



**Republic v National Land Commission; Doshi & another (Exparte);
Kombe & 2 others (Interested Parties) (Judicial Review Miscellaneous
Application 16 of 2017) [2024] KEELC 4438 (KLR) (4 June 2024) (Ruling)**

Neutral citation: [2024] KEELC 4438 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
JUDICIAL REVIEW MISCELLANEOUS APPLICATION 16 OF 2017**

EK MAKORI, J

JUNE 4, 2024

BETWEEN

REPUBLIC APPLICANT

AND

THE NATIONAL LAND COMMISSION RESPONDENT

AND

ASHOK LABHASHAKER DOSHI EXPARTE

MOHAMED HUSSEIN JAFFER EXPARTE

AND

CHARO KOMBE INTERESTED PARTY

PAUL MUTEKI INTERESTED PARTY

TERESI MWANGEKA INTERESTED PARTY

RULING

1. On 20th November 2017, this Court (Olola J.) issued a significant order, staying the decision of the Respondent vide Gazette Notice No. 6862 contained in Vol. CXIX- No. 97 dated 17th July 2017. This order was a crucial step in the legal process, directing the Commissioner of Lands to revoke the Applicants’ title over property known as Land Reference Number 17439 (Grant No. C.R. 212/1) pending hearing and determination of the present Judicial Review Application.
2. The Court Order, which was pivotal in this case was issued on 20th November 2017, commanded the Respondent, whether by itself, its Chairman, Commissioners, Officers, Employees and Agents, and the Land Registrar, to be restrained from revoking Applicants’ title over property known as Land



Reference No.17439 (Grant No. C.R. 212/1) or issuing new title in the name of the Interested Parties or any other person pending hearing and determination of the application for Judicial Review Orders.

3. This Court made a final decision in its judgment dated 30th July 2019. It is reported as Republic v National Land Commission & 3 others Ex parte Ashok Labhshanker Doshi & another [2019] eKLR. This is what Olola J. said:

“A perusal of the impugned Gazette notice dated 17th July 2017 however identifies the Interested Parties herein as well as the Applicants as the parties that were interested in the claim.

21. As the Respondents tacitly concedes in the Replying Affidavit I did not think they had jurisdiction to handle a matter regarding which the ELC had made a determination such as this one. If the Interested Parties appeared before them, they were duty bound to inform the Respondent of the determination made by the Court in ELC 79 of 2012 aforesaid.
22. Otherwise, it is my view that the Respondent could not re-open the issue of the propriety or legality of the suit property once this Court had made a determination thereon.
23. As it were, an order of certiorari is used to bring to the High Court the decision of some inferior tribunal or authority for it to be quashed or declared invalid for having been made ultra vires. The Respondent’s impugned decision was clearly beyond its authority.
24. Accordingly I will allow the Amended Notice of Motion dated 20th November 2017 as prayed.
25. I make no order as to costs.”

4. The Applicant alleges that the orders of the Court have been and were disobeyed because the Respondents proceeded and issued new titles despite the existence of those orders. Hence, the current application seeks the following orders:

- a. Spent.
- b. Spent.
- c. The Chairman of the National Land Commission, the Secretary/Chief Executive Officer of the National Land Commission, the Director of Legal Affairs and Enforcement of the National Land Commission, the Chief Land Registrar, and the Land Registrar – Kilifi County, jointly and severally be summoned by this Court to show cause why they should not be committed to civil jail for six months for disobeying this Court’s order made by this court on 20th November 2017.
- d. The Chairman of the National Land Commission, the Secretary/Chief Executive Officer of the National Land Commission, the Director of Legal Affairs and Enforcement of the National Land Commission, the Chief Land Registrar, and the Land Registrar – Kilifi County be and are hereby ordered to purge their disobedience of this Court’s order made on 20th November 2017 by recalling, cancelling, nullifying and revoking the Title No. Kilifi/Kadzonzo/Madzimbani/1163 issued in the name of the Interested Party herein within 30 days of this order.



- e. Costs of this application be provided for.
5. I frame the issues for this Court's determination based on the material placed before me, including whether the respondent should be cited for contempt and who should bear the application costs.
 6. Mr. Oluga, for the Applicant, avers that the said order was made by consent of Mr. Wahome, counsel for the Respondent, out of an abundance of caution; the same was served upon the Respondent on 29th November 2017 as per paragraph 5 of the Supporting Affidavit dated 16th November 2020. The order was also served upon the Land Registry Mombasa and registered at the Lands Title Registry Mombasa as Registry No. CR. N212/9 on 30th November 2017 as per Paragraph 6 of the Supporting Affidavit dated 16th November 2020. Despite the order having been made in the presence of and by consent of the Respondent's counsel and subsequently served upon the Respondent and despite the order having been duly served and lodged in the Land Registry, the Land Registrar acted in utter disobedience of the Court's order by issuing Title Number Kilifi/Kadzozzo/Madzimbani/1163 in the name of the Interested Party on 5th July 2018 while the order was in force.
 7. The Respondent filed a Replying Affidavit sworn on 11th December 2023 by Brian Ikol, the Respondent's Director of Legal Affairs. The Respondent denied that its cited officers are guilty of contempt of Court and averred that its mandate does not extend to the issuance of title deeds. Being a constitutional office, it was rendered *factus officio* immediately after it gave its opinion.
 8. The Interested Parties filed a Replying Affidavit sworn on 24th October 2023 by Paul Muteke, the 2nd Interested Party, stating that the letters dated 9th November 2016 and 30th November 2016 were issued before the subject court order was issued, hence there will be no need to punish the persons cited for contempt.
 9. The Applicant submits that Section 63(c) of the [Civil Procedure act](#) provides that:

“To prevent the end of justice from being defeated, the court may, if so prescribed (1) Grant a temporary injunction and in case of disobedience commit the person guilty thereof to prison and order that his property be attached and sold.”
 10. The Applicant further states that Order 40 Rule 3(1) of the Civil Procedure Rules provides for the consequences of breach of an order of injunction, and states that:

“In cases of disobedience, or of breach of any such terms, the court granting an injunction may order the property of the person guilty of such disobedience or breach to be attached, and may also order such person to be detained in prison for a term not exceeding six months unless in the meantime the court directs his release.”
 11. Applicant contends that the order issued on 20th November 2017 by this Court was clear and unambiguous, that the Respondent, whether through its Chairman, Commissioners, Officers, Employees and/or Agents and/or the Land Registrar, be restrained from revoking the Applicants' title over property known as Land Reference Number 17439 (Grant No. C.R. 212/1) or issuing new title in the name of the Interested Parties or any other person pending hearing and determination of the application for Judicial Review Orders.
 12. The Applicant asserts that the Land Registrar issued Title No. Kilifi/Kadzozzo/Madzimbani/1163 in the name of the Interested Party on 5th July 2018. As of the said date, the order of this Court made on 20th November 2017 was in force — Title No. Kilifi/Kadzozzo/Madzimbani/1163 was issued to the Interested Party following the Respondent's revocation of the Applicants' title deed. If the Respondent



had not revoked the Applicants' title, the new title issued to the Interested Party would not have been issued. It is, therefore, clear that the process leading to the issuance of title deed to the Interested Party was initiated by the Respondent. Put differently, if the Respondent had not begun the process by revoking the Applicants' title, the title in the name of the Interested Party could not have been issued. The Respondent is, therefore, liable for the end product of the process initiated by the Respondent, which is the title deed issued to the Interested Party. The Respondent is responsible for issuing the title deed in the name of the Interested Party. Since the Respondent commenced and jump-started the issuance process of the Interested Party's title deed by revoking the Applicants' title, the Applicant believes that the Respondent cannot escape liability. When the Respondent became aware of the Court order staying its decision to revoke the Applicants' title, the Respondent was under obligation to inform the Land Registrar not to execute its decision revoking the Applicants' title and to notify the Land Registrar not to go on and complete the process by issuing the Interested Party's title. Despite being aware of the Court Order, the Respondent did not intervene but sat pretty and let the process go on to the conclusion. The Respondent (through the cited officers) must be held liable.

13. The Applicant cites the case of Kenya Human Rights Commission v Attorney General & another [2018] eKLR, in which the Court stated that it has inherent powers to enforce its orders under Article 159 of *the Constitution* to preserve the Rule of Law and order in a democratic society.
14. The Applicant, therefore, seeks that the Chairman of the National Land Commission, the Secretary/ Chief Executive Officer of the National Land Commission, and the Director of Legal Affairs and Enforcement of the National Land Commission should be ordered to purge their disobedience of this Court's order made on 20th November 2017 as they have undermined not only the Court's authority but also the Rule of Law.
15. Similarly, the Chief Land Registrar and the Land Registrar of Kilifi County should correspondingly be summoned to show cause why they should not be committed to civil jail for disobeying this Court's order by issuing the title to the Interested Party despite being aware of this Court's order which was duly served upon them.
16. The Applicant agrees with the Replying Affidavit of Paul Muteke that the letters dated 9th November 2016 and 30th November 2016 were sent out for compliance before the subject Court order was issued. However, the complaint in this application is not that the said letters were not issued; the complaint is that despite knowing the Court's order, the Respondent and the Land Registrar did not stop the implementation of the two letters. They completed the process they had commenced by issuing the title deed in favour of the Interested Party. Good order demanded that the Respondent and the Land Registrar should have stopped implementing the recommendations contained in those letters the moment this Court order was issued. They did not. Instead, they completed the process by issuing the Interested Party with a title deed in breach of this Court's orders. The Applicant avers that in paragraph 8 (ii) of his Replying Affidavit, Paul Muteke lied that the title deed had already been issued in his name when this Court made its order. The Applicant states that that is not true. The Court order was made on the 20th of November 2017, yet the Interested Party's title deed was issued on 5th July 2018, eight months later.
17. As Mr. Oluga learned, counsel for the Applicant submitted, and this Court agrees that punishing for contempt is to mitigate against anarchy. It is to reaffirm the supremacy of the Rule of Law, good order, and the authority of the Court under its mandate delegated by the citizenry as held in the case of Kenya Human Rights Commission v Attorney General & another [2018] eKLR, where the Court stated that



it has inherent powers to enforce its orders under Article 159 of *the Constitution* and in paragraph 57, the Court stated thus:

“Article 159 of *the constitution* recognizes the judicial authority of courts and tribunals established under *the constitution*. Courts and tribunals exercise this authority on behalf of the people. The decisions courts make are for and on behalf of the people and for that reason, they must not only be respected and obeyed but must also be complied with in order to enhance public confidence in the judiciary which is vital for the preservation of our constitutional democracy. The judiciary acts only in accordance with *the constitution* and the law (Article 160) and exercises its judicial authority through its judgments decrees orders and or directions to check government power, keep it within its constitutional stretch hold the legislature and executive to account thereby secure the rule of law, administration of justice and protection of human rights. For that reason, the authority of the courts and dignity of their processes are maintained when their court orders are obeyed and respected thus courts become effective in the discharge of their constitutional mandate.”

18. The elements that can lead to the Respondents being cited for contempt are as enunciated in Samuel M. N. Mweru & Others v National Land Commission & 2 others [2020] eKLR:

“It is an established principle of law that to succeed in civil contempt proceedings, the applicant has to prove -

- (i) the terms of the order,
- (ii) Knowledge of these terms by the Respondent,
- (iii). Failure by the Respondent to comply with the terms of the order.

Upon proof of these requirements the presence of willfulness and bad faith on the part of the Respondent would normally be inferred, but the Respondent could rebut this inference by contrary proof on a balance of probabilities. Perhaps the most comprehensive of the elements of civil contempt was stated by the learned authors of the book *Contempt in Modern New Zealand* who succinctly stated:-

“There are essentially four elements that must be proved to make the case for civil contempt. The applicant must prove to the required standard (in civil contempt cases, which is higher than civil cases) that: -

- (a) the terms of the order (or injunction or undertaking) were clear and unambiguous and were binding on the defendant;
- (b) the defendant had knowledge of or proper notice of the terms of the order;
- (c) the defendant has acted in breach of the terms of the order and
- (d) the defendant’s conduct was deliberate.

41. It is the last test in paragraph (d) above that warrants detailed consideration. Unfortunately, the applicant’s counsel never addressed it at all. On the face of our transformative constitution with an expanded Bill of Rights, a pertinent question warrants consideration. Do constitutional values permit a person to be put in prison to enforce compliance with a civil order when the requisites are established only preponderantly, and not conclusively? In my view, a



high standard of proof applies whenever committal to prison for contempt is sought because contempt of Court is quasi-criminal in nature.

42. Two principals emerge. The first is liberty: - it is basic to our Constitution that a person should not be deprived of liberty, albeit only to constrain compliance with a court order if reasonable doubt exists about the essentials. In this regard, I am not satisfied that wilful disregard of the court order has been established.
43. The second reason is coherence. It is practically difficult, and may be impossible, to disentangle the reasons why orders for committal for contempt are sought and why they are granted. In the end, whatever the applicant's motive, the court commits a contempt respondent to jail for Rule of Law reasons; and this high public purpose should be pursued only in the absence of reasonable doubt. Accordingly, it is impermissible to find an alleged contemnor guilty of contempt in the absence of conclusive proof of the essential elements. The requisite elements must be established beyond reasonable doubt. In such a prosecution the alleged contemnor is plainly an 'accused person.
44. Third, accidental or unintentional disobedience is not sufficient to justify one for holding guilty of contempt. It is further relevant to bear in mind the settled law on the law of contempt that casual or accidental or unintentional acts of disobedience under the circumstances which negate any suggestion of contumacy, would amount to a contempt in theory only and does not render the contemnor liable to punishment.
45. It should be noted that developing the common law thus does not require the prosecution to lead evidence as to the accused's state of mind or motive: once the three requisites mentioned earlier have been proved, in the absence of evidence raising a reasonable doubt as to whether the accused acted willfully and mala fide, all the requisites of the offence will have been established. And as O'Regan J pointed out, the power to imprison for coercive and non-punitive purposes is 'an extraordinary one': -

"The power to order summary imprisonment of a person in order to coerce that person to comply with a legal obligation is far-reaching. There can be no doubt that indefinite detention for coercive purposes may involve a significant inroad upon personal liberty. Clearly, it will constitute a breach of s 12 of *the Constitution* unless both the coercive purposes are valid and the procedures followed are fair. In this case there seems no doubt that the purpose is a legitimate one. It also seems necessary and proper, however, for the exercise of the power to be accompanied by a high standard of procedural fairness."^[48]

46. Contempt of court is not merely a mechanism for the enforcement of court orders. The jurisdiction of the superior courts to commit recalcitrant litigants for contempt of court when they fail or refuse to obey court orders has at its heart the very effectiveness and legitimacy of the judicial system. That, in turn, means that the court called upon to commit such a litigant for his or her contempt is not only dealing with the individual interest of the frustrated successful litigant but also, as importantly, acting as guardian of the public interest."



19. The Applicant complains of disobedience of orders served on the Respondent and Interested Parties. What emerges from the materials and submissions placed before me is that there was a public inquiry on the determination of review of grants and disposition of public land initiated by the Respondent that was ongoing and had been concluded by the Respondent exercising its mandate under Article 68 (c)(v) of *the Constitution*, and Section 14 of the NLC Act.
20. The Respondent recommended to The Chief Land Registrar under Section 14(5) of the NLC Act the revocation of title Land Reference No.17439 (Grant No. C.R. 212/1) in the names of the ex-parte Applicants herein. The advice was conveyed via letters dated 9th November 2016 and 30th November 2016.
21. The current Judicial Review Application was filed to challenge the said decision and mandate of the NLC, as provided above, in view of the fact that there was a matter - Mombasa ELC 79 of 2012 that had fully and finally settled the issues that the NLC purported to inquire and adjudicate on. This Court impugned that decision by the NLC. It was quashed. An order was issued earlier, with the parties' consent through their counsels, on the 30th of July 2019 to secure the substratum of the suit. - that, pending the hearing and determination of this matter, the title in issue was to remain in the names of the ex-parte Applicants. The orders were duly served on the Respondents and registered at the Lands Title Registry Mombasa as Registry No. CR. N212/9 on 30th November 2017 as per Paragraph 6 of the Supporting Affidavit dated 16th November 2020. Instead, the Land Registry, oblivious to the orders of this Court, issued title to the Interested Party, contrary to what the orders of this Court provided.
22. This prima facie was in contempt of the Court order because the NLC recommendations had not been implemented by the time the orders were issued and registered. The title to the Interested Party was issued on 5th July 2018—eight months after the issuance and registration of the orders, hence the current application.
23. The Respondent submitted that after rendering its decision, it became functus officio, and therefore, its officers cannot be cited for contempt. I agree that after the Respondent issued its opinion on the issues before it, touching on the suit property, it became functus officio. The letters that recommended the revocation of the title were issued before this matter was filed. The orders issued by this Court to stop further action on the suit property were to be implemented by the Chief Land Register via its Kilifi Land Registry. The Respondent was undertaking a quasi-judicial function subject to the Judicial Review Jurisdiction of this Court. It was up to the Chief Land Registrar through the Land Registrar Kilifi to adhere to the Court orders that had quashed the decision arrived at by the Respondent as having been ultra vires since already a competent Court of jurisdiction in Mombasa ELC 79 of 2012 had decided on the matter. I believe the orders sought to cite the Respondent for contempt will not be available under the circumstances of the case. What will be available is to summon the Chief Land Registrar through the Land Registrar – Kilifi County to appear before this Court and to show cause for recalling, canceling, nullifying, and revoking. Title No. Kilifi/Kadzozzo/Madzimbani/1163, issued in the name of the Interested Party herein within 30 days of this order, cannot be undertaken since the action undertaken by the name officers undermined this Court's order made on 20th November 2017 as subsequently fortified by the judgment of this Court dated 30th July 2019,—no order as to costs.

DATED, SIGNED, AND DELIVERED AT MALINDI ON THIS 4TH DAY OF JUNE 2024. UNDER THE DIRECTIONS ISSUED ON THE 22ND OF MAY 2024, THE RULING WILL BE SUPPLIED TO ALL THE PARTIES VIA THEIR RESPECTIVE EMAILS.

E.K. MAKORI

JUDGE

