



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 571 OF 2017**

**(Formerly Machakos ELC Case No. 222 of 2016)**

**MAUREEN WANGUI KAMANDE.....1ST PLAINTIFF**  
**PAUL NGUGI KAHARA.....2ND PLAINTIFF**  
**HASSAN AMIR MUSA BULHAN.....3RD PLAINTIFF**  
**MICHAEL MUREITHI GAIKO.....4TH PLAINTIFF**  
**OLIVE WANJIRU KAMANDE.....5TH PLAINTIFF**

**VERSUS**

**NICHOLAS MWANIKI WAWERU**

**T/A MAMBO MOTO MEDIA.....1ST DEFENDANT**  
**MICROSTART HOLDINGS LIMITED.....2ND DEFENDANT**  
**ANNE GATWIRI GATHUKU.....3RD DEFENDANT**

**AND**

**ESTHER MORAA MOMBO.....1<sup>ST</sup> INTERESTED PARTY**  
**JANE WANJIKU GITAU.....2<sup>ND</sup> INTERESTED PARTY**  
**DINAH MUDEMBEI MOMBO.....3<sup>RD</sup> INTERESTED PARTY**

**RULING**

The application before this court for determination is a Notice of Motion dated the 2<sup>nd</sup> August, 2017 brought pursuant to Article 10 of the Constitution, Section 4(a), 5, 28 (1) and 29 of the Contempt of Court Act 2016, Section 63 of the Civil Procedure Act, Order 40 Rule 3 of the Civil Procedure Rules and all the other enabling provisions of the Law. The Plaintiffs' seek the following prayers:

1. That this honourable Court be pleased to issue a notice to show cause against NICHOLAS MWANIKI WAWERU, SAMUEL GATHUKU KIMORI (a Director of the 2<sup>nd</sup> Defendant) and ANNE GATWIRI GATHUKU (a Director of the 2<sup>nd</sup> Defendant) Company as well as being the 3<sup>rd</sup> Defendant herein) to show cause why they should not be committed to civil jail for a period not exceeding 6 months for disobeying/being in contempt of court orders issued on 30<sup>th</sup> June, 2017.
2. That this Honourable Court be pleased to grant leave for committal of NICHOLAS MWANIKI WAWERU, SAMUEL GATHUKU KIMORI and ANNE GATWIRI GATHUKU the Directors for the 2<sup>nd</sup> Defendant to be committed to serve 6 months imprisonment for disobeying the court order issued on 30<sup>th</sup> June, 2017.

It is premised on various grounds as well as the supporting affidavit of MAUREEN WANGUI KAMANDE who avers that the Respondents were well aware of the ruling of the Court dated the 30<sup>th</sup> June, 2017 and the Court Order issued on 3<sup>rd</sup> July, 2017. She contends that despite

being served with the said Court Order, the Respondents have declined to obey it. She insists the Contemnors have knowingly and willfully disobeyed the Orders of this Court and should be cited for contempt.

The 1<sup>st</sup> Respondent opposed the application and swore a replying affidavit where he deposed that the Notice of Motion is fatally misconstrued as it refers to an order issued on 30<sup>th</sup> June, 2017 and yet there is no order issued on that day. He insists he has not been served at any stage by the Applicants' or their Advocate with any Order issued on the 30<sup>th</sup> June, 2017. He explains that vide a Memorandum of Appearance dated the 25<sup>th</sup> January, 2017, his advocates on record are Ochieng, Onyango, Kibet & Ohaga Advocates but the process server Paul Mwanja indicates he served Triple 'OK' Law which is a stranger to these proceedings. He challenges service of the Court Order and states that the application is premature as the timeline to which the only order issued in this suit began on the 3<sup>rd</sup> July, 2017 and had not lapsed at the time of filing the Applicant's notice of motion dated 2<sup>nd</sup> August, 2017. He contends that his Advocates duly filed a Notice of Appeal and an application for stay of the ruling dated and delivered on 30<sup>th</sup> June, 2017 pending Appeal through an Application dated 12<sup>th</sup> July, 2017 which has not been replied to nor opposed by any party to this proceedings. He avers that preferring an appeal cannot be deemed contemptuous. He denies being in contempt of the injunctive orders issued by this court and further that the Applicant has not suggested a bank where they can deposit the sums jointly. He denies willfully disobeying the Court Order. He insists the Applicant has not clarified what criteria they used to have each Respondent cited for contempt. He states that he does not have the Kshs.6, 820, 000 in his possession as he forwarded Kshs. 3,925,970 to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants respectively and the balance was utilized in the project. He reiterates that he was not served or given notice of an order issued on 30<sup>th</sup> June, 2017 or any penal consequences thereto and therefore should not be committed to civil jail.

The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents opposed the application and filed a replying affidavit sworn by ANNE GATWIRI GATHUKU AND SAMUEL GATHUKU KIMORI where they aver that as a general rule under Rule 81.6 the mode of service should be personal. They contend that none of them was personally served and no reference is made in the affidavit of service sworn by Paul K. Mwanja dated the 2<sup>nd</sup> August, 2017 as to service of any order whatsoever and notice of penal consequences upon themselves. They confirm that they have partly complied with the orders of the Court and the Applicants are yet to suggest a preferred bank where parties can open an escrow account for the deposits of the amount. Further, that the order issued on 3<sup>rd</sup> July, 2017 did not state what amount of the sum ordered was to be paid by each Respondent. They explain that the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents could not be in a position to ascertain what amount and in what manner they were to deposit the sum ordered despite their willingness to comply with the order of the court. They state that they have not willfully gone against the Court Order to warrant their imprisonment. They deny receiving the sum of Kshs. 6, 820, 000/= from the Applicants herein but confirm receiving Kshs. 3,925, 970 from the 1<sup>st</sup> Respondent which amount was in respect to plots purchased by the Applicants and other persons not parties to the suit herein. They reiterate that committal of the Respondents to six (6) months imprisonment will curtail their constitutional rights as well as Article 11 of the International Covenant on Civil and Political Rights as the applicants are only seeking to fulfill a contractual obligation.

The parties filed their respective submissions that I have considered.

### **Analysis and Determination**

Upon perusing, the application dated 2<sup>nd</sup> August, 2017 including the supporting/replying affidavits as well as the annexures thereon and all the parties submissions, the only issue for determination is:

- Whether NICHOLAS MWANIKI WAWERU, SAMUEL GATHUKU KIMORI and ANNE GATWIRI GATHUKU who are directors for the 2<sup>nd</sup> Respondent should be committed to civil jail for 6 months.

As to whether NICHOLAS MWANIKI WAWERU, SAMUEL GATHUKU KIMORI and ANNE GATWIRI GATHUKU who are directors for the 2<sup>nd</sup> Respondent should be committed to civil jail for 6 months.

The Applicants submitted that at the time the ruling was delivered, all the Defendants were represented by Counsel. Further, they served all respondents with both the Ruling delivered on 30<sup>th</sup> June, 2017 as well as extracted Order issued on 3<sup>rd</sup> July, 2017 under cover of two letters annexed to the supporting affidavit marked as annexure 'MWK 3 and MWK 4' respectively. The applicants submitted that the Defendants had disregarded the Order of the Court and relied on the cases of **Bob Collymore & Another V Cyprian Nyakundi (2016) eKLR; Nigerian Supreme Court Case ADETOUN OLADEJI (NIG) LTD Vs NIGERIA BREWERIES PLC SC and Independent Electoral and Boundaries Commission & Another V Stephen Mutinda Mule & 3 Others (2014) eKLR** to support their arguments.

The 1<sup>st</sup> Respondent submits that a Court Order must contain a clear and dire penal notice and that there does not exist a Court Order dated the 30<sup>th</sup> June, 2017. He avers that the Applicant's Notice of Motion is fatally defective as well as a non starter and relied on the case of **Sam Nyamweya & 3 others Vs Kenya Premier League Limited & 2 Others (2015) eKLR** to support this argument. He submitted that the Applicants have not met the standard of proof required in contempt proceedings and relied on the case of **Africa Management Communication International Limited Vs Joseph Mathenge Mugo & another (2013) eKLR** to support this argument. He insists there has not been a deliberate breach not to comply with the Court Order and that the Court did not indicate what each Respondent was to pay. He relied on the case of **Alken Connections Limited Vs Safaricom Limited** to buttress this argument. The 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents stated that the Order of 30<sup>th</sup> June, 2017 did not indicate the amounts to be paid by each of them. They contend that committal to civil jail is unconstitutional and relied on the case of **Beatrice Wanjiku & Another Vs Attorney General Petition 190 of 2011 and case of Re Zipporah Wambui Mathara (2010) eKLR** to buttress their argument. They further submitted that the contemnors have demonstrated that indeed failure to comply was not deliberate because the Court did not clarify the amount to be deposited by each Respondent and further sought for the Court to enlarge time to deposit the funds in Court.

The 4<sup>th</sup> Contemnors SAMUEL GATHUKU KIMORI filed his submissions where he insisted that the Defendants had fully complied with paragraph two of the court order and did not interfere with land parcel number KAJIADO/ KITENGELA/ 71159. Further, that the Defendants have applied for review of the orders of the court issued on 30<sup>th</sup> June, 2017 and a party who approaches the court to seek review,

vary or vacate its own orders cannot be cited for contempt. He insists the Defendants are in compliance of the Court Order and correspondence between the Counsels is a clear indication that they want the matter settled. The Defendants have made a deposit of Kshs. 500,000/=. He submitted that they are willing to sell the suit land with a view to fully comply with the Order of the Court. In his submissions, he has relied on the case of **Republic Vs Principal Secretary, Ministry of Defence Ex parte George Kariuki Waithaka (2018) eKLR and Njenga Mwangi Wahira and Partners Vs County Secretary & Another (2018) eKLR** in support of his submissions.

Black's Law Dictionary (Ninth Edition) defines contempt of court as:- ***“Conduct that defies the authority or dignity of a court. Because such conduct interferes with the administration of justice, it is punishable usually by fine or imprisonment.”***

**In the case of In Johnson Vs Grant (1923) SC 789 at 790** Clyde L J noted:- ***“The phrase ‘contempt of court’ does not in the least describe the true nature of the class of offence with which we are here concerned.... The offence consists in interfering with the administration of the law; in impending and perverting the course of justice..... it is not the dignity of court which is offended – a petty and misleading view of the issues involved, it is the fundamental supremacy of the law which is challenged.”***

I wish to make reference to Section 29 of the Environment and Land Court Act which stipulates that: ***‘ 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’.***

In the case of **Maisha Nishike Ltd vs. Commissioner of Lands & 3 others (2011) eKLR** the court while citing the holding in **Kalyaso Farmers Cooperative Society & others Vs County Council of Narok** the court held 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.’***

In another case of **Shimmers Plaza Limited Vs. National Bank of Kenya Ltd (2015) eKLR** where the court held as follows: ***‘the notice of the order is satisfied if the person or his agent can be said to either have been present when the order was given or made; or was notified of its terms by telephone, email or otherwise. In our view, ‘otherwise’ would mean any other action that can be proved to have facilitated the person having come into knowledge of the terms of the judgement and/or order. This would definitely include a situation where a person is represented in court by counsel. Once the Applicant has proved notice, the Respondent bears an evidential burden in relation to wilfulness and mala fides disobedience.’***

Further, in another case of **Njenga Mwangi Wahira and Partners Vs County Secretary & Another (2018) eKLR** the Court held that: ***‘ In the circumstances, I am of the view that the Respondent having given a reason for non-compliance and asked for this Court’s indulgence, it should be given strict timelines within which to comply with the orders of this Court as to payment of the subject decretal sum, before contempt proceedings can commence.’***

In the instant case, I note that the Order that was purportedly disobeyed was delivered on 30<sup>th</sup> June, 2017 in the presence of the Applicant’s Counsel but in the absence of the Respondents’ Counsels. I note the Respondents Counsels had participating in the application dated the 7<sup>th</sup> December, 2016 where the 1<sup>st</sup> Respondent had actually filed a replying affidavit. Further, the determination of the said application culminated in the ruling delivered on 30<sup>th</sup> June, 2017. The 1<sup>st</sup> Respondent insists that the firm representing him is not known as TRIPLEOK LAW but I note from the letterhead of one of the letters filed in Court by his advocates’ firm, known as Ochieng, Onyango, Kibet & Ohaga Advocates, they are also referred to as TRIPLEOK LAW. From the court records, it is clear that despite the order of the court being granted on 30<sup>th</sup> June 2017 the Respondents who have always been represented by Counsels, have failed to comply with it.

From the Court records, I note that the Respondents lawyers have appeared in Court severally after the issuance of the impugned order, seeking direction in respect of apportionment of the amount to be deposited by each Respondent as well as agreeing on the relevant bank account to deposit the funds. The Respondents can now not claim that they were unaware of the terms of the Court Order, the amounts to be deposited as well as the Bank Account agreed upon. I opine that Court Orders are sacrosanct and should be obeyed even if a party feels the same was not properly issued. The Respondents claim they have lodged an Appeal as well as sought for review of the impugned order but todate there is no Memorandum of Appeal presented in Court and neither as the impugned order been reviewed.

Based on the facts before me and in associating myself with the decisions cited above, I find that since the Respondents were represented by their respective Counsels, they had the knowledge of the Order of the Court dated the 30<sup>th</sup> June, 2017. In the circumstance, I find the instant application merited. I direct that the Respondents do deposit the sum of Kshs. 6,820,000/= in a joint account which they had already agreed upon within 30 days from the date hereof, failure of which they will be cited for contempt and directed to pay a fine of Kshs. 100,000 each but in default, the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents be committed to civil jail for one (1) month.

The Applicants are awarded the costs of the instant application.

**Dated, Signed and Delivered in Kajiado this 31<sup>st</sup> July day of July, 2019**

**CHRISTINE OCHIENG**

**JUDGE**