



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC CASE NO. 334 OF 2012**

CATHERINE WAMBUI WARUINGE..... PLAINTIFF/APPLICANT

=VERSUS=

RATIA ENE SEMERA MUTEMPERIA.....1<sup>ST</sup> DEFENDANT/RESPONDENT

DAVID LEKENI SEMERA.....2<sup>ND</sup> DEFENDANT/RESPONDENT

SAMUEL SITOYA SEMERA.....3<sup>RD</sup> DEFENDANT/RESPONDENT

JULIUS SAIMI SEMERA.....4<sup>TH</sup> DEFENDANT/RESPONDENT

JOHN SEMERA.....5<sup>TH</sup> DEFENDANT/RESPONDENT

SAITOTI SEMERA.....6<sup>TH</sup> DEFENDANT/RESPONDENT

**RULING**

1. This is the Notice of Motion dated 5<sup>th</sup> December 2016. It is brought under Order 40 Rules 1, 3(1), 3(3) and 8 of the Civil procedure Rules, Section 1A, 1B, 3A & 63 (c) of the Civil procedure Act, Section 5(1) of Judicature Act and all other enabling provisions of the law.

2. It seeks order:-

*(1) Spent*

*(2) That the defendants/respondents be denied audience before the honourable court until such time as the defendants have purged their contempt.*

*(3) That the Hon. Court be pleased to issue the following orders against the defendants for deliberately and consciously defying and disobeying the court orders issued by the honourable court on 7<sup>th</sup> January 2015.*

*(a) The defendants: Ratia Ene Semera Mutemperia (1<sup>st</sup> defendant), David Leken Semera (2<sup>nd</sup> defendant), Samwel Sitoyia Semera (3<sup>rd</sup> defendant), Julius Saimi Semera (4<sup>th</sup> defendant), John Semera (5<sup>th</sup> defendant) and Saitoti Semera (6<sup>th</sup> defendant) be fined such sums of money as this honourable court may direct and the same be paid into court forthwith.*

*(b) Property belonging to Ratia Ene Semera Mutaperia (1<sup>st</sup> defendant, ), David Leken Semera (2<sup>nd</sup> defendant), Samwel Sitoyia Semera (3<sup>rd</sup> defendant), Julius Saimi Semera (4<sup>th</sup> defendant), John Semera (5<sup>th</sup> defendant) and Saitoti Semera (6<sup>th</sup> defendant) be attached to the extent of such value as this honourable court may direct; and*

*(c) That Ratia En Semera Mutemperia (1<sup>st</sup> defendant) , David Leken Semera (2<sup>nd</sup> defendant), Samwel Sitoyia Semera (3<sup>rd</sup> defendant), Julius Saimi Semera (4<sup>th</sup> defendant), John Semera (5<sup>th</sup> defendant) and Saitoti Semera (6<sup>th</sup> defendant) be committed to and/or detained in prison for a term of six months.*

*(4) That there be liberty to apply.*

*(5) That the cost of this application be borne by the defendants.*

3. The grounds are on the face of the application and are listed as in paragraph 1 to 14.

4. The application is supported by the affidavit of Catherine Wambui Waruinge, the plaintiff/applicant sworn on the 5<sup>th</sup> December 2016.

5. The application is opposed. There is a replying affidavit sworn by, David Leken Semera, the 2<sup>nd</sup> defendant/respondent on the 6<sup>th</sup> August 2018.

6. On the 21/3/2017 the court directed that the application be canvassed by way of written submissions.

#### **The Plaintiff's/Application's Submissions**

7. The contempt application arises from the court order of 7<sup>th</sup> January 2015. The defendants/respondents have adamantly and knowingly denied the implementation of the court order. The plaintiff/applicant is the registered owner of the parcel of land known as Kajiado/Kisaju/319 which borders Kajiado/Kisaju/318 owned by the defendants. There is no doubt that a court order exists that ought to be obeyed.

8. She has relied on the cases of **Basil Criticos vs Attorney General & 8 Others [2012] eKLR; Teachers Service Commission vs Kenya National Union of Teachers & 2 Others [2013] eKLR; Kenya Tea Growers Association vs Francis Atwoli and 5 Others [2012] eKLR; Econet Wireless Ltd vs Minister for Information & Communication of Kenya & Another [2005] eKLR and Shimmers Plaza Limited vs National Bank of Kenya Limited [2015] eKLR.**

#### **The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants'/Respondents' Submissions**

9. The orders of 7<sup>th</sup> January 2015 were duly served on the Land Registrar Kajiado. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants/respondents were never personally served with the said orders nor were their advocates served. Neither of them have been found to be in contempt of court to warrant the orders sought. No evidence of disobedience of the court order has been tendered before this Honourable Court. They have relied on the cases of **Chiltern District council Vs Keane [1985] 1WLR 619; Osero & Co. Advocates vs Labhsons Limited [2006] e KLR and Sambaza Productions Limited vs Esther Muthoni Muthee Nairobi HCA No. 474 of 2002.**

10. No order will normally be issued or committal of a person unless he has been personally served with the order, and disobedience of which is said to institute contempt. The 2<sup>nd</sup> and 3<sup>rd</sup> respondents were not personally served and neither was their advocate. They have relied on the case of **Nyamodi Ochieng Nyamogo & another vs Kenya Posts & Telecommunication Corp (Civil Application No. 264 of 1993)** and **Loise Margaret Waweru vs Stephen Njuguna Githuri Civil Appeal No 198 of 1998.**

11. It has not been shown to the court how the 2<sup>nd</sup> and 3<sup>rd</sup> respondents were identified as having been at the premises on the day of the alleged contempt. The Land Registrar and the surveyor have not sworn affidavits specifically identifying the 2<sup>nd</sup> and 3<sup>rd</sup> respondents as having been present and which action they look that can be said to be contemptuous of the order of this honourable court.

12. In case of civil contempt, the applicant must prove "a clear and unequivocal command and an equally clear and undoubted disobedience."

The standard of proof is higher than the standard in civil cases. This power to commit a person to jail, must be exercised with utmost care, and exercised only as a last resort. They have also relied on the cases of **Mutitika vs Baharini Farm Ltd Civil Application No. Nai 24 of 1985; Godfrey Kamau Kimani vs Thomas Wambura Mombasa Misc. 956 of 2011 which quoted with approval, the words of Lord Denning in Re Bramble Limited [1970] 1 Ch 128.** They urge that the application be dismissed with costs to the 2<sup>nd</sup> and 3<sup>rd</sup> respondents.

13. I have considered the notice of motion dated 5<sup>th</sup> December 2016, the affidavit in support and the annexures. I have also considered the replying affidavit. I have considered the written submissions of counsel and taken into account the relevant provisions of law. The issue for determination are:-

*(i) Whether or not the alleged contemnours were served with the said court order.*

*(ii) Whether or not the alleged contemnours are guilty of contempt of the court order and what orders should this court make in the circumstances.*

14. It is the plaintiff's/applicant's case that the defendants/respondents have adamantly and knowingly denied the implementation of the orders issued on 7<sup>th</sup> January 2015. The said orders are:-

*“(i) That Machakos HCCC No. 334 of 2012 and Machakos HCCC No 335 of 2012 be consolidated.*

*(ii) That the District Land Registrar and Surveyor, is hereby ordered to visit the property and establish whether:*

*(a) Any of the defendants residential houses are within the suit property.*

*(b) There is a fenced temporary structure within the suit property.*

*(c) The appropriate age of any structure within the suit property”.*

15. By a letter dated 30<sup>th</sup> June 2016, the Land Registrar, Kajiado, N. D. Nyambaso wrote to the Deputy Registrar High Court of Kenya at Machakos.

**“REF: ELC 334 of 2012**

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*Reference is hereby made to the above matter, and in particular the court order issued on 7<sup>th</sup> January 2015. I wish to confirm to the Hon. Court that on 15<sup>th</sup> April 2015 one of our Land Registrars by the name Irene Kamau and a surveyor by the name Loise Kiholia visited the land Parcel Number Kajiado/Kisaju/319 with a view of carrying out the exercise as stated in your order.*

*I wish to now report back to the Hon. Court that your said orders would not be carried out as directed because the respondents in this case became hostile and violent. The officers from the lands office and the plaintiff were denied access to the said land. The Hon. Court may give further orders and or directions on this matter.*

**N. D. Nyambaso**

**Principal Land Registrar**

**Kajiado”**

16. It is the 2<sup>nd</sup> and 3<sup>rd</sup> defendants’/respondents’ case that they were not personally served with the said orders of 9<sup>th</sup> January 2015 nor were their advocates served. Further that the Land Registrar and Surveyor have not sworn affidavits to confirm that the 2<sup>nd</sup> and 3<sup>rd</sup> respondents were present and the actions they took in wilful disobedience of the court order.

17. I have gone through the notice of motion dated 5<sup>th</sup> December 2016. The same is supported by the affidavit of Catherine Wambui Waruinge the plaintiff/applicant herein.

In paragraph 15 she depones:-

***“That I am aware that the court order of 7<sup>th</sup> January 2015 was served upon the Land Registrar Kajiado to ensure compliance of the second limb of the order of 7<sup>th</sup> January 2015”.***

This confirms that the orders of 7<sup>th</sup> January 2015 were served on the Land Registrar Kajiado. It is not in doubt that there is nothing attached to the supporting affidavit of the plaintiff/applicant confirm that the orders were served on the 2<sup>nd</sup> and 3<sup>rd</sup> defendants/respondents and the rest of the defendants/respondents.

18. It is my humble view that the said Irene Kamau and Loise Kiholia, ought to have sworn affidavits to demonstrate the presence of the said 2<sup>nd</sup> and 3<sup>rd</sup> defendants/respondents on 15<sup>th</sup> April 2015 in the suit property and what actions they undertook to defeat the implementation of the court orders. Failure to have them swear an affidavit is fatal to this application. I have seen the photographs attached to the affidavit in support. The same shows a group of people appearing to be in discussion. One can also see a police officers in uniform. They do not support the Land Registrars assertion that there was violence and hostility.

19. The upshot of the matter is that the court order of 7<sup>th</sup> January 2015 was not served on the 2<sup>nd</sup> and 3<sup>rd</sup> defendants/respondents or any of the other defendants/respondents personally. It was incumbent upon the plaintiff/applicant to prove that they (defendants/respondents) had knowledge of such an order. Though the 2<sup>nd</sup> and 3<sup>rd</sup> defendants/respondents’ counsel was in court when the orders was granted, there is no indication that the alleged contemnors were present. The court cannot be sure that the counsel notified them.

20. I find that the contemnors herein had no knowledge of the court orders issued on 7<sup>th</sup> January 2015. I am guided by the holding in **Justus Kariuki Mate & Another vs Martin Nyaga Wambora & Another CA Civil Appeal No 24 of 2014** where it was held that:

***“It is important that the court satisfies itself beyond any shadow of doubt that the person alleged to being in contempt committed the act complained of with full knowledge or notice of the existence of the order of the court forbidding it. The threshold is quite high as it involves possible deprivation of personal liberty”.***

21. I am also persuaded by the holding of Emukule J in Mombasa **HC Misc Application No 20 of 2015 Republic Exparte Farid Mohammed Al Maary & 2 Others V County Government of Mombasa** where the Court observed that:

***“For purposes of contempt proceedings the responsibility attaches to an individual or individual officials and not every official of the respondent”.***

It was therefore important for the applicant to ensure that the contemnors were served personally.

22. The other question is whether the contemnors are guilty of contempt of the court order. The standard of proof in matters of contempt is well settled. The Court of Appeal in **Civil Appeal No. 39 of 1990 Refrigeration & Kitchen Utensils Limited vs Gulab Chand Popattal Shah & Others** in approving the standard of proof in contempt cases as set out in the case of **Gatheru Mitika & Others vs Bahari Farm Limited Civil Appeal NO 24 of 19954** held:

***“that in case of alleged contempt the breach for which the contemnor is cited, must not only be precisely defined but proven on standard which is higher than proof on a balance of probabilities but not as high as proof beyond reasonable doubt. This is because the charge of contempt of court is an offence of criminal character and a party may lose his liberty”.***

23. It would therefore mean before a court cites a contmnor for contempt there must be sufficient evidence to prove that he/she had knowledge of the court order and has wilfully disobeyed it. It was incumbent upon the applicant to prove that the acts complained of actually occurred and that the acts were committed by the contemnors herein.

As is stated earlier the photographs attached do not demonstrate any hostility or violence neither do they confirm the presence of the contemnors. They are inconclusive.

24. All in all, I find that the applicant has failed to discharge her burden as required by law. I find that the application herein lacks merit and the same is dismissed. The costs do abide the outcome of the main suit.

It is so ordered.

**Dated, signed and delivered in Nairobi on this 21<sup>ST</sup> day of NOVEMBER 2018**

.....

**L. KOMINGOI**

**JUDGE**

**In the presence of:-**

.....Advocate for the Plaintiff

.....Advocate for the Defendants

.....Court Assistant