



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MAKUENI

ELC SUIT NO. 376 OF 2017 (O.S)

IN THE MATTER OF REGISTRATION OF TITLE TO LAND BY ADVERSE POSSESSION

AND IN THE MATTER OF SECTION 38 OF THE LIMITATION OF ACTIONS ACT

AND

IN THE MATTER OF LAND PARCEL NUMBER LR.KALAWA/KATHULUMBI/225

MARY MUNGUTI.....1ST PLAINTIFF/RESPONDENT

SHADRACK MBALUKA.....2ND PLAINTIFF/RESPONDENT

VERSUS

SAULI MAUNDU MUTUA.....DEFENDANT/APPLICANT

R U L I N G

1. There is before me a Notice of Motion Application expressed to be brought under Sections 1A, 1B and 3A of the Civil Procedure Act Cap 21 of the Laws of Kenya, Order 51, Order 40 Rule 3 of the Civil Procedure Rules and all other enabling provisions of the law for orders:-

1) Spent.

2) THAT the Defendants/Respondents be cited for contempt of the Orders of this Honourable Court issued on 5/4/2018 and they be subsequently imprisoned for a period not exceeding six months.

3) THAT the costs of this application be borne by the Respondents in any event.

2. The application is predicated on grounds 1, 2, 3, 4, 5, 6, 7, 8 and 9 as well as the supporting affidavit of Sauli Maundu Mutua, the Defendant/Applicant herein sworn at Machakos on 20th July, 2018.

3. The Plaintiffs/Respondents have opposed the application vide the replying affidavit of Shadrack Nzioki Mbaluka, the second Plaintiff/Respondent, the same having been sworn at Machakos on 29th January, 2019 and filed in court on even date.

4. The court directed that the application be disposed off by way of written submissions.

5. The Defendant/Applicant has deposed in paragraphs 2, 3, 4, 5 and 6 that he is the registered owner of the suit land known as LR No.Kalawa/Kathulumbi/225 as per the annexed copy of the title deed marked as annexure SMM-1, that he obtained orders of this court on 05th April, 2018 by consent of both parties herein, that the said order required that the suit property be preserved from further dealings and/or interference pending the determination of the main suit, that the order was duly served upon the Respondents as per the affidavit of service marked as SMM-2 and that in contravention of the said court order, the Plaintiffs/Respondents jointly rented some portion of the suit land to one Patrick Kithale Mbithi, Katela Mukeke, and Kithusi Kioo who are engaged in cutting down trees for charcoal burning, farming and grazing cattle on the said suit land as per a bundle or photographs annexed as annexure SMM-3.

6. On the other hand the 2nd Plaintiff/Respondent has deposed in 5, 6, 7, 8 and 9 that the court directed that the parties herein do maintain the status quo, that the status quo meant that the Respondents remain in possession peacefully till suit is heard, that from the pleadings it is admitted that the Applicant has never been in possession of the suit premises, that there is no evidence of leasing out the suit property and that the Applicant has failed to be specific as to who is grazing cattle and when the grazing took place.

7. The Defendant/Applicants Counsel extensively submitted on the contempt of Court Act No.46 of 2016 as well as Order 40 Rule 3 of the Civil Procedure Rules and added that this court did issue an order of status quo to preserve the suit property from further dealings and/or interference pending the hearing and determination of the main suit. The Counsel went on to submit that the order was made in the presence of both Counsel for the Defendant/Applicant and the 2nd Plaintiff/Respondent. That the said order was duly served upon the Plaintiffs/Respondents. That none of the Plaintiffs/Respondents ever sought clarification from the court concerning implementation of the said order.

8. It was also the Counsel's submissions that the Environment and Land Court being a superior court, it derives its jurisdiction from the provisions of Section 5(a) and (b) of the Contempt of Court Act No.46 of 2016 which provides that:-

“Every superior court shall have power to punish for contempt of court on the face of court and punish for contempt of court.”

The Counsel cited the case of **Republic vs. Kenya School of Law & 2 others [2015] eKLR** where G.V. Odunga, J made the following remarks:-

“in my considered view, Court orders are not made in vain and are meant to be complied with. If for any reason a party has difficulty in complying with court orders the honourable thing to do is to come back to court and explain the difficulties faced by the need to comply with the order. Once a court order is made in a suit the same is valid unless set aside on review or appeal..... where it has been brought to the Court's attention that its orders are being abrogated or abridged by brazen or subtle schemes and manoeuvres in the name of statutory provisions this Court cannot turn a blind eye to the same I must send a strong message to those who are intent in disobeying court orders that such conduct will not be tolerated no matter the status of the contemnors in the society in my view contempt of court is such a grotesque monster that courts should hound it wherever it rears its ugly head and wherever it seeks to take cover behind any craft or innovation.....”

9. Regarding service of the order, the Counsel cited the case of **Bob Collymore & Another vs. Cyprian Nyakundi, [2016] eKLR** L. Njuguna, J found the Defendant in contempt of interim orders which were made in the presence of the Defendants advocate. The Counsel went on to submit that in the latter case, the court was convinced that there was proper service and thus held the Defendant in contempt.

10. Lastly, the Defendants/Applicants Counsel cited the case of **Central Bank of Kenya & Another vs. Ratilal Automobiles Ltd & Others in Civil Application number 247 of 2006 (NRB)** where the court of Appeal held that:-

“Judicial power in Kenya vests in the courts and other tribunals established under the constitution and that it is a fundamental tenet of the rule of law that court orders must be obeyed and it is not open to any person or persons to choose whether or not to comply with or to ignore such orders as directed to him or them by a court of law.”

11. On the other hand, the Counsel for the Plaintiffs/Respondents submitted that their position was that the court order required them to maintain status quo pending the hearing and determination of the main suit. The Counsel cited the Contempt of Court Act Number 46 of 2016 to define what constitutes contempt. He also cited the case of **Econet Wireless Kenya Ltd vs. Minister for Information and Communication of Kenya & Another [2005] 1 KLR** where Ibrahim, J (as he then was) stated that:-

“It is essential for the maintenance of the rule of law and order that the authority and the dignity of our courts are upheld at all times. The Court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors. It is the plain and unqualified obligation of every person against, or in respect of whom, an order is made by a Court of competent jurisdiction, to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or void.”

However the Counsel did not avail the said authority.

12. Regarding the meaning of status quo the Counsel submitted that Black's Law Dictionary 8th Edition states that it is a Latin word which means *“the situation as it exists”* and referred to the case of Baobab Beach Resort where Murithi J explained its effect. Murithi's J explanation was quoted by F. Tuiyot in **Saifudeen Abdullahi & 4 others in Mombasa High Court Misc. Civil Cause No.11 of 2012** where he stated:-

“In my view, an order to Status quo to be maintained is different from an order of injunction both in terms of the principles for grant and the practical effect of each. While the latter is an substantive equitable remedy granted upon establishment of a right, or at interlocutory stage, a prima facie case, among other principles to be considered, the former is simply an ancillary order for the preservation of the situation as it exists in relation to pending proceedings before the hearing and determination thereof.”

Of importance to note is that the Counsel did not avail the two authorities to court but rather provided the case of Pricilla Wanja Kibui & James Kiongo Kibui & Another [2014] eKLR where Ombwayo J quoted the two authorities.

13. The Counsel was of the view that the application is devoid of merit and urged the court to dismiss it with costs to the Defendants/Respondents.

14. I have read the application together with its supporting affidavit as well as the replying affidavit. I have also read the submissions filed by the Counsel on record for the parties herein. I wish to point out that on the 09th November, 2018 it was held in the case of **Kenya Human Rights Commission vs. Attorney General & Another [2018] eKLR** that:-

“A declaration is hereby issued that the entire contempt of Court Act No.46 of 2016 is invalid for lack of public participation as required by Articles 10 and 118(b) of the Constitution and encroaches on the independence of Judiciary.”

15. Section 38 of the Contempt of Court Act repealed Section 5 of the Judicature Act, Chapter of the Laws of Kenya.

16. Section 5 of the Judicature Act provided as follows:-

“Section 5(1)

The High Court and the Court of Appeal shall have the same power to punish for contempt of courts as is the time being possessed by the High Court of Justice in England, and that power shall extend to upholding the authority and dignity of subordinate courts.”

17. I need not point out that Judicature Act was enacted before the Environment and Land Court was established pursuant to Article 162(2) (b) of the Constitution as well as Section 4(1),(2) and (3) of Environment and Land Court Act No.19 of 2011. This court being of equal status of the High Court, I hold that it has the power to punish for contempt. It should be noted that Section 5 of the Judicature Act was repealed by Section 38 of the Contempt of Court Act No.46 of 2016. As observed, the latter Act was found to be invalid for lack of public participation as is required by Articles 10 and 118(b) of the Constitution and also for encroaching on the independence of the Judiciary. The repeal of the said Section 5 of the Judicature Act cannot stand since the repealing Act was found to be invalid

18. It is not in dispute that the Plaintiffs/Respondents are in occupation and possession of the land which is the subject matter herein. It is also not in dispute that on 05th April, 2015 the court did issue an order of status quo. This is what the court had to say on the material day. **“In the circumstances, I do order for status quo pending the conclusion of the matter.”** In my view, both parties had an obligation to seek the Court’s interpretation of what the order for status quo meant. Unfortunately, they did not do so. As it were, by the said orders of the court, parties were expected to remain in the status they were in. No one enquired whether or not the acts by the Plaintiffs/Respondents that the Defendant/Applicant has complained of were included in the order of status quo as expressly mentioned hereinabove. In my view therefore, it would be wrong to accuse the Plaintiffs/Respondents of contempt of court. The application by the Defendant/Applicant must therefore fail. The circumstances of this case dictate that each party herein should bear their own costs for interpreting the courts order without seeking the courts intervention. For those reasons, I hereby proceed to dismiss the application dated 20th July, 2018. Each party to bear their own costs.

Signed, dated and delivered at Makeni this 14th day of May, 2019.

MBOGO C. G.,

JUDGE.

In the presence of:-

Mr. Masaku for the Defendant/Applicant

Mr. Tamata for the Plaintiffs/Respondents

Ms. C. Nzioka - Court Assistant

MBOGO C.G, JUDGE

14/05/2019.