



**REPUBLIC OF KENYA**

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

**MISC CIVIL APPLICATION NO 22 OF 2017**

**HELLEN NEKESA NIELSEN.....1<sup>ST</sup> PLAINTIFF/APPLICANT**

**PAUL FRIEDRICK NIELSEN.....2<sup>ND</sup> PLAINTIFF/APPLICANT**

**-VS-**

**DOROTHY NELIMA WAFULA.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**THE ESTATE OF JOHANNES FRIEDRICK WILHELM**

**LOWE (DECEASED).....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**RULING**

1. By a Notice of Motion dated 6<sup>th</sup> April, 2017, the Applicants herein, Hellen Nekesa Nielsen and Paul Friedrich Nielson seek the following orders:

**1. That this Honourable Court do issue orders of committal to prison of the Respondent herein, Dorothy Nelima Wafula for contempt of Court.**

**2. That costs herein be provided for.**

2. According to the Applicants, the Respondent has disobeyed the orders of this Honourable Court by inter alia selling part of the land **PLOT NO.LR KWALE/DIANI BEACH BLOCK 372** to an unsuspecting 3<sup>rd</sup> party when to her knowledge the Court had ordered the distribution of the same to individual owners, and the disobedience is flagrant and willful.

3. The Applicants applied and were granted leave to serve Notice of Motion on the Respondent and annexed to the supporting Affidavit the Application for leave dated 2<sup>nd</sup> February 2017 together with the affidavit in support, a copy of statement, the judgment dated 15<sup>th</sup> June 2015 and the decree dated 18<sup>th</sup> June 2015 in **Mombasa ELC Case No. 237 of 2012** which the Respondent is alleged to have disobeyed.

4. According to the Applicants, on 15<sup>th</sup> June 2015 an order was given by Hon. Mr. Justice Mukunya which was issued on 18<sup>th</sup> June 2015 in the following terms:

***a) That the entry No.13 on the proprietorship section of land Parcel KWALE/DIANI BEACH BLOCK/372 be cancelled and the names of Dorothy Nelima Wafula and Johannes Frederick Wilhelm Lowe be cancelled and replaced by the original entry No. 9 in the names of:***

**1. DOROTHY NELIMA WAFULA**

**2. HELLEN NEKESA NIELSEN**

**3. PAUL FRIEDRICK NIELSEN**

**4. JOHNNESS FRIEDRICK WILHELM LOWE, as proprietors in common in equal shares (1/4 each)**

***b) That the suit propriety be surveyed and the plaintiffs shall get ½ share of the same, the costs of the survey be shared equally.***

***c) That each party to bear its own costs.***

5. The Applicants contend that despite this order, the Respondent purported to sell the property to a 3<sup>rd</sup> party by the name Marialuise Friedericke by an agreement dated 12<sup>th</sup> November 2015 and has refused to open the gate of the property to allow surveyors to enter into the property to carry out the order given by the Court. It is the

Applicant's contention that the Respondent's actions have frustrated the execution of the Court order and therefore is in blatant breach of the said order and has brought the reputation and dignity of the court into disrepute.

6. I have considered the Application, the affidavit in support as well as the submissions filed and the authorities cited. The power of the Court to punish for contempt of court is governed by the Contempt of Court Act, 2016 which was assented to on 23<sup>rd</sup> December, 2016 and commenced on 13<sup>th</sup> January, 2017. Under the said Act, contempt of Court includes willful disobedience of any judgment, decree, direction, order or other process of a Court. It is therefore clear that the willful disobedience of a judgment, decree or order properly constitutes contempt of court. It is trite that contempt of Court proceedings and applications are subtle and criminal in nature and would impose criminal sanctions if a conviction followed. The standard of proof in matters of contempt of Court is well settled. It must be higher than proof on a balance of probabilities but not exactly beyond reasonable doubt.

7. In this case, it is the Applicant's contention that the Respondent has failed to comply with the order of the Court despite service of the same. There is no doubt that on 15<sup>th</sup> June, 2015, Hon. S. Mukunya, J gave a judgment in which the entry of the title of the Suit Property was to be cancelled by removing the names of Dorothy Nelima Wafula and Johannes Fredrick Wilhem and replaced with the names of Dorothy Nelima Wafula, Hellen Nekesa Nielsen, Paul Friedrich Nielsen and Johannes Fredrick Wilhem Lowe as proprietors in common in equal shares (1/4 each) and that the property was to be surveyed and the Applicants were to get ½ share of the same. The Court further ordered that the survey work was to be shared equally.

8. The decree that was extracted and attached to the Applicants affidavit shows that the judgment was delivered on 15<sup>th</sup> June, 2015 in the presence of M/s Orange Advocate for the Plaintiffs and in the absence of the Defendants. The Respondent who was the 1<sup>st</sup> Defendant is being accused of having deliberately disobeyed the orders of the Court issued on 15<sup>th</sup> June, 2015. The Applicants allege that the said order was served upon the Respondent.

However, I have keenly perused the affidavits of service filed by the process server. There is nowhere in those affidavits that the Process Server has deponed that he served the Respondent with the order issued by the Court on 15<sup>th</sup> June, 2015. This Court is being asked to commit the Respondent for contempt of Court for having disobeyed the orders of the Court issued on 15<sup>th</sup> June 2015. The decree extracted is clear that the Respondent was absent when the order was made. No evidence of service of the orders issued by the Court on 15<sup>th</sup> June 2015 has been shown to the Court.

9. I also note that whereas the Application is seeking for prayers against the Respondent, the orders issued by the Court is clear that costs of the survey was to be shared by the parties equally. It is however not clear who was to initiate or carry out the survey exercise. The Applicants have not shown the Court what steps they took on their part to implement the orders of the Court.

10. From the evidence on record, I cannot safely hold that the Respondent has disobeyed the orders of the Court issued on 15<sup>th</sup> June 2015. It was incumbent upon the Applicants to prove that indeed the Respondent was served and obstructed the implementation of that order. The evidence on record is clear that there was no such service. In addition, it is not clear whom the order was directed and who was to initiate the survey work. The Court was only clear on the sharing of the survey costs. Although the Applicants allege that the Respondent has refused to open the gate of the property to allow surveyors to enter into the property to carry out the order of the Court, the Applicants have not stated when the obstructions, if any, was done. Moreover if there was such refusal, or obstruction, the applicants could have simply sought for an order for the police to provide security to the surveyors as they carry out their work.

11. The Applicants have also alleged that the Respondent has disobeyed the orders of the Court by selling part of the suit land to a third party. I note that in the decree, the Court had ordered distribution of the land to the parties and the Respondent was entitled to a share comprising  $\frac{1}{4}$  of the plot. I have looked at the Agreement for sale attached to the affidavit in support of the Application. In that Agreement, the Respondent sold a portion of the **ORIGINAL LR NO.KWALE/DIANI BEACH BLOCK/372** measuring 30m by 28m square. From the evidence adduced before Court, the Applicants have not stated whether or not the portion allegedly sold is bigger than the share that the Respondent was entitled to in the decree dated 15<sup>th</sup> June, 2015. From the evidence on record, the Court is not in a position to tell whether the portion allegedly sold comprised the Respondent's share of the Suit Property or exceeded the same.

12. In my considered view, and having taken into consideration the evidence on record, I am not satisfied that the Applicants have proved the alleged contempt on the part of the Respondent. Consequently, I do find that the Application lacks merit and hereby dismiss it.

I order that each party bears their own costs.

**Delivered, signed and dated at Mombasa this 14<sup>th</sup> February, 2018.**

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**C. YANO**

**JUDGE**