



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**  
**AT MOMBASA**  
**ELC CASE NO. 154 OF 2012**

**1. BIMBITA MGALA DZUMBA**

**2. CHAWARI KIMBO MWADZUYA & 46 OTHERS.....PLAINTIFF/APPLICANTS**

**=VERSUS=**

**FREEDOM LIMITED & 14 OTHERS.....DEFENDANTS/RESPONDENTS**

**RULING**

1. On 23<sup>rd</sup> October 2012, the trial Judge, Tuiyot J. Esq. made the following orders which are relevant for the determination of the present application dated 2<sup>nd</sup> June 2017.

**“Further order. After speaking to parties (counsel) it is agreed that a status quo involving the following be maintained pending the hearing and determination of the application dated 5<sup>th</sup> September 2012;**

- i. The defendants shall allow the plaintiff’s unhindered access to the water points.**
- ii. The defendants shall not interfere with the homesteads & dwelling houses existing on the land as at 15<sup>th</sup> October, 2012 when the deputy registrar visited the suit land.**
- iii. The plaintiff shall not harvest sand or in any other way waste the suit land.”**
- iv. The defendants shall not sell or in any other way dispose of or part with possession of the suit land.**

2. The plaintiffs have brought their application dated 2<sup>nd</sup> June 2017 and later amended on 28. 8. 2017 premised on the provisions of order 40 rule 3 of the Civil Procedure Rules and section 3A of Civil Procedure Act & section 29 of the contempt of Court Bill, 2016 seeking for orders that:

**a. Spent**

**b. That Harji Govind Ruda the director of the 1<sup>st</sup> defendant be arrested and committed to civil jail for a period of six months or as the court deems fit.**

**c. That the Respondent be ordered to pay costs of this application.**

3. That applicants pleads that the sand harvesting disrupts the status quo, secondly that if the wastage of the land is not prevented, it will render any order/judgement of the court nugatory and incapable of enforcement in the event the court finds in favour of the applicants. In support of the orders prayed for, Bimbita Mgalla Dzumba swore an affidavit dated the 2<sup>nd</sup> June 2017. Mr. Mgalla deposed that the 1<sup>st</sup> defendant have through their employees/agents continued the harvest of sand within the suit land in direct contravention of the court order of 26<sup>th</sup> October 2012. He annexed photographs taken on 28.4.17 of tractors said to be harvesting sand. In paragraph 2, Mr. Mgalla deposed that the sand harvesting has been committed with the consent and connivance of the 1<sup>st</sup> defendant's director by instructing tractors and Caterpillars to come on the land and start harvesting sand. They urged the court to grant the orders sought.

4. Sophia Mkoma supporting the application deposed that the 1<sup>st</sup> defendant immediately after the declaration of the election on 14. 8. 2017 brought two more tractors on the suit land which tractors proceeded to flatten her portion of the land she uses for cultivation and this a direct violation of the order of 26<sup>th</sup> October 2012. Similar sentiments were expressed in the affidavit of Kuri Beja Japhet, the 35<sup>th</sup> plaintiff.

5. The application is opposed by the replying affidavits filed by Peter Beja Japhet the 13<sup>th</sup> Respondent, Harji Govind Ruda 1<sup>st</sup> defendant's director and dated 12. 7. 17 & further affidavit dated 4<sup>th</sup> September 2017 together with the grounds of opposition dated 18<sup>th</sup> September 2017. The 1<sup>st</sup> defendant in the grounds aver that the application is misconceived, incompetent and fatally defective and is an abuse of the court process. That the orders sought cannot be granted.

6. In the replying affidavit of Mr. Peter Beja Japhet, he deposed that both Sophia and Kuri are his siblings. He deposed that Sophia does not live on the suit land therefore has no crops that have been flattened or home that has been interfered with. Mr. Beja also deposed that there are no sand deposits found at the area shown on the applicants' photographs which is near Nairobi- Mombasa highway. It is his contention that the order not to harvest sand was directed at the applicants and the 1<sup>st</sup> defendant has not disobeyed the order as given.

7. The 1<sup>st</sup> defendant annexed copies of the criminal proceedings brought against some of the plaintiffs (1<sup>st</sup> plaintiff & another) where they were convicted with the offence of threatening to kill David Munene who is described a surveyor and was acting on instructions from the 1<sup>st</sup> defendant. In his replying affidavit of 12<sup>th</sup> July 2017, Mr. Harji Govind Ruda deposed that the court has no jurisdiction to grant the orders sought under the provisions of order 40 rule 3. Further that at the time the orders of 23. 10. 2012 were made by the court, development works were already ongoing on the suit land as evidenced by the affidavits of Divyanshu Panchal of 16<sup>th</sup> December 2015 and 7<sup>th</sup> September 2016. He also annexed as "HGR – 1" showing that the works have been openly on-going. Mr. Harji deposed that the 1<sup>st</sup> defendant has always respected the dignity of the court and the rule of law. He urged the court to dismiss the application with costs to the 1<sup>st</sup> defendant and for the court to give appropriate directions.

8. The parties filed written submissions which I have read and considered. It is trite law that he who alleges a fact must prove the existence of that fact as provided under sections 107 – 109 of the Evidence Act Cap 80. Secondly it is the law that proof of contempt is required to be above the standard of proof in civil cases because its proceedings are quasi – criminal in nature (see the decision in **Gatharia K. Mutikika vs Baharini Farm Limited**). The impugned orders was issued by the court pending hearing and determination of the application dated 5<sup>th</sup> September 2012 which application has not been concluded. However the record does show there have been subsequent multiple applications filed inspite of the hearing of the main suit having commenced. Given that the application of 5<sup>th</sup> September 2012 has not been determined and no setting aside/varying of the impugned orders having taken place, it follows then that the orders of 23. 10. 12 remain in force. I do agree that the orders were not given under the provisions of order 40 rule 1 hence the plaintiffs ought not to have invoked order 40 rule 3. However the application is also premised on the provisions of section 3A of the Civil Procedure Act which gives this

court inherent powers to make orders as may be necessary for the ends of justice. For this reason, I will consider the application on its merits.

9. The applicants herein amended the application of 2<sup>nd</sup> June 2017 without leave of the court and in contravention of order 8 rule 3, leave was required because the 1<sup>st</sup> Respondent and the alleged contemnor named had already filed responses to the first application. Although this is the scenario, I note that there is a prayer for leave to amend included and the same would have been allowed. Consequently the misnomer is one that can be cured by an award of costs to which I grant to the party initially sued Mr. Divyanshu Panchal. The other parties have had opportunity to respond to the present application. Their prejudice if any will be dealt with at the end/conclusion of this application.

10. Now to the merits of the orders sought; the orders given by the trial judge then were quite clear and specifically directed to each of the parties in the dispute. The same was given in the presence of the advocates for the parties to the dispute. I will therefore not delve into the issue of service or knowledge of the order as in the handwritten proceedings, the advocates on record appended their signatures. The only issue for my determination is whether there has been disobedience of this order. The applicants aver that the wastage of the land if not prevented will render any order or judgment of the court nugatory. The applicants also accuse the 1<sup>st</sup> defendant of instructing caterpillar tractors to come on the land and start harvesting sand and flattening the land belonging to the applicants.

11. The applicants annexed two photographs. One is said to have been taken on 20. 10. 2012. It has one house built beside a dual carriageway tarmac. This date was before the issuance of the impugned order. The second photograph is said to have been taken on 28. 4. 2017. It shows two tractors parked next to a house. There are also containers and trailers on the far end in the background behind the said house. In front of this house has something looking like a gully. The house is not identified as belonging to any of the applicants. The two tractors are parked and do not appear to be harvesting any sand as pleaded in paragraph 4 of the affidavit of Bimbita Mgalla Dzumba. Neither is there any evidence of visible sandy soil harvested nearby. (of the photograph). Mr. Kuri Beja Japhet, deposed that the 1<sup>st</sup> defendant brought two more tractors after 14. 8. 2017 which proceeded to flatten his land that he cultivates. No evidence of the tractors flattening the land or destroyed crops were annexed/shown. The same proposition was put forth by Sophia Mkoma without annexing pictorial evidence or report of the agricultural officer.

12. The applicants submitted that the act of taking tractors on the suit land is by itself contemptuous of the court order. Paragraph (i), (ii) and (iv) of the order were specific on what the defendants were restrained from doing. This court is not told what the status of the land was before the order of 23. 10. 2012 was given i.e. whether there were some tractors on the land or not. The 1<sup>st</sup> defendant annexed two letters dated 9<sup>th</sup> August 2012 from the Town Council of Mariakani and 17<sup>th</sup> July 2012 from Kenya National Highways Authority granting 1<sup>st</sup> defendant through Ms Colfax Holdings limited permission to complete the “*said works*”. The 1<sup>st</sup> defendant would be said to be in contempt if in the process of completing the works, they are interfering with the plaintiffs’ access to the water points and or their homesteads as directed by the court. This was not brought out in the application. It is therefore my finding that the applicants have made allegations which fell short of the standard of proof for one to be punished for contempt.

13. In conclusion, I find no merit in the application and hereby order it dismissed with costs to the 1<sup>st</sup> and 13<sup>th</sup> defendants/Respondents together with costs as awarded to Divyanshu Panchal and ordered in paragraph 9 above.

**Dated, signed & delivered at Mombasa this 25<sup>th</sup> January 2018.**

**A. OMOLLO**

**JUDGE**