



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

JUDICIAL REVIEW NO. 16 OF 2018

**IN THE MATTER OF APPROVAL FOR BUILDING TEMPORARY STRUCTURE
AND ACCEPTANCE OF LAND RENT IN MERU MUNICIPALITY BLOCK II/287**

AND

IN THE MATTER OF AN APPLICATION FOR AN ORDER OF MANDAMUS BY WAY OF JUDICIAL REVIEW

BETWEEN

REPUBLIC.....APPLICANT

AND

THE COUNTY GOVERNMENT OF MERU.....1ST RESPONDENT

THE PHYSICAL PLANNER MERU COUNTY.....2ND RESPONDENT

AND

THERESA STEPHEN KIUNGA As the legal representative of the estate of STEPHEN

MICHUKI M'KIUNGA – DECEASED.....EXPARTE APPLICANT

RULING

1. Before the court is the application dated 11.2.2021 under **Article 159 of the Constitution** , **Sections 1 1A, 1B, 3 & 3A of the Civil Procedure Act, Section 29 of Environment and Land Court Act** seeking for orders:-

- 1) **The court enjoins Elizabeth Mburu, John Ntoiti and Jeremy Lenya as interested parties hereinafter the 1st, 2nd and 3rd interested parties.**
- 2) **The court punishes the interested parties for contempt of court orders issued vide judgement dated 20.5.2020 and the decree thereto.**

- 3) **The court do allow the exparte applicant to develop, build, excavate, deposit building materials, fence, occupy, use and enjoy in anyway by putting up buildings on the suit land notwithstanding the lack of responses, approval's, consent and authority of the respondents herein.**
- 4) **Orders issue restraining the respondents from interfering with the applicant's occupation, possession, development, construction, user and enjoyment of the suit land.**
- 5) **That all and any other body, person or authority or officer whose authority, consent and or approval may be requested for purposes of developing Parcel No. Meru Municipality Block II.287 be allowed and or authorized to dispense with the authority, consent and or approval of the respondents.**
- 6) **OCS Meru police station be allowed to ensure compliance.**

2. The application is based on the supporting affidavit sworn by Theresa Stephen Kiunga on 11.2.2021.
3. The grounds are:- the court delivered its judgment on 20.5.2020 and the respondents were given 6 months to comply; there has been no compliance; the respondents are adamant; it has brought the court to ridicule over its authority and dignity; there is need to punish for contempt in the interest of justice.
4. In the supporting affidavit the applicant aver the building plans were submitted by her late husband on September 2017 but were declined leading to the filling of the Judicial Review; the judgment has not been complied with; orders were served as per the stamped forwarding letter; upon service parties had a meeting where the respondents insisted they could not comply unless the suit was withdrawn; she cannot undertake any developments thereon; it amounts to dereliction of duty on the part of the respondents and hence the need to punish for contempt of court.
5. The respondents have opposed the notice of motion through grounds of opposition and replying affidavits sworn by the 1st interested party on 21.4.2021 and 3rd interested party Jeremy Lenya on 10.11.2021.
6. The application is also supported by a supplementary affidavit and further affidavit sworn by Theresa Stephen Kiunga on 10.5.2021 and 16.11.2021.
7. In answer to the application, the respondents state the court is **functus officio** and cannot determine prayers 2, 4, 5, 6, 7 and 8 of the application which raises a new cause of action especially prayer 4 – 8 which do not fall within the purview of judicial review; the application lacks merits; is frivolous, vexatious, incompetent and an abuse of the court process.
8. As regards the 1st interested party, she depones she has authority of 2nd and 3rd interested parties to answer on their behalf. She states the judgment was directed at the respondents to consider the request and or plans for the applicant to put up a temporary structure on the plot; to accept land rates as per relevant laws and procedures under the Physical Planning Act; not to interfere with her peaceful and quiet use of the plot and the compliance was to be done within 6 months.
9. According to her, the 1st respondent was to consider the request and plans presented and this did not necessary mean to approve the same as alleged by the applicant.
10. In her view, to consider as used by the court meant either to approve or reject hence the respondents duly considered the same and informed the applicant over the decision and reasons for the same. She avers the applicant approached the 1st respondent on 4.8.2020 alongside her advocates in the presence of 3rd interested party and she was informed her building plans could not be approved due to the fact that the main trunk sewer line serving the Meru Town commercial centre traverses the subject plot and secondly since the building plans did not meet the terms of the Integrated Strategic Urban Development Plan for Meru Municipality (ISUDP) 2011-2013.

11. Additionally the 1st interested party avers the applicant was informed her plot falls within the commercial zone of the Municipality otherwise known as urban core whereas as per ISUDP, only storied buildings with a minimum of 8 floors high and plot coverage of 75 % were allowed yet her plans were temporary structures which are not allowed in the commercial zone and owing to the main trunk sewer line, 75% plot coverage could not be achieved. She avers the applicant failed to appreciate their concern and insisted her plans had to be approved as ordered by the court.

12. In the alternative 1st interested party stated the applicant was implored upon to amend her plans and make the building plans to be compliant but in vain.

13. Again 1st interested party stated applicant re-submitted her building plans within the compliance period but could not be approved for non-compliance with the existing physical planning rules and regulations otherwise the court did not direct the respondents to bend the law in complying with the decree.

14. The 1st interested party further stated that planning was critical for the property development of any town and to grant the orders sought in the application it would be tantamount to overthrowing the existing laws on physical planning.

15. She stated that whereas the respondents were ready to approve the building plans, the same must be compliant with the law and hence denied any officer had interfered with the applicant's rights as alleged since they were law abiding citizens including the court orders and that it was not true they had told the applicant they would not obey the judgment.

16. On the part of 3rd interested party, he denied disobeying the court order, explained the four key requirements from him by the judgment dated 20.5.2020, stated on 4.8.2020 building plans were presented to his office by the applicant which were rejected for non-compliance on account of ISUDP, public document in line of the **Physical Planning and Land Use Planning Act**; he gave a brief on how the process of approval is initiated that upon presenting the building plans, an invoice is processed to pay the prescribed fee and thereafter there will be assessment by physical planners.

17. As regards the applicant, 3rd interested party averred the applicant was told to go and remedy the defects but she refused leading to a meeting with other players where the applicant attended and was told her documents fell short of the basic test requirements hence was told the need to make amendments. According to 3rd interested party, the applicant left satisfied with the reasons and explanation given hoping to revert back with revised compliant documents for approval. He expressed the County's willingness to approve the plans once the applicant lodged the revised building plans.

18. Further 3rd interested party he stated a written communication would only have been issued after the building plans had been assessed, prescribed fees paid and received in the physical planning department.

19. He reiterated that the prayers sought flew against the law on physical planning and the proper development of the town. More so due to the issue of a main trunk sewer line traversing the plot and that if the applicant's developments are allowed it would affect the sewer line and bring the operations in the entire Meru town to a halt to the immense detriment of the resident's.

20. In the supplementary affidavit, the applicant states the issue of violation of 1st respondent physical planning rules and regulations is an afterthought; that it is her right to get written communication from the respondents who have declined to accept rent and rate payments despite her willingness to clear the same; there is no appeal or review against the judgment; she has done all what is necessary but the respondents have been adamant.

21. With court's directions, the parties attended court and filed a partial consent dated 16.12.2021 on the following terms:-

i. The exparte applicant's building plans have been approved as per the notification thereof dated 15.12.2021 and the conditions stated thereon.

ii. The exparte applicant to pay rates and rents arrears amounting to Kshs. 351,000/= on or before 31.1.2022.

iii. The issue of legality, unlawfulness, irrationality, voidness, nullity or otherwise in respect of accrued interests of Kshs. 411,840/= and or penalties be determined by the court. Parties be at liberty to file submissions.

iv. Costs of the application be awarded to the exparte applicant.

22. In view of the issues left pending in the consent, the court directed the interested parties to give oral testimony.
23. On his part, 3rd interested party testified he had approved the building plans for temporary structures hence discharged his mandate. He adopted his earlier affidavit as his response to the application.
24. In cross examination by Mr. Ngunjiru advocate for the applicant, the 3rd interested party admitted the approval of building plans fell on his docket but averred claimed he was not aware the court had previously delivered a judgment regarding the plot ownership in favour of the applicant. He stated the directorate of revenue fell under the CEC finance.
25. The 2nd interested party testified he was in-charge of collecting 1st respondent's revenue and admitted he had issued the applicants with a demand note for **Kshs. 969 930/=** for the period 2013-2021 based on Finance **Act** for the 1st respondent. In his view it was only the County Assembly upon request by the office of the Governor that could approve a wave of interest and penalties. He accepted he had sworn an affidavit on 10.11.2021.
26. In cross-examination, he denied he was aware of the judgment or any letter written to him on 9.3.2018. As regards the disputed amounts he stated it was the finance system which he used to calculate the rates and rents. He said he created the applicant's account on 5.11.2021 upon seeing the documents of ownership using the valuation roll of 2009 as a guide. According to him, the calculation was within the law though the property was not in the valuation roll as at 2009 since it was not recognized by then.
27. In re-examination, 2nd respondent stated 2009 was the correct baseline as per the Finance Guidelines.
28. The 1st interested party adopted her replying affidavit and stated the meeting convened was to see whether they could reach a compromise. According to her as a custodian of public good, her concern was real.
29. In re-examination she admitted she had been aware of the dispute since inception and its outcome. Further she admitted there was a time a request was made to the applicant to withdraw the matter so that the 1st respondent could explore an option of compulsory acquisition of her plot.
30. In re-examination, the witness stated they had not reached a point of a written communication over the approvals and or negotiations over the withdrawal of the claim by the applicant so as to generate the invoice.
31. The power to punish for contempt is provided by **Section 5 of the Judicature Act, Section 29 of the Environment and Land Court Act, Section 36 (1) of the High Court Organization an administrative Act 2015 and Order 40 Rule 3 (1) of the Civil Procedure Rules.**
32. Under **Section 63 (e) of the Civil Procedure Act, Section 10 (3) of the Magistrate's Act – 2016** courts have determined the ingredients to be proved and the standard to be met before punishing a contemnor for disobeying a court order.
33. In *Cecil Miller –vs- Jackson Njeru & Another [2017] eKLR*, the court outlined the ingredients as:-
- a) The terms of the order or judgment must be clear and unambiguous and were binding on the defendants.**
 - b) The defendant has knowledge or proper notice of the terms of the order.**
 - c) The defendant has acted in breach of the terms of the order.**

d) **The conduct was deliberate.**

See also *North Tetu Farmers Co. Ltd –vs- Joseph Nderitu Wanjohi (2016) eKLR.*

34. In *Akber Abdullah Kassam Esmail –vs- Equip Agencies Ltd & 4 others [2014] eKLR*, the court held the power to punish for contempt is never about protecting judge's feelings, ego or dignity but to prevent undue interference with the administration of justice.
35. In *Econet Wireless Kenya Limited –vs- Minister for Information & Communication of Kenya & another [2005] eKLR*, the court held it is essential for the maintenance of the law and order that the authority and dignity of courts to be upheld at all times, and that the court will not condone deliberate disobedience of its orders.
36. In *Samuel M. N. Mweru & others –vs- National Land Commission & 2 others, High Court, Nairobi, JR 443 of 2017 [2020] eKLR* the court held a court without contempt power is not a court, since it is so innate in the concept of jurisdictional authority that a court that could not secure compliance with its own judgments and orders is a contradiction in terms an oxymoron.
37. **Article 159 (1) of the Constitution** provides that the judicial authority is derived from the people and vests in, and shall be exercised by the courts established under the Constitution.
38. **Article 10 (1)** provides for national principles and values bidding on all state organs, whenever they apply, or interpret any law or makes or implement any public policy decision. These values and principles include the rule of law.
39. Looking at the ingredients and the burden of proof for one to be guilty of contempt of court, in *Shimmers Plaza –vs- National Bank of Kenya Limited [2015] eKLR*, the court held there must be satisfaction beyond any shadow of doubt that the person alleged to be in contempt committed the acts complained of in full knowledge or notice of the existence of the order of court forbidding it. The threshold is quite high as it involves possible deprivation of a person's liberty. Therefore the applicant has to prove all the facts relied on by way of evidence beyond reasonable doubt.
40. In the instant case there is no doubt the court issued an order and gave the respondents six months to comply.
41. In *Basil Criticos –vs- Attorney General & 13 others [2013] eKLR*, the court held that the knowledge of an order supercede personal service where a party clearly acts and shows that he had knowledge of the order. In this case, all the respondents have confirmed they knew about the judgment and the orders given by the court.
42. In *Oilfield Movers Limited –vs- Zahara Oil And Gas Limited [2020] eKLR*, the court held a party who has genuine difficulties in implementing a court order is not to be punished, and that the penal consequence of contempt proceedings are to be reserved for truly recalcitrant contemnors.
43. A party faced with contempt of court must place succinct evidence that the disobedience is not intentional but because of reasons beyond their control.
44. There is no doubt all the three interested parties hold senior positions with the 1st respondent. They have acknowledged knowledge of the specific orders granted by the court both in the replying affidavits and in their evidence in court. They have also admitted that they knew the net effect of the judgment and the orders granted by the court. This means the orders were clear and unambiguous. The interested parties admit what the court directed to be done was within their mandate of exercising statutory and responsibilities bestowed upon them by the 1st respondent.
45. The next step is if the interested parties complied with the orders and if not so, whether it was deliberate, unlawful and in flagrant disregard of the judgment. See *James Wahome Ndegwa –vs- Zachary Mwangi Njeru & 8 Others [2021] eKLR.*

46. The court record will show the applicant obtained a decree in 8.6.2020 subsequent to which she came back under judicial review to enforce the decree since the respondents had refused to honour the judgment. Thereafter an order was made and the respondents were given 6 months to comply.
47. If the respondent and in particular the interested parties had any difficulties in complying with the orders, they did not come back to court through review or clarifications and or appeal against the same if at all it was against the **Physical Planning and Land Use Act** or any other policy of the 1st respondent. Instead the respondents through the interested parties waited until the six months were over and beyond till the instant application was filed.
48. Looking at the conduct of the three interested parties, it is apparent they have been slow, unwilling and disinterested in complying with the court orders herein as expected of them under the **Fair Administrative Actions Act 2015**.
49. In *Republic –vs- County Secretary, Nairobi City County & another; Ex Parte Applicant: Mohamed Tariq Khan [2021] eKLR* the court held the act or omission constituting disobedience of an order may be intentional, reckless, careless, or quite accidental and or totally unavoidable. The court went on to hold that the mental element of liability for contempt arising out of disobedience is simply that the disobeying party either intended to disobey or made no reasonable attempt to comply with the order.
50. In the present case, the interested parties only attempted to comply with the orders when it was too late and or too little during the pendency of this application. I therefore find they were recalcitrant, adamant and made it difficult or impossible for the orders of the court to be obeyed. The excuses being given are not only spurious but were never invoked as a defence when the judicial review application was made over a one and half years ago. Even if the law and policy being quoted exists, the same was not passed recently. The court gave interested parties humble opportunity to purge the alleged contempt. Instead of taking the matter seriously, they have been reluctant to an extent of filing a partial consent dated 16.12.2021 which clearly indicates the loss they have caused and or occasioned both to their employer the 1st respondent and the applicant. If the interested parties had exercised their statutory duties and obligations on time and more so honoured the judgment, they would have avoided all the above. See *Henry Musemate Murwa –vs- Francis Owino, Principal Secretary, Ministry of Public Service, Youth & Gender Affairs & another [2021] eKLR*.
51. Instead the respondent want this court to determine the legality irrationality and unlawfulness of the interests and penalties payable by the applicant caused solely by them their acts of omission and commission in the light of clear orders fly against **Articles 10 and 232 of the Constitution**.
52. In the premises, I find the application merited in terms of prayer No. 3. The rest of the prayers are unmerited.
53. The three are directed to make mitigation before being sentenced for contempt of court.
- Orders accordingly.
- DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT MERU THIS 26TH DAY OF JANUARY, 2022**
- In presence of:**
Mr. Njindo for applicant

Kariuki for defendant/respondent

Court Assistant – Kananu

Parties present:

- 1) Mr. John Ntoiti

2) Jeremiah Lenya

3) Elizabeth Mburu

HON. C.K. NZILI

ELC JUDGE