



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

CIVIL SUIT NUMBER 564 OF 2013

JULIUS M. KILINDA

ELIUD DISHON MASILA

ERASTUS M. KITONYO

STEPHEN K. MUTINDA

MUTUA MUTUI

TITUS MAUTA

KILYUNGI MWANZA

MUMO JOHN

NYAMAI MUTINDA

FRED M. MUSYOKA

DAVID MUSEMBI

PETER NGUI

MWANZI JOHN

MUSANGI KILINDA

JUMA MULWA

FREDRICK M. MUSILU

MUTINDA MUNYWOKI

MARTIN JOHN

KILINDA MUNYASYA

FRED M KILONZI

KYALO KINYILI

PETER M. MUSYIMI

(Suing as members of Ngao Ya Kathatu Welfare Society)PLAINTIFFS /APPLICANTS

VERSUS

PHARES MWANGI NJOROGE.....1ST DEFENDANT/RESPONDENT

THE COUNTY GOVERNMENT OF NAIROBI CITY2ND DEFENDANT/RESPONDENT

RULING

Background

1. On 1st July 2013, **Justice John Mutungi** issued orders directing the Surveyor in charge of City Council Housing Development in Dandora to furnish the Court with a survey map delineating Plot No's 5/258 Soweto Ex Gitau Village Settlement Scheme and Plot No. 4/313 Soweto Ex Gitau Village Settlement Scheme and the said Surveyor was also directed to file the report in Court within 21 days from 1st July 2013. Owing to non-compliance of the said orders, the Plaintiffs have now moved this court seeking the **County Executive Officer of the 2nd defendant Mr. Charles Kerich and Mr. Stephen Mwangi, the Chief Officer for Lands and Housing**, to be committed to civil jail for a period of six months for disobeying the orders of this court made on 1st July 2013.

The Plaintiffs/Applicants case

2. The Application is based on various grounds and is supported by the affidavit of **Julius M. Kilinda the 1st plaintiff** herein who deposed that the orders were first served on 3rd July 2013 upon the 2nd Defendant through its legal office.

3. According to the Plaintiffs, the orders were subsequently served on diverse dates between the year 2013 and 2021 and further there were several reminders and correspondences in respect to the same but the 2nd Defendant has not complied with the said orders to date.

4. The 1st Plaintiff further deposed that service of the said orders was also effected to the office of Director, Nairobi Metropolitan Services on 20th August 2021 but no response was received nor any action taken.

5. In the supplementary affidavit sworn on 16th November 2021, the 1st Plaintiff further deposed that it was preposterous for the 2nd Defendant to purport to escape responsibility by raising the issue of transfer of its functions to the Nairobi Metropolitan Services since for the entire period when the said orders were issued, no such communication was ever raised either from its legal officers or other officers.

6. In their submissions, the Plaintiffs' Advocate submitted that they had established the elements necessary for punishment of contempt as was outlined in the case of ***Samuel M.N Mweru & Others v National Land Commission & 2 Others [2020] eKLR***, these elements were; the terms of the order, knowledge of these terms by the Respondent, failure by the Respondent to comply with the terms of the order and that the Respondent conduct was deliberate.

7. On the 1st element, on whether the terms of the order were clear, unambiguous and binding on the Defendant, it was submitted that the orders were clear and in plain language which was binding on the 2nd Defendant, it required the Surveyor in charge of City Council Housing Development Dandora to furnish the Court with a survey map delineating Plot No's 5/258 Soweto Ex Gitau Village Settlement Scheme and Plot No. 4/313 Soweto Ex Gitau Village Settlement Scheme and the said Surveyor was also directed to file the report in Court within 21 days from 1st July 2013 .

8. On the 2nd element on whether the 2nd Defendant had knowledge and proper notice of the order, it was submitted that the orders upon extraction, were first served on the 2nd Defendant on 3rd July 2013 and subsequently thereafter several correspondents and reminders have been made. The bundle of correspondences and reminders was attached to the 1st Plaintiff's supporting affidavit as annexure **JMK3**. On this element it was further stated that the 2nd Defendant had not denied the existence of the said orders.

9. It was further submitted that the 2nd Defendant had acted in breach of the orders since there is no compliance to date. This was also expounded by the Plaintiffs in establishing the 3rd element.

10. On the final element, it was submitted that the 2nd Defendant's conduct was deliberate since its been over eight years and there was no compliance to the existing orders.

11. The Plaintiffs' Counsel concluded their submissions by urging this Court to find merit in the application and allow the same as prayed.

The 2nd Defendant/Applicant's case

12. The Application was opposed by the 2nd Defendant who filed grounds of opposition dated 8th October 2021 and written submissions dated 18th November 2021.

13. Counsel for the 2nd Respondent submitted that the Application was not merited in view of the fact that pursuant to the issuance of the orders, there have been major developments to the effect that the 2nd Defendants functions have since been transferred to the Nairobi Metropolitan Services pursuant to **Article 187 of the Constitution as read with Section 26 of the Intergovernmental Relations Act, 2012**

and the deed of transfer dated 20th February 2020. In view of the same, the 2nd Defendant's responsibility towards the enforcement of the orders became obsolete and as such they have no authority over its enforcement.

14. Counsel further submitted that the Plaintiff has not proved and demonstrated the four elements necessary for such an application to succeed. Counsel further urged the Court to dismiss the same with costs.

Determination

15. The only issue for determination is whether this court should commit the alleged contemnors for contempt of the court orders that were issued on 1st July 2013.

16. The grounds to be proved in contempt proceedings, according to *G. Bonnie and N. Lowe, "The Law of Contempt" 4th Edition, London Butterworth's, 2010, P.129* are:

a) The terms of the order (or injunction or undertaking) were clear and unambiguous and were binding the Respondent;

b) The Respondent had knowledge of a proper notice of the terms of the order;

c) The Respondent has acted in breach of the terms of the order; and

d) The Respondent's conduct was deliberate.

17. Contempt of court has been defined as conduct which interferes with the administration of justice or impedes or perverts the course of justice. Civil contempt consists of a failure to comply with a judgment or order of a court or breach of an undertaking of court. (See *Osborne's Concise Law Dictionary*).

18. In the case of *Sam Nyamweya & Others vs. Kenya Premier League Ltd and Others [2015] eKLR* it was stated as follows:

"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."

Halsbury's Laws of England, Vol.9 (1) 4th Edition provides as follows:

"Contempt of Court can be classified as either criminal contempt, consisting of words or acts which impede or interfere with the administration of justice or which creates substantial risk that the course of justice will be seriously impeded or prejudiced, or contempt in procedure, otherwise known as civil contempt consisting of disobedience to Judgment, Orders or other process of Court and involving in private injury."

19. The elements of civil contempt were laid out by the Law Commission of New Zealand in 'Contempt in Modern New Zealand' that was cited in *North Tetu Farmers Co. Ltd vs Joseph Nderitu Wanjohi [2016] eKLR* 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) that:

(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 defendants conduct was deliberate."

20. Similarly in the case of *Samuel M.N Mweru & Others (Supra)* that was cited by both parties, the Court adopted the four elements necessary to be proved for consideration of an application for contempt.

21. As was held in the case of *Katsuri Limited vs. Kapurchand Depar Shah [2016] eKLR*, where the liberty of the subject is or might be involved, the breach for which the alleged contemnor is cited must be precisely defined and proved. The court went further to hold as follows:

"A contempt of court is an offence of a criminal character. A man may be sent to prison. It must be satisfactorily proved. It must be higher than proof on a balance of probabilities, almost, but not exactly, beyond reasonable doubt. The standard of proof

beyond reasonable doubt ought to be left where it belongs, to wit, in criminal cases. It is not safe to extend it to contempt.”

21. It is not in dispute that on 1st July 2013, this court differently constituted, issued orders directing the Surveyor in charge of City Council Housing Development Dandora to furnish the Court with a survey map delineating Plot No's 5/258 Soweto Ex Gitau Village Settlement Scheme and Plot No. 4/313 Soweto Ex Gitau Village Settlement Scheme and the said Surveyor was also directed to file the report in Court within 21 days from 1st July 2013.

22. It is also not disputed that the said orders were subsequently served and neither the 2nd Defendant disputed the existence of such orders at least according to the affidavits and the ground of opposition that were filed herein by the parties.

23. 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 have to be respected and protected at all costs. 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.

24. When the court exercises this power, it does so to uphold the rule of law and administration of justice. This court will not condone deliberate disobedience of its orders, and will not shy away from its responsibility to deal firmly and decisively with contemnors.

25. It is trite law as has been cited in case law relied on by both the Applicants and the 2nd Respondents that in order for the Court to cite a party for contempt, the Court order must be clear and unambiguous, duly served on the party and there must be an act of willful disobedience by the party.

26. In the instant case, this Court was informed that pursuant to a deed of transfer dated 20th February 2020, the 2nd Defendant's functions were transferred to the Nairobi Metropolitan Services. In view of the same, the 2nd Defendant's responsibility towards the enforcement of the said orders became obsolete and as such they have no authority over its enforcement.

27. I have also read the 1st Plaintiff's supporting affidavit and noted that on 20th August 2021, the Plaintiffs being aware of the transfer of the 2nd Defendant's functions to the Nairobi Metropolitan Services, served a copy of the said order forwarded with a letter dated 19th August 2021 to the said entity notifying them to comply even though no response was received.

28. The forwarding letter dated 19th August 2021 of the said order was annexed as annexure JMK4 and it read in part at paragraph 3 as follows: -

“ We are now serving upon you the Order of the Court granted on 1st July 2013 (attached) for your compliance. It is the duty of your office to designate an officer who should prepare the required report in accordance with the order” (Emphasis made by the Plaintiffs' advocate)

29. In view of the foregoing and considering the peculiar circumstances of this case noting that this is still a live matter before this Court and further considering that the 2nd Defendant acknowledged the existence of the said Orders save for the fact that the relevant functions had already been transferred from them, it will be draconian for this court to proceed and cite the named officers for contempt.

30. In conclusion, **the Court declines to grant the orders sought in the Plaintiffs' Application dated 17th September 2021. Each party to bear their own costs.**

31. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 31ST DAY OF JANUARY 2022

E. K. WABWOTO

JUDGE

IN THE VIRTUAL PRESENCE OF:-

MS. MUTUA FOR THE PLAINTIFFS/APPLICANTS

N/A FOR THE 1ST DEFENDANT/RESPONDENT

MS. MUNDA FOR THE 2ND DEFENDANT/RESPONDent.

COURT ASSISTANT: CAROLINE NAFUNA.

E. K. WABWOTO

JUDGE