Munene & 5 others v Attorney General & another; County Government of Kiambu (Interested Party) (Petition 399 of 2014) [2023] KEHC 1537 (KLR) (27 February 2023) (Ruling)

Neutral citation: [2023] KEHC 1537 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

PETITION 399 OF 2014

AA VISRAM, J

FEBRUARY 27, 2023

BETWEEN

STANLEY MBURU MUNENE ..... 1ST APPLICANT

SOLOMON NG'ANG'A WARUHIU ..... 2ND APPLICANT

AND

PAUL KANG'ETHE WARUHIU ..... 1ST PETITIONER

GEORGE KANG'ETHE WARUHIU ..... 2ND PETITIONER

STANLEY KANG'ETHE WARUHIU ..... 3RD PETITIONER

BENKAAMIN KIMANI WARUHIU ..... 4TH PETITIONER

AND

ATTORNEY GENERAL ..... 1ST RESPONDENT

COMMISSIONER OF LANDS ..... 2ND RESPONDENT

AND

COUNTY GOVERNMENT OF KIAMBU ..... INTERESTED PARTY

RULING

1. The Applicants' filed a Notice of Motion Application dated February 26, 2020 ("the Application") pursuant to the provisions of section 3A of the *Civil Procedure Act*, Order 51 Rule 1 (1) of the *Civil Procedure Rules, 2010*, and section 5 of the *Judicature Act*, seeking the following prayers:

> I. That Paul Kagura Mathenge and Emmanuel Mwagambo Mwangonah be committed to civil jail for six months each for contempt of court.

II. That the property of Paul Kagura Mathenge and Emmanuel Mwagambo Mwangonah be attached.

Applicants' submissions

2. The Application was supported by a Statement dated May 7, 2019; Verifying Affidavit sworn May 7, 2019; and a Further Affidavit sworn by Learned Counsel for the Applicants' on July 20, 2020.

3. The Applicants filed written submissions in support of the Application on October 11, 2021.

4. At the hearing of the Application, Learned Counsel for the Applicants, Ms Shaw, submitted that the parties entered into a consent order dated August 29, 2016 ("the Consent"), which was duly recorded in court. The terms of the Consent provided that the sum of Kshs 23,025,000 shall be deposited into a joint account of the Applicants' law firm and the 1st petitioner's law firm pending the determination of the Court of Appeal in Civil Appeal number 168 of 2018 ("the Appeal"). She submitted that the Consent had not been stayed or set aside; and that Mr Paul Mathenge Kaguru and Mr Emmanuel Mwagambo Mwangonah ("the Advocates") are the only partners in the law firm of Mwagambo & Okonjo Advocates.

5. Ms Shaw stated that the Advocates declined to open the joint escrow accounts, despite persistent reminders from her. And moreover, that the Appeal had since been determined in favour of the Applicants, who were entitled to receive their money. To date, her clients had been kept out of their money, causing them loss and hardship, and in breach of the terms of the Consent. Finally, she urged the court to find that the continued contempt by the said advocates was eroding the integrity of the Court.

6. Ms Shaw submitted that the Advocates had knowledge of the specific terms of the Consent which required them to remit the sum of Kshs 23,025,000 to a joint account as stated above. This was never done, and it has only presently come to her knowledge that a secret account was eventually opened holding Kshs 11 million rather than the full amount required.

7. Learned Counsel cited several cases in support of her submission that the orders of the court ought to be obeyed. In particular, she cited *Hadkinsen v Hadkinsen* (1952) ALL ER 567, which she submitted sets out the principle that obedience of court orders is a necessary ingredient for the rule of law, good order, and administration of justice. She further quoted the court of Appeal Decision in *Ahmed Noorani v Joyce Akinyi Ochieng* [2017]eKLR in which the court stated as follows:

> "It is the plain and unqualified obligation of every person against, or in respect of, whom an order is made by a court of competent jurisdiction to obey it unless and until that order is discharged. The uncompromising nature of this is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or even void."

8. Finally, counsel drew my attention to the Court of Appeal decision in *Rustam Hira vs Charles Mbagaya & Another* [2016] eKLR which, once again, restates the importance of the obedience of court orders.

Respondent's submissions

9. In reply, the 1st Petitioner filed a deposition, both on his own behalf, and on behalf of his law partner, Mr Emmanuel Mwagambo Mwangonah. He also filed Written Submissions dated November 18, 2021 opposing the Application.

10. Learned Counsel submitted that the contempt orders were hinged on the interpretation of the Consent and how he was expected to comply. He submitted that the terms of the original consent dated July 21, 2016 related to five petitioners, each of whom were to be paid a sum of Kshs 85,524, 000/- being the compensation in respect of the compulsory acquisition of their five properties. Of this total sum, Kshs 55,905,135/- would be paid out partly by the National Government and the balance of Kshs 29,618,865.00/- would be paid by the County Government of Kiambu, in instalments, and over a period of time.

11. Following internal negotiations between the parties, a second consent was arrived at, being the present Consent. The wording of the Consent was as follows:

> " The sum of Kes 23, 025,000/- being compensation attributable in respect of compulsory acquisition of LR No: Githunguri/Gaiehieko 336 be held in an escrow account opened jointly by the firms of Mwagambo &Okonjo Advocates and Ransley, McVicker & Shaw Advocates, pending the hearing and determination of Nairobi Civil Appeal No 168 of 2013 and or further consent"

12. He submitted that in accordance with the terms set out above, the law firms jointly opened the necessary account. Bank forms were sent by his law firm to the Applicants' law firm, and the senior partner at Ms Shaw's firm carried out the necessary actions, which included a partnership resolution to assent to the opening of the account. Accordingly, the bank account, DTB Bank, Prestige Branch, Account No 0415736001 ("the Bank Account") was opened.

13. Counsel submitted that thereafter, a portion of the funds were received from the National Government alone, being Kshs 55,000,000/-, no further amount was, or has been received from the County since. Accordingly, based on his interpretation of the terms of the Consent, each petitioner was entitled to, and eventually received, an equal share of the funds, which was Kshs11,000,000/- each following the judgment in the Appeal.

14. Based on his understanding of the terms of the Consent, each of the petitioners was equally entitled to compensation and that this was the reason for sharing the money equally among all five petitioners. The 1st Petitioner deponed that this is what was meant by holding the funds "on account", or paying on a "pro rata basis".

15. Counsel further submitted that the only way to secure the full sum of Kshs 23,050,000 for the Applicants' was by either paying them with his own money, or by securing a greater portion of the money received from the National Government for them, and to the exclusion of the other petitioners. This would mean giving the Applicants a first security, in priority over the other petitioners, which he did not think was the correct position.

16. Finally, counsel submitted that the original parties to the Consent were his firm, and the law firm of Ransley McVicker & Shaw Advocates, not the present law firm of Virginia Shaw & Company Advocates. He did however concede that this was not an issue because he had still complied with the terms of the Consent in good faith, despite this technical issue.

17. Learned Counsel submitted that he had taken all necessary steps as ordered by the court. He relied on the decision of the High Court in *Republic v Cabinet Secretary for Trade and Industrialization & another; Kenya Farmers Associated Limited & 9 others Ex Parte Tom Lihru Wanambisi* [2020] eKLR

quoting *Republic v Principal Secretary, Ministry of Defence, Ex Parte George Kariuki Waithaka* [2019] eKLR, where the court stated that:

> "As regards culpability, the act or omission constituting disobedience of an order may be intentional, reckless, careless or quite accidental and totally unavoidable. It is now established that a mental element for liability for contempt arising out of disobedience is simply that the disobeying party either intended to disobey or made no reasonable attempt to comply with the orders."

18. To bolster the above point, counsel also relied on the decision of the court in the case above quoting *Heatons Transport (St Helen) Ltd v Transport and General Workers Union* (1973(AC 15) in which the court emphasized that the question to be considered is, whether the disobedience is wilful, or that the party made no reasonable efforts to comply.

19. Finally, counsel cited the decision of the High Court in *Mwangi H.C. Wang'ondu vs Nairobi City Commission* Nairobi Civil Appeal No 95 of 1998, in which the court pronounced itself in the following terms:

> "...[that the threshold of proof required in contempt of court is higher than that in normal civil cases and one can only be committed to civil jail or otherwise penalised on the basis of evidence that leaves no doubt as to the contemnor's liability]"

Analysis and determination

20. Having considered the facts and the applicable law, the issues before me are as follows:

    I. Are the Advocates in breach of the terms of the Consent?

    II. Should the Advocates be held in contempt with attendant consequences?

21. The terms of the Consent were as follows:

    1. That the interim order of stay of execution issued by this court on August 16, 2016 is herein vacated and the consent orders issued on July 26, 2016 are hereby reinstated.

    2. The sum of Kes 23,025,000/- being compensation attributable in respect of compulsory acquisition of LR No: Githunguri/Gaiehieko 336 be held in an escrow account opened jointly by the firms of Mwagambo &Okonjo Advocates and Ransley, McVicker & Shaw Advocates, pending the hearing and determination of Nairobi Civil Appeal No 168 of 2013 and or further consent.

    3. That the firm of Mwagambo &Okonjo Advocates transfer the said amount of Kes 23,035,000 to the joint escrow account no later than 14 days from the date the joint account is opened.

22. Based on a literal reading of the above terms of the Consent, it is clear that the Advocates did not comply with the terms because they did not transfer the sum of Kshs 23,025,000 to the joint escrow account. However, this is not the end of the matter.

23. Looking at the exhibits annexed to the 1st Petitioner's Replying Affidavit, it is evident that the Advocates did open a bank account in the joint names of the law firms in the year 2018 and deposited Kshs 11 million in the same account.

24. The year of the account opening, 2018, is also consistent with the 1st Petitioner's version that money from the National Government arrived over a year after the parties had entered into the Consent.

25. The evidence shows that DTB sent e-statements directly to Ms Shaw's account, or to an account that she has not disputed is hers, at some point, and continued to do so, for a period of time of at least three months. As such, I do not think that Ms Shaw was a total stranger to the Bank Account.

26. The Advocates have admitted that they deposited only Kshs 11 million in the Bank Account and not Kshs 23,025,000/-. The bone of contention is whether or not they breached the terms of the Consent by depositing only a portion of the money, rather than the full amount. Here the parties disagree.

27. I have considered the reasons put forward by each of the parties, and I am persuaded that the Advocates did not have much of a choice in the matter. Based on the evidence before me, and from the sequence of events, I am of the view that at the time the Consent was adopted, neither the parties nor the court contemplated that one of paying parties, the County, would not pay its share.

28. The parties did not build in any contingency plan for such an event. The terms of the Consent were based on an ideal situation, in which all parties would pay the full amount to the Advocates for further and onward distribution. Had that happened, we would not be here today. Instead, based on the limited evidence before this court, it appears that the County reneged on its promise, and the Advocates, in turn, did not have the full amount of money to pay out to the Applicants.

29. I say 'limited evidence' because the County did not take part in this Application. The court did not have the benefit of hearing its side of the story. Questions such as: Where is the money? Was it ever paid? Will it ever be paid? remain unanswered.

30. I am persuaded on a balance that the Advocates received only the funds paid to them by the National Government, being the sum of Kshs 55,000,000/- in total.

31. The question I ask myself, is what should the Advocates have done? The Applicants are of the view that they are entitled to the sum of Kshs 23,025,000/- irrespective! The Advocates, on the other hand, adopted an interpretation of the Consent that the money received by them was to be held in equal shares, pro rata, and on account, for all five of the Petitioners.

32. Again, none of the parties had ever contemplated a scenario where the Advocates would be short of the full amount. In the circumstances, a literal interpretation of the terms of Consent would not be appropriate because the circumstances had changed.

33. I am satisfied that the Advocates adopted a reasonable approach. They could not pay what they did not have. The pro-rata approach was born out of necessity and was a fair and equitable way of handling the situation. I am satisfied that the Advocates made sufficient efforts to comply to the best of their ability, if not entirely, with the terms of the Consent.

34. On this issue, I therefore find that the Advocates did not comply with the terms of the Consent but for reasons that were beyond their control.

Issue No 2 should the advocates be held in contempt with attendant consequences?

35. The *Constitution of Kenya, 2010*, is the supreme law of the land and lays out the framework for governance, including the powers and limitations of the different branches of Government. In the *Mumo Matemu case – v- Trusted Society of Human Rights Alliance*, (2013) eKLR decision, the Court of Appeal stated that within the Constitutional framework of separation of powers, one of the powers that is granted to the Judiciary, is the ability to enforce obedience of its orders and decrees through the use of civil commitment for contempt of court.

36. Contempt of court is defined as any act that interferes with or obstructs the administration of justice. In order to enforce its orders, and maintain the integrity of the justice system, the court may impose sanctions, including civil commitment, on those who are found in contempt. This power is essential to the functioning of the Judiciary and is necessary to ensure that justice is administered effectively and fairly.

37. However, this power is not unlimited and must be exercised within the bounds of the Constitution. Article 20 of the Constitution states that the Bill of Rights applies to all law and binds all persons. The Constitution emphatically provides for the protection of individual rights and freedoms, including the right to liberty and security of the person as stated in Article 29 of the *Constitution*.

38. This means that any form of punishment, including civil commitment, must be proportionate, and not violate the constitutional rights of the individual. Finally, any limitation of rights may only be done strict in accordance with Article 24 of the *Constitution*.

39. Accordingly, in reaching a decision whether to hold a person in contempt and deprive that individual of liberty and property, a court must balance the interests of the Judiciary in maintaining the integrity of the justice system against the individual's said right.

40. The 1st Petitioner relied on the authority of the High Court in *Republic v Principal Secretary, Ministry of Defence, Ex Parte George Kariuki Waithaka* [2019] eKLR, in support of his submission that beyond the act, an additional mental element is required to establish culpability of the contemnor. This submission is consistent with a reading of section 4 of the *Contempt of Court Act* No 4 of 2016 (Contempt Act), which defines civil contempt as follows:

> " civil contempt which means willful disobedience of any judgment, decree, direction, order, or other process of a court or willful breach of an undertaking given to a court" (emphasis mine)

41. In *Moses Kuria v Hon. Attorney General & 2 others* [2017] eKLR - the Court of Appeal considered the question of whether a person can be held in contempt of court for breaching a court order when the breach was beyond their control. The court held that it would be unjust to hold a person in contempt if the breach was beyond their control and was not the result of their deliberate actions.

42. On the standard of proof required in contempt proceedings, in the English decision of *Re Bramblevale* (1970) 1 Ch. 128 , Lord Denning stated as follows concerning contempt of Court:

> " Contempt of court is an offence of a criminal character. A man may be sent to prison for it. It must be satisfactorily proved. To use the time-honoured phrase, it must be proved beyond all reasonable doubt."

43. The Court of Appeal in Civil Appeal No 95 of 1998 *Mwangi H.C. Wangondu vs Nairobi City Commission*, stated that the threshold of proof required in contempt of Court is higher than applicable in normal civil cases, and one can only be committed to civil jail, or otherwise penalized based on evidence that leaves no doubt as to the contemnor's culpability.

44. In *Republic v Principal Secretary, Ministry of Defence Ex Parte George Kariuki Waithaka* [2019] eKLR quoting the decision in *Heatons Transport (St Helens) Ltd v Transport and General Workers Union* (1973) AC 15 the court stated;

> " that it is now established that the mental element for liability for contempt arising out of disobedience is simply that the disobeying party either intended to disobey, or made no reasonable attempt to comply with the order". (emphasis mine).

45. I repeat, the power to hold a person in contempt and to commit to civil jail ought to be exercised with great care. The power of the Judiciary to enforce obedience to its orders and maintain the integrity of the justice system is essential, but must be balanced against the constitutional rights of the individual.

46. Article 24 of the *Constitution* is instructive, rights and fundamental freedoms ought to be limited only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, considering all relevant factors.

47. I have considered all the relevant factors. I am not satisfied that the Applicants have discharged the burden of proof to the applicable standard required for contempt of court. I do not think that this is a case of intentional and deliberate disobedience of a court order. I am also satisfied that the Advocates could not comply for reasons that were beyond their control, and that they made reasonable attempts to comply.

48. For the sake of clarity, I am not absolving the Advocates of their duty to comply with the terms of the Consent. The Advocates remain under a duty to take reasonable steps to recover any funds due pursuant to the terms of the Consent and to pay the same to the Applicants if and when the money is recovered.

49. The application dated February 25, 2022 is without merit and is dismissed.

50. Given the circumstances of this case I order that each party shall bear its own costs.

DATED AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS THIS 27TH DAY OF FEBRUARY 2023

ALEEM VISRAM

JUDGE

In the presence of;

..... for the Applicant

..... for the Respondent