



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NYERI**

**ELC CASE NO. 215 OF 2013**

**ZACHARY MAINA MUNYUA.....PLAINTIFFS/APPLICANT**

**-VERSUS-**

**NANCY WAMUYU MUNYUA.....1<sup>ST</sup> DEFENDANT**

**TERESA WAKANYI MUGO.....2<sup>ND</sup> DEFENDANT**

**BEATRICE WAIRIMU MUNYUA.....3<sup>RD</sup> DEFENDANT**

**CATHERINE WANJURI MUNYUA.....4<sup>TH</sup> DEFENDANT**

**DAMARIS WANJIKU MUNYUA.....5<sup>TH</sup> DEFENDANT**

**RULING**

1. The notice of motion dated **2nd September, 2016** *inter alia* seeks the following orders;

1. That a custodial sentence be meted on the 1<sup>st</sup> respondent in accordance with the provisions of the Civil Procedure Act Cap 21, Laws of Kenya until the main suit is heard and determined so as to restrain her from further acting in contempt of court.
2. That the same defendant be condemned for contravening the *sub-judice* rule by discussing matters before this court with the Chief of Gathehu Location, Mathira Sub-county, Nyeri county.
3. That she be condemned for contravening the same rule by organizing an illegal meeting of all members of our family which was scheduled for the 25<sup>th</sup> July, 2016 in the Chief's office to discuss matters before this court.
4. That she be condemned for acting in contempt of court and failing to maintain the *sattus quo* on land parcel LR No. Magutu/Gathehu/178.
5. That she be condemned for ploughing the access road leading to the homes of the plaintiff and the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendant.
6. That the cost of this application be paid for by the 1<sup>st</sup> respondent.

2. The application is premised on, among other grounds, that the 1<sup>st</sup> respondent has discussed matters before the court outside the court contravening the *sub-judice* rule and that she has encroached on Magutu/Gathehu/178 which amounts to contempt of court.

3. The application is supported by the affidavit of **Zachary Maina Munyua** where the grounds on the face of the application are reiterated.

4. The following documents are annexed to the affidavit:-

I) A letter from the Assistant Chief Giakaibei sub-location dated 22<sup>nd</sup> July 2016 marked **ZMM4**;

II) A letter from Mr. Zachary M. Munyua to the Chief of Gathehu Location dated 23<sup>rd</sup> July, 2016 marked **ZMM5**;

III) A letter from Mr. Zachary M. Munyua to M/S Maina Karingithi & Co. Advocates, Teresia Wakanyi Mugo, Beatrice Wairimu Munyua, Catherine Wanjiru Munyua and Damaris Wanjiku Munyua dated 16<sup>th</sup> June, 2016; and

(IV) Certificate of Postage.

5. In reply and opposition to the motion, the 1<sup>st</sup> respondent filed grounds of opposition dated **23<sup>rd</sup> March, 2016** that;

1. The applicant cannot allege the 1<sup>st</sup> defendant/ respondent to be in contempt of court as no orders has been issued by this honourable court;
2. The applicant has not stated how the 1<sup>st</sup> defendant/respondent has been in contempt of court without citing any violation of an order issued herein;
3. The applicant cannot hide behind the *sub-judice* rule and seek punitive custodial sentence against the 1<sup>st</sup> defendant/respondent where no wrong has been committed;
4. The applicant has since filing this suit specialized in filing numerous frivolous applications instead of setting the main suit for hearing;
5. The present application is misconceived, incompetent, lacks merits and is otherwise an abuse of the court process and ought to be dismissed with costs.

6. When the application came up for hearing, the applicant reiterated what was contained in his supporting affidavit. Counsel for the 1<sup>st</sup> respondent submitted that the applicant had not demonstrated how the 1<sup>st</sup> respondent had contravened the court order.

#### **Analysis and determination**

7. The order allegedly disobeyed by the 1<sup>st</sup> respondent was *inter alia* for maintenance of *status quo* issued by **Wakiaga J** on 7<sup>th</sup> July, 2014.

8. I have read and considered the affidavit evidence adduced in this case and I note that the applicant has merely made unsubstantiated allegations against the 1<sup>st</sup> respondent, which allegations the 1<sup>st</sup> respondent has denied.

9. Contempt proceedings being criminal in nature, it behooved the applicant to prove the allegations leveled against the 1<sup>st</sup> respondent by way of cogent evidence. In this regard see the cases cited hereunder: -

**1. Sam Nyamweya & 3 others v Kenya Premier League Limited & 2 Others (2015)eKLR** where it was held:-

**“...contempt proceedings are of a criminal nature and involve, if proved, loss of liberty, the applicant must therefore endeavor to prove all facts relied on beyond reasonable doubt. ..”**

**2. Eliud Muturi Mwangi (Practising in the name and style of Muturi & Company Advocates) v LSG Lufthansa Services Europa/ Africa GMBH & another [2015] eKLR** where **Gikonyo J.**, stated:-

**“...the appropriate standard of proof which must be attained is as was set out in the case of **OCHINO & OTHERS –VS- OKOMBO & OTHERS (1989) KLR 165**, by the Court of Appeal that:-**

**“...the standard of proof in contempt proceedings must be higher than proof on a balance of probabilities, almost but not exactly beyond reasonable doubt.”** and

**3. Peter K. Yego & others vs Pauline Nekesa Kode** where the court recognizing that contempt of court is criminal, held that **“it must be proved that one has actually disobeyed the court order before one is cited for contempt. The applicant in a application for contempt must prove beyond peradventure that the respondent is guilty of contempt....”**

10. Has the applicant made up a case for punishment of the 1<sup>st</sup> respondent?

Having considered the evidence adduced by the applicant against the 1<sup>st</sup> respondent, I find the same to be incapable of discharging the heavy burden imposed on the applicant of demonstrating that the 1<sup>st</sup> respondent breached the said orders of the court to warrant committing her to civil jail. I say this because no evidence was presented before the court capable of proving to the required standard of proof that the 1<sup>st</sup> respondent has contravened the orders issued by this court (read High Court) on 7<sup>th</sup> July, 2014 as alleged by the applicant.

11. Consequently, I dismiss the application with costs to the 1<sup>st</sup> respondent.

**Dated, signed and delivered at Nyeri this 5th day of April, 2018**

**L. N. WAITHAKA**

**JUDGE**

Coram:

N/A by the plaintiff

Nancy Wamuyu Munyua and 4 others

Court assistant - Esther