



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT THIKA

ELC MISC NO. E033 OF 2021

IKINU NGWATIO CO. LIMITED.....APPLICANT

VS

HAVAK ENTERPRISES LIMITED.....RESPONDENT

RULING

1. The Applicants filed the instant Application dated 22nd August 2021 seeking orders that;

a. This Honorable Court be pleased to lift the Respondent's veil of incorporation and reveal the natural persons and /or Directors behind the day to day running of HAVAK ENTERPRISES LTD.

b. The Directors and/or persons behind the day to day running of Havak Enterprises Ltd be committed to prison for a term not exceeding six months for being in contempt of Court orders issued by Hon. Ekhubi on the 30/4/2020 directing the maintenance of status quo.

c. This Honorable Court be pleased to issue injunctive orders restraining the Respondent either by themselves, agents, employees or whomsoever acting on their behalf from dealing in Land No. THIKA MUNICIPALITY BLOCK 29/719 & L.R 4953/2773 in any way whatsoever pending the hearing and determination of Thika MCL&E 129 and 144 all of 2019.

2. The application is based on the grounds on the face of it and the Supporting Affidavit of **Benard Kihura**, the Vice chairman of the Applicant sworn on 22/8/2021. He deponed that the Respondent is a juristic person registered under the Companies Act Cap 486 now repealed and who illegally and fraudulently obtained land parcel No. Thika Municipality Block 29/719 in 2019. That the said Block 29/719 comprises of land L.R 4953/2773 which lawfully belongs to the Applicant pursuant to a copy of the allotment letter issued on 1.12.94 for a period of 99 years.

3. The deponent further averred that in 2019 he was surprised to find the Respondent carrying out demolitions on his land. That he promptly reported the incident to the police but the Respondent claimed ownership of the suit land. That the Respondent rushed to Court and filed Thika ML&E 129 of 2019 wherein it also sought injunctive orders **pendete lite**. That the trial Court in determining the said application, ordered maintenance of status quo which the Respondent is now in blatant breach.

4. Moreover the Applicant's Counsel swore a Supplementary Affidavit on 12/10/2021 in support of the instant Application. He averred that the continued breach of status quo is detrimental and calculated to defeat the ends of justice as the Respondent has caused transfer of the suit land to one Yester Company Limited.

5. The application is unopposed. At the hearing the Applicant relied on the pleadings as filed on record.

6. The key issue is whether the Magistrates Court that issued the impugned orders has the jurisdiction to hear and determine a contempt of Court application arising from its own orders.

7. The Court in the case of **Samuel M. N. Mweru & Others v National Land Commission & 2 others [2020] eKLR** set out the legal framework for contempt of Court. This follows the decision of the High Court in the case of **Kenya Human Rights Commission v Attorney General & Another, [2018] eKLR** which declared the entire Contempt of Court Act No 46 of 2016 inconsistent with the Constitution and therefore null and void. The effect of this declaration means that the law in force now and at the time the impugned conduct of the Respondent is complained of is the law of contempt as set out in the Judicature Act.

8. **Section 5 of the Judicature Act** provides that:-

(1) The High Court and the Court of Appeal shall have the same power to punish for contempt of Court as is for the time

being possessed by the High Court of Justice in England, and that power shall extend to upholding the authority and dignity of subordinate Courts.

(2) An order of the High Court made by way of punishment for contempt of Court shall be appealable as if it were a conviction and sentence made in the exercise of the ordinary original criminal jurisdiction of the High Court.

9. The import of the above provision is that the High Court and the Court of Appeal have the same power to punish for contempt of Court as was possessed by the High Court of Justice of England and that power extended to upholding the authority and dignity of subordinate Courts. Therefore, the law that governed contempt of Court proceedings is the English law applicable in England at the time the application was filed. The Court has a duty to ascertain what the applicable law of contempt in the High Court of Justice in England was. I make reference to rules 81.4.-81.9 of the 2012, as obtains in England in respect to the enforcement of judgements orders and decrees, service of the judgments and or when service could be dispensed with.

10. Having said that it is instructive to note that the mandate of the Magistrate's Courts to determine contempt of Court was not affected by the decision of the Court in the Kenya Human Rights Commission case above.

11. Judicial power or authority is derived from the people of Kenya and vests in, and is exercised by the Courts and tribunals established by or under Art 159 of the Constitution.

12. Section 3A of the Civil Procedure Act provides for the saving of the inherent power of the Court for two key reasons; to meet the ends of justice and to prevent the abuse of the process of the Court.

13. The power to punish for contempt is therefore inherent and the Court wilds it in addition to those powers granted by statute.

14. Section 10 (3) of the Magistrates Act provides as follows;

“(1) Subject to the provisions of any other law, the Court shall have power to punish for contempt.

(2) ...

(3) In the case of Civil proceedings, the wilful disobedience of any judgment, decree, direction, order, or other process of Court or wilful breach of an undertaking given to a Court constitutes contempt of Court.

(4) ...

(5)

(6) The Court may sentence a person who commits an offence under

Sub-Section (1) to imprisonment for a term not exceeding five days, or a fine not exceeding one hundred thousand shilling or both;

(7) A person may appeal against an order of the Court made by way of punishment for contempt of Court as if it were a conviction and sentence made in exercise of the ordinary original criminal jurisdiction of the Court.”

15. Equally Section 63 of the CPA provides as follows;

“In order to prevent the ends of justice from being defeated, the Court may, if it is so prescribed-

(a) issue a warrant to arrest the Defendant and bring him before the Court to show cause why he should not give security for his appearance, and if he fails to comply with any order for security commit him to prison;

(b) direct the Defendant to furnish security to produce any property belonging to him and to place the same at the disposal of the Court or order the attachment of any property;

(c) 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;

(d) appoint a receiver of any proper and enforce the performance of his duties by attaching and selling his property;

(e) make such other interlocutory orders as may appear to the Court to be just and convenient.”

16. Similarly, Section 29 of the ELC Act empowers the Court, including the Magistrates court to punish for offences including contempt of Court. It provides that any person who refuses fails or neglects to obey an order or direction of the Court given under this Act, commits an offence and shall on conviction be liable to a fine not exceeding one million shilling or imprisonment for a term not exceeding two years or both.

17. From the foregoing I hope I have made it sufficiently clear that the Magistrates Court is seized with power to determine this application and it was unnecessary to file this application before me.

18. It is my finding that the Court with original jurisdiction is the Magistrates Court. Also the right of the Applicant to an appeal should be preserved.

19. Having now carefully considered the application and the affidavit in the absence of the response from the Respondent, it is clear to this Court that the application is incompetent.

20. It is dismissed with no orders as to costs.

21. It is so ordered.

DELIVERED, DATED AND SIGNED AT THIKA THIS 1ST DAY OF NOVEMBER 2021 VIA MICROSOFT TEAMS.

J. G. KEMEI

JUDGE

Delivered online in the presence of:

Mr. Lorot for the Applicant

No appearance for the Respondent

Ms. Phyllis Mwangi – Court Assistant