



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**  
**AT MOMBASA**  
**CIVIL SUIT NO 44 OF 2011 (OS)**

- 1. ABDALLA MGUTE.....1<sup>ST</sup> PLAINTIFF**  
**2. FELIX KATANA.....2<sup>ND</sup> PLAINTIFF**  
**3. PASTOR HARRISON NJAGI & 159 OTHERS.....3<sup>RD</sup> PLAINTIFF**

**VERSUS**

- 1. MOHSIN BIN SALEH SHERMAN.....1<sup>ST</sup> DEFENDANT**  
**2. SAID BIN SALEH SHERMAN.....2<sup>ND</sup> DEFENDANT**  
**3. HUSSEIN BIN SALEH SHERMAN.....3<sup>RD</sup> DEFENDANT**  
**4. OMAR BIN SALEH SHERMAN.....4<sup>TH</sup> DEFENDANT**

**AND**

- 1. MOSES MWAKIO**  
**2. MOHAMED TSUMO**  
**3. CLEMENT GITAHU WANJOHI.....CONTEMNORS**

**RULING**

1. By a Notice of Motion dated 28<sup>th</sup> September 2015 and amended on 2<sup>nd</sup> March 2016 and re-amended on 24<sup>th</sup> October 2016 the Plaintiffs/Applicants are seeking for orders:

**1) Spent**

**2) THAT the Contemnors herein, to wit, Moses Mwakio, Mohamed Ali Tsumo and Clement Gitahi Wanjohi be committed to jail for a period of six (6) months for being in contempt of the orders of this Honourable Court made on 30<sup>th</sup> March, 2011.**

**3) THAT all the properties of the Contemnors herein to wit, Moses Mwakio, Mohamed Ali Tsumo and Clement Gitahi Wanjohi be attached for disobeying the order of this Honourable**

Court made on 30<sup>th</sup> March 2011 and 29<sup>th</sup> February 2011.

**4) THAT an order of Temporary Injunction be granted restraining the Contemnors by themselves, their agents, assigns and/or employees or anyone claiming in or through them or otherwise howsoever from constructing, developing, getting into, selling or offering to sell, disposing off, sub-dividing, pledging, entering into, remaining in or in any other manner interfering with the Plaintiffs ownership and quiet possession and enjoyment of the property known PLOT NO.224/MN II MTOPANGA together with the building and/or improvements, trees, vegetation and/or crops thereon pending the inter partes hearing and further pending the hearing and determination of this suit or further orders of this Honourable Court.**

**5) THAT an order of Mandatory Injunction be granted compelling the Contemnors to forthwith pull down all the structures erected in the Suit Premises by themselves, their agents, assigns and/or employees or anyone claiming in or through them and to remove all the material, pebbles, rubbish brought by the Contemnors to property known as PLOT NO.224/MN II MTOPANGA and leave the same the way the property was prior to their illegal and/or unlawful actions herein failing which the Applicants be allowed to pull the same down at the Contemnors' costs.**

**6) THAT this Honourable Court be pleased to make an order that the OCPD, Kisauni Division together with officers under him or her do provide services, security and/or assist in enforcing the orders herein.**

**7) THAT costs of this application be awarded to the Applicants in any event.**

2. The Application is supported by the Affidavit of Abdalla Mgute sworn on 28<sup>th</sup> September 2015, a Further Affidavit by Abdalla Mgute sworn on 9<sup>th</sup> March 2016, a Supplementary Affidavit of Pastor Harrison Njagi sworn on 17<sup>th</sup> May 2016 and another Supplementary Affidavit of Pastor Harrison Njagi sworn on 2<sup>nd</sup> November 2016. The Application is also based on the grounds in the face of the Motion.

3. The Application is brought pursuant to the provisions of Section 1A, 1B, and 3A of the Civil Procedure Act and Order 40 Rules 1, 2, 3, 4, 9 and 10 of the Civil Procedure Rules. The Applicants aver that on 30<sup>th</sup> March 2011 this Honourable Court (J. B. Ojwang J as he then was) made an order, inter alia, of Temporary Injunction directing the plaintiffs/respondents by themselves or their servants or agents or otherwise howsoever restraining them from taking possession of the suit property, erecting more structures and/or dealing with the land known as sub division NO.PLOT 224/MN /II pending hearing of the Application dated 28<sup>th</sup> March 2011. That the said orders were extended from time to time by consent of the Advocates for the parties and are still in force to date. That the orders were duly extracted and served upon the 1<sup>ST</sup> Contemnor in June 2013 and served on Pastor Harrison Njagi on 23<sup>rd</sup> May 2015, at the office of OCS Kiembeni Police Station in the presence of the OCS Kiembeni Police Station and at other times before then. The Applicants further aver that the said orders were served upon the second and third Contemnors in the year 2012. It is the Applicants contention that the Contemnors herein have deliberately committed actions which are in clear breach of the said orders by constructing, sub dividing, fencing off, purporting to lay beacons and erecting buildings on the Suit Properties. That the Applicants attempts to stop them were met with threats prompting the Applicants to report the matter to the police. The Applicants aver that the dignity of the court has to be preserved and upheld at all times and therefore want the court to punish the Contemnors herein for contempt.

4. The 1<sup>st</sup> and 2<sup>nd</sup> Contemnors opposed the Application and filed grounds of opposition dated 6<sup>th</sup> December 2016. It is the 1<sup>st</sup> and 2<sup>nd</sup> Contemnors' contention that the Application is misconceived and non-meritorious, frivolous, scandalous and an abuse of the process of the court. They further contend that the Applicant is bad in law and incompetent and ought to be dismissed with costs.

5. The Advocates for the Applicants filed their submissions on 21<sup>st</sup> February 2017 and 1<sup>st</sup> and 2<sup>nd</sup>

Contemnors filed their Written Submissions on 13<sup>th</sup> March 2017. Mr. Tindika learned Counsel for the Applicants briefly highlighted on his Submissions.

6. I have duly considered the Application, the Affidavits on record, the Submissions filed and authorities cited. The power of the court to punish is governed by the Contempt of Court Act, 2016. Under the said Act, contempt of Court includes willful disobedience of any judgment, decree, direction, order or other process of a court. The standard of proof in matters of contempt of court is well settled. It must be higher than proof on a balance of probabilities but not exactly beyond reasonable doubt.

7. In this, case, it is the applicants' contention that the Contemnors were duly served with order issued by the court on 30<sup>th</sup> March 2011 and 29<sup>th</sup> February 2016. I have looked at the Notice of Motion dated 28<sup>th</sup> September 2015 and the order emanating therefrom issued on 30<sup>th</sup> March 2011. Paragraph 2 of the said Application and order clearly state as follows:

*“ 2 That an order of Temporary Injunction be and is hereby issued directing the Plaintiffs/Respondents by themselves or their servants or agents or otherwise howsoever be restrained from taking possession of Suit Property, erecting more structures and/or dealing with the land more particularly known as sub division **NUMBER PLOT 224/MN/II** pending hearing of this Application”*

It is apparent that the said order was directed at the Plaintiffs. From the pleadings, the Plaintiffs are listed as 1) Abdalla Mgute 2) Felix Katana and 3) Pastor Harrison Njagi and 159 others. I have gone through the names of the Plaintiffs who have been listed in the pleadings. The names of the Contemnors are not among those who are listed as plaintiffs. The order was directed at the Plaintiffs. In contempt cases, the breach for which the Contemnor is cited must be precisely defined. The order must also be couched in clear and unambiguous terms. This is because the charge of contempt of court is an offence of criminal character and a party may lose his liberty. The Application herein is directed at the Contemnors whereas the order alleged to have been disobeyed is directed at the plaintiffs. This raises doubts as to who in particular is the alleged Contemnor. I must satisfy myself beyond any shadow of doubt that the Contemnors herein disobeyed the order of 30<sup>th</sup> March 2011.

8. From the evidence on record, I cannot safely hold that the orders are directed at the Contemnors neither can I safely hold that they were properly served with the orders. In the grounds in support of the Application, the Applicants allege that the Contemnors were served with the Court Order in the year 2012 and in June 2013. In my view, these allegations are too general and not specific, clear and precise as required. The Applications have not given specific dates when the Contemnors trespassed into the Suit Premises and carried out the acts complained of. Moreover the order restrained the Plaintiffs/Respondents from among others, erecting more structures in the suit land. This was an admission that some structures were already erected on the Suit Premises at the time the order was issued. It was therefore incumbent upon the Applicants to distinguish between the structures that had already been erected and new structures put up after issuance and service of the order. The evidence on record also allude to invasion of the Suit Property by several other people.

9. In my considered view, and having taken into consideration the evidence on record and the submissions made, I am not satisfied that the Applicants have proved the alleged contempt on the part of the Contemnors. Consequently, I do find that the Application lacks merit and hereby dismiss it.

Each party to bear their own costs.

Dated signed and delivered at Mombasa this 7<sup>th</sup> day of December 2017

**C. YANO**

**JUDGE**