



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MOMBASA

CIVIL SUIT NO. 3 OF 2014 (O.S)

IN THE MATTER OF: LIMITATION OF ACTIONS ACT CAP 22 LAWS OF KENYA

IN THE MATTER OF: PLOT TITLE NO. CR. 21309 III M.N. AND THEN

TRANSFERRED TO NO. CR. 9044/15 SUB-DIVISION NO. 885 ORIGINAL NO. 313/9

SEC. III MN, DELINEATED ON SURVEY PLAN NO. 124355 ANNEXED

TO THE SAID TRANSFER AND THEN SUBDIVISION 885/1, (564/1),

885/2, (564/2) AND 885/3, (564/3) SEC III MN.

BETWEEN

1. MAHABUB SALIM

2. YUSUF BAKARI

3. ALI MUNGA

4. RIZIKI MOHAMED

5. YUSTINA KOROKORO & 500 OTHERS.....PLAINTIFFS/APPLICANTS

VERSUS

ELIUD TIMOTHY MWAMUNGA.....DEFENDANT

AND

1) E. O. BIGOGO, ASSISTANT COUNTY

COMMISSIONER, KIKAMBALA DIVISION.....1ST CONTEMNOR

2) THE ATTORNEY GENERAL.....2ND CONTEMNOR

RULING

1. The plaintiffs/applicants moved this court vide the application dated 27th August 2018 and brought under the provisions of Sections 5(1) of Judicature Act, 1A, 1B and 3A 63(e) of the Civil Procedure Act and order 40(3) and 51(1) of the Civil Procedure Rules. The applicant prayed that:

1) Spent

2) That the 1st contemnor E. O. Bigogo, Assistant County Commissioner, Kikambala Division be cited for contempt of Court

for failing to comply with a lawful court order served on him on the 23rd August 2018.

3) That the Court be pleased to issue warrants of arrest directed to the County Commander, Kenya Police Service, Kilifi County to arrest Mr. E. O. Bigogo, Assistant County Commissioner, Kikambala Division and produce him in court to show cause why he should not be punished for contempt of a court order issued on the 12th May 2015.

4) That the said E. O. Bigogo, Assistant County Commissioner, Kikambala Division; be committed to civil jail not exceeding six months for failing to comply with the court order issued by the court on the 12th May 2015 by continually harassing the Plaintiffs/Applicants.

5) That the cost of this application be borne by the contemnors.

2. The application is premised on several grounds on the face of it *inter alia*:

(a) *The 1st Contemnor has contemptuously failed to comply with the court order issued on the 12th May 2015 and served on him on the 23rd August 2018.*

(b) *The Applicants are suffering and will continue to suffer losses if the Contemnors are not made to comply with the said Court Order.*

(c) *The 1st Contemnor has continued to harass and prefer fictitious charges against the officials of Barani Community Self Help Group and continually summoning them for fictitious crime committed by them despite the order being served on him and a similar order being in the office of the Assistant County Commissioner since July 2015.*

3. The application is further supported by the affidavit sworn by Yusuf Bakari Ngao. Mr. Ngao deposed that they obtained a court order on 12th May 2015 restraining and/or directing the Assistant County Commissioner Kikambala Division and Kenya Police Service from interfering with the suit property. That the order was served on 15/7/2015 and on 23/8/2018 respectively as shown in the annexed affidavits of service marked as YBN-1. That in spite of being aware of the order and the consequence of its disobedience, the 1st Contemnor has continued to harass the residents by inviting strangers to invade Barani Settlement Scheme.

4. The applicants continued that the 1st Contemnor or his Invitees have even preferred charges against the officials of Barani residents for the alleged offence of robbery with violence and malicious damage to property as well as trespass. That the conduct of the 1st Contemnor or his invitees is contemptuous of the order and authority of this Court. They urged the court to grant the orders sought in their application herein.

5. There was no response to the application filed. I would have allowed the application as presented however the law requires that an applicant seeking orders of contempt must show proof beyond a balance of probabilities (**Katsuri Ltd Vs Kapurchand Depar Shah (2016 eKLR)**) since the grant of the orders takes away the liberty of the alleged Contemnors.

6. There is no dispute that this court made an order on 12th May 2015 in the following terms: ***“The Assistant County Commissioner Kikambala Division, the OCS Mtwapa Police Station, the DCIO Mtwapa Criminal Investigating Department and the OCPD, Kilifi Police Division be and are hereby restrained from deploying their Officers to be used in harassing, threatening, demolishing and/or evicting the Plaintiffs from the suit property pending the hearing and determination of this application.”***

7. The applicants deposed that the 1st alleged Contemnor has disobeyed the above order in spite of being served. As proof of the disobedience, the applicants annexed a letter dated 20/8/2018 drawn by their advocate and addressed to the 1st Contemnor. They also annexed summons issued to them on various dates requiring them to attend a meeting convened by the 1st Contemnor. The court order required the Contemnors to be ***“restrained from deploying their officers to be used in harassing, threatening, demolishing and/or evicting the plaintiffs from the suit property pending hearing and determination of the application”***.

8. The order was specific on what was not to be done. The applicants deposed that the 1st Contemnor or his invitees have preferred criminal charges against the officials of Barani residents. However they did not annex copies of the charge sheet or OB extract to corroborate this averment. Mr. Ngao deposed further that the 1st Contemnor has brought strangers/rich people to invade the suit property to force out Barani residents out of their homes. Again no photographs or names of the alleged strangers/rich people are given to corroborate the assertions.

9. Although the applicants have brought an application for contempt against the alleged Contemnors, they did not go a step further to demonstrate/prove the disobedience. In Section 108 and 109 of the Evidence Act Cap 80 of the Laws of Kenya states thus:

“108 - the burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.”

“109 - the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

See also the case of **Gathari K. Mutitika Vs Baharini Farm Ltd (1985) eKLR** where the Court of Appeal observed that ***“where the liberty of a subject is or might be involved, the breach for which the alleged Contemnor is cited must be precisely defined. It must be satisfactorily proved as a man may be sent to prison”***.

10. The application as presented therefore lacks merit for lack of proof of the act complained of that amounts to disobedience. The burden was at all times on the applicants to so prove and they failed to discharge this burden. Accordingly I dismiss it with no order as to costs.

Dated and signed at BUSIA this 22nd day of October 2019.

A.OMOLLO

JUDGE

Delivered at MOMBASA this 31st Day of October, 2019

C. YANO

JUDGE