



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ELCCASE NO. 2146 OF 2007**

**EMBALANDS INVESTMENTS LTD.....PLAINTIFF**

**VERSUS**

**DAVID OLOO MIRUKA.....1<sup>ST</sup> DEFENDANT**

**PIUS KIMANI.....2<sup>ND</sup> DEFENDANT**

**VULUKU NEBERT.....3<sup>RD</sup> DEFENDANT**

**AND**

**YUVINALLIS NYABUTO OMOSA.....1<sup>ST</sup> CONTEMNOR**

**BEATRICE NYAMBURA KARIUKI.....2<sup>ND</sup> CONTEMNOR**

**RULING**

On 28<sup>th</sup> August 2014, Mutungi J. made orders on the following terms as is material to the proceedings before the court:-

*“THAT the parties do observe and maintain the present status quo. No party shall sell, transfer or dispose and/or construct on the suit property pending the hearing and determination of the main suit.”*

The order was extracted and issued on 1<sup>st</sup> September, 2014 with a penal notice. What I now have before me is an application by the 1<sup>st</sup> and 3<sup>rd</sup> Defendants brought way of amended Notice of Motion dated 28<sup>th</sup> April, 2015 seeking the following orders:-

1. *THAT the honourable court be pleased to certify this matter as urgent, service thereof be dispensed with and the same be heard ex-parte in the first instance.*

2. *THAT pending the hearing and determination of this application, an order do issue directing the officers commanding Embakasi Police Station (OCS) in Nairobi County to ensure compliance by the plaintiff/respondent and its agents and the contemnors herein above – named with this honourable court’s status quo orders issued on 28<sup>th</sup> August, 2014.*

3. *THAT pending the hearing and determination of this application the plaintiff/respondent be restrained from interfering with the defendants/applicants’ possession of the suit property namely,*

Plot Number 13416, within Embakasi area (hereinafter referred to only as “**the suit property**”), commencing and/or continuing with any development on the aforesaid property in breach of this honourable court’s orders of status quo issued on 28<sup>th</sup> August, 2014.

4. THAT the application be served for inter-parties hearing on priority basis, on a date to be appointed by this honourable Court.

5. THAT the plaintiff/respondent be ordered to deposit a sum of Kshs.100,000/= (One Hundred Thousand Shillings) into this honourable court as security for the damage and loss caused to the defendants/applicants by the plaintiff’s/respondent’s breach of this honourable court’s orders issued on 28<sup>th</sup> August, 2014.

6A. THAT the contemnors hereinabove named YUVINALIS NYABUTO OMOSA and BEATRICE NYAMBURA KARIUKI, who are the directors of the plaintiff company be arrested and detained in prison for a period of six (6) months or such other period as this honourable court may deem fit to order for disobeying this honourable court’s orders issued on 28<sup>th</sup> August, 2014.

7. THAT the plaintiff and the contemnors herein be ordered to demolish any structures erected on the suit property subsequent to orders herein and/or restore the status quo pending the hearing and determination of this application.

8. THAT the plaintiff and the contemnors herein be ordered to demolish any structures erected on the suit property to the orders herein and/or restore the status quo pending the hearing and determination of the suit.

9. THAT at the costs of the application be borne by the plaintiff/respondent.

10. THAT this honourable court do make any other and/or further order as it may deem fit and just.

The 1<sup>st</sup> and 3<sup>rd</sup> Defendants’ application was brought on the grounds that the plaintiff whose directors are Yuvenalis Nyabuto Omosa and Beatrice Nyambura Kariuki (hereinafter referred to as “the 1<sup>st</sup> and 2<sup>nd</sup> alleged contemnors”) has disobeyed the order of status quo that was made by Mutungi J. on 28<sup>th</sup> August, 2014. The 1<sup>st</sup> and 3<sup>rd</sup> defendants’ (hereinafter referred to as “the applicants”) have contended that the said order was served upon the plaintiff and that the plaintiff’s advocate was also in court when the order was made. The applicants have contended that in breach of the said order, the plaintiff invaded the suit property on 2<sup>nd</sup> August 2014 and burnt down the structures belonging to the applicants. The applicants have contended further that on 7<sup>th</sup> August 2014 a director of the plaintiff accompanied by a group of people armed with crude weapons invaded and forcefully entered the suit property and started demolishing the applicant’s premises.

The applicants have contended that their pleas to the Officer Commanding Embakasi Police Station to intervene and stop the plaintiff’s invasion did not bear any fruit. The applicants have contended that following the said invasion and forceful entry onto the suit property, the plaintiff has commenced construction on the suit property in defiance of the order of 28<sup>th</sup> August 2014 aforesaid. The applicants have attached to their affidavit in support of the application among others, a copy of the order made on 28<sup>th</sup> August 2014 said to have been disobeyed, photographs said to have been taken on the suit property evidencing the destruction that was carried by the plaintiff and construction works being undertaken by the plaintiff on the suit property.

The applicants’ application was opposed by the plaintiff and the alleged contemnors through separate replying affidavits. The 1<sup>st</sup> alleged contemnor, Yuvenalis Nyabuto Omosa swore an affidavit on 29<sup>th</sup> April 2015 in opposition to the application. In his affidavit, the 1<sup>st</sup> alleged contemnor stated that he had not been formally joined in this suit and that there was no evidence that he was served with the order which

he is alleged to have disobeyed. The 1<sup>st</sup> alleged contemnor stated further that the applicants have not given the particulars of the property in respect of which the orders of demolition are sought. The 1<sup>st</sup> alleged contemnor stated that Plot No. 13416/15 and Plot No. 13416/16 belong to him and that the same are not in dispute in this suit. The 1<sup>st</sup> alleged contemnor denied that he was served with the order made by Mutungi J. herein on 28<sup>th</sup> August 2014 which required the parties to this suit to maintain status quo. He stated that he has never been a party to this suit and that the said order for maintenance of status quo has never been served upon him personally or through his advocate. He stated that the property which is the subject of this suit was subdivided and each of the directors of the plaintiff issued with separate titles in respect of the portions of the said property. He reiterated that Plot No. 13416 which is a portion of the original parcel of land is owned by him and that no claim has been lodged in respect thereof from which an order can be issued restraining him from dealing therewith. The 1<sup>st</sup> alleged contemnor claimed that the defendants' defence and counter-claim filed herein is based on forgery in that the defendants/applicants could not purport to have acquired L.R No. 13416 as at the year 2009 when the said parcel of Land came into existence in the year 2012. The 1<sup>st</sup> alleged contemnor contended that the applicants had not met the threshold required to punish a party for contempt of court.

The 2<sup>nd</sup> alleged contemnor opposed the application through a replying affidavit sworn on 11<sup>th</sup> May 2015. The 2<sup>nd</sup> alleged contemnor stated that she had not been formally joined in this suit as a party and that the order alleged to have been disobeyed by her was never served upon her. The 2<sup>nd</sup> alleged contemnor denied disobeying the said order which was made by the court on 28<sup>th</sup> August 2014. The 2<sup>nd</sup> alleged contemnor stated that the suit property does not belong to the plaintiff and that the applicants had not mentioned the property in respect of which demolition orders have been sought. The 2<sup>nd</sup> alleged contemnor reiterated that she did not disobey the order for maintenance of status quo. She maintained that she has never been a party to this suit and that the order alleged to have been disobeyed by her was not served upon her or her advocates.

The application was argued by way of written submissions. I have considered the application and the affidavits which were filed by the alleged contemnors in opposition thereto. I have also considered that the submissions by the respective advocates for the parties. The law on contempt of court is now well settled. An applicant seeking the punishment of a person for disobeying a court order must establish that the alleged contemnor knew of the court order alleged to have been disobeyed which knowledge may be gained through service of the order or derived from other sources. The onus was upon the applicants herein to demonstrate that; this court issued an order, the order restrained the alleged contemnors from doing the acts complained of, the alleged contemnors knew of the order and that they disobeyed the same. Contempt of court proceedings are quasi criminal in nature because the contemnor may lose his liberty if found guilty of the contempt complained of. In view of this, the standard of proof of contempt is higher than proof on a balance of probabilities. See, the holding in the court of appeal case of, Mutitika -vs- Baharini Farm Ltd. (1985) KLR 227, where the court stated that the standard of proof in contempt proceedings must be higher than proof on a balance of probabilities, and almost but not exactly, beyond reasonable doubt. It follows therefore that for the applicants to succeed in the present application, they have to satisfy the court to a degree beyond a balance of probability that the alleged contemnors disobeyed the order of the court made herein on 28<sup>th</sup> August 2014.

The alleged contemnors are said to be directors of the plaintiff. It is not disputed that on 28<sup>th</sup> August, 2014, Mutungi J. made an order that the status quo be maintained in relation to the suit property which from the order meant that neither party was to sell, transfer dispose of and/or carry out any construction on the suit property pending the hearing and determination of the suit. According to the plaint filed herein on 25<sup>th</sup> September 2007, the suit property is L.R No. 13416. The applicants have contended that while this suit was pending, the alleged contemnors in their capacities as directors of the plaintiff invaded the suit property on 2<sup>nd</sup> August, 2014 and 7<sup>th</sup> August, 2014, set on fire and demolished the structures which the applicants had put up and thereafter commenced construction thereon. The applicants have exhibited photographs said to have been taken on the suit property after the acts complained of showing the destruction allegedly carried out by the plaintiff and the construction which the plaintiffs is said to be carrying out on the suit property contrary to the court order aforesaid.

The applicants have contended that the order of 28<sup>th</sup> August 2014 was duly served upon the plaintiff and that the plaintiff was also represented in court by an advocate when the order was made. The applicants have contended that the disobedience of the said order by the Plaintiff was deliberate. The applicants have contended that as directors of the plaintiff, the alleged contemnors are the proper parties to be punished for contempt committed by the Plaintiff. The applicants have cited the cases of Christine Wangari Gachege vs. Elizabeth Wanjiru Evans & 11 others (2014) eKLR, Shimmers Plaza Ltd. vs. National Bank of Kenya Ltd. (2015) eKLR and Gatimu Farmers Company vs. Geoffrey Kagiri Kimani & Others (2005) eKRL in support of their submission that knowledge of a court order supersedes personal service of the order which is no longer mandatory before contempt can be proved.

In their submissions in reply, the plaintiff and the 2<sup>nd</sup> alleged contemnor submitted that neither the plaintiff nor the 2<sup>nd</sup> alleged contemnor is the owner of L.R No. 13416 in respect of which the order in question was made and as such they could not have disobeyed the said order. The plaintiff and the 2<sup>nd</sup> alleged contemnor have contended that the said parcel of land is non-existent. The plaintiff and the 2<sup>nd</sup> alleged contemnor have contended further the applicants' application is incompetent for want of leave and personal service which are mandatory under order 52 of the Rules of the Supreme Court of England. The plaintiff and the 2<sup>nd</sup> alleged contemnor have submitted further that the order alleged to have been disobeyed was not served upon them with a penal notice. They have submitted further that the status quo that was to be maintained was not defined in the said order and as such it is not possible to point out with precision the acts alleged to constitute contempt of the said order. The plaintiff and the 2<sup>nd</sup> alleged contemnor have submitted that the photographs submitted to court are worthless and do not in any way assist the applicants' case. They have submitted that the applicants have not met the standard of proof required to punish for contempt. The plaintiff and the 2<sup>nd</sup> alleged contemnor have submitted that the acts alleged to constitute contempt are alleged to have been committed on 2<sup>nd</sup> August 2014 and 7<sup>th</sup> August 2014 while the order alleged to have been breached was made on 28<sup>th</sup> August 2014. They have submitted that the plaintiff and the 2<sup>nd</sup> alleged contemnor could not have breached the order of 28<sup>th</sup> August 2014 before it was made.

In his submissions, the 1<sup>st</sup> alleged contemnor adopted the submissions by the Plaintiff and the 2<sup>nd</sup> alleged contemnor. The 1<sup>st</sup> alleged contemnor submitted that even if knowledge of the order is sufficient to prove contempt, he was not aware of the order which he is alleged to have breached. The 1<sup>st</sup> alleged contemnor submitted that L.R No. 13416 which is the subject of the contempt application ceased to exist several years ago following the sub-division thereof and that he was away during the time when he is alleged to have disobeyed the subject court order.

From the material before me, I am not satisfied that the applicants have proved the charge of contempt levelled against the alleged contemnors. According to the applicants, the orders which are said to have been disobeyed were made on 28<sup>th</sup> August 2014. In paragraphs 5 and 7 of the grounds in support of the application and paragraphs 8 and 10 of the affidavit in support of the application, the respondents are alleged to have disobeyed the said order on or about 2<sup>nd</sup> August 2014 and on 7<sup>th</sup> August 2014. I am in agreement with the submission by the respondents/alleged contemnors that they could not have disobeyed an order which was not in existence when they are alleged to have disobeyed the same. Again, whereas, I am in agreement with the applicants' contention that personal service of an order is now not a condition precedent for proof of contempt of court, the applicants had a duty to demonstrate that the alleged contemnors had knowledge of the order. I have noted that the alleged contemnors were not parties to this suit as at the time the orders said to have been disobeyed were made. The applicants have sought their punishment on account of their position as directors of the plaintiff. The applicants have argued that since the plaintiff's advocate was in court when the order was made, the plaintiff and its directors must be deemed to have known of the order. In my view, I don't think that this argument has any merit. The advocate who was present in court was acting for the plaintiff as a legal entity. He was not acting for the alleged contemnors. I am of the view that it would be farfetched to say that since the said advocate was aware of the order, the directors of the plaintiff which he was representing must also be taken to have had knowledge of the order. I am in agreement with the applicants that where a body corporate has disobeyed an order of the court the persons to be cited for contempt are its officers such as its directors. This is

however not to say that a body corporate and its officers or directors are one and the same thing. I am of the opinion that the officers of a body corporate would only be held liable for contempt committed by a body corporate where the order which has been disobeyed was brought to the attention of the said officers or directors in their capacity as such officers or directors and they defied the same. I am of the view that it would be overreaching to say that where an advocate representing a body corporate is aware of the existence of a court order, the directors or officers of the said body corporate are also deemed to be aware of the same order.

As I have stated earlier, contempt of court must be proved to a degree beyond a balance of probabilities. The onus was upon the applicants to discharge this burden. I am of the view that they have failed to do so. They have failed to demonstrate that the alleged contemnors were served with the subject court order or that they had knowledge of the same. The applicants have also failed to prove that the said court order was disobeyed by the alleged contemnors. The order that was made by the court on 28<sup>th</sup> August 2014 was for the maintenance of status quo in respect of L.R No. 13416 which is the suit property. The applicants were under a duty to demonstrate that the acts complained of were committed by the plaintiff or the alleged contemnors on the suit property namely, L.R No. 13416. The applicants have placed evidence before the court showing that some premises were demolished and that construction works are being undertaken. There is no evidence that the said demolition was carried out on the suit property and that the plaintiff or the alleged contemnors were involved in the same. The plaintiff and the alleged contemnors have denied that the acts complained took place on the suit property which they claimed is no longer in existence. They have also denied that they were involved in the acts complained of. Apart from the photographs exhibited by the applicants showing demolished structures and construction works being underway, no evidence was placed before the court to show who undertook the said demolition, the person carrying out the construction and the property on which these activities took or are taking place. It is also not clear as I have pointed out above whether the activities complained of took place before or after the order of 28<sup>th</sup> August 2014.

For the foregoing reasons, I find no merit in the amended Notice of Motion dated 28<sup>th</sup> April 2015. The same is accordingly dismissed with costs to the Respondents.

**Delivered and Dated at Nairobi this 24<sup>th</sup> day of January, 2017**

**S. OKONG'O**

**JUDGE**

**In the presence of**

Mr. Otenyo	for the Plaintiff
Mr. Mwendwa	for the 1 <sup>st</sup> and 3 <sup>rd</sup> Defendants
N/A	for the 2 <sup>nd</sup> Defendant
N/A	for the 1 <sup>st</sup> Alleged Contemnor
Mr. Omino	for the 2 <sup>nd</sup> Alleged Contemnor
Kajuju	Court Assistant