



**Republic v Cabinet Secretary Ministry of Lands & another; Magondu (Exparte) (Environment and Land Judicial Review Appeal 8B of 2021) [2022] KEELC 2257 (KLR) (12 May 2022) (Ruling)**

Neutral citation: [2022] KEELC 2257 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAKURU  
ENVIRONMENT AND LAND JUDICIAL REVIEW APPEAL 8B OF 2021**

**LA OMOLLO, J**

**MAY 12, 2022**

**IN THE MATTER OF: AN APPLICATION BY ROSEMARY NJERI MAGONDU  
TO APPLY FOR JUDICIAL REVIEW ORDERS OF MANDAMUS AND  
PROHIBITION DIRECTED AT THE CABINET SECRETARY MINISTRY OF  
LANDS AND HOUSING AND THE DISTRICT LAND REGISTRAR NAKURU**

**AND**

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

**AND**

**IN THE MATTER OF: THE REGISTRATION OF TITLES ACT, CAP 281 LAWS OF KENYA**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**CABINET SECRETARY MINISTRY OF LANDS ..... 1<sup>ST</sup> RESPONDENT**

**DISTRICT LAND REGISTRAR NAKURU ..... 2<sup>ND</sup> RESPONDENT**

**AND**

**ROSEMARY NJERI MAGONDU ..... EXPARTE**

**RULING**

**Introduction**

1. This ruling is in respect to the Ex parte Applicant's Chamber Summons application dated 29<sup>th</sup> December, 2021. The said application is expressed to be brought under Section 10 of the *Judicature Act* and Rule 3 of the *High Court Practice and Procedure and Vacation Rules*.



2. The application is filed under certificate of urgency and seeks the following orders:
  - i. Spent
  - ii. Spent.
  - iii. That an order of committal to civil jail for contempt be issued against the 1<sup>st</sup> and 2<sup>nd</sup> Respondent herein for a term of six months or such other period of time this Honourable court deems fit for not adhering to this Honourable court's judgment delivered on the 29<sup>th</sup> November, 2021 issuing orders of mandamus to cancel the title known as Kiambogo/Kiambogo Block 2/487 and recall the said title issued to third parties and an order of prohibition from endorsing in the register the transfer in respect of land title known as Kiambogo/Kiambogo Block 2/487 directed to the Respondents.
  - iv. That the costs of this application be borne by the Respondents.
3. The application is based on the grounds on its face and supported by the affidavit sworn by Kirui Kiprotich counsel for the Applicant. The Supporting affidavit is sworn on the 29<sup>th</sup> December, 2021.

### **Factual Background**

4. The ex parte applicant commenced this suit vide an application dated 17<sup>th</sup> August, 2021 which was initially filed in the High Court under the *High Court Practice and Procedure and Vacation rules*. Vide a court order dated 3<sup>rd</sup> August, 2021, the file was transferred to this court on the 27<sup>th</sup> September, 2021 for hearing and final determination.
5. The ex parte Applicant had sought the following orders:
  - a. Spent
  - b. That leave be granted to the Applicant to apply for Judicial Review Order of Mandamus do issue(*sic*) to the Cabinet Secretary Ministry of Lands and Housing and the District Land Registrar Nakuru to cancel the title known as Kiambogo/Kiambogo Block2/487 and recall the said title issued to third parties.
  - c. That leave be granted to the Applicant to apply for Judicial Review Order of Prohibition do issue (*sic*) to prohibit the Cabinet Secretary Ministry of Lands and Housing and the District Land Registrar Nakuru from endorsing in the register the transfer in respect of land parcel known as Kiambogo/kiambogo Block2/487 (Mwariki)to any other person to whom the title to the said parcel of land as (sic) been issued to.
  - d. Thatthe costs of this application be borne by the Respondent.
6. This court heard the application and delivered its judgment on 29<sup>th</sup> November, 2021 and granted the following orders:
  - a) An order of Mandamus do issue to the Cabinet Secretary Ministry of Lands and Housing and the District land Registrar Nakuru to cancel the title known as Kiambogo/Kiambogo Block2/487 and recall the said title deed issued to 3<sup>rd</sup> parties.
  - b) An order of Prohibition do issue to prohibit the Cabinet Secretary Ministry of Lands and Housing and the District Land Registrar Nakuru from endorsing in the register the transfer in respect of land parcel known as KIambogo/KiambogoBlock2/487 to any other person to whom the title to the said parcel of land has been issued.



- c) Each party to bear own costs.

### **Ex Parte Applicant's Contention.**

7. The Ex parte Applicant's counsel contends that the court on 29<sup>th</sup> November, 2021 delivered its judgment and issued an order of Mandamus and an order of Prohibition against the Respondents and that the said judgment was duly served upon them.
8. It is the Ex parte Applicant's contention that the Respondents have refused, neglected and failed to comply with the said judgment to enable her conduct a search on the suit property so as to ascertain the ownership.
9. The Ex parte Applicant further contends that the deliberate conduct of the Respondents is contemptuous to this court and a real threat to its dignity thus the urgent need for the orders sought to ensure that this Court's judgement delivered on 29<sup>th</sup> November, 2021 is complied with.
10. He ends his deposition by stating that the continued disobedience of the court's judgment is likely to embarrass and delay the just and fair hearing of the suit hence the need for the orders sought in the instant application be allowed.

### **2<sup>nd</sup> Respondent's Response**

11. In response to the application, the 2<sup>nd</sup> Respondent filed a replying affidavit sworn on 27<sup>th</sup> January, 2022 by one R.G Kubai wherein he deposes that the application is misconceived and an abuse of the court process.
12. He deposes that the application offends the requirements of Section 80(2) of the [Land Registration Act](#) which requires that the registered owner be notified of the intended rectification of title.
13. He further deposes that the current registered owner is Freehold Group Housing Co-op Society and that the Applicant did not serve the Respondents with any court order. He ends his disposition by stating that it is in the best interest of justice that the application is dismissed with costs.

### **Ex Parte Applicant's Response To The Replying Affidavit.**

14. The Ex parte Applicant filed a Further Affidavit in response to the 2<sup>nd</sup> Respondent's Replying Affidavit sworn by her counsel on record.
15. He deposed that the 2<sup>nd</sup> Respondent had filed a Replying Affidavit dated 26<sup>th</sup> October, 2021 in response to the Applicant's Judicial Review Application dated 17<sup>th</sup> August, 2021.
16. He deposed further that in the Replying Affidavit dated 26<sup>th</sup> October, 2021, the 2<sup>nd</sup> Respondent expressly stated in paragraph 8 that he did not oppose the claim for cancellation in order to preserve the sanctity of title in favor of the Applicant.
17. He deposed that the Applicant's application does not offend section 80(2) of the [Land Registration Act](#) as it is a requirement of the said section that the proprietor has knowledge of omission.
18. He further deposes that in this matter there was an investigation by the Directorate of Criminal Investigation and all parties that were involved in the fraud summoned to the offices of the DCI.
19. It is the Ex parte Applicant's contention that the 2<sup>nd</sup> Respondent in his Replying Affidavit states that the current registered owner of the suit property is Freehold Group Housing Co-op Society. That the



- 2<sup>nd</sup> Respondent has attached a green card that shows that the housing society bought the suit property from Celestine Nkonge Ngai who had previously bought it from Lucy Nyokabi Ndungu.
20. He further deposes that after judgment was delivered, he extracted the decree and duly served it the 2<sup>nd</sup> Respondent.
21. He finally deposes that if it is a requirement for the registered owner to be notified, then there is nothing stopping the 2<sup>nd</sup> Respondent from notifying the registered owner. He urged the court to allow the instant application.

### Issues For Determination

22. The Ex parte Applicant filed her submissions on 14<sup>th</sup> March, 2022 and identified the following issues for determination:
- Whether the Respondents' actions amount to contempt of court.
  - Whether the Respondents' can be held liable for contempt of court.
  - Whether the application is in contravention of Section 80(2) of the Land Registration Act.
23. Counsel for the Respondents, on the other hand, did not file submissions but expressed that he would be relying on the replying affidavit sworn on 27<sup>th</sup> January, 2022. This reply is by the 2<sup>nd</sup> Respondent. Essentially, there is no response by the 1<sup>st</sup> Respondent
24. In my view, the twin issues for consideration are:
- Whether the Respondents are in contempt of the order of this Honourable court.
  - Who shall bear the costs of the application?

### Analysis And Determination

25. I have taken in to consideration the provisions of the Constitution of Kenya 2010, relevant statutes, judicial decisions, the response by the 1<sup>st</sup> Respondent and the submission filed by the Applicant.
26. The law relating to contempt of court is found in section 5 of the judicature Act, section 29 of the Land Act and The Practice Directions on Proceedings in the Environment and Land Court.
27. Section 5 of the Judicature Act provides as follows;
- The High Court and the Court of Appeal shall have the same power to punish for contempt of court as is for the time being possessed by the High Court of Justice in England, and such power shall extend to upholding the authority and dignity of subordinate courts.
28. Section 29 of the Environment and Land Court Act provides as follows;-
- Any person who refuses, fails or neglects to obey an order or direction of the Court given under this Act, commits an offence, and shall, on conviction, be liable to a fine not exceeding twenty million shillings or to imprisonment for a term not exceeding two years, or to both.
29. Practice direction 43 on Proceedings Relating to the Environment and the Use and Occupation of, and title to Land and Proceedings in Other Courts (Gazette Notice No. 5178) provides that non-compliance with the relevant provisions of the CPR, orders, and/or directions issued by a judge shall attract sanctions including but not limited to the imposition of costs, fines, striking out of pleadings,



the dismissal of a suit and/or meting out punishment prescribed in the ELC Act or any other Statute as the court may deem fit bearing in mind the overriding interest of justice.

30. This application is seeking prayers that the Respondents be found to be in contempt. What constitutes contempt of court?

31. In the case of Shimmers Plaza Limited v National Bank of Kenya Limited [2015] eKLR, the Learned Judges of Appeal went to great lengths in tracing the foundations of law on contempt as practiced in Kenya. They state;

“Christine Wangari Gachege v Elizabeth Wanjiru Evans & 11 Others, (supra) when dealing with the same issue concerning the applicability of English Law of contempt in our Courts had this to say:

“Following the implementation of the famous Lord Woolf’s Access to Justice Report, 1996’, the Rules of the Supreme Court of England are gradually being replaced with the Civil Procedure Rules, 1999. Recently on 1 st October, 2012 the Civil Procedure (Amendment No. 2) Rules, 2012 came into force and part 81 thereof effectively replaced Order 52 of the Rules of the Supreme Court of England in its entirety.”

Consequently, a careful consideration must be had to the provisions of the Contempt of Court Act of 1981 Act and PART 81 of Civil Procedure (Amendment No. 2) Rules, 2012 with regard to contempt proceedings in Kenya.”

32. Part 81 provides for four different natures or forms of violations under contempt of court. They are

- i. Committal for “breach of a judgment, order or undertaking to do or abstain from doing an act” provided for under Rule 81.4.
- ii. Committal for “interference with the due administration of justice” (applicable only in criminal proceedings) provided for under Rule 81.11.
- iii. Committal for contempt “in the face of the court”, provided for under Rule 81.16.
- iv. Committal for “making false statement of truth or disclosure statement.” provided for under Rule 81.17.

33. For what it is worth, I have demonstrated that the willful disobedience of any judgment, decree, direction, order, or other constitutes contempt of court.

34. In Samuel M. N. Mweru & Others Vs National Land Commission & 2 others [2020] eKLR the Learned Judge cited with approval excerpts from the book “Contempt in Modern New Zealand”. He states as follows;

It is an established principle of law that in order to succeed in civil contempt proceedings, the Applicant has to prove (i) the terms of the order, (ii) Knowledge of these terms by the Respondent, (iii). Failure by the Respondent to comply with the terms of the order. Upon proof of these requirements the presence of willfulness and bad faith on the part of the Respondent would normally be inferred, but the Respondent could rebut this inference by contrary proof on a balance of probabilities.



Perhaps the most comprehensive of the elements of civil contempt was stated by the learned authors of the book *Contempt in Modern New Zealand* who succinctly stated: -

"There are essentially four elements that must be proved to make the case for civil contempt. The applicant must prove to the required standard (in civil contempt cases which is higher than civil cases) that:-

- (a) the terms of the order (or injunction or undertaking) were clear and unambiguous and were binding on the Defendant;
- (b) the Defendant had knowledge of or proper notice of the terms of the order;
- (c) the Defendant has acted in breach of the terms of the order; and
- (d) the Defendant's conduct was deliberate.

35. In effect, an Applicant seeking to cite another for contempt is held to very high standards of proof, higher than in civil cases. He must prove the following:

- a. That there is in existence of an order/ judgement that is clear unambiguous and binding.
- b. That the Defendant/Respondent has knowledge of the said order/ Judgement
- c. That the Defendant/Respondent has acted in breach of the said orders
- d. That the Defendant/Respondent's conduct is deliberate.

36. Looking at the circumstances in the present application, this Honourable Court rendered its Judgement on the 29<sup>th</sup> November, 2021. This judgement is clear and unambiguous. The court while exercising its writ jurisdiction issued orders of prohibition and mandamus directed at the Respondents. No Appeal has been preferred against this judgment neither has the court been approached to make clear and parts of it in the event that they were not understood. The first element is therefore satisfied.

37. On the second element, I wish to refer to the definition of 'notice' as contained in *Black's Law dictionary* 12<sup>th</sup> Edition at page 1277;

"A person has notice of a fact or condition if that person Has actual knowledge of it; Has received information about it; Has reason to know about it; Knows about a related fact; Is considered as having been able to ascertain it by checking an official filing or recording."

38. I take two approaches in answering the question of fact of notice/knowledge of the judgement. The first is that Respondents were represented by counsel who appeared and is on record as stating that the Respondents would not be opposing the Judicial Review Applying for the reason that the application is necessary for preservation of the sanctity of title in favour of the Applicant. The matter was reserved for judgment. I am of the view that counsel for respondent in conceding to the application must have known the nature of orders that would eventually be granted against his clients and the date on which the court would be granting the said orders.

39. In the case of *Shimmers Plaza Limited* (*Supra*) the learned Judges held;

"Would the knowledge of the judgment or order by the advocate of the alleged contemnor suffice for contempt proceedings" We hold the view that it does. This is more so in a case such as this one where the advocate was in Court representing the alleged contemnor and the orders were made in his presence. There is an assumption which is not unfounded,



and which in our view is irrefutable to the effect that when an advocate appears in court on instructions of a party, then it behooves him/her to report back to the client all that transpired in court that has a bearing on the client's case."

This is the position in other jurisdictions within and outside the commonwealth. In addressing the issue whether service of a judgment or order on the solicitor for the Ministers is sufficient knowledge of the order on their part to found liability in contempt; the Supreme Court of Canada in *Bhatnager v. Canada (Minister of Employment and Immigration)*, [1990] 2 S.C.R. 217 at p. 226, LJ Sopinka, held that: - "In my opinion, a finding of knowledge on the part of the client may in some circumstances be inferred from the fact that the solicitor was informed....".

40. My second approach on notice is in respect of the 2<sup>nd</sup> Respondent states in his response that he was not served with the judgment. I have had occasion to look at the annexures in support of this application. There is a letter dated 5<sup>th</sup> December, 2021 in which counsel for the Applicant encloses a copy of the judgement and ask the 2<sup>nd</sup> Respondent to inform him of when he might be able to conduct a search to ascertain ownership of the property. This letter bears the 2<sup>nd</sup> Respondent's rubber stamp for the 7<sup>th</sup> December, 2021.

41. In *Basil Criticos v Attorney General and 8 Others* [2012] eKLR the learned Judge pronounced himself as follows:-

"...the law has changed and as it stands today knowledge supersedes personal service....where a party clearly acts and shows that he had knowledge of a Court Order; the strict requirement that personal service must be proved is rendered unnecessary"

42. I am satisfied that whatsoever the Respondents had notice of the Judgment and I find, therefore, that the second element has been fulfilled.

43. On the third element there is no doubt that the Respondents are in breach. Otherwise, this court would not have to deal with the current application. In any event, nothing would have been easier than for the Respondents to state that the application has been made in bad faith and prove that they have complied with the orders of the court. The 2<sup>nd</sup> Respondent instead cites section 80(2) as the reason for non-compliance.

44. Section 8 (3) of the *law reform Act* states that once a court has rendered itself on a judicial Review application, the only thing left for a party to do is comply or Appeal. I decline to be drawn into sitting on Appeal from a decision of this court. The said section provides;

(8)

(3) No return shall be made to any such order, and no pleadings in prohibition shall be allowed, but the order shall be final, subject to the right of Appeal therefrom conferred by subsection (5)

45. Taking into consideration my finding on the above three elements, the logical deduction is that the Respondents conduct is willful and deliberate.

46. It is essential for the maintenance of the law and order that the authority and dignity of courts must be upheld at all times. The court shall not condone deliberate disobedience of its orders.



47. In the *shimmers plaza case* (Supra), The learned judges quoted several decisions to reiterate the importance of obedience of court orders as a corollary to upholding the rule of law, good order and administration of justice in democratic societies. These decisions are:

*Hadkinson v Hadkinson*, (1952) ALL ER 567, “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 even void.

Lord Cottenham, L.C., said in *Chuck v Cremer* (1) (1 Coop. temp. Cott 342): “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 exists it must not be disobeyed.”

48. In the *shimmers case* (supra) the learned Judges of appeal reaffirmed the position of the court in *Refrigeration and Kitchen Utensils Ltd. v Gulabchand Popatlal Shah & Another*, -Civil Application No.39 of 1990 thus;

“ ... It is essential for the maintenance of the rule of law and good order that the authority and dignity of our courts is upheld at all times.”

49. I am further fortified in my decision by the provisions of *the Constitution* of Kenya 2010. Article 159(1) of which provides that the judicial authority is derived from the people and is vested upon the courts. Article 10(1) cites the rule of law is one of the national values and principles binding on all state organs, public and state officers while implementing public policies and decisions.
50. It is not for us to decide when to obey the law. Obedience of the law is not negotiable and is not a question of convenience; It is imperative that we all do. The dignity, and authority of the Court must be protected and it is for this reason that the law provides punishment for those who flagrantly disobey court orders.

## **B. Who shall bear the cost of this application?**

51. On the question of costs of the application, the general rule is that costs shall follow the event in accordance with the provisions of Section 27 of the *Civil Procedure Act* (Cap. 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise.

## **Disposition**

52. Having regard to the circumstances of this case, judicial decisions cited and the various provisions of the law, I find the Respondents to be in contempt of the judgement of the court delivered on 29<sup>th</sup> November, 2021 and hence guilty.
53. Consequently, the Notice of Motion application dated 17<sup>th</sup> December, 2021 is allowed in the following terms;
- a. The 1<sup>st</sup> and 2<sup>nd</sup> Respondent shall appear before this Honourable court on 4<sup>th</sup> July, 2022 for mitigation and sentencing.



b. Pending mitigation and sentencing, the Respondents are at liberty to purge the contempt.

54. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 12<sup>TH</sup> DAY OF MAY 2022.**

**L. A. OMOLLO**

**JUDGE.**

**In the presence of: -**

**Mr. Kirui for the Ex- parte Applicant.**

**No appearance for the Respondents.**

**Court Assistant; Ms. Jeniffer Chepkorir.**

