

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT MALINDI**  
**CIVIL CASE NO. 231 OF 2017**

**NICHOLAS MKOMA MKALI & 253 OTHERS .....**  
**.....PLAINTIFFS**

**VERSUS**

**YAHYA MOHAMED SULEIMAN & 30**  
**OTHERS.....DEFENDANTS**

**RULING**

1. What is before this court is an application dated under Sections 1A,1B,3A, 63, and 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules. The application seeks that the court do review and set aside its orders issued on 11<sup>th</sup> December 2024. The grounds on which it is premised are as follows: the basis upon which the applicants were found guilty of contempt of Court is that they constructed a wall around plot number 2310, 2311 and 2312 during the pendency of court orders of *status quo*; that they indeed agree that they put up the wall, but add that they had permission from another Court authorizing eviction of persons from the plots and the fencing of those plots and both actions were performed long before the *status quo* order. They also maintain that it was by sheer error that the lower court order was never produced during the hearing of the contempt proceedings. That they believed that they were doing the correct thing and that they had authority from a court of law.
2. The application is supported by the sworn affidavit of Kassim Abdallah Mohamed. In the affidavit it is stated that he owns the plots in question and he has been in occupation thereof for some time now; that sometime in 2023, he sued the person who sold him those portions, wanting him not only to move out by himself, but also to remove some

people who were in occupation at his instruction; that the matter was resolved by way of a consent; that the order was served on the police who gave the deponent protection when he was doing construction; the wall was for the purpose of protecting the land from interference by other unauthorized persons who may have wanted to come and to settle on the land; that as can be seen from the face of the order he complied by serving every person required to be served with the order, and he proceeded with his work on the land legally. That he inadvertently forgot to inform his lawyer about that order and that the lawyer also forgot about it, and so it was not brought to the attention of this court during the hearing of the contempt proceedings; that had the pendency of that order been made known to the court, it would not have arrived at the decision it did, of finding him to be in contempt.

3. The affidavit of Duncan Mukala Kumbo sued as Duncan Mukua is also relied on by the applicant. Its gist is that the deponent worked for the applicant then; that he did supervise the work during construction of the fence because he knew that Mr Kassim had an order and in fact he had security from the police.
4. Kassim swore a supplementary affidavit dated 24<sup>th</sup> February 2025. The gist of that affidavit is that there is no appeal pending both the Notice of Appeal and the application having been withdrawn. He attached the notices of withdrawal as exhibit "SK2" showing that Notice of Withdrawal of Notice of Motion dated third February 2025 was received by O.M. Robinson Advocates on 14<sup>th</sup> February 2025 and the Notice of Withdrawal of the Notice of Appeal was dated 17<sup>th</sup> February 2025 but the latter document had nothing on its face to show that it was served. He cited Rule 54 of the Court of Appeal rules 2022 that what remains is for the Court of Appeal Registrar to do the administrative work; that even the advocates for the plaintiffs in the Kilifi court case were aware of the construction of the wall; that his advocate has informed him that he inadvertently failed to bring the order to the attention of the court

because of the many cases arising from the same land. Now the defendants seek him to be punished yet they are not in occupation of any part of the property.

5. The application is opposed. The first plaintiff filed his sworn affidavit dated 19<sup>th</sup> February 2025. He states that the application has failed to meet the threshold for the orders sought; that the contemnors will finally have a chance mitigate their conduct before sentence. Now the application is an afterthought because the contemnors preferred on appeal against the ruling here December 2024 hence the review door has been shut by dint of Section 80 CPA and order 45 CPR 2010; the applicants also filed an application for stay of execution COACA No E003 of 2025 in the Court of Appeal which the respondents hearing responded; that the application was purportedly withdrawn by a notice of withdrawal dated 10<sup>th</sup> February 2025; that under Rule 54(2) of the Court Of Appeal rules the Notice Of Withdrawal is not self-executing; that the stay of execution application is still alive and awaiting hearing on merits; that the process of appeal and review cannot be taken at the same time hence the application is incompetent and a non-starter.
6. The deponent states that he was unaware of Mombasa CMCC ELC E163 of 2023; that the court order issued in that case was issued in the presence of Mr Oddiaga for the present applicant on 21<sup>st</sup> September 2023 approximately two months earlier before the *status quo* order was issued by this court on 7<sup>th</sup> November 2023. Therefore, Mr Oddiaga and his client were aware of the lower court order at the time and date of issuance of the *status quo* order on 7<sup>th</sup> November 2023; that nevertheless, this court is superior to the lower Court and its order takes precedence over the lower Court and it must be obeyed; that there was no perimeter wall around the property at the time of issuance of the *status quo* order on 7<sup>th</sup> November 2023; that the contemnors embarked on erecting a perimeter wall on 21<sup>st</sup> May 2024 with knowledge of the *status quo* order made on 7<sup>th</sup> November 2023;

that therefore the order made on 21<sup>st</sup> September 2023 cannot form the basis for reviewing the court orders finding the applicants to be in contempt.

### **ANALYSIS AND DETERMINATION.**

7. The issue that rises for determination is whether the court should review its order finding the applicants in contempt.
8. It is not in doubt that Kassim Abdallah Mohamed has certificates of title over the suit land. It is not doubted that Mombasa ELC E163 of 2023 exists and that a decree was issued on 21<sup>st</sup> September 2023 arising from the recording of a consent. The order reads as follows in part:
  - a. "An order of eviction to issue against the defendant, his agent, employee or any other person in occupation of plot numbers 2310 23 11 and 23:12 for vacant possession;
  - b. The Officer Commanding Station, Ndonya Police Station to give security to the plaintiff during the eviction;
  - c. That the three plots to be fenced by the plaintiff to secure them from squatters and or intruders."
9. The application that led to the issuance of orders of contempt is dated 28<sup>th</sup> May 2024. As its basis, that application singled out the court orders made on 7<sup>th</sup> November 2023 ordering the parties to maintain the *status quo* without exception pending the hearing and determination of the suit.
10. It is the case that before this court issued the 7<sup>th</sup> November 2024 orders, another Court, albeit lower, had issued its own orders by consent on 26<sup>th</sup> September 2023. The applicant maintains that it is these orders that they were implementing when building the wall fence around the suit properties. Their position is that they forgot that these

orders existed while they were defending the contempt application and so they never brought the orders to the attention of the court.

11. The applicants may have been justified to act on those orders to build a wall fence around the suit premises between the date of their issuance and the date the *status quo* orders were issued by this court because that is what those orders authorized. However, that justification ought to be understood only in reference to construction that happened before 7<sup>th</sup> of November 2023. Once this court issued its orders on 7<sup>th</sup> November 2023, they were supposed to be obeyed without any qualification whatsoever.
12. From the application dated 28<sup>th</sup> May 2024 which gave rise to the orders finding the applicants to be in contempt, the complaint raised was that on Tuesday 21<sup>st</sup> May 2024, long after the orders of this court were issued the contemnors embarked on construction of a perimeter wall on one edge of the suit property; that despite the order being served on them they ignored the same altogether.
13. This court finds it difficult to understand that, faced with a serious application for committal for contempt, both the contemnors and their advocate would forget they had an order that authorized them to construct a wall around the suit premises and which order could have afforded them a defence, however feeble. That such an order was in their possession as at the time the contempt application was heard is an indicator that they should have produced it. The explanation by the applicants for such default is that they are dealing with many cases over the suit land, which contributed to the default.
14. The consequence of its non-production of that order at the right time despite its being in existence then, is that it can not therefore be categorized as "*new matter or evidence which was not within the knowledge of the applicants*" as at the time of the application and issuance of a ruling finding them in contempt.

15. Notwithstanding that the order does not afford a ground for review, this court is nevertheless allowed by law to inquire into any other sufficient reason that may influence the review of a ruling or order. In the midst of all this rigmarole the court reminisces that its core business is to hear and determine cases and not to punish parties. Penal proceedings are a peripheral engagement only metamorphosed into an absolute necessity where there has been contumelious conduct on the part of any party which obstructs justice or brings the justice system into disrepute or mockery.

16. Much as the disclosure that there was a lower court order that existed at the time of the contempt may not afford the applicants sufficient ground for review under the heading "*discovery of new and important matter or evidence*" under Order 45 Rule 1(b), it divulges a scenario where a *status quo* order was made by this court without an express setting aside of an incompatible earlier lower court order.

17. The order made on 7/11/2023 was as follows:

"The motion dated 25/10/2023 is marked as dispensed with by the consent of the parties who also hereby agree that all parties shall maintain the current *status quo* without exception pending the hearing and determination of the main suit. That consent is adopted as the order of this court today.

Signed

7/11/2023."

18. The *status quo* order was given on the second day of the coming up of the matter before me. A perusal of the proceedings of 7/11/2023 leaves one with the impression that much confusion may result if parties do not focus on the core issues in the principal pleadings in this matter. Not even once did any counsel appearing that day mention that Mombasa CMCC ELC E163 of 2023 existed, or that there were orders that emanated therefrom that had authorized eviction and fencing of the land. This is a situation that is likely to bring and


perpetuate embarrassment in this matter. On the same day Mr Malombo stated that most of his client's houses had been demolished and prayed for a *status quo* order which Mr Oddiaga conceded to.

19. Even though it was the default of the parties in bringing to the court notice of the orders from the lower court, now that they have been brought, this court has to start taking what was done under them, whether done after my *status quo* order or thereafter, into consideration especially as the consequences of conviction may include loss of liberty. In matters liberty of the individual, it is much better to err on the side of caution.
20. The issue that is raised by the applicants is that they believed that they were covered by the order of the lower court emanating from Mombasa CMCC ELC E163 of 2023 while they were constructing the wall after this court issued a *status quo* order. In this court's view, there should have been an express stipulation by counsel for the plaintiffs, meant to be incorporated into the *status quo* order, that the lower court orders should not be applicable any more after I issued *status quo* orders in this file.
21. Breaching a *status quo* order in a case in which there is a previous, diametrically opposed court order, however incompetent or wanting in jurisdiction the former order is, is totally different from breaching a *status quo* order where there is no court order at all. In the former scenario, there is, before any ventilation of the issue of which order is superior, possibility of a misunderstanding by laymen that may sustain their belief that compliance with the earlier order is still proper while in the latter scenario, only a requirement of unqualified obedience to the only existing court order is involved.
22. Arising from the foregoing is a logical conclusion that where in the first scenario there may be a defence, however feeble, that a previous court order was being obeyed in the execution of works that breached the latter day order, it is unsafe to convict any person unless

the court has first been made to see and consider that earlier order either while issuing its *status quo* order or at the contempt application stage.

23. In the outlined circumstances, this court is of the view that the conviction for contempt made on 11/12/2024 can not stand, and I hereby set it aside. The applicants are discharged. This discharge however is no licence for any further action that may be construed as contempt of the orders of 7/11/2023.
24. Parties are also hereby ordered to focus on the core issues in this litigation and be ready for the hearing. This matter shall be mentioned on 3/2/26 for further directions.

**Dated, signed and delivered at Malindi on this 26<sup>th</sup> day of November 2025.**

A rectangular box containing a handwritten signature in blue ink, which appears to read 'Mwangi Njoroge'.

**MWANGI NJOROGE  
JUDGE, ELC, MALINDI.**