



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MACHAKOS**

**ELC. PETITION NO. 137 OF 2018**

**IN THE MATTER OF ARTICLES 19, 20, 21, 22, 23, 40 AND 64 OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS**

**UNDER ARTICLES 20(2), 21(1), 27, 40(1) AND 40(3) OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF THE LAND ACT, 2012 AND THE LAND REGISTRATION ACT, 2012**

**AND**

**IN THE MATTER OF COMPULSORY ACQUISITION OF LAND REFERENCE NUMBER 22423,**

**MACHAKOS WITHOUT DUE PROCESS AND IN CONTRAVENTION OF THE**

**CONSTITUTION OF KENYA, 2010**

**BETWEEN**

**DAVID GITAU THAIRU.....PETITIONER**

**AND**

**THE COUNTY GOVERNMENT OF MACHAKOS.....1<sup>ST</sup> RESPONDENT**

**THE GOVERNOR, MACHAKOS COUNTY GOVERNMENT.....2<sup>ND</sup> RESPONDENT**

**THE HON. ATTORNEY GENERAL.....3<sup>RD</sup> RESPONDENT**

**RULING**

What is before Court for determination are two Notice of Motion applications dated the 2<sup>nd</sup> and 9<sup>th</sup> September, 2021 respectively. In the application dated the 2<sup>nd</sup> September, 2021, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents seeks the following orders:

**1. Spent**

**2. The warrants of arrest issued by the acting Deputy Registrar of this Honourable Court on 1<sup>st</sup> September, 2021 against the 2<sup>nd</sup> Respondent/Applicant be set aside and their execution stayed pending the inter partes hearing of this application.**

**3. The warrants of arrest issued by the Court on 1<sup>st</sup> September, 2021 against the 2<sup>nd</sup> Respondent/Applicant be set aside and their execution stayed pending the hearing and determination of this application.**

**4. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents/Applicants be granted leave to respond to the Notice to Show Cause issued by the Court on 28<sup>th</sup> July, and**

**5. The costs of this application be borne by the Petitioner/Respondent.**

The application was premised on the grounds on the face of it and the supporting affidavit of DR. BENJAMIN MUNYWOKI MUSAU where he confirms that warrants of arrest were issued against the 2<sup>nd</sup> Respondent on 1<sup>st</sup> September, 2021 as he failed to attend court, yet he was represented by Counsel. He contends that the Notice to Show Cause (NTSC) was only served upon the 2<sup>nd</sup> Respondent's advocates on 20<sup>th</sup> August, 2021 and they required time to respond. He insists the Hon. Magistrate did not have jurisdiction to issue the Warrants of Arrest against the 2<sup>nd</sup> Respondent as the acting Deputy Registrar, Environment and Land Court as this is a Petition which had been heard and determined by a Judge. Further, the 2<sup>nd</sup> Respondent was condemned unheard and infringes on his rights. He explains that the 2<sup>nd</sup> Respondent is neither an accounting officer nor pay point of the 1<sup>st</sup> Respondent and cannot personally make any orders in respect to the payment of the outstanding amounts in his personal capacity. Further, the Judgement and Decree were not personally directed to the 2<sup>nd</sup> Respondent and the Respondents have a reasonable cause as to why the judgement has not been complied with. He reiterates that the Petitioner has not made any efforts to follow up with the relevant departments of the 1<sup>st</sup> Respondent for compliance with the Judgement as advised by the Court in the ruling of the Contempt application.

The application is opposed by the Petitioner DAVID GITAU THAIRU where he deposes that the supporting affidavit is defective as it is sworn by an advocate yet there are contentious issues. He insists the application is frivolous, vexatious, an abuse of the court process and full of misrepresentation of material facts. Further, that the interim orders were fraudulently obtained. He avers that the 2<sup>nd</sup> Respondent was duly served with the Hearing Notice and Notice to Show Cause at the 1<sup>st</sup> Respondent's offices. He explains that the Deputy Registrar was discharging his administrative duties as mandated by law and hence had power to issue a Warrant of Arrest. He states that judgement was also passed against the 2<sup>nd</sup> Respondent and it is appropriate to commence execution proceedings against him. He confirms that he does not have any claim against the 3<sup>rd</sup> Respondent since he had abandoned proceedings against it prior to delivery of judgement.

In the application dated the 9<sup>th</sup> September, 2021, the Petitioner seeks the following orders:

**1. Spent**

**2. That the Honourable Court be pleased to set aside/discharge/vacate orders issued on 3<sup>rd</sup> September, 2021.**

**3. That the Warrant of Arrest issued on 1<sup>st</sup> September, 2021 by Hon. C. N. Ondieki to remain in force and be enforced against the 2<sup>nd</sup> Respondent as directed.**

**4. That upon inter parte hearing of this application, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' application dated 2<sup>nd</sup> September, 2021 be struck out/or dismissed for abuse of court process.**

**5. That costs of this application be borne by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.**

The application is premised on the grounds on the face of it and the supporting affidavit of DAVID GITAU THAIRU where he avers that judgement was entered in his favour on 30<sup>th</sup> July, 2020 and despite several efforts, the Respondents have defied orders including directions by failing to comply with the court orders. He explains that he commenced execution of the Decree against the 2<sup>nd</sup> Respondent and was issued with a Notice to Show Cause on 28<sup>th</sup> July, 2021 which was served upon him. He claims despite service upon the 2<sup>nd</sup> Respondent, he failed to appear in court and it is only his advocate who appeared in court on 1<sup>st</sup> September, 2021 and failed to satisfy the court as to why the Notice to Show Cause (NTSC) should not be executed against him. Further, that subsequently the Court issued a Warrant of Arrest against the 2<sup>nd</sup> Respondent. He states that the 2<sup>nd</sup> Respondent's Advocates on record B. M. Musau pursuant to the Supporting affidavit and Certificate of Urgency application misrepresented to the Court by concealing material facts purposely to obtain interim orders he was seeking. Further, the Court issued interim orders lifting/suspending the Warrant of Arrest issued on 1<sup>st</sup> September, 2021 and these actions continue to frustrate him from enjoying the fruits of his judgement.

The 1<sup>st</sup> and 2<sup>nd</sup> Respondents opposed the application by filing a replying affidavit sworn by JAMES KATHILI the County Attorney where he deposes that they have largely complied with the Judgement including Decree issued by the Court by removing the soil dumped on the Petitioner's land as well as restoring the said land. He insists the 2<sup>nd</sup> Respondent is not the Accounting Officer of the 1<sup>st</sup> Respondent. He claims the Advocate swore the supporting affidavit upon instructions of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents. Further, there is absolutely no mistake or error in the affidavit to render it defective. He avers that there is no evidence to prove the Notice to Show Cause (NTSC) was served upon the 2<sup>nd</sup> Respondent. Further, that the Deputy Registrar in execution of his duties is specifically excluded from dealing and/or issuing orders under Order 22 Rule 28 of the Civil Procedure Rules. Further, the Petitioner has not made any efforts to get the damages paid. He contends that payment is a bureaucratic process and subject to funds from the National Treasury. He reiterates that they instructed a Counsel to hold their brief when the Notice to Show Cause (NTSC) proceeded before the Deputy Registrar. Further, the law requires the Notice to Show Cause (NTSC) to be served personally upon a party.

The two applications were canvassed by way of written submissions.

**Analysis and Determination**

Upon consideration of the two Notice of Motion applications dated the 2<sup>nd</sup> and 9<sup>th</sup> September, 2021 respectively including the respective Affidavits and rivaling submissions, the following are the issues for determination:

- **Whether the Deputy Registrar had jurisdiction to issue the warrant of arrest against the 2<sup>nd</sup> Respondent.**
- **Whether the Orders issued on 3<sup>rd</sup> September, 2021 should be varied and or set aside.**

I will deal with both issues jointly, however, before I do so, I will highlight an excerpt from the impugned Judgement dated 30<sup>th</sup> July, 2020 which is the issue in contention herein that culminated in the issuance of the NTSC and thereafter a Warrant of Arrest.

**‘54(b) An order do issue directing the 1<sup>st</sup> and 2<sup>nd</sup> Respondents by themselves, their servants or agents to remove all deposits of wastes, soil and other debris deposited by the said 1<sup>st</sup> and 2<sup>nd</sup> Respondents on the Petitioner’s Land Reference Number 23423, Machakos and to restore the land to the original state it was before the Respondents committed acts of waste and trespass thereon.**

**(e) The Petitioner to be paid by the 1<sup>st</sup> Respondent exemplary damages in the sum of Kenya Shillings five (5) Million.’**

It is the Petitioner’s contention that he has sought to enforce the Judgement in vain as the 1<sup>st</sup> and 2<sup>nd</sup> Respondents have frustrated his efforts. Further, he proceeded to extract a Notice to Show Cause (NTSC) against the 2<sup>nd</sup> Respondent who failed to personally attend court after which the Deputy Registrar issued a Warrant of Arrest. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents insist the 2<sup>nd</sup> Respondent was not personally served, is not the Accounting Officer for the 1<sup>st</sup> Respondent and that the Deputy Registrar did not have jurisdiction to issue Warrants of Arrest. First and foremost, it is not in dispute that the impugned judgement was appealed from. Further, it has not emerged whether the 2<sup>nd</sup> Respondent ever challenged being the Accounting Officer for the 1<sup>st</sup> Respondent during the hearing of this suit.

Order 49 Rule 5 of the Civil Procedure Rules provides that:

**‘Formal orders for attachment and sale of property and for the issue of notices to show cause on applications for arrest and imprisonment in execution of a decree of the High Court may be made by the registrar or, in a subordinate court, by an executive officer generally or specially thereunto empowered by the Chief Justice by writing under his hand, but in the event of any objection being taken to the proceedings thereunder, all further proceedings shall be before a judge.’**

While Order 49, Rule 7(1) (b) (x) of the Civil Procedure Rules stipulates that:

**‘(1) The Registrar may - (b) hear and determine an application made under the following Orders and rules (x) Order 22 other than under rules 28, and 75;’**

Order 22 Rule 28 of the Civil Procedure Rules provides that:

**‘(1) Where any party against whom a decree for the specific performance of a contract, or for an injunction, has been passed, has had an opportunity of obeying the decree, and has wilfully failed to obey it; the decree may be enforced by his detention in prison, or by the attachment of his property, or by both. (2) Where the party against whom a decree for specific performance or for an injunction has been passed is a corporation the decree may be enforced by the attachment of the property of the corporation. (3) Where any attachment under subrule (1) or (2) has remained in force for six months, if the judgment-debtor has not obeyed the decree and the decree-holder has applied to have the attached property sold, such property may be sold; and out of the proceeds the court may award to the decree-holder such compensation as it thinks fit, and shall pay the balance (if any) to the judgment-debtor on his application. (4) Where the judgment-debtor has obeyed the decree and paid all costs of executing the same which he is bound to pay, or where at the end of six months from the date of the attachment, no application to have the property sold has been made, or, if made, has been refused, the attachment shall cease. (5) Where a decree for the specific performance of a contract or for an injunction has not been obeyed, the court may, in lieu of or in addition to all or any of the processes aforesaid, direct that the act required to be done may be done so far as practicable by the decree holder, or some other person appointed by the court, at the cost of the judgment-debtor, and upon the act being done the expenses incurred may be ascertained in such manner as the court may direct and may be recovered as if they were included in the decree.’**

I note in this instance, the Deputy Registrar had issued a Notice to Show Cause against the 2<sup>nd</sup> Respondent in respect to payment of exemplary damages in line with enforcement of Court’s Decree. Further, the Deputy Registrar proceeded to issue a Warrant of Arrest. From a reading of the legal provisions I have cited above, especially Order 22 Rule 28 of the Civil Procedure Rules, It is clear that the Deputy Registrar did not have the jurisdiction to hear and determine an application for Notice to show cause (NTSC) where a warrant of arrest was issued. Further, as per the Constitution, the 2<sup>nd</sup> Respondent is not the Accounting Officer for the 1<sup>st</sup> Respondent and on perusal of the judgement, I note it is actually the 1<sup>st</sup> Respondent that was ordered to pay exemplary damages. Insofar as I concur with the Petitioner that the 2<sup>nd</sup> Respondent was indeed served, I find that the warrant issued for his arrest in respect to payment of exemplary damages was not proper. However, I note the 1<sup>st</sup> Respondent has not indicated why it has only partially enforced the Judgement/Decree but failed to pay the exemplary damages and costs to the Petitioner.

In the circumstances, I will proceed to set aside the said Warrants of Arrest and direct that the 1<sup>st</sup> Respondent’s Accounting Officer be served with a fresh Notice to show cause (NTSC) within 14 days from the date hereof, for failing to settle the decretal amount.

It is against the foregoing that I find the Application dated 2<sup>nd</sup> September, 2021 merited and will allow it. I however disallow the application dated 9<sup>th</sup> September, 2021.

On the issue of costs, I will award the same to the Petitioner for the two applications, as he is the inconvenienced party that is yet to be paid the decretal sum.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 19<sup>TH</sup> DAY OF JANUARY, 2022**

**CHRISTINE OCHIENG**

**JUDGE**