



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MISCELLANEOUS CIVIL APPLICATION NO. JR ELC 66 OF 2010

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR ORDERS OF
PROHIBITION, CERTIORARI AND MANDAMUS**

AND

**IN THE MATTER OF THE LAW REFORM ACT, ORDER LIII OF THE CIVIL PROCEDURE
RULES AND THE**

LAND ACQUISITION ACT, CAP 295 OF THE LAWS OF KENYA

BETWEEN

MAISHA NISHIKE

LTD.....APPLICANT

AND

**THE COMMISSIONER OF LANDS.....1ST
RESPONDENT**

**THE MINISTER OF LANDS.....2ND
RESPONDENT**

**PERMANENT SECRETARY, MINISTRY OF LANDS.....3RD
RESPONDENT**

**PERMANENT SECRETARY, MINISTRY OF ROADS AND PUBLIC WORKS.....4TH
RESPONDENT**

RULING

This ruling is in respect of an application by the applicant dated 30th November, 2010 in which the following orders are sought:

“1. The Honourable Court do cite for contempt the following persons:

- (a) The Commissioner of Lands, Mr. Zablon A. Mabea;**
- (b) The Minister For Lands, the Hon. Mr. James Orengo;**
- (c) The Permanent Secretary, Ministry of Lands, Ms. Dorothy Angote;**
- (d) The Permanent Secretary, Ministry of Roads, Mr. Michael Kamau;**
- (e) The Directors Of China Road & Bridge Corporation (K)**

2. The Honourable Court do commit to civil jail for a period of six (6) months for contempt of court the following persons:

- (a) The Commissioner of Lands, Mr. Zablon A. Mabea;**
- (b) The Minister for Lands, the Hon. Mr. James Orengo;**
- (c) The Permanent Secretary, Ministry of Lands, Ms. Dorothy Angote;**
- (d) The Permanent Secretary, Ministry of Roads, Mr. Michael Kamau;**
- (f) The Directors of China Road & Bridge Corporation (K)**

3. Any other order that this honourable court might deem fit and just to grant in the circumstances.

4. Costs of the application be borne by the Respondents.”

The application was supported by an affidavit sworn by **Evans Mwaura Githua**, a Director of the applicant. The applicant is the registered proprietor of a parcel of land known as **Land Reference Number 5989/3** measuring 20 acres or thereabout.

Sometimes in the year 2010 the 1st and 2nd respondents initiated the process of compulsory acquisition of a portion of the aforesaid parcel of land measuring **2.9647 acres**, hereinafter referred to as **“the suit property”**, for purposes of construction of the Nairobi Northern By-Pass road. The applicant was aggrieved by the manner in which the process was conducted and moved to court and sought leave to apply for orders of certiorari to quash the decision of the said respondents published in the Kenya

Gazette. He also sought leave to apply for an order of prohibition directed to the respondent to prohibit them,, their authorized agents, servants or any other person howsoever from taking any steps to enforce the said decision.

The application came up for hearing before Wendoh J. on 30th July, 2010 and leave was granted as sought. Further, the grant of the leave was to operate as a stay of implementation of the aforesaid decision for a period of sixty (60) days.

The applicant alleged that the orders issued by Wendoh J. were extracted and served upon “all the three respondents”. According to an affidavit of service sworn by one **Moses M. Wambua**, a court Process Server, on 2nd August, 2010 he served the said order upon one Mr. Odero, a Legal Officer at the Ardhi House, Nairobi, who accepted service for and on behalf of the 2nd and 3rd respondents. On the same day, the order was also served upon one Mr. G.O. Ochieng, Land Registrar, for and on behalf of the 1st respondent. The Process Server further indicated that on the same day at around 12.20 p.m. he proceeded to the Ministry of Roads Headquarters and met the secretary of the 4th respondent and when he introduced himself to her and the purpose of his visit, she directed him to the Legal Department situate on the 11th floor of the building where he effected service upon one Mr. Ochiel, a Legal Clerk, who accepted service for and on behalf of the 4th respondent.

On 5th August, 2010 at around 3.35 p.m. the Process Server went to the offices of **China Road and Bridge Corporation (K) Limited** situate along Gitanga Road. He effected service of the order upon one Pauline, a Receptionist at the said company’s offices. The said Pauline stated that she had authority to receive the order for and on behalf of the company.

The applicant further stated that the matter came up for mention before Wendoh J. on 29th September, 2010 and the earlier orders were extended until 8th November, 2010 when the application was set to be mentioned again. On the said date the respondents were represented by **Miss Kimaiyo**, State Counsel. The extended orders were duly extracted and served upon the respondents. An affidavit of service marked as “**EMG 6**” is annexed to the applicant’s affidavit.

In paragraph 12 of Mr. Githua’s affidavit he deponed as follows:

“12. In complete breach of the lawful orders issued by this court, the respondents, by themselves, their agents and or employees did on 28th of October 2010 and subsequently on 4th, 17th, 19th and 20th of November, 2010 breach the said orders by commencing road construction work on the portion of the suit property subject matter of the present proceedings. In addition, the respondents by themselves and/or their agents did create a full access road on the applicant’s property which access road is used by the contractors on an almost daily basis. Attached herewith and marked “EMG 7” are (1) photographs taken on the said dates demonstrating the construction work being undertaken by the respondents and/or their agents on the property subject matter of the present suit and (2) a map of the disputed property indicating the portion where the construction works are being undertaken.”

In view of the alleged acts of breach the applicant urged the court to grant the orders sought.

The respondents filed grounds of opposition. A replying affidavit sworn by **Engineer Michael Mwaura**

Kamau, the Permanent Secretary in the Ministry of Roads was also filed. The 4th respondent said that he was not personally served with the orders alleged to have been breached and neither was he personally served with the application dated 30th November, 2010. He said that the orders issued on 30th July, 2010 were served upon the central registry of his Ministry. His Ministry obeyed the said orders and did not continue with the construction of the Nairobi Northern By-Pass road through the suit property.

In the grounds of opposition signed by **Charles M. Mutinda**, Senior Litigation Counsel, who appeared for the respondents, he stated *inter alia*:

- **the application is misconceived and lacking in merit as the manner of disobedience by each of the alleged contemnors has not been pleaded**
- **the 1st, 2nd and 3rd respondents have no role in the construction of roads and as such the application as filed against them is devoid of merit and was filed in bad faith with a view to exerting pressure upon the respondents.**
- **the order given on 29th September, 2010 is ambiguous and incapable of being complied with unless served and read together with the order given on 30th July, 2010.**
- **orders given on 30th July, 2010 and 29th September, 2010 were not personally served upon the alleged contemnors.**
- **the contractor China Road and Bridge Corporation (K) Limited is an independent contractor and its actions in constructing the Nairobi Northern By-Pass road cannot be visited upon the principal, the 4th respondent.**

The applicant's application aforesaid was not promptly heard as there were attempts by parties to amicably settle not only the application but the entire judicial review proceedings but the efforts were unsuccessful.

On 16th June, 2011 counsel for the parties made their brief submissions. Mr. Mugambi for the applicants urged the court to find that there had been breach of the aforesaid court orders and proceed to punish all the persons named in the application in accordance with the law. In support of his submissions, counsel cited the decision of Ojwang J., (as he then was), in **KALYASOI FARMERS CO-OPERATIVE SOCIETY & OTHERS vs COUNTY COUNCIL OF NAROK [2005] eKLR.**

I will refer to that case at a later stage.

With permission of the court, the applicant also exhibited a DVD recording of bulldozers undertaking road construction work on the suit property. I may also add that on **25th February, 2011** the court visited the suit property with a view to ascertaining the actual state of affairs on the ground.

Mr. Mutinda for the respondents made submissions in line with the grounds of opposition as stated hereinabove. He urged the court to find that since there was no personal service of the orders alleged to

have been violated the respondents ought not to be found guilty of contempt of this court's orders. He cited the provisions of **Order 52 Rule 3(1)** of the **Rules of the Supreme Court of England**. Counsel also cited several other authorities including **NYAMODI OCHIENG NYAMOGO & ANOTHER v KENYA POSTS AND TELECOMMUNICATIONS CORPORATION Civil Application No. NAI 264 of 1993**, where the Court of Appeal emphasized the necessity of personal service in contempt proceedings.

Mr. Ochieng for the Directors of China Road and Bridge Corporation (K) supported Mr. Mutinda's submissions. He added that the lady known as Pauline who was said to have been served with the orders in issue is not a principal officer of the company and she had no authority to accept service of the orders for and on behalf of the directors of the company. However, the company did not swear an affidavit to that effect.

I have given due consideration to the submissions by counsel as summarized hereinabove. **Section 5(1)** of the **Judicature Act** grants power to the High Court and the Court of Appeal to punish for contempt of court. The section states 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 that power shall extend to upholding the authority and dignity of subordinate courts.”

Order 52 of the **Rules of the Supreme Court of England** has detailed provisions regarding the applicable law in committal proceedings.

Regarding personal service, the commentary to **Order 53 rule 3(1)** states as follows:

“No order will normally be issued for the committal of a person unless he has been personally served with the order, disobedience to which is said to constitute the contempt, or, if the order is directed to a group of persons or a corporation, some appropriate member has been personally served.”

However, there are exceptions to that strict construction of the law. That is why the first sentence above reads “No order will **normally** be issued

....” **Halsbury's Laws of England, 4th Edition Volume 5 paragraph 65** states as follows:

“Where an order requires a person to abstain from doing an act, it may be enforced notwithstanding that service of a duly indorsed copy of the order has not been served, if the court is satisfied that, pending such service, the person against whom enforcement is sought has had notice of the terms of the order either by being present when the order was made or being notified of the terms of the order, whether by telephone, telegraph or otherwise.”

The above cited quotation clearly shows that there are instances in which a person can be punished for contempt of court even if he was not personally served with a court order which he is alleged to have breached, provided that the court is satisfied that the person was aware of the terms of the order.

There is no denial that the orders said to have been breached by the respondents herein were not personally served upon the persons sought to be punished for contempt of court. There is however no

doubt that the said orders were served upon the offices of the respondents and were received by the persons named in the affidavit of service sworn by Moses M. Wambua, Process Server. Upon service of the orders construction of the Nairobi Northern By-Pass road on the suit property was stopped for some time. No doubt the stoppage of the work was in obedience to the aforesaid orders.

Shortly after the applicant instituted contempt proceedings, the court was urged to visit the site and make appropriate observations before hearing the application. The application to visit the suit property was made on 31st January, 2011. Although the same was opposed by the respondents, the court ruled in favour of the applicant and a site visit was done on 25th February, 2011. All the advocates for the parties including representatives of China Road and Bridge Corporation Kenya were present. The court observed that some work had recently been undertaken on the suit land. There was a heap of soil that had been piled on a portion of the suit land and there was also an access road that had recently been made. There were also several markings that had been made on the ground. The tarmacking of the road had however been stopped. It was evident to all that some work had been done on the site in the recent past, say within the months of November/December 2010 or thereabout. The court formed the opinion that there had been no strict compliance with the orders issued by Wendoh J.

It is instructive to note that in the written submissions filed on behalf of China Road and Bridge Corporation Kenya, the company states, *inter alia*:

“The circumstances that led to the alleged contempt were issues of miscommunication and inadvertent mistake/failure on the part of the applicant’s advocate to relay the ruling and the orders thereof to the interested party and it is the interested party’s submission that the same is excusable as an apology was duly tendered for any inconvenience that was caused to the applicant.”

It was however not demonstrated by the applicant that the 1st, 2nd, 3rd and 4th respondents or any of them had authorized the construction company to undertake any further work on the suit land while the matter was still pending in court. It was not also shown that any of the respondents was aware that the construction company may have done anything on the suit land that may be construed to amount to a breach of the aforesaid court orders.

On the part of China Road and Bridge Construction Corporation, it cannot be denied that it was aware of the orders that had been issued by this court. As earlier stated, it is the issuance of the orders that had initially caused the construction company to stop construction of the road.

In KALYASOI FARMERS CO-OPERATIVE SOCIETY & 6 OTHERS v COUNTY COUNCIL OF NAROK (*Supra*) the court cited HADKINSON v HADKINSON [1952] All ER 567 at page 569, where **Romer, LJ** held as follows:

“It is the plain and qualified obligation of every person against, or in respect of whom an order is made against 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 void.”

It is not clear why the construction company decided to construct the access road complained of by the applicant, knowing that the court had ordered stoppage of the work pending hearing and determination of the dispute. Whether the directors of the company had personally been served with the court orders or not they were aware of the same. If for any reason the company thought it necessary to undertake any further work on the suit land during the pendency of the suit it ought to have sought variation of the orders. Lord Cottenham, L.C. in CHUCK v CREMER (1846), 1 Coop. temp. Cott. 205, set out in HADKINSON v.

HADKINSON (at p.569) stated:

“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 void – whether it was regular or irregular... [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 existed it must not be disobeyed.”

In REPUBLIC v THE MINISTER OF MEDICAL SERVICES & OTHERS ex parte MOSES COLLINS ONONO LORRE & OTHERS [2011] eKLR, this court held that knowledge of a court order is higher than service of the same. In contempt proceedings where it is shown that a person, though well aware of the existence of a court order, deliberately chose to disobey the same, such a person cannot be allowed to hide under the cloak of lack of personal service to escape punishment for such disobedience.

One of the national values and principles of governance that binds all state organs, state officers, public officers and all persons whenever any of them applies or interprets our constitution or any law is observance of the rule of law. See **Article 10(2)** of the **Constitution of Kenya, 2010**. The judiciary must interpret the Constitution and all other laws in a manner that promotes the values and principles stipulated in the Constitution. Courts should also interpret the Constitution in a manner that permits the development of the law. In this new constitutional dispensation, I am persuaded that the judiciary ought to apply and interpret the law regarding contempt in a way that discourages impunity but promotes and encourages respect for the rule of law.

Article 159(2)(d) of the **Constitution** requires the court to administer justice without undue regard to procedural technicalities. Courts must ensure that substantial justice is administered to all persons without fear, favour, affection or ill will. **Article 159 2(a)** of the **Constitution** requires that justice be done to all, irrespective of status. In exercise of judicial authority, courts are enjoined to ensure that the purpose and principles of the Constitution are protected and promoted.

If courts continue to maintain the rigid position that a person can only be punished for contempt of court if it is shown that such a person had been personally served with a court order duly indorsed with a penal notice, without any consideration as to whether the person deliberately violated the order, without any consideration to the circumstances leading to such violation, I believe the courts will not be promoting respect for the rule of law and the development of the law. I am not at all trivializing individual rights to liberty such that persons alleged to have breached court orders are not accorded fair trials, far from it. What the court is advocating is a fair and balanced interpretation of the law so as to give meaning to our constitutional values if indeed “justice be our shield and defender”.

In SHAH & ANOTHER v SHAH [1989] KLR 220, Simpson, J. (as he then was), quoted the words of Lord Diplock in A.G. v TIMES NEWSPAPERS [1973] 3 ALL ER 54 at page 71 where the learned delivered himself thus:

“In any civilized society it is a function of government to maintain courts of law which its citizens can have access for the impartial decision of disputes as to their legal rights and obligations towards one another individually and towards the state as representing society as a whole. The provisions of such a system for the administration of justice by courts of law and the maintenance of public confidence in it are essential if citizens are to live together in peaceful association with one another.”

In conclusion, I hold that the respondents herein are not guilty of contempt of court but the Directors of China Road and Bridge Corporation (K) are guilty of contempt of court, having violated the orders issued on 29th July, 2010 and extended thereafter. In the circumstances, the said Directors are ordered to appear before this court on 21st July, 2011 for mitigation and sentencing. China Road and Bridge Corporation (K) shall bear the costs of this application.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 15TH DAY OF JULY, 2011.

D. MUSINGA
JUDGE

In the presence of:

Nazi – Court Clerk

Mr. Ochieng for the Interested Party

Mr. Nyaribo for the Applicant

Mr. Onyiso for Mr. Mutinda for the Respondents