

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ELCLC NO. E005 OF 2025

ETHICS AND ANTI-CORRUPTION COMMISSION.....PLAINTIFF
VERSUS

THUREYA MOHAMED ALI DIN.....1ST DEFENDANT

HADSON KITOGHO.....2ND DEFENDANT

RULING

1. By a notice of motion dated 03.07.2025 filed pursuant to *Section 29 of the ELC Act, Section 5 of the Judicature Act, Rule 81.4 of the English Civil Procedure (Amendment No. 3) Rules 2020 and all other enabling provisions of the law*, the plaintiff sought to cite the respondents for contempt of the court orders issued on 27.01.2025 and to be punished by either fine or committal to civil jail.
2. The application was based upon the grounds set out on the face of the motion and the contents of the supporting affidavit sworn by George Kimiti on 03.07.2025. It was contended that the respondents had willfully and deliberately disobeyed the orders of this court to the detriment of public interest. The respondents were said to be constructing and erecting structures on one of the suit properties being Mombasa/Block XVI/618. The plaintiff claimed that the

respondents were strategically setting up a mosque to ensure that its demolition would be challenging due to its sensitive nature.

3. The plaintiff opposed the application vide a replying affidavit sworn by Thureya Mohamed Ali Din, the 8th respondent in the main suit and the 1st respondent in the application. He contended that he resides in the United Arab Emirates and had not instructed anyone in Kenya to construct structures on the suit property. He maintained that as the registered owner of the suit property he was entitled to use it unless his registration was cancelled. It was contended that the orders of the court did not in any way restrict him from carrying out any activity in the confines of peaceful possession of the property. He urged the court to disallow the application.
4. The court directed that the application be canvassed through written submissions. The parties were consequently granted timelines within which to file and exchange their respective submissions. The 1st respondent filed his submissions on 06.10.2025 while the plaintiff had not filed any submissions by the time of preparation of the ruling.
5. The court has perused the application dated 03.07.2025, its response as well as the submissions made in opposition to it and is of the view that the following key issues arise for determination herein;

a. *Whether plaintiff has made out a case against the respondents for contempt of the orders of the court issued on 27.01.2025.*

b. *Who shall bear the costs of the application.*

6. The instant application is premised, *inter alia*, on Section 5 of the Judicature Act, the same was repealed by the nullified Contempt of Court Act. The court in *Samuel M. N. Mweru & Others v National Land Commission & 2 others [2020] eKLR* held;

“Therefore the law that governs contempt of court proceedings is the English law applicable in England at the time the alleged contempt is committed. Section 5 of the Judicature Act [21] imposes a duty on the High Court, the Court of Appeal and law practitioners to ascertain the applicable law of contempt in the High Court of Justice in England, at the time the application is brought.”

7. The court further held;

‘An application under Rule 81.4 (breach of judgement, order or undertaking) now referred to as "application notice" (as opposed to a notice of motion) is the relevant one for making the application now under consideration. The application notice must set out fully the grounds on which the committal application is made and must identify separately and numerically, each alleged act of contempt and be supported by affidavit(s) containing all the evidence relied upon.’

8. In addition, Section 29 of the Environment and Land Court Act provides as follows;

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.”

9. The court will now address the issue as to whether the plaintiff has established any basis for the orders sought to be granted. On 27.01.2025, the court, upon perusing the instant application under certificate of urgency and in the absence of counsel, granted, *inter alia*, an interim injunction in terms of No. 2 of the application pending inter parties hearing. Prayer 2 of the application was;

“pending the hearing and determination of this application inter partes a temporary injunction is issued restraining the defendants by themselves, their servants, agents or any other person from wasting, damaging, constructing, building, erecting structures, or edifices, alienating or in any way further alienating or interfering with the properties referred to as Title Nos Mombasa/Block XVI/610, Mombasa/Block XVI/611, Mombasa/Block XVI/614, Mombasa/Block XVI/615, Mombasa/Block XVI/616, Mombasa/Block XVI/617, Mombasa/Block XVI/618, Mombasa/Block XVI/619 and Mombasa/Block XVI/973.”

10. The court extended the said orders on 04.03.2025, 20.09.2025, and on 31.07.2025, respectively, when the court ordered no further construction on the suit property, including drilling, equipping or

development of a borehole until delivery of this ruling. However, there is no indication on record to show that the *ex parte* order of 27.01.2025 was ever extracted and its terms set out in full and served upon the respondents. The photographs annexed to the plaintiff's application do not bear any date stamps to show the date and time they were taken.

11. It is trite law that contempt proceedings are quasi-criminal in nature. As such, the standard of proof is higher than the balance of probabilities in civil cases, although not as high as beyond a reasonable doubt. The court in *Samuel M. N. Mweru & Others v National Land Commission & 2 others (supra)* held;

"It is an established principle of law that in order to succeed in civil contempt proceedings, the applicant has to prove;

- (i) the terms of the order,*
- (ii) Knowledge of these terms by the Respondent,*
- (iii) Failure by the Respondent to comply with the terms of the order.*

*Upon proof of these requirements the presence of willfulness and bad faith on the part of the Respondent would normally be inferred, but the Respondent could rebut this inference by contrary proof on a balance of probabilities. Perhaps the most comprehensive of the elements of civil contempt was stated by the learned authors of the book *Contempt in Modern New Zealand* [47] who succinctly stated:-*

"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."*

12. From the material on record, it is not clear that the 1st and 2nd respondents deliberately disregarded the interim injunctive orders of the court. The plaintiff has attached pictures that appear to show some sort of construction on an unidentified building. That does not necessarily establish that it's happening on the suit property and there is little to no connection between the respondents and the alleged construction. As previously stated the standard of proof in contempt proceedings is higher than the balance of probabilities, though not beyond reasonable doubt. The evidence adduced herein does not meet this higher standard of proof that would warrant the court to impose a fine or commit the respondents to civil jail.

13. Although the costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to *Section 27 of the Civil Procedure Act (Cap 21)*. A successful party should ordinarily be awarded the costs of an action unless the court, for good reason, directs otherwise. See *Hussein Janmohamed & Sons -vs- Twentsche Overseas Trading Co. Ltd [1967] EA 287*. Although the application has not succeeded, the court is not inclined to penalize the plaintiff with costs since the suit is still pending in court. The court is of the view that costs of the application should be in the cause.

14. The upshot of the foregoing is that the court finds and holds that the application dated 03.07.2025 is not merited. As a consequence, the court makes the following orders;

a) That the plaintiff's application dated 03.07.2025 is hereby dismissed.

b) Costs of the application shall be in the cause.

Orders accordingly.

Ruling dated and signed at Mombasa and delivered virtually via Microsoft Teams on this 27th day of November **2025**.

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Y. M. ANGIMA

JUDGE

In the presence of:

Gillian - Court assistant

N/A for the Plaintiff

N/A for the 1st and 2nd defendants

Hussein Adnan for the 3rd defendant

Ms Choni for the 4th, 5th, 6th and 8th defendants

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