



**Gikonyo & 14 others v National Land Commission & 8 others; Kimani (Contemnor)
(Environment & Land Petition 9 of 2019) [2023] KEELC 20464 (KLR) (5 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 20464 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND PETITION 9 OF 2019
AA OMOLLO, J
OCTOBER 5, 2023**

BETWEEN

PETER MATIRA GIKONYO 1ST PETITIONER

MICHAEL THIONGO KINYANJUI & 13 OTHERS 2ND PETITIONER

AND

NATIONAL LAND COMMISSION & 8 OTHERS RESPONDENT

AND

STEPHEN NJENGA KIMANI CONTEMNOR

RULING

1. The 13th Contemnor has moved this court vide the notice of motion application dated 16th June 2023 brought under the overriding provisions and section 80 of the *Civil Procedure Act* and Order 45 of the *Civil Procedure Rules* Cap 21 of the Laws of Kenya. The Applicant seeks to be granted the following orders
 - a. Spent
 - b. Spent
 - c. That this Court be pleased to review, vary and or vacate its ruling delivered on the 10th December 2020 together with the resultant decree and notice to show cause and any consequent orders thereof
 - d. That this Court be pleased to grant any other orders and relief it deems just and expedient in the circumstances
 - e. The Costs of this application be provided for



2. The application is supported by several grounds listed on its face inter alia
 - i. That the applicant only learnt of the Petition, the application dated 29th April 2020 and the ruling thereof on 10th February 2021 after the Court found him to be in contempt.
 - ii. That they were not served either physically or through any other means with the aforesaid orders dated 20th August 2019 or 29th of October 2019 or even the contempt application dated 29th April 2019
 - iii. That the 12th and 13th Contemnors/Respondents are not directors, shareholders or members of the 8th Respondent- kiambu Dandora Farmers Ltd
 - iv. The 12th and 13th Respondents are now at risk of losing their freedom due to the fact that they have been condemned unheard in respect of the contempt application dated 29th April 2020
3. The Petitioners filed a replying affidavit dated 6th July 2023 sworn by Michael Thiongo Kinyanjui in opposing the application at hand. Mr Kinyanjui deposed that the application is an afterthought as it has been brought three years after the impugned order was made. He deposed that the application has been overtaken by events as the Applicants already paid the fine and returned the container thus purging the contempt.
4. The Petitioners contend that the application does not meet the threshold for review, instead its seeking to overturn the decision of a court of concurrent jurisdiction. They further aver that the 13th Contemnor/applicant was duly represented by Mr Murunga advocate during the hearing of the contempt application and that Mr Murunga only ceased acting on 2nd March 2021 stating conflict of interest. Mr Kinyanjui deposed that inspite of notice of change of advocates filed by Auma Okumu LLP advocates, Mr Murunga continued to appear for the Applicant and he subsequently filed a notice of appointment to represent him.
5. From the pleadings filed, the issue for determination is whether or not the 13th Contemnor/Applicant was served with the order he was charged with disobeying. The second issue is whether or not the Applicant was heard during the prosecution of the contempt application dated 29th April 2020. In seeking to answer these questions, I have perused the court record which provides thus; on 3rd June 2020 when the impugned application came up for inter parties hearing the Coram reads that Mr Murunga advocate appeared for the 8th Respondent and the 12th, 13th and 14th alleged contemnors. He (Murunga) sought 14 days to enable him file a response to the application which request was granted.
6. On 10th February 2021, Mr Murunga again informed the Court that he had been instructed to appear for the 12th and 13th Contemnors/Applicants and sought time to take instructions on the NTSC. However, on 1st March 2021, counsel informed the Court that having reconsidered the matter, he felt there would be conflict of interest if he continued representing the Applicant. The application to cease acting was granted and another date taken for the hearing of the notice to show cause.
7. This court draws the inference that the issue of service of the application for contempt ought to have been addressed by the Court on the 3rd of June 2020 when the said application was first listed for hearing. The court did not address the subject of service because it appeared all the parties alleged to have contravened the order were represented, including the applicant then represented by Mr Murunga who also represent him in the current application.
8. Mr Murunga, learned counsel has not sworn any affidavit to attest that there was a mistake on his part to have informed the court that he was representing the 12th, 13th and 14th alleged contemnors.



The averment now made by the Applicant that he was never served does not lie and if Mr Murunga misrepresented him, then he cannot shift the blame to the applicant.

9. One of the other issues raised in the application was the denial of the Applicant to being a director, shareholder, member or employee of the 8th Respondent. Okongo J in his ruling rendered on the 10th December 2020 at page 9 thereof stated thus; “the 8th Respondent averred that it is the owner of Nairobi Block 166 and that the titles issued in respect thereof were not fake as claimed by the Petitioners. The 8th Respondent averred that the its members were issued with titles following the subdivision Nairobi Block 166 where the suit properties were situated...”

At page 15; the 8th Respondent filed a detailed affidavit in response to the application. The 8th Respondent did not deny that the 12th and 13th respondents/alleged contemnors were its members”

10. Besides Mr Murunga advocate indicating that he represented the applicant, Justice Okongo also made a finding that on the basis of the membership of the Applicant to the 8th Respondent that he became aware of the orders issued by the court on 20th August 2019 and 29th October 2019. Consequently, if the applicant felt the judge was wrong in reaching such a conclusion since he was never served, the forum open to him was to appeal the order. It would be contrary to law if I made a finding that the Applicant was not aware of the order he allegedly contravened as it amounts to sitting on an appeal on the decision of a judge of concurrent jurisdiction.
11. In light of the above observation, it is my considered opinion that the right to review does not lie to the Applicant. Further, he brought the application after undue delay. Assuming Mr Murunga was not acting for him all along, he became aware of the order on 10th February 2021 when he instructed learned counsel to represent him. He personally appeared in court on 8th April 2021 when he asked to be allowed time to engaged an advocate. From then on, the matter was active in court for the hearing of the NTSC. However, he waited for 2 years to bring this application and without explaining the delay. The Petitioners have termed his action an afterthought and I do agree with them.
12. In conclusion, I make a finding that the application dated 16th June 2023 is without merit and it is hereby dismissed with costs to the Petitioners.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 5TH DAY OF OCTOBER, 2023

A. OMOLLO

JUDGE

