



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**JR MISC. APPLICATION NO. 576 OF 2005**

**IN THE MATTER OF APPLICATION BY KANGEMA JUAKALI ASSOCIATION AND OTHERS FOR AN ORDER OF MANDAMUS AND AN ORDER FOR PROHIBITION ALL DIRECTED TO THE CLERK (NOW ADMINISTRATOR-KANGEMA SUB-COUNTY, THE CHAIRMAN AND MEMBERS OF THE KANGEMA TOWN COUNCIL, TO SATISFY SECTION 29, 32 AND 33 OF THE PHYSICAL PLANNING ACT OF 1996 AND ALL RELEVANT LAWS AND PROVISIONS**

**REPUBLIC .....APPLICANTS**

**VERSUS**

**CLERK TO KANGEMA TOWN COUNCIL MR. MICHAEL NJOGU (NOW**

**ADMINISTRATOR KANGEMA SUB-COUNTY**

**MR. ZACHARIAH MWAURA NGATIA**

**KANGEMA TOWN COUNCIL.....RESPONDENTS**

**EX PARTE : KANGEMA JUA KALI ASSOCIATION**

**CYRUS GACHOKA MUNYIRI**

**JAMES MWANGI NJAU**

**RULING**

**Introduction**

1. By his ruling dated 10<sup>th</sup> May, 2006, **Emukule, J** made the following orders:

**a. I affirm and declare that the Town Council of Kangema has the legal duty and obligation to convene and hold a meeting of its appropriate committee on town planning to consider, and determine the Association's application dated 14/12/2004. The Town Clerk of Kangema Town Council shall therefore convene and have such meeting held within thirty (30) days of the date of this order;**

**b. The Town Clerk shall communicate to the Association's Chairman at the Associations'**

registered Postal Address as well as by recorded delivery within seven (7) days of the date of such decision allocation the Association the new site described as marked 4<sup>2</sup> in the Councils meeting of 3/12/1999;

c. The Council shall also resolve that the title to the new site shall be issued in the name of the permanent secretary to the Treasury incorporated under Chapter 101, Laws of Kenya and on the same terms as per the lease relating to Kangema Title No. Township/102 issued on 26/11/1998 and to take effect either as of 1/10/1996 or the date of issue as the Commissioner of Lands shall decide or shall deem fit;

d. Pending the issue of such title the Council shall clearly demarcate, and point out to the Associations' elected officials (the Applicant herein) the beacons to the new site, and shall allow the Association's members to take over the new site (60) days from the date hereof.

e. The old title No. Kangema Township/102 shall be surrendered only upon the issue of the new title in terms stated in the old title save the commencement date if the Commissioner of Lands shall so decide

### Ex Parte Applicants' Case

2. The Applicant has now moved this Court vide a Notice of Motion dated 3<sup>rd</sup> February, 2016 seeking the following orders:

1. That this application be certified as urgent and the same be heard on a priority basis.
2. That pending the hearing and determination of this application inter partes, the honourable court be pleased to declare that the actions of the defendant herein are fraudulent and also negligence and acts in gross disobedience and contempt of the court orders issued on 10/5/2006 and should be punished by way of imprisonment for six months.
3. That pending the hearing and determination of this application inter partes the honourable court be pleased to declare that the said alternative plot 4(2) non-existent and order the defendant convene a town planning committee meeting to consider the applicant's application for development as applied for on 14/12/2004.
4. That the honourable court be pleased to declare that applicants herein be allowed occupation and erection of a perimeter fence on plot LR Kangema Township/102 with immediate effect.
5. That the costs of this application be borne by the defendant

3. The application was supported by an affidavit sworn by **James Mwangi Njau** who described himself as the 3<sup>rd</sup> applicant herein and secretary of the 1<sup>st</sup> applicant.

4. According to the deponent, the 1<sup>st</sup> applicant is an association of artisans registered under the **Societies Act** (Cap 108 of the Laws of Kenya) and the applicants are the beneficiaries of plot LR Kangema Township/102. The named Respondent, **Zacharia Mwaura Ngatia**, was on the other hand described as the administrator of Kangema sub-county whose duty among other duties is to convene the meetings of the Town Planning Committee to consider among others, applications for development.

5. According to the deponent, this Court gave an order directing the respondents to clearly demarcate and point to the applicants herein, the beacons of the said new site and allow the association's members take over the new within 60 days of the orders date and the old title plot LR Kangema Township/102 only be surrendered upon the issuance of the new title and the said order and penal notice were duly served upon the 1<sup>st</sup> respondent. However, the respondent, the Kangema Sub-County Administrator has completely

and wilfully refused to convene a meeting of the Town Planning Committee of the Kangema Sub-County to consider the application for Development of Plot LR Kangema Township/102 forwarded on the 14<sup>th</sup> December, 2004 and further refused to advise the members of the Town Planning Committee, without malice, that Plot LR Kangema Township/102 is leased outright for the benefit of the applicants herein, and that the applicants' application for development is rightfully before them for approval or disapproval.

6. To the deponent, the 1<sup>st</sup> respondent has abdicated his duties, which include advising the town planning committee that the said Plot 4(2) was a fraud to put the court and the justice system in a circus in the following manner:

- a. In SRMCC No. 37 of 1997, the respondents claimed ownership of plot LR Kangema Township/102.
- b. In PMCC No. 36 of 2000, the respondents said that they required proper planning;
- c. In this application, they completely lie to the court that they have a plot 4(2);
- d. All the above, maliciously to deny the applicants herein the benefit of their plot LR Kangema Township/102.

7. It was therefore contended that the 1<sup>st</sup> respondent is in sheer contempt of the Court's orders and disobeying, disrespecting, disregarding and dishonouring the same and should be punished severely.

### **Respondent's Case**

8. In opposing the application the Respondent filed a replying affidavit sworn by the said **Zacharia Mwaure Ngatia** who confirmed that he was the Sub-County Administrator of Kangema Sub-County.

9. According to him the application is bad in law, misconceived and an abuse of the process of the Court; the prayers sought in the application cannot be granted on the basis of the extracted order given on 17<sup>th</sup> May, 2006; the 3<sup>rd</sup> ex parte applicant does not state in his application whether he brings the application on his personal capacity or on behalf of the 1<sup>st</sup> and 2<sup>nd</sup> ex parte applicants; the 3<sup>rd</sup> ex parte applicant does not state in his application whether he brings the application on behalf of the 1<sup>st</sup> ex parte applicant, that is Kangema Jua Kali Association, a registered society and there is no evidence annexed to the application to show that he is an official of the 1<sup>st</sup> ex parte applicant.

10. It was deposed that the order given on 19<sup>th</sup> May, 2006 was directed to the then Town Council of Kangema which is now non-existent hence there is no Town Planning Committee at the Kangema Sub-County which can be convened to effectuate the order of the court. It was however averred that after the order was issued, the then Kangema Town Council convened the Planning Committee meeting in order to effectuate the said orders, and when they went to inspect and allocate the plot then known as plot number 4(2) the said allocation was opposed by the Ministry of Public Works which said the plot was theirs and not subject to allocation to a third party.

11. It was further disclosed that the National Government under the then Ministry of Local Government identified a plot near the KCC cooling plant for the development of the *juakali* shades whose construction of was ongoing and once completed, the same would cater for all the members of the *juakali* fraternity including the members of the ex parte applicants.

12. It was therefore contended that this application was made in bad faith and was actuated by malice and ill-intention against the deponent in person by the 3<sup>rd</sup> ex parte applicant and should be dismissed with costs.

### **Applicant's rejoinder**

13. In a rejoinder, it was averred that the deponent of the supporting affidavit was the secretary of the 1<sup>st</sup> applicant which is an association of artisans registered under the **Societies Act** (Cap 108 of the Laws of Kenya), and the beneficial owner of Plot LR Kangema Township/102 while the 1<sup>st</sup> respondent/defendant (Mr. Zacharia Ngatia) is the administrator of Kangema sub-county, a decentralized unit of Muranga County Government.

14. According to the deponent, section 59 of the **Urban Areas and Cities Act** (Cap 275) is clear to the respondents about the perpetuity of this application and proceedings while section 20 thereof is explicit about the functions of a management board which functions are performed by a management committee in case of a town. According to him, section 34 of the same Act (Cap 275) is also explicit about service delivery in towns (by Town Committees) and it is not denied that in Kangema sub county there is an urban area -Kangema Town.

15. To the deponent, section 6 of the **County Government Act** (No. 17 of 2012) spells out the powers of county governments (Murang'a County Government included), and among the powers is the power to delegate any of its functions to its officers, decentralized units or other entities within the county while under section 36(1)(a) of the above mentioned Act, one of the functions of the executive committee is to supervise the administration and delivery of services in the county and all its decentralized units and agencies. Section 48(3) thereof gives the functions and provisions for the delivery of services in the decentralized units, and that if a constituency or part of a constituency falls under urban areas or cities is considered as falling under **Urban Areas and Cities Act** (No. 13 of 2011).

16. To the deponent, under section 50 of the **County Government Act** (no. 17 of 2012), the responsibilities of sub-county administrator (the 1<sup>st</sup> Respondent included) is the co-ordination, management and supervision of the general administrative functions in the sub-county hence the 1<sup>st</sup> Respondent is fraudulently misleading this Court that there were or there are deliberations about the applicant's application for Development permission (forward to them on 14/12/2004) for plot LR Kangema Township/102 citing parcels of land upon parcels of non-existent plots.

### **Determination**

17. I have considered the issues raised in the instant application.

18. In my view that orders (2) to (5) issued on 10<sup>th</sup> May, 2006 were consequential upon the outcome of order (1) by which the Town Council of Kangema was directed to convene and hold a meeting of its appropriate Committee on town planning to consider and determine the applicant's application dated 14<sup>th</sup> December, 2004 within 30 days of the order.

19. According to the Respondent, the said meeting was duly held but upon inspection of the said plot, its allocation was opposed by the Ministry of Public Works on the ground that the plot was theirs and was not subject of allocation to a third party. The Respondent has exhibited a copy of the minutes dated 14<sup>th</sup> June, 2006. It is however clear that the said meeting was held outside the time prescribed by the Court. There is no allegation that any of the parties moved the Court for the extension of the time limited by the Court. That notwithstanding the applicant has relied on an affidavit of service sworn by one **Elijah K. Chepkwony** filed on 17<sup>th</sup> October, 2015 in which the deponent deposed that the ruling was served on the Respondent herein on 10<sup>th</sup> September, 2015. By that date from the Respondent's exhibited minutes, the Ministry of Public Works had intimated that the order could not be complied with.

20. In **Victoria Pumps Ltd & Another vs. Kenya Ports Authority & 4 Others [2002] 1 KLR 708, Onyango-Otieno, J** (as he then was) expressed himself *inter alia* as follows:

**“The ruling said to have been disobeyed though is dated 31<sup>st</sup> January 2002, was not delivered on that day but was delivered on 8<sup>th</sup> February 2002. This in effect means that as on 31<sup>st</sup> January 2002 before the ruling was delivered there was no ruling capable of being disobeyed**

or obeyed as the same ruling had not been delivered and no one could be said to have known about it so as to obey it or disobey it. The Ruling could not have taken effect from 8<sup>th</sup> February 2002 and could have only been issued on 8<sup>th</sup> February 2002 or thereafter and not before that date... No orders were issued on 31<sup>st</sup> January 2002. Although the ruling was dated that date it was not delivered until 8<sup>th</sup> February 2002 and the order was extracted and issued or sealed on 11<sup>th</sup> March 2002. By 31<sup>st</sup> January 2002 no order had been delivered and none could be sealed and be disobeyed till the same order was delivered on 8<sup>th</sup> February 2002.... The law in such a case as this where a party is seeking committal to civil jail against the other party on the grounds that the order delivered by the court has been disobeyed, the party sought to be committed or cited for contempt must be personally served with a properly extracted order which must have a Penal Notice appended to it. In the instant case the Penal Notice is not properly appended, as it should have been at the very end of the order and not part of it...*From the evidence it is clear that by the time the court gave the order for release of both containers to the applicant one container was no longer available and could not be released to the applicants as it was already out of reach of the applicants. The order was thus not capable of being enforced as it was, having been issued long after the same container had been removed from the possession and control of the alleged contemnors and its contents sold at a public auction advertised in the Kenya Gazette*". [Emphasis added].

21. Similar circumstances were dealt with by this Court in **Gachoni Enterprises Limited vs. D.N. Nyaga t/a Njeru, Nyaga & Co. Advocates & another [2012] eKLR** where this Court expressed itself as follows:

**"I now wish to consider the issue whether the conditions necessary for committal for contempt have been proved. It is trite law that where committal is sought for breach of an injunction, it must be made clear what the defendant is alleged to have done and that it is breached. The notice of motion must state exactly what the alleged contemnor has done or omitted to do which constitutes a contempt of court with sufficient particularity to enable him to meet the charge. The necessary information must be given in the notice itself. The slightest ambiguity to the order can invalidate an application for committal as ambiguity can in turn lead to the standard of proof, which is the criminal standard, not being attained especially on affidavit evidence. Therefore the law is that no order requiring a person to do or abstain from doing any act may be enforced by contempt unless a copy of the order has been served personally and endorsed with a notice informing him that if he disobeys the order he is liable to the process of execution. In other words the Court will only punish for contempt of injunction if satisfied that the terms of the injunction are clear and unambiguous and that the defendant has a proper notice of the terms and the breach of the injunction has been proved beyond reasonable doubt... Obviously by the time the said order was served, the period of compliance had lapsed and the respondent could not be expected to comply therewith "within the next seven (7) days" or "within seven (7) days from today". It is not surprising therefore that the respondent alleges that by the time the said order was served the money had been released to his client and was no longer in his possession in order for him to comply with the court order... Accordingly, I find that the applicant is the author of its own misfortune for obtaining court orders and failing to serve the same in time for compliance."**

22. In the premises it is my view and I find that the application herein falls short of the standards in contempt proceedings.

23. Consequently the application fails but as I have found that the Respondent met after the period ordered by the Court there will be no orders as to costs.

24. It is so ordered.

**Dated at Nairobi this 20<sup>th</sup> day of September, 2016**

**G V ODUNGA**

**JUDGE**

***Delivered in the presence of:***

***Applicants in person***

***Mr Ogutu for Mr Kariuki for the Respondent***

***Cc Mwangi***