



**REPUBLIC OF KENYA**

**High Court at Meru**

**Miscellaneous Case 11 of 2011**

**IN THE MATTER OF APPLICATION FOR LEAVE TO INSTITUTE CONTEMPT  
PROCEEDINGS**

**AND**

**IN THE MATTER OF THE LTS CASE NO.65/2001**

**AND**

**IN THE MATTER OF THE ENFORCEMENT OF THE DECREE IN LDT NO.65/00**

**BETWEEN**

**ALICE M. NYAGA.....APPLICANT**

**VERSUS**

**CLERK CHOGORIA TOWN COUNCIL.....1<sup>ST</sup> RESPONDENT**

**PIUS NJAGI NDUBI.....2<sup>ND</sup> RESPONDENT**

**RULING**

The applicant Alice M. Nyaga through a Notice of Motion dated 11<sup>th</sup> March, 2012 brought under Section 3, 3A, Civil Procedure Act and Order 51 Rule 1 of Civil Procedure Rules, Section 55 of the Judicature Act(Cap 8) and Order 52 Supreme Court Rules is seeking that the Clerk, Chogoria Town Council be committed to jail for a period not exceeding six(6) months for violating court's order dated 16<sup>th</sup> August, 2010 and further court do direct that an access road be excised from land parcel Mwimbi/Chogoria/905. That the OCS Chogoria do ensure compliance.

The grounds in support of the application are stated on the face of the application. The application is supported by annexed affidavit of the applicant. The application on the other side is opposed. The 1<sup>st</sup> respondent swore a replying affidavit in opposition to the application on 6<sup>th</sup> June, 2011 whereas the 2<sup>nd</sup> respondent swore his replying affidavit on 27<sup>th</sup> July, 2012.

The trial court heard oral submissions made by Mr. C. Kariuki, learned Advocate for the applicant, Mr. G. Ringera, learned Advocate for 1<sup>st</sup> respondent and the 2<sup>nd</sup> respondent who appeared in person. The court has carefully considered the said submissions. It has also read the pleadings filed by the parties herein in support of their respective opposing positions.

The issue for determination by this court is whether the respondents have violated the court's orders made on 16<sup>th</sup> August, 2010 directing that a road of access be excised from land parcel Mwimbi/Chogoria/905, and further whether the court clerk has met the costs of the portion of land excised from Mwimbi/Chogoria/905.

In the present application, the facts are as follows:-That the applicant and the respondents were parties in the Land Disputes Tribunal in which the applicant had sued the respondents seeking a road of access to land parcel Mwimbi/Chogoria/497. The applicant was successful and the tribunal's decision was made judgment of court in the CMC LDT No.65 of 2000. A decree was extracted and served upon the respondents. The respondents did not comply with the courts decree.

On 10<sup>th</sup> February, 2011 the applicant sought court's leave to lodge application for contempt. The application was granted on 23<sup>rd</sup> February, 2011 and present application was subsequently filed on 11/8/2011. The 1<sup>st</sup> respondent in his replying affidavit contends inter alia that the suit property is no longer held by the Council as it is no longer in existence as the register in respect of the same was closed as per annexure "MWI" which shows the same was closed on 6/9/2002 on subdivision to read Nos.3502-3505 and that the respondent has no land available for creation of an access road. The 1<sup>st</sup> respondent further contends that the respondent has no mandate to forcefully enter into registered land to curve out an access road and that the applicant can only get reprieve from the Land Registrar.

The court meanwhile had called for a report from Meru South District Surveyor, Physical Planning Officer of Meru South and the Land Registrar ascertaining where the road of access to Mwimbi/Chogoria/497 was. The report was filed on 8/8/2011 and showed land parcel Mwimbi/Chogoria/497 does not have road of access.

The 2<sup>nd</sup> respondent on the other hand provided copies of mutation forms indicating that the suit property that is Mwimbi/Chogoria/905 had been subdivided into four plots and the same is closed. The 2<sup>nd</sup> respondent further contended that the application is overtaken by events as parcel Mwimbi/Chogoria/905 no longer exists following its subdivision to plots Nos.3502, 3503, 3504 and 3505 as per annexure "PNN2" and PNN 3(a), (b) and (c). Incidentally plots No.3502 and 3503 are in the name of the 2<sup>nd</sup> respondent. The owners of plots No's 3504 and 3505 have not been disclosed.

The order for excising access road from land parcel Mwimbi/Chogoria/905 was issued on 16<sup>th</sup> August, 2001. The 1<sup>st</sup> respondent did not deny being aware of the court's order nor did he deny service of the court's order. The 2<sup>nd</sup> respondent admit he was party to the suit at the trial before Land Disputes Tribunal but denies being served with any application that occasioned the issuance of the decree. He however admitted of coming to know of the order through a friend. He did not indicate when he became aware of the order.

In matters of contempt of the court, one is required to obey the court's order upon becoming aware of the same whether he is served with a copy of the order or not and in default of compliance one is in contempt of court.

In support of the above proportion I refer to the case of **GATIMU FARMERS –VS-GEOFFREY KAGIRI KIMANI & OTHERS HCCC NO.302 OF 2004(NAIROBI)** in which the court stated that orders issued by court binds not only parties to the suit but all those persons who are made aware of the said order.

In the instant case the respondents were aware of the court's order having participated in the proceedings and the allegation of non-service cannot be used as a basis for parties to disobey court's order.

Further the 2<sup>nd</sup> respondents proceeded to carry out subdivision of suit property as per mutation form on 19<sup>th</sup> September, 2001 under watchful eye of the 1<sup>st</sup> respondent who did not stop the mutation so as to comply with court's order and decree.

The 1<sup>st</sup> respondent cannot be said to have not been aware of what was happening as the lands are within its area of jurisdiction. The 1<sup>st</sup> respondent deliberately decided to disobey court's order. Incidentally the 2<sup>nd</sup> respondent's title No.3502 and 3503 were issued on 6.9.2002. The 2<sup>nd</sup> respondent's plots as per sketch plan attached to the mutation form are the ones blocking the road of access to Mwimbi/Chogoria/497.

The excuse by the respondents that Mwimbi/Chogoria/905 has been subdivided and that no road of access can be excised is untenable. The first respondent is the one who allocated the plots within Chogoria Town and left the applicant without road access and they are the ones who are responsible for the applicant's misery.

In the instant application, the respondent did not challenge the court's decree but proceeded to carry out subdivision in complete disregard of court's order requiring that a road of access be excised from Mwimbi/Chogoria/905. The subdivision which was carried out contrary to court's decree with a view to deny applicant right of access road to her plot cannot be used to stop execution of the decree requiring the opening of road of access nor can such subdivision be used by the respondents to frustrate a valid court's decree. The order is clear that the Council is to meet costs of the portion of land excised from Mwimbi/Chogoria/905(now 3502, 3503, 3504 and 3505).

Article 10(3) of the Constitution of Kenya which deals with natural values and principles of governance entrenches justice and equity to all.

The said article provides:-

**10. (1) the national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them—**

**(a) Applies or interprets this Constitution;**

**(b) Enacts, applies or interprets any law; or.....”**

The respondents in refusal to open road of access to applicant's property are acting contrary to national values and principles of governance. Article 10(2) (b) of the Constitution enjoins court to do justice equity in administration of justice.

Article 10(2),(b) of the Constitution provides:-

**(2) The national values and principles of governance include—**

**(b) Human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized;**

Further to the above Article 159 1 (a), (b) and (d) provides:-

**159. (1) Judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under this Constitution.**

**(2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles**

**(a) Justice shall be done to all, irrespective of status;**

**(b) Justice shall not be delayed;**

**(d) Justice shall be administered without undue regard to procedural technicalities; and.....”**

Under the above Article the court is enjoined to do justice to all irrespective of status and do the same expeditiously without undue regard to technicalities.

In view of the above, I find that the respondents were all the time aware of the court order and decree and chose to ignore it. They proceeded to cause subdivision ignoring the court's order.

I am satisfied the applicant has proved her case on the required standard as set out in the case of **MUTITIKA –VS-BAHARINI FARM LIMITED(1985) KLR(229)** in which case it was stated:-

***“The standard of proof in contempt proceedings must be higher than proof on balance of probabilities, and almost but not exactly, beyond reasonable as it is not safe to extend the latter standard to an offence which is quasi criminal in nature.” The guilt of a contemnor has to be proved with such strictness of proof as is consistent with the grant of the charge.”***

In light of the above, the application succeeds and I proceed to make the following orders:-

1. ***The Town Clerk, Chogoria Town Council is guilty of violating court's order dated 16<sup>th</sup> August, 2010 by failing to excise road of access to MWIMBI/CHOGORIA/497.***
2. ***The Clerk, Chogoria Town Council is given thirty(30) days from today to excise road of access from parcel No.Mwimbi/Chogoria/905(now Nos.3502, 3503, 3504 and 3505) to access Mwimbi/Chogoria/497 and meet the costs of the portion of land to be excised from the above as previously ordered in the decree dated 18<sup>th</sup> September, 2001.***
3. ***In default of compliance with (2) above I hereby order that warrant of arrest do issue against the person of the Town Clerk, Chogoria to show cause why he/she should not be committed to civil jail in a suitable remand home for a period not exceeding six months or until such period as may be deemed appropriate for the purposes of purging the contempt. The warrant of arrest should be executed and enforced by the Bailiff of this court and the Officer-in-charge of the Chuka Police Station is hereby directed to assist the Bailiff in the enforcement of the order and providing security for the said exercise.***
4. ***Costs of the application awarded to the applicant against the 1<sup>st</sup> respondent.***

**DATED, SIGNED AND DELIVERED AT MERU THIS 18<sup>TH</sup> DAY OF OCTOBER, 2012.**

**J. A. MAKAU**

**JUDGE**

**DELIVERED IN OPEN COURT IN PRESENCE OF:**

1. Mr. C. Kariuki for applicant
2. Mr. G. Riungu for the 1<sup>st</sup> respondent
3. 2<sup>nd</sup> respondent in person.

**J. A. MAKAU**

**JUDGE**