



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**ELC CASE NO. 5 OF 2015**

**FRESCO BUSHLANDS (K) LIMITED.....PLAINTIFF**

**VERSUS**

**1. WARSAME MOHAMED ISSAAK**

**2. MOHAMED YUSUF HORAR**

**3. MOHAMED ALIM MAHAT**

**4. NASTE DAUD**

**5. AGRICULTURAL DEVELOPMENT CORPORATION.....DEFENDANTS**

**RULING**

1. By an Amended Notice of Motion application dated 8<sup>th</sup> January 2017, Fresco Bushlands (K) Limited, the Plaintiff herein prays for Orders:-

***1. That Messrs Warsame Mohamed Isaak, Mohamed Yusuf Horar, Mohamed Ali Mahat and Daud Naste be summoned to personally attend Court to show cause why they should not be punished for disobeying the Court orders made on 7<sup>th</sup> November 2016 by Hon. Mr. Justice Angote.***

***2. That Messrs Warsame Mohamed Isaak, Mohamed Yusuf Horar, Mohamed Ali Nahat and Daud Naste the 1<sup>st</sup> to 4<sup>th</sup> Defendants herein be declared contemnors and punished for contempt of Court by way of committal to civil jail for a period of six(6) months with no alternative to fine for disobeying a valid Court order made on 7<sup>th</sup> November 2016.***

***3. That the costs of this application be borne by the Defendants and the same be assessed by the Court and be paid forthwith.***

2. The application is supported by an Affidavit sworn by the Plaintiff's Kulalu Ranch Manager one Bare Muhumed and is made on the following grounds:-

***a) That the Plaintiff is a leasee of 95,000 acres of Land Reference No. 14248 situate within Kilifi County from the 5<sup>th</sup> Defendant as described and defined by the lease dated 27.05.2010 and sketch map delineating the boundaries communicated to the Plaintiff vide 5<sup>th</sup> Defendant's letter dated 11<sup>th</sup> August 2010.***

***b) That on 4<sup>th</sup> April 2014, the Honourable Court in HCCC No. 123 of 2014 made orders restraining the 5<sup>th</sup> Defendant from interfering with the proprietary rights of the Plaintiff as contained in the said lease dated 26.05.2010 which orders are still in force.***

***c) That on 7.11.2016 by consent of the parties this Honourable Court made orders restraining the 1<sup>st</sup> – 4<sup>th</sup> Defendants from trespassing on the 95,000 acres leased to the Plaintiff aforesaid.***

***d) That the 1<sup>st</sup> – 4<sup>th</sup> Defendants in flagrant disobedience of the said orders of 07.11.16 have proceeded to enter the said property and forcefully evicted some of the agents of the Plaintiff while at the same time vandalizing and burning the properties of the Plaintiff under Supervision of the Police.***

***e) That further to the foregoing, the 1<sup>st</sup> – 4<sup>th</sup> Defendants have unleashed all their livestock to graze on the said property in blatant violation of the Court orders of 07.11.2016 to the prejudice of the Plaintiff; and***

***f) That It is just and fair that the 1<sup>st</sup> -4<sup>th</sup> Defendants be punished for contempt to uphold the authority of the Court and to protect the interests of the Plaintiff in the said Court order.***

3. In a Replying Affidavit sworn by Mohamed Ali Mahat, the 3<sup>rd</sup> Defendant/Respondent and filed herein on 18<sup>th</sup> January 2018, the Respondents term the application as being ill conceived, bad in law and otherwise an abuse of the Court process. They accuse the applicant of seeking to enforce orders which he has already challenged in Civil Appeal No. 107 of 2016 in the Court of Appeal at Malindi.

4. The Respondents further aver that they were not parties in Malindi HCCC No. 123 of 2014 and that the orders referred to have no bearing on this case. At any rate, they deny breaching the Orders of the Court and/or evicting any agent of the Plaintiff from its leased land.

5. In regard to the alleged involvement of the police in the evictions, the 3<sup>rd</sup> Respondent accuses the Plaintiff of being economical with the truth. He avers that the Police were only pursuing the Applicant on account of a report of assault made by the 3<sup>rd</sup> Defendant and that he was only assisting the Police to have the applicant arrested for the offence. The Respondents conclude that the Applicant has not made any proper case for the Respondents to be cited for contempt and urge the Court to throw out the application.

6. I have considered the Application and the response thereto. I have also perused the written and oral submissions made before me by the Learned Advocates for the parties.

7. This suit was filed by the Plaintiff against the four Defendants sought to be cited for contempt herein on 12<sup>th</sup> January 2015. In the Plaintiff filed on the said date, the Plaintiff prays for:-

***a) A declaration that the Defendants are trespassers on the suit property;***

***b) An order of permanent injunction do issue against the Defendants by themselves, and/or their hirelings, servants, employees and/or agents on their behalf from entering, trespassing and/or continuing with the impugned (sic) intended developments on the suit property; and***

***c) Costs of the suit.***

8. The gist of the Plaintiff's case can be discerned at paragraphs 6 to 9 of the Plaintiff where the Plaintiff pleads as follows:-

***“6. The Plaintiff avers that it has at all material times to this suit enjoyed all the property rights and interests as a leasee of 95,000 acres of land parcel Reference Number 14248 situate within Kilifi County otherwise known as Kulalu Ranch(hereinafter referred to as the suit property) from Agricultural Development Corporation which lease is still in force.***

***7. The Plaintiff will crave leave of the Honourable Court to show and demonstrate the lease between itself and Agricultural Development Corporation is still in force.***

***8. On or about December 2014 the Defendants diversely and separately entered into the suit property and commenced grazing their livestock therein.***

***9. Subsequently a few days ago the Defendants began delivering materials demonstrating their interest to develop the suit property.”***

9. From the record herein, it is not disputed that the Plaintiff has leased the said 95,000 acres of all that parcel of land situated in Kilifi District and known as Kulalu Ranch Land Reference No. 14248 from the Agricultural Development Corporation. It is however apparent that the said Land Reference No. 14248 measures approximately 247,910 acres and that the remaining portions have been leased out to various other parties including the Respondents by the said Agricultural Development Corporation.

10. It is also apparent again from the record, that the boundaries of the various portions were not properly determined at the time the portions were leased out and indeed the Plaintiff has sued the said Agricultural Development Corporation in Malindi ELC Case No. 123 of 2013 seeking certain determinations.

11. The Respondents have been granted grazing rights to certain portions of the land by the said Agricultural Development Corporation but the uncertainty on the extent to which they can graze and on which portion of land has fueled serious conflict between them and the Plaintiff. Indeed the application before me is the third one seeking to have the Respondents cited and jailed for contempt since this suit was filed in 2014.

12. After the initial two applications seeking to cite the Respondents for contempt failed, the Plaintiff filed an application dated 25<sup>th</sup> February 2016 seeking orders of injunction to issue restraining the Respondents from evicting, threatening the agents of the Plaintiff on LR No. 14248 or demolishing their houses. The said application was allowed by the Honourable Angote J on 16<sup>th</sup> September 2016.

13. The Respondents were not happy with the said Orders ostensibly on the basis that it appeared to have enjoined them from the entire land owned by the Agricultural Development Corporation and by an Application dated and filed on 5<sup>th</sup> October 2016 they sought a review thereof

to have the same reflect that the injunction only referred to the Plaintiff's leased portion of 95,000 acres.

14. Subsequently on 7<sup>th</sup> November 2016 the parties met in open Court and recorded the following consent before the Honourable Angote J:-

***“1. That an injunction be and is hereby issued restraining the 1<sup>st</sup> -4<sup>th</sup> Defendants by themselves or their hirelings, employees, servants and/or any other person acting on their behalf from evicting or threatening the agents of the Plaintiffs from the structures or houses on 95,000 acres of land number LR No. 14248 leased to the Plaintiff situate in Kilifi County or demolishing the said houses or in any way acting in any manner that may affect the Plaintiffs rights and or interest in the said structures, houses or land pending the determination of the suit.***

***2. That the Application dated 5<sup>th</sup> October 2016 is marked as spent.***

15. Those are the Orders which the Respondents are accused of violating. It is the Plaintiffs case that the Respondents proceeded to enter their property whereupon they forcefully evicted some of the Plaintiffs agents and further vandalized and burnt the properties under the supervision of the Police. The Plaintiff further avers that the Respondents have since unleashed all their livestock to graze on the Plaintiff's property.

16. The Respondents deny the accusation and accuse the Plaintiff of refusing to co-operate with them and the officials of the Agricultural Development Corporation to delineate proper boundaries of the land leased to the Plaintiff.

17. I think it is now settled by Judicial precedence that in order to make a case for civil contempt, an applicant must prove to the required standards that:-

***a) The terms of the order(or injunction or undertaking) were clear and unambiguous and were binding on the defendant;***

***b) The defendant had knowledge of or proper notice of the terms of the order;***

***c) The defendant has acted in breach of the terms of the Order; and***

***d) The defendant's conduct was deliberate.***

18. As was restated by the Court of Appeal in *Mutiika –vs- Baharini Farm Ltd (1985) KLR 229* at 234, the standard of proof in contempt proceedings must be higher than proof on the balance of probabilities, almost but not exactly, as beyond reasonable doubt.

19. In his Ruling delivered on 24<sup>th</sup> April 2015 on the first contempt application filed by the Plaintiffs herein, Angote J. had disallowed the application on the basis that there was no evidence availed to the Court to show that by the time the application before him was filed, the Defendants had been furnished with documents to show the extent of the Plaintiffs 95,000 acres so that they refrain from encroaching thereon.

20. That unfortunately remains the position herein. It is not clear to me that the 95,000 acres leased to the Plaintiffs have now been clearly delineated and marked out. Even if it were, absolutely no evidence was furnished to the Court to demonstrate that the four Respondents cited herein invaded the Plaintiffs property and evicted anyone. There was indeed no evidence that the Plaintiff's property was destroyed, and/or that the destruction was done by the four Respondents. If there was any destruction and it was reported to the Police as alleged, I was not told what action if any the Police took.

21. As it were, the Respondents are also licensed to use a Portion of LR No. 14248 Kilifi and unless there is clear evidence that they grazed their livestock and/or in any manner encroached upon the Plaintiff's portion, there would be no basis to grant the Orders sought herein.

22. In the result, I find no merit in the application dated 8<sup>th</sup> January 2017. The same is dismissed with costs.

**Dated, signed and delivered at Malindi this 31<sup>st</sup> day of October, 2018.**

**J.O. OLOLA**

**JUDGE**