



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISII

PETITION NO. 3 OF 2018

**IN THE MATTER OF ARTICLES 23, 40(3), 47, 67, 186 AND SCHEDULE 4 PART 2 OF THE CONSTITUTION OF THE
REPUBLIC OF KENYA**

AND

**IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS AND FUNDAMENTAL FREEDOMS IN ARTICLES 40(3)
AND 47 OF THE CONSTITUTION**

BETWEEN

KENYA AGRICULTURAL AND

LIVESTOCK RESEARCH ORGANIZATION.....PETITIONER

VERSUS

KISII COUNTY GOVERNMENT.....1ST RESPONDENT

IBRAHIM MOSE-MEMBER OF COUNTY ASSEMBLY

BOBARACHO WARD.....2ND RESPONDENT

AND

MR. PATRICK LUMUMBA

THE COUNTY SECRETARY

KISII COUNTY GOVERNMENT.....CONTEMNOR

RULING

INTRODUCTION

1.This Ruling relates to the Petitioner’s application dated 20th April 2021 brought pursuant to Article 10, 23(3) and 159 2 (a) , (b), (d) and (e) of the Constitution of Kenya, Section 36 of the High Court Organization and Administration Act and Section 3(1) and (5) of the Judicature Act. The Applicant seeks the following orders:

a) Spent

b) That a temporary injunction do issue restraining the 1st Respondent herein either by himself, his agents servants, employers and or any other person whatsoever from encroaching upon, commencing or continuing with construction of any structure whatsoever , trespassing onto, remaining on or in any way howsoever interfering with all that parcel of land marked as “C” in the maps annexed in the Petitioner’s List and bundle of documents dated 22nd February 2018 as filed together with the Petition herein at page 1 SN 2 situate at Kisii and decreed in the judgment and decree of this court made on 29th August 2019 pending the hearing and determination of this application.

c) That an order directing the 1st Respondent to restore the suit property to the status ante the 28th day of March 2021 and remove all

or any structure(s) erected on the Petitioner's suit property above referred within 30 days failure of which the Petitioner do carry out the restoration and/or removal of the erected structures at the 1st Respondent's costs and expenses.

d) That Mr. Patrick Lumumba being the County Secretary of the 1st Respondent herein be and is hereby cited and held in contempt of court judgment and decree as given on 29th August 2019.

e) That upon citing and holding the said Mr. Patrick Lumumba as the County Secretary of the 1st Respondent herein in contempt of court orders under prayer 2 hereinabove, the Honourable Court does and hereby impose sentence upon the contemnor as hereunder:

i) A monetary fine of not less than Kenya shillings ten million (Kshs. 10,000,000/= or such sum as the Honourable Court shall determine in its discretion provided that the imposed fine be paid by the Contemnor personally)

ii) In addition to such monetary fine, a custodial sentence for a term of not less than 12 months or such period as the Honourable Court shall in its discretion find as appropriate and befitting in the circumstances.

f) That the costs of the Contempt proceedings be borne by the said Patrick Lumumba as the County Secretary of the 1st Respondent herein personally.

g) The Petitioner be at liberty to initiate proceedings for assessment of costs of this contempt proceedings be borne by the 1st Respondent (sic).

2. The application is premised on the grounds set forth on the face of the Notice of Motion and the Supporting Affidavit of Dr. Eliud Kireger, the Director General of the Petitioner sworn on the 20th April 2021. In the said affidavit, Dr. Kireger has deponed that on or about the 28th day of March 2021, the 1st Respondent in disregard of the judgment of this court dated 29th August 2019 trespassed onto the suit property, tore down the perimeter fence and unlawfully cut down trees planted for research purposes.

3. The 1st Respondent then commenced construction of a permanent building on the suit property after hiving off a portion of land belonging to the Petitioner. It is the Petitioner's contention that in so doing the 1st Respondent is determined to disrespect the Constitution and governing laws of this country by disregarding the judgment of this court. It is contended that Mr. Patrick Lumumba being the Accounting Officer of the 1st Respondent is responsible for implementation of the 1st Respondent's actions complained herein.

4. The application is opposed by the Replying Affidavit of Patrick Lumumba, the County Secretary of the 1st Respondent sworn on the 24th May 2021. He depones that the Petitioner's claim does not fall within his job description as the same lies with the officer in charge of Lands, Housing and Physical Planning and or the officer in charge of roads at the County Government of Kisii. He denies that there is a road or any construction on the suit property. It is his contention that the Petitioner is making allegations which ought to be handled in a new suit. He denies that the 1st Respondent has engaged in any of the activities alleged by the Petitioner. He depones that he is not the Chief Officer of the 1st Respondent nor is he the Secretary of the County Public Service Board as the said Board is a legal entity capable of suing and being sued. It is his further contention that the Petitioner is trying to sneak in the prayer for restoration of the suit property which was not granted in the judgment. He denies that he was served with the orders complained of and states that the law protects public officers from personal liability in the event of any allegation done in the cause of the said officer's duties.

5. In response to the Replying Affidavit, the Petitioner filed a Further Affidavit sworn by Dr. Eliud Kireger on the 4th June 2021, in which he reiterated the contents of his Supporting Affidavit. He maintained that as the County Secretary and Head of Public Service in the County Government, the Contemnor was responsible for the acts complained of as he is in charge of the daily operations of the 1st Respondent with the mandate to establish and abolish offices in the County Public Service, as well as exercising disciplinary control over all officers of the 1st Respondent. He deponed that the persons undertaking the construction have all along informed the Petitioner that the construction is being undertaken by the 1st Respondent and the building is the designated Governor's residence. He has annexed a bundle of recent photos depicting the on-going construction. Additionally, Dr. Kireger swore a Supplementary Affidavit dated 28th June 2021 emphasizing the construction was still going on despite the court order and without the approval of the National Construction Agency or the National Environment Authority.

6. When the matter came up for inter partes hearing on 25th May 2021, the court directed that the application be canvassed by way of written submissions which would be highlighted at a later date. The court also directed the Deputy Registrar, Kisii to visit the suit property for purposes of confirming the situation on the ground and file her report in court. The Deputy Registrar visited the site and filed her report dated 9th July 2021.

APPLICANT'S SUBMISSIONS

7. In his submissions dated 5th July 2021, learned counsel for the Petitioner submitted that the Petitioner had instituted a suit on 2nd February 2018 whose gist was that the Respondent was constructing a feeder road across the Petitioner's property thereby contravening the Petitioner's proprietary rights under Article 40 of the Constitution of Kenya.

8. By its judgment dated 29th August 2019 the court entered judgment in favour of the Petitioner and held *inter alia* that the Petitioner's right to property under Article 40 had been violated. The court issued a permanent injunction against the Respondents jointly and severally restraining their agents, servant and or employees from encroaching upon, trespassing onto or in any manner howsoever interfering with the suit property identified and marked "C" in the map annexed to the Petition. The feeder road was ordered closed and the Petitioner was

awarded compensation in the sum of Kshs.6,993,600 together with interest thereon from the date of judgment until payment in full.

9. It is counsel's contention that on or about the 21st March 2021, the Respondents without any due regard to the Petitioner's constitutional rights as decreed by the court in its judgment trespassed onto the suit property, tore down the perimeter fence, cut down trees planted for the basis of research and started constructing a permanent building. Counsel referred the court to the photographs annexed to the Supporting, Further and Supplementary Affidavits. He submitted that the 1st Respondent was determined to disrespect the Constitution and the governing laws by constructing on the suit property despite the judgment and decree of this Honourable Court.

10. Counsel submitted that even though the 1st Respondent and the Contemnor denied knowledge of any activities on the suit property and stated that if there was any construction that constituted a new cause of action, the Deputy Registrar's visit confirmed that indeed there was construction going on the suit property.

11. Counsel submitted that the Contemnor cited herein is the County Secretary of the 1st Respondent. It was his submission that the office of the County Secretary is established under section 44 (3) (a) of the County Governments Act. The acts complained of are acts done by employees or agents of the 1st Respondent to whom the cited Contemnor is the Chief Executive Officer. It is his contention that according to section 44(i) of the County Government Act, the Contemnor is the Secretary of the County Executive Committee and he is in charge of the day to day operations of the 1st Respondent. He contends that since the Contemnor is in charge of taking minutes of the cabinet of the 1st Respondent, such a crucial decision as the construction of the Governor's residence could not have taken place without a meeting of the County Executive Committee and such minutes could only have been taken by the Contemnor and relayed to the Committee member for Land and Public works. He accuses the contemnor and 1st Respondent of failing to make frank and full disclosure regarding the construction. He placed reliance on the case of **Legal Advice Centre aka Kituo Cha Sheria v Communication Authority of Kenya [2015] eKLR**.

12. On the key role played by the County Secretary in the satisfaction of court decrees, counsel relied on the case of **Republic v County Secretary Migori County & Another [2020] eKLR**, where the court held that the County Secretary and Chief Officer Finance were responsible for satisfaction of court orders and decrees on payment of money owed by the County Government.

13. Stressing that Court orders must be obeyed, counsel relied on the case of **Kenya Tea Growers Association v Francis Atwoli & 5 Others and Teachers Service Commission v Kenya National Union of Teachers [2013] eKLR** and **Civil Application No. Nai 1 of 2017 Fred Matiangi, the Cabinet Secretary Ministry of Interior and Coordination of Nation Government v Miguna Miguna**.

1ST RESPONDENT AND CONTEMNOR'S SUBMISSIONS

14. Learned Counsel for the 1st Respondent and the Contemnor submitted that the application is bad in law and an abuse of the process of the court. It was his contention that the Petitioner approached the court seeking injunctive orders which were granted in the judgment delivered on 29th August 2019. He argued that this brought the Petition to an end and the court became *functus officio*. He submitted that in the Petition, the Petitioner was complaining against the feeder road which was being constructed by the 2nd Respondent across his land, he did not complain about a house. The judgment was therefore about the feeder road.

15. He submitted that the suit property is trust land where the Petitioner was given a portion thereof to carry out research activities for the benefit of the people of Kisii County and the Petitioner has no title. It was his submission that the Respondents had obeyed the court order by stopping the construction of the feeder road. He was of the view that when the Deputy Registrar visited the suit property she ought to have visited the portion where the feeder road was being constructed. The report of the Deputy Registrar concluded that there were buildings on the suit property which belong to the County Government and which were occupied by employees of the County Government.

16. Counsel submitted that the house was being constructed on a separate piece of land which was about a kilometer from the feeder road and if the Petitioner had a problem with the on-going construction, she ought to file separate suit.

17. He submitted that one Patrick Lumumba was not a party to the proceedings and no application had been made to have him joined to the suit, therefore citing him for contempt of court would amount to condemning him unheard. He added that the County Government had various departments including the department of Public Works and Roads and the County Secretary was not in charge of this department.

18. It was counsel's submission that the Petitioner was asking for more orders than what the judgment had granted instead of executing the orders issued in the judgment.

ISSUES FOR DETERMINATION.

19. Having considered the Notice of Motion, rival affidavits and submissions the following issues arise for determination:

- i. Whether the County Secretary should be cited for contempt of the judgment of the court dated 29th August 2019.
- ii. Whether the Contemnor was aware of the judgment of the court.
- iii. Whether the 1st Respondent and Contemnor has acted in breach of the judgment of the court.
- iv. Whether the Petitioner is entitled to the reliefs sought.

ANALYSIS AND DETERMINATION

20. Counsel for the Petitioner contended that by virtue of the fact that the Contemnor is the Secretary to the County Executive Committee who is in charge of the day to day operations of the county Head of Public service and the County Government, he is responsible for the actions complained of. Counsel argued that in the case of **Republic v County Secretary Migori County & Another Ex-parte Linnet Magambo** the court relied on the decision of **Republic v County Secretary Nairobi City Council & 3 Others** where Nyamweya J held that by virtue the functions of the County Secretary under section 44 of the County Governments Act the County Secretary and the Chief Officer Finance were jointly responsible for the satisfaction of court orders and decrees on payment of money owed by the Nairobi City County by virtue of their roles and functions.

21. On the other hand, counsel for the 1st Respondent has argued that the County Secretary who is named as the Contemnor was not a party to the suit when the judgment was delivered. That may be so, but it is not in dispute that the County Secretary's role places him at the center of the County Government's operations. Among the orders granted by the court was a permanent injunction restraining the Respondents, their agents, servants and/or employees from encroaching upon, trespassing onto or in any manner howsoever from interfering with the suit property identified and marked "C" in the maps annexed to the Petition. As the officer responsible for the day to day operations of the County Government, the County Secretary is accountable and answerable for any acts of omission and commission attributable to the County Government which may be in contempt of a valid court order.

22. In order for the court to punish a person for contempt, it must be satisfied that the person alleged to have been in contempt committed that acts complained of with full knowledge or notice of the existence of the court order forbidding the said act. The threshold is quite high as it punishment for contempt involves deprivation of one's personal liberty.

23. In the **Teachers Service Commission V Kenya National Union of Teachers & 2 Others (2013) eKLR** the court observed as follows:

The importance of personal service in contempt proceedings which are quasi-criminal in nature need not be overemphasized.

The Halsbury's laws of England 4th Edition Vol 9 at page 37 provides as follows:

"As a general rule no order of court requiring a person to do or abstain from doing any act may be enforced unless a copy of the order has been served personally on the person required to do or abstain from doing the act in question.

Similarly, the explanatory notes in Order 52 Rule 3 (1) of the England Supreme Court Rules which are applicable in our jurisdiction provide that:

"No order will normally be issued for the committal of a person unless he has been personally served with the order, disobedience to which is said to constitute the contempt, or if the order is directed at a group of persons or corporation, some appropriate member has been personally served.

In my view the words "general rule" and "normally" in these provisions are instructive. To my mind, the import here is that in the normal scheme of things personal service in matters of contempt is a requirement"

*However, in **Basil Criticos V A.G (2012) eKLR** Lenaola J (as he then was) held as follows:*

The law has changed and as it stands today, knowledge supersedes personal service... where a party clearly acts and shows that he had knowledge of a court order, the strict requirement that personal service must be proved is rendered unnecessary"

24. This position was reaffirmed in the case of **Shimmers Plaza v National Bank of Kenya (2015) eKLR** where the Court of Appeal held that the knowledge of the judgment or order by the advocate of the alleged Contemnor suffices for contempt proceedings.

25. In the instant case the 1st Respondent was represented by the County Attorney throughout the proceedings and the said Attorney was present when the judgment was delivered. It is therefore presumed that he conveyed the decision of the court to the 1st Respondent through its key officers including the County Secretary.

26. This leads me to the next question as to whether the 1st Respondent and Contemnor have acted in breach of the judgment of the court. As mentioned earlier in this ruling, the court issued an injunction restraining the Respondents from interfering with the suit property belonging to the Petitioner. In his Replying Affidavit, the County Secretary denied that there was any trespass on the suit property. He further denied that the 1st Respondent had engaged in any of the activities alleged in the Petitioner's Supporting Affidavit. In his Further and Supplementary affidavit, the Petitioner reiterated that the 1st Respondent was constructing a permanent building on the suit property. He attached a bundle of photographs of the said house under construction. The court further directed the Deputy Registrar to visit the site for purposes of ascertaining the position on the ground. In her report, the Deputy Registrar clearly stated as follows:

1. *"The site that the Petitioner identified is in dispute. The Petitioner alleged that the site belongs to KALRO and forms part of the parcel labelled "C". The Respondent on the other hand alleged that that part belongs to AIC Agricultural Training Institute owned by the Kisii County Government and did not form part of the portion labelled "C"*

2. *In the disputed part "C" there was construction on going.*

3. *There was no feeder road in the disputed site.*

4. There were two houses that belong to the Kisii County Government according to the sentiments of the tenants living there

5. Photographs were taken and shared with all the parties and if the judge allows the same can be provided”

27. In order to make a case for civil contempt, the Applicant must prove certain elements which were set out in the case of **Cecil Miller V Jackson Njeru (2017) eKLR**. The court cited the book entitled “*Contempt in Modern New Zealand*’ which sets out the elements of civil contempt as follows:

- a) That the terms of the order (or injunction or undertaking) were clear and unambiguous and were binding on the Defendant.
- b) That the Defendant had knowledge of or proper notice of the terms of the order.
- c) That the Defendant acted in breach of the terms of the order.
- d) That the Defendant’s conduct was deliberate.

28. Furthermore, the Court of Appeal in the case of **Michael Sistu Mwaura Kamau v Director of Public Prosecutions & 4 Others [2018] eKLR** restated the essentials required to be established in contempt proceedings as follows:-

*“the court must be satisfied that the alleged contemnor has willfully and deliberately disobeyed a court order that he was aware of. This was observed by the Supreme Court in **Republic v. Ahmad Abolfathi Mohammed & Another**. Secondly, as this Court emphasized in **Jihan Freighters Ltd v. Hardware & General Stores Ltd** and in **A.B. & Another v. R. B. [2016] eKLR**, to sustain committal for contempt of court, the order of the court that is alleged to have been deliberately disobeyed must be clear and precise so as to leave no doubt as to what a party was supposed to do or to refrain from doing. Lastly, the standard of proof in committal proceedings is higher than proof on a balance of probabilities, though not as high as proof beyond reasonable doubt. (See **Mutitika v. Baharini Farm** (supra) and **Republic v. Ahmad Abolfathi Mohammed & Another** (supra).*

29. I am duly guided by the above authorities. I will therefore proceed to analyze the instant case against the said essential elements:

Were the terms of the order clear and unambiguous?

The relevant final orders of the court in its judgment stated as follows:

iv. “An order of permanent injunction is hereby issued against the respondents jointly and severally restraining their agents, servants and/or employees from encroaching upon, trespassing onto or in any manner howsoever interfering with the suit property identified and marked “C” in the maps annexed to the Petition”

v. An order directing the closure of any feeder/ access road that the respondent may have unlawfully created over the suit property with immediate effect”

30. In my considered view the terms are not clear and unambiguous as the acreage of the area marked “C” is not known and there are no beacons in place. It is therefore no wonder that when the Deputy Registrar went to the site with the parties, they could not agree on the exact location of the area marked “C” on the ground and she noted in her report that the area marked “C” “is in dispute.

Were the Respondents and Contemnor aware of the court order?

31. There is no doubt that the 1st Respondent was aware of the Court order as the County Government was a party to the proceeding and they were represented by counsel. On the other hand, the County Secretary was not a party to the proceedings although by virtue of his office he is deemed to have had knowledge of the judgment.

Did the Respondents and Contemnor deliberately act in breach of the court order?

32. In view of my observation that the order is not clear and unambiguous, I am unable to make a finding that the 1st Respondent has breached the court order.

33. The upshot is that the application is not well founded and it is hereby dismissed. I make no order as to costs.

DATED, SIGNED AND DELIVERED AT KISII THIS 27TH DAY OF OCTOBER, 2021.

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J.M ONYANGO

JUDGE