



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KISUMU**

**ELC PETITION CASE NO. 10 OF 2019**

**IN THE MATTER OF THE CONSTITUTION OF THE REPUBLIC OF KENYA**

**AND**

**IN THE MATTER OF ARTICLE 2 (1) (2) (4) (5) (6) ARTICLE 3 (1) ARTICLE 20 (1)(2) (3) (4) ARTICLE 21 (1), ARTICLE 22 (1) (3), ARTICLE 24 (1) (2) (3), ARTICLE 40, ARTICLE 50 (1), ARTICLE 60 (1) (B) & ARTICLE 64 (B).**

**AND**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS OF AN INDIVIDUAL AS ENshrined IN ARTICLE 40 & 47 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER FO THE LAND REGISTRATION ACT SECTIONS 24, 25 & 26**

**AND**

**IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS OF THE INDIVIDUAL) HIGH COURT PRACTICE RULES, 2006 AS READ WITH CLAUSE 19 OF THE CONSTITUTION OF THE REPUBLIC OF KENYA TRANSITIONAL CLAUSES AND CONSEQUENTIAL PROVISIONS OF THE SCHEDULE TO THE CONSTITUTION**

**BETWEEN**

**KATANGI DEVELOPERS LIMITED.....PETITIONER/APPLICANT**

**VERSUS**

**THE HON. ATTORNEY GENERAL.....1<sup>ST</sup> RESPONDENT**

**KENYA RAILWAYS CORPORATION.....2<sup>ND</sup> RESPONDENT**

**RULING**

Katangi Developers Ltd, the Decree Holder has come to court against the Judgment Debtors who are the Respondents by application dated 21/4/2021 seeking orders that the Principal Secretary Ministry of Interior and Co-ordination of National Government be arrested and/or committed to civil jail for such time as the Honourable Court shall deem just and expedient for being in disobedience of the Honourable Court’s Orders of 16<sup>th</sup> March, 2021 and that the Managing Director of the Kenya Railways Corporation be arrested and/or committed to civil jail for such time as the Honourable Court shall deem just and expedient for being in disobedience of this Honourable Court’s orders of 16<sup>th</sup> March, 2021 and that the Inspector General of Police to enforce these orders by arresting and prosecuting the above cited contemnors and bringing them to court for sentencing and committal. Lastly, that the costs of this Application be paid by the Respondents in any event. The application is grounded on facts that the Honourable Court delivered its Judgment dated 11<sup>th</sup> February, 2021 on Petition No. 10 of 2019 finding in favour of the Petitioner/Applicant.

Pursuant to the said Judgement, the Petitioner extracted a decree of 16<sup>th</sup> March, 2021 and a copy of which decree was served upon the Respondents. That the Respondents have refused to comply with the said judgment and decree of this Honourable Court.

The applicant states that prior to its Judgment, this Honourable Court had earlier issued mandatory interlocutory orders on the 27<sup>th</sup> day of September, 2019 directed at the Respondents to comply and the Petitioner/Applicant extracted the said interlocutory order of 27<sup>th</sup> September 2019 and served the same on all the Respondents. The Respondents did not comply with the said orders prompting the Petitioner/Applicant to file the Notice of Motion application dated 18<sup>th</sup> October 2019 citing the Respondents for contempt of valid court orders.

That pursuant to the said Petitioner/Applicant's application of 27<sup>th</sup> September, 2019, this Honourable Court via its Ruling delivered on the 15<sup>th</sup> day November 2019 found the Respondents to be in contempt of court orders and consequently the ordered that the Respondents be committed to civil jail for one month for being in disobedience of this Honourable Courts' orders of the 27<sup>th</sup> day of September, 2019 and of 7<sup>th</sup> day of October, 2019. In the alternative, each respondent was to pay a fine of Kshs. 200,000/=. The Respondents have failed to pay the fine.

Despite the said orders from the interlocutory applications and the instant decree from the Court's judgment being duly served on the Respondents, the Respondents have adamantly refused to comply with or obey the Orders of this Honourable Court.

The Respondents have by their actions made it clear that they are not willing to comply with Court orders unless punitive measures are taken against them.

The Orders prayed for here are necessary in order to preserve the dignity of this Honourable Court; to uphold the rule of law; and to protect the proprietary rights of the Petitioner/Applicant as a person entitled to equal protection of the law.

The application is supported by the affidavit of Dipak Panachand Shah wherein he states that he is aware having been shown a true copy of the extracted decree that on the 16<sup>th</sup> March, 2021 this Honourable Court ordered the Respondents to remove all fences, barriers, blockades, blockages, beacons, beacon marks, and any other objects hitherto or blocking, barring, impending or interfering with access ingress or egress to or from the properties of the Petitioner registered as Kisumu Municipality/Block 7/414, 415, 417, 419, 420, 421, 422, 424, 425, 426, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, and 440.

That the Petitioner's Advocates on record caused the said extracted order to be served on the Respondents. That at the time of filing this application the Respondents have not complied with this Honourable Court's decree and the dictates for the judgment of this Honourable Court of 16<sup>th</sup> March 2021.

That prior to the delivery of this Honourable Court's Judgement, this court had earlier delivered an interlocutory ruling and issued mandatory orders on 27<sup>th</sup> day of September, 2019 directed at the Respondents. The Petitioner's Advocate on record caused the said extracted order of 27<sup>th</sup> September, 2019 to be served on all the Respondents. However, the Respondents did not comply with the said orders prompting the Petitioner/Applicant's Advocates on record to file the Notice of Motion application dated 18<sup>th</sup> October, 2019 citing the Respondents for contempt of valid court orders.

That pursuant to the said Petitioner/Applicant's application of 27<sup>th</sup> September, 2019, this Honourable Court via its Ruling delivered on the 15<sup>th</sup> day November, 2019 found the Respondents to be in contempt of court orders and consequently the court ordered that the Respondents be committed to civil jail for one month for being in disobedience of this Honourable Court's orders of the 27<sup>th</sup> day of September 2019 and of 7<sup>th</sup> day of October, 2019. In the alternative, each respondent was to pay a fine of Kshs. 200,000/=. The Respondents have refused and/or failed to pay the fine. Despite the said orders from the interlocutory application and the instant decree from the Court's final decree being duly served on the Respondents, the Respondents have adamantly refused to comply with or obey the orders of this Honourable Court.

That by their actions, the Respondents have made it clear that they are not willing to comply with Court orders unless punitive measures are taken against them.

That despite the court's judgement and a valid decree thereto, the Respondents have contemptuously refused to remove the fences, barriers, blockades, blockages, beacons, beacon marks, and all other objects blocking, barring, impending or interfering with access ingress or egress to or from the properties of the Petitioner registered as Kisumu Municipality/Block 7/414, 415, 417, 419, 420, 421, 422, 424, 425, 426, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, and 440. The acts of the Respondents have brought the dignity of the Court into disrepute and seriously undermined the rule of law in this Country.

That is apparent that the Respondents have no intention to obey this Honourable Court's order unless the court punishes the officers of the Respondent for their contemptuous attitude.

Dr. (Eng.) Karanja Kibicho E.B.S the Principal Secretary state department for Interior and Citizen services, Ministry of Interior and coordination of National Government filed a replying affidavit in his capacity as the head of the administration of the state department of interior and citizen services stating that The Ministry of Interior & Co-ordination of National Government did not play any role in the alleged fencing, erecting barriers, blockades, blockages and or doing any act to impede or interfere with access ingress and egress to or from the suit properties as alleged by the Petitioner.

That is evident that he did not authorize and/or direct any person and/or government agency to interfere in any manner with the petitioner's quite possession of the suit property and therefore he is unable to comply with any resultant court order.

That it must be stated at the outset that the application is driven by malice, mischief and is an abuse of the process of this honourable court and the orders sought should not be granted for the following reasons:

- a) The Ministry of Interior & Co-ordination of National Government did not instruct any person and/or government agency to erect any structures aimed at blocking access to the suit property.
- b) That the National Youth Service is not domiciled in the Ministry of Interior & Co-ordination of National Government.
- c) That he was not personally served neither did he have any knowledge of the court orders issued on 16<sup>th</sup> March, 2021.

That he has been informed by the Chief State Counsel that it is trite law that for him to be found to be in contempt of court the Applicant must satisfy this honourable court beyond any shadow of doubt that he disobeyed the court orders allegedly issued on 16<sup>th</sup> March 2021 while having full knowledge and/or notice of their existence.

That the Chief State Counsel further informs him which information he verily believes to be correct that since the Applicant has not adduced any evidence to prove that he had knowledge of the existence of the court orders and neither have they proved that they served him personally, they have laid no legal basis for this honourable court found me guilty of contempt of court. That the applicant must prove beyond peradventure that he is guilty of contempt.

That the Applicant has not made out a case for him to be held in contempt of court since there is no tangible evidence produced that he has disobeyed any court order.

Stanley Gitari, the Senior Legal Officer of the Kenya Railways Corporation states that the application is misconceived bad in law totally and incurably defective, an abuse of court process. The said officer states that acts complained of are acts of a multi-agency Government of Kenya unit over the suit property earmarked partly for the expansion and revival of Kisumu Port. The project is being undertaken on behalf of Kenya Ports Authority and that Kenya Railways has absolutely no contact of the happenings there. That Kenya Railways has lost part of its land as well. In a nutshell the Kenya Railways Corporations is not in control of the project.

I have considered the applications, the replying affidavits, and rival submissions and do find that this court has already found the Kenya Railways Corporation in contempt of court orders and has fined the Kenya Railways Kshs 200,000 which they have paid and therefore giving an order that contradicts the earlier order will be contrary to administration of justice. I do find that the orders made are clear and unambiguous and should be obeyed accordingly. The Respondents have been served through their advocates and are aware through the said advocates.

I do find that the 1<sup>st</sup> Respondents is still in contempt of the court orders and should by law purge the contempt before they proceed and that they should comply with the court orders within 30 days. The application by the Judgment Debtor being the 2<sup>nd</sup> Respondent id dated 29/3/2021. The applicant seeks stay of execution pending appeal. Order 42 Rule 6 of the Civil Procedure Rules provides: -

**“6. (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.**  
**(2) No order for stay of execution shall be made under subrule (1) unless—**  
**(a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and**  
**(b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.**

In this case the applicant has satisfied the court that application has been made without unreasonable delay, However, there is no evidence that the applicant will suffer substantial loss if stay is not granted as the opening of the road of access will not render the appeal nugatory as the same can be closed again if they succeed on appeal. The suit properties are still registered in the names of the decree holder.

Granting a stay of execution pending appeal is discretionary and the same should be exercised judiciously and the person making such application should come to court with clean hands. In this case the applicant’s hands are not clean as they have never obeyed court orders at the preliminary stage and after judgment, I do decline to grant the orders of stay pending appeal and the same is dismissed with costs as the Judgment debtor continuous to disobey court orders.

In conclusion in respect to two applications, I do make an order that the Attorney General and Kenya Railways Corporation do comply with court orders issued by this court within 30 days as if issued today failure of which the Decree Holder be at liberty to apply. The application for stay of execution pending appeal is not allowed. Costs to the Decree Holder.

In both applications Orders accordingly.

**DATED, SIGNED AND DELIVERED AT KISUMU THIS 8<sup>TH</sup> DAY OF OCTOBER, 2021**

**ANTONY OMBWAYO**

**JUDGE**

*This Ruling has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15<sup>th</sup> March 2020.*

**ANTONY OMBWAYO**

**JUDGE**