



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL & TAX DIVISION COURTS

MISC. NO. 69 OF 2010

STEPHEN KIMANGA.....1ST PLAINTIFF
PAUL KIMARI.....2ND PLAINTIFF
FREDRICK NJORA.....3RD PLAINTIFF
JACKSON MUCHOKI.....4TH PLAINTIFF
PATRICK GITHINJI.....5TH PLAINTIFF
MOSES KIMANGA.....6TH PLAINTIFF

VERSUS

LUCY WAITHERA MWANGI.....1ST DEFENDANT
JOHN IRUNGU GITHINJI.....2ND DEFENDANT
JULIUS KARIUKI MWANGI.....3RD DEFENDANT
THE ATTORNEY GENERAL.....4TH DEFENDANT

RULING

This Ruling is delivered in the Notice of Preliminary Objection filed to challenge the Notice of Motion dated 28th January 2010, in which the applicants, Stephen Kimanga, Paul Kimari, Fredrick Njora, Jackson Muchoki, Patrick Githinji and Moses Kimanga seek orders of the court inter alia, as follows:

1. That the Respondents, Lucy Waithera Mwangi, John Irungu Githinji, Julius Kariuki Mwangi and the Attorney General of the Republic of Kenya be summoned to appear before the court to show cause why they should not be committed to civil jail for contempt of court.

2. **That the Respondents be committed to civil jail for contempt of court.**
3. **That the Respondents be condemned to pay costs of the application.**

Leave to take out these proceedings was granted to the Respondents on 25th January 2010, the court having satisfied itself that there was reasonable ground to find that the Respondents had breached this court's orders of 21st April 2009, directing that a sum of KShs. 48,000,000/= representing an award by the Government of Kenya as compensation for the compulsory acquisition of land parcel No. 209/1803/4 situate in the Ngara area of Nairobi (Known as Fig Tree Hotel Ltd) be deposited in a joint account in the names of the Applicant's Advocates M/S Omangi Musangi & Co. Advocates and the 1st, 2nd and 3rd Respondent's former advocates M/S E. K. Njagi & Co. Advocates, pending the hearing and determination of **H.C.C.C. No. 454 of 2008**, filed by the Respondents against the Applicants herein.

The Grounds of Objection are that:-

1. **The application is incompetent, being based on a statement of particulars which is incompetent and supported by an affidavit which is equally incompetent. That the statement of particulars and the Supporting Affidavit were made and sworn by the Applicant's Advocate without stating whether he had authority to do so and in place of a Verifying Affidavit as required under the law.**
2. **The application should be dismissed for failure to satisfy mandatory provisions of the law in that the order said to have been breached and the notice of penal consequences were never served on the respondents personally and if served, no Affidavit of service has been filed/served to that effect.**
3. **The application ought to have been filed in the primary suit, to wit, H.C.C.C. No. 454 of 2008.**

Written submissions were filed on behalf of the Plaintiff's on one hand and the 1st, 2nd, and 3rd Defendants on the other and the same were highlighted orally before me. No submissions were filed by the Attorney General. Counsel for the Respondents relied on the following authorities to support the Preliminary Objection.

1. **MWANGI H. G. WANGONDU V NAIROBI CITY COMMISSION (CIVIL APPEAL NO. 95 OF 1988**
2. **DUNCAN MANUEL MURIGI V KENYA RAILWAYS CORPORATION MISCELLANEOUS APPLICATION NO. 235 OF 2007**
3. **ANN MWANGI V NAIROBI CITY COUNCIL MISCELLANEOUS CAUSE NO. 675 OF 2006**
4. **OCHINU & ANOTHER V OKOMBO & 3 OTHERS CIVIL APPEAL NO.36 OF 1989.**

Counsel emphasized that the allegation of breach, as stated in paragraph 8 of the Supporting Affidavit,

was not adequate to demonstrate evidence of breach within the requirements of the law of contempt. That the words “---on or around the month of December 2009, the Applicants got wind that the 4th Respondent released the aforesaid amount to the 1st, 2nd and 3rd Respondents” had no probative value. That the Respondent’s advocate having deponed to matters of fact without stating whether he had his clients’ authority to swear to the same rendered the affidavit and the entire application incompetent.

In response, counsel for the Applicants has submitted that the court should consider the peculiar circumstances of this case and presume due notice, on the part of the Respondents, of both the order said to have been breached and the penal consequences thereof. That the order having been recorded by consent of the parties and reinforced in the ruling of Khaminwa J., when she refused to vary or set the same aside, at the Respondent’s application, is enough ground to find that the Respondents have always had notice of the existence of the order, which was, in any event, served on the 4th Defendant’s instructing clients, putting them on notice to comply.

To give weight to the above argument, counsel cited **Order 52 Rule 3/1** of the **Supreme Court Practice Rules 1997 Vol 1**, which deals with personal service in contempt proceedings and states as follows:-

“--- But court may dispense with personal service especially where there is no other course available to uphold the authority of the court and protect the Applicant. Notably, failure to comply with a proper procedure such as personal service is not necessarily fatal to the lawfulness of a contempt order. Indeed the court has complete discretion,----to perfect an invalid committal order in a contempt case, but that power should only be used in exceptional cases and should be dictated by the need to do justice having regard to the interests of the contemnor, the victim of contempt and other court users. When a contemnor has not suffered any injustice by the failure to follow proper procedures (such as service) the procedural order could stand subject to variation to take account of any technical or procedural defects----”

Counsel has cited several other useful authorities, which in my view, however, are more relevant when dealing with the substantive motion after the Preliminary Objection before me has been disposed of. The seriousness of the allegations levelled against the Respondents cannot be wished away even as they push for the striking out of the contempt proceedings on the grounds set out in the Preliminary Objection. In my understanding of the law the purpose of a Preliminary Objection is to bring to an end litigation, which ought not to have been brought before court in the first place. The end result should be that justice is not only done but also seen to have been done. I believe that was the spirit in which the Court of Appeal for East Africa moved when reaching the decision in **MUKISA BISCUIT MANUFACTURING CO. LTD V WESTEND DISTRIBUTORS LTD [1969] E. A 696**, which has continued to guide our courts when dealing with preliminary objections.

At the close of the written submissions filed on behalf of the Applicants, learned counsel has emphasized the need to give effect to the law of contempt noting that the same does not merely exist to protect the personal dignity of the judiciary or the private rights of the litigants but, more importantly to guard against the supremacy of the law being challenged with impunity.

The verdict passed against strict adherence to formalities and technical procedures by the **Constitution of Kenya 2010**, and the courts themselves is that the same has, oftentimes, been in itself an impediment rather than an aid, to the proper administration of justice. Hence the enactment of **Article 159 (2) (d)** of the **Constitution of Kenya 2010**, and formulation of the overriding objective principle to guide the courts in civil cases.

I am of the view that, to disallow the Notice of Motion dated 28th January 2010, on the basis of technicalities, as requested by the Respondents, would render a major blow to the course of justice given the circumstances of the case. The court cannot, merely for the sake of procedure turn a blind eye and pretend that its orders of 24th February 2009, do not exist and/or that they are of no value or that they were issued without any intention that they be obeyed. The circumstances of the case, as borne out by the record, are such that due notice of the said orders on the part of the Respondents is hereby presumed. The alleged impropriety of the Statement of Particulars and the Affidavit in support of the Notice of Motion is not fatal to the proceedings since the application itself is based on matters of record of which counsel, as the agent of the Applicants has full knowledge of.

The Attorney General came on record for the 4th Respondent on 6th May 2010. On the same date the Attorney General applied for and obtained an adjournment owing to the short notice given him to prepare for the hearing. The hearing of Preliminary Objection was adjourned to 21st July 2010 but was postponed (as per the court record) to 13th October 2010, then 23rd November 2010, with directions that due notice be issued. Although the record shows that the Attorney General was duly served to attend court on 23rd November 2010, but did not attend, there is nothing on record to show that he was made aware of the order, recorded by consent, that the matter do proceed by way of written submissions. The court was not told whether the submissions filed by the Applicants on one hand and the 1st, 2nd and 3rd Respondents were ever served upon the State Law Office.

Want of service of the order for written submissions on the Attorney General is to me enough ground not to allow the Preliminary Objection, since it is imperative that the Attorney General, as one of the parties cited in the contempt proceedings makes his position known to the court. In view of the fact that the State Law Office, under the newly appointed Attorney General has made a public declaration that the days of unexplained non attendance before court by its officers are no more, it is important that these proceedings be given a chance, in order that the Attorney General can explain to the court if indeed the instructing client, the Commissioner of Lands, has blatantly ignored the court's orders and why. To proceed otherwise would expose the 4th Respondent to a situation where it may be condemned unheard.

For all the above reasons, I hereby overrule the Preliminary Objection and order that the contempt proceedings proper do proceed at the date to be fixed at the registry with the contemnors being properly served with a hearing notice. For the sake of expedience, I direct that this ruling be served upon the Solicitor General forthwith.

Orders accordingly.

DELIVERED and SIGNED at NAIROBI this 12th day of SEPTEMBER, 2011

M. G. MUGO

JUDGE

In the presence of:

No appearance For the Applicants

Mr. Njuguna

For the Respondents