



Watamu Men Fridays Limited & another v Attorney General & 6 others (Environment & Land Case 104 & 4 of 2019 (Consolidated)) [2024] KEELC 6731 (KLR) (15 October 2024) (Ruling)

Neutral citation: [2024] KEELC 6731 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 104 & 4 OF 2019 (CONSOLIDATED)
FM NJOROGE, J
OCTOBER 15, 2024**

BETWEEN

WATAMU MEN FRIDAYS LIMITED PLAINTIFF

AND

ATTORNEY GENERAL 1ST DEFENDANT

CHIEF LAND REGISTRAR 2ND DEFENDANT

DIRECTOR OF SURVEYS 3RD DEFENDANT

REMO LENZI 4TH DEFENDANT

SEVEN ISLANDS WATAMU LIMITED 5TH DEFENDANT

**AS CONSOLIDATED WITH
ENVIRONMENT & LAND CASE 4 OF 2019**

BETWEEN

ALYVIDZA INVESTMENT LIMITED PLAINTIFF

AND

SEVEN ISLANDS WATAMU LIMITED 1ST DEFENDANT

LAND REGISTRAR KILIFI 2ND DEFENDANT

CHIEF LAND REGISTRAR 3RD DEFENDANT

ATTORNEY GENERAL 4TH DEFENDANT



RULING

1. The Applicant filed a notice of motion application dated 22/4/2024 seeking orders as follows: -
 - a. Spent;
 - b. That prior to the hearing and determination of prayers (c), (d), (e) and (f) below, the 2nd, 3rd and 4th Defendants be compelled to supply the court under oath and names and service numbers of the officers who registered Parcel No. Kilifi/Jimba/1125 as entry no. 9 dated 13.2.2020 of Photo Index Diagram (PID) No. 12 of Kilifi/Jimba Registration Section and registered the subdivision of Parcel No. Kilifi/Jimba/1125 into three portions namely Parcel No. Kilifi/Jimba/1719, Kilifi/Jimba/1720 and Kilifi/Jimba/1721;
 - c. The honourable court be pleased to cite and punish for contempt the directors of the 1st Defendant namely Roberto Lenzi and other and the specific officers of the 2nd, 3rd and 4th Defendants disclosed in (b) above for:
 - i. Jointly and severally registering parcel no. Kilifi/Jimba/1125 as entry no. 9 dated 13.2.2020 of Photo Index Diagram (PID) No. 12 of Kilifi/Jimba Registration Section; and
 - ii. Jointly and severally subdividing and registering parcel no. Kilifi/Jimba/1125 into three portions namely; Parcel No. Kilifi/Jimba/1719, Kilifi/Jimba/1720 and Kilifi/Jimba/1721.
 - d. The honourable court be pleased to issue a mandatory order cancelling entry no. 9 dated 13.2.2020 of Photo Index Diagram (PID) No. 12 of Kilifi/Jimba Registration Section and revoke and cancel the registration of Parcel No. Kilifi/Jimba/1125 together with the resultant title deeds for Parcel No. Kilifi/Jimba/1719, Kilifi/Jimba/1720 and Kilifi/Jimba/1721;
 - e. The honourable court be pleased to issue mandatory orders directing the 2nd and 3rd Defendants to delete from the land registry records entry no. 9 dated 13.2.2020 of Photo Index Diagram (PID) No. 12 of Kilifi/Jimba Registration Section and the registration of Parcel No. Kilifi/Jimba/1125 together with the resultant title deeds for Parcel No. Kilifi/Jimba/1719, Kilifi/Jimba/1720 and Kilifi/Jimba/1721;
 - f. The court be pleased to re-open the plaintiff's case to file further witness statements and adduce more evidence;
 - g. The costs of the application be provided for.
2. The application is supported by the affidavit of the applicant's director, Philip Obandah Arungah sworn on 19/4/2024. According to the Applicant, while the suit was still pending, the 1st, 2nd and 3rd Defendants' agents registered Parcel No. Kilifi/Jimba/1125 as entry no. 9 dated 13.2.2020 of Photo Index Diagram (PID) No. 12 of Kilifi/Jimba Registration Section and registered the subdivision of Parcel No. Kilifi/Jimba/1125 into three portions namely Parcel No. Kilifi/Jimba/1719, Kilifi/Jimba/1720 and Kilifi/Jimba/1721, contrary to prohibitory orders issued by this court.
3. The deponent narrated that on 17/10/2019, a consent order to maintain status quo pending the hearing and determination of the suit was recorded in the presence of counsel for all parties; that as at that time, the status quo as confirmed in a related judgment of the Court of Appeal, Civil Appeal



No. 67 of 2016, was that the PID No. 12 of Kilifi/Jimba Registration Section had not been registered. This, he alleged, was also the status confirmed by a surveyor's report dated 13/12/2019. He added that sometime in December 2019, two other matters were filed in this court- ELC JR No. 7 of 2019 and HC Misc. Civil Application No. 14 of 2019.

4. On 5/12/2019 orders were issued against them ex-parte in ELC JR No. 7 of 2019. The orders directed the Director of Surveys to immediately amend the survey records Registry Index Map No 12 for Kilifi/Jimba registration section to include plot no Kilifi/Jimba/1125. These orders were later set aside on 28/5/2021. Prior to that setting aside the court first issued a status quo order in the matter on 5/2/2020 which was to last up to 12/3/2020 which order was later extended to the ruling date herein above, that is 28/5/2021. To the Applicant therefore, between 17/10/2019 (date of the consent order in ELC NO 4 OF 2019 to 28/5/2021 (date of setting aside the order allowing the amendment of the RIM), the Defendants were barred from registering the said PID since that is the root cause of action or foundation in this suit, or carry out any other activities thereon; that sometime in February 2024, upon conducting another survey, the Applicants learnt that the agents of the defendants had registered the PID and subdivided the suit property Kilifi/Jimba/1125 contrary and in deliberate disregard of this court's orders.
5. The deponent further states that sometime in February 2024 he learnt that the 1st defendant was still selling units relating to some developments on the suit property so he and others commissioned a surveyor to do a report. The resulting survey report is said to be dated 27/3/2024 by one Kiguru, a Surveyor. It revealed that the parcel no 1125 was registered and subdivided into three portions. The report shows that the changes were done after 17/10/2019 and 5/2/2020. It is stated that the order of 17/10/2019 was by consent of all parties and the order carried a penal notice and so the acts in contravention of that order were deliberate. The subsequent filings of Roberto Lenzi in this matter never disclosed the changes. Neither did the respondent's counsel notify court. Thus the applicant maintains that the names of the officers concerned with the changes are thus needed in these proceedings.
6. The application was opposed. On their part, the 4th and 5th Defendants filed grounds of opposition dated 29/5/2024 stating that the application is marred with massive misrepresentation of facts, devoid of merit and a gross abuse of the court process. To these Defendants, the application is only but an attempt to amend the plaint at a late stage. That amendment of the Registry Index Map as alleged by the Applicant was done in compliance of mandamus orders issued in ELC JR No. 7 of 2019, and that the same was done before stay of execution orders were issued. Counsel added that the subdivision was equally made pursuant to a judgment of the Court of Appeal in Civil Appeal No. 81 of 2016 requiring the mapping of Plot No. 103 within the suit property Kilifi/Jimba/1125.
7. The 1st Defendant filed a replying affidavit sworn by Lee Dzoro, District Surveyor, on 29/5/2024, wherein he deposed that the office of the District Surveyor was served with a court order dated 5/12/2019 in JR No. 7 of 2019, compelling the Director of Surveys to amend the survey records of Registry Index Map No. 12 for Kilifi/Jimba Registration Section to include Title No. Kilifi/Jimba/1125. Subsequently, the process commenced immediately in accordance with the court order and the law.
8. On 26/4/2024, the court directed that parties first canvass by way of written submission, the merit or otherwise of prayer (b) sought in the application. This ruling will thus be confined to the said prayer.



Applicant's Submissions

9. Mr. Munyithya, counsel for the Applicant filed submissions dated 29/5/2024. He submitted that as public officers, agents of the 2nd, 3rd and 4th Defendants have a duty to maintain public trust and that Article 75 of *the Constitution* provides guidelines on their conduct. Counsel argued that pursuant to the said provision, a state officer found to have contravened the integrity chapter under *the Constitution* is to be held personally liable. To support this argument, counsel relied on the case of Hamran Ahmed Salim v The Cooperative Bank of Kenya Limited & 2 others [2021] eKLR.
10. Counsel added that the need to grant prayer (b) is so because non-compliance of the integrity chapter is personal and further, because the rest of the orders sought, particularly prayer (c) is dependent on the former. He argued that the prayer is justified since court orders cannot be issued in vain. To this end, counsel relied on the case of Justus Wanjala Kisiangani & 2 others v City Council of Nairobi & 3 Others; and Uasin Gishu Quarry Limited v Commissioner of Lands [2010] eKLR.

1st, 2nd and 3rd Defendants' Submissions

11. Relying on the case of Samuel M. N. Mweru & others v NLC & 2 others [2020] eKLR, the State Counsel, Mr. Munga argued that having failed to demonstrate that the terms of the orders of status quo were clear and well known to the Defendants, there is therefore no justification to supply the names of the officers involved in the alleged registration. He added that the orders were never served on the 2nd and 3rd Defendants and that the mutation forms were even signed by a private surveyor.

4th and 5th Defendants' Submissions

12. According to counsel for these Defendants, prayer (b) is superfluous and vexing in nature as it seeks disclosure of officers who implemented a valid court order in ELC JR No. 7 of 2019. To him, the prayer is premature as it presumes that the said officers are guilty. That the order is unattainable without the wholistic consideration of the application.
13. Counsel added that in exercise of its jurisdiction, the court must thoroughly interrogate whether the allegation of contempt is sustainable in the first place. That the alleged contemnors must get on their defence before a decision is entered. Counsel cited the case of Woburn Estate Limited v Margaret Bashforth [2016] eKLR. He added that the risk in presuming contempt without adhering to the rigors of a fair trial as the Applicant wishes the court to do will only sabotage the ends of justice. Counsel urged the court to be guided by the decision of Carey v Laiken, which he did not give any citation thereto.

Analysis and Determination

14. From the above, it is distinct that the issue for determination is whether the 2nd, 3rd and 4th Defendants should be compelled to supply the court under oath, the names and service numbers of the officers who registered Parcel No. Kilifi/Jimba/1125 as entry no. 9 dated 13.2.2020 and the subdivisions thereto.
15. The standard of proof in contempt proceedings, is generally higher than that of balance of probabilities, although not beyond reasonable doubt. It is also trite that orders for punishing an alleged contemnor are never issued at large. Such orders must be directed at a particular person who is named in the order and who is alleged to have disobeyed the orders or aided or abetted in the disobedience of the court orders. The Applicant wants this court to compel the 2nd, 3rd and 4th defendants to give information so as to proceed with the application for contempt.



16. It must however be remembered that in the context of public bodies, under the [Access to Information Act](#), 2016, an individual is generally expected to request information directly from the relevant body before seeking court intervention. If the request is denied, ignored, or not responded to, the individual can then seek redress from the court. This principle is anchored on Article 35 (1) of [the Constitution](#) of Kenya, regarding the right to information. That Article reads: -
35. (1) Every citizen has the right of access to—
- (a) information held by the State; and
 - (b) information held by another person and required for the exercise or protection of any right or fundamental freedom.
17. [The Constitution](#) is therefore clear that information held by the state is accessible by citizens and that information is available on request and without any delay. Article 35 does not place any condition for accessing information.
18. For purposes of actualizing Article 35, Parliament enacted the [Access to Information Act](#), 2016. Section 4 (1) of that Act establishes the right of every citizen to access information held by the state or by another person where such information is required for the protection of a right. Section 4 (3) further states that a public entity or private body shall disclose information expeditiously without unnecessary delay and at a reasonable cost. Section 8 (1) thereon outlines the procedure for a person to make a formal request for information from a public entity or private body, and Section 9 (1) provides that the entity must respond to the request within a period of twenty-one days. Under Section 14, an individual is entitled to apply for a review of any decision issued by an entity regarding their application. The review is sought at the Commission of Administrative Justice.
19. In [Speaker of the National Assembly v Karume \(Civil Application 92 of 1992\)](#) [1992] KECA 42 (KLR) (29 May 1992) (Ruling) the Court of Appeal stated as follows:
- “In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by [the Constitution](#) or an Act of Parliament, that procedure should be strictly followed.”
20. In summary, the [Access to Information Act](#) lays down the procedure to be followed in obtaining information from an entity. This court affirms that before seeking judicial intervention, a party must first attempt to obtain the information through formal requests.
21. In the present case, the Applicant has failed to demonstrate that it made any attempts to obtain from the named Defendants the names of the officers involved in the impugned registration process. It can not be deciphered whether, had the Applicant sought that information through a written application as stipulated in the [Access to Information Act](#), the Defendants would have provided the same. Dragging the respondents to court to compel them while such application has not been made is in this court’s view improper and the relief sought is an abuse of the court process. In the circumstances, I decline to grant prayer (b) and I hereby strike out that prayer summarily.
22. This court had ordered a preliminary trial of only prayer b in the motion. It has been denied. This application is set down for hearing in respect of the other prayers. The applicant shall file and serve submissions in respect of prayers (c), (d), (e), (f) and (g) within 7 days from today and the Respondents shall respond thereto within 7 days of service. With regard to prayer (c), the 2nd, 3rd and 4th Defendants shall not be required to answer it owing to the findings of the court made earlier in this ruling. This application shall be mentioned on 5/11/2024 for issuance of a ruling date.



**RULING DATED, SIGNED AND DELIVERED AT MALINDI ON THIS 15TH DAY OF OCTOBER
2024.**

MWANGI NJOROGE

JUDGE, ELC MALINDI

