



**Trans County Developers Limited v National Land Commission & another; Rotich (Applicant)
(Environment & Land Case 118 of 2020) [2022] KEELC 3449 (KLR) (11 May 2022) (Ruling)**

Neutral citation: [2022] KEELC 3449 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT & LAND CASE 118 OF 2020**

EO OBAGA, J

MAY 11, 2022

BETWEEN

TRANS COUNTY DEVELOPERS LIMITED PLAINTIFF

AND

NATIONAL LAND COMMISSION 1ST DEFENDANT

PROTUS HAMISI WAMBANDA 2ND DEFENDANT

AND

BETTY J ROTICH APPLICANT

RULING

Introduction:

1. This is a ruling in respect of a Notice of Motion dated June 29, 2021 in which the 1st defendant/applicant seeks the following orders: -
 1. Spent
 2. That pending the hearing and determination of this Application, this Honourable court be pleased to stay the execution of the warrants of arrest issued on June 21, 2021 by this honourable court against the secretary/Chief Executive Officer of the 1st defendant herein.
 3. That this Honourable court be pleased to discharge or lift the warrants of arrest issued against the Chief Executive Officer/Secretary of the 1st respondent on June 21, 2021.
 4. That the consent order dated February 23, 2021 be set aside/vacated.
 5. That the cost incidental to the application abide in the outcome of the main suit.



6. That this honourable court do make such further orders and or directions(s) as it may deem necessary in the circumstances in order for the ends of justice to be met.

Background:

2. The applicant had compulsorily acquired part of Kapsaret/Kapsaret Block 10 (Lamaiywet/732 on behalf of Kenya National Highways Authority (KENHA) for purposes of construction of Eldoret Bypass. When the awards were being processed, it turned out that there were issues as regards the valuation and the amount which the Applicant received from KENHA. The amount in the valuation and award was Kshs 32,574,044/= whereas KENHA had remitted to the Applicant Kshs 2,792,154/=
3. The amount in the award was consequently varied to Kshs 2,792,154/= and it was expected that the affected party would go for the compensation. As the applicant was waiting for disbursement of the award, there arose a dispute as to who owned the property part of which had been acquired for the construction of the Eldoret Bypass. The plaintiff/respondent then filed the present suit in which it sought to compel the Applicant to pay the Kshs 32,574,044/= to it and not to the 2nd defendant/respondent.
4. The plaintiff/respondent contemporaneously filed an application in which it sought an injunction to stop the applicant from releasing the Kshs 32,574,044/= to the 2nd defendant/respondent. The plaintiff/respondent also sought orders compelling the applicant to deposit the Kshs 32,574,044/= in the joint names of the Advocates for the plaintiff/respondent and that of the 2nd defendant/respondent.
5. On February 3, 2021, the Advocates for the plaintiff/respondent and that of the 2nd defendant/respondent entered into a consent which compromised the Notice of Motion dated December 21, 2020 with the result that the applicant was compelled to deposit Kshs 32,574,044/= in a joint account in the names of the advocate for the plaintiff/respondent and the 2nd defendant/respondent. The Applicant was to comply with the order within 14 days.
6. The order was served upon the applicant which did not comply. the 2nd defendant/respondent then moved to court and filed a Notice of Motion dated March 22, 2021 in which he sought an order committing the Chief Executive Officer of the applicant for contempt of court. This Application was allowed on June 10, 2021. Warrants of arrest were extracted and given to Police officers from Central Police Station in Nairobi who went to arrest the CEO of the Applicant. This is what prompted the applicant to file the present application.

Applicant's contention:

7. The applicant contends that it was not served with documents in this case which culminated into the issuance of the warrant of arrest against its Chief Executive Officer. The applicant contends that as it was sorting out the awards for disbursement of the monies to those affected by the Eldoret – Bypass, it came to the attention of the applicant that there were variations between the amount of monies in the advertised awards and what was actually due to land acquired. The anomaly was rectified and the affected party was asked to go for payment but none went.
8. It turned out that, KENHA on whose behalf the land was acquired had disbursed to the Applicant a sum of Kshs 2,792,154/= which was in accordance with what the surveyors of KENHA and the Applicant found. It also emerged that there was a dispute as to who owned the acquired portion. There were the two parties in this suit as well as Eldoret Hospital who were laying claim to the acquired plot.



The applicant therefore argues that in accordance with the Land Act, the applicant was obliged to keep the compensation until the true owner was ascertained.

9. The applicant contends that by the plaintiff/respondent and the 2nd defendant/respondent entering into a consent for the deposit of Kshs 32,574,044 in their advocates account, the parties were going against the provisions of the Land Act and that in any case, the amount sought to be deposited was a result of alleged agreement between parties and was not a true reflection of the value of the acquired portion.
10. The applicant contends that the parties herein colluded to have the amount deposited in court contrary to the express provisions of the Land Act. The applicant argues that the warrants should not have been issued based on a consent which was obtained through collusion.

Plaintiff/Respondent’s contention:

11. The plaintiff/respondent contends that the applicant was duly served with all documents which culminated into the issuance of warrant of arrest and that the applicant chose to ignore the same. The plaintiff/respondent argues that there was valuation and an award given which were published and that if there were any changes to the initial valuation and award, then it is not aware and that the order for deposit was made by consent and is not against any law. The plaintiff/respondent contends that as the amount had been ascertained, it became the property of the recipient and the parties entitled to it were free to enter into a consent to preserve it.

The 2nd Defendant/Respondent’s contention:

12. The 2nd defendant/respondent contends that the applicant’s application is misconceived, bad in law and brought in bad faith.

Analysis:

13. The parties were directed to file written submission. The applicant filed its submissions dated January 26, 2022. The plaintiff/respondent filed its submission dated January 17, 2022. I have considered the applicant’s application as well as the opposition to the same by the plaintiff/respondent as well as the 2nd defendant/respondent. The first issue for determination is whether the consent of February 3, 2021 should be set aside. The 2nd issue is whether the warrant of arrest against the applicant’s Chief Executive Officer should be vacated.
14. On the first issue, the law is clear that a consent order can only be set aside if it was obtained by fraud or collusion, material non-disclosure or against the policy of the court or on grounds which will vitiate a contract. See Flora N. Wasike –vs- Destimo Wamboko (1988) Eklr.

In the instant case, the plaintiff/respondent and the 2nd defendant/respondent are fighting over ownership of the property acquired. Though *prima facie*, it is the plaintiff/respondent who has title to the property acquired, the initial award was made in favour of the 2nd defendant/respondent. It is not clear under what circumstances the 2nd defendant/respondent was being awarded a huge sum of money yet the property was not in his name. This huge amount turned out to have been some sort of arrangement which was meant to fleece public funds. This is why the amount was substantially reduced when it was discovered that there was something fishy with the same. There is clearly collusion which went into the recording of the consent.

15. There is a clear procedure under the Land Act on what should happen to monies for compensation where the true owner is not known. Pursuant to section 115 of the Land Act, the applicant is obliged



to put such monies in a special compensation account held by it. It was not therefore open to the plaintiff/respondent and the 2nd defendant/respondent to enter into a consent which was contrary to established law.

Disposition:

16. I therefore find that the consent of February 3, 2021 is amenable to be set aside. I therefore proceed to set aside the consent order made on February 3, 2021 which has been erroneously stated to have been given on February 23, 2021. This being the case, it follows that the warrant of arrest against the Chief Executive officer of the applicant issued on June 21, 2021 stands vacated. The costs of this application shall abide the outcome of the main case.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET ON THIS 11TH DAY OF MAY, 2022.

E. OBAGA

JUDGE

In the virtual presence of;

Mr. Lilan for Plaintiff

Court Assistant -Albert

E. OBAGA

JUDGE

May 11, 2022

