



**Denholm v Muema & another (Environment and Land Appeal
13 of 2021) [2023] KEELC 16202 (KLR) (22 February 2023) (Judgment)**

Neutral citation: [2023] KEELC 16202 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND APPEAL 13 OF 2021
LL NAIKUNI, J
FEBRUARY 22, 2023**

BETWEEN

LINN ALEXANDER JAMES DENHOLM APPELLANT

AND

CATHERINE NDUKU MUEMA 1ST RESPONDENT

BENSON CHAI 2ND RESPONDENT

JUDGMENT

1. The Judgment herein pertains to an appeal lodged before this Honorable Court by Linn Alexander James Denholm – the Appellant herein. The appeal was filed through a Memorandum of Appeal dated 22nd March 2021 and a Record of Appeal dated 10th June, 2021. The record of Appeal was filed on 11th June, 2021 against the 1st and 2nd Respondents herein. In a nutshell, the appeal revolves around the interpretation by the lower court of its own two orders herein as seen here below.
2. The Appeal emanates from a Ruling delivered and dated 12th March, 2021 by the Chief Magistrate’s Court at Mombasa – Hon. F. Kyambia in the Civil Case –ELC. Case No. 158 of 2020. Based on the Affidavit of Service on record the Record of Appeal was properly served upon the 1st Respondent on 25th October, 2021. Upon being satisfied that the 1st Respondent was served directions were taken under the Provisions of Section 79 B and G of the Civil Procedure Act Cap. 21 and Order 42 (11), (13) and (16) of the Civil Procedure Rules 2010 on the appeal as follows:-
 - a. That the Record of Appeal is complete, endorsed by all parties and admitted.
 - b. That the Appeal to be disposed off by way of written submissions
 - c. That the Replies filed by the 1st Respondent contained in the Record of Appeal to be considered.



- d. Regarding service of the 2nd Respondent, the Honorable Court on 30th November, 2021, directed that the 2nd Respondent to be served by way of substituted means by publishing the advertisement in a local newspaper of wide national circulation.
3. Indeed, this Honorable court has noted from the facts in the proceedings that both 1st and 2nd Respondents were fully aware of this proceedings. On 15th January, 2022, the Appellant published the order of the service of the Record of Appeal on the 2nd Respondent which was published a notice/ advertisement in the local newspaper “The Daily Nation” newspaper and filed an affidavit of service to that effect. Thus the court was satisfied that service of the Record of Appeal was properly done. Besides, when the matter was fixed for mention on 24th January, 2022 for further direction ascertainment on compliance, the 2nd Respondent Mr. Benson Chai appeared in court. The 2nd Respondent requested for some time to file replies to the Appeal. He was granted 14 days to file replies and also secure a professional legal Advisor to assist him in handling the filed appeal.
4. On 24th February, 2022, the 2nd Respondent indicated to this court that he was not in good financial status to have engaged an Advocate hence, he requested for an extension of time to organize himself. The Court granted him the request. On 19th September, 2022 the parties having fully complied with court’s direction it slated for highlighting the written submissions which the parties discharged effectively.

II. The Appellant’s case

5. From the filed Memorandum of Appeal, the Appellant averred as follows:-
 - a. The trial Court erred in law and fact by holding that the Appellant had not discharged the burden bestowed on him in contempt proceedings yet from the evidence tendered by the Appellant which was not rebutted by the Respondent, the Appellant demonstrated beyond reasonable doubt that the Respondent interfered with the status quo of the suit premises contrary to the orders issued by the trial court.
 - b. That the trial court erred in law and fact by failing to take into account that the contempt of court proceedings are action in rem and therefore the 2nd Respondent herein being the agent/caretaker of the Respondent was properly impleaded and therefore was liable for contempt of court having aided/supervised the ongoing construction which interfered of the status quo of the suit property.
 - c. That the trial court erred in law and fact by contradicting and misconstruing itself that the orders of status quo as issued on 11th September, 2020 were only limited to disposition of the suit property and non-interference of the Respondent’s quiet occupation of the said premises.
 - d. The trial court erred in law and fact by failing to hold the 1st Respondent and 2nd Respondent in contempt of court order despite having appreciated that the 1st Respondent and the 2nd Respondent were having full knowledge of the orders of status quo as issued 11th September, 2020 but intentionally continued with substantial construction on the suit premises thereby materially interfering with the status of the suit property.



- e. That the trial court erred in law and in fact by further directions the 1st Respondent was already doing construction of the suit premises despite previous orders barring the same, thus the court cannot purport to issue similar orders twice to enforce compliance.
- f. That the trial court erred in law and in fact by failing to hold that the Respondent's refusal to comply with orders of the court as issued was calculated to undermine the rule of law, the integrity of the court and administration of justice.
- g. That the trial court erred in law and in fact by dismissing the Appellant's application on a technicality despite clear and overwhelming evidence that the Respondent's had commenced further construction and erection of iron pillars on the suit property thereby altering the status of the suit property to the detriment of the Appellant.
- h. That the trial court erred in law and in fact in arriving at a decision that was wholly against the weight of the evidence, law and justice for this reason therefore the Appellant prayed for:-
 - i. The Appeal herein to be allowed by setting aside the Chief Magistrate's Court Ruling and order delivered on 12th March, 2020 and in lieu thereof allow the Appellants application dated 25th November, 2020.
 - ii. This matter be remitted back to the Chief Magistrate's Environment and land Court other than the one presided over by Hon. F. Kyambia for further hearing and determination.
 - iii. The costs of this Appeal be provided for.
 - iv. Any other relief and/or orders that this Honorable Court may deem fit to grant.

6. From the filed pleadings, the Appellant informed Honorable Court having known and hence being close friends with the 1st Respondent for several years. He indicated that the 1st Respondent used to visit her friends who were working for the Appellant in Thika. They started dating but their friendship and/or relationship, germinated into a marriage as would have been expected whatsoever. During their relationship the Appellant was so open to the 1st Respondent and he involved her in all his investment. According to the Appellant, he undertook all these in good faith as the 1st Respondent have made him believe that they would get married and start a family together, but all in vain. Thus, the Appellant would acquire properties and got them registered in the names of the 1st Respondent. All was done out of trust. For instance, in the year 2017 he purchased the suit property known as Land Reference No. Plot No. 11616/III/MN North of Mtwapa and North of Creek County of Kilifi and constructed a house on it. However, later on he traveled to Great Britain but on coming back, the 1st Respondent prevented him from accessing the house situated on the suit land. By that material time, she had altered documents for other properties from his names to hers. Indeed, he found out that she had sold the suit land to the 2nd Respondent. Arising from all these facts of alleged illegalities, misrepresentation of facts and deceits on the part of the 1st Respondent, the Appellant decided to institute the suit and sought the reliefs set out from the filed Complaint dated 10th February, 2020.



7. On the 10th February, 2020, the Appellant moved the sub-ordinate court vide a Notice of Motion Application dated even date under the Provision of Order 40 Rule 1, 2, 3 and 4 of Civil Procedure Rules essentially seeking for temporary injunction orders restraining the 1st Respondent by herself, her servants, employees and/or agents from alienating selling or in any other way dealing and/or interfering with the suit property pending hearing and determination of the both application and the suit thereof.
8. On the same date, the Honorable Court granted ex-parte orders and directed that the 1st and 2nd Respondents be served for an "inter-partes" hearing on 18th February, 2020. Upon service on 10th March, 2020 the 1st Respondent filed their Replies. The parties were directed to have the application be disposed off by way of written submissions. Pursuant to that all parties complied whereby the Appellant filed his written submissions dated 28th July, 2020, while the 1st Respondent filed her undated written submission later on.
9. However, while awaiting for the delivery of the Ruling onto the Notice of Motion application dated 10th February, 2020 by the trial court, on 25th November, 2020 the Appellant moved the trial court under the provisions of Order 40 Rule 3 of Civil Procedure Rules 2010, and Part 81.4 of the Civil Procedure Rules, 1999 of the Supreme Court of England. By this application, the Appellant sought for the following orders:-
 - (a) A Notice to Show Cause be issued against the 1st and the 2nd Respondent to show cause why they should not be punished for contempt of the orders issued on 10th February 2020 and 11th September, 2020 respectively.
 - (b) The 1st and 2nd Respondents to be held in contempt of court orders issue on 10th February, 2020 and 11th September 2020 for their Act of interfering with the status of the suit property by digging foundations, erecting Iron Pillars and continuing with construction on the suit property after the issuance of the court order on 10th February, 2020 and 11th September, 2020 by committing them to imprisonment for a period of 6 months.
10. On 14th December, 2020 the 1st Respondent filed their Replies to the above application dated 25th November, 2020 filed by the Appellant, while the Appellant filed further Affidavit 15th December, 2020. Thereafter, the 1st Respondent filed their written submissions dated 31st December, 2020. On the 12th March, 2021 the trial Court having considered the application delivered its ruling on terms to be recapped in detail at a later stage in the course of this judgment thereof which is the pith and substance of this appeal. Subsequently, the Appellant got aggrieved by the said Ruling by the lower court.
11. To begin with, it's important to state that taking that it's the Ruling of the Sub-Ordinate Court that the subject matter of this Appeal, an Appellate Court it will proceed to fully re-evaluate the contents of the said ruling based on the given precedents. In addition, the Honorable Court has noted the fact that the Appellant holding that the action by the Respondents in allegedly disobeying the Court orders were all calculated to undermine the Rule of Law, the interest of justice and to prevent the integrity of the Court. In the process, this Honorable Court has observed that the subordinate court, summarized the replies made by the Respondents sworn on 14th December, 2020 whereby the 1st Respondent refuted having at all interfered nor alienated the suit property. She held that the same had always been under her good care and management right from time before the filing of the suit and delivery of the ruling and whereby the court ordered that the status quo be maintained. In addition, the court held that the 1st Respondent denied having been served with the pleadings and the orders of 10th February 2020 as at the material time been out of the country. The Honorable Trial Court confirmed and concurred with



the 1st Respondent assertion that the orders of the court delivered on 11th September, 2020 were for the status quo to be maintained and which meant, according to the said court that the Respondents being restrained from disposing off the suit property while the Appellant was restrained from interfering with the Respondents occupation of the suit property. The trial court held that these orders were to remain in force until the suit was heard and determined. The trial court observed that these orders were made in the presence of the Advocates for the parties and hence according to it there was no need for them to have been served as all what was required was for the parties to have had the knowledge that the orders alleged to have been disobeyed existed. The trial court underscored and rightfully so that none of the parties would therefore plead ignorance of the existence of these orders.

12. Therefore, the trial Court having stated the issue of the knowledge by the parties of the court orders of 10th February, 2020 and 11th September, 2020 respectively, the trial court held that what was then before it for its determination was whether the Respondents had failed to comply with the said orders. It held that the burden of proof to show and discharge that the orders had been disobeyed by the Respondents lied with the Appellant. The court asserted and rightfully so that the standard of proof in matter of contempt was higher than proof on balance of probabilities. This was because the contempt proceedings were in the nature of criminal offence and at times the liberty of a party was at stake.
13. While applying these legal principles to the instant case, the Honorable trial Court concluded that the Appellant failed to discharge its burden effectively as required by law. In saying so, it held that as he failed to demonstrate to court that the 1st Respondent had disposed off the suit property. The trial Court held that instead of doing that, the Appellant only made the allegations that the 1st and 2nd Respondents had been digging foundation and undertaking constructions, erecting iron pillars on the suit property which according to the trial Court's interpretation were activities beyond the ambit and confines of the orders of court made on 10th February, 2020 and 11th September, 2020 respectively. And now this is where the appellate court finds its entry point in the filed Appeal. However, for the benefit of doubt and on abundance of caution, the court proceeded to emphasize and fore-warned the Respondents to stop any activities on the suit property save for occupation until the suit was heard and determined. Be that as it may, the trial court was of the view that the 2nd Respondent had been wrongly joined in these proceedings as he had not been a party to the proceedings giving rise to the orders alleged to have been disobeyed and hence it concluded the application failed. It was for these reasons that the court in its ruling declined to allow the application dated 25th November, 2020 and the prayers made thereof

III. The Submissions

15. On 25th October, 2021, as stated the Record of Appeal was admitted and directions given specifically in the presence of all the parties. The Honorable Court directed that the said appeal be disposed off by way of written submissions with given stringent time lines. Pursuant to that the parties herein fully complied on 29th September, 2022, all the Counsels were granted ample opportunity to highlight their written submissions a duty they effectively and ably executed, with great diligence, devotion dedication and resilience accordingly. The Honorable Court is sincerely grateful to them for undertaking their role professionally.

A. Written submission by the Appellant

16. On 15th June, 2022, the Learned Counsel for the Appellant, the law firm of Messrs. Mutisya Mwanzia & Ondeng Advocates filed their written submissions dated even date. Mr. Ondeng Advocate commenced his submissions by providing this Honorable court with a brief background of this case. In the course of the tendered submissions, the Counsel raised eight (8) grounds of the appeal in detailed as follows:-



Firstly, as pertained to grounds 1 and 2 of the Appeal the Counsel stated that both in the said Supporting Affidavit found on pages 198 to 219 and further Affidavit found on Pages 226 to 227 of the Record of Appeal clearly demonstrated that the Respondents proceeded and interfered with the orders of the status quo of the suit property by digging foundation, erecting iron pillars and continuing with construction thereby changing the absolute status of the suit premises from how it was earlier on despite of the court orders of 10th February, 2020 and 11th September, 2020 respectively. Hence, the Counsel argued that the 1st and 2nd Respondent breached the Court orders thereof. The Counsel averred that the Appellant discharged the burden of proof bestowed upon him in establishing that there was contempt of court proceedings. Citing the provisions of Section 107 of the *Evidence Act* Cap 80, he further averred that the Appellant annexed relevant evidence that demonstrated that the construction of beams, digging and erection of pillars was taking place on the suit premises a clear proof indeed that the Respondents though were in full knowledge of court orders but deliberately and willfully disobeyed Court orders. To buttress his argument, the Counsel cited the provisions of Section 29 of *Environment and Land Court Act* No. 19 of 2011 and the decision of High Court Nairobi of Samuel M.N. Mweru and Other v National Land Commission & 2 Others [2020] eKLR.

17. With regard to whether the 2nd Respondent was improperly impleaded, the Counsel's contention was that the trial court erroneously held that position and abdicated its duty. The Counsel opined that whether a person was party or not to court proceedings, he or she ought to abide by the relevant Court orders so long as there existed knowledge of such orders. Hence, according to the Counsel submitted that that the 2nd Respondent as a caretaker, agent of the 1st Respondent was therefore properly pleaded and was liable for contempt of court having aided and supervised in the digging of the foundation and the construction of the pillars that took place on the suit land which interfered with the status quo of the suit premises. To support his argument, the Counsel cited the decision of "Miguna Miguna v Fred Matiang'i Cabinet Secretary Ministry of Interior Government and 8 Others 2018 [eKLR] Econet Wireless Kenya Limited v Minister for Information and Communication of Kenya & Another (16) where court held:-

"It is essential for the maintenance of the Rule of Law and Order that the authority and the dignity of our courts are upheld at all time. The court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contentions. It is the plan and unqualified obligation of every person against or in respect of whom an order is made by court of competent jurisdiction, to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or void."

18. Secondly with regard to grounds Numbers 3 and 4 of the appeal, the Counsel submitted that the orders of status quo as issued by the trial court on 11th September, 2020 meant that the prevailing circumstances whether on proprietorship or physical condition of the suit premises were and ought to be maintained by all the parties herein. To the Counsel, therefore the order was merely limited to and/or on the disposition of the suit property as was misconceived by the trial court. To support itself on the meaning of the status quo, the Counsel relied on the decision of: - Republic v National Environment Tribunal & Another Ex - Parte Palm House Limited. [2013] eKLR Odunga JA, defined the word "Status Quo" as defined by Black Law Dictionary 9th Edition – "the situation that currently exists"; "the existing state of affairs, things as they are"..... hence when court orders for status quo to be maintained it meant it is expected that the circumstances as at the time when the order is made or the statutes takes effect must be maintained..... It is meant to preserve existing state of affairs. For instance, if there was a dispute between a tenant and a Landlord there is an order for status quo



to be maintained if the tenant is in occupation it means he remainsunless the order is for the maintenance of status quo ante,

19. The Counsel argued that the trial court misinterpreted the meaning of its order of status quo to be maintained. According to the Counsel the trial court did that despite of the 1st and 2nd Respondents having the knowledge of the existence of the court order they still proceeded on to cause construction and such other related activities on the suit property.

Thirdly, as regarding grounds Numbers 5, 6, 7 and 8, of the appeal the Counsel submitted that the trial court having issued orders of status quo to be maintained on 11th September, 2020 it once again proceeded on to issue a further order on 12th March, 2021 to enforce compliance against the 1st and 2nd Respondents. According to the Counsel this was a contravention of the doctrine of “Ship Rule” which meant – altering its own orders which barred Courts from reopening their own decision, once it had made a decision. In other words, in such a situation it becomes ‘functus officio. To support itself, he cited on the decision of:- Republic v Attorney General & 15 Others, Ex Parte Kenya Seed Co. Limited & 5 Others [2010] eKLR.

20. Additionally, the Counsel strongly submitted on the essentials for the maintenance of the Rule of law and order. He urged the Honorable court not to condone deliberate disobedience of its orders and hence punish such cases of contemptuous actions. He stressed that all Court orders are to be obeyed unless they had been discharged varied or set aside and thus applied to any person who believed the order to be irregular. He further emphasized that Court orders were binding on the person it was addressed to and until it was set aside, the order remained valid and it was to be complied with. To him in the instant case the 1st and 2nd Respondents were in contempt of these two court orders in the manner in which they interpreted them.

In conclusion the Counsel urged court to find that the 1st and 2nd Respondents were in deliberate breach of the court order issued by the trial court as already demonstrated and allow the filed appeal as prayed hereof.

B. Written submissions by the 1st and 2nd Respondents

21. On 14th July, 2022 the Learned Counsel for the 1st and 2nd Respondents the Law firms of Messrs. Angeline Omollo and Associates filed their written submissions dated even date.

M/s. Omollo Advocate commenced by providing a detailed expose and the background to the matter. In the course of her submissions the Learned Counsel raised four (4) pertinent issues as follows:-

22. Firstly, she refuted the allegation made by the Appellant that, the 1st and 2nd Respondents were in contempt of the Court orders of 10th February, 2020 and 11th September, 2020 respectively as ruled out by the trial court on 12th March, 2021. In saying so, she argued that according to her the orders were exclusively on restraining the Respondents herein from disposing off the suit property and nothing else. To her these orders never stated the Respondents could not live on the suit property but according to her clearly held that there should be no disposal off the suit property until the determination of the pending suit. The Learned Counsel argued and of course rightly so that contempt of Court was in the nature of criminal proceedings and therefore proof of a case against a contemnor was high than that of balance of probability because liberty of the subject was usually at stake. In such a case, the applicant must prove willful and deliberate disobedience of the court order. If he were to succeed. On this legal principles, she relied on the decision of “Gatharia K. Mutikika v Baharini Farm L[1988] eKLR.
23. The Counsel’s contention was that due to the gravity of the consequences for contempt proceedings, it was proper that the Court order be served and the person cited for contempt should have had personal



knowledge of the order. In the instant case, the Counsel stated that the 1st Respondent resided in the United State of America and only her daughter resided in the suit property. Hence, the allegations against her could not have happened while she was away abroad. She was never served directly with the order instead the service was done through her Advocate's Offices a fact supported by the Applicant intimation that the 1st Respondent was aware of the order as her Advocate was in court when the Ruling and orders were issued. The Counsel argued that the 1st Respondent never had knowledge of these orders as knowledge was an issue of facts and one ought to be aware of the terms of the order. According to her, what was required was not only that the alleged contemtor ought to know what the order required him to do or not to do but willfully and deliberately disobeyed it. She cited the case of "Katsuri Limited v Kapurchand Depor Shah [2016] eKLR whereby the court held:-

“In order for an applicant to succeed in Civil Contempt proceedings, the Applicant has to prove (i) the terms of the order, knowledge of the terms by the Respondents, failure by the Respondent to comply with the terms of the order.”

Likewise, the Counsel held that when the orders were issued the 2nd Respondent was in Malindi, hence unaware of the said orders. Also taking that he was not a party to the ongoing suit at the lower court. He only became party to these proceedings after being served by substituted means by having an advertisement published in the newspapers following a court order by this Honorable Court. Hence there was no prove that the 1st and 2nd Respondents were served with the court order or were aware of the order which they disobeyed.

24. The Counsel further argued and emphasized and rightfully so that for the Respondents to be held in contempt, the Applicant must demonstrate that there was willful disobedience of the order. She relied on the case by the Supreme Court of India – “Indian Airports Employees Union v Ranjan Catterjee & Another (AIR) 1999 SC 880, SCC 537” and concluded that the Applicants failed to proof satisfactory that the 1st and 2nd Respondents had knowledge of the said orders and that they deliberately and willfully acted in the contrary by disobeying the said orders:-

Secondly, the Counsel urged the court to strike out the Appeal before it for being frivolous, vexation and scandalous and lacking merit. It should allow the matter to proceed on in the Lower Court for hearing and final determination. She reiterated that the Applicant failed to proof satisfactory his allegation that the 1st and 2nd Respondent had deliberately and willfully disobeyed Court orders hence amounting to Contempt of Court and being granted the orders sought thereof.

25. Additionally, she argued that the Applicant had a penchant of filing numerous applications before the lower court all intended to further delay the matter and defeat the course of justice. Indeed, she pointed out to six (6) of such interlocutory applications filed by the Applicant. Therefore, she urged court to strike out the appeal as the Applicant still had the right of appeal even after the lower courts will have delivered its judgment against the Appellant.
26. Thirdly, the Counsel's contention was that there was a misjoinder of parties in respect to the 2nd Respondent who was never a party to the suit in the lower court. He could not be enjoined at the Appeal stage without seeking leave of Court. On this point of misjoinder the Counsel placed reliance to the case of “Communications Commissions of Kenya and 4 Others v Royal Media Services Ltd. & 7 Others Petition NO. 15 of 2014 [2014] eKLR and David Kiptugen v Commissioner of Lands, Nairobi and 4 Others [2016] eKLR.

Furthermore, the Counsel argued that the Appellant failed to demonstrate how the ends of justice would better be served by joining the 2nd Respondents to the case yet he had no stake in this Appeal.



Fourthly, the Counsel averred that the photographic exhibits produced in Court by the Appellant and marked as an Exhibit “LAJD-4A to C never placed the 1st and 2nd Respondents at the center of the allegations of being in deliberate and willful disobedience of Court orders of 10th February, 2020 and 11th September, 2020 by the lower Court as meted out by the Appellant. She argued that these exhibits produced contracted the provisions of Section 78 on admissibility of photographic evidence. To buttress her point the Counsel cited the case of “Republic v Nelson Otieno Odira & Another [2014] eKLR where Court held:-

“A reading of Section 78 shows that the exception in relation to photographs evidence on specific to the terms thereof. The purpose of Section 78 of the Act is to enable the court admit photographic evidence without calling the marker of the Act have been met. The Section is not authority or it does not provide authority for the Director of Public Prosecution to permit only certain officers to take photographs and produce them in evidence. Section 78 deals with production of photographic evidence in court and provides photographs taken by officers may be produced without calling the officer taking the photographs if the condition specified in the section are met

She averred that in the instant case the photographs produced by the Appellant were without certificate of production as required by law. In conclusion, she urged court to dismiss the appeal for lack of merit.

IV.The Issues for Determination.

27. I have had a chance to critically assess all the pleadings filed in this Appeal being the Record of Appeal and its contents, the Memorandum of Appeal by the Appellant, the written submissions, the Plethora of cited authorities by the parties, the relevant provisions of the Constitution of Kenya, 2010 and the statutes.

For the Honorable Court to be in a proper position to arrive at an informed, plausible, just, fair and reasonable decision from the filed Appeal by the Appellant herein, the Honorable Court has condensed the subject matter into the following three (3) salient issues for its determination. These are:-

- a. Whether the filed appeal by the Appellant being aggrieved by the decision/ Ruling delivered by the Lower Court on 12th March, 2021 has any merit whatsoever.
- b. Whether the parties are entitled to the relief sought from the filed Appeal.
- c. Who will bear the costs of the Appeal?

V. Analysis and Determination

IssueNo. (a) Whether the filed appeal by the Appellant being aggrieved by the decision/Ruling delivered by the lower court on 12th March, 2021 has any merit whatsoever.

28. Before embarking on the issues for analysis under this sub-heading as indicated earlier in the Judgement the Honorable Court in a preamble form the court makes two assertions. First on the re-evaluation of the evidence from trial court and secondly the brief facts of this case. To begin with, While dealing with all appeals emanating from the decision by the trial Courts, as a first appellate Court it is guided and



informed by the principles summarized in the decisions of; - *Selle & Another – v Associated Motor Boat Co. Limited & Others* [1968] E.A. 2123 at Page 126 as:-

“Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusion though it should always bear in mind that it has neither seen nor heard the witnesses and should make allowance in that respect. In particular this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he had clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence of if the impression on the demeanor of a witness is inconsistent with the evidence in the case generally.”

29. Similarly, in the case of “*Peter v Sunday Post Limited* 1958 E.A. 424 Sir Kenneth O’Connor P. rendered the applicable principles as follows:-

“It is a strong thing for an appellate court to differ from the finding on a question of facts, of the judge who tried the case and who had the advantage of seeing and hearing the witnesses. An appellate court has indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon the evidence should stand. But this is a Jurisdiction which should be exercised with caution. It is not enough that the appellate court might itself have come to a different conclusion....”

Brief Facts:

30. The facts of this case which led to the Ruling by the Lower Court are brief. From the filed pleadings hereof, on 10th February, 2020 the Appellant instituted a suit before the trial court and an application seeking for temporary injunction orders against the 1st and 2nd Respondents herein On the said material day, the orders were granted in his favour and against the Respondents. Subsequently, on 11th September, 2020, the trial court issued orders of the status quo to be maintained. On 25th November, 2020 the Appellant claimed that the 1st and 2nd Respondents were disobeying these orders and hence filed an application for contempt proceedings against the 1st and 2nd Respondents to the effect that despite of them being knowledgeable of the said orders of the two court orders.

31. On 12th March, 2021 having heard the parties on this application the trial Court rendered its ruling as follows:-

“.....I have considered the application herein, the affidavit evidence and the submissions by both Counsels together with the applicable law and the precedents cited particularly by the Plaintiff’s Advocates. Vide ruling I delivered on 11th September, 2020, I directed that the status quo be maintained. For avoidance of doubt, I made it clear that the Respondent is restrained from disposing the suit property and the Applicant in (sic) other hand restrained from interfering with the Respondent’s occupation of the suit property. Those orders were to persist until the suit is heard and determined. Those orders were made in the presence of the Advocates and so there was no need of service of the orders.....what is for determination is whether the Defendant has failed to comply with the orders.in this case the Plaintiff alleges that the Defendant and the affected party are digging foundations and erecting iron pillars. In other words, the Plaintiff alleges the Defendant is constructing the suit property. It is clear from the orders I granted on 11th September, 202 that the Defendant was restrained from disposing off the suit property pending the hearing and determination of the suit. It is not alleged that the Defendant is disposing off the suit property. What



is alleged is that she is undertaking some constructions. I do not think the Plaintiff has discharged his burden bestowed on him in contempt proceedings”

It’s from the foregoing Ruling that the Appellant being aggrieved by the said decision by the trial Court that decided to prefer the Appeal before this Honorable Court. The Court has deliberately re – produce the excerpt of the ruling as it shall be referring to it extensively at a later of this Judgement.

32. Now turning to the issues for the analysis of this sub heading. From the materials and records of appeal, it is my view that clearly the main borne of contention herein are two prong: -

(a) Whether the Learned trial court and/or Magistrate erred in law and fact in holding that the 1st and 2nd Respondents were in contempt of Court on grounds that the Appellant never discharged its burden bestowed on him in contempt proceedings against the 1st and 2nd Respondents. That the trial Court misconstrued the orders of status quo to mean they were only limited to disposition of the suit land; and.

(b) Whether the Learned Magistrate/trial court erred in Law and Facts in finding that despite of the 1st and 2nd Respondents who were all with full knowledge of the court orders of 10th February, 2020 and 11th September, 2020 there were clear and overwhelming evidence to the effect that 1st and 2nd Respondents commenced further digging of foundation, construction and erection of the iron pillars on the suit land but held them never willfully and deliberately disobeyed the said orders and/or being in contempt. Hence, it proceeded to dismiss the Appellants application dated 25th November, 2020, which according to the Appellant it was done on a technicality.

Be that as it may, it is my view that in order to adequately and deliberately cause proper discretion and adjudication on these two issues, it’s important to first and foremost have a look at the exact orders granted by the trial court. The Honorable Court strongly feels the trial Court found itself in this situation from the way and manner it proceeded to interpret its orders of 10th February, 2020 it’s a case of splitting heirs here. The English saying has it that “you made the bed lay on it” comes to play here. Indeed, from the onset, I fully concur with the Counsel for the Appellant that the courts are bound by their own orders as guided by the Provisions of Order 2 Rule 6 of the Civil Procedure Rules 2010. On 10th February, 2020, the trial court granted the following orders verbatim found on Page 59 of the bundle.

- a. That the application dated 10th February, 2020 be and is hereby certified as urgent.
- b. That an interim injunction be and is hereby granted restraining the Defendants by herself, her servants, employees from alienating, selling or in any other way dealing and/or interfering with the property known as property known as Plot No. 11616/III/MN and the house standing there on pending inter parties hearing on 18th February, 2020 before court No. 6 (Emphasis is mine).

33. In my own direct assessment, the above orders by Court are clear, plain and simple. The orders intended to forbid the 1st and 2nd Respondents and their assigns, and/or servants from having any activities taking place on the suit land pending the hearing and determination of the main suit before it. In simple terms, the orders are to preserve the suit property from any



wastage, interference and/or alteration in all manners in the interim stage. To me the operative “pari materia” expression from the orders are restraining Respondents from “.....alienating, selling or in any other way dealing and/or interfering with the property known as property known as Plot No. 11616/III/MN”. The expression from a legal view point is extremely potent and loaded so to speak. It simply means not undertaking any single activity including disposition on the land. The closest I may think of it’s a replica on “the principles of Lis Pendens” which means the power of control which courts acquire over property involved in a suit pending the continuance of the action and until final judgment is rendered. It is my view that these orders were not exclusively to disposing off the land alone, but pertaining to restrain of all activities whatsoever until the matter is heard and determined. There are no exception to this Court order otherwise it will be interpreted as select thinking and splitting heirs herein. Thus, the Court holds that the trial Court mislead itself to have singled out the order to mean disposing off the land alone. That is, it meant the only transaction that the orders meant to restrained the Respondents from undertaking was disposing off the suit land, Nay. Far from it. To me it meant all other activity including digging foundation and construction of pillars and so forth. Indeed, the orders at the foot note bears the penal notice derived from the Provisions of Order 40 Rule 3 of the Civil Procedure Rules 2010 to the effect that any party served with the order and fails to obey he/she shall be cited for contempt of the court liable to imprisonment for a period not exceeding six (6) months.

34. Additionally, it’s not in dispute that on 11th September, 2020 the Honorable trial court ordered that the status quo to be maintained. I am a life in the ambiguity this expression normally creates more often than not among parties in many cases. My simple understanding of this order and deriving from the meaning of “Status quo” from the Black Law dictionary 9th Edition is that “the situation that currently exists” at this juncture, I fully concur with the Learned Counsel for the Appellant – while citing the case of “Republic v National Environment Tribunal & Another (Supra)” to the effect that when court of law order that the status quo to be maintained it is expected that the circumstances as at that time when the order was made or the statute takes effect must be maintained. An order for status quo is meant to preserve existing state of affairs. The status quo must therefore be interpreted with respect to existing factual scenario.
35. Thus in order to properly apply this legal principle to this instant case, the herculean issue is what were state of affairs or the existing factual scenario in the instant case? The query is correctly answered by the trial court, when it stated:-

“Vide Ruling I delivered on 11th September, 2020, I directed that the status quo be maintained for avoidance of doubt I made it clear that the Respondent is restrained from disposing the suit property and the applicant on the other hand was restrained from interfering with the respondent’s occupation on the suit property. Those orders were to persist until the suit was heard and determined. In this case the Plaintiff alleges that the Defendants and the affected party are digging foundations and erecting iron pillars. In other words, the Plaintiff alleges that the Defendant is constructing the suit property.”

My understanding from the above except from the Ruling is that before the issue of ownership and use of the suit land between the Appellant and the 1st Respondent is heard and determined, the status quo to be maintained. this means the 1st Respondent should be allowed to continue the occupation of the suit land while restraining all parties from conducting any other activities or interference



whatsoever on the suit property. The restraining order simply means undertaking any construction on the suit property. To me that was the main purpose of the orders which was delivered by the trial Court on 10th February, 2020 and 11th September, 2020 respectively. Therefore having stated this, I fully concur with the Learned Counsel for the Appellant and reiterate that the Learned Magistrate wrongly misinterpreted and misconstrued the legal rationale of these orders by erroneously holding that:-

“It is clear from the orders I granted on 11th September, 2020 that the Defendant was restrained from disposing off the suit property pending the hearing and determination of the suit” . Definitely, there would be a total departure from the previous order of 10th February, 2020 by reopening and expounding up its own Jurisdiction to new issues never raised before the court. As far as these orders are concerned the trial court became functus officio.

36. In saying so, I have keenly observed that the trial court had found itself in rather awkward testimony by its own making while holding to wit: -

“However for purposes of maintaining order and peace the Defendant is directed to stop any activities on the suit property save for occupation until the suit is determined”

I find these assertions rather curious and perplexing!. Why does court all of a sudden urge parties from engaging from any activities and for the maintenance of peace at this stage? This Court gets the impression that it was as though all over sudden, the trial Court became suspicious of the activities taking place on the suit land including the allegations of digging of foundation, construction of beams and erecting pillars and which it felt were outside the ambit of the delivered orders by this Court. It found itself on cross roads. Hence, as a way out of the tight corner, the trial Court decided to make the above statement as a soft landing. Very shrewd indeed.

37. Having stated that, I now wish to address myself onto the second sub-issue herein regarding whether the 1st and 2nd Respondents were in contempt of the court order. It's well established that courts do not issue orders in vain. Courts guard its own orders jealously. They must be honored and obeyed at all costs however irrelevant they may be. Should a person disagree with a court order, the available remedy is to more court for it to discharge vary or set aside its orders with good and/or justifiable reason. In this case Order 40 Rule 7 would be applicable provides:

“ Any order for an injunction may be discharged, or varied or set aside by the court on application made thereto by any party dissatisfied with such order.”

I fully concur with both the counsels for the Appellant and Respondents to the effect that, contempt of court is in the nature of criminal proceedings, and therefore proof of a case against a contemtor is higher than that of a balance of probability. This is because liberty of the subject is usually at stake and the applicant must prove willful and deliberate disobedience of the court order. If he were to succeed. It is an offence of a criminal character, as a man may be sent to prison. It must be proved satisfactorily. There has been a myriad of cases where they hold for an application for a contempt to succeed in Civil Proceedings. These include and not limited to the case of Shimmers Plaza Ltd. v NBK Limited (2015) eKLR Christine Wangari



Gachege – Versus- Elizabeth Wanjiru Evans & 11 Others 2014 eKLR state that the Applicant has to prove the following grounds:-

- a. The terms of the order.
- b. The Knowledge of the terms by the Respondents
- c. Failure by the Respondent to comply with the terms of the order

38. The Honorable Court has decided to look into the concept of the Contempt of court in details. It is that conduct or action that defies or disrespects authority of court. Black Law Dictionary 9th Edition defines it as:-

“The act or state of despising the conduct of being despised conduct that defies the authority or dignity of a court or legislature. Because such conduct interferes with administration of Justice”

Properly put, contempt is the conduct that impairs the fair and efficient administration of justice. From the very onset, this Court takes cognizance to the fact that the Contempt of Court Act, No. 46 of 2016 was declared constitutionally invalid and nullified in 2018 for lack of public participation as required under Articles 10 and 118 (b) of the Constitution and for encroaching on the independence of the Judiciary as founded in the case of: “Kenya Human Rights Commission – Versus - Attorney General & Another (2018) eKLR. In the given circumstances, this court is compelled to revert to the provision of the law that operated before the emanated of the Contempt of Court Act – the Judicature Act and the Supreme Court Rules of England. Under the provisions of Section 5 of the Judicature Act, Cap. 8 of the Laws of Kenya confers jurisdiction on the Superior Courts to punish for contempt provides thus:-

“The High Court of Appeal shall have the same powers to punish for contempt of court as is for the time being possessed by the High Court of England and that power shall extend to upholding the authorities and dignity of sub - ordinate courts.

39. Additionally, under Section 27 of the Environment and Land Court Act Provides that:-

“ Any person who refuses, fails or neglects to obey an order or direction of the court given under this Act, commits an offence and shall on conviction be liable to a fine not exceeding twenty Million Shillings (Kshs. 20,000,000/=) to imprisonment for a term not exceeding two years or to both.

In the case of “Charity Mpano Ntiyine v China Communication Constructions Company Limited & National Environment and Management Authority [2017] eKLR. Court held that there are three elements that must be proved in contempt proceedings. These are:-

- a. Applicant must demonstrate terms of orders
- b. Applicant must demonstrate knowledge of terms by the Respondents and
- c. Applicant must demonstrate failure of Respondent to comply with the court order.



40. Under Order 40 Rule 3 of Civil Procedure Code provides that cases of disobedience or of breach of any terms of a temporary injunction the court granting that injunction may order the property of the person guilty of such disobedience or breach to be attached and may also order such person to be detained in prison for a term of not exceeding six (6) months unless the court directs his release.

The reason why courts punish for contempt is to uphold the dignity and authority of the court, ensure compliance with directions of the court observance and respect of due process of law, preserve an effective and impartial system of justice and maintain public confidence with administration of justice by court. Without sanctions of contempt there would be a serious threat to the rule of law and administration of justice for a party to be cited for contempt he must have violated and/or disobeyed an order that was directed at him.

41. From the above legal principles its not well established that service of the court order is no longer a condition precedent. For this reason, I totally disagree with the Learned Counsel for the 1st and 2nd Respondent while holding that the 1st and 2nd Respondent were never personally served directly with the court order as they were both away. 1st Respondent at the United States of America while the 2nd Respondent was in Malindi, the County of Kilifi “But instead served through her Advocate’s Offices. The critical ingredient for an applicant for contempt proceedings is knowledge for contempt proceedings is knowledge of the order and its terms. I have noted the Counsel has held that the 1st and 2nd Respondents were both not aware of the terms orders. The Learned Counsel argues and rightfully so that knowledge is a question of facts and one must be aware of the court order. She holds that the Contemptor must know what the order required him to do or not to do but willfully and deliberately disobeyed it. I find this argument rather interesting and not persuasive at all. Indeed, I fully concur with the trial court when it held that:-

“Those orders were made in the presence of the Advocates for the parties, there fore there was no need of service of the orders..... None of the parties in these proceedings can claim was not aware of the orders as the same was made in the presence of their advocates and it is naturally presumed that they were informed of the orders by their advocates.

42. Besides the 1st Respondent in her Replying Affidavit sworn under Oath on 14th December, 2020, under Paragraph 6 Page 221 of the Record of Appeal she depones that

“That in response to paragraph 5 the orders of temporary injunction of 10th February, 2020 were not extended by the ruling made by court on 11th September, 2020. The court only stated that the status quo be maintained and Applicant is put to strict proof thereof”.

A quick reading of the above assertion is a clear indication without any iota of doubt that the 1st Respondent was aware of the orders of the trial court. It would be extremely mischievous to refute having knowledge of the said orders.

The only person the court may wish to vouch for though might have been the orders but not directed at him would be the 2nd Respondent who I have noticed that he been struck out from the proceedings in the Lower Court. Indeed it was until on 18th October, 2021 that this Honorable Court directed that he be served by way of



substituted means by publishing an advertisement in the local newspapers. For this reason, I proceed to exonerate him from being aware of the court order.

43. Finally, the court now wishes to deal on the third limb of the ingredients for contempt proceedings – whether the Respondents willfully and deliberately failed to obey the terms of the court orders. I fully concur with the assertion by the trial court to the effect that the burden is on the Appellant to demonstrate that the 1st and 2nd Respondents willfully and deliberately disobeyed the said court orders. As indicated above, the standard of proof on matter of contempt is high than proof on balance of probabilities as stated the contempt proceedings are of the nature of criminal offence and at times the liberty of a party is at stake See *Mutitika v Baharini Farm Limited* [1985] KLR 229.

To advance its argument while seeking for the orders of contempt against the 1st and 2nd Respondents, the Applicant has averred that under Paragraph 9 of the Supporting Affidavit sworn on oath by Lynn Alexander James Deliholm on 25th November, 2020 thus:-

“That despite the Defendant and the Affected party having participated in the proceedings herein having been served and/or being aware of the said orders the Defendant and the affected party have failed and/or refused to comply with the said orders in that they are interfering with the status of the suit property by digging foundation erecting iron pillars and continuing with construction on the suit property”.

44. To proof this, he annexed a set of four (4) photographs marked as LAJD – 4A to C. The Honorable Court has keenly assessed the only evidence available as adduced by the Appellant as proof of the willful and deliberate disobedience of the court order and find it not satisfactory proof at all. In saying so, the Honorable Court holds the following reasons: -

Firstly, all the four (4) photographs are black and white. I have noted they are blurred and not easily visible it is rather difficult to place the exact location and people on it.

Secondly, although they bear a date – being 19th November, 2020 as the date when they were taken, they fail the test of admissibility as required by law. The provisions Section 106 A to H of the *Evidence Act* Cap 80 as they are not accompanied with a Certificate as required by law making them inadmissible. I wonder why the Appellant never thought of invoking Order 18 Rule 11 of CPC for a site visit. For these reasons, the court is persuaded and upholds the decision of the trial court to the effect that the Appellant has not satisfactorily executed and discharged its burden as required by law.

IssueNo. (b) Whether the parties are entitled to the relief sought from the filed Appeal.

45. Under this sub-heading the court has already noted and concluded that the lower court delivered two orders on 10th February, 2020 and 11th September, 2020. All the parties were fully aware of these orders as they were informed by their Advocates who were present in court all along during the proceedings. Besides, the 1st Respondent also committed herself of being aware of the court order by deponing onto an affidavit on oath while responding to the application for contempt by the Appellant. However, in as much as the 1st and 2nd Respondents were aware of the terms of the court orders, the Appellant has failed to satisfactorily proof that the Respondents were in breach of the Court order. He has not fully demonstrated that the 1st and 2nd Respondents have been digging foundation, erecting iron pillars and continuing with construction on the suit land from the Photographs annexed thereof. The said documents by the Appellant evidence fails to meet the test of admissibility as required by the provisions



of Chapter II Section 5 to 16 and Part VIII on Electronic Records Sections 106 A and 106B of the [Evidence Act](#).

46. For this reason, the court is not persuaded in the given circumstances that the 1st and 2nd Respondents are of breach of Court orders. However, from the suspicion that the trial court has raised by warning parties to desist from any further activities and an order to maintain peace and tranquility until the case is heard and determined.

Based on the Court's inherent discretion bestowed on me by law, I proceed to invoke the Provisions of Sections 1, 1A, 3 and 3A Civil Procedure Sections 3 and 13 of ELC Act No. 19 of 2011 Section 101 of [Land Registration Act](#) and 150 of [Land Act](#) and Article 159 of Constitution of Kenya Order 18 Rule 11 Civil Procedure Rule by ordering that the lower court to conduct a site visit locus in quo and establish the actual position on the ground before embarking on any further proceedings of the matter. Should there be any tangible evidence that indeed the 1st and Respondent was in breach of the court order appropriate punishment to be imposed according to the law.

Issue No (c) Who will bear the costs of the Appeal?

47. The issue of Costs is at the discretion of Courts. Costs mean the award that a party is granted at the conclusion of any process, legal action or proceeding in any litigation. The Proviso of the provision of Section 27 (1) of the [Civil procedure Act](#), Cap. 21 provides that Costs follow the event whereby by events it means the result of the said process, legal action or proceedings.

In the instant case, taking that the matter is still to proceed hearing and final determination before the trial Court, it is just fair, reasonable and equitable that each party bears its own costs.

VI. Conclusion and Disposition.

48. The upshot of the foregoing, and having conducted an indepth analysis of the framed issues herein, the Honorable Court finds that the Appeal by the Appellant has merit to a certain extent. Accordingly, and for avoidance of any doubts, the Honorable Court makes the following orders for disposal thereof:-
- a. That the appeal herein be and is hereby allowed by setting aside the Ruling and order delivered by Chief Magistrate Court on 12th March, 2020.
 - b. That notwithstanding the order number (c) below, an order of this Court be and is hereby made that the Appellant has not been able to satisfactorily proof that the 1st and 2nd Respondents herein were in willful and deliberate breach of the Court orders by the Chief Magistrate delivered on 10th February, 2020 and 11th September, 2020 respectively.
 - c. That an order be and is hereby made remitting back this matter to the Chief Magistrate (Environment and Land) Court for:-
 - i. Further hearing and determination of the suit.
 - ii. Conducting a Site Visit ("Locus in Quo") in the presence of all the parties on the suit property based on the provision of Order 18 Rule 11 of Civil Procedure Rules, 2010 in order to establish the actual status of the matter vis – vis the allegations meted by the Appellant herein.
 - iii. Should there be any proof that indeed there were digging of foundation erecting of iron pillars and continuing construction on the suit properly after the orders of 10th February, 2020 and 11th September, 2020 then appropriate punishment to be meted up on the 1st Respondent for contempt proceedings as provided for by the provisions of the relevant law.



d. THAT the matter to be mentioned before the Chief Magistrate on 16th March, 2023 for compliance of this orders and/or further direction.

e. THAT each party to bear its own costs.

It Is So Ordered Accordingly

JUDGMENT DELIVERED, SIGNED AND DATED AT MOMBASA ON THIS 22ND DAY OF FEBRUARY.....2023.

HON. MR. JUSTICE L.L. NAIKUNI (JUDGE)

ENVIRONMENT AND LAND COURT AT

MOMBASA

In the Presence of:-

- a. M/s Yumnah, the Court Assistant;
- b. Mr. Onden’g Advocate for the Appellant.
- c. M/s. Omollo Advocate for the 1st and 2nd Respondent.

