



REPUBLIC OF KENYA



**KENYA LAW**  
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**Asaa & 113 others v Rajab & 10 others (Environmental and Land Originating Summons 54 of 2020) [2024] KEELC 1309 (KLR) (13 March 2024) (Ruling)**

Neutral citation: [2024] KEELC 1309 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
ENVIROMENTAL AND LAND ORIGINATING SUMMONS 54 OF 2020**

**EK MAKORI, J**

**MARCH 13, 2024**

**IN THE MATTER OF:**

**PLOT NO. 102- MALINDI, LT 37, FOLIO 501, FILE 3420 INCLUDING: SUBDIVISION NO. 11020- MALINDI, LT 41, FOLIO 253, FILE 11407 SUBDIVISION NO. 102/1- MALINDI, LT 45, FOLIO 57, FILE 13087& SUBDIVISION NO, 11021- MALINDI, LT 45, FOLIO 58, FILE 13088 AND ANY OTHER SUBDIVISION THEREFROM**

**AND**

**IN THE MATTER OF:**

**AN APPLICATION FOR DECLARATION THAT THE PLAINTIFFS/APPLICANTS HAVE OBTAINED OWNERSHIP OF TWO THIRTY-FOUR DECIMAL FIVE (234.5) ACRES OR NINE FOUR DECIMAL NINE FOUR ONE EIGH (94.9418) HECTARES OR THEREABOUT OF THE ABOVE SAID PARCELS OF LAND BY WAY OF ADVERSE POSSESSION**

**BETWEEN**

**ASAA TABU ASAA & 113 OTHERS ..... PLAINTIFF**

**AND**

**MOHAMED SAID RAJAB ..... 1<sup>ST</sup> DEFENDANT**

**NAIMA ABDALLA ISSA ..... 2<sup>ND</sup> DEFENDANT**

**JAMAL H. MOHAMED ..... 3<sup>RD</sup> DEFENDANT**

**KULTHUM BINTI ABDALLA & 7 OTHERS ..... 4<sup>TH</sup> DEFENDANT**



## RULING

1. On 16<sup>th</sup> July 2021, this court (Olola J.) issued orders that:

“That this Honourable Court be and is hereby pleased to issue an order of temporary injunction restraining the Defendants/Respondents and/or any other person acting on their behalf from demolishing the Plaintiffs' already existing structures on the suitland, subdividing, selling, and transferring the suitland pending the hearing and determination of this suit.”

2. *Status quo* orders were issued and extended on 7<sup>th</sup> June 2022 and 13<sup>th</sup> July 2022, requiring each party to respect their existing abode and location on the ground until the outcome of this dispute.
3. It is alleged by the Applicants that the orders have already been violated by the Respondents who have sub-divided the land and sold it to 3<sup>rd</sup> contemnors who have commenced construction of house(s) as can be seen from the photographs attached. The act is on the portion occupied by the 67<sup>th</sup> Plaintiff Pastor Robert Charo Nyange who succumbed due to hypertension on 31<sup>st</sup> May 2023 due to the invasion of his land.
4. The incident was allegedly reported to the Police Station and the 3<sup>rd</sup> to 18<sup>th</sup> Contemnors were released at the intervention of the 1<sup>st</sup> to 2<sup>nd</sup> contemnors.
5. In rebuttal, the 3<sup>rd</sup> Respondent contends that on the contrary, the Applicants are the ones who are in contempt. The 114<sup>th</sup> Plaintiff Thomas Jefwa has proceeded and sold a portion 100 ft by 100 ft, part of the suit land described as Forum/102. The sale agreement is attached. A charge was brought against him for obtaining money by pretenses.
6. Henry Tamal Baya, (Plaintiff No. 113), George Kalama Nzaro (Plaintiff No. 48), Asaa Taabu Asaa (Plaintiff No. 5), Sharrif Karisa (Plaintiff No. 26), Anthony Ziro Waje (Plaintiff No. 18)- have all sold portions of the suit property or have in one way or another disobeyed the orders of this court either by selling off or constructing.
7. That on 5<sup>th</sup> August 2021, some of the Plaintiffs invaded Plots No. 16870, 16872, and 16873, dug holes, and started to subdivide the same. It was reported to the police and forcible detainer charges were brought against them.
8. The suit is argued to visit the scene and establish the correct *status quo*.
9. The issues for the determination of this Court are whether contempt has been to warrant the summoning of the alleged contemnors as against the contemnors and who should bear the costs of the application.
10. For contempt to succeed it has to be shown, that there were orders issued by this Court that were unambiguous and served on the parties who it has to be revealed willfully and deliberately failed or ignored to abide by the same.



11. Contempt aims to uphold the rule of law over the rule of the jungle. The proof and purpose have been explained by Mativo J. in the case of *Samuel M. N. Mweru & Others v National Land Commission & 2 Others* [2020] eKLR:

“40. It is an established principle of law that<sup>[45]</sup> in order to succeed in civil contempt proceedings, the applicant has to prove (i) the terms of the order, (ii) Knowledge of these terms by the Respondent, (iii). Failure by the Respondent to comply with the terms of the order. Upon proof of these requirements the presence of willfulness and bad faith on the part of the Respondent would normally be inferred, but the Respondent could rebut this inference by contrary proof on a balance of probabilities.<sup>[46]</sup> Perhaps the most comprehensive of the elements of civil contempt was stated by the learned authors of the book *Contempt in Modern New Zealand*<sup>[47]</sup> who succinctly stated:-

“There are essentially four elements that must be proved to make the case for civil contempt. The applicant must prove to the required standard (in civil contempt cases which is higher than civil cases) 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.
41. It is the last test in paragraph (d) above that warrants detailed consideration. Unfortunately, the applicant's counsel never addressed it at all. On the face of our transformative constitution with an expanded Bill of Rights, a pertinent question warrants consideration. Do constitutional values permit a person to be put in prison to enforce compliance with a civil order when the requisites are established only preponderantly, and not conclusively? In my view, a high standard of proof applies whenever committal to prison for contempt is sought because contempt of Court is quasi-criminal in nature.
42. Two principals emerge. The first is liberty: - it is basic to our Constitution that a person should not be deprived of liberty, albeit only to constrain compliance with a court order if reasonable doubt exists about the essentials. In this regard, I am not satisfied that wilful disregard of the court order has been established.
43. The second reason is coherence. It is practically difficult, and may be impossible, to disentangle the reasons why orders for committal for contempt are sought and why they are granted. in the end, whatever the applicant's motive, the court commits a contempt respondent to jail for Rule of Law reasons; and this high public purpose should be pursued only in the



absence of reasonable doubt. Accordingly, it is impermissible to find an alleged contemnor guilty of contempt in the absence of conclusive proof of the essential elements. The requisite elements must be established beyond reasonable doubt. In such a prosecution the alleged contemnor is plainly an ‘accused person.’

44. Third, accidental or unintentional disobedience is not sufficient to justify one for holding guilty of contempt. It is further relevant to bear in mind the settled law on the law of contempt that casual or accidental or unintentional acts of disobedience under the circumstances which negate any suggestion of contumacy, would amount to a contempt in theory only and does not render the contemnor liable to punishment.
45. It should be noted that developing the common law thus does not require the prosecution to lead evidence as to the accused’s state of mind or motive: once the three requisites mentioned earlier have been proved, in the absence of evidence raising a reasonable doubt as to whether the accused acted willfully and mala fide, all the requisites of the offence will have been established. And as O’Regan J pointed out, the power to imprison for coercive and non-punitive purposes is ‘an extraordinary one’: -

“The power to order summary imprisonment of a person in order to coerce that person to comply with a legal obligation is far-reaching. There can be no doubt that indefinite detention for coercive purposes may involve a significant inroad upon personal liberty. Clearly it will constitute a breach of s 12 of the *Constitution* unless both the coercive purposes are valid and the procedures followed are fair. In this case there seems no doubt that the purpose is a legitimate one. It also seems necessary and proper, however, for the exercise of the power to be accompanied by a high standard of procedural fairness.”<sup>[48]</sup>

46. Contempt of court is not merely a mechanism for the enforcement of court orders. The jurisdiction of the superior courts to commit recalcitrant litigants for contempt of court when they fail or refuse to obey court orders has at its heart the very effectiveness and legitimacy of the judicial system. That, in turn, means that the court called upon to commit such a litigant for his or her contempt is not only dealing with the individual interest of the frustrated successful litigant but also, as importantly, acting as guardian of the public interest.<sup>[49]</sup>

12. It will appear all the parties are fully aware of the content, and intent of the orders of this Court for compliance. It was meant for the good of all - to maintain the substratum of the suit property so that in the end any judgment or decree that would emanate from this Court would easily be enforceable. It would seem from the averments of the parties in this litigation that neither the applicants nor the respondents intend to adhere to the orders in place. According to the materials presented by both sides, and given the large number of litigants, both the applicants and the respondents have resorted to a free-for-all and have begun either selling, building, or constructing, as well as a general waste of the suit property, making it difficult to determine who to punish at this time. What is good for the goose is also



good for the gander – all the parties herein are in contempt of the orders issued by this Court. None deserves protection more than the other.

13. Application dated 5<sup>th</sup> July 2023 is hereby dismissed. Since all sides seem to be in disobedience of the orders of this court, there will be no order as to costs.

**DATED, SIGNED, AND DELIVERED AT MALINDI VIRTUALLY THIS 13<sup>TH</sup> DAY OF MARCH 2024.**

**E. K. MAKORI**

**JUDGE**

In the presence of: -

Ms Oloo for the 3<sup>rd</sup> Respondents

Ms. Chengo holding brief for Mr. Kenga for Applicants

Court Assistant: Happy

