REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY

ELC APPEAL NO. E016 OF 2024

LMK INVESTMENT LIMITED……………………………1ST APPELLANT

GEORGE PETER KALUMA………………………………2ND APPELLANT

VERSUS

ALFRED OSORO OYOPUDO……………………………1ST RESPONDENT

JACOB DWALO ARIADO………………………………..2ND RESPONDENT

CYNTHIA ACHIENG ABIERO…………………………3RD RESPONDENT

RULING

1. This Court will not tire reminding parties that the manner in which they draft pleadings is not only extremely important in communicating their case to the Court but also determines whether the claim, plaint or defence is sustained or fails. The instant application is one which if this court were to apply the strict sense of relying on the manner it is drafted, it would dismiss without a wink. This is because, the Supporting Affidavit though annexed thereto misleads in a crucial fact. It is deposed therein that it is in support of an application dated 5th

September 2025 yet the instant one is dated 11th September 2025. As such, if this court were not to treat that as an error, it would mean that the instant application would be considered as having been filed without a supporting affidavit. If that were the case, it is not one of those that Order 2 Rule 15(2) of the civil Procedure Rules contemplates that do not require a supporting affidavit to be filed with it. It means this application, without a supporting affidavit would be bare, hollow and incurably defective, and would be struck out.

2. Granted that this court will always be guided by the fundamental principle of doing substantive justice to all and sundry, this court treats the date referred to as an error. Thus, the application is to be considered, under Article 159(2)(d) of the Constitution, based on substantive justice.

3. That said, by a Notice of Motion dated this 11th day of September 2025 the Respondents moved this court for order that the Appellants were in contempt of Court over orders it issued. They brought it under Sections 1A, 1B and 3A, 63 (d) of the Civil Procedure Act, Section 5(1) of the Judicature Act,

Article 159 of the Constitution and Order 51 of the Civil Procedure Rules 2010. They prayed for orders: -

1. …Spent.
2. … Spent.
3. That there be and is hereby issued an injunction restraining the Appellants from any further dealings and/or developments on the property known as KANYADA/KOTIENO/KATUMA A/2983,2984 and 2528 pending the hearing and determination of this Appeal.
4. That there be and is hereby issued an order compelling the appellants to demolish the fence and fencing posts illegally erected on the suit property contrary to the orders of the court issued on the 2nd of July 2024.
5. That there be and is hereby issued an order to the OCS Homa Bay Police Station to accompany the applicants and oversee the demolition of the fence as well as to maintain law and order during the demolition exercise.
6. That there be and is hereby issued an Order citing GEORGE PETER KALUMA & LMK INVESTMENTS LIMITED for contempt of court.

7. That upon citation for contempt, the aforesaid GEORGE PETER KALUMA & LMK INVESTMENTS LIMITED be sanctioned by committal to civil jail, sequestration of property, payment of a fine and/or any further orders.

8. That this Honorable Court make any further or other Orders to restore its reputation and dignity.

9. THAT costs of this application be borne by the Appellants.

4. The application was supported by the grounds set out on its body. In brief, they were that on 2nd of July 2024 this court issued an order for the maintenance of the status quo with regards to the property Kanyada/Kotieno/Katuma A/ 2983, 2984 and 2528 pending the hearing and determination of this appeal, which orders were issued ex parte on the application of the appellants. in blatant disregard of the orders which they themselves sought and were granted, the appellants have proceeded to deal with the suit property in a manner that disobeys the orders of the court. In particular, the appellants fenced off the property by installing concrete fencing posts and chain-link wire on the property boundaries and ploughed the entire field.

5. The 2nd Respondent reached out to the appellants with regards to the illegal fencing done, but was met with accusations of theft and threats to his person, which he then proceeded to report to Homa Bay police station. The appellant deliberately circumvented the court orders, in what could only be termed as an abuse of the court process and manifest bad faith. Through their actions the appellants determined the ownership of the property and conferred on themselves the rights associated with the said property by dealing with it in the manner outlined above. Their actions amount to a breach of good order and an abuse of the court process, particularly, by the fencing off of the property by concrete is an act of disobedience of court orders.

6. Further, the Appellants neither cared about due process nor did they approach the court in order to pursue the rule of law hence should be denied audience forthwith until they purged the contempt by demolishing the fence erected. It demeaned the court for the Appellants to approach it and then violate the very orders they sought from it. Their actions were aimed at achieving an end other than a fair adjudication of the matter.

They did not intend that the matter be adjudicated to the end but wanted to use interlocutory orders to purport to acquired proprietary interest over the suit property. Their conduct was a direct affront against the court's authority.

7. Furthermore, court orders were neither mere suggestions nor could their terms be handled by recipients at will but were mandatory obligations for compliance. The Appellant were well aware of the implications of court orders but had chosen to act in defiance. Their actions set a bad precedent of disregard of orders and decisions of the Court.

8. It was apprehended that the Appellants could hence move to further deal in the property by possibly putting up buildings or other dealings that will surely be costly for the respondents to remedy. That the Court ought to provide a remedy that would be just and equitable. It was in the interests of justice that the orders sought are granted.

9. The application was supported by the affidavit of Jacob Dwalo, the 2nd respondent on 11th September 2025. He deponed that the affidavit was in support of an application dated 5th September 2025. Further, he deposed that he had authority

from the 3rd Respondent to swear the affidavit in that behalf yet he did not annex any written authority from the said party, authorizing him to plead on his behalf.

10. Be that as it may, his depositions largely repeated the contents of the grounds in support of the application save that he added a few further facts as included here below, and the court shall not repeat them in this summary now but will consider them in light of the said grounds. These additional depositions were that among the order issued on the 2nd of July 2024 were the order for maintenance of the status quo obtaining on the parcel of land. He reproduced the said orders. The appellants fenced the said property in blatant disregard of the orders. He annexed and marked JDA-1 photographs of the fenced property. He discovered on the 13th day of August 2025, and was reliably informed that the fencing had been done at the behest of one George Peter Kaluma, the 1st appellant.

11. On the 18th day of August 2025, he reached out to the 1st appellant regarding the illegal fencing done, but was met with baseless accusations of theft and fraud and the 1st appellant

threatened him of criminal activity. He annexed and marked JDA-2 extracts of the WhatsApp communication between the parties. He reported the incident to Homa Bay Police Station under OB Number 20/2/9/2025 on the 2nd of September 2025 but the officers declined to record a statement and issue him with an abstract. They instead advised him to pursue the matter as a civil claim.

12. The Respondents filed a Replying Affidavit sworn on 26th October 2025 by one George P. O. Kaluma. He deponed that whereas the Respondents had fraudulently possessed titles to the subject properties, the Appellants had remained in possession of the parcels for decades. This position had never been challenged before any court or anywhere else until the deponent personally decided to institute the matter before the subordinate court. Further, he believed that the courts would not issue orders or status quo which were vague. He specifically reproduced Paragraph 9 of the ruling of the court which he is alleged to have disobeyed, and particularized the directions the court gave them relating to the what was to be done as per the status quo on the suit land pending the hearing

of the appeal. He added that the orders were express injunctions against the Respondents, now Applicants herein.

13. He deponed further that when the Kenya Airports Authority wanted to expand their airport and construct a modern and expansive runway they had the trouble of establishing where the boundaries were, almost encroaching the properties in issue. That faced with the threat of interference and encroachment, he quickly instructed people on the ground who are tenants thereon to erect a fence around the property, not for any other reason, but just to clearly demarcate how far the Kenya Airports Authority action was to go. Further, that that was the only reason the fence was erected, but the Respondents had no plans to erect permanent structures thereon. Lastly, that the orders of the learned Judge did not in any way bar him from using the property or remaining in possession.

ISSUE, ANALYSIS AND DETERMINATION

14. The affidavit in support of the application is misleading in terms of which parties have brought the application. Therefore, any paragraphs which refer to any facts which only the other

applicants other than the deponent of the of the supporting affidavit is inadmissible hearsay, and should and must be disregarded or struck out. This court restates so because at paragraph 2 the 2nd Respondent/ now applicant swore that he had authority to swear the affidavit on his behalf and that of the 3rd Respondent. Butt the court carefully perused all the documents filed in the instant case and even in the trial court. There was no written authority to plead signed and filed by that party, in terms of Order 1 Rule 13 (1) of the Civil Procedure Rules which provides that where there are more than one plaintiff in a suit, read mutatis mutandis with appeals, one or two may be authorized to appear, plead or act on behalf of the other. Order 1 Rule 13(2) specifically provides that "*The authority shall be in writing signed by the party giving it and shall be filed in the case*."

15. In the instant case the was no written authority giving the deponent such capacity to swear affidavit in that behalf. The applicant who swore the supporting affidavit only stated that he had authority to swear the affidavit. That was one hundred per cent untrue, in the circumstances.

16. Regarding punishment for contempt of court in this Court, 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."

17. This court is alive to the fact that by the time the instant application was filed, there was a status quo that was obtaining on the suit properties. Thus, in order to determine whether or not there was breach of the orders issued on 2nd July 2024, this Court has to restate the status quo as it was on the material date. This is important because those are the circumstances which, the Respondents are found to have acted in breach they have to be punished for.

18. Those circumstances can only be gleaned from the pleadings the parties filed in the trial court and the affidavits in support of the various applications therein and in this Court. In brief, the status quo in relation to the occupation of the suit parcels is

that the appellants were in occupation and use of the same. When the appellants, thus, filed the application dated 23rd May 2024 by which they sought, among others, an order of injunction against the Respondents who are now the applicants, the Court granted the following orders (relevant port reproduced):

> ***“Thus, the application is allowed in the terms infra; (A) Status quo obtaining over the suit parcels of land be maintained pending the hearing and determination of this appeal. In***
> ***particular, the respondents shall not sell, transfer, fence, develop or further subdivide or in any manner dispose of the suit parcels of land pending the outcome of the appeal.”***

19. It is these orders that the Appellants/Respondents are alleged to have breached and a prayer made for their punishment therefor. Thus, the Court needs to consider whether the appellants’ actions, as deposed on the Affidavit sworn on 11th September 2025, are in tandem with or contrary to the orders.

20. This Court must first define what constitutes Contempt of Court. The learned author, **Bryan Garner in Black's Law Dictionary, 11th Edition, Thompson Reuters, 2019, p. 397**, defines contempt as,

> ***"…disregard of, or disobedience to, the rules or orders of a legislative or judicial body, or an interruption of its proceedings by disorderly behavior or insolent language, in its presence or so near thereto as to disturb the proceedings or impair the respect due to such a body".***

21. It is clear from the definition that any party, whether served with a court order or not, is bound to obey as long as it is directed to him or her and provided he has knowledge of its existence. One thing should be always borne in mind: court orders are not issued in vain hence they must be respected, obeyed, and/or fulfilled.

22. In Kenya, courts have emphasized time and again on obedience of court orders. Thus, in the **Kenya Human Rights Commission v Attorney General & another [2018] eKLR** the Court held as follows:

"Article 159 of the Constitution recognizes the judicial authority of courts and tribunals established under the Constitution. Courts and Tribunals exercise this authority on behalf of the people. The decisions courts make are for and on behalf of the people and for that reason, they must not only be respected and obeyed but must also be complied with in order to enhance public confidence in the judiciary which is vital for the preservation of our constitutional democracy. The judiciary acts only in accordance with the Constitution and the law (Article 160) and exercises its judicial authority through its judgments decrees orders and or directions to check government power, keep it within its constitutional stretch hold the legislature and executive to account thereby secure the rule of law, administration of justice and protection of human rights. For that reason, the authority of the courts and dignity of their processes are maintained when their court orders are obeyed

and respected thus courts become effective in the discharge of their constitutional mandate."

23. Elsewhere in Africa, Nkabinde J in **Nthabiseng Pheko v Ekurhuleni Metropolitan Municipality & another CCT 19/11(75/2015)** observed that:-

"The rule of law, a foundational value of the Constitution, requires that the dignity and authority of the courts be upheld. This is crucial, as the capacity of courts to carry out their functions depends upon it. As the Constitution commands, orders and decisions issued by a court bind all persons to whom and organs of state to which they apply, and no person or organ of state may interfere in any matter, with the functioning of the courts. It follows from this that disobedience towards courts orders or decisions risks rendering our courts impotent and judicial authority a mere mockery. The effectiveness of court orders or decisions is substantially determined by the assurance that they will be enforced."

24. In Canada, the Court was more emphatic that any other in other jurisdictions. It did so in the case of **Canadian Metal Co. Ltd v Canadian Broadcasting Corp(N0.2) [1975] 48 D.LR (30)**, where it stated that:

"To allow court orders to be disobeyed would be to tread the road toward anarchy. If orders of the court can be treated with disrespect, the whole administration of justice is brought into scorn… if the remedies that the courts grant to correct… wrong can be ignored, then there will be nothing left for each person but to take the law into his own hands. Loss of respect for the courts will quickly result into the destruction of our society." Courts, therefore, punish for contempt to insulate its processes for purposes of compliance so that the rule of law and administration of justice are not undermined. Without this power or where it is limited or diminished, the court is left helpless and its decisions would mean nothing. This ultimately erodes public confidence in the courts; endangers the rule of law, administration of justice

and more importantly, development of society. That is why the court stated in Carey v Laiken [2015] SCC 17 that; "Contempt of court rests on the power of the court to uphold its dignity and process. The rule of law is directly dependent on the ability of the courts to enforce their process and maintain their dignity and respect."

25. Furthermore, this Court has emphasized, in **Wamalwa v Ekirapa (Environment and Land Miscellaneous Application 2 of 2022) [2023] KEELC 16129 (KLR) (13 March 2023) (Ruling)** that:

"It is therefore a fundamental rule of law that court orders be obeyed and where an individual is enjoined by an order of the court to do or to refrain from doing a particular act; he has a duty to carry out that order. The court has a duty to commit that individual for contempt of its orders where he deliberately fails to carry out such orders. (Louis Ezekiel Hart v Chief George 1 Ezekiel Hart (-SC 52/2983 2nd February 1990). and in Hon. Martin Nyaga Wambora and

another v Justus Kariuki Mate & another [2014] eKLR, the Court stated the duty to obey the law by all individuals and institutions is cardinal in the maintenance of rule law and administration of justice."

26. Such are the grave cautions the law and courts have always made to parties. In addition to it, this Court is aware of the legal position that the standard of proof in contempt of court proceedings is higher than that of a balance of probabilities. It means that for one to be found guilty of contempt of court the court as well any other party should not be left guessing as to whether the act or omission impugned took place or that it constituted willful disobedience with its attendant requirement of knowledge of the order. It is therefore cautious and extremely slow in finding a party guilty of contempt of court.

27. In **Republic v Ahmad Abolfathi Mohammed & another SC Criminal Application No. 2 of 2018 [2018] eKLR** the Supreme Court stated:

> "***It is, therefore, evident that not only do contemnors demean the integrity and authority of***

Courts, but they also deride the rule of law. This must not be allowed to happen. We are also conscious of the standard of proof in contempt matters. The standard of proof in cases of contempt of Court is well established. In the case of <u>Mutitika v. Baharini Farm Limited [1985] KLR 229, 234</u> the Court of Appeal 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...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 an offence which can be said to be quasi-criminal in nature."***

28. For one to be guilty of contempt of court, the six fundamental ingredients of such a quasi criminal conduct must be proved by the applicant. These are that;

1. There must be a court order in existence
2. It must be clear or unambiguous

3. It was directed at the alleged contemnor
4. It was served on him or he had constructive knowledge of the order
5. He failed to obey the order
6. His failure to observe it or the wrongful action was deliberate.

29. When the law analysed above is applied to the instant case, this court finds that indeed there was an order in existence. It was issue on 2nd July 2024. It was clear and precise. Its terms or requirements were that the parties were to maintain the status quo which was specified as being that the Respondents were "***not to sell, transfer, fence, develop or further subdivide or in any manner dispose of the suit parcels of land pending the outcome of the appeal."***

30. It is alleged that the Respondents in the instant appeal did two of more of such acts as contemplated in the prohibition of the order. These were that they fenced off the property by installing concrete fencing posts and chain-link wire on the property boundaries and ploughed the entire field. The applicants annexed photographs marked as annexture

dsadassd to evidence that. The Respondents, through the Replying Affidavit of George Peter O. Kaluma do not deny putting up the fence. But they offer an explanation that the property was in danger of being wasted and or encroached by the Kenya Airport Authority when it was expanding the runway of Kabunde Airstrip, and that the orders were not intended to dispossess them or put them out of possession of the land hence they did not commit any disobedience thereof.

31. With these two contending factual standpoints a number of facts emerge which need to be clarified. First, who was in possession of the suit land when the orders were issued? Did the orders stop the said party(ies) from doing any activities on the land while they lasted? Did orders imply that the party in possession leaves the suit property in danger of being wasted or encroached or they could secure it in case of such danger? To whom were the orders specifically directed? Who were the Respondents in the application that gave rise to the orders that specified that the Respondents could not do any of the things or acts specified? So, did the Respondents in the instant

application do any act that contravened the prohibition on the Respondents in the orders of status quo?

32. The simple and straight answers to the above questions are as follows, in sequence. One, the Appellants who are now the Respondents were the ones in possession of the suit property at the time of issuance of the orders. Second, the orders stopped activities of selling, transferring, fencing, developing or further subdividing or disposing of the suit parcels. They did not stop farming, ploughing or tilling the suit parcels. Third, the orders did not imply that the party in possession leaves the property to waste or in danger of wasting including encroachment. It means further that the party in possession was under obligation to do acts that could reasonably protect the property when it was in danger of or exposed to being wasted. That, in my humble view could include securing the boundaries thereof if any activity threatened the same. But it could not include partitioning: something the Respondents herein have not done. Fourth, the orders of status quo were directed to the parties but more specifically it was the Respondents in the application who could not "…fence…" the

property in issue. Fifth, the Respondents in the application dated 23rd May 2024 were the Respondents in the instant appeal and who are the applicants herein. Sixth, the Respondents in the instant application did not do any acts that constituted contempt of court as alleged.

33. At times I wonder why human beings make life very complicated, yet the issues they face daily are simple. If we all followed Christ’s example, there would be no societal issues to be solving except the natural ones such as presents diseases, accidents, and others like struggles in expanding knowledge. The instant application herein would be resolved using an elementary school level conversational scenario as hereunder.

34. Supposing the applicants rushed to the comprehensive primary school near the suit land, shouting incoherent words as they enter the head teacher’s office but peradventure, pupils in a Class Three (3) room next to the office witness the unfolding events through the windows and rush out towards the said office in a bid to understand the problem. Thereat, they pose a number of questions, which in my humble view, would follow

the conventional way of solving legal issues, namely, looking at the Issue (I) and the Rule (R), and Applying the law to the facts (A) in order to Conclude (C) the matter or arrive at a finding. It is often put in a mnemonic Issue, Rule, Application and Conclusion (IRAC). They would pose the questions and receive answers thereto as follows:

1. Sirs, what is the problem or Issue? Answer: We want the Respondents to be found guilty of contempt of court. (*Assuming the pupils want to understand the real issue better than the applicants put it, they would move to the next question*).
2. Sirs, we suppose you know what you are complaining about. So, what is the law or Rule (R) on contempt of court? Answer: it is that anyone who willfully disobeys a court order which is clear and directed to him and is served on him, or he is aware of it is guilty of contempt of court.
3. Sirs, then why are you complaining or what did the Respondents do? That means, apply (A) the law to the facts. Answer: “they fenced and ploughed the entire suit

land." Oh! That is bad! But wait a minute, what did the Court say on 2nd July 2024? Answer: That the Respondents in the application leading to that order should not ...fence..." the suit land.

4. Sirs, who were the Respondents? Answer: "*Ooops*! We are the ones."

5. Sirs, "sorry, then we conclude (C) that you are wrong. You have no valid complaint. We cannot help you."

35. And that would end the fray by the pupils asking the applicants to leave their school compound the soonest possible or they (children) call security to remove them.

Away from the scenario, there was also a prayer for injunction in the application. The applicants prayed that there be an injunction restraining the Appellants from any further dealings and/or developments on the property known as KANYADA/KOTIENO/KATUMA A/2983,2984 and 2528 pending the hearing and determination of this Appeal. Without a doubt the injunction is being sought in an appeal. The appeal was filed by the Respondents. The applicable law

is Order 42 Rule 6(6) of the Civil Procedure Rules which provides that,

"Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with."

36. Regarding the principles for grant of an interlocutory injunction, even on appeal, the principles in **Giella -vs- Cassman Brown [1973] EA 358**. It is a three-pronged one. Its three limbs are:

- **(a) Whether the applicant has established a prima facie case**
- **(b) Whether the he or she would suffer irreparable loss that may not be compensated by damages and**
- **(c) That if the court is in doubt, it may rule on a balance of convenience.**

37. In essence, in the same way as applications for injunctions are sought successfully under Order 40 of the Civil Procedure Rules by parties who have claims upon which such prayers are

predicated, any injunctions sought on appeal must be predicated upon the party so seeking having an existing appeal which it succeeds it would be rendered baseless if the injunction is granted and the adverse party carries out acts detrimental to the property in issue. Then if under Order 40 of the Rules the applicant has to show that he has a prima facie case, the applicant in an appeal is required to show such by putting his foot forward that he has an arguable appeal.

38. Under Section 107 of the Evidence Act, it is he who alleges who proves the fact in issue unless the law shifts the onus on the other adverse party. Thus, the applicants have to show that they have a prima facie case. But as the facts are, the applicants are neither the appellants nor have they ever filed a cross appeal herein. What cause of action do the 2nd and 3rd Respondents who are now applicants have in the instant appeal? I see none: they are only waiting for the determination on merits of the appeal against them. Morevoer, the instant appeal was filed almost two years ago and they have never sought an injunction in it. One wonders what stake or threat is there now that they move the court under urgency. The first

hurdle has not been crossed by the applicants hence the prayer is lost.

39. Even assuming that the court reasoned wrongly regarding the first limb of the prayers, as to whether the Applicants will suffer irreparable loss if the orders are not granted, the Court has to first bring out the understanding of the phrase irreparable loss. In ***Pius Kipchirchir Kogo v Frank Kimeli Tenai [2018] eKLR***

http://kenyalaw.org/caselaw/cases/view/156488/ Justice Munyao stated as follows: "*Irreparable injury means that the injury must be one that cannot be adequately compensated for in damages and that the existence of a prima facie case is not itself sufficient. The applicant should further show that irreparable injury will occur to him if the injunction is not granted and there is no other remedy open to him by which he will protect himself from the consequences of the apprehended injury.*"

40. The Applicants depose that there is a fear that the Appellants may develop the suit land and carry out the other alleged acts as deposed in the affidavit sworn on 11th

September 2025. The Respondents depose that they do not in any way intend to develop the suit parcels of land. One thing that the applicants ought to bear in mind is that imagination about what is likely to occur but whose foregrounding occurrence evidence is not demonstrated cannot amount to irreparable harm, and which cannot be compensated by way of damages. Thus, the second limb too fails.

41. Lastly, since the Appellants are in occupation, the balance of convenience tilts in their favour.

42. The upshot is that the application dated 11th September 2025 fails. It is dismissed with costs to the Respondents.

43. The judgment in the instant appeal to be delivered on 22nd January 2026 as directed before.

44. Orders accordingly.

Ruling **dated, signed and delivered** via the **Teams Platform** this **20th** day of **January 2026**.

HON. DR. *IUR* NYAGAKA

JUDGE

In the presence,

Ngani Advocate for Ms. Adoyo for the Appellants/Respondents

Nahashon Mburu holding for Kosgei for **2nd** and **3rd** Respondents/Applicants