



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

**IN THE MATTER OF: HIGH COURT CIVIL MISC. APPLICATION NO. 320 OF 2000**

**REPUBLIC**

**VERSUS**

**THE COMMISSIONER FOR LANDS**

**IN THE MATTER OF: AN APPLICATION BY AL SHERMAN LTD FOR LEAVE TO APPLY FOR ORDERS FOR COMMITTAL OF THE COMMISSIONER OF LANDS IN RESPECT OF THE DISOBEDIENCE OF THE LAND ORDER DATED 27<sup>TH</sup> NOVEMBER 2001.**

**REPUBLIC**

**VERSUS**

**THE COMMISSIONER FOR LANDS ..... RESPONDENT**

**EX-PERTE**

**AL-SHERMAN LIMITED ..... APPLICANT**

**RULING**

Al-Sherman Limited (hereinafter “the applicant”) was on 27.11.2001 granted the following orders in Miscellaneous Application No. 320 of 2000:

**“(a) an order of Mandamus be and is hereby issued to the Commissioner of Lands to make a grant of the land comprised in L.R. No. 24167 to the applicant;**

**(b) An order of prohibition to the Registrar of titles, Mombasa prohibiting him to register the Grant under L.R. No. 24167 to any person other than the applicant.”**

On 13.12.2001, one Bernard Munyasia Mwanzia, a process server, swore an affidavit of service in which he deponed, inter alia, that he served a court order issued on 27<sup>th</sup> November 2001 upon a Mr.Ochieng, a Legal Officer who accepted service on behalf of the Commissioner of Lands.

On 6.10.2006 M/s A.B. Patel & Patel Advocates for the applicant, lodged a Notice of Motion for one main order committing to prison the Commissioner of Lands for his disobedience and/or defiance of the court order given on 27.11.2001. The application is based on the ground that despite service of the said order, the Commissioner of Lands has failed and/or refused and/or neglected to make a grant of the land

comprised in L.R. No. 24167 to the applicant. The application is supported by an affidavit sworn by one Syed Kassim Shah, a partner in the firm of A.B. Patel & Patel Advocates instructed by the applicant. In the affidavit, it is deponed that the applicant was, on 22.9.2006, granted leave to commence contempt proceedings on the basis of affidavits and grounds filed in those proceedings.

The application was opposed and there is an affidavit sworn in opposition to the application sworn by Zablon Agwata Mabea, the commissioner of Land as on 24.10.27. It is deponed in the affidavit that, he was never served with the order of 27.10.2001 and it would be unfair for the order sought to be issued against him.

When the application came up for hearing before me on 4.6.2009, counsel agreed to file written submissions which were in place by 2.7.2009. I have considered the application, the affidavits filed, and the submissions of counsel. I have also read all the authorities referred to by counsel. Having done so, I take the following view of the matter. As stated in **Mutitika - v - Baharini farm [1982 - 88] 1 KAR 863**, contempt of court is of a quasi criminal character and **“the standard of proof ... Must be higher than proof on the balance of probabilities, almost but not exactly, beyond reasonable doubt...)**

Over time, courts have laid down certain prerequisites to be established before a committal order can be made. Regarding service of the order allegedly disobeyed, personal service is the best form of service. The Court of Appeal in **Nyamodi Ochieng Nyamogo & Another - v - Kenya Posts & Telecommunications Corporation (Nairobi C. Appl. No. 264 of 1993)** quoted with approval the following passage from Halsbury's Laws of England 4<sup>th</sup> ed Vol. 9 page 37 para 61:

**“61. Necessity of Personal Service. As a general rule, no order of court requiring a person to do or obtain from doing any act may be enforced unless a copy of the order has been served personally on the person required to do or abstain from doing the act in question .....**

**Where the order is made against a company, the order may only be enforced against an officer of the company if this particular officer has been served personally with a copy of the order .....**”

The courts have also held that the order allegedly disobeyed should be accompanied with a notice in the form of an endorsement of penal consequences. The Court of Appeal in the said case of **Nyamodi Ochieng Nyamogo & Another - v - KPT Corporation, (supra)** quoted with approval Order 45 rule 7/5 R.S.C. 1982 Ed of England as follows: -

**“It is a necessary condition for the enforcement of a judgment or order under Rule 5 by way of sequestration or committal, that the copy of the judgment or order served under this Rule should have the requisite penal notice indorsed thereon.”**

The suggested form of endorsement was given as follows: -

**“If you, the within named A.B. disobey this judgment (or order) you will be liable to process of execution for the purpose of compelling you to obey the same.”**

The English procedure is adopted in Kenya under the provisions of section 5 of the Judicature Act (Cap 8) which has given the Court of Appeal and the High Court the same power to punish for contempt of court as is for the time being possessed by the High Court of Justice in England.

Turning back to the matte at hand, has the applicant satisfied the above prerequisites? With regard to the order itself, there is no dispute that it did not have the requisite penal notice indorsed thereon. It therefore did not carry a notice of the penal consequences of disobedience as required by the rules as stated above.

How about service? The process server in his affidavit of service deponed that he was referred to a Mr. Ochieng, a legal officer, whom he was informed, had the authority to accept all services on behalf of the Commissioner of Lands and the Department, and the said officer accepted service by signing and

stamping at the reverse of the court order. It is plain therefore that the commissioner of Lands was not personally served with the court order he was expected to comply with. Unfortunately for the applicant, the order purportedly served by the process server was not exhibited. There is therefore no evidence that the said Mr. Ochieng was ever served with the court order as alleged.

The applicant has sought reliance on the case of **Mohamed – v – Bakari & 2 Others [2005] 2 KLR 196** for the proposition that where personal service is not possible, other forms of service may be resorted to. In that case there was evidence that the successful candidate in an election had deliberately evaded service of a petition challenging his election. There is no such evidence in this case. The process server has not deposed that he insisted on serving the Commissioner of Lands personally and was denied access. On the contrary, the process server seems to have taken the position that all process for the Commissioner was to be received by the Legal Department. In any event the **Mohamed – v – Bakari** case considered service of an election Petition which is governed by different and comprehensive provisions under the relevant Act of Parliament.

Granted, court orders should be complied with in the interests of the administration of justice and among other things to enhance the rule of law and maintenance of Law and Order. Equally important is the liberty of the citizen enshrined in the Constitution. That liberty may only be taken away when the Law says so. Committal for contempt of court can only be ordered where the applicant complies with the mandatory provisions of Section 5 (1) of the Judicature Act as discussed above. The applicant herein has not so complied with the result that this application is without merit and is dismissed with no order as to costs.

It is so ordered.

**DATED AND DELIVERED AT MOMBASA THIS 24<sup>TH</sup> DAY OF AUGUST 2009**

**F. AZANGALALA**

**JUDGE**

Read in the presence of: -

Situma holding brief for shah for the applicant.

**F. AZANGALALA**

**JUDGE**