



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA

Civil Case 44 of 2011

1. ABDALLA MGUTE 1ST
PLAINTIFF
2. FELIX KATANA 2ND
PLAINTIFF
3. PASTOR HARRISON NJAGI & 159 OTHERS 3RD
PLAINTIFF

V E R S U S

1. MOHSIN BIN SALEH SHERMAN 1ST
DEFENDANT
2. SAID BIN SALEH SHERMAN 2ND
DEFENDANT
3. HUSSEIN BIN SALEH SHERMAN 3RD
DEFENDANT
4. OMAR BIN SALEH SHERMAN 4TH
DEFENDANT

RULING

1) It is said that **CHRISPUS MZUNGU MWAGAMBO, KATANA KIBWANA, SULEIMAN AKIDAH, OMAR ISMAIL, TEDSON GONA, KIBWANA JEFWA** and **MOHAMED ALI** (the Alleged Contemnors) have disobeyed the Court Order of 30th March 2011 which injunctioned the Plaintiffs from taking possession of land described as Plot No. 224/MN/II (the suit property), erecting more structures thereon and/or dealing with it. The Notice of Motion dated 17th January 2012 filed by the Plaintiff's seeks the following orders-

“(a) That the alleged Contemnors herein, to

wit, CHRISPUS MZUNGU MWAGAMBO, KATANA KIBWANA, SULEIMAN AKIDAH, OMAR ISMAIL, TEDSON GONA, KIBWANA JEFWA and MOHAMED ALI be committed to jail for a period of six (6) months for being in contempt of the Order of this Honourable Court made on 30th March 2011.

(b) That all the properties of the alleged

Contemnors herein, to wit, CHRISPUS MZUNGU MWAGAMBO, KATANA KIBWANA, SULEIMAN AKIDAH, OMAR ISMAIL, TEDSON GONA, KIBWANA JEFWA and MOHAMED ALI be attached for disobeying the order of this Honourable Court made on 30th March 2011.

2) It is common ground that the alleged contemnors were aware of the Court Order and were duly served. Through an affidavit sworn on 17th January 2012 the Plaintiffs complain that the alleged contemnors have breached the order by selling or continuing to build on the suit property. That these breaches were committed in June 2011, August 2011 and September 2011. Attached to that affidavit were photographs said to be of some of the ongoing construction. So this Court is asked to punish the alleged Contemnors and uphold its dignity.

3) The 5th alleged Contemnor, on written authority of his colleagues, swore an affidavit on 29th March 2012 in answer to the application. It was a short affidavit in which they denied being in contempt of Court. They deny ever selling any portions of the suit property. Instead, they aver that it is the 3rd Plaintiff who is guilty of selling portions thereof. Annexed to the affidavit is a copy of a document in which the 3rd Plaintiff is said to have witnessed a sale transaction.

4) That is the rival evidence. The Court must evaluate that evidence and decide the matter one way or another. The onus rests with the Applicant to prove the contempt. The standard of proof is a standard higher than proof on a balance of probabilities but not as high as proof beyond reasonable doubt (**The Court of Appeal in Civil Application No. Nairobi 39 of 1990 Refrigerator & Kitchen Utensils Ltd and Gulabchad Popatlal Shah & Others** citing **Civil Application No. Nbi 24 of 1985 Gatharia Mititika & Others –Vs- Baharini Farm Ltd**).

5) The allegations of sale of the land by the alleged Contemnors are not backed by any documentary evidence or oral evidence of an independent witness. Similarly no evidence was presented to corroborate the reports allegedly made by the Plaintiffs to the police in the months of August and September 2011. No names were given of persons who may have purchased portions of the suitland.

6) On the issue of construction the Plaintiffs showed the Court some photographs as proof of ongoing work. This was refuted by the alleged Contemnors. The alleged Contemnors denied being the owners of the houses in the photographs. It was the position of the alleged Contemnors that a site visit by Court would vindicate them. This Court has looked at the photographs but is unable to make much of them. Three of the photographs show incomplete houses. But there are no specifics as to who is constructing them. There is no evidence whatsoever connecting the alleged Contemnors to those incomplete buildings.

7) The burden cast on a party applying for the punishment for contempt of Court is not a particularly light one. In the matter before me the Applicants have failed to discharge their duty. No documentary or independent evidence implicates the alleged Contemnors. Look for instance at the following allegation by the Applicant-

“22. That the Respondents in front of Mr.

Machache the Assistant Chief termed the Court Order as fake, that they did not recognize it whereupon the said Assistant Chief reprimanded them of the same.”

The Assistant Chief was not called upon by the Applicants to corroborate this account.

8) While it is paramount that the dignity of Court process must be protected and upheld, the liberty of the alleged Contemnors should not be taken away on evidence as weak as that presented by the Applicants. I am afraid their application dated 17th January 2012 must fail. I hereby dismiss it with costs.

Dated and delivered at Mombasa this 9th day of October, 2012.

F. TUIYOTT

JUDGE

Dated and delivered in open court in the presence of:-

Tindika for the Plaintiffs

No appearance for the Defendants

Sitonik for Kenga for the alleged Contemnors

Court clerk - Moriasi

F. TUIYOTT

JUDGE



While the design, structure and metadata of the Case Search database are licensed by [Kenya Law](#) under a [Creative Commons Attribution-ShareAlike 4.0 International](#), the texts of the judicial opinions contained in it are in the [public domain](#) and are free from any copyright restrictions. Read our [Privacy Policy](#) | [Disclaimer](#)