



**REPUBLIC OF KENYA**

**High Court at Nairobi (Nairobi Law Courts)**

**Civil Miscellaneous Application 30 of 2009**

**REPUBLIC.....APPLICANTS**

**VERSUS**

**THE REGISTRAR OF TITLES**

**NAIROBI REGISTRY.....1<sup>ST</sup> RESPONDENT**

**THE ATTORNEY GENERAL.....2<sup>ND</sup> RESPONDENT**

**THE DIRECTOR OF SURVEYS.....3<sup>RD</sup> RESPONDENT**

**THE CITY COUNCIL OF NAIROBI.....4<sup>TH</sup> RESPONDENT**

**WHITE HORSE INVESTMENT LIMITED.....1<sup>ST</sup> INTERESTED PARTY**

**ASTER HOLDINGS LIMITED.....2<sup>ND</sup> INTERESTED PARTY**

**EX PARTE CAROGET INVESTMENT LIMITED**

**RULING**

1. Before me are two applications brought by way of Motions on Notice dated 4<sup>th</sup> March 2011 and 15<sup>th</sup> October 2012. The former seeks orders that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents herein be committed to prison for such period of time as the Court may deem fit as well as an order of sequestration, attachment and sale of the properties of the said respondents. The application also seeks costs of these proceedings. On the other hand the application dated 15<sup>th</sup> October 2012 seeks an order for stay of these contempt proceedings.

2. In my view where the Court is confronted with two applications, one seeking to commit for contempt and the other seeking stay of the said contempt proceedings, it is prudent that the Court ought to deal with the latter application before dealing with the former. This is due to the fact that once an application for committal is dealt with, it may likely render the application for stay superfluous. This is so because if the application is allowed and an order of committal is granted, to grant an application for stay of proceedings thereafter would turn the proceedings into a theatre of the absurd. Where, however, the application for contempt is disallowed, there would be no pending committal proceedings capable of being stayed. It is

therefore prudent to deal with the application for stay in which case is the application is granted the hearing of the application for contempt would be kept in abeyance and if disallowed the contempt proceedings may then proceed. Similar reasoning was adopted by the Court of Appeal in Salesio M'aribu vs. Meru County Council Civil Appeal No. 183 of 2002 and Nova Industries Limited & 2 Others vs. Fidelity Commercial Bank Limited Civil Application No. Nai. 315 of 1998 which decisions were cited with approval in my decision in Nairobi High Court (Commercial & Admiralty Division) High Court Civil Suit No. 186 of 2010 - Triple Eight Construction Company (Kenya) Limited vs. China Petroleum Pipeline Bureau & Another

3. Accordingly I intend to deal with the Notice of Motion dated 15<sup>th</sup> October first. As already stated the said Motion seeks the following orders:

- 1) **THAT this application be certified as urgent and be heard ex parte at the 1<sup>st</sup> instance.**
- 2) **THAT there be a stay of the contempt proceedings pending before this court.**
- 3) **THAT the costs of this Application be provided.**

4. The said application is supported by an affidavit sworn by **Cyrus Wambugu Ngatia**, the first respondent herein. According to him, he has not been able to comply with the Court order issued in High Court Misc. Civil Application No. 30 of 2009 since he has instructed the Hon. Attorney General to appeal against the said order which appeal according to his information is pending. There is also an application pending in the Court of Appeal seeking stay of execution pending the hearing and determination of the said appeal. According to him, the 2<sup>nd</sup> interested party **Aster Holdings Limited** filed a civil suit being Nairobi ELC No. 562 of 2010 whose subject matter is the same as the one in these proceedings. In his view, compliance with the court order will necessarily lead to registration and issuance of title documents to the land in the names of the *ex parte* applicant notwithstanding the pendency of the said ELC 562 of 2010 in which fraudulent conduct on the part of the *ex parte* applicant herein is alleged with regard to the procurement of the deed plan that he relies on in claiming title to the suit premises. According to the information furnished to him by the advocate on record for the respondent in this matter, a temporary injunction has been issued barring any interference with the title thereof pending the hearing and determination of that suit in which an order of prohibition was issued compelling the Respondents from interfering with the applicant's title and possession of Grant No. 105610 and from registering documents adverse to the applicant's interest at the instance of the 2<sup>nd</sup> interested party. It is therefore his view that complying with the subject court order will complicate matters especially if **Caroget Investment** transfers the property to unsuspecting 3<sup>rd</sup> party which may lead to endless litigation contrary to the principle that in the interest of the Republic all litigation must come to an end. It is further deposed that if registration was done in compliance with the Judicial Review it will only have dealt with the propriety of the exercise of power of cancellation by the registrar but the substantive issues and the full merits of the case can only be determined by the conclusion of ELC No. 652 of 2010. On the advice of his counsel he believes that under sections 3A and 3B of the Civil Procedure Act, Cap 21 Laws of Kenya, overriding objective of the procedure and court work is both to arrive at a just decision and deal with matters with finality and that complying with the court order is contrary to Article 159(2)(a) of the Constitution which provides that justice shall be done to all irrespective of status.

5. In opposition to the application the main applicant, **Caroget Investment Limited** filed an affidavit sworn by **Francis Gichanga Karanja**, its Director on 24<sup>th</sup> October 2012. According to him, it is not true or correct that the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents filed a Notice of Appeal against the order made herein on 29<sup>th</sup> July 2010 and no party has filed a record of appeal in the Court of Appeal against the said order. Civil Application No. 191 of 2010, according to him was filed in the Court of Appeal by the 2<sup>nd</sup> Interested Party herein and is yet to be heard and determined. In the meantime there is no order staying the execution of the order made on 29<sup>th</sup> July 2010. Since the 2<sup>nd</sup> and 3<sup>rd</sup> respondents are not the applicants in Civil Application No. 191 of 2010, it is deposed that they cannot rely thereon in justifying their disobedience of the order of 29<sup>th</sup> July 2010. It is the position of the *ex parte* applicant that since the judicial review proceedings were filed before the ELC No. 562 of 2010, the execution of the order in the

former cannot be stayed pending the determination of the later. In his view this application is meant to enable compromise of the said ELC Case to the detriment of the *ex parte* applicant herein.

6. It is further deposed that the order in ELC Case restrained the *ex parte* applicant and the 2<sup>nd</sup> interested party from alienating and/or encumbering their respective titles but did not prohibit the 1<sup>st</sup> and 2<sup>nd</sup> respondents from complying with the order of 29<sup>th</sup> July 2010 whose compliance does not contravene sections 3A and 3B of the Civil Procedure Act or Article 159(2)(a) of the Constitution.

7. I have considered the foregoing as well as the submissions filed on behalf of the *ex parte* applicant herein. The Respondents did not file any submissions in support of the instant application.

8. The first issue for determination is whether the Court can grant the orders sought herein. It is contended based on **Republic vs. Municipal Council of Mombasa & 2 Others ex parte Adopt-A-Light Limited [2008] eKLR** that orders of certiorari, prohibition and mandamus are not capable of further execution and/or stay. I have looked at the decision cited and in that decision it is clear that the order being appealed from was an order which nullified a contract. The law since the decision in **Western College of Arts and Applied Sciences vs. Oranga & Others [1976] KLR 63**, is clear that unless the Court granted a positive order stay of execution is not capable of being granted since there would be nothing in those circumstances to be stayed. In this case, however, not only did the Court grant an order of certiorari but it went on to grant the orders of mandamus as well. In **Republic vs. University of Nairobi Civil Application No. Nai. 73 of 2001 (CAK) [2002] 2 EA 572**, the Court of Appeal granted a stay in respect of a matter that arose from a judicial review application. It is therefore my view that where the order being appealed from is capable of being executed over and above the order for costs, stay of execution may be granted

9. As indicted hereinabove, the stay sought in the instant application does not seek a temporary relief. What is sought seem so be permanent order of stay since it is not expressed to be sought pending any further action or proceedings. To grant the stay in the terms sought is likely to occasion a miscarriage of justice since its effect would be to permanently lock out the *ex parte* applicant from proceedings with the contempt of Court proceedings. To that extent the said application is incompetent.

10. Further, it is important to note that judicial review proceedings do not deal with the merits of the decision but only with the decision making process. In granting orders of judicial review the Court does not purport to determine the ownership of the disputed properties but only deals with the process through which the decision was arrived at and once the Court finds that the decision was not properly arrived at and the Court quashes the decision, the matter is then left to the authority concerned to decide whether to commence the process afresh by following the correct procedure or leave the matter to lie. Accordingly the mere fact that there is a matter pending in which the merits of the ownership of the disputed land is in issue does not necessarily entitle one to a stay of the order granted in judicial review. Similarly the fact that a party has filed a Notice of Appeal to the court of appeal or even the appeal itself does not entitle him to stay of execution. In this case, it is contended that there is an application for stay of execution pending in the Court of Appeal. If that position is correct, then to file a similar application before this Court amounts to an abuse of the process of the Court since it may be deemed as playing lottery with judicial process. In **Nyokabi Karanja & 3 Others vs. Kamuingi Housing Co. Limited Civil Application No. Nai. 61 of 2005** it was held by the Court of Appeal that it is an abuse of the process of the Court to maintain two parallel and identical applications on the same matter. See also **Kutima Investment Limited vs. Kihara and Another [2007] 1 EA 162**.

11. I have said enough to show that that the Notice of Motion dated 15<sup>th</sup> October 2012 is incompetent and the same is struck out with costs.

12. With respect to the Motion dated 4<sup>th</sup> March 2011, it is clear that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents have not obeyed the orders that were issued by the **Hon. Mr Justice Mbogholi** herein on 29<sup>th</sup> July 2010. The reasons for not doing so which were the grounds upon which the Motion dated 15<sup>th</sup> October 2012 have been found untenable by this Court.

13. In my considered view, Court orders are not made in vain and are meant to be complied with and therefore a party should not take it upon himself to decide on which orders it will obey and which ones it will not obey. If for any reason a party has difficulty in complying with court orders the honourable thing to do is to come back to court and explain the difficulties faced by the need to comply with the order. 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”.**

14. This position was confirmed by the Court of Appeal in Refrigerator & Kitchen Utensils Ltd. vs. Gulabchand Popatlal Shah & Others Civil Application No. Nai. 39 of 1990. In Wildlife Lodges Ltd vs. County Council of Narok and Another [2005] 2 EA 344 (HCK) the Court expressed itself thus:

**“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”.**

15. The mere fact that the said decision made by **Hon. Mr Justice Mbogholi** herein on 29<sup>th</sup> July 2010 is implemented does not necessarily mean that the disputed property cannot be preserved. If the Order in the said ELC Case was aimed at preserving the said property without it changing hands I do not see how that state of affairs cannot be preserved if parties concerned are properly advised.

16. In the premises, I direct that a warrant of arrest do issue directed to the first Respondent herein to appear before this Court to show cause why he should not be committed for contempt of Court.

17. The *ex parte* applicant will have the costs of this these proceedings.

**Dated at Nairobi this 15<sup>th</sup> day of April 2013**

**G V ODUNGA**  
**JUDGE**

**In the presence of Mr Havi and Ms Ng’ania for the applicant.**