



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT NAIROBI
MILIMANI LAW COURTS
MISCELANEOUS APPLICATION NO. 91 OF 2019
IN THE MATTER OF AN APPLICATION FOR AN ORDER OF COMMITAL
TO CIVIL JAIL FOR CONTEMPT OF COURT.

AND

IN THE MATTER OF THE NATIONAL ENVIRONMENT TRIBUNAL AT
NAIROBI TRIBUNAL APPEAL NO. NET 179 OF 2016

-BETWEEN

BALCON HOUSING COMPANY LIMITED 1ST APPLICANT

JOHN KAMAU MAINA

JOHN WAITHAKA WANJIKU

VIELINA WAITHERERA MWANIKI.....2ND APPLICANT
(REPRESENTING HINGA RESIDENTS ASSOCIATION)

AND

ELIZABETH NJERI HINGA RESPONDENT

NATIONAL ENVIRONMENT MANAGEMENT
AUTHORITY (NEMA).....1ST INTERESTED PARTY

NATIONAL ENVIRONMENT TRIBUNAL.....2ND INTERESTED PARTY

NYOIKE HINGA.....3RD INTERESTED PARTY

RULING

1. This is a Ruling in respect of a Notice of Motion dated 28th May 2019 which seeks the following orders:-

1) Spent

2) That this Honourable Court be and is hereby pleased to find the Respondent herein to be in contempt of Court for the willful disobedience of the Stop Order issued by the Honourable Tribunal on the 24th June 2016 in NET/179/2016 and Orders for

Preservation of the Suit Property L.R No. 11478 Mirema Drive issued by Hon. Justice Msagah Mbogholi on 10th August 2011 and therefore be committed to civil jail.

3) Any other or further orders and/or directions as this Honourable Court deems just and expedient.

4) THAT the costs of this application be provided for.

2. The 1st Applicant is a limited liability company incorporated pursuant to the provisions of the Companies Act. The 1st Applicant is involved in an ownership dispute with the Respondent in respect of LR. No. 11478 which is about 151 acres. The 2nd Applicant is a Residents Association known as Hinga Residents Association which is situated at Mirema in Kasarani area of Nairobi City County. The ownership dispute is in ELC 157 of 2008 where Justice Mbogholi Msagha had issued orders preserving the suit property until the ownership Dispute is heard and determined.

3. There are other cases pending in court touching on the suit property such as **ELC 445 of 2013 [National Environment Management Authority – vs- Elizabeth N. Hinga] and ELC 1183 of 2013 [Elizabeth N. Hinga – vs – National Environment Management Authority & 3 others]**. The Respondent had been undertaking quarrying activities on the suit property which prompted the filing of the suits which are mentioned in this paragraph. Orders were given in one of the said cases which orders were subsequently varied by consent. The varied orders were extended from time to time.

4. On 4th May 2016, the National Environment Management Authority (NEMA) granted the Respondent a license to carry out quarrying activities on the suit property. The Applicants were aggrieved with the issuance of the license. They moved to the National Environment Tribunal (NET) where they filed an Appeal. As per section 129 (4) of the Environment Management and Coordination Act (EMCA), NET issued a stop order on 24th June 2016 which meant that the Respondent was not to do any activity on the suit property until the Appeal before NET was heard and determined.

5. The Applicants contend that despite the stop order by NET and the orders by Justice Mbogholi Msagah requiring preservation of the suit property, the Respondent has gone ahead to carry on with her quarrying business which action has endangered the residents of Hinga Estate and is likely to endanger the users of the Northern By-pass. The Applicants contend that there is quarrying going on including blasting using explosives which is likely to affect the Applicants.

6. The Respondent has opposed the Applicants' application based on the Respondent's replying affidavit sworn on 3rd February 2020. The Respondent contends that she had not been served with a stop order as alleged by the process server. She states that she was only served with a stop order after the officials of NET visited the suit property on 11th January 2017.

7. Prior to the stop order being given, there were orders which had been issued in ELC 445 of 2013 stopping her from undertaking quarrying activities on the suit property. These orders were varied by consent. The variation of the court order allowed her to access the quarrying site to pick up stones which had been dressed and were ready for ferrying out of the site. She argues that once this was done, she stopped further quarrying and that if there is any further quarrying going on, then it is being done by persons from the nearby slum area who steal and quarry at the instigation of local politicians. She further states that she complained about the stealing to the police officers at Kasarani police station.

8. The Respondent denies that she has disobeyed any order of the NET and doubts the photographs which were exhibited by the Applicants. The Respondent further contends that she is sick and has no time to go to the quarry where she was stopped from conducting any activities. She had contacted her customers and asked them not to expect any more stones as she had been stopped from quarrying. She states that she is not in control of those stealing stones from the quarry and cannot be held responsible for the theft activities of the thieves.

9. I have considered the Applicants' application as well as the opposition to the same by the Respondent. I have also considered the submissions by the parties herein. The only issue for determination is whether the Respondent is guilty of contempt of the order issued by NET on 24th June 2016. Prayer (2) of the notice of motion is asking the court to find that the Respondent is guilty of disobeying the NET order of 24th June 2016 and the preservation order given by Justice Mbogholi Msagah in ELC 157 of 2008. It is important to point out that that one of the Applicants herein namely Balcon Housing Company Limited has filed a separate application for contempt arising out of disobedience of the preservation orders granted by Justice Mbogholi Msagah in ELC 157 of 2008. The same issue cannot therefore be raised in this application which has nothing to do with ELC 157 of 2008.

10. On the issue of disobedience of the NET order given on the 24th June 2016, there is no doubt that the stop order was given on the 24th June 2016. The order was served by NET upon the Respondent in January 2017. The Respondent therefore is aware of the same. What is to be determined is whether the Respondent has disobeyed the same. This is because the law is clear that a person cannot be punished for contempt unless it is shown that he/she has deliberately disobeyed the order. Prove of contempt is supposed to be beyond a balance of probabilities because contempt proceedings are quasi criminal in nature and a person may lose his/ her freedom. This was the finding in the case of **Mwangi H.C Wangonde - vs – Nairobi City Commission, Nairobi Civil Appeal No. 95 of 1998** where it was held that threshold of proof required in contempt of court is higher than in normal civil cases, and one can only be committed to civil jail or otherwise penalized on the basis of evidence that leaves no doubt as to the contemnor's culpability.

11. In the instant case, the Respondent has demonstrated that even before the stop order by NET was given, she had been stopped from undertaking quarrying activities vide ELC 445 of 2013. The orders were later varied by consent whereby the Respondent was allowed to pick the stones which had been processed. There is no evidence that the Respondent went back to continue with quarrying. There is no evidence of any blasting going on. In this era of technology, I would have expected that the Applicants would have even recorded even a single incident of blasting.

12. The photographs which were annexed to the Applicants' application are photocopies which are not clear on when they were taken. Some

photographs show stationary vehicles. It is not clear as to which part the photographs were taken from. With this kind of evidence, it is difficult to conclude that the activities were being undertaken at the behest of the Respondent. The Respondent has explained that there are people who carry out quarrying illegally. She has reported these activities to the police officers at Kasarani police station. No action has been taken to stop these illegal activities. The Respondent cannot be liable for the criminal activities of other people. I therefore find that the Applicants have failed to prove contempt on the part of the Respondent. I find no merit in this application which is hereby dismissed with costs to the Respondent.

It is so ordered.

Dated, signed and delivered at Nairobi on this 5th day of May 2020

E. O. OBAGA

JUDGE

In the virtual presence of :-

Mr Musyoka for Applicant

Court Assistant: Hilda

E.O.OBAGA

JUDGE