

IN THE COURT OF APPEAL

AT MOMBASA

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

CIVIL APPEAL (APPLICATION) NO. E029 OF 2024

BETWEEN

ANNETTE MUDOLA MBOGOH.....1ST APPLICANT/APPELLANT

(Suing as the administrator and legal representative of the estate of the late BENSON

C. MBOGOH)

FRASER JACKSON UTANJE.....2ND APPLICANT/APPELLANT

RAJAB MWADUNGULE

KATUMBO.....3RD APPLICANT/APPELLANT

AND

**BIDII JUMA.....1ST
RESPONDENT**

**PHILERIA A. KANZOLO.....2ND
RESPONDENT**

**KARISA LAT & 63 OTHERS.....3RD RESPONDENTS & 63
OTHERS**

(An application instituting contempt proceeding against the contemnors herein for breaching the orders by Murgor, Laibuta and Ngenye-Macharia, JJ.A.) delivered on 29th January 2025.

RULING OF THE COURT

By a Notice of Motion dated 23rd April 2025 brought pursuant to **Section 5** of the **Judicature Act, Sections 3A** and **3B** of the **Appellate Jurisdiction Act, the**

Contempt of Court Act of 1981 in England and **PART 81 - Applications and proceedings in Relation to Contempt of Court, Rules 81.4 of Applications and Proceedings in relation to Contempt of the Court**, the Applicants seek orders that the Respondents and their agents, servants, proxies and or accomplices namely: **George Orek, Patrick Obadia, Karisa Tunje** and **Benta Anyango Migono** who by themselves or through their agents, servants, employees, proxies or tenants are continuing to perpetuate the act of selling plots in Plot Number 422/I/MN (*the subject land*) to unsuspecting members of public and further undertaking construction works contrary to, and/or in violation of, orders of injunction given by this Court on 29th January 2025, should be found in contempt of court and detained in prison for a period of six months or for such period as the court deems sufficient.

The Motion is brought on grounds on its face and the affidavit in its support sworn by **Rajab Mwadungule Katumbo** on behalf of the Applicants, in which he contended that they filed an appeal before this Court on 27th February 2024 accompanied by a Notice of Motion dated 6th May 2024 and lodged on 7th May

2024 seeking, among other reliefs, injunctive orders; that on 29th January 2025, when the motion came up for hearing, counsel for both parties recorded a consent order which compromised the application; and that the Court adopted the consent and issued an order allowing the Notice of Motion dated 6th May

2024 and granting an interim injunction restraining the Respondents, their agents, servants, proxies or any other person acting under their instruction or for their benefit from undertaking any transactions or actions affecting the Applicants' continued occupation and proprietary interests in the subject land pending both the hearing of the application *inter partes* and the determination of *Civil Appeal No. E29 of 2024*.

He further stated that counsel for the Respondents was present in court when the consent intended to preserve and maintain the status quo of the subject land pending hearing and determination of the appeal was adopted as a court order; that, despite the order, one Karisa Tunje, who was actively acting as a property agent on the land had invited unsuspecting members of the public to acquire interests in the land, and that the 1st, 2nd and 3rd Respondents, together with Karisa Tunje, had granted entry onto the land to George Orek, Patrick Obadia, and Benta Anyango Migono, who were carrying out development of permanent structures on the property; that, on 19th March 2025, the advocate for the Respondents was notified by the Applicant's counsel—by a letter dated 10th March 2025—to advise their clients and proxies

to desist from the contemptuous activities, but that the violations persisted.

He further deposed that, one Patrick Obadiah had commenced construction of a story building on the land around February 2025 and that, despite being served with a notice requiring him to stop the contemptuous acts, he had continued with the construction; that they had taken photographs on 21st March 2025 depicting the building under Patrick Obadiah's management, which at the time of filing was at ground floor level. The deponent asserted that Patrick Obadiah was served with a Penal Notice on 28th March 2025 *via* WhatsApp number 0725 392 802 supported by an affidavit of service, which number was verified through an MPESA name screenshot; and that Patrick Obadiah was the registered owner of that phone number.

The Applicant further averred that one George Orek was finalising the first floor of a mansion-like storey building he was constructing despite prior notice advising him to cease further construction; that the photographs taken on 21st March 2025 showed George Orek's ongoing building developments; that, as at 29th January 2025, George's building was at the completion stage of the ground floor; and that a Penal Notice was also served on George Orek *via* WhatsApp number 0722 586 052, and that

evidence of service included, together with the MPESA screenshot annexed that confirmed his ownership of that number.

Regarding one Benta Anyango Migono, the Applicant deposed that, as at 29th January 2025, she had completed erecting a mansion on the subject land, save for windows, doors, tiles, electricity installation and painting; that, by the time of swearing the affidavit, Benta Migono had completed all final touches—including installing windows, doors, electricity and painting—rendering the house habitable, as evidenced by the photographs taken on 16th April 2025; that she was served with a Penal Notice via WhatsApp number 0722 609 707 on 15th April 2025 evidencing service of the notice; and that MPESA ownership verification confirmed that the cell phone number to be hers.

The Applicant further contended that the 1st, 2nd and 3rd Respondents, through their accomplices—George Orek, Benta Anyango Migono, Patrick Obadiah and Karisa Tunje had continued to wantonly breach the injunction order issued on 29th January 2025 and erect fixtures, buildings, and other developments on the subject land, and to allow people onto the land to undertake building projects in open defiance of the court order.

The deponent concluded that, to restrain the ongoing acts of impunity and blatant disregard of the court's authority, it was

necessary for this Court to commit the 1st, 2nd and 3rd
Respondents, together with George Orek, Patrick

Obadia, Karisa Tunje and Benta Anyango Migono, to civil jail for six months, or to such other period as the court deemed just and appropriate.

In response, the Respondent, Bidii Juma, filed a Replying Affidavit which he deposes that he is the 1st Respondent and is duly authorised to swear the affidavit on behalf of all the other Respondents. He acknowledged that a consent was indeed entered on 29th January 2025, but stated that it was done solely for purposes of expediting the appeal lodged by the Applicants.

He averred that the individuals cited by the Applicants—namely Patrick Obadiah and Benta Anyango Migono are members who purchased land after the Respondents obtained their title while George Orek has always been resident on the suit land having constructed his premises long before the Applicants filed their application for joinder in the High Court; that no new houses have been built, contrary to the allegations made in the supporting affidavit; that George Orek and Karisa Tunje were part of the original list of persons who went before the trial court and, therefore, cannot be proxies of the 1st, 2nd or 3rd Respondents; and that, in any event, the subject land ceased to exist nearly 65

years ago, and that the land on which the Respondents resided comprises Plots 845 and 846, whose titles still exist and which are not part of the proceedings.

Bidii Juma further asserted that the Applicants are trivialising serious matters as if the Applicants genuinely believed that new buildings had been erected, they should have produced documentary evidence showing when the structures were constructed as the buildings identified were built much earlier; and that the Applicants do not have a case against the Respondents, and are merely engaging in “non-issues” instead of pursuing their appeal.

The deponent further challenged the competency of the application, arguing that the Applicants seek to punish persons who are not party to the suit or the application, and who will be condemned unheard; and that this Court should dismiss the application and direct the Appellants to proceed with the appeal, which he describes as “*dead before arrival.*”

In response, the Applicant filed a Further Affidavit in which he deposed that George Orek’s building on the subject land is still under construction and uninhabitable; and that it was untrue for the Respondent, Bidii Juma, to assert that George Orek has been on the subject land throughout, or that he had constructed the building prior to the Applicant’s High Court application seeking

joinder. He further deposed that the purported sale agreements between the Respondents and Patrick Obadiah and Benta Anyango Migono were not annexed and that, likewise, the Respondents had not annexed the title deed or

certificate of official search of the land they claim to own; and that, in any event, the Environment and Land Court had on 12th May 2020 issued an order barring the Respondents from interfering with the Applicants' quiet and peaceful occupation of the subject land.

The Applicant also stated that it was false for Bidii Juma to aver that the persons cited had not built any houses after the consent orders were recorded, and he annexed a certificate of production of electronic evidence, to authenticate the photographs; that the contemnors, George Orek and Karisa Tunje, were not listed among the original plaintiffs in *Bidii Juma & 63 Others vs Habib Abdulla & 3 Others, Mombasa ELC No. 40 of 2016 (O.S)*, contrary to the impression created in the Replying Affidavit; and that, in addition, the Respondents had, in *Benson Mbogoh & 2 Others vs Madonga Kenga Masha & 12 Others, Mombasa ELC No. 234 of 2015*, filed affidavits affirming that they were on the subject land.

The deponent also adduced photographs filed by the Respondents in the application dated 17th March 2016 in *Benson Mbogoh & 2 Others vs Madonga Kenga Masha & 12 Others*,

showing the state of the land at the time of Judgment; that, at the time, the injunction issued on 12th May 2020 was in force and that, therefore, the houses attributed to the Respondents and their proxies had not been constructed; that a photograph taken on 7th March 2025 showed the house

built by Patrick Obadiah in its early stages with the foundation only recently dug and labourers on site; and that, as at 21st March 2025, the structure had reached ground-floor level with concrete blocks raised to about two blocks above the foundation.

It was further deposed that the house built by Benta Anyango Migono was constructed from start to finish after the consent orders were recorded; that, given this evidence, the Respondent, Bidii Juma, has not approached the Court with clean hands; and that his averments opposing the Applicants' application are unsupported by any documentary evidence or annexures.

Both parties filed written submissions. When the application came up for hearing, learned counsel **Mr. Kioko** appeared for the Applicants while learned counsel **Mr. Birir** appeared for the Respondents. In their written submissions, counsel for the Applicants submitted that the Notice of Motion dated 23rd April 2025 was well-founded and deserving of the Court's urgent intervention. They began by reiterating this Court's guidance in **Christine Wangari Gachege vs**

Elizabeth Wanjiru Evans & 11 Others [2014] eKLR where the

Court affirmed the statutory basis of contempt proceedings under **Section 5** of the **Judicature Act**. Counsel submitted that the application sought orders to punish the Respondents and their proxies for continuing to sell portions of the subject land, and to carry

out construction works on the land in open violation of the injunction orders of 29th January 2025. It was submitted that the principles governing contempt are settled in that an applicant must demonstrate the existence of a clear court order, knowledge of that order by the contemnor, breach of the order and deliberate conduct as set out in **Cecil Miller vs Jackson Njeru & Another [2017] eKLR**. In the

Applicants' view, each of these elements was fully satisfied in this case.

Counsel argued that the injunction order was clear and unambiguous and expressly restrained the Respondents and their proxies from engaging in any transaction or activity affecting the Applicants' occupation or proprietary interests in the subject land pending the outcome of the appeal; and that, despite this, the Respondents continued to sell portions of the land and to allow construction to be carried out as demonstrated by the photographic evidence produced.

Further, it was submitted that the Respondents were aware of the court order since their advocate was present in court when the injunction was pronounced, and that subsequent written

notices dated 10th March 2025 and 28th March 2025 were issued to the Respondents and their proxies warning them of impending contempt action should the violations continue. Counsel argued that the proxies' silence amounted to an implicit admission of wrongdoing,

particularly because they continued with construction and other prohibited activities despite being cautioned.

Counsel rejected the Respondents' contention that the subject land had ceased to exist; and that the 1st Respondent acknowledged that he and the other Respondents have long occupied the subject land and produced a 2009 search showing entries relating to *ex parte* orders affecting the same plot. They assert that the Respondents' own documents confirm the continued existence and identity of the subject land.

It was asserted that, in his replying affidavit, the 1st Respondent admitted that Patrick Obadiah and Benta Anyango Migono purchased land from the Respondents, and that George Orek was on the property. It was observed that, notwithstanding that no sale agreements were produced, there was no doubt that the adversely mentioned individuals acted as the Respondents' agents, servants, or representatives and that, therefore, their conduct was attributable to the Respondents.

Having established the clarity of the order, and the Respondents' knowledge of it and their continued breach, counsel finally addressed the element of willfulness on the Respondents'

part, which it was asserted was evident from the repeated violations even after written warnings and personal

service of notices, the continued construction works and land transactions without any attempt to comply with the injunction or to exonerate themselves. In counsel's view, such defiance demonstrated that the breach was intentional. In conclusion, counsel submitted that the Applicants have fully met the legal threshold for the grant of contempt orders and urge the Court to commit the Respondents and their proxies to civil jail for a period of 6 months.

On their part, learned counsel for the Respondents submitted that their position was fully supported by the replying affidavit sworn by Bidii Juma on 20th May 2025 and in which he explained that the individuals complained of by the Applicants, namely Patrick Obadiah and Benta Anyango Migono—were not proxies of the Respondents, but independent members who lawfully purchased land and were duly registered by the Land Registrar, Mombasa, as owners of Plots 845 and 846. Counsel emphasized that these individuals are *bona fide* proprietors and not agents acting on behalf of the Respondents.

It was further submitted that the Applicants have unfairly and misleadingly implicated George Orek, and yet he had built his

house long before the Applicants sought to be joined in the proceedings before the lower court. Counsel reiterated that no new houses have been constructed and firmly deny that George Orek or Karisa Tunje are proxies of the 1st, 2nd or 3rd Respondents;

and that these individuals were part of the original list of persons involved in the dispute alongside the Respondents and cannot now be recast as agents merely to sustain the Applicants' false narrative. It was argued that the Applicants have distorted the facts, especially the status of the subject land, because, while the Applicants continue to assert that they are in Plot No. 422/1/MN, that parcel ceased to exist 65 years ago when it was subdivided into various smaller plots that were sold or allocated to various people; and that the Respondents reside in Plots 845 and 846 and not in the long-extinct Plot 422/1/MN.

Counsel submitted that the Applicants' case is fundamentally weak as they have attempted to manufacture allegations through photographs intended to peddle falsehoods, and which are inadmissible because they do not disclose where they were taken, who took them, how they were taken, or at what time they were taken; that **section 78** of the **Evidence Act**, which, is applicable — *mutatis mutandis*—to civil proceedings to guide the admissibility of photographic evidence ought to have been complied with; that a proper photographic exhibit must be accompanied by an affidavit or statement from the person who

took the photographs so that they can be cross-examined on their authenticity; that, instead, the Applicants “bandied a bundle of photographs” without meeting the legal requirements and expected the Court to rely on them to conclude that the Respondents had breached court orders; that the parties the Applicants seek to

be punished have not acted in contempt of court; that the assertion that these individuals are proxies of the Respondents is false, especially because they were parties in the lower court and are responsible for their own conduct which cannot be attributed to the Respondents; that the Respondents have at all times respected court orders and have not engaged in any conduct warranting punishment; and that this Court should direct the Applicants to focus on their appeal rather than on side shows.

Having examined the matters raised in this application, it is worthy of note that respect for court orders and the upholding of the rule of law are basic tenets in the administration of justice.

It was held in the case of **Hadkinson vs Hadkinson [1952] 2 All ER 211** that:

“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 even void. A party who knows of an order, whether null and void, regular or irregular, cannot be permitted to disobey it... It would be most dangerous to hold that suitors or their solicitors could themselves judge whether an order was null

and void, or whether it was regular or irregular. They should come to the court and not take it upon themselves to determine such a question. The course of a party knowing of an order which was null or irregular and who might be affected by it was plain: he should apply to the court that it might be discharged. As long as it existed, it must be obeyed. Such being the nature of this obligation, two consequences will in general follow from its breach. The first is that

anyone who disobeys an order of the Court is in contempt of court and may be punished by committal or attachment or otherwise...”

The above excerpt underscores the binding force of a court order that, once issued, must be obeyed unless properly set aside. Failure to comply amounts to contempt of the court order and inevitably attracts penal sanctions.

In the case of **Wildlife Lodges Ltd vs County Council of Narok & Another [2005] 2 EA 344 (HCK)** the Court expressed itself as follows:

“It was the plain and unqualified obligation of every person against or in respect of whom an order was made by a Court of competent jurisdiction to obey it until that order was discharged. Disobedience of such an order would, as a general rule, result in the person disobeying it being in contempt and punishable by committal or attachment, and in an application to the court by him not being entertained until he had purged his contempt. A party who knows of an order, whether null or valid, regular or irregular, cannot be permitted to disobey it... It would be most dangerous to hold that suitors or their solicitors could themselves judge whether an order was null or valid, whether it was regular or irregular. They should come to the Court and not take upon themselves to determine such a question. The course of a party knowing of an order which was null or irregular, and who might be affected by it, was plain: he should apply to the Court that it might

be discharged. As long as it existed, it must not be disobeyed... If there is a misapprehension in the minds of the defendants as to the reasonable meaning of the order, then the expectation of them is that they would have made an application to the court for the resolution of any misunderstanding, and this would have been the lawful course."

For a party to succeed in an application for contempt of court, certain essential elements are required to be established. As articulated in **Kristen Carla**

Burchell vs Barry Grant Burchell, Eastern Cape Division, Case No. 364 of 2005, an

applicant must demonstrate that:

“a) That the terms of the court order are clear, definite, unambiguous, and binding on the respondent.

b) That the respondent had knowledge of, or was duly notified of, the order and its terms.

c) That the respondent acted in breach of the said order.

d) That the respondent’s disobedience was deliberate and willful.”

This was also reiterated in the case of **Ambala & another vs Ambala &**

another [2021] KESC 45 (KLR); Butt & another (Contemnor)

[2023] KECA 867 (KLR) as follows:

In applying these elements to the circumstances of this case, and beginning with whether the impugned orders were clear and unambiguous, a consideration of the order of January 2025 clearly shows that it specified that there was to be no further

developments by the Respondents or their agents, servants or representatives on the subject land. We see no ambiguity or lack of clarity in the orders as framed.

As to whether the Respondents had knowledge of the court order, the Applicants allege that the 1st, 2nd and 3rd Respondents as well as the 63 other respondents were served with the court order and that, therefore, they had notice of its existence. A consideration of the Motion discloses that the Applicants' complaint is against the 1st, 2nd and 3rd Respondents, who they allege are agents for George Orek, Patrick Obadia, Karisa Tunje and Benta Anyango Migono to whom they have sold portions of the subject land, and who have commenced building construction. The 1st, 2nd and 3rd Respondents have not denied the existence or knowledge of the court order. However, as concerns George Orek, Patrick Obadia, Karisa Tunje and Benta Anyango Migono, we are uncertain as to the basis on which they are described as the Respondents' agents, servants, or representatives, so that their conduct becomes attributable to the 1st, 2nd, and 3rd Respondents. This is particularly because the Applicants have not produced any sale agreements or other documentation showing the existence of such relationship as between them. As a result, we are not able to discern how knowledge of this Court's order by the 1st, 2nd, and 3rd Respondents translates or extends into knowledge of the court

order by George Orek, Patrick Obadia, Karisa Tunje and Benta Anyango Migono, who are not parties to the appeal or to this application. In effect, we are unable to conclude that George Orek,

Patrick Obadia, Karisa Tunje and Benta Anyango Migono had knowledge of the court order, or that they were in breach of such order.

As to whether the 1st 2nd and 3rd Respondents willfully breached the court order, from the material placed before us, we are unable to reach such finding. This is because the photographs attached to the Applicants' affidavit in support of the Motion and relied upon are inconclusive since they do not indicate when and where they were taken, or who took them. Neither was the context within which they were taken provided. As a consequence, the constructions depicted in the photographs are not shown to be specific to the subject land. In addition, no title deeds or survey plans comprising coordinates that pointed to ownership of the parcels or the location of the constructions was provided. In point of fact, the photographs could have been taken anywhere on planet Earth. Evidently, the Applicants appear to have produced photographs of random and unspecified buildings under construction and proceeded to allege that they belong to the Respondents or their agents without adducing sufficient supporting documentation. Without having produced any concrete

material to support the allegations of contempt, we find them to be far-fetched and agree with the Respondents that this is tantamount to sending this Court on a *“wild goose chase”*.

Based on the forgoing, it becomes clear that the criteria for concluding that the 1st, 2nd and 3rd Respondents, George Orek, Patrick Obadia, Karisa Tunje and Benta Anyango Migono were in contempt of this Court's order of 29th January 2025 has not been established.

Having so found, the Notice of Motion dated 23rd April 2025 lacks merit, fails, and is hereby dismissed with costs to the 1st, 2nd and 3rd Respondents.

It is so ordered.

Dated and delivered at Malindi this 20th day of February, 2026.

A. K. MURGOR

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

DR. K. I. LAIBUTA C.Arb, FCIArb.

.....
JUDGE OF APPEAL

G. W. NGENYE-MACHARIA

of the original

signed

DEPUTY REGISTRAR

*I certify that this
is the true copy*

