



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MURANG'A

PETITION NO. 4 OF 2018

**IN THE MATTER OF ARTICLES 1, 2, 20, 22(1), 23(3), 40, 43, 47,
48, 159(2), 162(2)(b) & 165(3) OF THE CONSTITUTION OF KENYA**

AND

IN THE MATTER OF THE NATIONAL LAND COMMISSION ACT

AND

**IN THE MATTER OF THE THREATENED CONTRAVENTION OF RIGHTS AND FUNDAMENTAL
FREEDOMS UNDER ARTICLES 40, 47, 50(1) OF THE CONSTITUTION OF KENYA**

BETWEEN

JOHN PETER MWANGI KAGIRA.....PETITIONER

VERSUS

THE NATIONAL LAND COMMISSION.....1st RESPONDENT

ATHI WATER SERVICES BOARD.....2ND RESPONDENT

RULING

1. Vide a Notice of Motion filed on the 17/1/2020 and amended on the 17/8/2020 the Applicant sought the following prayers;

a. That the Respondents herein be cited for contempt of Court.

b. That the Chief Executive Officer of the 1st Respondent, MS KABALE TACHE ARERO, be committed to civil jail for a period of six months for disobedience and non-compliance with the Judgment of this Honourable Court delivered on 24/6/2019.

c. That the Chief Executive Officer of the 2nd Respondent, MR. MICHAEL MWANGI THUITA, be committed to civil jail for a period of six months for disobedience and non-compliance with the Judgment of this Honourable Court delivered on 24/6/2019.

d. That the Chairperson of the 1st Respondent, GERSHOM OTACHI BW'OMANWA, be committed to civil jail for a period of six months for disobedience and non-compliance with the Judgment of this Honourable Court delivered on 24/6/2019.

e. That this Honourable Court do make such further or other orders and issue such directions as will expeditiously ensure that the Petitioner receives just and adequate compensation for the compulsory acquisition of the suit property L.R. No. LOC.16/KIGORO/1681.

f. That the said orders to be enforced by the Officer Commanding Kilimani Police Station.

g. Costs of this application be provided for by the Respondents.

2. The application is expressed to be premised on the judgment of this Court delivered on the 24/6/2019 in which the Court interalia declared the process of the acquisition of the wayleave over the Applicant's suit land LR LOC16/KIGORO/1681 (suit land) inconsistent with the law and the Constitution. Interalia, in the said judgement the Court issued orders of mandamus compelling the Respondents to comply with the Constitution, the Fair Administrative Act and the Land Act.

3. The Applicant contends that the Respondents are yet to commence the process of compulsory acquisition as directed by the Hon Court despite knowledge of the judgment. That the Respondents have threatened to evict him and take possession of the suit land without due process and due compensation.

4. The application is further supported by the affidavit of the Applicant where he averred under para 10 that the Respondents have already evicted him and taken possession of the suit land without due process and compensation.

5. That the Respondents have decided to disobey the Court orders with impunity and beseeched the Court to punish them for contempt of Court to preserve the dignity and authority of the Courts.

6. While opposing the application the 1st Respondent through the Replying Affidavit of Brian Ikol, its in-house counsel dated the 30/11/2020 explained that the delay in complying with the orders of the Court was occasioned by the fact that the 1st Respondent was without a chairperson and Commissioners for a period of 9 months until Nov 2019 when they were sworn in. That the delay in complying with the orders was neither willful, deliberate or intentional.

7. That the named officers of the 1st Respondent were never served in person and therefore had no knowledge of the impugned orders.

8. That the 1st Respondent did cause the gazette of the acquisition Notice No 6384 on the 20/8/2020 and conducted an inquiry on the 15/9/2020 at Ndakaini Social Hall which was attended by the Petitioner in which he made representations and submitted a claim for compensation. That the 1st Respondent prepared an award for the Petitioner on the 18/11/2020 which the Petitioner elected to reject.

9. The application is opposed by the 2nd Respondent vide the replying affidavit deposed by Ms Emily Kyalo, its learned in-house counsel filed on the 4/3/2020. She averred that the 2nd Respondent has at all times been committed to comply with the said judgement by remitting the monies for compensation to the Public Trust Account maintained by the 1st Respondent. Further she explained that the process of acquisition of the right of way is interalia vested in the 1st Respondent and the overall role of the 2nd Respondent is minimal.

10. That the 2nd Respondent has compensated many project affected persons but the Applicant is demanding more money in excess of the assessed value.

11. The parties elected to canvass the application by way of written submissions which I have read and considered. Equally on the 26/1/2021 the parties presented limited highlighting which have been considered in the ruling.

12. The key issue for determination is whether the application has merit; who meets the costs of the application.

13. This application arises from the judgement of this Court delivered on the 24/6/2019 as follows;

a. A declaration that the intended acquisition of the Petitioner's land by the 1st Respondent without adhering to strict and mandatory provisions of the Constitution, the Land Act No 6 of 2012 violates the Petitioner's Constitutional right to ownership of property as guaranteed under Art 40(3)(a) & (b) of the Constitution.

b. A declaration that failure by the 1st Respondent to comply with the mandatory provisions of the Land Act violates the Petitioner's Constitutional right to administrative action that is lawful, reasonable and procedurally fair as guaranteed under Art 47 (1) of the Constitution.

c. An order of mandamus be and is hereby issued compelling the Respondents to comply with the provisions of the Constitution, Land Act and Fair Administrative Actions Act as the case may be in respect of each one of them.

d. The Petitioner's prayers in c, d, e, (inadvertently named as a), f (b), g(c) are declined.

e. Each Party to meet their own costs.

14. It is the position of the Applicant that the Respondents have willfully, deliberately and intentionally disobeyed the orders of the Court and should be held and punished for contempt of Court.

15. Both Respondents have opposed the application with reasons.

16. Contempt of Court is a civil contempt which means willful disobedience of any judgment, decree, direction, Order, or other process of a Court or willful breach of an undertaking given to a Court.

17. Black's Law Dictionary, 9th Edition at page 360 defines contempt as follows;

“Contempt is a disregard of, disobedience to, the rules, or Orders of a legislative or judicial body, or an interruption of its proceedings by disorderly behaviour or insolent language, in its presence or so near thereto as to disturb the proceedings or to impair the respect due to such a body.”

18. Contempt is necessary for maintenance of law and Order and so that the dignity of the Courts is upheld. It is trite law that every person against whom a Court Order is made against has unqualified obligation to obey the Order however unpalatable the Order may be until or unless the Order is discharged or set aside. See **Econet Wireless Kenya Ltd vs. Minister for information & Communication of Kenya & Another [2005] 1 KLR 828.**

19. For an application of contempt to succeed the Applicant must prove the following elements;

- a. The terms of the order (or injunction or undertaking) were clear and unambiguous and were binding on the defendant;
- b. The defendant had knowledge of or proper notice of the terms of the order, normally as the result of personal service;
- c. The defendant has acted in breach of the terms of the order and the defendant's conduct was deliberate.

20. It is not in dispute that the wording of the orders issued by the Court are clear and unambiguous. The said orders did bind the Respondents as set out by the Court.

21. The 1st Respondent has argued that its officers were not served in person and therefore had no knowledge of the orders. The record shows that the said judgement was delivered in the absence of the 1st Respondent's counsels although they were served. It is on record and undisputed that the said extracted orders together with the judgment were served upon the 1st Respondent on the 16/7/19. See the letter of even date. The 1st Respondent's assertion that its officers were not served in person is in my view, a lame excuse. I say so because Brian Ikol, in his affidavit contended that they complied with the orders of the Court as detailed in para 10-14. How did they comply with the orders if they were not aware? Though there is no evidence that they were served in person it is the conclusion of the Court that the 1st Respondent and its officers had constructive knowledge of the Court orders.

22. As to whether the Respondents acted in breach and whether the said breach was deliberate, it is on record that both Respondents have denied any willful non-compliance of the Court orders. They however admit that there was a delay in complying with the orders. The explanation for the delay is that the 1st Respondent who is constitutionally and legally, mandated to undertake the acquisition of the wayleaves was without commissioners for a period of 9 months. This was in public domain that the commissioners were only appointed in November 2019. The Court has no reason to disbelieve this position.

23. Further the 1st Respondent has given detailed steps that it took to comply with the orders of the Court namely, the gazette notice No 6384 dated 28/8/2020, inquiry held on the 28/8/20 leading to the award dated the 17/11/2020.

24. From the foregoing the Court is of the view that the Respondents complied with the orders of the Court in repeating the acquisition processes and there is no ground to fault it albeit with delay which has been explained to the satisfaction of the Court. This was done with the involvement of the Applicant.

25. There is therefore no evidence that the Respondents willfully breached the orders of the Court.

26. The Applicant did not present any evidence before the Court to show that he has been evicted from the suit land. Neither did he table any evidence of a threat that amounts to willful disobedience of the Court orders.

27. It is clear from the record that the issues between the parties is the quantum of compensation. Section 128 of the Land Act makes the necessary provisions on how to impugn an award of compensation.

28. In the end the application is not merited. It is dismissed.

29. The Applicant to bear the cost of the application.

30. **It is so ordered.**

DATED, SIGNED AND DELIVERED AT MURANGA THIS 3RD DAY OF JUNE 2021.

J G KEMEI

JUDGE

Delivered in open Court in the presence of:

Petitioners – Absent

Ms. Njuguna for the 1st Respondent

2nd Respondent – Absent

Court Assistant: Alex