



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**  
**AT MALINDI**  
**ELC CIVIL CASE NO.5 OF 2015**

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

**=VERSUS=**

**1. WARSAME MOHAMED ISAAK**

**2. MOHAMED YUSUF HORAR**

**3. MOHAMED ALI MAHAT**

**4. NASTE DAUD**

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

**R U L I N G**

1. What is before me is the Application by the Plaintiff dated 3<sup>rd</sup> September 2015 seeking for the following orders:

**(a) That Messrs. WARSAME MOHAMED ISSAK, MOHAMMED YUSUF HORAR, MOHAMED ALI MAHAT and NASTE DAUD be summoned to personally attend court to show cause why they should not be punished for disobeying the court orders of 9<sup>th</sup> March 2015.**

**(b) That Messrs. WARSAME MOHAMED ISSAK, MOHAMMED YUSUF HORAR, MOHAMED ALI MAHAT and NASTE DAUD the 1<sup>st</sup> to 4<sup>th</sup> Defendants herein be punished for contempt of court by way of committal to civil jail for a period of six (6) months without an option of fine for disobeying the Honourable Court's order issued on 9<sup>th</sup> March 2015.**

**(c) That the contemnors do bear the costs of this Application.**

2. The Application is premised on the grounds that on 26<sup>th</sup> July 2015, this court restrained the 1<sup>st</sup> – 4<sup>th</sup> Defendants from interfering with the rights of the Plaintiff over the suit property; that the 1<sup>st</sup> to 4<sup>th</sup> Defendants have blatantly disobeyed the said orders and continue to do so unabated to the prejudice of the Plaintiff's rights and that the 1<sup>st</sup> to 4<sup>th</sup> Defendants have invaded the suit property,

- grazed their livestock therein and harassed his agents.
3. The Plaintiff's administrator deponed that the Defendants' servants invaded the suit property and abducted the Plaintiff's agent and detained some of the Plaintiff's guard including a motorcycle registration number KMRN 008Q.
  4. In their Replying Affidavit, the 3<sup>rd</sup> Defendant deponed that they have never disobeyed the orders of this court; that they are operating within the ambit of their lease and that demarcation has not been done and boundaries have not been established by ADC, 5<sup>th</sup> Defendant.
  5. The advocates made brief oral submissions which I have considered.
  6. This is a second time the Plaintiff is filing an Application seeking to cite the Defendants for contempt.
  7. In the Application dated 9<sup>th</sup> February 2015, the Plaintiffs right for orders similar to the orders in the current Application. In the Ruling of 24<sup>th</sup> April 2015, this court held as follows:

**18. Although the order of 12<sup>th</sup> January 2015 was clarified by this court on 26<sup>th</sup> January 2015, there is no evidence before me to show that by the time the current Application was filed, the 1<sup>st</sup> to the 4<sup>th</sup> Defendants had been furnished with documents to show the extent of the 95,000 acres so as to move their cows out of the said land.**

**19. It is for that reason that I decline to hold the 1<sup>st</sup> to the 4<sup>th</sup> Defendants in contempt of the orders of this court considering that they were to graze on a portion of the suit land.**

**20. Consequently, I dismiss the Plaintiff's Application dated 9<sup>th</sup> February, 2015 with costs.**

8. On 30<sup>th</sup> June, 2015, the court informed the parties that the orders of 9<sup>th</sup> March 2015 were in force and parties were at liberty to file an Application for contempt in case of disobedience.
9. On 9<sup>th</sup> March 2015, while the Ruling in respect to the first Application for contempt was pending, this court made the following order:

**“ In the meantime, the 1<sup>st</sup> – 4<sup>th</sup> Defendants to move out of 95,000 acres, if they are there, leased to the Plaintiff pending the outcome of this Application and the suit as per the consent recorded in court. The 5<sup>th</sup> Defendant (ADC) to lead the process of identifying the 1,000 acres that the 1-4th defendants are supposed to graze on. The County Commander to enforce this order.”**

10. The above order was premised on the deposition of the Company Secretary of ADC who deponed that LR NO. 14248 measures approximately 239,390 acres and that the 95,000 acres which had been leased out to the Plaintiff had not been demarcated. Counsel for ADC informed the court that the Plaintiff has never agreed with ADC the extent of the 95,000 acres that they were to utilise under the lease.
11. The Plaintiff's counsel has not informed me what has changed since 24<sup>th</sup> April 2015 when I dismissed its Application for contempt.
12. I have not been told if my orders of 9<sup>th</sup> March 2013 calling upon the 5<sup>th</sup> Defendant (ADC) to lead the process of identifying the 1,000 acres leased to the Defendants and 95,000 acres leased to the Plaintiff were ever complied with, and if not, the reasons thereof.
13. In the absence of evidence that the Plaintiff's 95,000 acres have been identified, I am unable to find with certainty that the 1<sup>st</sup>-4<sup>th</sup> Defendants did encroach on the 95,000 acres leased to the Plaintiffs.
14. If ADC, who were joined in these proceedings, are unwilling to identify the 95,000 acres leased to the Plaintiff, then that would be a different cause of action which the Plaintiff can pursue. However, for the purposes of this Application, I find and hold that no evidence has been placed before me to show the extent of the land that the Plaintiff has leased to enable me ascertain if

indeed the Defendants have encroached on it.

15.As was held in **Mutitika Vs Baharini Farm Limited (1985)KLR 229**, the standard of proof in contempt proceedings must be higher than proof on the balance of probabilities, almost but not exactly, beyond reasonable doubt. The Plaintiff has not discharged that burden.

16.For those reasons, I dismiss the Application dated 3<sup>rd</sup> September 2015 with no order as to costs.

**Dated and delivered in Malindi this 2<sup>nd</sup> day of October 2015.**

**O. A. Angote**

**Judge**