



Trimax Energy Limited v Mohamed & another (Environment & Land Case E250 of 2022) [2022] KEELC 15568 (KLR) (20 December 2022) (Ruling)

Neutral citation: [2022] KEELC 15568 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E250 OF 2022
EK WABWOTO, J
DECEMBER 20, 2022**

BETWEEN

TRIMAX ENERGY LIMITED PLAINTIFF

AND

SHIRAZ JAN MOHAMED 1ST DEFENDANT

CHIEF LANDS REGISTRAR 2ND DEFENDANT

RULING

1. This ruling is in respect to two applications. The plaintiff's application dated November 10, 2022 and the 1st defendant's application dated October 24, 2022.
2. In the plaintiff's application dated November 10, 2022, the plaintiff sought the following orders: -
 - i. Spent
 - ii. This honourable court be pleased to review its orders of October 7, 2022.
 - iii. In the interim, the honourable court be pleased to issue an order for maintenance of the prevailing *status quo* with regards to property land reference number 20280, grant number IR 65576 (suit property).
 - iv. Cost of the application be borne by the 1st respondent.
3. The application was supported by the affidavit of Ahmed Hassan Hilowle sworn on November 10, 2022.
4. In the 1st defendant's application dated October 24, 2022, the following orders were sought: -
 - i. Spent



- ii. That summons be issued against the plaintiff/respondent directors to appear before court and show cause why they should not be committed to civil jail for such terms as the court may deem fit.
 - iii. That this honourable court be pleased to find the plaintiff/respondent directors in contempt of the court order issued on the October 7, 2022 and they be committed to civil jail for a term of six (6) months until they purge the contempt and comply with the orders of this honourable court issued on the October 7, 2022.
 - iv. That this honourable court be pleased to fine the contemnor a sum of Kenya shillings two million (Ksh 2,000,000).
 - v. That the costs of this application be borne by the interested party personally. (sic)
5. The defendant's application is supported by the grounds on the face thereof and the affidavit of Shiraz Jan Mohamed, sworn on October 24, 2022.
 6. Pursuant to the directions of the court issued on November 21, 2022, the court directed both applications to be heard together upon which a ruling will be rendered for both applications. Both parties complied and filed their written submissions. The plaintiff filed its written submissions together with its list of authorities through CSA Advocates both dated November 28, 2022. The 1st defendant's submissions and list of authorities were filed through Kipyator Kibet & Associates Advocates and were dated November 25, 2022.
 7. In support of its application dated November 10, 2022 and in opposition to the 1st defendant's application dated October 24, 2022, the plaintiff outlined two issues for determination by this court;
 - i. Whether the court should vary/review its orders of October 7, 2022.
 - ii. Whether the 1st defendant has proven that plaintiff is in contempt of the court's orders.
 8. On the first issue, Counsel for the plaintiff cited order 45 of the *Civil Procedure* which provides the grounds for review of the court's orders. It was argued that, there was a mistake made in reference to the suit property which mistake was occasioned by the plaintiff's counsel. It was further submitted that at the time the court issued its orders, the plaintiff had not been able to access the relevant documents from the Ardhi Sasa platform which documents were only accessed on October 6, 2022 after the court had rendered its ruling on October 3, 2022 upon which the orders were extracted on October 7, 2022.
 9. It was also submitted that whereas the 1st defendant alleges that fraud on the part of the Plaintiff, the said issue of fraud is a substantive one which can only be dealt with during trial.
 10. The plaintiff cited the cases of *General Properties Limited vs Saika Two Estate Developers Limited* [2021] eKLR and *Republic vs Council of Legal Education & 2 others Exparte Mitchell Njeri Thiongo Nduati* [2019] eKLR.
 11. On whether or not the plaintiff should be cited for contempt, it was submitted that the plaintiff fully complied with the order that were served upon being served with the same. It was also stated that the said orders contained a self-executing directive of OCPD Embakasi Police Station to assist in enforcing the court orders.
 12. The plaintiff contended that the photographs attached to the 1st defendant's application dated October 24, 2022 are inadmissible in evidence for want of certificate of extraction as required under section



- 106 B of the *Evidence Act*. The plaintiff urged the court to dismiss the 1st defendant's application since contempt had not been proven to the required standard. The plaintiff further urged the court to allow its application dated November 10, 2022.
13. In opposition to the application dated November 10, 2022, the 1st defendant submitted that the plaintiff has not met the threshold for this court to review its orders issued on October 7, 2022. It was submitted that for the applicant to succeed, the applicant must prove there is discovery of new or important matter or evidence which after exercise of due diligence, was not within his knowledge or could not be produced at the time when the decree order was made or on account of some mistake or error apparent on the face of the record or for any other sufficient reasons.
 14. On the issue of the "alleged fraud", the 1st defendant submitted that the same must be specifically proved by the party alleging it and reference was made to the cases of *Ratial Gordhanbhai Patel vs LALJI Makonji*, Civil Appeal No 70 of 1956 and *Jacinta Njeri Wanyoike vs Teresia Wanjiku Wainaina* (2017) eKLR.
 15. On the averment made by the plaintiff that there was an error occasioned by its counsel when he referred to the suit property as LR Number 20280, grant Number IR 63376 instead of IR 65576, the 1st defendant stated that the same cannot be the new and important evidence or error apparent on the face of the record to persuade this court to review its orders as contemplated in order 45 of the *Civil Procedure Rules*. The 1st defendant contended that in any event, he has been in possession of LR No 20280 IR number 65576.
 16. The 1st defendant further reiterated his position that that there is no apparent nor mistake or discovery of any new evidence or material facts or any other sufficient reason to warrant review of the order issued on October 7, 2022.
 17. On whether the plaintiff should be cited for contempt of court in respect to the orders issued on October 7, 2022, the 1st defendant submitted that pursuant to the issuance of the said orders, the plaintiff has trespassed, entered and interfered with the 1st defendant's property an action which prompted the 1st defendant to file the application for contempt.
 18. Counsel for the 1st defendant submitted that all the elements necessary for proving civil contempt had been demonstrated, these elements being; unambiguous nature of the terms of the order, knowledge of the order, acting in breach of the order and deliberate conduct from the person being cited for contempt. Counsel also cited the cases of *Teachers Service Commission vs Kenya National Union of Teachers & 2 others* [2013] eKLR, *Maisha Nisbike Ltd vs Commissioner of Lands & 3 others* (2011) eKLR and *Chuck Cremer* (1846), 1 Coop temp, Cott, 205 in support.

Analysis and Findings

19. The court has carefully considered the applications as presented as well as the parties' affidavits and written submissions for and against the applications. In my humble view the main issues for determination are as follows: -
 - i. Whether this court should set aside and or vary its orders issued on October 7, 2022 pursuant to the ruling delivered on October 3, 2022.
 - ii. Whether the plaintiff is guilty of contempt.
 - iii. Who should bear the costs of both applications.



20. I will now proceed to analyze all the issues sequentially. The jurisdiction of the court to set aside an or vary an order of injunction is outlined under order 40 rule 7 [Civil Procedure Rules, 2010](#) which provides as follows:

“Any order for an injunction may be discharged, or varied, or set aside by the court on application made thereto by any party dissatisfied with such order.”

21. In the instant case, the court delivered a ruling on October 3, 2022 and made the following orders which were extracted on October 7, 2022:-

- i) The orders issued on July 27, 2022 are varied to the extend that the injunction orders pending the hearing and determination of this suit shall not apply to property known as grant number IR 65576 Land Reference number 20280.
- ii) That pending the hearing and determination of this suit, a temporary injunction is hereby issued restraining the plaintiff whether through its servants, employees, agents or anyone acting at its behest or whatsoever from trespassing, entering into or interfering in any manner with the defendant’s occupation and possession of grant number IR 65576 Land Reference Number 20280.
- iii) The OCPD/OCS Embakasi Police Station to assist with the enforcement of this court order.
- iv) Each party to bear own costs of both applications.

The orders issued were issued based on facts placed before this court by both parties.

22. A court may set aside and or vary its orders on the discovery of new and important issue or evidence which it did not have at the time of issuance of the said orders. The plaintiff has now come to this court and averred that there was an error on the part of his counsel when he inadvertently referred to the suit property LR Number 20280, grant number IR 63376 instead of IR 65576.

23. It was also submitted that the plaintiff has obtained new information which was not in its possession before the court rendered its ruling. The said information is to the effect that the 1st defendant fraudulently obtained a title to the suit property. In demonstrating this position, the plaintiff averred that the certificate of lease issued to the 1st defendant does not indicate that he is the registered owner and neither did it emanate form the 2nd defendant and if indeed it was issued by the 2nd defendant then it was issued unlawfully and therefore void, the entry of June 26, 1995 is an entry for tenancy in common in the name of Shiraz Janmohamed and Mohamed Rafiq Kassam and that Shiraz Janmohamed and the 1st defendant are separate persons and the 1st defendant is also not the distinct owner of the suit property.

24. The 1st defendant denied all the allegations raised by the plaintiff and reiterated that he is the owner of the suit property having been in occupation of the same until when the plaintiff interfered with his occupation.

25. From the pleadings and the information availed by the parties, it now appears that the plaintiff and the 1st defendant are trying to litigate over the ownership of the suit property through interlocutory applications. Considering that both parties claim to be relying on documents issued by the Chief Land Registrar in proof of their ownership to the suit property and further considering the fact the Chief Land Registrar being the custodian of all land records and yet no response has been filed on his behalf in response to the case pleaded by the plaintiff and 1st defendant, it will not be in the best interest of



justice to review the orders issued herein at this stage. In the circumstances, I will direct that the issues raised by the plaintiff be considered during trial.

26. On the issue of contempt, the plaintiff has denied being in contempt and further averred that he has indeed complied with the orders given on October 3, 2022. I have perused the said orders and noted that the same had a self-executing directive requiring the OCPD/OCS Embakasi Police Station to enforce the same. Both parties the plaintiff and the 1st defendant having taken contracting position as to whether or not the said orders were complied with, its only appropriate for the OCPD/OCS Embakasi to be summoned to this court and explain the noncompliance or otherwise of the same.
27. In view of the foregoing, the plaintiff's application dated November 10, 2022 and the 1st defendant's application dated October 24, 2022 are disposed in the following terms:
- i. The application dated November 10, 2022 is hereby dismissed.
 - ii. The orders sought in the application dated October 24, 2022 are declined.
 - iii. Summons shall be issued to the OCPD/OCS Embakasi Police Station to appear in court to explain whether there was compliance with the court orders issued on October 7, 2022.
 - iv. This matter shall be mentioned in open court on January 16, 2023 at 11.00am.
 - v. Each party to bear own costs of both applications.
- 28 Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 20TH DAY OF DECEMBER 2022.

E. K. WABWOTO

JUDGE

In the presence of: -

Mr. Madowo for the Plaintiff.

Mr. Kibet for the 1st Defendant.

N/A for the 2nd Defendant.

Courts Assistants- Caroline Nafuna.

