



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

MILIMANI LAW COURTS

Miscellaneous Application 6 of 2011

IN THE MATTER OF ORDER RULE 1 OF THE CIVIL PROCEDURE ACT

AND

**IN THE MATTER OF AN APPLICATION FOR BY HASSAN LOLO LOCHE FOR LEAVE TO
APPLY FOR JUDICIAL REVIEW ORDER OF PROHIBITION**

BETWEEN

HASSAN LOLO LOCHE.....APPLICANT EXPARTE

VERSUS

**HON. ATTORNEY GENERAL1ST RESPONDENT
NAIROBI PROVINCIAL COMMISSIONER2ND RESPONDENT**

AND

**CITY COUNCIL OF NAIROBI.....1ST INTERESTED
PARTY**

STEPHEN MUIGAI.....2ND INTERESTED PARTY

RULING

By way of a notice of motion brought under Order 40 Rule 3 of the Civil Procedure Rules, 2010 and sections 1A,1B,3A and 63 (c) of the Civil Procedure Act Stephen Muigai (the 2nd Interested Party) prays for the following orders:-

- 1. THAT an order of committal to prison be made against HASSAN LOLO LOCHE the applicant herein for such period as this honourable court may deem fit and just.**
- 2. THAT the Applicant herein be ordered to purge his contempt by demolishing all the structures build after this honourable court ordered that no further developments should be undertaken on Plot X3 located in Huruma Estate until further orders of this court.**
- 3. THAT the costs of this application be borne by the Applicant herein.**

The Application is supported by grounds on its face together with the supporting affidavit sworn by

Stephen Muigai (the 2nd interested Party) on 6th April, 2011. In short the 2nd Interested Party's case is that on 22nd February, 2011 Musinga, J issued orders to the effect that no further developments should continue on plot No X3 located at Huruma Estate pending the hearing of the Interested Party's application dated 16th February, 2011. Thereafter the 2nd Interested Party's counsel extracted the order and served it together with a Penal Notice upon Hassan Lolo Loche's advocate on record namely M/s Onyancha Nyakundi & Co. Advocates. It is the 2nd Interested Party's case that even after the said order was served upon Hassan Lolo Loche's advocate Hassan Lolo Loche (the Applicant in these Judicial review proceedings) continued to carry out construction on the plot. The 2nd Interested Party therefore urges this court to uphold its dignity and authority by punishing Hassan Lolo Loche for contempt of court.

In grounds of opposition dated 11th April, 2011 and filed in court on the same date Hassan Lolo Loche opposes the 2nd Interested Party's application on the grounds that it does not meet legal mandatory conditions for contempt proceedings, the same is not factual and misleading and that the supporting affidavit thereof was not sworn by the 2nd Interested Party. The grounds of opposition were buttressed by the replying affidavit sworn on 3rd May, 2011 by Hassan Lolo Loche. He denied carrying out further construction.

The advocates for the parties filed written submissions in support of the positions they have taken. The 2nd Interested Party's lawyer argued that the fact that the Applicant's advocate was present in court when the order was issued and that he was also served with the order and penal notice means that the Applicant was aware of the court order. He submitted that the applicant cannot question the 2nd Interested Party's signature on the supporting affidavit since the Applicant has no personal knowledge of the 2nd Interested Party's signature.

On his part counsel for the Applicant argued that the Applicant is not guilty of contempt because he was not personally served with the order together with a penal notice. He also submitted that the 2nd Interested Party has not placed any tangible evidence before the court to show that the Applicant had indeed continued with the construction and thereby disobeyed the court order. Thirdly counsel for the Applicant submitted that the application should be dismissed because the supporting affidavit was not signed by the 2nd Interested Party. He asked the court to compare the signature on the other documents signed by the 2nd Interested Party and the signature on the supporting affidavit and come to the conclusion that the signatures were not made by the same hand.

Let me start by considering the issue of the signature on the supporting affidavit. The Applicant has urged the court to declare the signature on the supporting affidavit not to be the signature of the 2nd Interested Party. On what basis would the court make such a declaration? It was upon the Applicant to endeavor to place before the court evidence to show that the signature on the supporting affidavit did not belong to the 2nd Interested Party. Such evidence could have come from a handwriting expert or by way of cross-examination of the 2nd Interested Party. The Applicant did not adduce such evidence. That being so, it is safe to hold that the signature on the supporting affidavit belongs to the 2nd Interested Party.

The second issue is whether the Applicant was properly served with the court order and penal notice. The Court of Appeal has held that where there is no evidence of personal service of the order on the contemnor the contemnor cannot be committed for contempt of court. See *Loise Margaret Waweru Vs. Stephen Njuguna Githuru Court of Appeal at Nairobi. Civil Appeal No. 198 of 1998*. In the case before me there is no evidence that the Applicant was personally served with the court order and penal notice.

Having concluded that the Applicant was not personally served with the court order, I need not make a decision as to whether the Applicant disobeyed the court order or not. It is imperative however that court orders are obeyed by the parties. The Applicant is the one who brought these judicial review proceedings. He must have believed that this is where he would get assistance. It would be sad if he were to go out and disobey orders given by the organ he had run to for refuge. For avoidance of doubt let it be

known to all parties that the orders issued by this court on 22nd February, 2011 remain in force. The said orders clearly commands that no further developments should take place on the plot. The orders should be obeyed. The cost of this application will be in the cause.

Dated and signed at Nairobi this 25th day of January, 2012.

W. K. KORIR

JUDGE