REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 584 OF 2012

BETWEEN

JOHN GITONGA GACHUHI……..…….. 1ST PETITIONER

EILEEN WAMBUI NJOROGE……..…….. 2ND PETITIONER

PETER NJOROGE REGERU…….....…… 3RD PETITIONER

SAMUEL KARANJA MURIAKIARA…….....…….4TH PETITIONER

SALOME NJAMBI GITAU (AS ADMINISTRATIX OF THE ESTATE

OF ANDREW GITAU NG'ANG'A - DECEASED)…….....…….5TH PETITIONER

AND

THE COMMISSIONER OF LANDS…….....…….1ST RESPONDENT

MINISTRY OF ROADS…….....…… 2ND RESPONDENT

KENYA NATIONAL HIGHWAYS AUTHORITY…….....…….3RD RESPONDENT

THE HON. ATTORNEY GENERAL…….....…….. 4TH RESPONDENT

THE COUNTY COUNCIL OF KIKUYU…….....…….. 5TH

RESPONDENT

THE TOWN COUNCIL OF KIKUYU……..... 6TH RESPONDENT

RULING

Introduction

1. In a judgment delivered in this matter on 19th April, 2013, the Honourable Court (Hon. Justice D.S. Majanja) ordered the rectification of Gazette Notice No 3788 dated 26th May, 2006 by deleting the entry in respect of **plot No 842- County Council of Kiambu** and substituting the same with the respective parcels of the petitioners, namely:- **Muguga/Gitaru/842/59 - John Gitonga Gachuhi; Muguga/ Gitaru/ 842/62 - Eileen Wambui Njoroge; Muguga/Gitaru/1042- Peter Njoroge Regeru; Muguga/ Gitaru/1078 - Samuel Karanja Muriakiara**; and **Muguga/Gitaru 842/1 - Salome Njambi Gitau (administrator of the Estate of Andrew Gitau Ng'ang'a (Deceased)**. The Court further directed that the said rectification be published in the Kenya Gazette within 14 days of the judgment. Costs were also awarded to the petitioners.

2. The said Gazette Notice was rectified through Gazette Notice No. 3236 of 16th May, 2014. The Gazette carrying the rectification, however, omitted to include **Muguga/Gitaru/1042** belonging to Mr. Peter Njoroge Regeru, the 3rd petitioner. It is this omission that prompted the filing of the contempt proceedings seeking to hold the respondents liable for disobedience of the orders of the Court.

3. The respondents thereafter filed an application for review of the judgment of Majanja, J on the grounds that they had discovered new evidence that was not available at the time of the proceedings. It is to these two applications that this ruling relates.

The Application for Contempt

4. In an amended application dated 27th February, 2015, which was supported by two affidavits, one sworn by Mr. John Kiarie Njuguna on 27th February, 2015 and another by Mr. John Gitonga Gachuhi sworn on 30th October, 2013, the petitioners pray for orders that:

1. ***The Honourable Attorney General, the Permanent Secretary Transport and Infrastructure and the Chairman National Land Commission be committed to prison for such term(s) as the Honourable Court shall deem just and appropriate for contempt of court.***

2. ***This Honourable Court do make such orders and issue such directions as will expeditiously ensure that the petitioners receive just and adequate compensation for the compulsory acquisition of their land for the construction of the Southern By-pass.***

5. The application is premised on the grounds that the 1st, 2nd and 4th respondents, despite being represented in court at the time and despite being served with the decree and letters requesting compliance, have not taken any step to comply with the decree issued by the Court in this matter. Further, despite numerous appearances, demands, reminders and promises, the respondents have only partially complied with the decree. The petitioners allege that the construction of the road is now almost complete and the decree of the Court as well as the Constitution are being violated with impunity.

Application for Review

6. In an application dated 27th April, 2015, supported by an affidavit sworn on their behalf by Mr. Fidelis Kamwana Mburu on the same date, the 1st, 2nd, and 4th respondents pray for orders that:

1. ***The judgment dated 19th April, 2013 be reviewed to the extent that the 1st, 2nd, and 4th respondents should not be compelled to gazette their intent to compulsorily acquire plot No. Muguga/Gitaru/1042 (formerly Muguga/ Gitaru/487/85), belonging to Peter Njoroge Regeru, the 3rd respondent herein.***

2. ***The decree dated 13th May, 2013 and which is attendant to the said judgment, be varied to the extent that the 1st, 2nd and 4th respondents are not compelled to gazette their intention to compulsorily acquire plot No. Muguga/Gitaru/1042(formerly Muguga/ Gitaru/ 487/85), belonging to Peter Njoroge Regeru, the 3rd respondent herein.***

3. ***The costs of this application be in the cause***.

7. The application is based on the grounds that:

1. ***The Gazette Notice No. 3788 was done in the mistaken belief by the respondents that the land parcels Muguga/Gitaru/487 and Muguga/ Gitaru/842 still existed and belonged to the Town Council of Kiambu.***

2. ***That unbeknown to the respondents, <u>Muguga/Gitaru/487</u> and <u>Muguga/Gitaru/842</u> had long been subdivided and certificates of ownership [Certificate of Lease] issued to the petitioners.***

3. ***That throughout the hearing of the petition herein, and the proceedings subsequent to the delivery of the judgment herein, and upon exercising due diligence, Counsel conducting this matter on behalf of the respondents was unable to obtain the relevant deed plans and cadastral maps of the land in question.***

4. ***That upon inquiry from the Ministry of Transport and Infrastructure in March, 2015, copies of the relevant cadastral maps were traced and availed to respondents' Counsel. Specifically, the 90th Edition of the cadastral plans of the larger Kiambu District, which clearly indicate that plot No. Muguga/Gitaru/1042 is a sixth row plot from where the Nairobi Southern By-Pass Road has now been constructed.***

5. ***That the cadastral maps form new and important evidence that were it to have been availed during the hearing of the petition, the court could have reached a different decision in respect to Muguga/Gitaru/1042.***

8. The respondents contend that it is not possible to gazette the 3rd petitioner, who is the beneficial owner of **Muguga/Gitaru/1042**, because the said parcel of land is not required for the construction of the Nairobi Southern By-pass; that such gazette notices are done for purposes of an inquiry with an intent to acquire land; and that such invitation does not in any way give any benefit or right to the person whose land is intended to be acquired.
9. It is their case further that given the location of land parcel No. Muguga/Gitaru/1042, it will not be required for the construction of the Nairobi Southern By-pass and its acquisition will not be justified at all. Their submission is that the cadastral maps which are now available form new and important evidence that was not available during the hearing of the petition and are a proper basis for the orders of review that they seek.

Submissions for the Petitioners

10. In support of their application to cite the respondents for contempt, the petitioners submitted that the respondents were directed to comply with the orders in April, 2013 but had failed to do so. They termed this callous disregard of both the law and the Constitution by state agents as one that

flies in the face of not just the decree but also the letter and spirit of Article 21 of the Constitution.

11. It was their contention that while the respondents through their Counsel had taken the Court and the petitioners round in circles while pleading one excuse after the other as the reason for their inability to fully comply with the decree, the petitioners and the Court had indulged them for over a year from the commencement of the contempt proceedings. The petitioners observed that the respondents had begun to hint at a possible review application after this Court expressed its impatience with them. The petitioners further observed that the application for review was filed the same day that the Court had scheduled for hearing of the application for contempt.

12. The petitioners submitted that the application for review is improperly before the Court. They relied on the decision in **Hadkinson vs Hadkinson [1965] ALLER 102 and Mawani vs Mawani [1976-80] 1 KLR 607** to submit that the respondents have no right of audience before the Court as a contemnor cannot have audience before he has purged the contempt.

13. It was also their contention that the application is improper as the respondents are in contempt of court, were hopelessly out of time, and had failed to disclose crucial information, particularly that compensation has been done or is being done for the same head title, Muguga/Gitaru/487 and 842 to persons other than the petitioners. They argued therefore that non-disclosure of material facts and misleading the Court disentitles the applicant to the discretionary orders that it seeks, and they termed the respondents' application a gross abuse of the court process and without merit.

14. It was the petitioners' further submission that the respondents possessed sufficient information at the time they went to gazette the amendment to omit the parcel belonging to the 3rd petitioner. Consequently, it is false for them to claim that they have just discovered the plans now. The petitioners further observed that in any event, the plans and maps are exclusively kept by the respondents and they have not explained why they did not have them yet the title deeds had been issued. They submitted therefore that the respondents case for review does not meet the threshold set in **Origo and Another vs Mungala [2005] 2 KLR 307**.

15. It was the petitioners' case further that the AG cannot now be heard to say that one parcel, being part of the head title targeted and duly gazetted by the Commissioner of Lands for acquisition, is now not needed. Their submission was that the Commissioner of Lands is estopped and precluded from taking such a patently contradictory position.

Submissions in Response

16. The 1st, 2nd and 4th respondents submit that their application for review seeks to stop their being compelled to gazette an intention to compulsorily acquire plot No. Muguga/Gitaru/1042. They contend that the petitioners, being in possession of the parcels in question, deliberately elected to conceal information on the physical location of the land from the Court and the respondents; that they concealed the location and throughout the hearing of the petition, they declined to tender the deed plans in respect of the land parcels. It is the respondents' argument therefore that citing them for contempt will be tantamount to allowing the petitioners to benefit from their act of material concealment. They submit further that in any event, the petitioners were under an equal obligation to tender before the Court the deed plan/cadastral maps of the parcel in question.

17. The respondents further argue that Gazette Notice No 3236 was done pursuant to section 162 (2) of the Land Act, No 6 of 2012. The notice in the said Gazette is notice of *"intention to acquire,"* with a concurrent invitation to those affected by the acquisition to be attended to by the National Land Commission for purposes of getting their views for purposes of compensation. It is their contention therefore that no right accrues from such a notice of intention that is capable of being violated by them, or capable of being enforced by this Court, for the privilege to issue such notices rests with the Commission upon giving a technical evaluation of the need to use such land for public purposes. Accordingly, if there is no need to acquire the land in question, then there is no need to gazette or to invite its owners for purposes of an inquiry.

18. With regard to the application to cite them for contempt, the respondents submitted that the petitioners' application is fatally and incurably defective and ought to be struck out. They contend that the applicable law with regard to contempt is the Judicature Act. They rely on the decision in **Christine Wangari Gachege vs Elizabeth Wanjiru Evans and 11 Others [2014] eKLR** to submit that in terms of **section 5 (2) of the Judicature Act**, in punishing for contempt, the Court exercises ordinary criminal jurisdiction, and it is paramount therefore that the procedure for instituting such proceedings be scrupulously followed. It was submitted on their behalf that the present application is defective as it fails to comply with the mandatory provisions of the Civil Procedure (Amendment No. 2), Rules, 2012 and Part 81 thereof; and that the petitioners have not personally served the contemnors with the alleged defied court order or a notice of penal consequences.

19. The respondents submit further that there is no indication that this Court dispensed with service of the judgment in this matter, or an order extracted pursuant to the judgment, upon the contemnor, yet no evidence of such service had been placed before the Court. They therefore prayed that the Court allows the application for review and dismisses the application for contempt.

Determination

20. At the centre of the two applications before me is the 3rd petitioner's property, title number Muguga/Gitaru/1042. The petitioners seek to have the respondents punished for contempt of Court for their failure to gazette it as one of the parcels to be acquired for the construction of the Nairobi Southern By-pass passing through Kikuyu town. The respondents seek a review of the judgment of Majanja, J to remove the said parcel from the list of those to be gazetted for acquisition on the basis that it is not one of the parcels that was required for the construction of the by-pass and its acquisition was not necessary.
21. I am therefore required to address myself to two issues:

a. ***Whether the 1st, 2nd and 4th respondent should be cited for contempt of Court.***

b. ***Whether the application for review should be allowed;***

22. As the two issues are intricately intertwined in this petition, my analysis shall deal with them simultaneously.

23. The law on contempt in Kenya is found in the Judicature Act, Cap 8, Laws of Kenya under section 5 which is to the effect that:

1. ***The High Court and the Court of Appeal shall have the same power to punish for contempt of court as is for the time being possessed by the High Court of Justice in England, and such power shall extend to upholding the authority and dignity of subordinate courts.***

2. ***An order of the High Court made by way of punishment for contempt of court shall be appealable as if it were a conviction and sentence made in the exercise of the ordinary original criminal jurisdiction of the High Court.***

24. Courts in this jurisdiction have addressed the question of contempt vis-à-vis applications for review or stay of the orders allegedly breached in circumstances similar to the one now before me. In **Rose Detho vs Ratilal Automobiles Ltd and 6 Others Civil Appli 304 of 2006 (171/2006 UR), t**he respondents submitted that the application for stay of execution ought not be heard until the applicant has purged her contempt and complied with the superior court's orders. The issue for determination then was whether it was open to the court in the circumstances to uphold the preliminary objection and to refuse to hear the application for stay in light of the contempt by the applicant. The court addressed the question as follows:

"[6] Has the contemnor a right to be heard? This is indeed an everyday question

in all our courts. While the general rule is that a court will not hear an application for his own benefit by a person in contempt unless and until he has first purged his contempt, there is an established exception to that general rule where the purpose of the application is to appeal against, or have set aside, on whatever ground or grounds, the very order disobedience of which has put the person concerned in contempt. See Exito Navegacion S.A. vs Southland Enterprises Co. Ltd, The Messianik Tolmi [1981] 2 LLOYD'S REP. 595 at page 602. In his speech Brandon LJ said:-

"….that there may be cases where an appeal by a party in contempt against the very order disobedience of which has put him in contempt, can be shown to be, for one reason or another, an abuse of the process of the Court. In such a case the exception to the general rule discussed above would not apply."

It is worthy of note that the learned law Lord before reaching this conclusion discussed a number of authorities both in the nineteenth and twentieth centuries, including the case of Hadkinson vs Hadkinson [1952] 2 ALL ER 567 at page 567, at 569-570. This authority by Denning LJ contained a learned and scholarly historical account of the origins and development of the rule that a contemnor will not be heard until he has purged his contempt and it appears that the indepth analyses thereof led Denning LJ to formulate what he described as the "modern rule" which is in the following terms:

" I am of the opinion that the fact that a party to a cause has disobeyed an order of the court is not of itself a bar to his being heard, but if his disobedience is such that, so long as it continues, it impedes the course of justice in the cause, by making it more difficult for the court to ascertain the truth or to enforce the orders which it may make, then the court may in its discretion refuse to hear him until the impediment is removed or good reason is shown why it should not be removed."

25. As regards obedience to court orders, the Court in the **Detho** case made the observation that:

> **[14]** ***"We have been addressed at length by Mr. Odera on the topic of "The Independence of the Judiciary". I have carefully considered the submissions but only so far as they are relevant to the matter now before us. I would, however, agree with him that there would be no reason for the country to have and to maintain courts whose decisions and orders are useless and are not binding on anybody. Surely, it would be against public policy and unconstitutional to retain such courts. Moreover, it would be manifestly wrong for the courts to be seen as reluctant to jealously guard their authority or to ward off forces out to weaken their constitutional authority."***

26. I agree with the sentiments of the Court in the above matters. In particular, I note and are guided by the decision in the **Rose Detho** case **(supra)** with respect to the question of contempt where the court acknowledged that it is a general rule that a court will not hear an application for his own benefit by a person in contempt unless and until he has first purged his contempt. I accept the proposition that an exception exists to that general rule where the purpose of the application is to appeal against, or have set aside, on whatever ground or grounds, the very order disobedience of which has put the person concerned in contempt.

27. In the present case, I am satisfied that in the circumstances and on the facts presented before me, the respondents have a right of audience before me in respect of their application for review, which I now turn to consider before making my final determination on the question of contempt.

The Law on Applications for Review

28.Section 80 of the Civil Procedure Act provides as follows:

Any person who considers himself aggrieved –

a. ***by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or***
b. ***by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.***

29.Order 45 rule 1(1) which is largely in *pari materia* with the above section 80 provides that:

1. ***Any person considering himself aggrieved –***

a. ***by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or***
b. ***by a decree or order from which no appeal is hereby allowed, and who ,from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.***

30.The powers of the Court with regard to applications for review are set out in Order 45 Rule 3 which provides that:

1. ***Where it appears to the court that there is not sufficient ground for a review, it shall dismiss the application.***

2. ***Where the court is of the opinion that the application for review should be granted, it shall grant the same: provided that no such application shall be granted on the ground of discovery of new matter or evidence which the applicant alleges was not within his knowledge, or could not be adduced by him when the decree or order was passed or made without strict proof of such allegation***.

31.In **Francis Origo and Another vs Jacob Kumali Mungala (C.A. Civil Appeal No.149 of 2001 (unreported)**, the High Court dismissed an application for review because the applicants did not show that they had made discovery of new and important matter or evidence as the witness they intended to call was all along known to them and in any case, the applicants had filed an appeal which was struck out before the filing of the application for review.
32.In **Pancras T. Swai vs Kenya Breweries Limited, Civil Appeal No. 275 of 2010 the court made the observation that:**

> ***"As repeatedly pointed out in various decisions of this Court, the words, "for any sufficient reason" must be viewed in the context firstly of Section 80 of the Civil Procedure Act, Cap 21, which confers an unfettered right to apply for review and secondly on the current jurisprudential thinking that the words need not be analogous with the other grounds specified in the order. In Sarder Mohamed vs Charan Singh Nand Sing and Another (1959) EA 793, the High Court correctly held that Section 80 of the Civil Procedure Act conferred an unfettered discretion in the Court to make such order as it thinks fit on review and that the omission of any qualifying words in the Section was deliberate."***

33.The Court went on to observe as follows:

> ***In Shanzu Investments Limited vs Commissioner for Lands (Civil Appeal No. 100 of 1993) this Court with respect, correctly invoked and applied its earlier decision in Wangechi Kimata and Another vs Charan Singh (C.A. No. 80 of 1985) (unreported) wherein this Court held that: "any other sufficient reason need not be analogous with the other grounds set out in the rule because such restriction would be a clog on the unfettered right given to the Court by Section 80 of the Civil Procedure Act; and that the other grounds set out in the rule did not in themselves form a genus or class of things which the third general head could be said to be analogous.***
>
> **[30]** ***The discovery of new and important matter or evidence or mistake or error apparent on the face of the record or for any other sufficient reason in rule 1 of Order 44 (now Order 45 in 2010 Civil Procedure Rules) relates to issues of facts which may emerge from evidence. The discovery does not relate or refer to issues of law. The exercise of due diligence referred to in rule 1 refers to discovery of facts but does not relate to ascertainment of existing law which the court is deemed to be alive to***." (Emphasis added)

34. Another important principle with respect to applications for review is that such an application must not be brought too late in the day. The question of delay was addressed by the court in **Allen vs Mc Alpine and Sons [1968] ALL ER 56** in which Salmon L J pointed out that:

> ***"As a rule, when inordinate delay is established, until a credible excuse is made out, the natural inference would be that it is inexcusable. It is an all- time saying which will never wear out however often said that justice delayed is justice denied."***

35. In the present case, the decision of Majanja, J was made and orders granted on 19th April, 2013. The respondents did not act in accordance with the said orders, which led to the petitioners filing an application by way of Notice of Motion dated 30th October, 2013 urging the court to grant them orders and issue directions so as to expeditiously ensure that they received just and adequate compensation for the compulsory acquisition of their land. In an earlier application by way of chamber summons dated 28th October, 2013, the petitioners had sought leave to cite the Commissioner of Lands the Principal Secretary, Ministry of Roads, and the Attorney General for contempt. They later amended their application on 27th February 2015.

36. The respondents' application for review was filed on 27th April 2015. The respondents explain this delay on the basis that the requisite maps were not available at the Lands Registry. It was submitted on behalf of the respondents by Learned State Counsel, Mr. Moimbo, that the respondents exercised diligence during the hearing of the petition in pursuit of the deed plans and the cadastral maps, and that they contacted the Kenya National Highways Authority but did not get the plans, but that they subsequently got the plans, hence their application to review. His contention is that the placement of the cadastral maps on record presents new and material evidence which, if it had been placed on record, the Court could not have reached the decision it reached.

37. The respondents have submitted that it is not possible to gazette the 3rd petitioner's property, Muguga/Gitaru/1042, as one of the parcels that the respondents intend(ed) to acquire as the said parcel is not required for the construction of the Nairobi Southern By-pass. Its case is that such gazette notices are done for purposes of an inquiry with an intent to acquire land, and that such invitation to an inquiry does not in any way give any benefit or right to the person whose land is intended to be acquired.

38. I have considered the respective positions of the parties on this matter. On the one hand, and given my finding with respect to the application of the principle in the Detho case, it is my view that the

respondents cannot be held in contempt and therefore precluded from having a right of audience before the Court.

39. Secondly, having considered the application for review, I am inclined to agree that there is a basis for the orders sought. Had the cadastral maps been available and placed before the Court at the time the petition was under consideration, a different decision would have been arrived at. The respondents have gazetted all the other parcels which were required for the construction of the Southern by-pass, and which were intended to be acquired for that purpose. They had therefore, by the time they made their application for review, substantially complied with the orders of the Court. The 3rd petitioner's parcel, Muguga/Gitaru/1042 is, on the uncontroverted material before me, a sixth row parcel that was not required for the construction of the by-pass and was not intended to be acquired.

40. In the circumstances, I disallow the application for citing the respondents for contempt and allow the application for review dated 27th April 2015. In the premises, I issue the following orders which commend themselves to me:

1. ***The judgment dated 19th April, 2013 is hereby reviewed to the extent that the 1st, 2nd, and 4th respondents should not be compelled to gazette their intent to compulsorily acquire plot No. Muguga/ Gitaru/ 1042 (formerly Muguga/ Gitaru/ 487/85), belonging to Peter Njoroge Regeru, the 3rd respondent/3rd petitioner herein.***

2. ***The decree dated 13th May, 2013 and which is attendant to the said judgment, is hereby varied to the extent that the 1st, 2nd and 4th respondents are not compelled to gazette their intention to compulsorily acquire plot No. Muguga/ Gitaru/ 1042(formerly Muguga/Gitaru/487/85), belonging to Peter Njoroge Regeru, the 3rd respondent/3rd petitioner herein.***

41. With respect to costs, I direct that each party shall bear its own costs of the applications.

Dated Delivered and Signed at Nairobi this 12th day of February 2016

MUMBI NGUGI

JUDGE

Mr. Njuguna instructed by the firm of Kiarie Njuguna & Co. Advocates for the petitioners.

Mr. Moimbo instructed by the State Law Office for the 1st, 2nd and 4th respondent.