



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO.325 OF 2011

BETWEEN

RAMATHANI MATHENGE KAMOZU.....1ST PETITIONER
WILSON ABUYAH.....2ND PETITIONER
ATHUMANI MOZE MSAFIRI.....3RD PETITIONER

AND

THE HONOURABLE ATTORNEY GENERAL.....1ST RESPONDENT
THE SETTLEMENT FUND TRUSTEES.....2ND RESPONDENT
THE KENYA ANTI-CORRUPTION COMMISSION.....3RD RESPONDENT
THE COMMISSIONER OF LANDS.....4TH RESPONDENT
TAVETA TOWN COUNCIL.....5TH RESPONDENT
PUBLIC SERVICE COMMISSION.....6TH RESPONDENT
THE DIRECTOR LAND ADJUDICATION
AND SETTLEMENT.....7TH RESPONDENT
THE MINISTER FOR LOCAL GOVERNMENT.....8TH RESPONDENT
KENYA NATIONAL CAPITAL CORPORATION.....1ST INTERESTED PARTY
BASIL CRITICOS.....2ND INTERESTED PARTY
TAVETA FARMERS ASSOCIATION.....3RD INTERESTED PARTY

RULING ON A PRELIMINARY OBJECTION

Factual Background

1. The Petitioners, on 19th December 2011, filed their **Petition No. 325 of 2011** along with a Notice of Motion dated 16th November 2011 under a Certificate of Urgency. In the Motion, they sought, among others, orders that:

“Pending the hearing and determination of this Application, a conservatory order by way of stay and/or injunction be issued preventing all government public servants and/or officers, inclusive of the local police, the Commissioner of Lands, Taveta Town Council or any other government officials from issuing letters of allotment in respect of sub-divisions arising from LR 5865/2 (formerly Taveta I.R 2097), surveying or demarcating the land or evicting the Petitioners and all affected persons in occupation of the suit land until determination of the Application;

And

Pending the hearing and determination of this Application there be, by way of a conservatory order, a stay of any further dealings, development of whatsoever nature and/or issuance of title deeds or leases in respect of the suit land by the Respondents, their servants, agents or any other Respondents through their servants or agents.”

2. The grounds upon which the orders were sought included that the Petitioners, by the actions of the Respondents, were being denied the right to property to which they were entitled and that they would lose their place of residence in land L.R. No.5856/2 once letters of allotment and titles in respect of the subject land are issued to other persons by the Respondents.
3. When the matter came up before the Court on 19th December 2011, it directed that the matter be mentioned at a later date as it considered that the Petition raised issues that were similar to those raised in another matter before the Court.
4. On 17th February 2012, the matter was mentioned along with another matter before this Court and Conservatory Orders issued on a consent basis, preventing, among other actions, the issuance of letters of allotment, title deeds or leases in respect of land L.R. No.5856/2 (formerly Taveta I.R 2097) pending determination of the Petition.
5. On 17th December 2014, following an Application by the Petitioners by way of Notice of Motion, supported by an affidavit of Ramadhani Mathenge Kamozu dated 26th March 2014, this Court ordered all parties to the suit to finalise and file their submissions on the main Petition, for hearing on 2nd March 2015. On that date, this Court also issued the following Conservatory Orders:

“1. That a Conservatory Order be and is hereby issued restraining the Principal Magistrate’s Court, (Taveta) from continuing with or hearing the following criminal cases, more particularly:

- a. Republic vs Mwangi Mbwika, Criminal Case No. 495 of 2013 Charged with forcible detainer contrary to Section 91 of the Penal Code;***
- b. Republic vs Ema Muthoki Ndinda, Criminal Case No. 22 of 2014 charged with creating disturbance contrary to Section 95/1b of the Penal Code;***
- c. Republic vs Mary Mueni, Criminal Case No. 17 of 2014 Charged with forcible detainer contrary to Section 91 of the Penal Code;***
- d. Republic vs Justin Mkoy Mzalendo, Criminal Case No. 32 of 2014 charged with creating disturbance contrary to Section 95/1b of the Penal Code;***

e. Republic vs Agnes Mutua, Muli Mumo, Elizabeth John, John Gusta, Forqus Anthony, Edward Maina, Muteti Wambua, Meshack Kasika Mutungi, Michael Muthiani, Mwangangi Kavele, Shadrack Mutisya alias Mburu, Nyange Mwakima Francis, Michael Mulinga Bondo, Francis Muteti Kaumwa, Ian Chalo, Amina Saba, Elijah Chege, Mirabu Gaudizia, Josephine Munjiua, Rose Ngele Kitogo, Mutinda Makau, Jeremiah Muli Wambua, Fredrick Zirani Tore, William Mwakasi Mwaki, Martine Ndung'u Mwachia, Albert Wambua Mutiso, Criminal Case No. 692 of 2012 and 643 of 2012. All charged with forcible detainer contrary to Section 91 of the Penal Code; and

f. Republic vs Amos Mutuki, (..... Criminal Case Number not given) of 2013 charged with making a document without lawful authority contrary to Section 375a of the Penal Code And more particularly in regard to the orders for the Court made on 29th September 2012*

2. *That an Order of prohibition be and is hereby directed at the Principal Magistrate's Court Taveta restraining him or any other Judicial Officer in Taveta from hearing or in any other way handling any criminal matter arising from dispute of ownership of Land relating to L.R. 5865/2 formerly (Taveta I.R 2097)."*
6. In a related matter, on 2nd April 2015, the Director of Public Prosecutions (DPP) sought Revision, by the High Court, of a Resident Magistrate's Court decision in a case in which the 1st Petitioner had been charged with malicious damage to property, forcible detainer and unlawful assembly, (in connection with issues relating to the land in dispute) in **Criminal Case No. 152 of 2015 - Republic v Ramathan Mathenge and 3 others**. The Resident Magistrate's Court had ruled that the said criminal case could not proceed on account of the Conservatory Orders of this Court issued on 17th December 2014. (reproduced elsewhere above).
7. The DPP had in that regard requested the High Court to evaluate and satisfy itself as to the legality, propriety, judiciousness and correctness of the ruling and consider revising it to prevent a miscarriage of justice. The request was based on **Sections 362 and 364 of the Criminal Procedure Code and Article 165 (6) of the Constitution**.
8. Muriithi J sitting at the High Court at Voi declined to grant the orders sought in the Application for Revision stating that this Court's Order was, in the first place granted to preserve the status quo and protect the accused persons (the Petitioners herein) pending determination by the Court, of this Petition in which they had challenged the constitutionality of their prosecution. Therefore, Muriithi J reasoned that to permit the prosecution of the named persons by the Taveta Resident Magistrate's Court or any other Subordinate Court before the determination of this Petition would render the Petition nugatory.
9. Muriithi J also added that although the Order of this Court did not overtly include all Magistrates in the country, the same should be inferred from the Order, when the objective of the order is considered. He also added that the idea of the DPP seeking to side step an Order of the High Court, to unusually file criminal proceedings contrary to established Court practice in a Court outside the local geographical limits where the suit property is situate is objectionable and an affront to the due administration of justice.
10. On 9th April 2015, by way of Notice of Motion under a Certificate of Urgency, the Petitioners filed an Application supported by an affidavit of Ramathani Mathenge Kamozi, also dated 9th April 2015 seeking, among others, orders that:

"a) Certain persons, including the Deputy County Commissioner, Taveta one Timothy Nkaduda, the Police Commander, Taita Taveta County, the Officer Commanding Station, Taveta, the Officer Commanding Police Division, Taveta Sub-County, the Prosecutor, Taveta Law Courts, the Criminal Investigation Department Officer-in-Charge, the

Settlement and Adjudication Officer, Taveta and or officer known as Maina Ngugi, Director of Settlement, Cabinet Secretary in the Ministry of Lands and District Land Registrar, Taita Taveta, be committed to a six months jail term for contempt of Court and fined.

b. The Chairman, Secretary, Organising Secretary and Treasurer of the Taveta Farmers Association be committed to Civil Jail for 6 months for contempt of Court and fined.”

11. This Application was based on grounds that various Government Officers had issued title deeds contrary to the Orders of this Court, that the 1st Petitioner and other squatters have been charged in criminal cases and that the Respondents as well as the Interested Parties had made it clear that they will continue to charge other persons, in clear contempt of the Orders of this Court. Further, that following confirmation of this Court’s order in the above criminal case, the Application for contempt proceedings was marked as withdrawn by consent on 7th July 2015, in the presence of Counsel for the Petitioner, Counsel for the 1st, 2nd, 4th, 7th and 8th Respondents, Counsel for the 3rd Respondent and Counsel for the 1st, 2nd and 3rd Interested Parties.

12. However, on the same grounds that the Application of 9th April 2015 had been based, the Petitioners filed another contempt Application on 8th September 2015 seeking orders that:

“a) The Deputy County Commissioner, Taveta and or Timothy Nkaduda, Officer Commanding Station, Taveta and or Duncan Njau, Officer Commanding Police Division, Taveta Sub- County, and or Simon Jeremiah Gachaba, the Prosecutor Taveta Law Courts, and or Mr. Ogeri, the Settlement and Adjudication Officer Taveta and or Officer known as Stephen Maina Ngugi be committed to a six months jail term for contempt of Court and fined.

b. Pastor Frank M’mare, Patrick Mrisha and Josial Kimanzi Malombe be committed to civil jail for 6 months for contempt of Court.”

13. Learned Justice Onguto, hearing the matter as the Duty Judge certified the matter as urgent, ordered it to be served upon the Respondent and Interested Parties and to be placed before this Court for further directions on 15th September 2015, on which day I ordered that the Application be responded to and be listed for directions on 13th October 2015.

14. In the meantime, the 3rd Interested Party, on 14th September 2015 and the 1st, 2nd, 4th, 6th, 7th and 8th Respondents, on 13th October 2015, filed Notices of Preliminary Objection to the contempt Application of 8th September 2015. The grounds for the Preliminary Objections were in the following terms for the 1st, 2nd, 4th, 6th, 7th and 8th Respondents:

“1) That none of the Respondents herein is legally capable of violating this Honourable Court’s Orders, in terms of the Orders issues on 17/02/2012 and 17/12/2014.

2. That the facts outlined in the entire application, and the supporting documents annexed thereto, do not in any way point to any form of disobedience or non-compliance with the Orders of this Court referred to. Specifically that:

a. Annexures RMK-AB and RMK-AC do not in any way demonstrate the relationship between the Orders allegedly violated, the Petitioner/Applicant and LR 5865/2 [formerly Taveta LR 2097];

b. The offence in relation to which Gilbert Kamuta was bonded [annexture RMK-AC] was assault and malicious damage; and

c. There is no demonstrable link between the titles issued and the land in the question herein.

3. That the Application is fatally defective for want of conformity to provisions of the Judicature Act, Cap 8 Laws of Kenya. Specifically that:

a. The Application herein does not exhibit any Court Order, and an attendant Penal Notice, capable of being violated by the Respondent and capable of supporting a contempt claim.

b. There is no evidence of personal service effected upon the Respondents of the Order alleged violated by the Respondents.

4. That the Application is frivolous, misconceived, [and] an abuse of this Court's process. That this Application is a deliberate attempt by the Petitioners to further delay the hearing of the main Petition filed herein."

For the 3rd Interested Party, the Preliminary Objection was framed thus:

"..Counsel for the 3rd Interested Party will contend as a preliminary point of law, to be determined in limine, that the Applicant's Application is hopelessly misconceived, frivolous, totally devoid of merit and mala fides for the reason inter alia;

i. For a want of conformity with the law and practice of contempt of Court as provided for in the Judicature Act and as practiced by the rules of Court in England. (sic)

ii. Want of specific acts detailing, constituting or amounting to alleged contempt (s) and

iii. Such other or further grounds as may be adduced at the hearing thereof."

Submissions for the 1st, 2nd, 4th, 6th 7th and 8th Respondents

15. On 16th December 2015, Mr. Moimbo, Learned State Counsel for 1st, 2nd, 4th, 6th 7th and 8th Respondents stated that the Application for contempt is premised on the Order issued on 17th December 2014 which unbeknownst to the Petitioners, was dealt with in **Petition 258 of 2011** where the Order was found to be wanting and therefore incapable of attracting any order of committal contempt.

16. He further contended that none of the Respondents named in the Application are legally capable of violating the Court's orders issued on 17th February 2012 and 17th December 2014 and that the facts outlined in the entire Application, along with the supporting documents provided by the Petitioners, do not in any way point to any form of disobedience or non-compliance with the Orders of this Court, specifying that the documents do not demonstrate the relationship between the Orders allegedly violated, the Petitioners and the land in question, i.e. L.R. No.5865/2.

17. He also contended that the Application does not exhibit any Court Order and the attendant Penal Notice capable of being violated by the Respondents and therefore capable of supporting a contempt claim.

18. In addition, he pointed out that the Petitioners had neither provided any evidence of personal service of the order having been effected upon the Respondents nor of the order allegedly violated by the Respondents.

19. He concluded by stating that the Application is frivolous, misconceived and an abuse of the Court process, asserting that it represents a deliberate attempt by the Petitioners to further delay the

hearing of the Petition herein.

Submissions for the Interested Parties

20. Mr. Kihang'a for the 3rd Interested Party on his part submitted that the contempt Application is improperly before the Court as leave for the same had not been sought. He asserted that since the matter involves possible incarcerations, notice of the contempt Application had to be issued to the English Crown's equivalent in Kenya. According to him therefore, the Application does not conform to the law and practice of contempt of Court as provided for in the **Judicature Act** and **Rules of Court in England**.
21. He also contended that although mandatory, there is no Penal Notice attached to the order in issue and added that the Petitioners offered no specific act that details, constitutes or amounts to contempt.
22. Mr. Odhiambo for the 1st Interested Party stated that he supported the Preliminary Objections and identifies with the submissions of his colleagues Mr. Moimbo and Mr. Kihang'a.

Submissions for the Petitioners

23. Representing the Petitioners, Mr. Wandaka objected to the Preliminary Objections, contending that the grounds relied upon by the Respondents and Interested Parties are not grounds that fall within the law as Preliminary Objections in that they constitute facts and evidence. In this regard, he stated that the Courts over time have identified grounds for raising Preliminary Objections, for example, where there is limitation of time or where an arbitration clause appears in a contractual dispute and therefore binds parties to the subject contract.
24. On seeking leave for the contempt Application, he referred the Court to the case of **Christine Wangari Gachege vs Elizabeth Wanjiru Evans [2014] eKLR** in which it was determined that it is no longer necessary to seek leave prior to lodging a contempt Application.
25. He concluded by reiterating that the issues being brought up by the Respondents and Interested Parties are only intended to delay the conclusion of the Petition.

Determination

26. Having set out the background leading to the filing of the Notices for Preliminary Objection by the 1st, 2nd, 4th, 6th, 7th and 8th Respondents and the 3rd Interested Party, I will now proceed to determine if the grounds are valid and resolve whether those parties have made their case sufficiently enough to lead to the striking out of the contempt Application by the Petitioners.
27. Of utmost importance in doing so is an understanding of what constitutes a Preliminary Objection. Sir Charles Newbold. P aptly defined a Preliminary Objection in the case of **Mukisa Biscuit Company vs Westend Distributors Limited (1969) EA 696**, stating that:

“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law, which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does nothing but unnecessarily increase costs and occasion confuse the issues. This improper practice should stop.”

He added thus:

“So far as I am aware, a Preliminary Objection consists of a point of law which has been pleaded or which arose by clear implication out of pleadings, and which if argued as a

preliminary point may dispose of the suit.”

28. As elucidated above therefore, a Preliminary Objection must raise a point of law based on ascertained facts or evidence, without touching on the merits of the matter in consideration. It can never be premised on disputed facts or evidence.

29. Duly guided by the above holdings, I will first consider and determine each of the grounds of objection raised and whether they fall within the definition of a Preliminary Objection and accordingly proceed to determine the sufficiency of only those grounds that I find fall therein.

30. In summation, the grounds of objection raised by the 1st, 2nd, 4th, 6th 7th and 8th Respondents and the 3rd Interested Parties are as follows:

(Each ground is complemented by my findings thereon)

i. That none of the Respondents is legally capable of violating this Honourable Court’s Orders, in terms of the Orders issued on 17th February 2012 and 17th December 2014.

31. The main contention in the contempt Application by the Petitioners is that the Respondents are indeed capable of violating this Court’s orders. This ground is of course contested, and in my view, can only be ascertained by this Court on consideration of the merits of the Application and evidence provided by both parties to support their positions. It therefore does not fall within the definition of a Preliminary Objection and as a consequence, I will not proceed to determine it any further.

ii. That the facts outlined in the entire Application, and the supporting documents annexed thereto do not in any way point to any form of disobedience or non-compliance with the Orders of this Court referred to e.g. by detailing specific acts of disobedience or specific acts amounting to contempt.

32. This ground expressly refers to documents provided by the Petitioners in support of their claims. It therefore refers to evidence and moreover, takes a position that differs from that of the Petitioners with regard to the said evidence. In mentioning the lack of specific acts of contempt, it raises a substantive issue of the matter. In order to determine the opposed positions and the substantive issue, the Court has to weigh the evidence that shall be presented before it (including the documents specified in this ground). I find therefore, that this ground does not fall within the definition of a Preliminary Objection and this Court will not proceed to determine it any further.

iii. The Application bears no evidence of personal service of the order or an attendant penal notice.

33. This ground also mentions evidence concerning the Order. The Petitioners, in relation to this ground, argue knowledge of the order by the Respondents and this fact is therefore contested. I resolve that on the basis that this ground refers to opposing evidence and touches on the merits of the Application by mentioning the state of the Order which constitutes the heart of the Application, the Court would have to probe the evidence before it, prior to making a sound determination of the issue. Moreover, if allowed, this ground even if it led to the Application being disposed of may arise later as the Petitioners can argue the subject thereof in their favour based on legally accepted exceptions. Consequently, I find that this ground does not fall within the definition of a Preliminary Objection and this Court will not proceed to determine it any further.

iv. That the Application is frivolous, misconceived, an abuse of this Court’s process and a deliberate attempt by the Petitioners to further delay the hearing of the main Petition.

34. This ground comprises assertions that are disputed by the Applicants in the contempt Application and are sweeping in nature. This ground can only be suitably determined when the reasons upon

which it is based are ascertained and examined by this Court. In doing so, the Court would have to exercise its discretion in doing so. Thus, I find that this ground does not fall within the definition of a Preliminary Objection and this Court will not proceed to determine it any further.

v. **That the matter was already dealt with in Petition 258 of 2011.**

35. This issue is one akin to a plea of *res judicata* but although a pure point of law, it falls in the face of the fact that in **Petition No. 258 of 2011**, specific actions of the Respondents were the basis of the contempt Application therein. Although the Court dismissed that Application, the present Application has to be determined on its own merits and context, and I see no reason to go beyond that finding. In the event, although not specifically argued, *res judicata* cannot be properly invoked in the present Petition.

vi. **For a want of conformity with the law and practice of contempt of Court as provided for in the Judicature Act and as practiced by the rules of Court in England as leave was not sought and notice was not given to the equivalent of the Crown.**

36. It is not contested that leave was not sought nor notice issued by the Petitioner before filing the contempt Application. In any case, if leave had been sought or notice given, the Court records would reflect the same. On this basis and on the basis that the foundation of leave relied upon in this ground is the Judicature Act and the England Civil Procedure rules, this ground qualifies as a matter of law which if determined in the positive may dispense with the contempt Application. I find therefore, that this ground falls within the definition of a Preliminary Objection and I will thus proceed to determine it further.

37. In that context, **Section 5 (1) of The Judicature Act, Cap 8** of the Laws of Kenya, which empowers the High Court to punish acts of contempt of Court provides thus:

“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 subordinate courts.”

38. In the matter before me, the Respondents and Interested Parties that gave Notices for Preliminary Objection contend that the contempt Application by the Petitioners is improperly before this Court and should consequently be dismissed.

39. On the need to adhere to procedure prior to the filing of a contempt application, which may include seeking leave and issuing requisite notice, Odunga J in **John Mugo Gachuki vs New Nyamakima Co. Ltd [2012] eKLR** held thus:

“...as contempt of Court proceedings connote an element of criminality in the sense that they allege an affront to the rule of law.... I, accordingly find that these proceedings were not instituted in strict compliance with the law and are therefore incompetent. That would have been sufficient to dispose of this matter.”

40. Excluding instances therefore where the Court will exercise its discretion and permit Applications that are appropriate save for impropriety only on account of technicalities, I agree with and adopt Learned Judge Odunga's sentiments on the importance of contempt Applications conforming to required procedure, since they are of a serious nature and may yield grievous consequences on the part of those accused of flouting the Court's Orders.

41. Further interrogation of the aforementioned provision of the **Judicature Act**, which makes reference to the powers of the High Court Justice in England to punish contempt of Court, reveals the procedure its constituent contempt applications must adhere to. In this regard, the above provision is to be read with **Part 81** and specifically **Section 81.4** of the **Civil Procedure Rules of**

England, 2012 which provides that in contempt proceedings for breach of orders, an application is to be made within the proceedings in which the impugned order was made, setting out the grounds on which the committal is requested and supported by an affidavit containing the evidence relied upon. I note in that regard that there is no provision requiring leave to be sought nor notice to be issued to any person.

42. In a more indicative manner, the Court of Appeal, in the case of **Christine Wangari Gachege vs Elizabeth Wanjiru Evans & 11 others [2014] eKLR** held that leave or “permission” is not required where committal proceedings relate to a breach of a judgement, Order of the Court or undertaking.
43. Appreciably, in the case of **Kenya Country Bus Owners’ Association (Through Paul G. Muthumbi – Chairman, Samuel Njuguna – Secretary, Joseph Kimiri – Treasurer) & 8 others vs Cabinet Secretary For Transport & Infrastructure & 5 others [2014] eKLR** Odunga J found the following concerning these provisions:

“..a reading of Section 5 of the Judicature Act together with Part 81 of the Civil Procedure Rules of England makes it clear that Section 81.4 applies to contempt of court proceedings both in the High Court and the Court of Appeal.”

44. The import of his decision was that leave was not therefore required prior to the filing of a contempt Application. Taking all the principles enunciated above therefore and applying them to the present Application, I find that there is indeed no requirement to seek leave as the present Application seeks orders to punish named persons for the disobedience of an Order issued by this Court in these proceedings. The Application is therefore properly before this Court and this ground of objection is thus discounted on this basis.
45. I conclude by noting that a refusal to allow the Preliminary Objection would not prejudice any of the parties as all parties’ positions will be presented and considered in determination of the pending contempt Application and in accordance with the precepts of fair hearing.

Disposition

46. For the above reasons, I find no merit in 3rd Interested Party’s and the 1st, 2nd, 4th, 6th, 7th and 8th Respondents’ Notices of Preliminary Objection filed on 14th September 2015 **and** 13th October 2015 **respectively**.
47. The Notices of Preliminary Objection filed on 14th September 2015 **and** 13th October 2015 are therefore hereby overruled and Parties are ordered to hearing for the contempt Application dated 8th September 2015.
48. Let each party bear its own costs.
49. Orders accordingly

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 15TH DAY OF APRIL, 2016

ISAAC LENAOLA

JUDGE

In the presence of:

Muriuki – Court clerk

Miss Mithira holding brief for Mr. Wandake for Petitioner

Mr. Mwara holding brief for Mr. Kihanga for 3rd Interested Party

Mr. Moimbo for 1st, 2nd, 6th, 7th and 8th Respondents

Mr. Opondo holding brief for Miss Shamalla for 3rd Respondent

Order

Ruling duly read.

ISAAC LENAOLA

JUDGE

Order

Directions on 8/7/2016.

ISAAC LENAOLA

JUDGE