



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

PETITION NO. 39 OF 2016

IN THE MATTER OF: ALLEGED CONTRAVENTION OF FUNDAMENTAL

RIGHTS AND FREEDOMS UNDER ARTICLES 1, 2(5), 2(6), 10, 22, 23, 28,

33, 35, 36, 42, 43(1) (B), 53 118(1)(B), 174(c), 196(2), 201AND

232(1) (f) OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF: RULES 2, 3, 4, 11, 20 AND 23(1) OF THE CONSTITUTION OF KENYA (PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS) (PRACTICE AND PROCEDURE RULES, 2013 AND ALL OTHER ENABLING POWERS AND PROVISIONS OF THE LAW

AND

IN THE MATTER OF: ARTICLES 1, 7, 8, 12, 21 AND 25 OF THE

UNIVERSAL DECLARATION OF HUMAN RIGHTS (1984)

AND

IN THE MATTER OF: ARTICLE 11(1) OF THE INTERNATIONAL

COVENANT ON ECONOMIC, SOCIAL & CULTURAL RIGHTS (1976)

AND

IN THE MATTER OF: SECTIONS 3(A), 6, 87, 115 OF THE

COUNTY GOVERNMENT ACT NO.17 OF 2012

AND

IN THE MATTER OF: SECTIONS 3(1), 57(A), 58, 59, 68 AND 69 OF THE

ENVIRONMENTAL MANAGEMENT AND COORDINATION ACT NO.8 OF 1999

AND

IN THE MATTER OF: SECTIONS PART III AND PART IV OF THE

PRIVATIZATION ACT CAP 485 OF THE LAWS OF KENYA

AND

IN THE MATTER OF: SECTIONS 11(C) (D), 33(4), 36(1) (B) (C)

(D) (i) OF THE URBAN AREAS AND CITIES ACT NO.13 OF 2011

AND

IN THE MATTER OF: PART VI OF THE PUBLIC PRIVATE PARTNERSHIPS ACT NO. 15 OF 2013

AND

IN THE MATTER OF: PART IV AND PART V OF THE PUBLIC
PROCUMBENT AND DISPOSAL ACT CAP 412C OF THE LAWS OF KENYA

AND

THE MATTER OF: SECTIONS 35, 36, 37, 42 OF THE PHYSICAL
PLANNING ACT CAP...OF THE LAWS OF KENYA

AND

IN THE MATTER OF: PART II OF THE SECTIONAL PROPERTIES ACT NO.21 OF 1997

BETWEEN

1. LEGAL ADVICE CENTRE
2. HAKI YETU ST. PATRICK'S
3. TRANSPARENCY INTERNATIONAL KENYA
4. JACK MAINA.....PETITIONERS

AND

1. THE COUNTY GOVERNMENT OF MOMBASA
2. COUNTY SECRETARY, COUNTY GOVERNMENT OF MOMBASA
3. COUNTY EXECUTIVE COMMITTEE MEMBER- LAND PLANING AND
HOUSING DEPARTMENT.....RESPONDENTS

RULING

1. Before the Court is an application by way of a Notice of Motion. It is dated 21/12/2020. The application is taken out by the Petitioners. The application seeks the following orders: -

1) SPENT

2) ALI HASSAN JOHO who is the Governor of the 1ST Respondent herein, DENNIS LEWA who is the County Secretary of the 1st Respondent and TAWFIQ BALALA who is the County Executive Committee Member in charge of Land, Housing and Physical Planning of the 1st Respondent or any other person acting in those respective capacities, jointly and severally, be summoned by this court to show cause why they should not be committed to civil jail for six months for disobeying this Honourable court's order made vide Judgment delivered on 23rd December 2016 and the ensuing decree.

3) Cost of this application be paid by the Respondents jointly and severally.

2. The application is premised on the grounds set out therein and is supported by affidavit of **Wangu Gacheru** sworn on 21/12/2020 and a Supplementary Affidavit of the same person sworn on 21/07/2021.

3. The petitioners' case is that vide judgment delivered on 23/12/2016, this court held that the Respondents are bound to comply with the law and to supply information at every stage of implementation of the project. However, the Respondents have deliberately and adamantly

refused, neglected, and declined to comply with the directives given by Justice Otieno on 23/12/2016, despite many reminders and incessant prodding by the petitioners.

4. The deponent avers that specifically, the Petitioners through their advocate on record have engaged the Respondents in the following manner:

i. Vide letter dated 26/06/2019 requesting for documents and information and in response to the said letter, the 3rd Respondents vide letter dated 2/07/2019 absolutely and in violation of the directive issued by the court by requesting to be furnished by the 1st petitioner's list of directors for the purpose of ascertaining whether the 1st petitioner is indeed a citizen clothed with the capacity to make a request for access to information and that part of information being sought was private information pursuant to section 6 of the Access to Information Act since the project is being undertaken under a joint venture Partnership with partners in the private sector.

ii. In response to the letter dated 2/07/2019, the Petitioners' advocate wrote the letter dated 8/07/2019, in which the Respondents were clearly informed that the request for information was not a favour but was pursuant to a valid judgment of the court.

iii. In a subsequent response dated 17/07/2019, the Respondents alleged that the Petitioners had misinterpreted the judgment of the court and that the information sought was available in the public domain through electronic and print media as well as the County Governments website. However, for avoidance of doubt after visiting the Mombasa County Government website several times, the information sought was not available on the website

iv. The 2nd Petitioner directly and vide letter dated 9/09/2019, engaged the Respondents through an umbrella forum called Coast Land Non-State Actors (Herein after "CLNSA") seeking information about the project and the 3rd Respondent vide letter dated 7/10/2019 indicated that they were willing to work with CLNSA. Subsequently a meeting was held on 22/11/2019, which was attended by the Petitioners' representatives as well and it was resolved, inter alia that the Respondents should share a work plan on how they intend to implement the housing project; information should be given; and there should be consistency in the project and a work plan ought to be drawn to guide the process. However, after the training, efforts to get information from the Respondents have bore no fruit.

5. It is the Petitioners' case that the Respondents have commenced implementation of the housing project in Mombasa and more specifically in Buxton Estate without making any information available and without proper and meaningful public participation.

The Response

6. The Respondents oppose the application. They jointly rely on the Replying Affidavit sworn by one **Tawfiq Balala** on behalf of the 1st, 2nd and 3rd Respondent on 18/1/2016.

7. The Respondents' case is that to the best of their knowledge and ability, they have availed all the requisite documents to the Petitioners pursuant to the orders issued by the Court, and as an aid to ensure progressive public participation in the course of implementation of the "Mombasa Urban Renewal & Redevelopment of Old Estates" and that the information requested by the Petitioners is readily available in the public domain through both election, print media and also accessible through www.mombasa.go.ke.

8. The deponent avers that the 1st Respondent Requested for proposal for Urban Renewal and Redevelopment of Old Estates within Mombasa County through a joint venture partnership particularly with respect to Buxton Estate amongst others. An Invitation for bids was advertised in the Daily Nation dated 1/07/2019, with an addendum published on 11/07/2019. Therefore, the 1st Respondent is unable to avail the details of the contracts negotiated noting that the tendering process has not been concluded. As such, the Petitioners' request for contract copies and when the project is to start is premature and this is a classic case of the petitioner putting the cart before the horse.

9. The deponent avers that the 1st Respondent has adequately communicated through RFPs under the heading "Project Implementation Strategy" that the existing units will be considered in allocating the newly built housing, the manner in which the houses will be disposed, particularly there was a proposal to have the property registered under the Sectional Properties Act 1987.

10. It is the Respondents' case that the Petitioners' request for County Assembly Hansard proceedings is castigatory, mala fide and solely meant to derail the fulfilling of the Respondents' mandate to provide affordable housing, since the Hansard proceedings are readily available under the County Assembly of Mombasa website <https://www.mombasaassembly.go.ke/hansard>.

11. It is also the Respondents' case that the Petitioners have utterly failed to demonstrate the manner in which the alleged contemnors have contravened the orders issued by the Honorable Court vide judgment delivered on 23/12/2016.

12. In rejoinder, the Petitioners aver that they have expressly requested for the joint venture Agreement/Private Partnership Agreement/Contract, which the 1st Respondent executed with private developers. However, the Respondents have failed to avail the said contracts and through the deponent **Tawfiq Balala** in the Replying Affidavit, lied on oath that no contract had been signed and that the procurement process was ongoing.

13. The deponent avers that the Petitioners have since established that in **ELC Petition No. 28 OF 2020: Justus Chai Mbaru & 12 Others v County Government of Mombasa**, in which one **Jimmy Waliula**, the County Attorney of the 1st Respondent swore a Replying Affidavit on 27/10/2020, **Mr. Waliula** deposed that the Respondents through a competitive tendering process awarded the Tender CGM/PRO/T/002/2019-2020 to Buxton Point Apartments Limited to construct 1500 house in Buxton Estate, and subsequently, on

15/1/2020, the Respondents and Buxton Point Apartments Limited entered into a joint venture agreement detailing the implementation of the project. Therefore, **Jimmy Waliaula** confirmed on oath that the tendering process was concluded, an award made and a contract duly signed between the 1st Respondent and Buxton Point Apartments Limited. However, **Tawfiq Balala** one year after the joint venture agreement deliberately failed to disclose the same to the Court, but instead lied that the tendering process was not yet concluded.

14. The deponent avers that the Replying Affidavit by **Tawfiq Balala** is a clear confirmation that the Respondents have deliberately disobeyed the court order by deliberately refusing to avail most crucially the contract to the Petitioners and public. Therefore, the Respondents' conduct must be punished for being in violation of the orders of the court made on 23/12/2016 and the cited officers should be committed to civil jail and one **Tawfiq Balala** should be punished for perjury.

Submissions

15. The Petitioners' submissions were filed on 15/09/2021, while the Respondents' submissions were filed on 16/09/2021.

Determination

16. From the pleadings and submissions filed before this Court by the parties, I have identified one issue for determination: -

(1) Whether the Respondents are in breach of the violation of the court orders made vide the judgment delivered on 23/12/2016.

17. **Mr. Oluga** Learned Counsel for the Petitioners in his submissions reiterated the contents of its Supporting Affidavit dated 21/12/2020 and supplementary affidavit 21/07/2021.

18. **Mr. Kinyua** learned counsel for the Respondents reiterated the Respondents contents of the Replying affidavit sworn on 18/1/2021 and submitted that the 2nd contemnor is no longer in the employment of the 1st Respondent. Nevertheless, the Respondents have fully complied with the judgment delivered on 23/12/2016 by the court and all the information sought by the Petitioners vide letters dated 26/06/2019 and 8/07/2019 is readily available in the public domain through both electronic and print media.

19. Counsel further submitted that the 1st Respondent has at all material time's undertaken public participation pursuant to Article 10 and 174 of constitution.

20. Courts have defined contempt of Court in direct terms and for example in **Stewart Robertson vs Her Majesty's Advocate, 2007 Hcac63, Lord Justice Clerk** it was held that:

“Contempt of court is constituted by conduct that denotes willful defiance of or disrespect towards the court or that willfully challenges or affronts the authority of the court or the supremacy of the law, whether in civil or criminal proceedings.”

21. The **Black's Law Dictionary (9th Edition)** defines it in similar terms as:

“Conduct that defies the authority or dignity of a court. Because such conduct interferes with the administration of justice, it is punishable usually by fine or imprisonment.”

22. In the case of **North Tetu Farmers Co. Ltd v. Joseph Nderitu Wanjohi [2016] eKLR** Justice Mativo stated thus:

“Writing on proving the elements of civil contempt, learned authors of the book Contempt in Modern New Zealand have authoritatively stated as follows:-

“...there are essentially four elements that must be proved to make the case for civil contempt. The applicant must prove to the required standard (in civil contempt cases which is higher than civil cases -

a. the terms of the order (or injunction or undertaking) were clear and unambiguous and were binding on the defendant;

b. the defendant had knowledge of or proper notice of the terms of the order;

c. the defendant has acted in breach of the terms of the order; and

d. The defendant's conduct was deliberate.”

23. The law on contempt is now well settled. Court orders are not made in vain and are meant to be complied with and if for any reason a party has difficulty in complying with court orders the honourable thing to do is to come back to court and explain the difficulties faced by the need to comply with the order. Once a Court order is made in a suit the same is valid unless set aside or reviewed on appeal. In **Econet Wireless Kenya Ltd vs. Minister for Information & Communication of Kenya & Another [2005] 1 KLR 828** Ibrahim, J (as he then was) stated:

“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 times. The Court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors. 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 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.”

24. In **Central Bank of Kenya & Another vs. Ratilal Automobiles Limited & Others Civil Application No. Nai. 247 of 2006**, the Court of Appeal held that Judicial power in Kenya vests in the Courts and other tribunals established under the Constitution and that it is a fundamental tenet of the rule of law that court orders must be obeyed and it is not open to any person or persons to choose whether or not to comply with or to ignore such orders as directed to him or them by a Court of law. The consequences of failure to obey Court orders are that any action taken in breach of the court order is a nullity and of no effect.

25. Similarly, in **Awadh vs. Marumbu (No 2) No. 53 of 2004 [2004] KLR 458**, it was held that:

“It must be remembered that court orders must be obeyed at all times in order to maintain the rule of law and good order. This of course means that the authority and dignity of our courts must be upheld at all times and this differentiates civilized societies from those applying the law of the jungle at times referred to as banana republics. It is the duty of the Court not to condone deliberate disobedience of its orders nor waiver from its responsibility to deal decisively and firmly with the approved contemnors.”

26. A court order is binding on the party to whom it is addressed and remains valid and must be followed until set aside. Having said that, it is trite law that when committal is sought for breach of an order, it must be made clear what the alleged contemnor is accused of doing and that, which is breached. The application must state with sufficient specificity what the alleged contemnor has done or omitted to do that constitutes contempt of court in order for him to face the charge. The required information must be included in the notice itself. The slightest ambiguity in the order can render an application for committal null and void, as ambiguity can lead to the standard of proof which is higher than the standard in civil cases but lower than criminal standard, not being attained especially on affidavit evidence.

27. In **Halsbury’s Laws of England, 4th Edition Volume 9 at paragraph 52** it is stated:

“It is a civil contempt of court to refuse or neglect to do an act required by a Judgment or order of the court within the time specified in the judgment or order...A judgment or order against a corporate body may be enforced by an order of committal against the directors or other officers of the corporation.”

28. In this case, there is no dispute regarding knowledge of the terms of the order sought to have been disobeyed by the Respondents. However, the cause of disagreement is that the petitioners are demanding for information (more specifically, the joint venture agreement between the 1st Respondent and Buxton Point Apartments limited) relating to the housing project being undertaken by the Respondents at Buxton Estate. The Respondents on the other hand have argued that the Petitioners’ requests are premature and the Respondents are unable to avail the details of the joint venture agreement/contract negotiated, noting that the tendering process has not been concluded.

29. I have considered the submissions by the parties and I find and hold that the Petitioners have on a balance of probabilities demonstrated to the court by annexing a Replying affidavit filed in **ELC Petition No. 28 of 2020: Justus Chai Mbaru & 12 Others v County Government of Mombasa** in which one **Jimmy Waliula**, the 1st Respondent’s County Attorney confirms that indeed the procurement process was concluded and the Tender **CGM/PRO/T/002/2019-2020** to Buxton Point Apartments Limited to construct 1500 house in Buxton Estate and subsequently, on 15/1/2020, the Respondents and Buxton Point Apartments Limited entered into a joint venture agreement detailing the implementation of the project. However, almost one year after the joint venture was entered into, the Respondents’ employee one **Tawfiq Balala**, lied on oath and misled this Court by stating that the tendering process in relation to the Buxton Housing Project was ongoing and that the Petitioners request for information on the Buxton project was premature.

30. In the Respondents defence, **Mr. Kinyua** submitted that the 2nd contemnor (**Tawfiq Balala**) was no longer in the employment of the 1st Respondent. Having considered the Respondents’ defence I am not persuaded that there is good will on the part of the Respondent in matters relating to the furnishing of information on the joint venture agreement entered into in relation to the Buxton project. Rather than furnishing the required information, the Respondents have elected to engage in passing the back, which in my view is equivalent to the Respondents wanting to have their cake and eating it at the same time.

31. In the end, I find and hold that the Respondents act of passing the back has not displaced the inference made by the Petitioners in relation to the information relating to the Joint Venture Agreement entered into between the 1st Respondent and Buxton Point Apartments limited. Consequently, the Respondents are in contempt of the Court judgment delivered on 23/12/2016 and the resultant order

31. The Court of Appeal in **Shimmers Plaza Limited v National Bank of Kenya Limited [2015] eKLR** stated as follows: -

“The courts should not fold their hands in helplessness and watch as their orders are disobeyed with impunity left, right, and center. This would amount to abdication of our sacrosanct duty bestowed on us by the Constitution. The dignity, and authority of the Court must be protected, and that is why those who flagrantly disobey them must be punished, lest they lead us all to a state of anarchy. We think we have said enough to send this important message across.”

32. In the premises, the following orders do hereby issue -

a) **The Respondents shall within 30 days of service of this order comply with the judgment of this Court delivered 23/12/2016**

and the resultant order by furnishing the Petitioners with copies of the contracts/Joint venture Agreements between the 1st Respondent and Buxton Point Apartments limited and all document relating to the project;

b) This matter is fixed for a Mention on 16/11/2021 with a view to ascertain compliance and/or for further orders of the Court.

c) Costs for the application are given to the Applicants.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 30TH DAY OF SEPTEMBER 2021.

E. K. OGOLA

JUDGE

Judgment delivered via MS Teams in the presence of:

Ms. Inuva holding brief Oluga for Petitioner/Applicant

Mr. Kinyua holding brief Mboko for Respondents

Ms. Peris Court Assistant