



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

PETITION CASE NO. 5 OF 2016

(FORMERLY MILIMANI NAIROBI PETITION NO. 211 OF 2016)

IN THE MATTER OF CHAPTER FOUR, THE BILL OF RIGHTS,

ARTICLES 2(5), 2(6), 3(1), 11(1), 11(2)(a), 32,35, 44, 50(1), 56(d), 159

AND

ARTICLES 165 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF

ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS

UNDER ARTICLES 32 AND 44(2) OF THE CONSTITUTION OF KENYA 2021

AND

IN THE MATTER OF APPLICATION BY

ISAIAH WAWERU NGUMI.....1ST PETITIONER

EVANSON J.M. JOMO.....2ND PETITIONER

DANIEL NG'ANG'A JOEL.....3RD PETITIONER

VS.

THE CHAIRMAN NATIONAL LAND COMMISSION.....1ST RESPONDENT

THE DIRECTOR GENERAL,

KENYA NATIONAL HIGHWAYS AUTHORITY.....2ND RESPONDENT

(The 3rd respondent was expunged by an order of the court dated 31/08/2016)

THE DIRECTOR GENERAL NATIONAL MUSEUMS OF KENYA.....3RD RESPONDENT

ORIGINAL SIGONA ENTERPRISES LIMITED.....4TH RESPONDENT

THE KIAMBU COUNTY EXECUTIVE DEPARTMENT OF CULTURE.....5TH RESPONDENT

THE DIRECTOR GENERAL

NATIONAL TRANSPORT AND SEFETY AUTHORITY.....6TH RESPONDENT

THE HON. ATTORNEY GENERAL.....7TH RESPONDENT

RULING

1. This is a ruling on the chamber summons dated 23rd May, 2019 filed by Isaiah *Waweru Ngumi, Evanson Jomo* and *Daniel Ng'ang'a Joel*, collectively referred to as the applicant.

BACKGROUND

2. The applicants filed the petition in this matter on 24th May, 2016 against the respondents reflected in the title of this Ruling. By their petition, the applicants pleaded that they were shareholders of Original ***SIGONA ENTERPRISE LIMITED*** (hereinafter the Company). The company is the registered owner of the property SIGONA/1937 (hereafter the suit property). On the suit property is a building known as Sigona House (hereinafter the House). Kenya National Highway Authority (hereinafter KENHA) while in the process of expanding and constructing Nairobi-Naivasha Road A104 intimated its intention to acquire properties which acquisition included the suit property. The applicants by their petition argued that there was need to preserve the House so that the applicants and the public at large could continue to enjoy their cultural rights as enshrined in the Constitution and that there was need for the Director General National Museums of Kenya and the Kiambu County Government to preserve the House as a monument.

3. This Court delivered its judgment on the petition on 9th January, 2017. By that judgment, this Court declined to grant the applicants' prayers for injunction to restrain the respondents from interfering with the suit property and the House, and the prayer for change of design for the road project to accommodate the applicant's view for preservation of the House.

4. This Court did find that the National Museum of Kenya had failed:-

*“to structure a process which would ensure that the Principles and Values of the Constitution including Public Participation, inclusiveness and fair hearing... in its decision to decline to recommend to the Cabinet Secretary to gazette Sigona House as a Protected Building under **Section 25** of the National Museum and Heritage Act.”*

5. The National Museum of Kenya was ordered in the afore-stated judgment to facilitate a structured process of considering view of the applicants and other stakeholders and the public regarding the status of the house. That process was to be undertaken within 30 days of the said judgment.

6. Other than the said order directed to the National Museum of Kenya the other prayers of the applicants' petition were dismissed.

7. It is in that background that the applicants filed the chamber summons under consideration.

CHAMBER SUMMONS DATED 23RD MAY, 2019

8. Very irregularly, and without the leave of this Court the applicants ' titled this petition as follows:-

“IN THE MATTER OF CONTEMPT OF COURT ACT NO. 46 OF 2016

AND

IN THE MATTER BETWEEN

REPUBLIC

VERSUS

MOHAMED ABDALA SWAZURI

THE FORMER CHAIRMAN

NATIONAL LAND COMMISSION1ST RESPONDENT

MR. STEPHEN MUTURI NDUNG'U THE CHAIRMAN

ORIGINAL SIGONA ENTERPRISES LIMITED.....2ND RESPONDENT

NATIONAL LAND COMMISSION.....3RD RESPONDENT

AND

EXPARTE

ISAIAH WAWERU NGUMI.....1ST APPLICANT

EVANSON JM JOMO.....2ND APPLICANT

DANIEL NG'ANG'A JOEL.....3RD APPLICANT"

The applicants ought not to have changed the title of this matter.

9. By that application the applicants seek leave to file contempt of court proceedings against **Mohamed Abdala Swazuri** for causing to be published in the Kenya Gazette Number 35 of 16th March, 2018 indicating the intention of the National Land Commission to compulsorily acquire part of the suit property; for leave to file contempt proceedings against Mr. Stephen Muturi Ndungu, the Chairman of the Company, for having published a report seeking views of the company's shareholders on what should be done with the house, and for having instructed the company's general manager to discuss with the company's employee the compensation for the acquisition of the house. The applicants additionally sought leave to institute proceedings for order of certiorari to quash the gazette notice on compulsory acquisition of the suit property and such leave to operate as stay of the compulsory acquisition and of any engagement of compensation of that acquisition.

ANALYSIS AND DETERMINATION

10. As stated herein above, the court by its judgment dated 9th January, 2017 dismissed the prayers in the petition whereby the applicants had sought to permanently restrain the acquisition or demolition of the house. The only order made in that judgment is for the National Museum of Kenya to undertake a process to determine if the House is a monument within the meaning of section 25 of the National Museum and Heritage Act.

11. A report was filed in this matter by the counsel representing the National Museum which report revealed that a public hearing was held by the Museum on 16th February, 2017 to get the public's views under **Section 25(1)** of the **National Museum and Heritage Act** on the consideration of gazette of the House as a National Monument.

12. The public meeting was published through the **standard newspaper** and the **star newspaper**. The applicants were specifically invited to attend that public hearing and according to the roll of attendants I have noted that two of the applicants did attend. The national Museum of Kenya, by its report following that public meeting concluded that there was no justification to gazette the Sigona House as a National Monument.

13. In my consideration of the application for leave to file contempt proceedings, it needs to be stated that everyone is obligated to obey court orders. This was restated in the case **AMOS MATHENGE KABUTHU VS. SIMON PETER MWANGI (2015) eKLR** thus:-

"The general rule governing the obligation of persons to obey court orders was enunciated in the case of HADKINSON V. HADKINSON [1952] ALL ER 567, in which Romer LJ stated at page 569 as follows:-

"It is the plain and unqualified obligation of every person against, or in respect of whom, an order is made against 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 even void." (emphasis added).

9. Further, Lord Donaldson MR said in JOHNSON -V- WALTON (1990) 1 FLR350 AT 352 stated that:-

"It cannot be too clearly stated that, when an injunctive order is made or when an undertaking is given, it operates until it is revoked on appeal or by the court itself, and it has to be obeyed whether or not it should have been granted in the first place." (Emphasis added).

14. It is also useful to cite what was stated in the case **SAMUEL M.N. MWERU & OTHERS VS. NATIONAL LAND COMMISSION & 2 OTHERS (2020) eKLR** as follows:-

"31. A court without contempt power is not a court. The contempt power (both in its civil and criminal form) is so innate in the concept of jurisdictional authority that a court that could not secure compliance with its own judgments and orders is a contradiction in terms, an "oxymoron." Contempt power is something regarded as intrinsic to the notion of court; even obvious, I would say. In the common lawyer's eye, the power of contempt "is inherent in courts, and automatically exists by its very nature."

...If courts are to perform their duties and functions effectively and remain true to the spirit which they are sacredly entrusted with, the dignity and authority of the courts has to be respected and protected at all costs. Otherwise, the very cornerstone of our constitutional scheme will give way and with it will disappear the Rule of Law and a civilized life in the society. It is for this purpose that courts are entrusted with the extraordinary power of punishing those who indulge in acts whether inside or outside courts which tend to undermine their authority and bring them in disrepute and disrespect by scandalizing them and obstructing them from discharging their duties. When the court exercises this power, it does so to uphold the majesty of the law and of the administration of justice. The foundation of judiciary is the trust and confidence of the people in its ability to deliver fearless and impartial justice. When the foundation itself is shaken by acts which tend to create disaffection and disrespect for the authority of the court by creating distrust in its working the edifice of the judicial system gets eroded.

33. It is essential for the maintenance of the Rule of Law and order that the authority and the dignity of courts is 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.”

15. The above is the undoubted the position in law. The one issue that will determine this matter is my consideration whether there was a court order issued by this court’s judgment which applicant have shown has been disobeyed. As stated before, and I reiterate, the applicant’s prayers in the petition were dismissed. The court however ordered the National Museum of Kenya to carry out a process to collect views on the gazettelement of the House as a monument. The report filed on behalf of the National Museum plainly shows that the National Museum heeded the court order and undertook the public hearing and proceeded to prepare a report which is before court.

16. Since there is no order that was otherwise capable of being disobeyed, as alleged by the applicants, leave cannot be granted in vain. I am not persuaded leave sought is meritorious because there was no order in the judgment which was capable of being disobeyed as alleged. The chamber summons for that reason is misconceived and is dismissed. This Court, as correctly argued on behalf of KENHA is *functus officio* and the applicants will be well advised to bear in mind the principle of finality as discussed in the case **KAMAU JAMES GITUHO & 3 OTHERS VS. MULTIPLE ICD(K) LIMITED & ANOTHER (2019) eKLR** as follows:-

“...the principle of finality which is hinged on the public interest policy that litigation must come to an end. Bosire, J.A in JASBIR SINGH RAI & 3 OTHERS VS TARLOCHAN SINGH RAI & 4 OTHERS [2007] eKLR succinctly described the principle as follows:

“This is a doctrine which enables the courts to say litigation must end at a certain point regardless of what the parties think of the decision which has been handed down.”

Further, the finality principle dealt with the all-too human predilection to keep trying until something gives. See this Court’s decision in WILLIAM KOROSS VS HEZEKIAH KIPTOO KOMEN & 4 OTHERS [2015] eKLR.”

DISPOSITION

17. For the reasons set out above the chamber summons dated 23rd May, 2019 is dismissed with costs.

RULING, SIGNED DATED AND DELIVERED AT KIAMBU THIS 21ST DAY OF OCTOBER, 2021.

MARY KASANGO

JUDGE

Coram:

Court Assistant: Ndege

For Mohamed Swazuri: No appearance

For Stephen Muturi Ndungu: No appearance

For National Land Commission: No appearance

For Mr. Isaiah Waweru Ngumi: Present in person

For Evanson J.M. Jomo: No appearance

For Daniel Nganga Joel: No appearance

Mr. Ngotho for KENHA

COURT

Judgment delivered virtually.

MARY KASANGO

JUDGE