



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT MALINDI**

**ELC NO. 44 OF 2020**

**KIBWANA HAMADI & 291 OTHERS.....PLAINTIFFS/RESPONDENTS**

**VERSUS**

**JOHN KIMOGUT KIPTOO.....1<sup>ST</sup> DEFENDANTS/APPLICANT**

**LAND REGISTRAR, MOMBASA.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**RULING**

This ruling is in respect of an application brought by way of a Notice of Motion dated 10<sup>th</sup> August 2021 by the 1<sup>st</sup> Defendant/applicant seeking for the following orders:

*a) Spent*

*b) That the Plaintiffs Kibwana Hamadi, Mohamed Wafula, Mwezinane Kamanza, Steven Baya, Baraka Kamanza, Tsuma Kodi Mboga, Mwadingo Kabi, Meshack Baya Yaa, Hamisi Kea and Stallon Solano specifically and the Plaintiffs be held to be in contempt of the orders of the honourable court issued on the 3<sup>rd</sup> of June 2021.*

*c) That the said Kibwana Hamadi, Mohamed Wafula, Mwezinane Kamanza, Steven Baya, Baraka Kamanza, Tsuma Kodi Mboga, Mwadingo Kabi, Meshack Baya Yaa, Hamisi Kea and Stallon Solano do appear in court and show cause why they should not be jailed for contempt of court.*

*d) That the contemnors be committed to jail and/or fined accordingly.*

*e) That in view of the aforesaid disobedience and contempt, the orders issued on 3<sup>rd</sup> June 2021 be set aside.*

Counsel agreed to canvas the application vide written submissions which were duly filed.

**1<sup>ST</sup> DEFENDANT'S SUBMISSIONS**

Counsel relied on the grounds on the face of the application together with the supporting affidavit of John Kimogut Kiptoo wherein he deposed that this court granted orders of status quo to be maintained on the suit land title No. CR 64260 Plot No. 9911/III/MN on 3<sup>rd</sup> June 2021.

The 1<sup>st</sup> defendant deponed that as at the time the orders were issued there were no developments on the suit property and that on 30<sup>th</sup> June 2021, the 1<sup>st</sup> defendant witnessed the plaintiffs namely Kibwana Hamadi, Mohamed Wafula, Mwezinane Kamanza, Steven

Baya, Baraka Kamanza, Tsuma Kodi Mboga, Mwadingo Kabi, Meshack Baya Yaa, Hamisi Kea, Stallon Solano and other plaintiffs clearing the bushes on the suit property with the intentions of putting up structures thereon.

Counsel listed three issues for determination by the court as follows:

*a) Whether the Plaintiffs, more so Kibwana Hamadi, Mohamed Wafula, Mweziane Kamanza, Steven Baya, Baraka Kamanza, Tsuma Kodi Mboga, Mwadingo Kabi, Meshack Baya Yaa, Hamisi Keah and Stallon Solano are in contempt of court orders issued on 3<sup>rd</sup> June 2021.*

*b) Whether the cited respondents should be punished for such contempt, and*

*c) Whether the orders issued on the 3<sup>rd</sup> June 202 should be set aside.*

On the first issue, counsel submitted on the law relating to contempt of court proceedings and relied on Section 63 of the Civil Procedure Act as well as Order 40 Rule 2(2). Section 63 of the Civil Procedure provides.

*In order to prevent the ends of justice from being defeated, the court may, it is so prescribed*

*(a) Issue a warrant to arrest the defendant and bring him before the court to show cause why he should not give security for his appearance, and if he fails to comply with any order for security commit him to prison;*

*(b) Direct the defendant to furnish security to produce any property belonging to him and to place the same at the disposal of the court or order the attachment of any property.*

*(c) Grant a temporary injunction and in case of disobedience commit the person guilty thereof to prison and order that his property be attached and sold.*

*(d) Appoint a receiver of any property and enforce the performance of his duties by attaching and selling his property.*

*(e) Make such other interlocutory orders as may appear to the court to be just and convenient.*

It was counsel's submission that the Plaintiff/Respondents approached the Court vide their Notice of Motion dated the 23<sup>rd</sup> June 2020 seeking an injunction against the Defendants from any dealings on the suit land title No. CR 64260 Plot No. 9911/III/MN, whereby the court declined to grant the same and rendered a ruling which stated as follows:

*"In the circumstances, I decline to grant the orders of injunction in the manner sought by the Plaintiffs. Instead, I am of the view and I hereby order that pending the hearing and determination of this suit, the status quo obtaining as of today be maintained by each party remaining on the respective portions of land which they currently occupy. There should be no sale and/or further subdivision of the land until the suit is heard and determined."*

Mr. Nyabena submitted that the ruling was unambiguous as the status quo prevailing at the time as at 3<sup>rd</sup> June 2021 and that any reasonable man would have known what the prevailing status quo was. Counsel relied on the case of **Shimmers Plaza Limited vs National Bank of Kenya Limited (2015) eKLR**, where the Court held that: -

*"Status quo" in normal English parlance means the present situation, the way things are at the time that order was given. It cannot therefore relate to past or future occurrences or events... All it meant was that everything was to remain as it was at the time the order was given. If there was any transaction of whatever nature that was going on in the land in question, it has to freeze and await the discharging of the court order."*

It was counsel's further submission that the true position of the status of the suit property as at 3<sup>rd</sup> June 2021 could only be as per the report of the Deputy Registrar dated 5<sup>th</sup> July 2021 and further argued that for the court to determine whether or not a party is in contempt, the court must establish that there a court order in existence, whether the contemnor was aware of the order, whether the order has been disobeyed and whether the action amounts to breach.

Counsel relied on the case of *Republic V Kiambu County Registrar & 3 Others ex parte Stephen Wanyoike Kinuthia (2016) eKLR* where the court held:

*“In my view a party ought not to create absurd situations and rely on the same to evade the consequences of a court order. As this Court held in Republic vs. Kenya School of Law & 2 Others Ex Parte Juliet Wanjiru Njoroge & 5 Others (2015) eKLR: “Court orders, it must be appreciated are serious matters that ought not to be evaded by legal ingenuity or innovations. By deliberately interpreting Court orders with a view to evading or avoiding their implementation can only be deemed to be contemptuous of the court. Where a party is for some reason unable to properly understand the Court order one ought to come back to Court for interpretation or clarification...Where it has been brought abrogated or abridged by brazen or subtle schemes and manoeuvres.....this Court cannot turn a blind eye to the same.”*

Counsel therefore submitted that the applicant has satisfied the ingredients of proof of contempt and cited the case of *James Gachiri Mwangi v John Waweru Muriuki & 3 others [2020] eKLR* and urged the court to allow the application as prayed

On the second issue as to whether the respondents should be punished for contempt, counsel relied on the cases of *Shimmers Plaza Limited v National Bank of Kenya Limited (supra)* and *James Gachiri Mwangi v John Waweru Muriuki (supra)* and urged the court to find that the respondents are in contempt of court therefore should be punished.

On the last issue as to whether the orders issued on 3<sup>rd</sup> June 2021 should be set aside, counsel submitted that the conduct of the Plaintiff/Respondents clearly shows that they do not deserve the orders issued by the court on the 3<sup>rd</sup> June 2021 at their instigation and relied on the case of *Rufus Muriithi Nyaga V Rebecca Magwi Njeru (2018) eKLR* where in vacating the orders of status quo issued at the instigation of the contemnor, the court stated thus:

*“I am of the considered opinion that the applicant has failed to comply with this court’s orders and directions. He has also blatantly taken over land of the respondent and her siblings without any colour or right. He ought to have filed this appeal and awaited its outcome. This action amounts to deliberate breach of the law. The applicant does not deserve the orders issued to him on 17/07/2017. The Respondent has good cause to seek the setting aside of the said orders. I find her application merited. For the foregoing reasons, I hereby allow the Respondent’s application dated 13/10/2017 in terms of prayer 2. For avoidance of duplication of the court’s orders, I decline to grant prayer 3 of the application. In effect the orders issued on 17/07/2017 stand vacated.*

Counsel therefore urged the court to vacate the orders dated 3<sup>rd</sup> June 2021.

#### **PLAINTIFF/RESPONDENTS’SUBMISSIONS**

The plaintiff/respondents in response to the application filed grounds of opposition dated 13<sup>th</sup> September 2021 and Replying affidavits sworn by the Plaintiffs but more particularly, Kibwana Hamadi deposed that the parties herein are in occupation of the suit property and that the orders to maintain status quo were only to prohibit sale and subdivision of the suit property. He further deposed that the Plaintiffs have not cleared any bushes as alleged but that the 1<sup>st</sup> Defendant/applicant was constructing a perimeter wall and harassing the Plaintiff/respondents and annexed copies of police OB to that effect.

In response to the allegation of construction of a perimeter wall the 1<sup>st</sup> Defendant/applicant filed a further affidavit and deposed that the Plaintiffs have never been in occupation of the suit property and that the said perimeter wall was on a different plot not the suit property.

Counsel gave a brief background to the application and stated that on 3<sup>rd</sup> June 2021, the Honourable Court delivered a ruling on an application dated 23<sup>rd</sup> June,2020 and 11<sup>th</sup> August,2020 by the Plaintiff/applicants and Respondent respectively where the court granted orders of status quo to be maintained pending the hearing and determination of the suit.

Counsel stated that one of the 1<sup>st</sup> defendant’s prayers in the application dated 11/8/20 was to urge the court to undertake a site visit before the injunction but the court did not grant that orders as seen at paragraph 15 of the Ruling hence the said ruling and order are still in place as it has neither been set aside, varied nor stayed.

It was counsel’s submission that the defendant being dissatisfied with the Court’s ruling, filed an Ex-Parte Application dated 10<sup>th</sup>

June, 2021 and obtained ex-parte orders before Justice Sila Munyao to visit the suit land for survey and submit a report against the directions of this Honourable Court in the name of recording 'status quo'. That in the same application the applicant also prayed that the Plaintiffs be cited for contempt.

Counsel submitted that pursuant to an Amended Notice of Motion dated 14/7/2021 which was heard inter partes before Hon. Justice J. O Olola, this Hon Court vide an Order dated 29/7/2021 vacated the ex-parte orders delivered by Hon. Justice Sila Munyao and further expunged from record of the Court, the report by Deputy Registrar Hon Wasike submitted on 5<sup>th</sup> July 2021.

Counsel listed three issues for determination by the court as follows:

- a) *Whether the 1<sup>st</sup> Defendant/applicant's application is res judicata.*
- b) *Whether the Plaintiffs/respondents are in contempt of the court orders issued on 3rd June 2021.*
- c) *Whether the 1st Defendant/applicant's application is an omnibus application apt for striking out.*

Mr. Nyanje submitted that the 1<sup>st</sup> defendant's application is *res judicata* as the issues raised were adequately and conclusively dealt with by this court vide the ruling delivered on 3<sup>rd</sup> June 2021 and the orders dated 29<sup>th</sup> July 2021 which orders are still in effect. Counsel relied on the case of **IEBC v Maina Kiai & 5 others [2017] eKLR**.

On the issue as to whether the Plaintiff/respondents are in contempt of the court orders issued on 3<sup>rd</sup> June 2021, counsel submitted that the court should consider the elements as established in the case of **Sheila Cassatt Issenberg & another v Antony Machatha Kinyanjui [2021] eKLR** where Justice E.C Mwitwa quoted with approval **Cromwell J**, of the Supreme Court of Canada in **Carey v Laiken**, 2015 SCC 17 (16<sup>th</sup> April 2015) to determine whether or not the claim on contempt was indeed established.

Counsel therefore submitted that the order dated 3<sup>rd</sup> June, 2021 was unequivocal, and its operation was only on the ambit of maintaining status quo, sale and sub-division of the suit property; otherwise the parties were at liberty to occupy their respective portions of land that they lived in.

On the last issue as to whether the 1<sup>st</sup> Defendant/applicant's application is an omnibus application apt for striking out counsel submitted that the Plaintiff/respondents did nothing and are not in contempt and cited the cases of **Pyaralalmhandbheru Rajput v Barclays Bank and others Civil Case No. 38 of 2004** as quoted in the case of **Beta Healthcare International Limited v Grace Mumbi Githaiga & 2 others [2016] eKLR**.

Mr. Nyanje urged the court to dismiss the application as the applicant has not proved contempt to the required standard noting that contempt is quasi criminal in nature hence the standard of proof is higher than the normal civil claims.

### **ANALYSIS AND DETERMINATION**

The issue for determination are as to whether this application is *res judicata*, whether the Plaintiff/respondents are in contempt of the orders emanating from the ruling delivered on 3<sup>rd</sup> June 2021 and whether the orders issued on the 3<sup>rd</sup> June 2021 should be set aside.

On the first issue whether the application is *res judicata*, the court is guided by the provisions of Section 7 of the Civil Procedure Act which states as follows:

#### ***Res judicata***

***No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.***

In the case of *Invesco Assurance Company Limited & 2 others v Auctioneers Licensing Board & another; Kinyanjui Njuguna & Company Advocates & another (Interested Parties) [2020] eKLR* explained the said section 7 as follows:

*“The doctrine will apply only if it is proved that:*

- i. The suit or issue raised was directly and substantially in issue in the former suit.*
- ii. That the former suit was between the same party or parties under whom they or any of them claim.*
- iii. That those parties were litigating under the same title.*
- iv. That the issue in question was heard and finally determined in the former suit.*
- v. That the court which heard and determined the issue was competent to try both the suit in which the issue was raised and the subsequent suit.”*

Coming back to the current application, it should be noted that the same was an application for injunction which ruling was delivered on 3<sup>rd</sup> June 2021. The Plaintiff/respondents had sought orders of injunction restraining the Defendants from entering, trespassing or otherwise dealing with the suit property. This court declined to issue those orders but ordered that the status quo be maintained since both parties occupied the suit property.

The issues that resulted in the orders dated 29<sup>th</sup> July 2021 were in relation to the ex parte orders issued on 16<sup>th</sup> June 2021 and the Deputy Registrar’s report. The Plaintiffs/respondents had sought to set aside the ex parte orders and expunge Deputy Registrar’s report from the record which was granted in the presence of counsel. It follows that the Deputy Registrar’s report does not form part of the record having been expunged from the court record.

I find that the application being an application seeking that the respondents be cited for contempt is not res judicata.

On the second issue as to whether the Plaintiff/respondents are in contempt of the orders emanating from the ruling delivered on 3<sup>rd</sup> June 2021, the court is guided by the provisions of section 5 of the Judicature Act which provides that:

*The High Court and the Court of Appeal shall have the same power to punish for contempt of court as is for the time being possessed by the High Court of Justice in England, and that power shall extend to upholding the authority and dignity of subordinate courts.*

Further, section 29 of the Environment and Land Court Act, 2011 provides:

#### *Offences*

*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 or to imprisonment for a term not exceeding two years, or to both.*

The Court of Appeal in *Micheal Sistu Mwaura Kamau v Director of Public Prosecutions & 4 others [2018] eKLR* explained:

*“It is trite that to commit a person for contempt of court, the court must be satisfied that he has willfully and deliberately disobeyed a court order that he was aware of. ...Secondly, as this Court emphasized in Jihan Freighters Ltd v. Hardware & General Stores Ltd and in A.B. & Another v. R. B. [2016] eKLR, to sustain committal for contempt of court, the order of the court that is alleged to have been deliberately disobeyed must be clear and precise so as to leave no doubt as to what a party was supposed to do or to refrain from doing. Lastly, the standard of proof in committal proceedings is higher than proof on a balance of probabilities, though not as high as proof beyond reasonable doubt. (See Mutitika v. Baharini Farm (supra) and Republic v. Ahmad Abolfathi Mohammed & Another (supra).”*

The order that is in question which was delivered vide a ruling dated 3<sup>rd</sup> June 2021 states in part as follows:

***“That being the case, it is evident both the Plaintiffs and the 1<sup>st</sup> Defendant are in occupation of parts of the suit property and have both made some developments thereon. In the circumstances I decline to grant the orders of injunction in the manner sought by the Plaintiffs. Instead, I am of the view and I hereby order that pending the hearing and determination of this suit the status quo obtaining as of today be maintained by each party remaining on the respective portions of the land they currently occupy. There should be no sale and or further sub-division of the land until the suit is heard and determined.”***

The reason that I have reproduced the contents of the order is to show that the order was clear and unambiguous. Any right thinking man/woman would be able to deduce and understand what the ruling meant to safeguard. The status quo obtaining at the time of the ruling should be maintained. The court went further to describe the status that both the plaintiffs and the respondent are in occupation of portions of the suit land and that they should remain in their respective portions. The ruling also ordered that there should be no sale or further subdivision of the suit land pending the hearing and determination of the case.

Counsel for the plaintiff/respondents’ submission that the ruling was only to the effect that there should be no sale or further subdivision is flawed and does not hold any water. Status quo is as per the status obtaining when the ruling was delivered on 3<sup>rd</sup> June 2021.

It was incumbent upon the 1<sup>st</sup> Defendant/applicant to prove that the Plaintiff/respondents deliberately disobeyed the orders issued on 3<sup>rd</sup> June 2021. The 1<sup>st</sup> Defendant/applicant alleged that the Plaintiffs had cleared some bushes within the suit property with an intention to put up structures. He attached copies of photographs allegedly of the cleared bushes. The photographs do not show any evidence of cleared bushes.

For contempt of court proceedings to succeed the applicant must prove that (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 as was held in the case of ***Kristen Carla Burchell vs Barry Grant Burchell, Eastern Cape Division Case No. 364 of 2005***

It without doubt that the orders were clear and that the parties were aware of the order. What is in doubt is whether the respondents willfully disobeyed the court order. Counsel for the 1<sup>st</sup> defendant urged the court to rely on the Deputy Registrar’s Report to ascertain the status quo but unfortunately the court cannot rely on it as it had been expunged from the court record. Without any further evidence the court is unable to ascertain that bushes were cleared as alleged. I also notice that the respondents attached photographs indicating that there was a fence under construction on the suit land. Status quo applies both ways to both parties.

This case has been convoluted by applications and counter applications which have stalled the hearing of this suit. Applications do not solve the question at hand and the best that can happen in this case is to fix this matter on priority basis and hear the main suit once and for all. Applications and counter applications make the court a parking lot for cases without any intention of leaving the parking spaces. This is not good for access to justice. I notice that the applicant filed a Notice of Appeal to the Court of Appeal in respect of the ruling that vacated the orders expunging the Deputy Registrar’s report and no outcome has been reported.

I therefore find that the applicant has failed to prove that the respondents are in contempt of the court order dated 3<sup>rd</sup> June 2021. Having found so, I also find that the order of status quo should remain in place to preserve the substratum of the case pending the hearing and determination of this suit. This case should be heard on priority basis to avoid the multiplicity of applications which will not solve the real issue at hand.

Application is hereby dismissed with each party bearing their own costs

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 20<sup>TH</sup> DAY OF JANUARY, 2022.**

**M.A. ODENY**

**JUDGE**

***NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Ruling has***

*been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.*



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