



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC PETITION NO. 9 OF 2019

PETER MARIRA GIKONYO.....1ST PETITIONER/APPLICANT
MICHAEL THIONGO KINYANJUI.....2ND PETITIONER/APPLICANT
ROBERT KUNGU NGATA.....3RD PETITIONER/APPLICANT
JAMES MAINA MWANGI.....4TH PETITIONER/APPLICANT
CHARLES KINYUA MWAI.....5TH PETITIONER/APPLICANT
DAVID NJERU NYAGA.....6TH PETITIONER/APPLICANT
JUSTUS WAINAINA NJUGUNA.....7TH PETITIONER/APPLICANT
PAUL MWANGI NYUTU.....8TH PETITIONER/APPLICANT
JANE WAMBUI GAKURE.....9TH PETITIONER/APPLICANT
JOHN PETER WAMBUGU GICHIMU.....10TH PETITIONER/APPLICANT
STEPHEN NDUNG’U KINUTHIA.....11TH PETITIONER/APPLICANT
MERCY WANJIRU.....12TH PETITIONER/APPLICANT
GETHSEMANE MINISTRY.....13TH PETITIONER/APPLICANT
PHILIMA LIMITED.....14TH PETITIONER/APPLICANT
PETER MAINA.....15TH PETITIONER/APPLICANT

VERSUS

NATIONAL LAND COMMISSION.....1ST RESPONDENT
ABIGAEL MBAGAYA MUKOLWE.....2ND RESPONDENT
INSPECTOR GENERAL OF POLICE.....3RD RESPONDENT
ALLAN MACHARIA (FORMER DEPUTY COUNTY
COMMISSIONER, EMBAKASI).....4TH RESPONDENT

GEOFFREY MAIYEK, OCPD BURUBURU.....5TH RESPONDENT
EDWIN MWANIKI MUGURA OCS BURUBURU.....6TH RESPONDENT
THE CHAIRPERSON, NATIONAL ASSEMBLY DEPARTMENTAL
COMMITTEE ON LANDS.....7TH RESPONDENT
KIAMBU NDANDORA FARMERS COMPANY LIMITED.....8TH RESPONDENT
JEREMIAH IKIAO DCIO BURUBURU.....9TH RESPONDENT

AND

THE CHIEF LAND REGISTRAR.....1ST INTERESTED PARTY
NAIROBI CITY COUNTY.....2ND INTERESTED PARTY

AND

ADAMSON BUGEI
OCPD BURUBURU.....9TH RESPONDENT/CONTEMNOR
KENETH GITONGA MURUNGI, DEPUTY COUNTY COMMISSIONER,
EMBAKASI SUB-COUNTY.....10TH RESPONDENT/CONTEMNOR
HUSSEIN MOHAMED, POLICE OFFICER
BURUBURU POLICE STATION.....11TH RESPONDENT/CONTEMNOR
WILLY MWANGI MEMBER KIAMBU DANDORA
FARMERS CO. LIMITED.....12TH RESPONDENT/CONTEMNOR
STEPHEN NJENGA KIMANI MEMBER KIAMBU DANDORA
FARMERS CO. LIMITED.....13TH RESPONDENT/CONTEMNOR
GERALD NDIRANGU HIMAGA
AGENCIES LIMITED.....14TH RESPONDENT/CONTEMNOR
KENNEDY NDEGWA NJAU
(GANG LEADER).....15TH RESPONDENT/CONTEMNOR
JAMES MWANGI WANJIRU
(SECOND GANG LEADER).....16TH RESPONDENT/CONTEMNOR
LALASHE LENGARE ALIAS KIBONGE SAITOTI
(GANG MEMBER).....17TH RESPONDENT/CONTEMNOR

RULING

On 20th August, 2019 the court made the following orders:

“1. THAT the Notice of Motion dated 15th August, 2019 is urgent.

2. **THAT the same be served for hearing inter-partes on 29th October, 2019.**

3. **THAT until then, on a temporary basis, the 8th respondent be and is hereby restrained either by themselves, their directors, agents, servants, employees or otherwise howsoever from entering, unlawfully acquiring, taking over possession and constructing structures on all those properties known as L.R Nos. Nairobi Umoja Block 107/1118 – 1134.”**

When the Notice of Motion application dated 15th August, 2019 came up for hearing on 29th October, 2019, the court made the following order among others:

“THAT the interim orders granted on 20th August, 2019 are confirmed and extended until the hearing and final determination of this suit or further orders by the court.”

What is now before the court is a Notice of Motion application dated 29th April, 2020 brought by the petitioners seeking the following main prayers;

1. Notice to Show Cause to issue to the respondents/contemnors to show cause why they should not be committed to civil jail for disobedience of the orders that were issued by the court on 20th August, 2019 and confirmed on 29th October, 2019 pending the hearing and determination of the petition.
2. The respondents/contemnors be committed to civil jail and detained in prison for six (6) months or such period as the court may deem fit for contempt of the said court orders.
3. Such further or other consequential orders as the honourable court may deem just.

The application which was supported by the affidavit of the 2nd Petitioner, Michael Thiongo Kinyanjui was brought on the following grounds: The petitioners were the registered proprietors of L.R Nos. Nairobi Umoja Block 107/1118-1134 (“the suit properties”). On 6th April, 2019, the 8th respondent published in the Saturday Nation Newspaper an advertisement of its intention to sell the suit properties. Following that advertisement, the petitioners filed an application by way of Notice of Motion dated 9th May, 2019 in which they pointed out the illegal activities in which the 8th respondent was engaged in in collusion with the police officers from Buruburu Police Station. Before the said application was heard, the 8th respondent in a bid to frustrate these proceedings invaded the suit property. This prompted the filing of a second application dated 15th August, 2019 seeking injunctive reliefs pending the hearing of among others, the earlier application dated 9th May, 2019. The Notice of Motion application dated 15th August, 2019 was placed before the court on 20th August, 2019 and the court granted the injunctive order reproduced above. The said order was extracted and served upon the 8th respondent by the petitioners’ advocate, Charles Midenga and a court process server. In addition, the extracted order was displayed at the main entrance to the suit properties.

On 29th October, 2019, the court confirmed the said order and extended the same until the hearing and determination of the suit. The said orders were made in the presence of the 3rd, 4th, 5th, 6th and 9th respondents’ and the 1st interested party’s advocates. In defiance the said orders, on 13th December, 2019 and 18th December, 2019, more than 40 armed goons acting on the instruction of the 8th respondent invaded the suit properties and demolished a perimeter wall, caused deep excavation and abandoned tractors on the properties. That operation was coordinated by the 12th, 15th, 16th respondents and a Mr. John Kinga. The invasion and destruction of the petitioners’ wall was reported at Buruburu Police Station for necessary action. The OCPD Buruburu Police Station, the 9th respondent who at all times acted at the behest of the 8th respondent took no action on the report. On 23rd December, 2019, the petitioners’ advocates wrote to the 8th and 9th respondents pointing out that it was necessary for them to obey court orders and warning them that they risked being cited for contempt. On 21st February, 2020, the 10th respondent, chaired a meeting on security in Embakasi that was held at Visions Star Academy situated on one of the suit properties namely, L.R No. Nairobi Block 107/1134. The meeting was attended by among others, the 9th, 12th and 13th respondents and the petitioners. At the meeting, the respondents who were in attendance were informed of these proceedings and the orders that had been given by the court. The 9th and 10th respondents despite requests refused to provide security to protect the petitioners against attacks by the 8th respondent’s goons.

On 10th April, 2020 again in disobedience of the said court orders, the 12th and 13th respondents/contemnors brought a lorry and carried away the 2nd petitioner’s container that he had installed on Nairobi Umoja 107/1124 (now Nairobi Umoja 107/1306) and began erecting a temporary metallic fence around the property. On the same day, the 15th, 16th and 17th respondents/contemnors also demolished perimeter walls that had been erected on Nairobi Umoja 107/1123 and Nairobi Umoja 107/1119.

The petitioners averred that in further disobedience of the said orders, the members of the 8th respondent proceeded to carry out demolition of structures on L.R. No. Nairobi Umoja Block 107/1133 and also threatened to demolish the structures on Nairobi Umoja Block 107/1134. The petitioners contended that in order to undertake their illegal activities, the 8th respondent had procured fake titles on unknown parcel of land known as Nairobi Block 166 and that they had been subjected to illegal arrests on trumped up charges by police officers from Buruburu Police Station who were compromised by the 8th respondent. The petitioners averred that the respondents had no regard for the rule of law and were ill bent on continuing with their illegal activities unless the court urgently intervened and asserted its authority by granting the orders sought.

The application was opposed by the Attorney General on behalf of the 3rd, 4th, 5th, 6th, 9th, 10th and 11th respondents and the 1st interested party, and the 8th respondent. In its grounds of opposition dated 2nd June, 2020, the Attorney General (A. G) contended that the application was not properly before the court in that the contempt proceedings should have been brought against the directors of the 8th respondent rather

than the 8th respondent which is a juristic person. The A. G contended further that the orders alleged to have been disobeyed did not direct the police to enforce the same and that police officers should not be personally dragged into civil disputes unless directed expressly by the court to provide security. The A.G. contended that the orders in question were directed at the 8th respondent and that the police did not act under the directions of the 8th respondent. The A.G. contended that the petitioners were unprocedurally seeking orders for committal against parties who had no connection with the orders that were issued by the court. The A.G. contended that the petitioners had failed to comply with the procedural requirements for contempt of court proceedings and that the application was an abuse of the process of the court and lacked merit.

The 8th respondent opposed the application through a replying affidavit sworn by its director, Joseph Mwangi Karanja on 17th July, 2020. In the affidavit, the 8th respondent averred that it was the registered proprietor of all that parcel of land known as L.R No. 11379/3 (I.R 23514) measuring 818 acres (“plot No. 11379”). The 8th respondent averred that the suit properties were within plot No. 11379 owned by the 8th respondent. The 8th respondent averred that as the owner of plot No. 11379, it offered a portion of it for sale to the public through an advertisement that it published in a newspaper. The 8th respondent averred that the portions of plot No. 11379 that it offered for sale were not near the suit properties and that in offering the said portions of plot No. 11379 for sale, it was exercising its right to property guaranteed under the Constitution. The 8th respondent averred that it was not served with the pleadings in this suit especially the petitioners’ applications dated 16th February, 2019 and 9th May, 2019 and as such it was not aware of the orders that had been made by the court in respect to the suit properties.

The 8th respondent averred that it was clear from the affidavit of the process server filed in support of the petitioners’ application that the 8th respondent was not served with any order. The 8th respondent averred that even the court was not satisfied with the service upon the 8th respondent. The 8th respondent averred that it only became aware of this suit on 2nd September, 2019 when it was served with the Notice of Motion dated 15th August, 2019. The 8th respondent averred that the said application was not accompanied by any order or hearing notice. The 8th respondent averred that it was after it instructed its advocates on record that it learnt that orders of injunction had been issued against it. The 8th respondent averred that failure to serve it was deliberate and was intended to ensure that the petitioners obtained favourable orders that could enable them engage in construction on the suit properties. The 8th respondent averred that the pictorial evidence and a notice that was placed before the court by the petitioners could not be verified. The 8th respondent averred that the petitioners had never been in possession of the suit properties. The 8th respondent denied bribing police officers at Buruburu Police Station and hiring goons to attack the petitioners. The 8th respondent denied further that it carried away the 2nd petitioner’s container from the suit properties or that it demolished any perimeter wall around the suit properties. The 8th respondent denied further that it had threatened to evict any of the petitioners from the suit properties. The 8th respondent averred that the suit properties were within Nairobi Block 166 which was a sub-division of its larger parcel of land, plot No. 11379.

The 8th respondent averred that it was the owner of Nairobi Block 166 and that the titles issued in respect thereof were not fake as claimed by the petitioners. The 8th respondent averred that its members were issued with titles following the subdivision of Nairobi Block 166 where the suit properties are situated and that the said members had taken possession of their parcels of land and some had developed the same before the filing of the suit. The 8th respondent averred that it was not possible in the circumstances to comply with the orders that were issued by the court in relation to the suit properties. The 8th respondent averred that the case before the court was that of double allocation and that it was important for the court to consider how the petitioners acquired their titles. The 8th respondent averred that it was abiding with the court order issued on 20th August, 2019 and the orders issued earlier. The 8th respondent denied that it had commenced eviction of the petitioners from the suit properties.

The 2nd petitioner swore a further affidavit on 27th July, 2020 in which he reiterated the contents of his affidavit sworn on 29th April, 2020 and averred that the affidavit of the 8th respondents’ director, Joseph Mwangi Karanja was meant to mislead the court. He reiterated that the 8th respondent was duly served with the court order in question and that the suit properties belonged to the petitioners and did not form part of the fake Nairobi Block 166 as claimed by the 8th respondent.

The petitioners’ application was argued by way of written submissions. The petitioners filed their submissions dated 23rd July, 2020 while the Attorney General filed its submissions dated 2nd June, 2020. The other respondents including the 8th respondent did not file submissions. I have considered the petitioners’ application together with the affidavits filed in support thereof. I have also considered the affidavit filed by the 8th respondent and the grounds of opposition filed by the A.G in opposition to the application. The following is my view on the matter. The only issue arising for determination in the application before me is whether the petitioners have established that the respondents/alleged contemnors breached the order issued herein on 20th August, 2019 and confirmed on 29th October 2019 and whether the petitioners are entitled to the reliefs sought in the application.

In Hardkinson v Hardkinson [1952] All ER 567, it was held that:

“It was the plain and unqualified obligation of every person against or in respect of whom an order was made by a court of competent jurisdiction to obey it unless and until it was discharged and disobedience of such order would as a general rule result in the person disobeying being in contempt and punishable by committal or attachment and in an application to the court by him not being entertained until he had purged his contempt.”

In Mutitika v Baharini Farm Ltd [1985] KLR 227 it was held that:

i. A person who knowing of an injunction, or an order of stay, willfully does something, or causes others to do something, to break the injunction, or interfere with the stay, is liable to be committed for contempt of court as such a person has by his

conduct obstructed justice.

ii. The standard of proof in contempt proceedings must be higher than proof on a balance of probabilities and almost but not exactly beyond reasonable doubt.

iii The principle must be borne in mind that the jurisdiction to commit for contempt should be carefully exercised with great reluctance and anxiety on the part of the court to see whether there is no other mode which can be brought to bear on the contemnor.

In Micheal Sistu Mwaura Kamau v Director of Public Prosecutions & 4 others (2018) eKLR the Court of Appeal set out the law on contempt as follows:

“It is trite that to commit a person for contempt of court, the court must be satisfied that he has willfully and deliberately disobeyed a court order that he was aware of. That is made absolutely clear by section 4 of the Contempt of Court Act and the ruling of the Supreme Court in Republic v. Ahmad Abolfathi Mohammed & Another (supra). Secondly, as this Court emphasized in Jihan Freighters Ltd v. Hardware & General Stores Ltd and in A.B. & Another v. R. B. [2016] eKLR, 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. Lastly, the standard of proof in committal proceedings is higher than proof on a balance of probabilities, though not as high as proof beyond reasonable doubt. (See Mutitika v. Baharini Farm (supra) and Republic v. Ahmad Abolfathi Mohammed & Another (supra).”

It is on the foregoing principles that the petitioners’ application falls for consideration. The petitioners have alleged that the respondents/alleged contemnors committed several acts which constituted contempt of the court orders aforesaid. The alleged contemnors are; the OCPD Buruburu Police Station, the Deputy County Commissioner, Embakasi Sub-County, a police officer at Buruburu Police Station, two members of Kiambu Dandora Farmers Company Limited, one, Gerald Ndirangu of Himaga Agencies Limited, Kennedy Ndegwa Njau, an alleged gang leader, James Mwangi Wanjiru, an alleged gang leader and one, Lalashe Lengare alias Kibonge Saitoti, alleged member of the gang. I have earlier in this ruling set out the acts of contempt alleged against these alleged contemnors. The burden was upon the petitioners to demonstrate that the alleged contemnors were served with the court order that they are alleged to have disobeyed or that they were aware of the same and that they deliberately committed acts amounting to disobedience of the said order. It is not in dispute that the orders that are said to have been disobeyed were directed against the 8th respondent only and its servants, agents or employees. The said orders were not directed against police officers at Buruburu Police Station neither were the said officers directed to assist in the enforcement thereof. The court did not therefore order police officers at Buruburu Police Station to do or refrain from doing any act which they can be said to have disobeyed. The same applies to the Deputy County Commissioner, Embakasi Sub-County. I do not think that the said police officers’ refusal to protect the petitioners from attacks by a gang allegedly hired by the 8th respondent however reprehensible it may have been amounted to contempt of court in the circumstances. I have also perused the two affidavits of service filed in support of the application. There is no indication that the said court orders were served upon the said police officers or the Deputy County Commissioner, Embakasi Sub-County. There is also no evidence that the said police officers acted as agents of the 8th respondent. Due to the foregoing, I find no basis for the orders of committal sought against the 9th, 10th and 11th respondents/alleged contemnors. With regard to 12th and 13th respondents/alleged contemnors who are said to be members of Kiambu Dandora Farmers Company Limited, the 8th respondent herein, it is not disputed that the injunctive order said to have been disobeyed was directed at Kiambu Dandora Farmers Company Limited. There is also no dispute that the said order bound Kiambu Dandora Farmers Company Limited together with its members, directors, agents and servants. I am satisfied from the affidavit of service sworn by Charles Midenga on 3rd September, 2019 that Kiambu Dandora Farmers Company Limited (the 8th respondent) was served with the order that was made by this court on 20th August, 2019. The 12th and 13th respondents/alleged contemnors are said to have hired the 14th respondent’s lorry which they used to remove the 2nd petitioner’s container from one of the suit properties after which they started erecting a metallic fence around the property. The 12th respondent is also said to have coordinated the demolition of a perimeter wall around Nairobi Umoja 107/1/1119 by armed goons. The said activities are said to have taken place in December, 2019 and 10th April, 2020 during the existence of the said order.

The 8th respondent filed a detailed affidavit in response to the petitioners’ application. The 8th respondent did not deny that the 12th and 13th respondents/alleged contemnors were its members. There was also no affidavit from the 12th and 13th respondents denying the alleged acts of contempt levelled against them. As members of the 8th respondent, the 12th and 13th respondents/alleged contemnors were aware of the orders that were issued by the court on 20th August, 2019 and 29th October, 2019. The activities which they are said to have engaged in were therefore carried out in defiance of the said orders. In the circumstances, I am satisfied that the petitioners have established allegations of contempt made against the 12th and 13th respondents.

As I have mentioned earlier, the 14th respondent/alleged contemnor is said to have been the owner of the lorry that was used to remove the 2nd petitioner’s container from one of the suit properties. There is no evidence that the 14th respondent was aware of the court order he is alleged to have disobeyed or that the same was served upon him. I find no basis therefore for the contempt proceedings brought against him. That leaves the 15th, 16th and 17th respondents/alleged contemnors. The 15th, 16th and 17th alleged contemnors are said to be members of a dreaded gang operating in Kayole and Umoja area of Nairobi. They are said to have been involved in coordinating the demolition of the petitioners’ perimeter wall around one of the suit properties and the carrying out of excavations on the property. The 15th, 16th and 17th respondents/alleged contemnors are also said to have been used constantly by the 8th respondent to cause havoc on the suit properties. To start with, it is not in dispute that the court order said to have been disobeyed was not directed against the 15th, 16th and 17th respondents/alleged contemnors. Secondly, there is no evidence that the said order was served upon the said respondents or that they were aware of the same. There is also no evidence before the court showing that the 15th, 16th and 17th respondents/alleged contemnors were acting as agents of the 8th respondent. For the foregoing reasons, I find no basis for holding the 15th, 16th and 17th respondents/alleged contemnors in contempt of the said court order.

In conclusion, the petitioners' application dated 29th April, 2020 succeeds only as against the 12th and 13th respondents/alleged contemnors. The Deputy Registrar shall issue summons for service upon the 12th and 13th respondents to appear before this court on a date to be fixed to show cause why they should not be committed to civil jail for contempt of the orders that were made by this court on 20th August, 2019 and 29th October, 2019. The application is dismissed as against the other respondents/alleged contemnors. The costs of the application shall be in the cause.

Dated and Delivered this 10th day of December, 2020

S. OKONG'O

JUDGE

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Mr. Midenga for the Petitioners

Mr. Allan Kamau for the Attorney General

Ms. Kamau and Mr. Murunga for the 8th Respondent

Ms. C. Nyokabi-Court Assistant