



**REPUBLIC OF KENYA**

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

**JR. MISCELLANEOUS APPLICATION NO. 239 OF 2014**

**IN THE MATTER OF AN APPLICATION FOR ORDERS OF MANDAMUS**

**AND**

**IN THE MATTER OF THE LAND REGISTRATION ACT (CAP 300) LAWS OF KENYA**

**AND**

**IN THE MATTER OF PARCEL OF LAND TITLE NUMBER GITHUNGURI/GIATHIEKO/412**

**AND**

**IN THE MATTER OF THE LAW REFORM ACT, CHAPTER 26 OF THE LAWS OF KENYA**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**VERSUS**

**KIAMBU COUNTY REGISTRAR..... 1<sup>ST</sup> RESPONDENT**

**KIAMBU COUNTY SURVEYOR..... 2<sup>ND</sup> RESPONDENT**

**AND**

**KARIUKIMAREGA.....1<sup>ST</sup> INTERESTED PARTY**

**PETER MUNGAI MAREGA**

**(AKA GIKUIYU MAREGA).....2<sup>ND</sup> INTERESTED PARTY**

**EX PARTE - STEPHEN WANYOIKE KINUTHIA**

**RULING**

1. On 23<sup>rd</sup> July, 2014, this Court delivered a judgement in these proceedings in which it granted an order of mandamus compelling the Respondents to determine, ascertain and/or fix the boundaries of parcel of land Title Number Githunguri/Giathieko/412 as provided in the said *Land Registration Act* as read with the *Survey Act* (Cap 299) Laws of Kenya. The said order was to be complied with within 30 days from

the date upon which the applicant complied with the necessary requirements for the said exercise to be conducted.

2. On 19<sup>th</sup> September, 2014, a consent order was recorded in these proceedings by which it was directed, *inter alia*, that in addition to fixing the boundaries of the parcels of lands mentioned in the motion, the boundaries for LR Nos. Githunguri/Gathieku/377 and 468 would also be fixed and the Respondents were to file their report within 14 days. The matter was then fixed for mention on 14<sup>th</sup> October, 2014 for compliance. In the meantime the parties were to maintain *status quo* in respect of the said properties.

3. By a report dated 7<sup>th</sup> November, 2014, the District Land Surveyor, Kiambu, reported that the respondents visited the land on 29<sup>th</sup> October, 2014 and that the boundaries defining parcels no. Githunguri/Gathieko/412 and 373 were measured and corner beacons erected while the boundaries for parcel no. 468 could not be measured as that parcel did not exist in the Registered Index Map. The Surveyor however noted that due to the order of 19<sup>th</sup> September, 2014 the boundaries were not aligned due to the *status quo* order in order to avoid destruction of the property.

4. By an application dated 24<sup>th</sup> May, 2016, the interested party herein substantially seeks that the *ex parte* applicant herein be found to have been in contempt of the said order of 19<sup>th</sup> September, 2014 and be punished accordingly. It is also sought that the said contempt be purged.

5. According to the interested party, despite being aware of the said orders, the *ex parte* applicant went ahead to secretly file an application before Githunguri Court being Misc. Appl. No. 8 of 2016 and on 20<sup>th</sup> May, 2016 police officers descended on the suit property and commenced making alterations of the boundaries and destroying crops ostensibly in execution of court orders. To the interested party the orders of this Court made on 19<sup>th</sup> September, 2014 are still in place as the same have neither been varied nor set aside hence the orders sought herein.

6. The application was opposed by the *ex parte* applicant. According to the *ex parte* applicant, the interested party has no *locus standi* with respect to land parcel no. 412 in light of the letters of administration issued to the *ex parte* applicant. In the *ex parte* applicant's view, this matter was concluded after the parties entered into a consent judgement which was adopted by this Court and that it would be a disaster for the Court to enter a consent judgement and then order that *status quo* be maintained.

7. It was the *ex parte* applicant's case that the boundaries were set by the Land Officers and that his only action was to place the boundaries in accordance with the said report hence he had not committed any contempt.

8. The *ex parte* applicant further contended that the placing of the boundaries was in compliance with the order issued by the Githunguri Court.

9. I have considered the issues raised herein. Court orders, it is now the law, are not made in vain and are meant to be complied with. Once a Court order is made in a suit the same is valid unless set aside on review or on appeal. In **Econet Wireless Kenya Ltd vs. Minister for Information & Communication of Kenya & Another [2005] 1 KLR 828 Ibrahim, J** (as he then was) stated:

**“It is essential for the maintenance of the rule of law and order that the authority and the dignity of our Courts are upheld at all times. The Court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors. It is the plain and unqualified obligation of every person against, or in respect of whom, an order is made by a Court of competent jurisdiction, to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or void”.**

10. This position was confirmed by the Court of Appeal in **Refrigerator & Kitchen Utensils Ltd. vs.**

**“It was the plain and unqualified obligation of every person against or in respect of whom an order was made by a Court of competent jurisdiction to obey it until that order was discharged, and disobedience of such an order would, as a general rule, result in the person disobeying it being in contempt and punishable by committal or attachment and in an application to the court by him not being entertained until he had purged his contempt. A party who knows of an order, whether null or valid, regular or irregular, cannot be permitted to disobey it...It would be most dangerous to hold that the suitors, or their solicitors, could themselves judge whether an order was null or valid – whether it was regular or irregular. That they should come to the court and not take upon themselves to determine such a question. That the course of a party knowing of an order which was null or irregular, and who might be affected by it, was plain. He should apply to the court that it might be discharged. As long as it existed it must not be disobeyed...If there is a misapprehension in the minds of the defendants as to the reasonable meaning of the order, then the expectation of them is that they would have made an application to the court for the resolution of any misunderstanding and this would have been the lawful course...In cases of alleged contempt, the breach for which the alleged contemnor is cited must not only be precisely defined but also proved to the standard which is higher than proof on a balance of probabilities but not as high as proof beyond reasonable doubt...The inherent social limitations afflicting most people in a developing country such as Kenya have the tendency to restrict access to the modern institutions of governance, and more particularly to the judiciary which is professionally run, on the basis of complex procedures and rules of law. Yet, this same Judiciary is generally viewed as the impartial purveyor of justice, and the guarantor of an even playing ground for all, a perception which ought to be strengthened, through genuine respect for the courts of justice, and through compliance with their orders. Consistent obedience to court orders is required, and parties should not take it upon themselves to decide on their own which court orders are to be obeyed and which ones overlooked, in the supposition that this oversight will not impede the process of justice...Justice dictates even-handedness between the claims of parties; and if it be the case that the plaintiff/applicant has not been accorded a level playing ground for the realisation of its economic activities, a matter that of course can only be established through evidence in the main suit, then the court ought to provide relief, by applying the established principles of law, one of these being the law of contempt...An ex parte order by the court is a valid order like any other and to obey orders of the court is to obey orders made both ex parte and inter partes since the Court by section 60 of the Constitution is the repository of unlimited first instance jurisdiction, and in this capacity it may make ex parte orders where, after a careful and impartial consideration, it is convinced that issuance of such an order is just and equitable. There is nothing potentially oppressive in an ex parte order, since such an order stands open to be set aside by simple application, before the very same court... Where a party considers an ex parte order to cause him undue hardship, simple application will create an opportunity for an appropriate variation to be effected thereto; and therefore there will be no excuse for a party to disobey a court order merely on the grounds that it had been made ex parte and this argument will not avail either the first or the second defendant”. [Emphasis mine].**

11. In my view just like an ex parte order, an order recorded by consent is no less an order than one arrived at after hearing the parties. In fact a consent order has the force of a contract hence the terms of setting aside the same are more stringent than in a case where the same is made after hearing the parties.

12. In this case although the *ex parte* applicant contends that the Court could not order the maintenance of status, that direction was as a result of a consent to which the applicant was a party hence the ex parte applicant was bound therewith.

13. The ex parte applicant contended that the fixing of the boundaries was pursuant to an order issued in Githunguri Court. Those proceedings were however instigated by the applicant who was well aware of the existence of an order maintaining *status quo* in these proceedings. In my view a party ought not to

create absurd situations and rely on the same to evade the consequences of a court order. As this Court held in **Republic vs. Kenya School of Law & 2 Others Ex parte Juliet Wanjiru Njoroge & 5 Others [2015] eKLR:**

**“Court orders, it must be appreciated are serious matters that ought not to be evaded by legal ingenuity or innovations. By deliberately interpreting Court orders with a view to evading or avoiding their implementation can only be deemed to be contemptuous of the Court. Where a party is for some reason unable to properly understand the Court order one ought to come back to Court for interpretation or clarification... Where it has been brought to the Court’s attention that its orders are being abrogated or abridged by brazen or subtle schemes and manoeuvres...this Court cannot turn a blind eye to the same.”**

14. In this case the ex parte applicant mischievously instituted the Githunguri proceedings with a view to sidestepping the orders of *status quo* issued in these proceedings. By doing so the ex parte applicant set out to steal a march both on the interested party and on this Court. As was held in **Pilar Timon Shah vs. Kaushik Mohanlal Shah & Another Civil Application No. Nai. 180 of 1999:**

**“Stealing a march” is not new in our jurisprudence as it is in fact an abuse of the Court process and an interference with the jurisdiction of the Court and the Court will not hesitate to exercise its inherent powers in terms of Rule 113 of the Court of Appeal Rules to stop abuse of the Court process.”**

15. This is a case where as appreciated by **Musinga, J** (as he then was) in **Republic vs. Minister of Medical Services Misc. Civil Application No. 316 of 2010**, the ex parte applicant’s conduct is “*no more than a subterfuge – a seemingly clever explanation or trick intended to justify the contemptuous acts complained of.*” The orders which were issued by the Githunguri Court in Misc. Appl. No. 8 of 2016 directing the OCS Githunguri to provide security towards enforcement of the orders issued herein were clearly a gross abuse of the process of this Court in as much as there were no orders to be executed and the same being substantive orders were issued unprocedurally in a Miscellaneous Application. They were without jurisdiction and therefore cannot be a defence to the application for contempt.

16. It was contended that the Land Officers having filed a report, the *ex parte* applicant was at liberty to demarcate the boundaries as there was nothing remaining for determination by this Court. A report of a land officer is, in my view, not a judgement unless and until it is adopted as such. A Court of law, it has been held, cannot divest itself of the responsibility for the final decision in a suit, by appointing a referee whose report is to be final and by limiting the court’s function to enter judgement in terms of that report. Such a decision would be without jurisdiction. See **Law, JA** in **Kirpal Singh vs. Jagat Singh and Others T/A Jagat Singh & Co. Civil Appeal No. 90 of 1962 [1965] EA 178.**

17. Similar circumstances arose in **Samwel Ongeru Ontiri vs. The Chairman BOG Nyatioko Sec. School & Others Kisii HCCA No. 113 of 2007** in which **Makhandia, J** (as he then was) held *inter alia* that:

**“In this case the surveyor’s report and not “award” stated in the said application was capable of being adopted as a judgement of the court if it was as a result of arbitration proceedings under Order XLV of the Civil Procedure Rules. Much as the application for the adoption of the report as a judgement of the court was expressed to have been brought under Order 45 rule 17(1) and (2) of the Civil Procedure Rules, these provisions of the law were wrongly invoked as there were no arbitral proceedings as known in law. The provisions cited in support of the application contemplate arbitration proceedings where parties themselves appoint an arbitrator or the court does the appointing on its own motion. In this case the consent order is very clear. Neither the District Surveyor nor Geomatic Services were appointed as joint arbitrators. It would appear that their appointment and brief was purely to visit the suit premises and make some findings on the ground that would later inform the court’s subsequent decision. In other words these surveyors were to give their professional advice and or findings to enable the parties and the court to know how to proceed with the**

case thereafter. Indeed a careful reading of the report merely shows the observations made by the surveyors when they visited the suit premises. It cannot by any stretch of imagination therefore pass for an award. To the court's mind, an award makes a definitive finding and is in the nature of a judgement where issues are identified, a decision is made on the same and reasons given for such decision(s). The report of the surveyors falls far too short of that expectation and therefore was incapable of being adopted as a judgement of the court... In the court's view, it was wrong for the learned Magistrate to have acceded to the request of the respondents to adopt the report as a judgement. That report should merely have formed part of the evidence since it did not resolve or completely adjudicate on the issue in controversy.”

18. The Court of Appeal made the position clear in **Joseph Muhingira Nyangaga vs. Hezekiel S Itumbo Civil Appeal No. 202 of 1997** when it held that when an order is made that the Land Registrar visits the land and files a report the report becomes part of the evidence and is not an award and if the Court proceeds as if it were an award the proceedings are a nullity.

19. It follows that whereas the Court could perfectly adopt the report filed by the land officers, before doing so there was no judgement capable of being executed by the Githunguri Court. In the absence of the order setting aside the order of *status quo*, the ex parte applicant simply had no right whatsoever in purporting to demarcate the boundaries of the suit parcels of land.

20. From the report made by the land officers, it is clear that in deference to the order of status quo they only placed the beacons but did not fence off the boundaries and that the fencing was done by the ex parte applicant. It follows that by doing so the ex parte applicant was in contempt of the orders of this Court and I so find.

21. Accordingly the ex parte applicant is hereby directed to forthwith remove the offending boundary fence and appear before this Court to show cause why appropriate action cannot be taken against him.

22. The ex parte applicant will bear the costs of these proceedings.

23. Orders accordingly.

**Dated at Nairobi this 16<sup>th</sup> day of November, 2016**

**G V ODUNGA**

**JUDGE**

**Delivered in the presence of:**

**Mr Aunga for Mr Mwaniki for the applicant**

**Mr Kimeria for the Respondent**

**CA Mwangi**