

**REPUBLIC OF KENYA**

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

**ELC CONSTITUTIONAL PETITION NO. E001 OF 2025**

**IN THE MATTER OF ARTICLE 22 (1) (2) & 23 (1) OF THE CONSTITUTION**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS AND  
FUNDAMENTAL FREEDOMS UNDER ARTICLES 2, 10, 20, 21, 23, 24, 35,  
47, 73(1) &(2) 159, 160, 174 (a), (c) and (f), 232 (1), 2a, 258 AND 259 (1) OF  
THE CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF THE DEFENCE OF THE CONSTITUTION UNDER  
ARTICLE 3 (1) & CHAPTER 6 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF INTERPRETATION, ENFORCEMENT AND  
PROTECTION OF THE BILL OF RIGHTS UNDER ARTICLES 19, 20, 24,  
165, 258 AND 259 OF THE CONSTITUTION**

**AND**

**IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF  
RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE AND  
PROCEDURE RULES 2013 (LEGAL NOTICE NO.117)**

**AND**

**IN THE MATTER OF THE CONTRAVENTION OF THE FAIR  
ADMINISTRATIVE ACTION ACT 4 OF 2015**

**AND**

**IN THE MATTER OF THE CONTRAVENTION OF THE PHYSICAL AND  
LAND USE ACT NO. 13 OF 2019**

**AND**

**IN THE MATTER OF THE CONTRAVENTION OF THE COUNTY  
GOVERNMENT ACT NO. 17 OF 2012.**

**AND**

IN THE MATTER OF THE CONTRAVENTION OF THE LAND ACT NO. 6  
OF 2012

AND

IN THE MATTER OF CONTRAVENTION OF THE URBAN AREAS AND  
CITIES ACT CAP 275

AND

IN THE MATTER OF CONTRAVENTION OF THE VIHIGA COUNTY  
REVENUE ADMINISTRATION ACT NO. 3 OF 2015

BETWEEN

FRANCIS ANGUEYAH OMINDE.....1<sup>ST</sup> PETITIONER

YUSTER MINAYO GWEYANI (Suing as the

Legal representative of the estate of

ELISHAMA KAYANGA (DECEASED) ..... 2<sup>ND</sup> PETITIONER

VERSUS

COUNTY GOVERNMENT OF VIHIGA.....1<sup>ST</sup> RESPONDENT

CHIEF OFFICER COMMERCE, TOURISM

AND COOPERATIVES COUNTY

GOVERNMENT OF VIHIGA .....2<sup>ND</sup> RESPONDENT

MUNICIPAL MANAGER, VIHIGA MUNICIPALITY.... 3<sup>RD</sup> RESPONDENT

AND

SAMUEL SAVULANE MMBWANGA (Suing as

The legal representative of the estate of PAUL

NABWANGA (DECEASED) ..... INTERESTED PARTY

**RULING**

This ruling is in respect of the Notice of Motion application dated 11<sup>th</sup> December 2025 seeking for orders that;

a. Spent

- b. Pending the hearing and determination of this application and the application dated 26<sup>th</sup> November 2025, a blanket conservatory order do issue restraining the respondents, their servants, agents or police officers from evicting, demolishing, cordoning off, fencing, interfering with access to or undertaking any enforcement or any administrative action whatsoever against any of the plots at Mbale Market, to avoid defeating the intended application dated 26<sup>th</sup> November 2025 for joinder and to preserve the substratum of the petition.
- c. Spent
- d. The court be pleased to order the OCS Mbale Police Station and/or the County Police Commander to enforce compliance with the court's orders and ensure that no officer interferes with the Petitioners' occupation and access to their suit property.
- e. Summons do issue forthwith to the following officers; the County Secretary Vihiga County, the CECM Trade, Vihiga County, the Municipal Manager, Mbale Municipality and the County Attorney, Vihiga County to appear in court personally and show cause why they should not be punished for contempt of court for disobeying the interim orders issued on 28<sup>th</sup> November 2025 and further extended on 9<sup>th</sup> December 2025.
- f. The respondents and the cited officers be found to be in wilful and deliberate contempt of court for deliberate and continuing disobedience of lawful orders issued on 28<sup>th</sup> November 2025 and further extended on 9<sup>th</sup> December 2025.
- g. Upon conviction, this honourable court be pleased to commit the contemnors to civil jail and/or fined, and the court do issue such further coercive orders as are necessary to secure full compliance.
- h. The costs of the application be provided for.

The application was based on the grounds set out in the Supporting Affidavit of Francis Angueyah Ominde, the 1<sup>st</sup> Petitioner and the annextures thereto.

The application was opposed vide the Replying Affidavit sworn on 18<sup>th</sup> December 2025 by Joseph Karungani Lunani and the annextures thereto.

The application was heard on 19<sup>th</sup> December 2025.

It was submitted on behalf of the applicants that the order issued by the court 28<sup>th</sup> November 2025 and extended on 9<sup>th</sup> December 2025 was not ambiguous. That despite the orders, the respondents proceeded to fence off the place with metal sheets and blocked it off. That denial of access to the land was a contravention of the court order. That section 10 of the Office of the County Attorney Act does not apply to contempt of court proceedings. Counsel prayed that the application be allowed in terms of prayers (b), (c) and (d) thereof.

On behalf of the respondents it was submitted that none of the officers cited was served with the court orders. That the court order was received in the office of the County Attorney. That by the time the orders were being issued the site had already been taken over. That the person in control was the contractor and not the County Government. That under the provisions of section 10 of the Office of the County Attorney Act, the County Attorney cannot be cited for contempt of court. That contempt proceedings dictate that the person alleging fraud must prove it on a degree beyond a balance of probabilities. That the applicants have not proved that there is disobedience of the court order.

I have considered the application, the grounds in support thereof, the contents of the Replying Affidavit and the submissions by Counsel. The substantive complaint in the application is that the proposed contemnors disobeyed a court order and that by reason of the said disobedience the applicants have been denied access to the suit plots.

The law under which the application was brought was not cited in the Notice of Motion. However, this court is empowered by inter alia the provisions of section 5 of the Judicature Act and the Environment and Land Court Act to determine contempt of court matters.

Contempt of court in a civil case is the willful breach or disobedience of a court judgment, decree or order, directions or other process of court or willful breach of an undertaking given by the court.

In Johari School Limited -vs- Rosemary Wamburu t/a Johari School [2021] eKLR the elements of contempt of court were stated to be;

- (a) the existence of valid court order whose terms are clear and unambiguous and binding on the Respondent.
- (b) proof that the respondent had knowledge or proper notice of the terms of the order.
- (c) proof that the respondent acted in breach of the terms of the order; and
- (d) that the conduct or action of the respondent was deliberate or willful.

In the present case the court record shows that on 28<sup>th</sup> November 2025 when the matter came up for directions, the court granted an interim order of temporary injunction in the following terms

“in the meantime, an interim order of temporary injunction is hereby granted restraining the respondents and their agents and servants from relocating, evicting and removing the petitioner or his tenants from plot numbers 17 and 18 Mbale Market and from interfering with the petitioner’s activities or business on plot numbers 17 and 18 Mbale Market pending hearing of the application inter partes.”

The order was given in the absence of the parties. The order was extended on 9<sup>th</sup> December in the presence of Counsel for both parties.

Hence the existence of a valid court order in clear and unambiguous terms and binding on the respondents is not in doubt.

According to the applicants the acts that amount to contempt of court are that the respondents cordoned off the suit lands thereby denying the applicants access thereto in contravention of the court order. To demonstrate this, the applicants exhibited photographs of the site.

The respondents reply was that firstly, it was not the respondents who cordoned off the plots but a contractor appointed by National government to construct the market and secondly, that by the time the orders were issued the site had been taken over by the contractor hence it was not the county government that was in control thereof.

While it was submitted on behalf of the applicants that the applicants had demonstrated to the required degree that the respondents were in contempt of the court order, on behalf of the respondents submitted that the standard of proof is higher than prove on a balance of probabilities.

In Mutitika vs Baharini Farm Limited [1985] KLR 227, the court held that;

“contempt of court is an offence of a criminal character. A man may be sent to prison. It must be proved satisfactorily.... It must be higher than proof on a balance of probabilities, almost but not exactly, beyond reasonable doubt. The standard of proof beyond reasonable doubt ought to be left where it belongs, to wit criminal cases. It is not safe to extend it to offences which can be said to be quasi-criminal in nature. However, the guilt has to be proved with such strictness of proof as is consistent with the gravity of the charge...”

In Michael Sistu Mwaura Kamau vs Director of Public Prosecution & 4 others (2018) eKLR the Court of Appeal held that

“It is trite law that to commit a person for contempt of court, the court must be satisfied that he has willingly and deliberately disobeyed a court order that he was aware of.”

The objective of contempt of court proceedings is, *inter alia*, to uphold the dignity of the court and to ensure that court orders are complied with and due process of the law respected. Hence a court of law will take an allegation of contempt of court seriously and act firmly to ensure that this objective is achieved. However, contempt proceedings being quasi- criminal in nature, the contempt must be proved to the required degree. In Githiga & 5 others vs Kiru Tea Company Ltd (Petition 13 of 2019) [2023] KESC 41 (KLR) (16 June 2023) (Judgement) the Supreme Court held that; -

“Due to the quasi-criminal nature of contempt proceedings and the gravity of the consequences that flowed from contempt proceedings, courts required to adhere to the principles of natural justice, procedural fairness and a right to be heard...because contempt proceedings being quasi-criminal, required a higher standard of proof than in normal civil cases and one could only be committed to civil jail or penalized on the basis of evidence that left no doubt as to the contemnor’s culpability.”

The objective of contempt of court proceedings is, *inter alia*, to uphold the dignity of the court and to ensure that court orders are complied with and due process of the law respected. Hence a court of law will take an allegation of contempt of court seriously and act firmly to ensure that this objective is achieved. However, contempt proceedings being quasi- criminal in nature, the contempt must be proved to the required degree.

From the above cited authorities, it is clear that the standard of proof in cases of contempt of court is higher than the normal standard of proof in civil cases of proof on a balance of probabilities. The burden of proof was on the applicant to prove that the cited officers and not the alleged contractor committed the acts complained of and that the acts were in contempt of court.

Reading through the application and all accompanying documents the court finds no evidence connecting the County Secretary, the CECM Trade, the County Attorney and the Municipal Manager Vihiga County to the acts complained of.

In canvassing the application, the applicants urged the court to grant prayers (b), (c) and (d) of the application. Prayer b seeks for a blanket conservatory order to issue pending hearing of the application. In my view this prayer is misconceived. It encompasses property in the entire Mbale Market which is not the subject matter of the petition (as the subject matter is plot numbers 7 and 8 only) and persons and entities for instance the police officers who are not parties in the petition. Further there is already in existence the order issued on 28<sup>th</sup> November 2025 and it has not been explained why the blanket conservatory order is desirable over and above the existing court order the subject of these contempt proceedings.

Prayer (c) is already spent as it sought for restoration orders pending hearing of the application the subject matter of this ruling.

Prayer (d) sought for an order directing the police to enforce compliance and to ensure that no officers interfere with the petitioner's occupation and access to the property. It has been demonstrated that police officers have been involved in interfering with the applicants' occupation of the suit land.

The applicants have failed to prove contempt of court against the respondents and/or the cited officers to the required degree. The application is dismissed.

Costs in the Petition.

The ruling herein does not however lift the court order issued on 28/11/2025 and extended on 9/12/2025. The respondents should abide by the court order as long as it is in existence and is binding upon them.

Orders accordingly.

**Ruling dated and signed at Vihiga, delivered virtually this 23<sup>rd</sup> day of December, 2025 through Microsoft Teams Online Application.**

**E. ASATI,  
JUDGE.**

**In the presence of:**

Faith- Court Assistant.

Lichuma for the Applicants.

Mukabi for the Respondents.