



Noor v County Government of Turkana & another (Environment & Land Case 88 of 2015) [2023] KEELC 22481 (KLR) (21 December 2023) (Ruling)

Neutral citation: [2023] KEELC 22481 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ENVIRONMENT & LAND CASE 88 OF 2015
FO NYAGAKA, J
DECEMBER 21, 2023**

BETWEEN

ABDI MOHAMED NOOR PLAINTIFF

AND

THE COUNTY GOVERNMENT OF TURKANA 1ST DEFENDANT

LOJAAM LUQA ENERGY CO LTD 2ND DEFENDANT

RULING

1. Through a Notice of Motion Application dated 10th July, 2023, (hereinafter ‘The Application’), supported by the Affidavit deposed to on a similar date by one Peter Eripete, the County Secretary of the County Government of Turkana, the 1st Defendant/Applicant, sought the following Orders:
 - a. ...spent
 - b. ...spent
 - c. ...spent
 - d. That the Honourable Court be pleased to review, vary and or set aside Orders made on the 30th May 2022 and the matter be reopened and starts de-novo.
 - e. That the Honourable Court be pleased to set aside the Orders of 18th May 2016 and reopen the Plaintiff’s case so that the Applicant can participate in the matter an in any case engage in alternative dispute resolution of the matter.
 - f. That this Honourable Court do issue such further orders as it may deem fair and just in the circumstances of this case.
 - g. That costs of this Application be provided for.



2. In the supporting Affidavit, Mr. Peter Eripete deposed that he had no knowledge of the contempt proceedings and he only instituted the instant application upon being informed of the warrants of arrest against him by his learned Counsel. His contention was that he had been out of office resolving cross-border conflicts when the alleged contempt took place and at no time did he disobey court orders.
3. He argued further that when judgment was entered, the 1st Defendant was not represented hence it did not have an opportunity to be heard in the matter contrary to Article 50(1) of *the Constitution*. He stated that the dispute proceeded to its conclusion without his knowledge and the name of the County Secretary came in at the execution stage when he had no powers to act on the Order since legally, he did not have such powers according to the County Government Act.
4. He deposed that there was a substantive County Executive Committee from the Ministry that was supposed to deal with the matter substantively. He argued further that since contempt proceedings are in the nature of Criminal proceedings and that the liberty of the subject is at stake, it was proper that the person cited should have had personal knowledge of that Order which did not happen in this case.
5. He deposed that the County Secretary has never been aware of the matter and neither was he made aware of existence of the case. He argued that unless the Honourable Court intervened, the Current County Secretary will be held in contempt in place of the former County Secretary.
6. The 1st Defendant pleaded further that it was in the interest of justice that the Honourable Court sets aside the Order of 30th May, 2022.

The Plaintiff/Respondent's Case

7. The Plaintiff challenged the Application through his Replying Affidavit deposed to on 10th August, 2023. Save from recounting chronology of events in this matter, he deposed that he has been willing to negotiate a settlement to receive a fair compensation for his land but, the 1st Respondent was unwilling to hear and was disobedient to Court orders.
8. He deposed that there was no basis in law for the Application and that it is misconceived and bad in law. He went on to argue that he had suffered gross injustice in the hands of 1st Defendant/Applicant and that the Application was lodged purely with the intention of forestalling the process of execution and to delay and obstruct justice.

The submissions

9. The Plaintiff/Respondent filed written submissions dated 18th September, 2023 whose contents have been taken into account hereinbelow in the analysis section.
10. The Defendant/Applicant did not file written submissions. That notwithstanding, this Court is enjoined to determine the Application on merits since submissions constitute only persuasive arguments in favour of parties' cases. While there may be the opportunity to distinguish authorities relied on and give a party's understanding of the law in issue, submissions only serve to highlight a party's strong points and an attempt to point to the court the adverse party's weak points so as to sway the Court's decision in favour of the party submitting. Thus, the court may as well ignore submissions or make a determination their absence notwithstanding. The Court of Appeal decision of Daniel



Toroitich Arap Moi vs. Mwangi Stephen Muriithi & Another [2014] eKLR is instructive on this when it refers submissions to a being a “marketing language” of parties’ cases. In it the Court stated:

“Submissions cannot take the place of evidence. The 1st respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties’ “marketing language”, each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed there are many cases decided without hearing submissions but based only on evidence presented.”

11. Thus, the Court now proceeds to the determination of the issues in this application.

Issues for Determination

12. From the foregoing arguments and counter-arguments, the only issue that arises for determination is, whether the Application is merited.

Analysis and Determination

13. The resolution of the dispute herein, in view of its long history, calls for a careful and comprehensive recount of the events.
14. On 18th May, 2016, this Court delivered Judgment in this suit. It declared Abdi Mohammed Noor, the Plaintiff/ Applicant herein, the lawful owner of Plot No. 268 situated at Lokichogio Township, Turkana County (hereinafter ‘The suit land’).
15. Accordingly, the Court issued a permanent injunction restraining the Applicant from trespassing, occupying, constructing or doing anything to interfere with the Plaintiff’s quiet possession. A decree was subsequently issued on 6th July, 2016. The Plaintiff filed and served his Bill of Costs.
16. A notice of taxation and Bill of Costs were served upon the County Government of Turkana, the Applicant herein, on 16th January, 2017. Costs of the suit were eventually taxed and a certificate of costs dated 22nd September, 2017 issued.
17. When execution was imminent, the 1st Defendant/Applicant wrote two letters both dated 18th July, 2019 to this Court. In one letter, it indicated there was no need to have the County Secretary attend Court pursuant to a Notice to Show Cause why execution should not be carried out since it was willing to pay the taxed sum of Kshs. 151,060/- within 14 days.
18. In the second letter, the Respondent/Applicant indicated that despite its commitment to make good the payment, it could not access funds due to closure of Financial Year. It stated that it would only be able to access funds after the National Government operationalized Integrated Financial management Information System (IFMIS) in the second week of August, 2018.
19. On 20th January 2021, the Plaintiff/Respondent lodged a Notice of Motion Application seeking, among other Orders, to evict the Defendant from the suit land and to cite the Respondent for contempt of Court Orders in respect of the injunction referred to in paragraph 2 hereinabove.
20. This Court ascertained on 30th May, 2022 that despite being duly served, the 1st Defendant/Applicant did not respond or appear in Court. In the premises, this Court allowed the Application essentially evicting the Defendant/Applicant from the suit land and citing the County Secretary for defying the orders of injunction.



21. The Court ordered the County Secretary to appear in Court within two weeks and in the alternative a warrant of arrest to issue. I have ascertained from the record that the Order of the Court was duly served but there was no attendance by the County Secretary.
22. On 15th June, 2022 and 17th October, 2022, this Court variously issued warrants of arrest against the County Secretary Turkana to show cause why he should not be punished for contempt of Court Orders.
23. As it would turn out, on 3rd November, 2022, Counsel for the 1st Defendant/Applicant informed Court that there had been a new officer had been appointed and as such needed time to get instructions. The Warrants of Arrest were extended.
24. The matter was mentioned in Court on various occasions when learned Counsel for the Plaintiff informed Court that there were challenges as to service of the Warrants of Arrest since there was a new administration. The Records indicates that, on 10th May, 2023, Mr. Collins Kigen, learned Counsel for the 1st Defendant/Applicant, informed Court that The County Government had every intention to settle its pending Bills. It only needed time. Learned counsel informed Court further that the Warrants of Arrest were issued to the former County Secretary.
25. Before making good its undertaking as stated hereinabove, the 1st Defendant/Applicant instituted the instant Application seeking to stay the warrant of arrest, to stay contempt of Court proceedings and vary the orders thereon The Application sought further to set aside the Judgment of this Court of 18th May, 2016 and order the case to be heard de novo.
26. It is abundantly clear from the foregoing record and history that there was disobedience of the Court Orders and a choreographed systematic intent to delay the process of execution of the decree of the Court and ultimately take this Court for a ride and dump it in the field of (an) Application(s) to either set aside a judgment and decree the Applicants have stated that and undertaken to honour. Such conduct is despicable and unacceptable!
27. On numerous instances, this Court accorded the 1st Defendant/Applicant, either at the instance of learned counsel or otherwise, the opportunity to appear before Court, in vain. The Applicant's instant application is seen to be a strategy to avert the contempt Orders of this Court of 30th May, 2022. My attention was drawn to the decision in *Justus Wanjala Kisiangani & 2 Others -vs- City Council of Nairobi & 3 Others* (2008) eKLR, relied upon by the Plaintiff/Applicant.
28. The Judges observations in the said case is a reflection of the goings-on in this case. He (Kimaru J) as he then was observed;

“I have perused the proceedings before the subordinate court. It is evident that the initial order granted by the Subordinate Court on 23rd February was extended from time to time till third August 2007 when the Respondent breached the said Order by demolishing the structures thereon. During all this time the interim Orders were extended, the Respondent's advocate was present in Court. The Respondent in this application cannot therefore be heard to say that they were unaware of the existence of the said Order”
29. In this dispute, the record is replete with instances when the Court confirmed that service of Court orders requiring the attendance of the County Secretary were effected upon the 1st Defendant/Applicant.
30. It is instructive that under Section 44 of the *County Governments Act*, Act No. 17 of 2012, the County Secretary of the County Government of Turkana is the Secretary to the County Executive Committee



and the head of the Public Service of the County Government. He/she is directly aware of and the implementor of the decisions made by those bodies of the County Government.

31. Regarding the argument that the 1st Defendant was unaware of the decree and orders of the Court, it should not be lost sight of the fact that learned Counsel for the 1st Defendant was in Court during the material times. As its duly appointed representative, he had express and constructive knowledge of the orders of the Court hence the 1st Defendant needed not to get personal service. The history of enforcement of court orders in Kenya is replete with evasions and evasive arguments by contemnors through reliance on the argument that they were not personally served. Let it be known to such people that the courts have since moved away from such basic arguments. Knowledge of a court order, irrespective of how it got to be is sufficient. It, therefore, cannot be argued that the County Government of Turkana had no notice of the warrants of arrest against the County Secretary; and least not in the circumstances of them making false undertakings to honour the orders and now they turn to pretend that they were not aware of the same.
32. The last issue this Court must address is the significance of the change in administration and its impact on the Orders of this Court. The Defendant/Applicant asserted the position that they were unable to make payments due to close of financial year.
33. Whereas it can be seen from the evidence that the 1st Defendant indicated to both the Court and the Plaintiff/Applicant through its two letters both dated 18th July, 2018, that it willing to obey the Court Orders by paying off the taxed fees of Kshs. 151,060/- it can only be inferred that it was only used as a smoke screen to further delay Plaintiff's fruits of judgment. I find so because the willingness to pay the said sum was made on 18th July, 2018. It has been 5 years and 5 months since that commitment was made, an unreasonably long period of time.
34. As regards the claim that there was change in administration and therefore the current County Secretary cannot be held responsible for the actions of the former County Secretary, the position is well established in law. In Gateway Insurance Company Limited -vs- Luke Gatimu, Chief Finance and Economic Planning & 3 Others (2016) eKLR, it was observed as follows.

‘...It follows that the contemnors are before this Court not in their personal capacities but because they are under constitutional and legislative obligation to ensure that court decrees are satisfied by the County Government. In a sense, it is a person currently holding the office concerned that becomes liable. It is therefore immaterial that the order of mandamus was issued against the former office holders. If the position were to the contrary, public authorities would simply escape liability by changing their officers as soon as decrees are issued against them. Such a scenario would render access to justice which in my view the realization of the fruits if Judgments is, a mirage.
35. Whereas the facts of the instant case are distinguishable, in principle, it makes the point that current office bearers cannot evade or circumvent responsibility on the basis of change in administration. They will be held responsible for failing to honour court orders which their offices are called upon to honour during their occupation of that office. Their offices are of perpetual succession. To argue that they cannot act while it is in their power to so do would be to make a mockery of the law of perpetual succession.
36. The decision in Kenya Agricultural and Livestock Research Organization Kisii County Government & 2 Others; Patrick Lumumba & Another (contemnors) (2021) eKLR is further enlightening. It was held;

“ ...21. On the other hand, counsel for the 1st Respondent has argued that the county secretary who is named as the contemnor was not a party to the suit when judgment was delivered.



That may be so, but it is not in dispute that the County Secretary's role places him at the centre of the County Government operations. Among the Orders granted by the Court was a permanent injunction restraining the Respondents, their agents, servants and or employees from encroaching upon, trespassing onto or in any manner howsoever from interfering with the suit property.

...as the officer responsible for the day to day operations of the county government, the county secretary is accountable and answerable for any acts of omission and commission attributable to the county government which may be in contempt of a valid Court Order.

There is no doubt that the 1st Respondent was aware of the Court order as the County Government was a party to the proceedings and they were represented by counsel. On the other hand, the county secretary was not a party to the proceedings although by virtue of his office he is deemed to have had knowledge of the Judgment”.

37. Based on the foregoing and in view of the fact that Warrants of Arrest were issued and wilfully disobeyed by the former County Secretary and having regard to the personal nature of contempt proceedings which need to be purged by the contemnor, this Court finds and holds the former County Secretary to still be in contempt of Court Orders. And to the extent that the decree of the Court is not honoured by the office of the 1st Defendant that is duly obligated to honour the same, as stated above, the said office is in contempt of the Court, and the officer in charge of the same is to be held personally responsible should the decree holder move the Court appropriately, if he has not.
38. That said, the circumstances of this case, militate against allowing the Application. It would make a travesty of this Court's core mandate of ensuring the rule of law through obedience of Court Orders, a key pillar in the administration of justice.
39. Before this Court pens off, I note that although the Applicant prayed for the setting aside of the judgment and earlier orders herein no material, sufficient or otherwise, was placed by them for me to find merit in their prayer. Moreover, not only from the conduct of the applicant which includes acquiescence as demonstrated by the record but also based on the time taken to move this Court, the prayer has been made with extreme inordinate delay. It cannot be granted.
40. In the premises, I agree with the Respondent that the Application is bad in law, and an abuse of Court process and is fit for dismissal.
41. The following final Orders hereby issue;
 - i. The Notice of Motion Application dated 10th July, 2023 is devoid of merit and is hereby dismissed in its entirety.
 - ii. The Orders of this Court of 30th May, 2022 citing the then County Government Secretary of the Turkana County Government and requiring his personal attendance in Court remain in force.
 - iii. For avoidance of doubt, the Warrant of Arrest issued by this Court against the then County on 15th July, 2022 hereby remains in force.
 - iv. The Orders of this Court of 18th May, 2016 hereby remain in force.
 - v. Costs of the Application to be shouldered by the 1st Defendant/Applicant.
42. It is so Ordered.



RULING DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL ON THIS 21ST DAY OF DECEMBER, 2023.



HON. DR. *IUR* FRED NYAGAKA
JUDGE, ELC KITALE

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