



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISC. CIVIL APPLICATION NO. 20 OF 2015

IN THE MATTER OF: THE PHYSICAL PLANNING ACT (CAP 286)

AND

**IN THE MATTER OF: RULE 14 AND 15 OF THE PHYSICAL PLANNING BUILDING AND
DEVELOPMENT**

AND

IN THE MATTER OF: THE NATIONAL PLANNING & BUILDING REGULATIONS

AND

**IN THE MATTER OF: APPLICATION FOR JUDICIAL REVIEW ORDERS OF MANDAMUS
AND PROHIBITION**

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

THE COUNTY GOVERNMENT OF MSA.....RESPONDENT

1. FARID MOHAMED AL-MAARY

2. HIBA ADNAN ALAMMEDIN

3. SURYAKANT M. SAVANI.....EX PARTE APPLICANTS

RULING

1. In orders granted and issued on 14th July, 2015 this court granted leave to the Applicants to commence judicial review proceedings for orders of mandamus and prohibition and ordered that the leave shall operate as a stay.

2. The order forbade the Respondents from carrying out any further construction of kiosks which would interfere with the Applicants access to their buildings situate on the specified titles parcel of land.

3. In an application dated 31st July, 2015, the Applicants accused the Respondents of disobeying the court order and consequently sought orders to cite the Respondent's County Secretary and Legal Officer for contempt of court orders for which they should be found guilty, and committed to civil jail at Shimo La Tewa Maximum Prison. All this is stated in the Grounds set out in the Notice of Motion dated and filed on 31st July, 2015 and the Supporting Affidavit of the Applicants, Hiba Adnan Farid Al-Maary sworn on 31st July, 2015 and the grounds on the face of the Notice of Motion (the Application). The Supplementary Affidavit of Farid Mohamed Al-Maary sworn on 13th November, 2015 continued to charge the Respondents failure to obey the court orders staying any further construction of stalls along the entrance to the Applicants' premises.

4. Counsel for the Applicants consequently urged the court to allow the application, and cite the Respondent's officials for contempt of court.

5. The Application was however opposed. In his Replying Affidavit sworn on 18th September, 2015, the Respondent's Director of Legal Services denies contravening the orders of court. He avers in paragraph 4 of the said Affidavit that –

“the Respondent has observed and abided by the orders issued by the Court to the effect that no structure has been put up, erected or allowed by the Respondent to be erected on the passage at the side of the buildings belonging to the Applicants, and further that the Respondent has not in any way interfered with the access to the ex parte Applicants' property, and concluded that the status quo has been maintained since the court orders were issued”.

6. The Respondents also deny that proper service of the Application was effected upon the person or persons to be cited for contempt. There is no Mr. Mummin in the office of the County Secretary, and that the Application is fatally defective for failure to enjoin the alleged contemnor(s) in their individual capacity, and that to that extent, the application is incompetent for failure to specifically name the officer or officers sought to be committed to jail.

7. However, in his Further Affidavit sworn on 7th October, 2015, Hiba Adnan Al-Maary avers that the Application was properly served because –

“... the Respondent being a government entity is a body whose accountability lies squarely with its respective officials who hold responsibility to account for every action or inaction attached to the Respondent.”

8. Both counsel filed authorities in support of their respective arguments. For the court's power to punish for contempt, counsel for the Applicants relied on the cases of **Abdalla Ali Taib & 4 others vs. Rabinder Kaur Ahluwalia [2015] (No. 27 of 2015)**.

9. There are two issues for determination by this court. **Firstly**, whether there was contempt of the court's orders by the Respondents. **Secondly**, what is the procedure for determination of such contempt?

10. On the first question, whether there was contempt of the court orders, the Respondent denied and averred in the Replying Affidavit of its Chief Legal Officer, that the Respondent did abide by the court orders. The Applicant did file an Affidavit attaching photographs.

11. Contempt proceedings are though brought pursuant to disobedience of court orders in civil actions, are criminal in nature, and are not subject to proof on the balance of probability. But neither are they like criminal cases, subject to proof beyond reasonable doubt. The proof of contempt must be beyond probability, and less than beyond reasonable doubt.

12. Unfortunately in this case, the photographic evidence of contempt failed to show either the date when they were taken or the location of the previous construction and the new kiosks the construction of which constituted the contempt. The high or credible probability of the commission of the contempt was therefore lost, and therefore lacked proof. The application must therefore fail on this ground alone.

13. The second issue concerns the procedure for determining complaints of contempt of court. Up and until 15th December, 2015, (the date of Assent), and 2nd January, 2016, (the date of Commencement) of the High Court (Organization and Administration Act) 2015 the court's power to deal with contempt of court proceedings was provided for in section 5 of the Judicature Act (Cap 8, Laws of Kenya), and Order 40, rule 3 of the Civil Procedure Rules, 2010. Section 5(1) provided –

“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 that power shall extend to upholding the authority and dignity of the subordinate courts.”

14. However, since the enactment of the High Court Organization and Administration Act, 2015, the Court of Appeal Administration Act, 2015 and the Magistrates Courts Act, 2015 (No. 26 of 2015) the power to punish for contempt of court has been reserved in each of the superior courts and the lower courts or subordinate courts. The drafters of those Acts, and the legislature somewhat failed to provide for the procedure for instituting contempt proceedings. Consequently, the procedure applicable in the High Court of Justice in England is still applicable in Kenya, and now throughout the superior courts, and the subordinate courts.

15. This effectively means that though the power to punish for contempt has been “domesticated” under the said enactments, the procedural law in contempt proceedings in Kenya is the law applicable in the High Court of Justice in England at the time the application for contempt was filed – **JUSTUS KARIUKI MATE & ANOTHER VS. HON. MARTIN NYAGA WAMBORA & ANOTHER (Civil appeal No. 24 of 2014), CHRISTINE WANGARI GACHEGE VS. ELIZABETH WAMORI EVANS & 11 OTHERS (Civil Appeal No. 233 of 2007).**

16. In England there was enacted the Contempt of Court Act, 1981 and there was also enacted, the Civil Procedure (Amendment No. 2) Rules, 2012 and Part 81 thereof replaced Order 52 of the Supreme Court Rule in its entirety.

17. Whereas Part 81 of the Civil Procedure (Amendment No. 2) Rules created four principal forms of contempt, Section 33 of the High Court (Organization and Administration) Act creates not less than fourteen categories of contempt of court. Section 33(a) of our Act, is equivalent to Part 81.4 of the Civil Procedure (Amendment No. 2) Rules, 2012, which provides for committal –

“... for breach of a judgment, order or undertaking to do, or abstain from doing an act” (81.4)

18. The contempt alleged in this case is clearly **“breach of judgment, order or undertaking to do or abstain from doing an act”**. Under Rule 81.6 of the said Part 81, a judgment or order to do or not to an act, may not be enforced in contempt proceedings unless there is prominently displayed in the front of the copy of the judgment or order served –

(i) a warning to the person required to do or not to do the act in question.

(ii) that disobedience, to the order would be contempt of court punishable by imprisonment, a fine or sequestration of assets.

(iii) a penal notice be served together with the order.

19. Although Rule 81.6 requires personal service, this can be dispensed with by the court under Rule 81.8, if the court is reasonably satisfied that the person had notice of the judgment or order because he was present when the judgment or order was made, or when he was properly or reasonably notified of the

terms of the judgment or order given by telephone, e-mail or otherwise, that is to say, alternative methods of service ordered by the court at given or known address or an alternative place or address. A notice is satisfied if the person or his agent be said or proven to have either been present when the judgment or order was made or was notified of its terms by telephone, e-mail or otherwise.

20. In this regard, Lenaola J, observed in **Basil Criticos vs. Attorney-General & 8 others [2015] e KLR** –

“that the law had changed and as it stands today, knowledge supersedes personal service. Where a party clearly acts and shows that he had knowledge of a court order, the strict requirement that personal service must be proved is rendered unnecessary.”

21. On the question of service therefore, whereas the applicants’ counsel insist that there was proper service, the Respondents contend that there was no service upon the alleged contemnor, the County Secretary, or the Legal Officer, who are not named. A Mr. Mummin if he is a member of the County Secretary’s office, or the Legal officer’s office is not named as the contemnor. The Affidavit of Service says the Application was served upon a Mummin, it does not say who Mr. Mummin was, or what he does, it does not describe his office, it does not say he is the contemnor.

22. It is correct as the Applicants contend that the Respondent is a government entity whose accountability lies squarely with its respective officials who hold the responsibility to account for every action or inaction attached to the Respondent. For purposes of contempt proceedings the responsibility attaches to an individual or individual officials, and not every official of the Respondent. The Applicant did not show that the County Secretary was served or that he had knowledge of the Application. To find the County Government of Mombasa in contempt would amount to making an order in **vacuo** and incapable of execution.

23. In the circumstances, I must find and so hold, that the Application herein is fatally defective for failure to enjoin the alleged contemnors in their individual capacity as Respondents to the Application, I also hold that condemning the entire body of officials of all ranks of the County Government of Mombasa would amount to stripping them of their right to fair hearing and an opportunity to be heard. Consequently, I find the application dated 31st July, 2014 is incompetent to extent it fails to specifically name the officers it seeks to commit to jail.

24. For all those reasons the Application dated and filed on 31st July, 2015 is dismissed with costs to the Respondent.

Dated, Signed and Delivered at Mombasa this 14th day of March, 2016.

M. J. ANYARA EMUKULE, MBS

JUDGE

In the presence of:

Mr. Mokaya holding brief Ms. Ali for Applicant

Mr. Obinju for Respondent

Mr. Silas Kaunda Court Assistant