



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**ELC NO. 20 OF 2016**

**FORMERLY MOMBASA HCCC NO. 59 OF 2016**

**COQUERO LIMITED.....PLAINTIFF/APPLICANT**

**VERSUS**

**BRUCE JOSEPH BOCKLE.....1<sup>ST</sup> RESPONDENT**

**WACHIRA MATHENGE,**

**COUNTY COMMISSIONER KILIFI.....2<sup>ND</sup> RESPONDENT**

**ALEXANDER MAKAU**

**OSC, KILIFI POLICE STATION.....3<sup>RD</sup> RESPONDENT**

**PHILEMON SANGAO**

**OSC, KIJIPWA POLICE STATION.....4<sup>TH</sup> RESPONDENT**

**GIKANDI NGIBUINI T/A**

**GIKANDI & COMPANY ADVOCATES.....5<sup>TH</sup> RESPONDENT**

**RULING**

1. By a Notice of Motion application dated 12<sup>th</sup> May 2017, as Amended on 7<sup>th</sup> June 2017 and filed herein on 8<sup>th</sup> June 2017, Coquero Limited, the Plaintiff herein, prays for orders:-

1.....

*1A. That this Court issues summons to the County Commissioner –Kilifi County (2<sup>nd</sup> Respondent, the Officer Commanding Police Station-Kilifi (3<sup>rd</sup> Respondent) and the Officer Commanding Station-Kijipwa Police Station (4<sup>th</sup> Respondent) to show cause, within 30 days upon service, why they should not be punished by the Court for contempt of Court;*

*2. That the Honourable Court do find, hold and declare that the 1<sup>st</sup> Respondent and Mr. Gikaindi Ngibuini one jointly and severally in contempt of the Court Order issued by the Honourable Justice A. Omollo on 9<sup>th</sup> December, 2015;*

*3. That the Honourable Court do find, hold and declare that the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents are jointly and severally in contempt of the Court Order issued by the Honourable Justice A. Omollo on 9<sup>th</sup> December 2015;*

*4. That the Honourable Court do order that the Respondents be committed to civil jail for the term of six months and/or impose a penalty of a fine for contempt of Court for having deliberately disobeyed the orders of the Court issued by the Honourable Justice F. Tuiyott on 25<sup>th</sup> September 2013 and the Court Order issued by the Honourable Justice A. Omollo on 9<sup>th</sup> December 2015;*

**5. Any further Orders of the Court towards protecting the dignity and honour of this Court;**

**6. That the costs be in the cause.**

2. The application is supported by an affidavit sworn by one Franklyn Pereira, a director of the Plaintiff and is based on the grounds, inter alia:-

**i. That the Applicant first filed Mombasa HCCC No. 13 of 2004, later on HCCC No. 59 of 2006(Now Malindi ELC No. 20 of 2006) against Bruce Joseph Bockle.**

**ii. That in the Judgment delivered in the said Mombasa HCCC No. 59 of 2006 (Now Malindi ELC 20 of 2016), the Court found that the Applicant is the indefeasible owner of the property known as LR No. 491 Section IV, Malindi North(the suit property);**

**iii. That the 1<sup>st</sup> Respondent was ordered inter alia to demolish and remove all constructions and property of whatever nature erected on the suit property and was restrained from remaining or continuing in occupation of the suit property;**

**iv. That having failed to comply with the decree the Court issued an order on 9<sup>th</sup> December 2015 for eviction of the Applicant from the suit property. The eviction was to be supervised by the Officer in Charge of the nearest Police Station;**

**v. That subsequently the said Orders were served upon the 1<sup>st</sup> Respondent and onto the officers of the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents;**

**vi. That in spite of the said service, the Respondents continue to blatantly disobey the orders and the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents have not enforced the same;**

**vii. That the 1<sup>st</sup> and 4<sup>th</sup> Respondents have been writing letters to law enforcement agencies whose purport and intention is to obstruct the administration of justice, undermine the dignity and authority of this Court and avoid enforcement of the Orders; and**

**viii. That by disobeying the Orders herein, the Respondents are in direct contravention and defiance of the Orders issued by this Court.**

3. Upon Service of the said Application, the 1<sup>st</sup> and 5<sup>th</sup> Respondents proceeded to Court on 13<sup>th</sup> June 2017 whereupon they filed a Notice of Preliminary Objection thereto on the grounds that:-

**1) The Court lacks jurisdiction to consider or hear the Notice of Motion founded on Section 5 of the Judicature Act Cap 8, Laws of Kenya when the said Section has been repealed by Section 38 of the Contempt of Court Act No. 46 of 2016;**

**2) The Court lacks jurisdiction to consider the Notice of Motion founded on Article 162(2) of the Constitution Section 3A and 63(c) of the Civil Procedure Act Cap 21 or Rule 81 of the Supreme Court of England Rules since neither of those provisions confer jurisdiction on the Environment and Land Court to entertain an application for contempt;**

**3) In the alternative, and without prejudice to (1) and (2) above, the Honourable Court lacks jurisdiction to entertain the application by virtue of Section 8 of the Contempt of Court Act No. 46 of 2016 since no leave was sought and obtained to institute the "Criminal Contempt" Charge leveled against the Respondents; and**

**4) The Honourable Court lacks jurisdiction to entertain the application by virtue of Section 26(1) and (3) of the Contempt of Court Act No. 46 of 2016.**

4. Subsequent to the filing of the Notice of Preliminary Objection, on or about 22<sup>nd</sup> June 2017, the Plaintiff herein filed another Notice of Motion application under Certificate of Urgency seeking orders as follows:-

**1. That this Honourable Court do grant leave to the Plaintiff/Applicant to amend the Notice of Motion dated 12<sup>th</sup> May 2017 and the Amended Notice of Motion filed herein on 7<sup>th</sup> June 2017 and served upon the Respondents be deemed as having been duly filed and served with the Court's leave.**

**2. That the costs of this application be in the cause.**

5. The Plaintiff's 2<sup>nd</sup> application is based on the grounds:-

**i. That the Amended Notice of Motion dated 7<sup>th</sup> June 2017 was filed without leave because as at the time of filing the same there were no responses filed by the Respondents herein and as such no prejudice would have been occasioned to the respondents;**

**ii. That since the Respondents expressed their protest to the said Amended Notice of Motion when this matter came up for hearing on 14<sup>th</sup> June 2017, there was need to file the present application so as to seek the Orders sought herein;**

**iii. That the law permits a party to amend its pleadings at any time before the determination of the matter and as such the Applicant is entitled to amend the Notice of Motion so as to bring it in line with the new law of contempt; and**

**iv. That the amendment has been sought without delay and none of the parties herein will be prejudiced in any way by the grant of the orders sought.**

6. In further response to the two applications filed by the Plaintiff, the 1<sup>st</sup> and 5<sup>th</sup> Respondents both separately filed elaborate Replying Affidavits on 10<sup>th</sup> July 2017 generally reiterating the position taken in the Notice of Preliminary Objection and expounding on the reasons why they individually consider the orders sought by the Plaintiff to be untenable.

7. As it were, when the matter came up for hearing before me on 25<sup>th</sup> July 2017, the Plaintiff's application dated 22<sup>nd</sup> June 2018 was allowed and a Consent Order was recorded between the Plaintiff's Advocates on record and the Honourable the Attorney General for the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondent Police Officers as follows:-

**"1. That the Applicants do hereby agree on the basis of the undertaking given by the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents to have the application dated 7<sup>th</sup> June 2017 compromised as against the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents on the basis that they will comply with the Court Order issued on 9<sup>th</sup> December 2015 by Honourable Justice A. Omollo.**

**2. That the Application dated 7<sup>th</sup> June 2017 be heard between the Applicant and the 1<sup>st</sup> and 5<sup>th</sup> Respondents..."**

8. I have therefore considered the Plaintiff's application dated 7<sup>th</sup> June 2017 and the response thereto by the 1<sup>st</sup> and 5<sup>th</sup> Defendants/Respondents. I have also considered written submissions filed and the authorities to which I was referred by the Learned Advocates for the parties.

9. In *Kenya Tea Growers Association –vs- Francis Atwoli and 5 Others (2012)eKLR*, Lenaola J( as he then was) cited with approval the English case of *Clarke and Others –vs- Chadburn & Others (1985) 1 All ER 211* in which the Court observed that:-

**"(One) need not cite authority for the proposition that it is of high importance that orders of the Courts should be obeyed. Willful disobedience to an order of the Court is punishable as a Contempt of Court, and I feel no doubt that such disobedience may properly be described as being illegal....Even if the Defendants thought that the injunction was improperly obtained or too wide in its terms, that provides no excuse for disobeying it. The remedy is to vary or discharge it."**

10. Again as was held in *Econet Wireless Ltd –vs- Minister for Information & Communication of Kenya & Another (2005) eKLR*:-

**"Where an application for committal for contempt of Court orders is made the Court will treat the same with a lot of seriousness and urgency and more often will suspend any other proceedings until the matter is dealt with and if the contempt is proven, to punish the contemnor or demand that it is purged or both. For instance an alleged contemnor will not be allowed to prosecute any application to set aside Orders or take any other step until the application for contempt is heard. The reasons for this approach are obvious-a contemnor would have no right of audience in any Court of law unless he is punished or purges the contempt."**

11. In their response to the application before me, the 1<sup>st</sup> and 5<sup>th</sup> Respondents contend that this Court has no jurisdiction to proceed and consider this matter in view of the fact that the Plaintiff has invoked the now repealed Section 5 of the Judicature Act to clothe this Court with jurisdiction to punish for contempt. They have equally faulted the Plaintiff for failing to invoke the provisions of the Contempt of the Court Act, No. 46 of 2016. It is also the Respondent's position that the Amended Motion is not supported by an affidavit and that the resultant application is thus incompetent and a candidate for dismissal.

12. While I agree with the 1<sup>st</sup> and 5<sup>th</sup> Respondents position that the application before me is not the best in form and substance, I refuse to accept the notion that the perceived irregularities are of such substance as to render the application incompetent. I say so because while it is true that the Plaintiff has cited the provisions of the repealed law, the application is also expressed to have been brought under the provisions of Section 3A and 63(c) of the Civil Procedure Act. Section 3A saves the inherent powers of this Court in the following words:-

**3A. Nothing in this Act shall limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the Court process."**

13. Section 63(c) on the other hand supplements the Court's powers as follows:-

**63(c) In order to prevent the ends of justice from being defeated, the Court may, if it is so prescribed:-**

**a)....**

**b).....**

**c)Grant a temporary injunction and in case of disobedience commit the person guilty thereof to prison and order that his property be attached and sold."**

14. Arising from the two provisions, I am persuaded that even though the Applicant did not cite the provisions of the most relevant statute, in this case, the Contempt of Court Act, this Court is nevertheless clothed with inherent jurisdiction to prevent the abuse of its process and to ensure that the ends of justice are not defeated.

15. I am equally not persuaded that the failure to file an affidavit in support of the amended Motion dated 7<sup>th</sup> June 2017 is fatal to the proceedings before me. As it were the original application dated 12<sup>th</sup> May 2017 which application is amended by the one before me was clearly supported by an Affidavit sworn on 12<sup>th</sup> May 2017 by one Franklyn Pereira who is described at paragraph 1 thereof as a Director of the Plaintiff. In my view, the purpose for the Amendment was already explained by a different application that was dated 22<sup>nd</sup> June 2017 which application was allowed by this Court on 25<sup>th</sup> July 2017. Mr. Pereira's affidavit remains unamended in its original form in the bed of the Court file and that must be the reason the Applicant has stated in the application before me that the:-

***“ Application is supported by the Statement and Affidavit sworn by Franklyn Pereira filed herein and on such other or further reasons and grounds as may be adduced at the hearing hereof.”***

16. Turning to the substance of the application before me the same relates to the alleged willful disobedience of orders issued by this Court on 25<sup>th</sup> September 2013 and again on 9<sup>th</sup> December 2015. A plain reading of the Orders granted by the Honourable Anne Omollo J on 9<sup>th</sup> December 2015 would appear to me to show that the Court allowed the Plaintiff to execute the decree arising from the Honourable Francis Tuiyott's Judgment issued on 23<sup>rd</sup> September 2013. Justice Omollo's order directed the Officer in –Charge of the nearest Police Station to ensure law and order is maintained during the execution of the Orders against the 1<sup>st</sup> Respondent. According to the Respondents, those Orders of 9<sup>th</sup> December 2015 did not require the 1<sup>st</sup> Respondent to do anything or refrain from doing anything.

17. The orders that are perhaps of greater importance to these proceedings are in my view issued pursuant to the decree of 25<sup>th</sup> September 2013. According to the Plaintiff, the 1<sup>st</sup> Respondent continues to remain and occupy the suit property in blatant disobedience of the said decree. It is however the Respondents position that the decree lacks clarity, is inherently ambiguous and incapable of enforcement.

18. The decree issued on 23<sup>rd</sup> September 2013 is in the following terms:-

***a) That a mandatory injunction is hereby granted requiring the Defendant to forthwith pull down and remove from the said land the said construction and remove all his property of whatever nature as well as his workmen, servants or agents from the Plaintiff's said land.***

***b) That an injunction is hereby granted restraining the Defendant by himself, his servants or agents or otherwise from preventing the Plaintiff from erecting the boundary wall on the said land and from trespassing onto the Plaintiff's land.***

***c) That an injunction is hereby granted restraining the Defendant by himself, his servants or his agents or otherwise howsoever from remaining on or continuing in occupation of the said land”***

19. In their submissions, before this Court, the 1<sup>st</sup> Respondent's Counsel submitted that the expression “the said land” as used in the decree is so imprecise, ambiguous and could, really mean anything and not necessarily the land that was in dispute between the Plaintiff and the 1<sup>st</sup> Defendant/Respondent in the two suits since filed herein. It is the 1<sup>st</sup> Respondent's case that the said order is incapable of compliance and that it does not order him to vacate, demolish and remove his construction materials from the property known as LR NO. 491(Original No. 490/1) Section IV Mainland North.

20. In my considered view however, nothing can be further from the truth. That decree arises from proceedings in which the 1<sup>st</sup> Respondent fully participated judging from the record. As was stated in *Kenya Tea Growers Association –vs- Francis Atwoli and 5 Others (supra)*, whether the Defendant thought the injunction was improperly obtained or too wide in its terms, that provided no excuse for disobeying it. The remedy was to apply to have it varied or discharged. Those orders clearly required him to vacate the suitland. He has neither done so nor applied to have them varied or discharged.

21. Reciting the Statement of Lord Clyde in *Johnson –vs- Grant, 1923 SC 789 at 790 Ndolo J in Teachers Service Commission –vs- Kenya National Union of Teachers & 2 Others (2013)eKLR* observed:-

***“...the law does not exist to protect the personal dignity of the Judiciary nor the private rights of parties or litigants. It is not the dignity of the Court which is offended, it is the fundamental supremacy of the law which is challenged.”***

22. The Learned Judge(Ndolo J) went on further to state and I agree as follows:-

***“The reason why Courts will punish for contempt of Court then is to safeguard the rule of law which is fundamental in the administration of justice. It has nothing to do with the integrity of the Judiciary or the Court or even the personal ego of the Presiding Judge. Neither is it about placating the applicant who moves the Court by taking out contempt proceedings. It is about preserving and safeguarding the rule of law. A party who walks through the justice door with a Court Order in his hands must be assured that the Order will be obeyed by those whom it is directed.”***

23. Arising from the foregoing, I am satisfied that the actions of the 1<sup>st</sup> Respondent since the decree of 23<sup>rd</sup> September 2013 are in utter violation and in contempt of the aforesaid orders of this Court.

24. I have also taken a keen consideration of the letters authorized by the 5<sup>th</sup> Respondent herein Mr. Gikandi Ngibuini Advocates. In his Replying Affidavit filed on 10<sup>th</sup> July 2017 he admits that he authorized the same. The letters dated 27<sup>th</sup> October 2016; 7<sup>th</sup> January 2016 and 18<sup>th</sup> April 2017 paint the picture of an Advocate out to protect his client's case almost at the verge of breaking the law. For instance while admitting that his client has lost both the case in the High Court and the Court of Appeal, the 5<sup>th</sup> Respondent advises the Inspector General of the Police in his letter dated 18<sup>th</sup> April 2017 that until investigations are carried out into how the Plaintiff acquired the land, his client's occupation should not be interfered with as that would amount to interfering with evidence.

25. As the Court of Appeal stated in *Mutitika –vs- Baharini Farm Ltd(1985) KLR 229, 234:-*

***“ A person who, knowing of an injunction, or an order of stay willfully does something or causes others to do something, to break the injunction or interfere with the stay is liable to be committed for contempt of Court as such a person has by his conduct obstructed justice.”***

26. I note however that the 5<sup>th</sup> Respondent's letters were addressed to Police Officers who are generally assumed to be knowledgeable in law and who should have obeyed the Court Orders nevertheless. As it were the Plaintiff did on 25<sup>th</sup> July 2015 enter into a consent with the 2<sup>nd</sup> to 4<sup>th</sup> Respondents and I choose to say no more in this regard. While the letters from the 5<sup>th</sup> Respondent were certainly overzealous in the protection of the Client's interests, I do not think in the circumstances before me that was-the 5<sup>th</sup> Respondent himself in contempt of the Orders of this Court. In the result, I will partially allow the Plaintiff's application as amended on 7<sup>th</sup> July 2017 and order as follows:-

***a) This Honourable Court finds, holds and declares that the 1<sup>st</sup> Respondent herein is in contempt of the Court's Orders issued on 25<sup>th</sup> September 2013 and subsequently on 9<sup>th</sup> December 2015.***

***b) The 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents are hereby ordered to proceed forthwith to apprehend the said 1<sup>st</sup> Respondent and to bring him to Court for purposes of passing an appropriate sentence.***

***c) The costs of this application shall be to the Plaintiff/Applicant.***

**Dated, signed and delivered at Malindi this 21<sup>st</sup> day of September, 2018.**

**J.O. OLOLA**

**JUDGE**