



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO (P), KARANJA & KOOME, J.J.A)

NYERI CIVIL APPLICATION NO. 139 OF 2018 (UR 88/2018)

BETWEEN

JOSEPH KINYUA.....1ST APPLICANT

PASCUALE GITONGA.....2ND APPLICANT

JOSHUA KALUNGE.....3RD APPLICANT

AND

ROBERT KIMATHI MATI.....RESPONDENT

*(An application for contempt proceedings against the respondent for deliberately disobeying this Honourable Court's order issued on 21st March, 2018 in Civil Application No. 138 of 2017 (UR 101/2017) being an application for stay of execution pending the filing, hearing and determination of an intended appeal from the Ruling of the High Court of Kenya at Meru (F. Gikonyo, J.) delivered on 11th October, 2017*

*in*

*H.C. Succ. Cause No. 417 of 2013)*

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**RULING OF THE COURT**

1. In the Notice of Motion before the Court pronounced to be premised on **Section 5** of the Judicature Act and **Sections 3A** and **3B** of the Appellate Jurisdiction Act, the applicant seeks an order that the Court finds Robert Kimathi Mati (the respondent herein) in contempt of the Court Order dated 21st March, 2018 and proceed to mete out sentence that will serve the ends of justice in the circumstances of the case.
2. The application is premised on grounds, *inter alia*, that this Court granted the applicants an order of stay of execution of the Ruling of the Environment and Land court delivered on 11th October, 2017 pending the determination of the applicant's appeal. The respondent is said to have ignored the said orders and proceeded to fence off portions of land subject of the Court order and has even sold a portion of the same to one Pastor Kimathi for a sum of "about Ksh. 400,000 .00".
3. In his affidavit in support of the application sworn on 14th November, 2018, the applicant deposes that he reported the matter to Muringene Police Post but he was advised that since the matter is of a civil nature and is still in court, the police could not act against the respondent. There are annexures of photographs of what appears to be a freshly erected fence and another showing what would appear to be a damaged fence and a copy of a "police order to arrest" the respondent for the offence of creating disturbance and interfering with boundary features.
4. There is also annexed to the affidavit the extracted court order granting stay orders. The order as extracted does not nonetheless have the particulars of the suit properties or sufficient details to identify the same. Even as at the time we heard this application online by way of video link, the Ruling of the court from which the said order was extracted, which Ruling would give the specific details of the suit property, had not been availed to us. The Deputy Registrar who was following up the matter with counsel for the applicant received the Ruling and forwarded the same after the application had already been heard and reserved for this Ruling. That being so, the Ruling did not avail much help to the applicant.

5. We have considered the Notice of Motion along with the annexures to the supporting affidavit. In our view, learned counsel for the applicant who filed the application does not appear to have given the application much thought. There is no evidence of service of the order in question, with the necessary penal notice on the respondent as required in contempt of court cases; other than the images of the purportedly damaged fence, and a freshly erected one, there is nothing to prove that the said fence was part of the suit premises; there was no evidence either to show that part of the suit premises had been sold to a third party, for instance, a sale agreement or even affidavit from the purported buyer.

6. This Court has often times pronounced that matters of contempt of court are grave matters that require serious interpretation and proof. Indeed, it is axiomatic that the standard of proof in matters of contempt of court is slightly higher than a 'balance of probabilities', as is the case in ordinary civil matters, but lower than the standard of "beyond reasonable doubt" prescribed in criminal matters. This is so because though civil in nature, contempt of court proceedings border on criminal culpability and a contemnor may be sent to prison if cited for contempt of court. It suffices not for an applicant, as is the case here, to throw such an application on **the lap of the court and with little or no evidence to support the claim of contempt and expect the court to find a party in contempt and proceed to mete out a punishment.**

7. Even though the application was not opposed by way of replying affidavit, and we repeat that there is no evidence placed before us to show that the same was served on the respondent, apart from the fact that the burden of proof remains on the applicant, we have no basis whatsoever to enable us make a finding that the respondent is in contempt of court and should be cited as such. In sum, we find the application totally devoid of merit and dismiss it with no order as to costs.

**Dated and delivered at Nairobi this 4th day of December, 2020.**

**W. OUKO, (P)**

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**JUDGE OF APPEAL**

**W. KARANJA**

.....

**JUDGE OF APPEAL**

**M. K. KOOME**

.....

**JUDGE OF APPEAL**

*I certify that this is a true*

*copy of the original*

*Signed*

**DEPUTY REGISTRAR**