REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND JUDICIAL REVIEW DIVISION

MISC. CIVIL APPLICATION 266 OF 2017

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW ORDERS OF CERTIORARI AND PROHIBITION BY THE TRUSTEES OF THE ARCHDIOCESE OF NAIROBI KENYA REGISTERED TRUESTEES (ST. JOSEPH MUKASA CATHOLIC CHURCH KAHAWA WEST)

AND

IN THE MATTER OF ARTICLES 47, 50(1), 60 & 67 OF THE CONSTITUTION OF KENYA, 2010 IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT 2015

AND

IN THE MATTER OF THE NATIONAL LAND COMMISSION ACT NO.5 OF 2012

AND

IN THE MATTER OF THE NATIONAL LAND COMMISSION'S DECISION ON LAND PORTION NO.KAHAWA WEST X31 AND X36 MADE ON 22/05/2017

BETWEEN

ARCHDIOCESE OF NAIROBI KENYA REGISTERED TRUSTEES (ST. JOSEPH MUKASA CATHOLIC

CHURCH KAHAWA WEST)……...….APPLICANT

VERSUS

THE NATIONAL LAND COMMISSION……...……RESPONDENT

AND

COUNTY GOVERNMENT OF NAIROBI…1ST INTERESTED PARTY

A.N. MWAURA ACTING AS THE CHAIRMANKAHAWA

WEST WELFARE ASSOCIATION…....…2ND INTERESTED PARTY

RULING

Introduction

1. On 26th May, 2017, I grant leave to the ex parte applicant herein, **Archdiocese Of Nairobi Kenya Registered Trustees (St. Joseph Mukasa Catholic Church Kahawa West),** leave to apply for orders of judicial review to quash the Respondent's decision terminating the re-planning and exchange of plot Nos. X31 and X36 and withdrawal of development approvals issued to the applicant by the 1st interested party herein. Leave was also granted to the applicant to apply for orders of prohibition restraining the 1st interested party from implementing the said decision. Apart from the leave the Court also directed that the grant of leave would operate as stay of implementation of the said decision.

2. On 19th September, 2017 this Court gave orders directing that the status quo vis-à-vis the suit property be maintained.

3. However vide an application dated 25th September, 2017, the 2nd interested party herein, **Kahawa West Welfare Association**, has moved this Court seeking the following orders:

> **a. That this application be certified as urgent and the same be heard ex parte in the first instance due to its urgency.**
>
> **b. That this honourable court be pleased to order the Registered Trustees St. Joseph Mukasa Catholic Church Kahawa West and the Father in Charge of St. Joseph Mukasa Catholic Church KahawaWest be committed to civil jail for contempt for disobedience of the orders issued on 19/9/2017 by Hon. Justice G.V. Odunga, sitting in the High Court of Kenya at Nairobi, in Misc. Civil Application 266 of 2017.**
>
> **c. That costs of this application be borne by the applicant**

4. According to the 2nd interested party herein, **Kahawa West Welfare Association** (hereinafter referred to as "the Association"), through its advocates on record, it filed an application dated 18th July, 2017 seeking an injunction restraining the applicant by themselves, their agents, servants and/or employees from carrying out any further construction, development or in any way interfering with the public car park and children's playground located in Kahawa West pending the hearing and determined of the suit and when the matter came up for hearing on 19th September, 2017 before this Court, the Court issued status quo orders, in order to preserve the suit property.

5. However, the applicants together with the Father in charge of **St. Joseph Mukasa Catholic Church Kahawa West** have deliberately disobeyed the said orders and have continued construction on the suit property. It was the Association's case that the said persons are clearly in contempt of the orders issued on 19th September, 2017 and therefore in order to safe guard the suit property and the interest of all the parties herein, it is only fair and in the interest of justice if the **Registered Trustees St. Joseph Mukasa Catholic Church Kahawa West** and the Father in Charge of the said Church be committed to civil jail for contempt for disobedience of the said orders issued on 19th September, 2017.

6. It was disclosed that the applicant intended to officially open the premises constructed on 30th September, 2017 which information was communicated officially in church on 24th September, 2017 by the Father in charge of St. Joseph Mukasa Catholic Church Kahawa West.

7. It was the Association's case that unless the orders sought herein are issued, the parties herein would only be engaging in an academic exercise since there shall be no property to preserve.

Ex Parte Applicant's Case

8. The application was opposed by the 1st interested party, **the Archdiocese of Nairobi Kenya Registered Trustees (St. Joseph Mukasa Catholic Church Kahawa West)** (hereinafter referred to as "the Church").

9. According to the Church, the application is incurably defective as it is filed under section 5 of the ***Judicature Act***, Cap 8 of the Laws of Kenya which was repealed by section 38 of the ***Contempt of Court Act***.

10. It was averred that the 2nd Interested Party/Applicant neglected, failed and/or refused to prosecute the application dated 18th July, 2017 to which the ex parte applicant raised a preliminary objection as to the Court' jurisdiction to issue injunctive reliefs in judicial review proceedings.

11. The Church averred that neither itself nor the ex parte applicant undertook any construction on the site after 19th September, 2017. It was averred that the applicant has been advancing his own vendetta against the Church and its officials with an ill motive. It would be inconceivable to proceed with the construction which requires a lot of resources without having a clear determination of the matter as it is the ex parte applicant who would stand to suffer if it did not succeed.

12. According to the Church, the allegations made by the Association are fictitious as it would not be possible to open unfinished premises. It was clarified that the occasion that was to occur was silver jubilee celebrations in which the church was celebrating 25 years from the inception of the parish.

13. According to the Church, due to the stoppage of the construction, it continues to suffer loss and damage arising from sums payable to the consultants who are engaged in the project and as such the 2nd Interested Party ought to give security for costs.

Determinations

14. Before dealing with the issues raised in this applicant, it is important to revisit the current position with respect to contempt of Court. Parliament vide Act No. 46 of 2016 enacted the ***Contempt of Court Act***, 2016 which was assented to on 23rd December, 2016 and commenced on 13th January, 2017.

15. According to the said Act contempt includes civil contempt means wilful disobedience of any judgment, decree, direction, order, or other process of a court or wilful breach of an undertaking given to a court. It is therefore clear that the wilful disobedience of a judgement, decree or order properly constitutes contempt of Court.

16. Section 37 of the Act empowers the Chief Justice to make rules for the better carrying out of the purposes of the Act. Those rules have however not been made. Before the enactment of the Act, section 5 of the ***Judicature Act*** imported the procedure for contempt of court followed by the High Court of Justice in England. Whereas the said section was deleted by section 38 of the Act, the rules contemplated by section 37 have not yet been promulgated. In my view, in the absence of the rules of procedure the lacuna must be filled by the invocation of section 24 of the ***Interpretation and General Provisions Act*** which provides that:

> ***Where an Act or part of an Act is repealed, subsidiary legislation issued under or made in virtue thereof shall, unless a contrary intention appears, remain in force, so far as it is not inconsistent with the repealing Act, until it has been revoked or repealed by subsidiary legislation issued or made under the provisions of the repealing Act, and shall be deemed for all purposes to have been made thereunder.***

17. The procedure existing before the enactment of the ***Contempt of Court Act*** was restated by the Court of Appeal in **Christine Wangari Gachege vs. Elizabeth Wanjiru Evans & 11 Others [2014] eKLR**. In that case the Court found that under Rule 81.4 of the ***Civil Procedure (Amendment No. 2) Rules***, 2012, which deals with breach of judgement, order or undertaking, the application for contempt is made in the

proceedings in which the judgement or order was made or undertaking given by what is referred to as "application notice" which application is required to set out fully the grounds on which the committal application is made, identify separately and numerically, each alleged act of contempt and be supported by affidavit(s) containing all the evidence relied upon. The said application and affidavit(s) must be served personally on the respondent unless the Court dispenses with the same if it considers it just to do so or authorises an alternative mode of service. In that case, the Court of Appeal held that leave or permission is nolonger required in such proceedings.

18. It is my view that in the absence of the rules, the procedure described by the Court of Appeal ought to be adopted with necessary modifications. As was rightly stated in **Republic vs. Returning Officer of Kamkunji Constituency & The Electoral Commission of Kenya HCMCA No. 13 of 2008,** Parliament intended and that the High Court has the responsibility for the maintenance of the rule of law hence there cannot be a gap in the application of the rule of law. Therefore where there is a lacuna with respect to enforcement of remedies provided under the Constitution or an Act of Parliament, or if, through the procedure provided under an Act of Parliament, an aggrieved party is left with no alternative but to invoke the jurisdiction of the Court, the Court is perfectly within its rights to adopt such a procedure as would effectually give meaningful relief to the party aggrieved. To fail to do so would be to engender and abet an injustice and as has been held before, a court of justice has no jurisdiction to do injustice. See **M Mwenesi vs. Shirley Luckhurst&Another Civil Application No. Nai. 170 of 2000** and **Kenya Industrial Estates Ltd vs. Transland Shoe Manufacturers Ltd. & 2 Others Civil Application No. Nai. 364 of 1999.**

19. It has been recognised that the law may be thought to have failed if it can offer no remedy for the deliberate acts of one person which injures another. See **Bollinger vs. Costa Brava Wine Co. Ltd [1960] 1 Ch. 262 at 238**. As was held in **Chege Kimotho & Others vs. Vesters & Another [1988] KLR 48; VOL. 1 KAR 1192; [1986-1989] EA 57** citing **Midland Bank Trust Co. vs. Green [1982] 2 WLR 130:**

> **"The law is a living thing: it adopts and develops to fulfil the needs of living people whom it both governs and serves. Like clothes it should be made to fit people. It must never be strangled by the dead hands of long discarded custom, belief, doctrine or principle."**

20. It is therefore clear that the law must adapt to the changing social conditions and where unlawful interference with a citizen's rights gives rise to a right to claim redress and if the ex parte applicant has a right he must of necessity have the means to vindicate it and a remedy if they are injured in the enjoyment or exercise of it since it is a vain thing to imagine a right without a remedy; for want of right and want of remedy are reciprocal. See **Rookes vs. Barnard [1964] AC 1129** and **Ashby vs. White [1703] 2 Ld Raym.938; 92 ER 126.**

21. In **Republic vs. Returning Officer of Kamkunji Constituency & The Electoral Commission of Kenya** (supra) it was held that just as nature abhors a vacuum, even the enforcement of the rule of law abhors a vacuum or a gap in its enforcement. Accordingly the Courts should uphold the jurisprudence that helps to "illuminate the dark spots and shadows in all circumstances, so that justice as a beacon of light and democratic ideals is practiced and hailed at all times over the hills, valleys, towns and homes in this beautiful land of Kenya. The mantle of justice and the rule of law must cover all corners of Kenya in all stations. Courts have a continuing obligation to be the foremost protectors of the rule of law".

22. I have considered the merits application and the material on record.

23. According to ***Black's Law Dictionary***, 9th Edition at page 360:

> **"Contempt is a disregard of, disobedience to, the rules or orders of a legislative or judicial body, or an interruption of its proceedings by disorderly behaviour or insolent language, in its presence or so near thereto as to disturb the proceedings or to impair the respect due to such a body."**

24. 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."

25. Similarly, in **Hadkinson vs. Hadkinson (1952) 2 All ER 56**, the judges of the Court of Appeal of England unanimously held that:

"It was the plain and unqualified obligation of every person against or in respect of whom an order was made by a court of competent jurisdiction to obey it unless and until it was discharged and disobedience of such an order would as a general rule result in the person disobeying it being in contempt and punishable by committal or attachment and in an application to the court by him not being entertained until he had purged his contempt."

26. In ***The Law of Contempt,*** **Butterworths (1996) Pages 555 – 569** by **Nigel Lowe and Brenda Sufrin** it is stated that:

"Coercive orders made by the courts should be obeyed and undertakings formally given to the courts should be honoured unless and until they are set aside. Furthermore it is generally no answer to an action for contempt that the order disobeyed or the undertaking broken should not have been made or accepted in the first place. The proper course if it is sought to challenge the order or undertaking is to apply to have it set aside."

27. It is now trite that Court orders are not made in vain and are meant to be complied with and that if for any reason a party has difficulty in complying with court orders the honourable thing to do is to go 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 on review or on appeal. In **Econet Wireless Kenya Ltd vs. Minister for Information & Communication of Kenya & Another [2005] 1 KLR 828Ibrahim, 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".

28. This position was confirmed by the Court of Appeal in **Refrigerator & Kitchen Utensils Ltd. vs. Gulabchand Popatlal Shah & Others Civil Application No. Nai. 39 of 1990**.

29. 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.

30. 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 civilised 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."

31. In this case the Respondents have raised the issue that the application was brought under the provisions which have since been repealed. Whereas I appreciate that section 5 of the ***Judicature Act*** was repealed, to disallow the application on that ground would with due respect amount to elevating the rules of procedure to a fetish. That position is nolonger tenable in light of Article 159(2)(d) of the Constitution.

32. With respect to personal service of the order alleged to have been disobeyed as opposed to the application for contempt, he current legal position on personal service was restated by **Lenaola, J** (as he then was) in **Basil Criticos vs. Attorney General & 4 Others [2012] eKLR**, **Republic vs. Minister of Medical Services Misc. Civil Application No. 316 of 2010** that:

"…the law has changed and so as it stands today, knowledge supersedes personal service and for good reason…where a party clearly acts and shows that he has knowledge of a court order, the strict requirement that personal service must be proved is rendered unnecessary."

33. This position was adopted by **Musinga, J** (as he then was) in **Republic vs. Minister of Medical Services** and **Kimaru, J** in **Gatimu Farmers Company vs. Geoffrey Kagiri Kimani & Others [2005] eKLR**. In the former case the learned Judge expressed himself as follows:

"Article 159(2) (d) of the Constitution requires the court to administer justice without undue regard to procedural technicalities. Article 10 of the Constitution stipulates various national values and principles of governance which bind all state organs, state officers, public officers and all persons whenever any of them applies or interprets the constitution or any law or implements public policy decisions. The values include the rule of law, good governance, integrity, transparency and accountability. The rule of law is vital in the stability of any nation and its institutions. In this new constitutional dispensation, it would be a mockery of justice for a respondent in contempt proceedings to come to court and say that even though he was aware of the terms of a prohibitory order, the order was not properly served upon him or that he considered the same to have some procedural defect, for example, lack of indorsement thereon, and therefore he ought not to be punished for contempt of court."

34. As stated in ***Halsbury's Laws of England***, 4thEdn. Vol. 5 para 65:

"Where an order requires a person to abstain from doing an act, it may be enforced notwithstanding that service of a duly indorsed copy of the order has not been served, if the court is satisfied that, pending such service, the person against whom enforcement is sought has had notice of the terms of the order either by being present when the order was made or being notified of the terms of the order, whether by telephone, telegraph or otherwise."

35. Therefore the law now is that once a party knows about the existence of a Court order, he cannot be heard to claim that he was not served therewith since knowledge supersedes service. It is however upon the applicant to adduce evidence showing that the alleged contemnor actually or constructively knew of the order. Constructive knowledge may be inferred where the person alleged to have been in contempt of the Court order was an alter ego or proxy of the person upon whom actual service was effected. Once the applicant shows that service was actually effected on a person who is reasonably expected to have brought the existence of the Court order to the notice of the contemnor, it is my view that the onus shifts onto the alleged contemnor to show that the existence of the order was not brought to his attention.

36. I have perused the record of these proceedings in so far as they relate to the alleged contempt. There is no evidence that the application for contempt was served personally on the ex parte applicant. Nor were directions sought from the Court dispensing with such service as appreciated in **Christine Wangari Gachege vs. Elizabeth Wanjiru Evans & 11 Others** (supra). Contempt of Court proceedings being quasi-criminal in nature the processes that require adherence to the rules of natural justice ought to be strictly followed. This in my view is the rationale for providing in section 7(3) of the said ***Contempt of***

Court Act that:

> ***[A]ny proceedings to try an offence of contempt of court provided for under any other written law shall not take away the right of any person to a fair trial and fair administrative action in accordance with Articles 47 and 50 of the Constitution.***

37. In this case the procedure requires personal service of the application for contempt on the respondent unless such service is dispensed with by the Court. I have not seen evidence of such personal service and the dispensation was neither sought nor obtained.

38. Having arrived at the said conclusion, it is my view that to deal with the other issues would be prejudicial to the Association in the event that it decides to commence similar proceedings properly.

39. In the premises the instant application is incompetent and is struck out but with no order as to costs.

40. Orders accordingly.

Dated at Nairobi this 18th day of October, 2017

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Mathi for the applicant and holding brief for Mr Otenyo for the 1st Interested Party

Miss Njuguna for the Respondent and holding brief for Miss Maina for the 2nd Interested Party

CA Ooko