



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**MISC. CIVIL APPLICATION NO. 450 OF 2009**

**IN THE MATTER OF: AN APPLICATION FOR JUDICIAL REVIEW ORDERS UNDER  
SECTIONS 8 & 9 OF THE LAW REFORM ACT (CAP 26 LAWS OF KENYA) & ORDER LIII  
OF THE CIVIL PROCEDURE RULES**

**AND**

**IN THE MATTER OF: THE LAW REFORM ACT (CAP 26 LAWS OF KENYA)**

**AND**

**IN THE MATTER OF: THE LAND TITLES ACT (CAP 282, LAWS OF  
KENYA)**

**AND**

**IN THE MATTER OF: THE REGISTERED LAND ACT (CAP 300, LAWS OF KENYA)**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**VERSUS**

- 1. THE ATTORNEY-GENERAL**
- 2. THE DIRECTOR OF LAND ADJUDICATION & SETTLEMENT**
- 3. THE MINISTER FOR LANDS AND SETTLEMENT.....RESPONDENTS**

**AND**

- 1. CHARO MASHA**
- 2. KENGA RANDU.....INTERESTED PARTIES**
- SALIM BAKARI.....EX PARTE APPLICANT**

## RULING

### Introduction – Applicant’s Case

1. On 22<sup>nd</sup> October, 2010, the court issued orders in favour of the ex parte Applicant to the effect that –
  - (1) An order of prohibition prohibiting the Respondents from issuing certificates of ownership and/or title documents in respect of Vipingo Settlement Scheme plots No. 169 and 176 to the First and Second Interested Party and/or anyone else except as stated in Order No. (2).
  - (2) An order of mandamus compelling the Second Respondent to forthwith issue ex parte Applicant with a certificate of ownership of the documents for VIPINGO SETTLEMENT SCHEME PLOTS NO. 169 AND 176 in accordance with the Judgment of the Recorder of Titles in Kilifi Land registration Court dated 20<sup>th</sup> June, 1972.
2. The said orders were duly extracted and served upon the Attorney-General on 18<sup>th</sup> November, 2010.
3. Despite the service of the said orders, no certificate of ownership or title document has been issued in the ex parte Applicant’s name in terms of the served order. The order has not been complied with. The Respondents are, and have been, aware of the orders and have in fact exchanged correspondence about them. In addition, despite many reminders through letters to the Attorney-General as the principal legal representative of the Respondents, the Respondents have to date not complied with the orders of court.

### The Application

4. Faced with the above non-compliance with the court orders, the ex parte Applicant filed on 12<sup>th</sup> July, 2015 the Notice of Motion dated 29<sup>th</sup> June, 2015 and sought orders –
  - (a) that the Director of Land Adjudication and Settlement and the Cabinet Secretary for Land, Housing and Urban Development be punished for contempt of court by imprisonment for six (6) months;
  - (b) that the court issue such orders as necessary to ensure that the orders of court dated 22<sup>nd</sup> October, 2010 are effected;
  - (c) that the costs of the application be granted to the ex parte Applicant.

### The Respondents’ Case

5. The Application was opposed by Miss Lutta, Senior State Counsel, who relied on the provisions of the Judicature Act, Article 50 of the Constitution, and the provisions of the Fair Administrative Action Act 2015, that under Section 5(2) of the Judicature Act, (Cap 8, Laws of Kenya), contempt proceedings are quasi-criminal in nature, and require service individually for purposes of a fair hearing under Article 50 of the Constitution. Counsel also relied upon Section 107 of the Evidence Act, (Cap 80, Laws of Kenya) that whoever alleges must prove. The burden of proof is upon the Applicant, that the Respondents had knowledge of the orders and disobedience thereof. The standard of proof for contempt is higher than the balance of probability. **Mitta vs. Baharani Farm Limited [1985]eKLR**. The service was made upon the Ministry of Lands – not an individual, and it is therefore unknown who is to be held liable for the disobedience of the order. The current Director was not in office at the time of the alleged disobedience. The Respondents would, counsel submitted, abide by whatever orders, the court made, other than an order for contempt. Counsel submitted further that no orders could be made in relation to Plot No. 169 which was already in possession of other persons who are not parties to the Application therein. Counsel consequently urged that the application be dismissed with costs.

6. The Replying Affidavit of Esther Ogega was in the same vein. It does not deny the facts as set out in the Introduction to this Ruling. What it does however, in effect say, is that the Applicant has not done anything since he was adjudicated the beneficial owner of Plots Nos. 169 and 176 in 1972, and have them registered in his name.

7. The Respondents also claim that once the land had been adjudicated in the Applicant's favour, the Chief Land Registrar, to whom all particulars of persons in whose favour the adjudication was made, were forwarded for issue of titles in their favour, is responsible for issue of titles not the Director of Land Adjudication and Settlement. Consequently, transactions on that basis had been conducted and effected in respect of Plot No. 169 since 1991. No effort had been made by the Applicant to check on the status of the plots. Likewise no effort has been made by the Applicant since the Judgment of the court herein on 22<sup>nd</sup> October, 2010.

### **Analysis of Submissions**

8. I have considered the submissions by counsel for the respective parties. The issue is whether the Respondents committed any act of contempt of the court's order made on 22<sup>nd</sup> October, 2010. Without going into the technicalities of whether the Respondents were properly served, suffice it to say that if the Respondents or the proper officers of the Respondent were not served, there would be no **Replying Affidavit** by the Director of Land Adjudication and Settlement citing the correspondence attached thereto. It is no answer to a charge of contempt of a court order that the particular officer was not in the office at the time the alleged contempt was committed. An Applicant need merely show that at the time the new officer took office, the issue the subject of the contempt was still outstanding. In an organization with a regular change of officers, the contempt attaches to the office, and all an applicant seeking contempt orders against such officer, needs to establish is that the new officer had knowledge of the matter complained about and took no remedial action on the complaint.

9. The lack of citation in the Affidavit of Service that the Director was or was not served is not fatal to the application for contempt. The courts must take judicial issue of the fact that access to the inner **sanctums** where these officers operate from is near impossible for such lesser mortals as Process Servers. So long as the orders are not obeyed, the act of disobedience subsists until it is expunged or expiated. I must therefore reject any argument that the Director was either not served personally, or that the Director was not the occupant of the office at the time the alleged acts of contempt were committed. Reason and defence why the application for contempt should fail must be found elsewhere, and not failure of service.

10. The Applicant herein was in 1972 adjudicated by the Kilifi Land Adjudication Committee as the beneficial owner of Plots Nos. 169 and 176 at Vipingo Settlement Scheme. He took no or little action to have the plots registered in his name. There was reason, the Interested Parties in this cause **Charo Masha** and **Kenga Randu**, had interest in the same plots. The Applicants got reprieve in orders of the court made on 22<sup>nd</sup> October, 2010, prohibiting the Respondents from issuing certificates of title to the Interested Parties or anyone else, and an order of mandamus directing the Respondent to issue titles to him. Thereafter the Applicant went to celebrate his victory.

11. That victory was in my view merely pyrrhic. The law as stated in Section 27 of the Land Adjudication Act, (Cap 284, Laws of Kenya) requires the Director of Land Adjudication and Settlement to forward the Register of Adjudication to the Chief Land Registrar for issue of title. So in effect, the onus was upon the Applicant to follow up the Adjudication Register at the Office of the Chief Land Registrar. Of course the Director of Land Adjudication and Settlement still has a question to answer, did he forward the Register of Adjudication to the Chief Land Registrar? And did he inform the Applicant?

12. There was no direct answer to these questions from the Respondents. However, from the Replying Affidavit of the Director of Land Adjudication and Settlement, the Register of Adjudication was most probably forwarded to the Chief Land Registrar, and hence to the Land Registrar Kilifi. That is how the charge dated 27<sup>th</sup> May, 1991 to the Settlement Fund Trustees was discharged on 30<sup>th</sup> September, 2014, and title to Plot No. 169 issued to Charo Masha on 30<sup>th</sup> September, 2014 to his personal representatives

on 10<sup>th</sup> October, 2014. In other words, Charo Masha and personal representatives of **Charo Masha**, then an Interested Party (now deceased), stole a march on the Applicant, and got Plot No. 169 registered in their names by transmission following orders in Kilifi High Court Succession Cause No. 135 of 2012. That order is not under challenge in these proceedings, and in any event this court has no jurisdiction to review or set aside that order. The Respondents cannot therefore be found or held in contempt in respect of Plot No. 169. The conclusion would not however be different in respect of Plot No. 176.

13. That Charo Masha or his personal representatives stole a march on the Applicant cannot be placed at the feet of the Director of Land Adjudication and Settlement. From 1972 when the Applicant was adjudicated the beneficial owner of Plots No. 169 and 176 to June, 2015 when the Application was filed is over forty three (43) years, and five (5) years since the orders of 22<sup>nd</sup> October, 2010 were issued which period of time the court considers, inordinate and inexcusable delay. There is merit in the expression that **“eternal vigilance is the price of liberty”**. The Applicant has not been diligent and has failed to follow matters for his own benefit. The Respondent could not process title for him. I am therefore unable to hold the view that the Respondents are or have been in contempt of court orders of 22<sup>nd</sup> October, 2010.

14. However, I direct the Applicant to process title to Plot No. 176 as soon as he can, so that the fruits of the Judgment granted to him in the Judgment of 22<sup>nd</sup> October, 2010 are realized.

15. Otherwise and in the circumstances, I find no merit in the application dated 29<sup>th</sup> June, 2015, and dismiss the same with a direction that each party bears its own costs.

16. There shall be orders accordingly.

**Dated, Signed and Delivered in Mombasa this 30<sup>th</sup> day of June, 2016.**

**M. J. ANYARA EMUKULE, MBS**

**JUDGE**

In the presence of:

Mr. Omondi for Applicant

Miss Lutta for Respondent

Mr. Silas Kaunda Court Assistant