



**Ismail & 2 others v Kenya Railways Corporation & 3 others; County Government of Mombasa (Proposed Interested Party); Mainga, Managing Director Kenya Railways Corporation & 2 others (Affected Party) (Environment & Land Case 232 of 2016) [2024] KEELC 3713 (KLR) (23 April 2024) (Ruling)**

Neutral citation: [2024] KEELC 3713 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND CASE 232 OF 2016**

**NA MATHEKA, J  
APRIL 23, 2024**

**BETWEEN**

**ABDISALIM HASSAN ISMAIL ..... 1<sup>ST</sup> PLAINTIFF  
MOHAMED ISMAIL ADEN ..... 2<sup>ND</sup> PLAINTIFF  
HALWA ABDULAHI MOAMED ..... 3<sup>RD</sup> PLAINTIFF**

**AND**

**KENYA RAILWAYS CORPORATION ..... 1<sup>ST</sup> DEFENDANT  
NDUVA MULI ..... 2<sup>ND</sup> DEFENDANT  
STANLEY GITARU ..... 3<sup>RD</sup> DEFENDANT  
GAPCP KENYA LIMITED ..... 4<sup>TH</sup> DEFENDANT**

**AND**

**COUNTY GOVERNMENT OF MOMBASA .. PROPOSED INTERESTED PARTY**

**AND**

**PHILIP J MAINGA, MANAGING DIRECTOR KENYA RAILWAYS CORPORATION ..... AFFECTED PARTY  
ABDIRAHMAN MOHAMED ..... AFFECTED PARTY  
ABDI GULED ..... AFFECTED PARTY**



## RULING

- 1 The application is dated 13<sup>th</sup> December 2023 and is brought under Sections 1A, 1B and 3A of the Civil Procedure Act, Cap 21, Order 40 Civil Procedure Rules, 2010 and Article 159 of Constitution of Kenya, 2010, seeking the following orders;
  1. Spent.
  2. That on account of the urgency herein and pending the inter partes hearing and determination of this application, notices to show cause be issued to Philip J. Mainga, Managing Director, Kenya Railways Corporation, Abdirahman Mohamed and Abdi Guled to appear before the court on the earliest available date to show cause why the suit property herein namely Residential House No. 5 Asset No. BRMSA 19125 standing on plot number MI/XXIII/213 situated at Mbaraki Estate was demolished on 11<sup>th</sup> and 12<sup>th</sup> December, 2023 despite there being in existence a court order issued by the court restraining any such demolition or interference with the aid asset pending further orders of the court.
  3. That the said Philip J. Mainga, Managing Director, Kenya Railways Corporation, Abdirahman Mohamed and Abdi Guled be punished for the said actions.
  4. That the costs of this application be provided for.
- 2 The grounds for the above was that this court had issued an order of status quo on 22<sup>nd</sup> August 2023 as well as extension of the status quo on 4<sup>th</sup> October 2023 and despite those orders one Philip J. Mainga allegedly consorted with Abdirahman Mohamed and Abdi Guled to cause the demolition of the aforementioned suit property. The 1<sup>st</sup> defendant and its advocates had been served on 22<sup>nd</sup> August 2023 and 30<sup>th</sup> September 2023 respectively. In a further affidavit filed on 14<sup>th</sup> September 2023 by counsel for the plaintiffs, an affidavit of service sworn on 14<sup>th</sup> September 2023 is attached to show that he served the said Abdirahman Mohamed and Abdi Guled on 11<sup>th</sup> September 2023 at 2.30 pm when the bulldozer was still on standby before demolition.
- 3 In rejoinder the said Philip J. Mainga filed a replying affidavit. He avers that the 1<sup>st</sup> applicant is not in possession of the suit property but has sublet it to one Mohamed Modri Nyai. He referred to a plaint marked PM 1 filed by the said Modri against the 1<sup>st</sup> respondent explaining that Modri is in possession as a sub lease of the 1<sup>st</sup> plaintiff. He was also certain that he was not served with an order of 28<sup>th</sup> August 2023 and that the said order of 22<sup>nd</sup> August 2023 was never brought to his attention. The said replying affidavit was followed by a notice of preliminary objection dated 16<sup>th</sup> January 2024 by the 1<sup>st</sup> respondent stating this Honourable Court has no jurisdiction to hear the appeal.
- 4 Counsel for the plaintiffs filed their submissions and argued that compliance of court orders is very important and that the violation of the court order of 22<sup>nd</sup> August 2023 was tantamount to contempt of this court and they relied on *Samuel M.N Mweru & Others vs National Land Commission & 2 Others* (2020) eKLR, *Econet Wireless Kenya Ltd v Minister for Information and Communication of Kenya & Another* (2005) eKLR, *Fiona Ansett v George Odinga Oraro & 3 others* (2020) eKLR. They request the court to punish the said Philip J. Mainga, Abdirahman Mohamed and Abdi Guled as provided in section 29 of the Environment and Land Act.
- 5 I have read and considered the application and the reply and the submissions together with the notice of preliminary objection raised by the 1<sup>st</sup> respondent. Before considering the application, I



have to consider the notice of preliminary objection which challenges the jurisdiction of this court to determine the instant application. In *Quick Enterprises Ltd Vs Kenya Railways Corporation*, Kisumu HCCC No.22 of 1999, the Court held that: -

"When preliminary points are raised, they should be capable of disposing the matter preliminarily without the Court having to result to ascertaining the facts from elsewhere apart from looking at the pleadings."

- 6 The preliminary point here is jurisdiction which was well – described in *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* (1989) KLR 1, where Justice Nyarangi of the Court of Appeal held as follows:

"I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

- 7 The jurisdiction as put by the 1<sup>st</sup> respondent is only to the effect of this court not being able to listen to the application. There is no provision quoted that prevents court from determining this application save that the plaintiffs used Order 40 of this [Civil Procedure Rules](#) in seeking the orders. The said Order 40 provides for temporary injunctions and interlocutory orders and the 1<sup>st</sup> respondent argues that a status quo does not fall under Order 40. I disagree with this disposition and I rely on *Giella Vs Cassman Brown* (1973) E.A 358 and *Joshua Walter Anyango T/A Anyango Ogutu & Co Advocates Vs Barclays Pension Services Limited & Another* (2019) eKLR where the court supported the position that the effect of a status quo order and an injunction are the same and that where the court found that an injunction order could not be issued, it ought not to have gone ahead and issued the status quo orders. Also, in *Texaco Ltd Vs Mulberry Ltd* (1972)1 WLR 814, the court held:

"The end result is that status quo orders will issue not just when the court is prompted by way of formal applications for injunction or conservatory or stay orders, but also when the court is of the view that as a case management strategy it would be more proportionate and appropriate without prejudicing one party but both, to issue a "status quo" order."

- 8 The preliminary objection is thus dismissed with costs. Now to the instant application, the 2<sup>nd</sup> prayer was for a notice to show cause to explain why they demolished the suit property on 11<sup>th</sup> and 12<sup>th</sup> December, 2023 and also for punishment in accordance with Section 29 of the [Environment and Land Court Act](#). In their reply, the their defence that the court the said Philip J. Mainga stated that he did not order the demolition of the suit property and that it is the County Government of Mombasa who did so. Under section 107 (2) of the [Evidence Act](#) the burden of proof shifted to the plaintiffs to prove the 1<sup>st</sup> respondent was involved. This has not been done. The said Abdirahman Mohamed and Abdi Guled are described as participating in the discussions and that they were served with the said order. I do not see the relationship of the individuals named in the demolitions which happened on 11<sup>th</sup> and 12<sup>th</sup> December 2023. In *Katsuri Limited Vs Kapurchand Depar Shab* (2016) eKLR the Court of Appeal held that;

"In Peter K. Yego & Others vs Pauline Nekesa Kode the court recognizing that contempt of court is criminal, held that it must be proved that one has actually is obeyed the court order



before one is cited for contempt. The applicant in an application for contempt must prove beyond peradventure that the respondent is guilty of contempt...

Although the proceedings are civil in nature, it is well established that an applicant must prove the elements beyond reasonable doubt, at least higher than the standard in civil cases. The fact that the liberty of the defendant could be affected means that the standard of proof is higher than the standard in civil cases. It is incumbent on the applicant to prove that the defendant's conduct was deliberate in the sense that he or she deliberately or willfully acted in a manner that breached the order."

9 The said Philip J. Mainga denies ever being served with the said order. The plaintiff maintains that they served the Advocates who represent Kenya Railways and that they were aware of the order. Personal service this is a requirement in contempt of Court proceedings as held by the Court of Appeal in *Ochino & Another vs Okombo & 4 others* (1989) KLR 165. The Court of Appeal in the said decision stated that as a general rule no order of a court requiring a person to do or to abstain from doing any act may be enforced by committing the said person for contempt, unless a copy of the order has been served personally on that person. The Court of Appeal further held that a copy of the order must be endorsed with a notice informing the person on whom a copy is served that if he disobeys the order he is liable to the process of execution to compel him to obey it. I find that service was improper. In the instant case, it is my finding that the application has not been proved and is without merit and I dismiss it. Costs to be in the cause.

10 It is so ordered.

**DELIVERED, DATED AND SIGNED AT MOMBASA THIS 23<sup>RD</sup> DAY OF APRIL 2024.**

**N.A. MATHEKA**

**JUDGE**

