



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**  
**AT MACHAKOS**  
**ELC. PETITION NO. 14 OF 2017**

JUSTUS KALII MAKAU.....1<sup>ST</sup> PETITIONER  
MOHAMED ISMAILI ABDI (*Chairman*).....2<sup>ND</sup> PETITIONER  
SHADRACK GATORE MBURU (*Secretary*).....3<sup>RD</sup> PETITIONER  
KELVIN OCHIENG NYAMOR (*Treasurer*).....4<sup>TH</sup> PETITIONER

*(Suing in their own name and on behalf  
of the Syokimau Residents Association)*

**VERSUS**

LINNET ACHIENG AMALLA.....1<sup>ST</sup> RESPONDENT  
THE COUNTY GOVERNMENT OF MACHAKOS.....2<sup>ND</sup> RESPONDENT  
NATIONAL ENVIRONMENT MANAGEMENT  
AUTHORITY.....3<sup>RD</sup> RESPONDENT

**RULING**

1. What is before me is the Petitioners' Notice of Motion dated 13<sup>th</sup> October, 2017 seeking for the following orders:

***a. That this Honourable Court may be pleased to issue Warrants of Arrest and commit the abovementioned person to prison for her contemptuous actions and/or omission in disobedience of the orders made by the Honourable Justice O. Angote (Mr.) on 28<sup>th</sup> September, 2017 that:***

***i. The 1<sup>st</sup> Respondent and her agents, servants or whomsoever acting on her behalf do halt the construction of multiple dwelling units and/or any further developments on Plot L.R. No. 12715/12673 in Syokimau pending the hearing and determination of the Petitioners' Application dated 4<sup>th</sup> September, 2017 on 1<sup>st</sup> November, 2017.***

***b. That the 1<sup>st</sup> Respondent be made to show cause why she should not be committed to prison for***

*disobedience of lawful court orders.*

*c. That the 1<sup>st</sup> Respondent be detained in police custody until the rising of the court.*

*d. That the 1<sup>st</sup> Respondent has repeatedly disobeyed orders from judicial bodies and should thus be held in contempt of court and face the consequences thereof.*

*e. That alternatively this Honourable Court may be pleased to sentence the 1<sup>st</sup> Respondent to serve such a jail term and simultaneously pay such a fine as this Honourable Court shall deem just and expedient.*

*f. That any other orders as this Honourable Court may deem just and expedient to uphold its dignity under all the circumstances of this case.*

*g. That the costs of this Application be provided for.*

2. The Application is supported by the Affidavit of the 1<sup>st</sup> Petitioner who has deponed that on 1<sup>st</sup> November, 2017, this court issued orders directed at the 1<sup>st</sup> Respondent restraining her, her agents, servants or whomsoever acting on her behalf to stop the construction of multiple dwellings units or any further developments on plot number L.R. 12715/12673 in Syokimau, Mikato Court, pending the hearing and determination of the Application dated 4<sup>th</sup> September, 2017.

3. The 1<sup>st</sup> Applicant deponed that despite issuance of the said court orders, the 1<sup>st</sup> Respondent has continued to develop the suit property; that the court orders were served on the 1<sup>st</sup> Respondent's advocates on 2<sup>nd</sup> October, 2017 and that the 1<sup>st</sup> Respondent had previously ignored the orders of the National Environment Tribunal to stop developing the suit land.

4. According to the 1<sup>st</sup> Petitioner, the continuing actions of the 1<sup>st</sup> Respondent to develop the suit land is meant to steal a march on the Petitioners' suit and is also an affront to justice and the rule of law.

5. In her Replying Affidavit, the 1<sup>st</sup> Respondent deponed that she has not breached the orders of 29<sup>th</sup> September, 2017; that there are no Minutes authorizing the 1<sup>st</sup> Petitioner to commence contempt proceedings and that she was not aware of the orders of this court requiring her to stop from developing the suit land.

6. The 1<sup>st</sup> Respondent deponed that the order of this court was neither personally served upon her nor is there evidence to show that she knew about the existence of the said orders and that one can only be punished for contempt of an order if the order is endorsed with a notice informing the person he is liable to the process of execution if he disobeys the order.

7. It is the 1<sup>st</sup> Respondent's case that the name of the process-server who served her advocate with the order has not been disclosed; that the photographs annexed on the Petitioners' Affidavit are in breach of the provisions of the Evidence Act; that there is no tangible evidence that she disobeyed the orders of this court and that the Application should be dismissed.

8. The 1<sup>st</sup> Petitioner filed a Further Affidavit in which he stated that even after the Application for contempt was filed, the 1<sup>st</sup> Respondent continued to disobey the orders of the court by fixing steel windows and doors, slabbing the floors and plastering the walls of the building; that the 1<sup>st</sup> Respondent's advocate acknowledged receipt of the orders of the court and that the exhibited photographs shows the 1<sup>st</sup> Respondent's contemptuous acts.

9. With the leave of the court, the 1<sup>st</sup> Respondent filed a Reply to the Further Affidavit in which she deponed that the service of the order on her advocate was not in compliance with the law and that she

should have been served with the order of the court personally.

10. According to the 1<sup>st</sup> Respondent, the Further Affidavit does not state by whom the works were being carried out and whose plot.

11. The 1<sup>st</sup> Respondent annexed on her Affidavit the Affidavit of the person supervising the construction works on L.R. No. 12715/12673 who deponed that on 3<sup>rd</sup> October, 2017, the 1<sup>st</sup> Respondent informed him of the order of the court barring any further construction works on the suit land; that the description of the construction works depicted in the Petitioners' photographs were works which had been executed long before the order of the court was made and that the 1<sup>st</sup> Respondent is not in disobedience of the orders of the court.

### **Submissions:**

12. The Petitioners' advocate submitted that the order of this court was duly extracted and served upon the 1<sup>st</sup> Respondent's advocate on 2<sup>nd</sup> October, 2017 at 9.35a.m; that despite the said service, the 1<sup>st</sup> Respondent continued with her contemptuous actions and that the 1<sup>st</sup> Respondent is using procedural technicalities to divert the attention of the court from the real issues. The Petitioners' advocate relied on numerous authorities which I have considered.

13. The 1<sup>st</sup> Respondent's advocate submitted that the law provides for the personal service of the impugned order on the 1<sup>st</sup> Respondent; that the 1<sup>st</sup> Respondent was not personally served and that the 1<sup>st</sup> Respondent stopped with any further works on the suit premises when she was informed of the order of the court by her advocate on 3<sup>rd</sup> October, 2017.

14. The 1<sup>st</sup> Respondent's advocate submitted that the photographs annexed on the Petitioners' Affidavits are of no probative value to the case at hand; that the photographs were not introduced in accordance with the Evidence Act and that the same should be expunged from the court records.

### **Analysis and final orders:**

15. This matter was commenced by a Petition dated 4<sup>th</sup> September, 2017. Contemporaneously with the Petition, the Petitioners filed a Notice of Motion under a Certificate of Urgency.

16. The Notice of Motion was placed before the duty Judge on 5<sup>th</sup> September, 2017 who certified it as urgent. The court ordered that the Application should be heard *inter-partes* on 28<sup>th</sup> September, 2017.

17. When the matter came up for hearing on 28<sup>th</sup> September, 2017, the 1<sup>st</sup> Respondent was represented by her current advocates. On the said date and in the presence of the advocates for the Petitioners and the 1<sup>st</sup> Respondent, the court allowed prayer number 2 of the Application until 1<sup>st</sup> November, 2017. The order that the court granted on 28<sup>th</sup> September, 2017 restrained the 1<sup>st</sup> Respondents from "*construction of multiple dwelling units and/or any further developments on plot number 12715/12673*". The order was to apply not only on the 1<sup>st</sup> Respondent, but also on her agents, servants or whomsoever was acting on her behalf.

18. Notwithstanding the fact that the 1<sup>st</sup> Respondent's advocate was in court when the order was issued, the Petitioners' advocate went out of his way and extracted the order which he served on the 1<sup>st</sup> Respondent's advocate. The 1<sup>st</sup> Respondent acknowledged receipt of the order on 2<sup>nd</sup> October, 2017. In the letter dated 2<sup>nd</sup> October, 2017 which was received by the 1<sup>st</sup> Respondent's advocate on the same day, the Petitioners' advocate informed the 1<sup>st</sup> Respondent's advocate that despite the order of 28<sup>th</sup> September, 2017, his client was still continuing with the construction of the building on the suit land.

19. The evidence before me shows that the 1<sup>st</sup> Respondent's advocate was in court when the order of 28<sup>th</sup> September, 2017 was made. Indeed, the said advocate was duly served with the extracted order on 2<sup>nd</sup> October, 2017 and was informed by the Petitioners' advocate to inform the 1<sup>st</sup> Respondent to abide by the said order.

20. The 1<sup>st</sup> Respondent has admitted that she was informed about the existence of the order by her advocate. According to the Affidavit of her contractor/foreman, he was informed by the 1<sup>st</sup> Respondent of the existence of the order of 28<sup>th</sup> September, 2017 on 3<sup>rd</sup> October, 2017. The 1<sup>st</sup> Respondent was therefore aware of the order of this court restraining her and her agents from continuing with the construction of the building.

21. The law on contempt does not require that service of the court orders must be personally served on the contemnor. In the case of *Justus Kariuki Mate & Another vs. Martin Nyaga Wambora & Another, Civil Appeal No. 24 of 2014 (Nyeri)*, the Court of Appeal held as follows:

***“On the other hand, however, this court has slowly and gradually moved from the position that service of the order along with the Penal Notice must be personally served on a person before contempt can be proved.”***

22. Similarly, in the case of *Shimmers Plaza Limited vs. National Bank of Kenya (2015) eKLR*, the Court of Appeal stated that knowledge of a court order suffices to prove service and dispenses with personal service for the purposes of contempt proceedings.

23. Indeed, all the court needs to satisfy itself is that the contemnor was aware of a court order, and where the contemnor's advocate was in court when the order was made, it is presumed that his client was also aware. In the *Shimmers Plaza case* (supra), the Court of Appeal held as follows:

***“Would the knowledge of the Judgment or order by the advocate of the alleged contemnor suffice for contempt proceedings? We hold the view that it does. This is more so in a case such as this one where the advocate was in court representing the alleged contemnor and the orders were made in his presence. There is an assumption which is not unfounded and which in our view is irrefutable to the effect that when an advocate appears in court on instructions of a party, then it behoves him/her to report back to the client all that transpired in court that has a bearing on the client's case.”***

24. Considering that the 1<sup>st</sup> Respondent's advocate was in court on 28<sup>th</sup> September, 2017 when the order of the court was made, and on the basis of the above holding by the court, the 1<sup>st</sup> Respondent was aware of the order of the court on the same day. Other than being made aware of the order of the court on 28<sup>th</sup> September, 2017, the 1<sup>st</sup> Respondent was further notified of the order of the court on 2<sup>nd</sup> October, 2017 when her advocate was formally served with the extracted order and a letter warning her about the consequences of breaching the court order.

25. Being satisfied that the 1<sup>st</sup> Respondent was aware of the order of the court made on 28<sup>th</sup> September, 2017, the next issue that I should determine is whether the 1<sup>st</sup> Respondent is in contempt of the said orders.

26. The 1<sup>st</sup> Petitioner has annexed on his Affidavit the photographs that were taken on 26<sup>th</sup> August, 2017, 4<sup>th</sup> October, 2017 and 5<sup>th</sup> October, 2017. The only relevant photograph for the purpose of the Application is the photograph that was taken on 4<sup>th</sup> and 5<sup>th</sup> October, 2017. I say so because the orders of this court were issued on 28<sup>th</sup> September, 2017, meaning that the 1<sup>st</sup> Respondent can only be said to have been in breach of the said orders for any actions that herself or her agents did in respect to the suit land after 28<sup>th</sup> September, 2017 and not before. The photographs that were taken on 4<sup>th</sup> and 5<sup>th</sup> October, 2017 show ongoing construction on Plot No. L.R. No. 12715/12673. Indeed, the signage seen in the photograph

shows that the construction was being undertaken on L.R. No. 12715/12673. The 1<sup>st</sup> Respondent has not informed the court what the man on top of the incomplete building were doing if not constructing the building.

27. It is obvious that despite the orders of 28<sup>th</sup> September, 2017 which the 1<sup>st</sup> Respondent was aware of, her agents and servants continued with developing the suit land as shown in the photographs taken on 4<sup>th</sup> October, 2017 and 5<sup>th</sup> October, 2017.

28. Even after this Application was filed and served on the 1<sup>st</sup> Respondent's advocate on 19<sup>th</sup> October, 2017, the photographs annexed on the Petitioners' Further Affidavit show that the erection of a wall on the top floor was being undertaken on the existing building on 10<sup>th</sup> January, 2018. Indeed, the photographs of 5<sup>th</sup> October, and 10<sup>th</sup> January, 2018 clearly show the wall that was put up by the 1<sup>st</sup> Respondent's agents between the two dates and after the order of 28<sup>th</sup> September, 2017.

29. Instead of producing evidence by way of photographs to controvert the evidence of the Petitioners, if any, the 1<sup>st</sup> Respondent wants this court to expunge the Petitioners' photographs from the record because they do not accord with the law. That line of a defence is not acceptable, especially where the allegations are that the alleged contemnor is undermining the authority of the court by ignoring its orders.

30. If the buildings depicted in the Petitioners' photographs are not within the suit premises, nothing would have been difficult than the 1<sup>st</sup> Respondent bringing her own set of photographs. Having not done so, I am satisfied that the 1<sup>st</sup> Respondent, through her agents, has changed the nature of the building on the suit land by adding an extra wall on top of the building in breach of the orders of the court.

31. As has been stated time and again, it is the 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. (*See Hadkinson vs. Hadkison (1952) ALL ER 567*). The 1<sup>st</sup> Respondent has not abided by that unqualified obligation. Consequently, the 1<sup>st</sup> Respondent should be punished in accordance with the law, for her contemptuous actions which went on even after the current Application was filed.

32. For those reasons, I direct that the 1<sup>st</sup> Respondent do appear in this court on a date to be given by the court for mitigation and sentence.

**DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 20<sup>TH</sup> DAY OF APRIL, 2018.**

**O.A. ANGOTE**

**JUDGE**