*** That on that date of 16<sup>th</sup> November, 2018 a consent order was entered and issued on the 18<sup>th</sup> December, 2018 directing the County Surveyor to visit land parcels Ewalel/Seretunin/632, and Baringo/Kapchomuswo “A”/2100 and establish their existence with the assistance of the County Land Adjudication and Settlement Officer. The Respondents and Board of Management of Nyolong Primary School was also restrained from any further construction on the land parcel Ewalel/Seretunin/632 or Baringo/Kapchomuswo “A”/2100, pending the filing of the report with the court. That the County Surveyor, Uasin Gishu filed their Report dated the 26<sup>th</sup> February, 2019 on the 4<sup>th</sup> March, 2019. That during the subsequent court appearance on 1<sup>st</sup> April, 2019 for highlighting the submissions in the Motion dated 16<sup>th</sup> January, 2019, the court was addressed on the filing of the Surveyor’s Report before granting the Motion dated the 16<sup>th</sup> January, 2019 by reviewing the conditions made on 18<sup>th</sup> December 2018 and further ordered that ***“An order of injunction is hereby issued restraining the Respondents from any further construction on the suit properties namely all those parcels of land known as Ewalel/Seretunin/632 and Baringo/Kapchomuswo “A”/2100, pending the hearing and determination of this suit.”*** The court

went ahead to fix a date for confirmation of compliance.

(c) That the Surveyor's Report filed on 4<sup>th</sup> March, 2019 which was procured through the consent order of 16<sup>th</sup> November, 2018 confirms among others that land parcels Ewalel/Seretunin/632 and Kapchomuswo "A"/2100 are different parcels of land in Ewalel/Seretunin and Kapchomuswo "A" Registration Section respectively, in Baringo County and are adjoining each other. That the Registry Index Maps for the two parcels do not perfectly conform to the ground as they have an overlap of 3.841 hectares [9.5 acres] that is reflected on the attached sketch map by the pink shaded area. That it is the finding of this Court that the order issued on the 1<sup>st</sup> April, 2019 effectively settled or compromised the Petitioners' Motions dated the 24<sup>th</sup> September 2018, 12<sup>th</sup> November 2018 and 16<sup>th</sup> January, 2019.

(d) That the order the 1<sup>st</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents are alleged to have disobeyed was issued on the 11<sup>th</sup> October, 2018 and is in the following words;

***"1. The service be effected within 3 days upon the respondents.***

***2. That in the meantime, the defendants/respondents, their agents, servants or assigns are herein restrained from invading, constructing or dumping materials or doing any act on the land Ewalel/Kabomoti/632, pending the hearing of the application.***

***3. Hearing inter-partes on 26<sup>th</sup> October, 2018."***

That it is apparent the description of the parcel of land in the order that is "Ewalel/Kabomoti/632", clearly differs from the two parcels in the Notice of Motion dated the 24<sup>th</sup> September, 2018 which were "Ewalel/Seretunin/632" and "Baringo/Kapchomuswo "A"/2100."

(e) That the finding in (d) above that the suit land described in the order dated 11<sup>th</sup> October, 2018 and issued on the 12<sup>th</sup> October, 2018 is different from the two parcels in the Motion dated 24<sup>th</sup> September, 2018 leaves the Court with doubt as to whether the said order as extracted reflects the Court order of 11<sup>th</sup> October, 2018 or was based on the application dated the 24<sup>th</sup> September, 2018.

(f) That the finding in (a) above on the alleged service of the order upon the 1<sup>st</sup> and 4<sup>th</sup> and Respondents through the watchmen at the school and County Offices, respectively do not amount to good service upon the said Respondents. That the watchman at the School and County Offices are not shown to be with authority to receive service in terms of **Order 5 Rule 8 of Civil Procedure Rules**. That the process server had not made any efforts to trace the Respondents or the officers with authority to receive service for 1<sup>st</sup> and 4<sup>th</sup> Respondents before deciding to serve the watchmen. That there is no way of confirming that the orders were actually handed over to and or received by the 1<sup>st</sup> and 4<sup>th</sup> Respondents for them to be said to have disobeyed the same. There is also no evidence tendered on how the 5<sup>th</sup> Respondent disobeyed the Court order.

(g) That the Petitioners have for reasons set out above failed to offer proof above a balance of probabilities that the 1<sup>st</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents, having been served with the said order, willingly disobeyed it by doing any of the acts specified thereon. That as only the 1<sup>st</sup> Respondent participated in the Motion dated the 24<sup>th</sup> September, 2018 by filing their replying affidavit and submissions, costs is awarded to them.

6. That the foregoing shows the Petitioners' Motion dated the 2<sup>nd</sup> November, 2018 is without merit. The application is dismissed with costs to the 1<sup>st</sup> Respondent.

**Orders accordingly.**

**Delivered virtually and dated at Eldoret this 13<sup>th</sup> day of November, 2020.**

**S. M. KIBUNJA**

**JUDGE**

**In the presence of:**

Petitioners: Absent.

Respondents: Absent.

Counsel: Mr. Miyianda for the Petitioners

Mr. Wabwire for 1<sup>st</sup> to 4<sup>th</sup>, 6<sup>th</sup> to 8<sup>th</sup> and 11<sup>th</sup> Respondents.

Court Assistant: Christine

and the Ruling is to be transmitted digitally by the Deputy Registrar to the Counsel on record through their e-mail addresses.