

**IN THE COURT OF APPEAL**

**AT MOMBASA**

**(CORAM: MURGOR, LAIBUTA & NGENYE, JJ.A.)**

**CIVIL APPEAL (APPLICATION) NO. E064 OF**

**2023 BETWEEN**

**THE ISLAMIC FOUNDATION.....APPLICANT**

**AND**

**MOHAMED NAAMAN ALY (As Trustee of the Wakf Properties of  
ALI BIN MOHAMED *alias* MUSES MOHAMED. 1<sup>ST</sup> RESPONDENT**

**ABDALLA MOHAMED ALY MUSES.....2<sup>ND</sup>**

**RESPONDENT**

**ALY KHAN ALY MUSES..... 3<sup>RD</sup>**

**RESPONDENT**

*(Being an application to cite the Respondents for contempt of the  
court orders issued on 3<sup>rd</sup> February 2023)*

\*\*\*\*\*

**RULING OF THE**

**COURT**

1. The genesis of the application before us is the respondents' suit against the applicant (the Islamic Foundation) in Mombasa ELC Case No. 219 of 2016 in determination of which the trial court (L. L. Naikuni, J.) rendered its judgment on 18<sup>th</sup> October 2022 in favour of the applicant, declaring that the respondents had the legal capacity, authority and/or mandate to grant the applicant the 50 acres of land claimed from the *Wakf* property created by Muses Mohamed (deceased) over Plot No. 9 Section III being CR No. 572/1 (the suit property); and ordering that the 50 acres of

land granted to the

applicant be annexed and subdivided from the larger portion of the suit property and be transferred to the applicant; and further orders directing the Land Registrar, Mombasa, to hive off and/or excise a portion measuring 50 acres from the larger portion of the suit property measuring 162 acres and transfer it to the applicant at their own cost within 60 days of the judgment; and that the costs of the suit be borne by the respondents.

**2.** Dissatisfied with the trial court’s decision, the respondent moved to this Court on appeal pending determination of which they applied for stay of execution of the judgment and decree of L. L. Naikuni, J vide a Notice of Motion dated 9<sup>th</sup> November 2022, which was determined in their favour in terms of the ruling dated 3<sup>rd</sup> February 2023 directing, *inter alia*, that **“... *the status quo pertaining on the ground [as regards the suit property] as of the date of this ruling be maintained pending the hearing and determination of this appeal.*”**

**3.** Subsequently, the applicant filed a Notice of Motion dated 5<sup>th</sup> March 2025 pursuant to sections 1A, 1B and 3A of the Civil Procedure Act, Cap. 21 Order 51 of the Civil Procedure Rules,

section

5 of the Judicature Act, Cap. 8 and all enabling provisions of law. In its Motion, the applicant prayed that this Court issues orders summoning the respondents to explain why they should not be held in contempt or disobedience of the orders issued on 3<sup>rd</sup> February 2023 by this Court; that, subject thereto, the respondents be committed to civil jail for a maximum period of six months for contempt of court, and for “blatantly and deliberately refusing, neglecting and or failing to comply with the orders issued by this Honourable Court on 3<sup>rd</sup> February 2023;” any other or further orders as this Court deems fit and appropriate; and that the costs of the application be borne by the respondents.

4. The applicant’s Motion was supported by the annexed affidavit of Mohamed Islam (the applicant’s Administrator) sworn on 14<sup>th</sup> March 2025 deposing to the 17 grounds of the Motion. In summary, the deponent averred, *inter alia*, that the status on the ground when this Court’s order was issued was that the applicant had been granted 50 acres of the suit property and had occupied 2 acres thereof, and on which they had erected an Islamic institution; that the suit property had not been fenced at the time the orders of the

Court were issued; that, sometime in December 2024,  
the

respondents proceeded to erect a fence on the suit property without moving the Court, which resulted in interference of the court order and the applicant's rights; that the respondents' action was a direct violation of the court order, which they were well aware of as they were represented by counsel when the Court delivered its ruling in that regard; that, on 8<sup>th</sup> January 2025, the applicant's advocate wrote a letter to the respondents notifying them of their contemptuous act and demanding that the respondents cease fencing of the suit property; that the respondents' counsel responded by a letter dated 24<sup>th</sup> January 2025 in which they admitted the acts of contempt and tried to "make light of their actions"; that, further, on 4<sup>th</sup> February 2025, the applicant's advocates wrote to the respondents informing them that they were in continuous contempt of court orders, and that there shall be penalties and consequences thereof; that the respondents have willfully and blatantly continued to breach and disobey the said court orders; that the respondents have exhibited conduct amounting to interference with the administration of justice, blatant disregard of the law and deliberate mockery of the justice system; that the orders and decrees of the Court must, for all intents and purposes, be

obeyed; and that it is therefore in the interest of

justice and preserving the integrity of this Court that the application be allowed and the respondents held in contempt.

5. In reply to the applicant's Motion, the respondents filed an affidavit sworn by one Ahmed Naaman Aly (a trustee of the *Wakf*) on 20<sup>th</sup> March 2025 on his own behalf and on the authority of Ali Khan Ali Muses (the 3<sup>rd</sup> respondent) deposing, *inter alia*, that they learnt that there were third parties interested in the suit property, who had fraudulently subdivided it as shown in a letter dated 5<sup>th</sup> January 2021 from the Director of Surveys and addressed to M/s. Edward Kiguru, Land Surveyors; that, in February 2024, several people invaded the suit property; that other invasions took place in July 2024 by large groups of people who lit fires to clear the suit property and began constructing houses thereon; that, on several occasions police officers from Kijipwa Police Station intervened to stop the invasion and removed the invaders; that, due to the frequency of the invasions and threat to the lives of the children attending Madrassa and worshipers at the mosque, the police advised them to fence the suit property; that the respondents contracted Barrowood

Enterprises Ltd between 3<sup>rd</sup> and 27<sup>th</sup> December 2024 to put up  
a

wooden and wire fence; that the respondents provided an entrance, which was always open to ensure unlimited access to all occupants of the suit property; that it was the respondents' duty to protect the subject property on behalf of the *Wakf*; that they put up the fence to secure the property from invasion by third parties; that fencing the suit property has not adversely prejudiced the applicant, but has instead ensured that the status quo is maintained by safeguarding the suit property from trespass, occupation and loss to third parties; that, by doing so, the respondents did not in any way intend to disobey court orders; and that the fence does not interfere with any part of the 50 acres claimed by the applicants.

6. In response, the applicant filed a supplementary affidavit sworn by Mohamed Islam on 1<sup>st</sup> April 2025 stating, among other things, that the respondents did not notify them of any issues affecting the suit property, including the alleged fraudulent subdivision thereof; that neither was this Court informed of the alleged invasions so as to issue any protection orders; that fencing the suit property has adversely affected the applicant by leaving them with no access to the portion of the suit property

claimed otherwise than through a

neighbouring institution; that the purpose of the status quo orders was to safeguard the substratum of the subject matter; that the respondents' action was in bad faith and in disobedience and disregard of the orders of the Court; that Mr. Ahmed Naaman had no authority to swear the replying affidavit, and neither did he hold a Power of Attorney to act on behalf of the 3<sup>rd</sup> respondent; and that the Court ought to hold the respondents in contempt, having admitted tampering with the status quo ordered by this Court.

**7.** In support of the Motion, counsel for the applicant, M/s. Khalid Salim & Company, filed written submissions and list of authorities dated 12<sup>th</sup> May 2025 citing the case of **Abdi Satarhaji & Another v**

**Omar Ahmed & Another** [2018] eKLR for the proposition that

contempt of court is constituted by conduct that denotes willful defiance of, or disrepute towards, the Court, or which willfully challenges or affronts the authority of the Court or the supremacy of the law. They urged us to allow the application with orders as prayed.

8. In rebuttal, learned counsel for the respondents, M/s. C. Katisya & Co., filed written submissions dated 16<sup>th</sup> May 2025 citing

the case of ***Mutitika v Baharini Farm Ltd*** [1985] eKLR where the

Court of Appeal cautioned itself of the need to jealously and anxiously guard the power of punishing for contempt with the greatest anxiety and hesitance; and submitting that alternative remedies and the standard of proof of an intention to disobey must be satisfied before the order of contempt is granted. Counsel urged us to dismiss the applicant's Motion with costs.

9. It is indisputable that the respondents put up a fence on the suit property to allegedly ward off trespassers and invaders who had allegedly began clearing portions of the suit property and putting up structures thereon. According to them, the fence was intended to secure the suit property, the children who attended Madrassa and the worshipers who prayed at the mosque erected on the *Wakf* property. They contended that doing so guaranteed maintenance of the status quo and was intended to safeguard the substratum of the appeal.

10. On its part, the applicant complained that the fencing altered the *status quo* to their prejudice; that they were not notified of

the alleged invasions and interference with the suit property;  
that the

fence impeded their access to the suit property, prompting them to seek alternative access through an adjoining property; and that, by their conduct, the respondents were in contempt of court for which they should be punished as prayed.

**11.** This Court pronounced itself on the standard of proof of contempt of court in **Mutitika v Baharini Farm Ltd**

[1985] KECA 60 (KLR) and held that:

**“In our view the standard of proof in contempt proceedings**

**must be higher than proof on the balance of probabilities,**

**almost but not exactly, beyond reasonable doubt. We envisage**

**no difficulty in courts determining the suggested standard of proof. The standard of proof beyond reasonable doubt ought to be left where it belongs, to wit, in criminal cases. It is not safe to extend it to offence which can be said to be quasi - criminal in nature.”** [Emphasis added]

12. In **Mukuha v Gashwe & 14 others** [2023] KECA 1482 (KLR),

this Court held that:

***“26. Cromwell J., in Carey v Laiken, 2015 SCC 17 enumerated three (3) elements to be satisfied in contempt proceedings as follows:***

***‘i) The order alleged to have been breached ‘must state clearly***

***and unequivocally what should and should not be done’.***  
***This***

***ensures that a party will not be found in contempt where an order is unclear. An order may be found to be unclear if, for example, it is missing an essential detail about where, when or to whom it applies; if it incorporates overly broad language; or if external circumstances have obscured its meaning.***

***ii. The party alleged to have breached the order must have had actual knowledge of it. It may be possible to infer knowledge in the circumstances, or an alleged contemnor may attract liability on the basis of the willful blindness doctrine.***

***iii. The party alleged to be in breach must have intentionally done the act that the order prohibits or intentionally failed to do the act that the order compels.’***

***... ....***

**29. In the case of Consolidated Fish (Pty) Ltd v Zive, 1968 (2) SA 517 (C) 524D, as applied in Noel Lancaster Sands (Edms) Bpk v Theron, 1974 (3) SA 688 (T) 691C, the court stated that:**

***‘A deliberate disregard is not enough, since the non-complier may genuinely, albeit mistakenly, believe he/she is entitled to act in the way claimed to constitute the contempt. In such a case good faith avoids the infraction.’***

***30. It is trite that the refusal to obey should be both willful and mala fides, and that unreasonable non-compliance, provided it is bona fide, does not constitute contempt. The applicant must show that the offence is committed not by mere disregard of a court order, but by the deliberate and intentional violation of the court’s dignity, repute or authority.”***

13. In **Samuel M. N. Mweru & Others v National Land**

**Commission & 2 others** [2020] KEHC 9233, Mativo, J. (as he then

was) held that:

***“38. The test for when disobedience of a civil order constitutes contempt has come to be stated as whether the breach was committed ‘deliberately and mala fide.’ A deliberate disregard is not enough, since the non-complier may genuinely, albeit mistakenly, believe he/she is***

***entitled to act in the way claimed to constitute the contempt. In such a case good faith avoids the infraction. Even a refusal to comply that is objectively***

***unreasonable may be bona fide (though unreasonableness could evidence lack of good faith).***

... ....

***40. It is an established principle of law that in order to succeed in civil contempt proceedings, the applicant has to prove (i) the***

***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.”***

14. Having carefully considered the applicant’s Motion, the grounds on which it is anchored, the affidavits in support of, and in reply to, the application, the rival submissions of respective counsel, the cited authorities and the law, we are persuaded that:

- (a) the order alleged to have been breached was couched in broad terms, namely to maintain the status quo pertaining on the ground as respects the suit property as at the date of

the ruling;

- (b) the respondents had actual knowledge of the status quo order in issue;
- (c) the order did not prohibit fencing or any act intended to safeguard the suit property from trespass or invasion by third parties;
- (d) the respondents were not in willful disobedience of the court order in issue, and that they did not, in our considered view, act with *mala fides*; and
- (e) that the applicant did not show that the offence complained of was committed, not by mere disregard of the court order, but by the deliberate and intentional violation of the Court's dignity, repute or authority.

15. In view of the foregoing, we find that the applicant did not prove the offence of contempt of court on the part of the respondents to the required standard, namely higher than on the balance of probabilities and almost, but not exactly, beyond reasonable doubt.

16. Accordingly, we reach the inescapable conclusion that the applicant's Motion fails and is hereby dismissed.

17. Considering the nature of the dispute and the parties involved, *to wit*, a public trust in the nature of a *Wakf* and an Islamic institution, both of which were established in the general interest of the Islamic community, we hereby order and direct that each party shall bear their own costs of the application.

**Dated and delivered at Mombasa this 19<sup>th</sup> day of December 2025.**

**A. K. MURGOR**

.....  
**JUDGE OF APPEAL**

**DR. K. I. LAIBUTA CArb, FCI Arb.**

.....  
**JUDGE OF APPEAL**

**G. W. NGENYE-MACHARIA**

.....  
**JUDGE OF APPEAL**

*I certify that this is a true copy of the original*

*Signed*  
**DEPUTY REGISTRAR**