



REPUBLIC OF KENYA

HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

Miscellaneous Civil Application 148 of 2006

**IN THE MATTER OF: AN APPLICATION BY TYREMASTERS LIMITED TO COMMIT
THE COMMISSIONER OF LANDS FOR CONTEMPT OF COURT ORDER DATED 28TH
NOVEMBER, 2006.**

AND

**IN THE MATTER OF: JUDGEMENT AND DECREE DATED 22ND APRIL, 2005 IN
NAIROBI HCCC.2555 OF 1997 IN TYREMASTERS LIMITED –VERSUS-THE
COMMISSIONER OF LANDS, ELIZABETH SIMUKWO AND KENNEDY OGUYA**

AND

**IN THE MATTER OF: AN APPLICATION BY TYREMASTERS LIMITED FOR AN
ORDER OF COMMITTAL TO PRISON OF THE COMMISSIONER FOR LANDS**

BETWEEN

REPUBLIC..... APPLICANT

-VERSUS-

COMMISSIONER OF LANDS..... RESPONDENT

EXPARTE: TYREMASTER (K) LIMITED

RULING

By a Notice of Motion dated 7th June, 2011 and filed in court on 8th June 2011, the Applicant herein the Commissioner of Lands moved the court seeking the following orders:

1. **THAT** this application be certified urgent be heard exparte in the first instance and its service upon the Respondent be dispensed with due to its urgency.

2. **THAT** this Honourable Court be pleased to suspend the execution of its Order issued on the 3rd June 2011 committing the commissioner of lands to civil jail for a period of three months pending

the hearing and determination of this application.

3. THAT this Honourable Court be pleased to set aside/vary or review its orders issued on the 3rd June 2011.

4. THAT this Honourable Court be pleased to dismiss the Respondents Contempt of Court Application dated 14th August 2007 with costs.

The application was supported by an affidavit sworn by Christine Natome, Senior State Counsel instructed by the Hon. Attorney General who was on record for the Applicant. The application was premised on 10 grounds which for convenience can be consolidated and summarized into the following main grounds:

1. That the Respondent abused the court process by filing and prosecuting application dated 14th April, 2011 while there was a pending contempt of court application dated 14th August, 2007 which the Respondent had neglected and/or failed to prosecute yet the two applications were in respect of alleged disobedience of the same court order.

2. That the Respondent is guilty of non-disclosure of material facts.

3. That the applicant is not in contempt of any court order since there was no personal service effected as required.

4. That the prayers sought in the application dated 14th August 2007 cannot be granted by virtue of Section 21(4) of the Government Proceedings Act.

5. That the application herein has been made without undue delay.

The application is opposed through a replying affidavit sworn by Mr. Chacha Odera, counsel for the Respondent.

The background against which this application was made as can be discerned from the court record and as stated by counsel for the parties when the application was argued interpartes on 10th November, 2011 is that on 28th June, 2006 the High Court issued an order of mandamus directing the Commissioner of Lands (*Applicant*) to pay the decretal sum in HCC. No.2555 of 1997 which amounted to a total sum of Kshs.17,044,720/- together with costs of the suit. The order of mandamus was apparently served on the then Commissioner of Lands together with a penal notice but when payment was not forthcoming, the Respondent sought and obtained leave to file contempt of court proceedings against the applicant. This is what led to the filing of the application dated 14th August 2007 seeking to have the applicant committed to civil jail for a period of 6 months or any such period as the court would determine for disobeying the order of mandamus issued on 28th November, 2006.

The application was opposed by the applicant and though it was fixed for hearing for a number of times, it never proceeded to hearing but was stood over generally apparently to give parties a chance to reach settlement as the Hon. Attorney General who represented the Applicant had informed the court that he had received instructions to settle the decree and parties were likely to record settlement.

From the court record, it is clear that no settlement was eventually reached as the Respondent subsequently sought and obtained leave to file fresh contempt proceedings against the applicant which culminated in the filing of application dated 4th April, 2011 seeking to have the applicant committed to civil jail for contempt of court. This application was heard exparte on 10th May, 2011 as the applicant though served with the application did not file any response to the same nor did he or any representative from the Hon. the Attorney General's office attend court on the hearing date. Following the hearing of the application exparte, J. Gacheche proceeded to deliver her ruling on the application on 3rd June, 2011. She

allowed the application and issued committal orders against the applicant for 3 months for contempt of court for having disobeyed the court orders issued on 28th November, 2006. She also awarded costs of the application to the Respondent.

These are the orders which the applicant in the application dated 7th June, 2011 to which this ruling relates now wants varied, reviewed or set aside.

In her submissions before the court, M/s Gitahi for the Applicant urged the court to set aside orders issued by J. Gacheche on 3rd June, 2011 in order to give the applicant an opportunity to be heard in his defence noting that committal of a person to civil jail is not a light matter especially where that person was a public officer who allegedly had no capacity to disburse funds which is what the order of mandamus which the Applicant had allegedly disobeyed required him to do. It was M/s Gitahi's submission that even though the Attorney General was not represented in the hearing on 10th May 2011, Counsel for the Respondent was obligated to disclose to the court that there was another application pending on the same subject matter dated 14th August, 2007 which had been defended by the Attorney General by way of filing grounds of opposition and skeleton submissions but which had not been prosecuted before embarking on canvassing his application dated 4th April, 2011. That the application dated 14th August, 2007 should have been disposed off first as the Applicant had a strong defence to the same and he should be given an opportunity to be heard on his defence.

On his part, Mr. Chacha Odera for the Respondent submitted that the filing of the 2nd application for contempt of court dated 4th April, 2011 was necessitated by the fact that a new commissioner of lands had taken office and he had not been served with the court order of 28th November, 2006 which was the basis for the contempt proceedings in the application dated 14th August, 2007. He further submitted that after the application dated 14th August, 2007 was stood over generally and the applicant through the Attorney General failed to settle the decree, the new commissioner of lands was served with the order of mandamus and a penal notice and as the new Commissioner of Lands also disobeyed the court order, fresh proceedings to commit him to civil jail for contempt of court were instituted. Mr. Chacha further contended that in his application for leave to file contempt proceedings against the new commissioner of lands, he referred the court to the court record and after J. Gacheche studied the same, she proceeded to grant leave to the Respondent to file contempt proceedings against the commissioner of lands. It was therefore his case that he was not guilty of any non-disclosure since the application dated 14th August, 2007 and the fact that it had not been prosecuted was part of the court record.

It was Mr. Odera's further contention that having been served with the application dated 4th April, 2011 and having failed to oppose the same or attend court on the hearing date without giving a reasonable explanation for their absence, the applicant through the Attorney General was now estopped from claiming that it had a good defence to the application.

Having carefully considered the application, the rival submissions by counsel and the court record, I find that it is not disputed that the application dated 14th August 2007 had been defended by the applicant and that it had not been prosecuted or withdrawn by the time the 2nd application seeking similar orders of committal of the applicant to civil jail for contempt of court was filed and prosecuted. It is also not disputed that the 2nd application was based on a 2nd service of the mandamus order and penal notice on a new commissioner of lands who had taken office replacing the commissioner who had been served with the order whose alleged disobedience was the basis of the 1st application for contempt of court. Having these facts in mind, I wholly concur with Mr. Chacha's submission that the new service of the court order on a new commissioner of lands and its alleged disobedience gave rise to a new cause of action which the Respondent had liberty to pursue by filing fresh contempt proceedings against the new commissioner to compel him to obey the court orders served on him since the 1st application was no longer sustainable having been based on disobedience of court orders by a public officer who was no longer in service. This was necessary in order to uphold and protect the dignity and authority of the court.

I therefore find that the filing of the 2nd application dated 4th April, 2011 was proper in law and it did not amount to an abuse of the court process although as correctly pointed out by M/s Gitahi for the applicant, the first application dated 14th August, 2007 ought ideally to have been formally withdrawn before the 2nd application was prosecuted.

Failure by the Respondent to withdraw the said application before prosecuting the 2nd application was a procedural omission which in my view did not affect the validity of the 2nd application dated 4th April, 2011 since the two applications were independent of each other based on different causes of action namely service and disobedience of court orders by two different officers.

The applicant has sought in paragraph 4 that the application dated 14th August, 2007 be dismissed with costs to the applicant. I find that since the said application was not prosecuted on merit, it would not be appropriate to dismiss it as prayed but in order to avoid a situation where it will remain hanging in the court record and it has now clearly been overtaken by events I will exercise my discretion and mark it as withdrawn with costs to the applicant herein.

On the issue of disclosure, I find that the claim that Mr. Chacha Odera did not bring it to the court's attention on 10th November, 2011 that there was another similar application pending which had not been prosecuted or otherwise determined which is not disputed by the Respondent did not amount to non disclosure of material facts since this information was already part of the court record and the court must have taken cognizance of that fact when studying the court file. It was not a matter which was entirely new and only known to the Respondent's counsel which then he would have been under a duty to disclose to the court.

It is also worth noting that on 17th March, 2011 when the application for leave to file fresh contempt proceedings against the applicant was prosecuted, M/s Natome, State Counsel for the applicant was actually in court and she did not also raise the issue of pendency of the application dated 14th August 2007.

It is clear from the depositions in the supporting affidavit sworn by M/s Natome on 7th June, 2011 and from M/s Gitahi's submission that what the applicant mainly seeks in this application are orders to set aside not to vary or review the orders issued by J. Gacheche on 3rd June, 2011. It is trite law that setting aside of judgement or orders obtained *ex parte* depends on the discretion of the court which must be exercised judiciously.

In order for the court to exercise its discretion in favour of the applicant, the applicant must give a satisfactory explanation of why he failed to attend the court on the hearing date or show sufficient cause why in the interest of justice the said orders should be set aside.

In this case it is my view that no good reason has been given why the applicant or the Attorney General did not attend the court on 10th May, 2011 when hearing of the application was fixed for hearing *inter partes*. It is not disputed that both the Attorney General and the commissioner of lands had been served with the application. They were therefore both aware of the application and the hearing date but they chose not to respond to the application and to attend court on the hearing date. Infact it is clear from the court record that the hearing date had been fixed on 17th March, 2011 in court in the presence and hearing of M/s Natome, the State Counsel who had conduct of the matter for the applicant instructed by the Hon. Attorney General. However on the hearing date there was no attendance by the applicant and no reasons were given for his absence or that of his counsel.

M/s Natome has deponed in paragraph 13 & 14 of her supporting affidavit that the reason why the Attorney General was not represented in the hearing of 10th May, 2011 was because the office file was missing. This in my view is not a good reason to warrant the exercise of the court's discretion in the applicant's favour by setting aside the impugned orders.

Having been aware of the hearing date, the Attorney General was duty bound to attend the court and seek directions on the way forward in view of the alleged missing file. The fact that the file was missing could not have prevented the Attorney General's representative or the applicant to attend the court on the hearing date to protect his interest. Besides this does not explain why no papers were filed in opposition to the application if in fact the applicant had a good defence to the application or he was interested in defending himself against the allegations in the application.

Having failed to utilize the opportunity given to him in the first place to defend the application by either filing papers in opposition thereto or attending the court to defend his interest on the hearing date without a good reason, the applicant cannot now have any justification to ask the court to give him a 2nd opportunity to do what he neglected and/or failed to do in the first opportunity accorded to him without any good reason. The applicant and particularly the Attorney General's office appear to have taken a rather casual view of this matter which is something that this court finds untenable. It is interesting to note that even after the instant application was filed, representatives from the State Law Office kept informing the court on subsequent mention dates that they were in the process of settling the Respondent's claim but this was not done by the time the application was argued inter partes on 10th November, 2011.

This court appreciates the fact that the liberty of a citizen especially that of a public officer sought to be punished for failure to execute a public duty is a weighty matter but is also alive to the fact that in every case the court must strive to administer substantive justice to the parties before it given the circumstances of each case. Justice is a double edged sword. It cuts both ways. The administration of justice often times require issuing of orders which may adversely affect one of the parties to litigation.

What then would be the interests of justice in this case?

From the court record, it is clear that the Respondent herein has been kept away from the fruits of a judgement obtained in its favour from 2006 about 5 years ago due to consistent failure by the applicant to obey court orders without giving any reasonable explanation. In my view substantive justice requires that the Respondent is enabled to enforce execution of the decree issued by a competent court in his favour so that it can be able to enjoy the fruits of its judgement.

Be that as it may, it is not lost on this court that the applicant has maintained that orders of 3rd June, 2011 should be set aside as he had not been personally served with the court order in question and that the said orders ought not to have been issued in the first place in view of the provisions of Section 21(4) of the Government Proceedings Act.

Having perused the court record, I find that the issue of the applicant not being an accounting officer who can be held responsible to settle the decree in HCC.2555/1997 was raised before J. Emukule who thereafter proceeded to grant the writ of mandamus against the applicant herein. It is not disputed that no appeal was lodged against J. Emukule's orders and the same were never set aside or vacated.

It would therefore follow that the orders of mandamus were valid and enforceable by the time the order of committal of the Applicant was issued by J. Gacheche. I also note from the court record that the issue of personal service of the order on the applicant was substantively dealt with by Hon. J. Gacheche in her ruling of 3rd June, 2011 and she made a finding that the applicant had been properly served with the said order.

In view of the foregoing, this court cannot vary or set aside the orders of 3rd June, 2011 on the basis of either lack of personal service on the applicant as alleged or on the basis of the fact that the orders should not have been issued in view of Section 21(4) of the Government Proceedings Act since in my view doing so would be tantamount to sitting on appeal on decisions made by my brother and sister judges of the High Court with whom this court share's concurrent jurisdiction which is not permissible in law. These are matters that can only be ventilated and determined on appeal by the Court of Appeal.

Without prejudice to the foregoing, if in fact the Applicant held the view that he could not comply with the

order of mandamus as he was not empowered to disburse funds as an accounting officer, it is difficult to understand on what basis he kept making numerous undertakings on mention dates before and after the orders were issued that he had obtained instructions to record settlement with the Respondent herein on the issue of payment.

For all the foregoing reasons, I find that sufficient cause has not been shown by the Applicant to warrant varying or setting aside of the orders issued by J. Gacheche on 3rd June, 2011. Consequently, I find no merit in the application dated 7th June, 2011 and it is hereby dismissed with costs to the Respondent.

DATED and**SIGNED** by me at Nairobi this 27th day of January, 2012

C. W. GITHUA
JUDGE

In the presence of:

M/s Ogembo for Chacha Odera for Applicant
N/A for Respondent