



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**  
**MILIMANI LAW COURTS**  
**ELC NO. 745 OF 2016**

**DANIEL MACHARIA.....PLAINTIFF**

**=VERSUS=**

**KIMANI KAMAU.....1<sup>ST</sup> DEFENDANT**

**WANJIRU WANJAU.....2<sup>ND</sup> DEFENDANT**

**MWANGI MUTHAKA.....3<sup>RD</sup> DEFENDANT**

**DAVID MACHARIA.....4<sup>TH</sup> DEFENDANT**

**RULING**

1. The plaintiff/applicant filed a Notice of Motion dated 16<sup>th</sup> January 2017 in which he sought the following orders:-

**1. Spent**

**2. ANTHONY MACHARIA an agent, servant or workman of the 4<sup>th</sup> defendant DAVID MACHARIA , now deceased , be made a necessary party to this party to this suit.**

**3. ANTHONY MACHARIA be arrested under warrants of arrest to be issued by this court sand be committed to prison for a term not exceeding 6 months for disobeying the Honourable Courts order given on the 19<sup>th</sup> day of July 2016.**

**4. The Officer Commanding Kamukunji Police Station be directed to enforce the warrants of arrest to be issued by this court.**

**5. The Court do grant any appropriate orders as it may deem fit in the circumstances of the case.**

**6. The costs of this application be the plaintiffs costs in any event.**

2. The applicant had filed a suit against four defendants whom he alleged were his tenants who had refused to pay rent since 1990. He contemporaneously filed an application for injunction seeking to stop the defendants from constructing on property called **Block 88** at **Shauri Moyo Estate Nairobi**.

3. On 19<sup>th</sup> July 2016, Counsel for the defendants made an undertaking in Court that there was to be no construction which was to be carried on the suit property pending hearing and determination of the application for injunction. The applicant now contends that Antony Macharia the alleged contemnor in this application has gone ahead to construct on the suit premises contrary to the undertaking which was given.

4. The alleged contemnor is son to the fourth defendant who has since died. The applicant now seeks to have the alleged contemnor enjoined in this case and be punished for disobeying the court order.

5. The alleged contemnor has opposed the applicant's application through a replying affidavit sworn on 12<sup>th</sup> April 2017 in which he contends that the applicant's application is an abuse of the court process; that he is not a legal representative of his late father and cannot therefore be enjoined in the proceedings as that would amount to substitution of his father without proper procedures as required in law.

6. The alleged contemnor has denied constructing any structure outside Room 6 on Block 8 as alleged and further states that there is no room left outside Room 6 where one can build an extension.

7. I have carefully considered the applicant's application as well as the opposition to the same by the alleged contemnor. There are two issues which emerge for determination. The first is whether the alleged contemnor ought to be enjoined in this suit and secondly whether the alleged contemnor has disobeyed any court order.

8. On the first issue, the alleged contemnor is son of the fourth defendant who is deceased. I have closely examined the documents of ownership of the applicant. It is clear he was allocated House No.1 on Block 88 by the then Nairobi City Council. The applicant however seems to suggest that he was given the entire Block 88 which has a number of rooms. The alleged contemnor's deceased father was occupying Room 6.

9. The alleged contemnor is not a legal representative of his deceased father and to allow him into this suit whether as an interested party or in whichever capacity will actually amount to substitution of the fourth defendant without following the law. In any case the alleged contemnor will not be a necessary party in view of the fact that the applicant was allocated House No.1 on Block 88. I therefore decline to enjoin the alleged contemnor as a party.

10. On the issue of contempt of court order, contempt proceedings are quasi criminal in nature. The proof required is not on a balance of probabilities but on a higher standard. In **Halsbury's laws of England at para 463 Vol 9(1) ( Re-issue) 3**, it was stated as follows:-

**“.....and a person not a party against whom any judgement or order may be enforced is liable to the same process for enforcing obedience to it as if he were a party”.**

11. In the instant case, the alleged contemnor is son to the fourth defendant who is now deceased. If he committed any act of contempt of a court order he can be punished even if he was not a party to the suit. It is not contested that he was aware of the undertaking given in court by his deceased father's counsel that there was to be no construction. The question which then arises is whether the alleged contemnor disobeyed the said order by constructing on the suit property.

12. It was upon the applicant to prove satisfactorily that there was construction outside room 6. This has not been demonstrated. What the applicant has done is to annex some photographs of some iron sheet structure without any proof that the same was done by the alleged contemnor. Block 88 is a city county property leased out to tenants. I do not think that a tenant can claim to own the open spaces next or adjacent to his/her house.

13. If there is any construction on the open spaces, it is the City County which can demolish such structures and a tenant has no right to claim the same. I therefore find that the applicant has failed to prove that the alleged contemnor committed an act of contempt of a Court Order. The upshot of this is

that the applicant's application fails and it is hereby dismissed with costs to the alleged contemnor.

It is so ordered.

**Dated, Signed and delivered at Nairobi on this 1<sup>st</sup> day of February ,2018.**

**E.O.OBAGA**

**JUDGE**

In the presence of :

M/s Ochola for Mr Kahonge for Plaintiff

Court Assistant : Hilda

**E.O.OBAGA**

**JUDGE**