Nightshade Properties Limited v National Land Commission & 4 others (Environment & Land Case 33 of 2019) [2024] KEELC 7343 (KLR) (6 November 2024) (Ruling)

Neutral citation: [2024] KEELC 7343 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MALINDI

ENVIRONMENT & LAND CASE 33 OF 2019

FM NJOROGE, J

NOVEMBER 6, 2024

BETWEEN

NIGHTSHADE PROPERTIES LIMITED .... PETITIONER

AND

NATIONAL LAND COMMISSION & 4 OTHERS & 4 OTHERS & 4 OTHERS & 4 OTHERS & 4 OTHERS & 4 OTHERS & 4 OTHERS & 4 OTHERS & 4 OTHERS & 4 OTHERS & 4 OTHERS .... RESPONDENT

RULING

1. That the effectiveness of the interface between governmental organizations and departments and the constitutional and statutory bodies charged with land acquisition processes and also that between the latter category and the judicial arm of government is under considerable scrutiny from legion quarters is manifest in the present application whose possible ramifications have elicited considerable anxiety in this court. Notwithstanding that the dispute regarding the subject land herein has endured three separate pieces of litigation- two petitions and one appeal-it still appears to simmer. It appears that not even an elaborate institutional superstructure relating to land acquisition established on robust constitutional and legal foundations has guaranteed an end to the present dispute, thus begging the question as to why; it is the case that persons and bodies charged with constitutional and legal mandate are fallible, just as all others are. However, after the original title cancellation debacle and following two sets of orders, one appellate, it can be hastily judged by a mere cursory perusal of the instant application that the 1st respondent's apparent failure to set in motion the appropriate statutory machinery to write finis to the dispute is not only appalling and despicable, but very loathsome in rule-of-law setting. The application seems to ooze evidence of oppressiveness and luridly paints an amazing spectacle to behold: that a transgressor spared flagellation, as the 1st respondent in this case has seemingly been, has aggregated no sufficiently sizeable remorse to seize that rare opportunity to self-correct. That said, it behoves this court to now embark onto the vital task at hand.

2. The Applicant, appearing quite vexed by the somnolent approach of the 1st respondent to its importunate plea for timeous recompense for its compulsorily appropriated land moved this court vide an application dated 7/3/2024 and filed on 11/3/2024 seeking the following orders:

   1. .... Spent;

   2. That the 1st respondent having failed to comply with the order of the court in Section 112 of the *Land Act* this court do determine the value of the land as directed by the court of appeal;

   3. That the costs of the application be provided for;

   4. Any other relief that this court may deem fit to issue for the interest of justice.

3. Before the present application was lodged however the applicant had filed a contempt application dated 18/6/2021 in which he sought to have the Chairman NLC, the Managing Directors of KPA and LAPSSET cited for contempt and fined or imprisoned for disobeying court orders. Whilst the present application filed on 7/3/24 was still pending the applicant also made a bid to galvanize the 1st respondent into action vide amendment of that committal application on 2/4/2024 to expunge the Managing Directors and leave the Chairman NLC as the sole target of punishment for contempt. Later, the original application and the amendment were withdrawn leaving the present application on the record and so this court took no notice of it for the time being.

4. The present application which was brought under the provisions of Section 112 and 128 of the *Land Act*, Sections, 1A, and 1B of the *Civil Procedure Act* is premised on the grounds set out on its face, and the supporting affidavit of one Mohamedraza S. Rashid thereto attached. The grounds for it are as follows: in its judgment dated 23/3/2021 this court made a determination that the 1st respondent was to determine the compensation due to the petitioner within 45 days; the 5th respondent lodged an appeal against that judgment and the 4th respondent cross-appealed; the civil appeal was determined on 7/7/2023; the appellate judgment confirmed the order of mandamus directing the 1st respondent herein to convene a meeting under the provisions of Section 112 of the *Land Act* to determine the just compensation due to the applicant; the 1st respondent has failed to comply with that order and the period given by the court of appeal has expired; that thus the matter ought to be reverted back to this court for determination of value and a valuation report is ready and filed in court; that in the absence of such valuation the petitioner continues to suffer at the hands of the respondent.

5. The application is unopposed.

6. The applicant filed submissions dated 26/9/2024 and reiterated the contents of the grounds set out herein above which are quite self-explanatory. It was submitted that the usual approach by a court is that when a constitutional body has been mandated to undertake various functions the courts should refrain from any interference; however, if that body fails to undertake or discharge its functions then courts should intervene; in this case, it is submitted, the Court Of Appeal has accorded the 1st respondent sufficient time to discharge its mandate and so this court must accept the invitation by the petitioner/applicant to intervene, and the only issue is to determine the value of the land so that the 2nd and 5th respondents may make payment as ordered by the Court Of Appeal within the time frame set out in its judgment of 7/7/2023; that courts can set timelines for the doing of things and they must be adhered to unless extended by the court. Citing the case of Mate and Another Vs Wambora & Another Petition 32 Of 2014 [2017] KESC 1 KLR CIV (JDGT) the applicant urged that it should be deduced that the 1st respondent is unwilling to comply with the orders of the court. It is urged that this court has power to determine the just compensation and that it should base its valuation on the valuation report in the record which places the value of the property at Kshs 1, 335,000,000/=.

Determination.

7. In the judgment dated 28/10/21 this court set out the prayers sought in this petition by the applicant: certiorari to quash the 1st respondent's decision to compulsorily acquire the suit land; mandamus directing the 1st respondent to convene a meeting to determine just compensation; a declaration of unconstitutionality of some of the 2nd and 5th respondents' decisions; a declaration that certain provisions of the *Kenya Ports Authority Act* are unconstitutional; injunction; a declaration that Section 120 of the *Land Act* is contrary to *the Constitution*, and a declaration that the matter concerns the petitioner's private rights and that it is not public interest litigation. The National Land Commission issued a Gazette Notice no 1518 on 16/2/2018 expressing an intention to acquire the suit land. This court found the 5th respondent had admitted being in occupation of the suit land yet the procedure had not been followed. The court also noted that the delay in the commencement of the process was not to be blamed on the respondents as the suit title had been cancelled and was only reinstated by court order on 12/5/17. However, two years before that, the process of compensation for other persons had been completed and monies released by the 5th respondent. This court ordered in judgment that the 1st respondent do convene a meeting within 45 days to determine just compensation. It also ordered that in default after the 45 days the 1st and 5th respondents would be injuncted from interfering with the suit land. Later on the Court of Appeal confirmed the mandamus order and added an order to the effect that the 2nd respondent should compensate the applicant within one year from the date of the judgment which was 7/7/24; the injunction order against the NLC and the LAPSSET was set aside.

8. The appellant's land having been occupied by government agencies, and the injunction order having been set aside by the Court of Appeal, it is clear that the only issue that remained was how much compensation ought to be paid and when. The respondents having avoided participation in this application before me, it seemed clear to see the agony suffered by the applicant as it awaited its compensation for land that it is not utilizing but which is in the hands of the government, hence the plea that the court assesses the compensation payable.

9. Only the issue of how much compensation is payable. The issue of when is already decided. If the applicant's application is anything to go by, had the respondents put their act together the compensation would have been paid by 6/7/24. It ought not have exceeded that date. It seems grievous that this matter is still pending despite very express orders of the Court of Appeal. Proceeding from the presumption that this court has jurisdiction to issue the orders sought, there is no recourse other than peruse the record for any beacons of hope that would guide it in the task, and that is no mean feat.

10. It may seem that other than the response to the contempt application and that was withdrawn, little else came forth from the National Land Commission in terms of material that could have assisted this court to determine the present application. Just as it never responded to the present petition and the appeal before the Court of Appeal, it never filed a response to the instant application. The petitioner's bundle and the KPA's documents filed in the main petition contain matters that this court ought to consider in assessing of compensation.

11. Of the foremost importance is the judgment dated 2/5/2017 in Malindi ELC Petition No 20 Of 2015 *Nightshade Properties Ltd Vs Registrar of Titles Mombasa and Another*. In that judgment the court stated as follows:

> The actions of the Registrar of Titles to revoke the petitioner's title without giving the petitioner a chance to explain how he acquired the same is therefore contrary, not only to section 14 of the *National Land Commission Act* but also article 47 (1) and 40(3) of *the constitution*... having failed to give the petitioner an opportunity to state its

case, the respondents acted unconstitutionally in revoking the petitioner's title.... in the circumstances I allow the petitioner's petition dated 30th November 2015...."

12. By that judgment, the gazette notice vide which the cancellation of title had been effected was revoked for the reason that the applicant had not been accorded a hearing, and the land records showing the petitioner as proprietor of the suit land were reinstated. It can not be known whether had the proper process been followed the title would have been found to be valid. It is after that judgment that the applicant began to agitate for compensation.

13. The letter by Prof Muhammad Swazuri, the then Chairman, National Land Commission, dated 28/6/2017 stated as follows:

> Though this land was allocated to Nightshade Properties Limited following (sic) it is overlapping with the land set apart for the Lamu Port area. Information from the Secretary, County Land Management Board then confirmed that a large part of this property LR No. 28101 had an overlap with other ownership interest interest (sic) who were compensated by Kenya Ports Authority to give room for construction of the now existing new port headquarters."

14. No dimensions regarding the overlap were given in that letter. It is remarkable that those details are missing in the letter dated 5th June 2017 by the same author, whose all other details are an exact replica of the letter of 28/6/2017. Also, the letter of demand dated 22/6/2018 written by Michael Daud & Associates advocates on behalf of the petitioner neither gives the overlap details or information as to how much of the land was acquired. The same case applies to the same firm's letter of demand dated 24/5/2019, though that letter gives some more light as to what was happening namely, that the KPA had taken possession and began construction of two berths for the port. The two supporting affidavits of the applicant's director dated 30/11/2019 in this matter are also unhelpful.

15. The contents of the September 2014 survey report by the Ministry of Land Housing and Urban Development found as follows:

> A total of fifty-eight 58 parcels were surveyed, as pointed out by the claimants around the port administration headquarters area. The parcels surveyed were of various areas(sizes) and had no defined roads of access since the parcel layout was in line and with respect to the Swahili village setup where landowners have a right of way over the neighbouring adjacent parcels for access. In Lamu port area it was found out that one parcel was unclaimed though it was fenced off and its boundaries were surveyed as per the fencing. The total area of the fifty-eight parcels is 153.072 ha."

16. I have considered the list of claimants availed by the KPA in opposition to the application for conservatory orders. None of the 58 parcels listed there is over 9 ha in size.

17. Gazette notice No 1518 of 16th February 2018 issued by Prof Muhammad Swazuri, the then Chairman, National Land Commission, indicated that 100 ha were scheduled for acquisition, and the applicant claims his land measures 100 ha.

18. In its decision the Court of Appeal after quoting from the case of *Republic Vs Kenya National Examinations Council Ex Parte Gathenji & Others* 1997 eKLR stated as follows:

> 52. An order of mandamus compels a public officer to act in accordance with the law. The main principles that apply therefore for an order of mandamus to issue are firstly, that the court will issue a mandatory order if it concludes that it is the only decision lawfully open to the public

body, and there is no other legal remedy that is available to remedy the infringement of a legal right. Secondly, the court will only compel the satisfaction of a public duty if it has become due.

53. The Learned Judge gave an order of mandamus against the 2nd respondent, the NLC to comply with section 112 of the Lands Act. there was no need to make any other order to accompany the order of mandamus. The reason is the mandamus was complete in itself. Furthermore, if the 2nd respondent failed to comply with it, the 1st respondent has a recourse as it is capable of execution."

19. The Court of Appeal therefore never set aside the mandamus order. It would appear that it is still available for execution. The question that arises is therefore whether the present application is the form of execution that would be envisaged in respect of such a mandamus order. In this court's view, it is being asked not to cause the National Land Commission to act in accordance with the Court of Appeal judgment that requires it to convene a meeting under the provisions of Section 112 of the *Land Act* to determine the just compensation due to the applicant herein etc., but to sidestep the National Land Commission and all the relevant statutory mechanisms that would have been implemented by that Commission under that law to ensure that payment to the applicant is finally effected, and to proceed to assess the compensation itself. With all due respect, this is contrary to what the Court of Appeal envisaged. It apparently never envisaged that this matter would be re-litigated again but held that the mandamus order is only decision lawfully open to the NLC, and implied that there is no other legal remedy that is available to remedy the infringement of the applicant's legal right. In any event, it being seized only of the applicant's valuation report, this court is not equipped to perform the task that the applicant seeks it to do. To buttress this point, it is noteworthy that the applicant has not specified the law under which this court may proceed to assess the compensation. What is primarily relied on to lodge the application is Section 112 and 128 of the *Land Act* and Sections 1A and 1B of the *Civil Procedure Act*. I wish to refer the provisions of those sections.

20. Section 112 provides as follows:

112. Inquiry as to compensation

(1) At least thirty days after publishing the notice of intention to acquire land, the Commission shall appoint a date for an inquiry to hear issues of propriety and claims for compensation by persons interested in the land, and shall—

(a) cause notice of the inquiry to be published in the Gazette or county Gazette at least fifteen days before the inquiry; and

(b) serve a copy of the notice on every person who appears to the Commission to be interested or who claims to be interested in the land.

(2) The notice of inquiry shall call upon persons interested in the land to deliver a written claim of compensation to the Commission, not later than the date of the inquiry.

(3) At the hearing, the Commission shall—

(a) make full inquiry into and determine who are the persons interested in the land; and

(b) receive written claims of compensation from those interested in the land.

(4) The Commission may postpone an inquiry or adjourn the hearing of an inquiry from time to time for sufficient cause.

(5) For the purposes of an inquiry, the Commission shall have all the powers of the Court to summon and examine witnesses, including the persons interested in the land, to administer oaths and affirmations and to compel the production and delivery to the Commission of documents of title to the land.

(6) The public body for whose purposes the land is being acquired, and every person interested in the land, is entitled to be heard, to produce evidence and to call and to question witnesses at an inquiry."

21. Section 128 provides as follows:

128. Reference to the Environment and Land Court

Any dispute arising out of any matter provided for under this Act may be referred to the Land and Environment Court for determination.

22. Section 1A *CPA* provides as follows:

1A. Objective of Act

(1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.

(2) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).

(3) A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court.

23. Section 1B *CPR* provides as follows:

1B. Duty of Court

24. For the purpose of furthering the overriding objective specified in section 1A, the Court shall handle all matters presented before it for the purpose of attaining the following aims—

(a) the just determination of the proceedings;

(b) the efficient disposal of the business of the Court;

(c) the efficient use of the available judicial and administrative resources;

(d) the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties; and

(e) the use of suitable technology."

25. The applicant claims a constitutional right for prompt compensation. Violation of constitutional rights of a citizen is a serious issue. Article 2 of *the Constitution* states that *the Constitution* is the supreme law of the land and that it binds all persons and organs at both levels of government. Article 10 provides again that the national values and principles of governance in that article shall bind all state organs, state officers, public officers, and all persons whenever any of them inter alia applies and interprets *the constitution* or enacts or applies any law or makes or implements public policy decisions. Thus it ought

to be respected by all persons. The rule of law, equity, transparency and social justice are among the national values and principles of governance in Article 10 of *the Constitution*. Further *the Constitution* provides for every person's right to administrative action that is expeditious lawful, reasonable and procedurally fair. This court is aware that it has been submitted for the applicant that the usual approach by a court is that when a constitutional body has been mandated to undertake various functions the courts should refrain from any interference and that if that body fails to undertake or discharge its functions then courts should intervene. However, if this court were inclined to favour the long suffering applicant's very seductive argument and be the bold knight in shining armour providing the much anticipated relief for the apparently long standing and egregious ills of the 1st respondent, and were it to act under Section 112 in lieu of the NLC as suggested by the applicant, shall it then:

a. appoint a date for an inquiry to hear issues of propriety and claims for compensation by persons interested in the land?

b. cause notice of the inquiry to be published in the Gazette or county Gazette at least fifteen days before the inquiry?

c. By that notice call upon persons interested in the land to deliver a written claim of compensation to the Commission, not later than the date of the inquiry?

d. serve a copy of the notice on every person who appears to the Commission to be interested or who claims to be interested in the land?

e. receive a written claim or claims of compensation to the Commission, not later than the date of the inquiry?

f. Conduct a hearing?

g. At the hearing, make full inquiry into and determine who are the persons interested in the land?

h. receive written claims of compensation from those interested in the land?

i. postpone an inquiry or adjourn the hearing of an inquiry from time to time for sufficient cause?

j. summon and examine witnesses, including the persons interested in the land, administer oaths and affirmations and compel the production and delivery to the Commission of documents of title to the land?

k. hear the public body for whose purposes the land has been acquired, and every person interested in the land entitled to be heard and to produce evidence and to call and to question witnesses at an inquiry?

26. I have deliberately failed to substitute the wording of the expected actions in the tasks above from "the Commission" to "the court" since, as it is apparent, those provisions appear to assign a task to a competent constitutional commission which according to the law is specially crafted and constituted to specifically conduct those tasks and it is thus irreplaceable, not even by an arbitrary order of this court assigning itself the said tasks, and that position appears to have been clear to the applicant herein too before the lodging of the instant application since it did not appeal to the applicant to seek an order of assessment of compensation by the court at the very inception of this litigation. This irreplaceability is also clearly evident in the provisions of Sections 8(1) and 8(2) of the *National Land Commission Act* which provide as follows:

8. Qualification for appointment as Chairperson or member of the Commission

(1) A person shall be qualified for appointment as the Chairperson if the person—

(a) holds a degree from a university recognized in Kenya;

(b) has knowledge and experience of at least fifteen years in matters relating to any of the following fields—

(i) public administration;

(ii) land management and administration;

(iii) management of natural resources;

(iv) land adjudication and settlement;

(v) land law, land survey, spatial planning or land economics; or

(vi) social sciences;

(c) meets the requirements of Chapter Six of *the Constitution*; and

(d) has had a distinguished career in their respective fields.

(2) A person shall be qualified for appointment as a member of the Commission if the person—

(a) holds a degree from a university recognized in Kenya;

(b) has knowledge and experience of at least ten years in matters relating to any of the following fields—

(i) public administration;

(ii) land management and administration;

(iii) management of natural resources;

(iv) land adjudication and settlement;

(v) land law, land survey, spatial planning or land economics; or

(vi) social sciences;

(c) meets the requirements of Chapter Six of *the Constitution*; and

(d) has had a distinguished career in their respective fields."

27. Some tasks, it so appears to this court, were assigned to specific persons or bodies under *the Constitution* for good reason, otherwise, perchance it assumed jurisdiction in the matter with alacrity, how would this court deal with the issue, as stated by the Chairman of the NLC, that the suit land is overlapping with the land previously already set apart for the Lamu Port area bearing in mind it is the final arbiter of disputes on validity of title to land? Or that it overlaps other plots whose owners have already been compensated? Or establish at least after these things are factored in, the remaining area to be made subject of compensation? Are not these the tasks reserved for the 1st respondent's otherwise able hands and publicly funded facilities? It is clear that the court is not well suited for the task at hand as proposed. The only other alternative to the 1st respondent's decision is a mechanical application of the applicant's own valuation. However, this course is fraught with peril since that valuation only epitomizes the applicant's own judgment of what the value is and it may not have taken into consideration all the

parameters concomitant to the compulsory acquisition process. However, the ultimate alternative, which is not very appealing to the justice of the case for any of the two sides, is a plucking of a figure from the air and its inclusion in an arbitrary order for payment, but in acting so the court would have unconscionably absconded the arbiter's post and descended into the arena of conflict. That course must be also rejected. Much as the 1st respondent's recalcitrance demands action, no craft will justify the court's possible circumvention of *the constitution* and statute to usurp the mandate of the NLC in order to garb itself with jurisdiction as a first instant forum for assessment of quantum in a compulsory acquisition matter.

28. Perchance the provisions of Section 128 of the *Land Act* are relied upon by the applicant, his apparent angst and frustration at the hands of a seemingly aloof or lackadaisical 1st respondent who would rather neither defend the petition nor appear at the appeal on a decision of this court passed against it and who would also not file anything to oppose the present application, have obfuscated from the applicant's view the provisions of Section 133(C) (6) of the *Land Act* which are as follows:

> Despite the provisions of Sections 127, 128 and 148 (5), a matter relating to compulsory acquisition of land or creation of wayleaves, easements and public right of way shall, in the first instance, be referred to the Tribunal." (Emphasis mine)

29. The provisions of the various sections replicated herein above are self-explanatory and it is needless need say more on the issue of this court's jurisdiction. This is a matter in which, perchance there had been any suspicion that the cause of action lay in pure trespass, the taking of possession by the 4th respondent and the issuance of a land acquisition Gazette Notice No 1518 by the 1st respondent absolutely dissipated that notion and narrowed down the pending dispute to only the issue of how much compensation ought to be paid. However, to arrive at that sum, the 1st respondent needed to implement the elaborate mechanisms under Section 112 of the *Land Act*. It is apparent that inquiry that would have had to be held to establish whether there are other claimants to the land, how much of it is not affected by the overlap alluded to in the 1st respondent's letter dated 28/6/2017, whether there were structures on the suit land and their value, and so on and so forth. The 1st respondent's response one way or another on these issues in the present application would have progressed the resolution of the dispute but now it appears that only its silence reigns. Unfortunately for the applicant, the application before me amounts to neither an application for execution of the orders of this court nor those of the appellate court against the 1st respondent and it must be rejected. It is therefore not without much sympathy for the applicant that, unopposed though it is, I would have dismissed the application dated 7/3/2024 solely owing to the foregoing grounds, and in a false sense of appreciation that it was propelled by the fuel of courage borne of desperation spawned by the 1st respondent's inscrutable indifference, award the applicant the token panacea of costs thereof to be taxed as against the 1st respondent only. However, it now appears that the above grounds are just a few of those upon which the final decision of this court will eventually rest. Others appear below.

30. In terms of hindsight, and for obvious reasons arising from the above findings, this court has inquired further into the circumstances of the withdrawn contempt application and its amendment and come to a startling finding, that there was indeed much of the information that it has labelled as not having been filed by the respondents to oppose the instant application. That that information was filed by the NLC and the LAPSSET in response to the now withdrawn contempt application does not lessen its value in the disposal of the instant application. First, on 29/10/2021, NLC filed a replying affidavit sworn on 28/10/2024 by Gershom Otachi, its Chairman, and revealed the following:

    a. On 21/4/2021 he caused to be published Gazette Notice No 3783 Of 2021 inviting members of the public to attend an inquiry as per Section 112 of the *Land Act*;

b. A meeting was held at Mokowe chief's camp in Lamu (apparently pursuant to that Gazette Notice); That the meeting was convened within the 45-day window granted by this court;

c. The applicant appeared and made an oral representation at that meeting and availed some documents but failed to provide an official search certificate and a valuation report;

d. At the said inquiry the commission received overlapping representations and claims of compensation over the suit land from around 100 members of Kililana Farmers Organization claiming ownership;

e. A group styling itself as Anime Organization claiming to have a boundary dispute with the suit land opposed any compensation to the applicant herein;

f. That further investigations involving the Survey Department showed that the suit land overlaps LR No 29636;

g. That other claimants had been compensated thus there was risk of double compensation for the same land;

h. That vital records from the land registry were unavailable;

i. That the hearing was inconclusive and was merely adjourned.

31. Attached to the said affidavit is a ground status survey report of the Lamu Port area compiled by officers from the NLC and the LBDA. It states that the investigation exercise involved digitization of the survey plan (of the suit land) and overlaying it with the Port area Plan and doing a spatial analysis to determine the location of the land parcels vis a vis the port area. It also involved a ground inspection survey. It was by that means that the overlaps referred to herein above were confirmed. The report confirms that compensation was effected in 2015 in respect of the said land: 52 out of 58 parcels for which compensation was paid in 2015 lie within the area the applicant claims is the suit land herein. A list of persons already paid, and the sizes of land they had claimed which fell within the land claimed by the applicant, is attached to that affidavit. The authors allude to the general principle that compensation ought not be paid twice for the same parcel of land, and recommend a further investigation for the authenticity of among others the title to the suit land.

32. The replying affidavit of the KPA sworn by one Michael Sangoro shifted the responsibility of complying with the court orders upon the NLC, but simultaneously observed that notwithstanding the applicant's complaint being non-compensation, a keen reading of the court order did not order any of the respondents to compensate the petitioner.

33. All the details of the facts in the NLC affidavit were within the knowledge of the applicant yet he never disclosed them to court in prosecuting this application. It may be said that the present application proceeded ex parte but he was still under obligation not to proceed as if nothing has ever been done by the NLC to comply with the court order. I am mindful at the courts' frustration at wilful non-disclosure in past litigation. In*Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] eKLR Nyarangi JA observed as follows:

> The necessity for full and frank disclosure is even greater in an ex-parte application.
>
> In the Andria (Vasso), [1984] 1 QB 477 at page 491, letter Gili Robert Golf L.F. (as he then was) in the course of reading the judgement of the court observed as follows: -
>
> It is axiomatic that in ex-parte proceedings there should be full and frank disclosure to the court of facts known to the applicant, and that failure to make such disclosure may result in

the discharge of any order made upon the ex-parte application, even though the facts were such that, with full disclosure, an order would have been justified."

In my judgement here there was not full disclosure by the applicant of the material facts to the High Court. Were the result of the appeal different, I would have been minded to penalize the respondent by ordering payment of extra costs."

34. In *Otieno, Ragot & Co. Advocates v City County of Nairobi & 2 others* [2015] eKLR it was stated as follows:

> The issue of non-disclosure was discussed as follows in *Bahadurali Ebrahim Shamji v. Al Noor Jamal & 2 Others Civil Appeal No. 210 of 1997* where the Court of Appeal stated that: -
>
>> It is perfectly well-settled that a person who makes an ex parte application to the court – that is to say, in the absence of the person who will be affected by that which the court is asked to do – is under an obligation to the court to make the fullest possible disclosure of all material facts within his knowledge, and if he does not make the fullest possible disclosure then he cannot obtain any advantage from the proceedings, and he will be deprived of any advantage he may have already obtained. It has been for many years the rule of court, and one which it is of the greatest importance to maintain, that when an applicant comes to the Court to obtain relief on an ex parte statement he should make a full and fair disclosure of all the material facts – facts, not law. He must not misstate the law if he can help it – the court is supposed to know the law. But it knows nothing about the facts, and the applicant must state fully and fairly the facts, and the penalty by which the court enforces that obligation is that if it finds out that the facts have not been fully and fairly stated to it, the court will set aside any action which it has taken on the faith of the imperfect statement...In considering whether or not there has been relevant non-disclosure and what consequence the court should attach to any failure to comply with the duty to make full and frank disclosure, the principles relevant to the issues in these appeals appear to include; (i) The duty of the applicant is to make full and fair disclosure of the material facts. (ii) The material facts are those which it is material for the judge to know in dealing with the application made; materiality is to be decided by the court and not the assessment of the applicant or his legal advisers. (iii) The applicant must make proper inquiries before making the application. The duty of disclosure therefore applies not only to material facts known to the applicant but also to any additional facts which he would have known if he had made sufficient inquiries..." (emphasis mine)

35. It is my view that the applicant ought to have informed his counsel with utmost candour of what transpired after the judgment was passed in his favour. It would have obviated the need for the present application. The presence of relevant material the replying affidavits to the committal application and the weight thereof, and the applicant's non-disclosure of material facts in his application, though militating against the grant of the orders sought and indeed sufficient to dismiss the present application on, now only add to the other grounds I gave above for the rejection of the application.

36. In the upshot I find that the application dated 7/3/2024 is not only unmerited but is also an abuse of the court process and it is hereby dismissed with costs.

RULING DATED, SIGNED AND DELIVERED AT MALINDI VIA ELECTRONIC MAIL ON THIS 6TH DAY OF NOVEMBER, 2024.

MWANGI NJOROGE

JUDGE, ELC, MALINDI