



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC CASE NO E004 OF 2020**

**MALVI INVESTMENTS LIMITED..... PLAINTIFF**

**-VERSUS-**

**NAIROBI CITY COUNTY GOVERNMENT.....1<sup>ST</sup> DEFENDANT**

**THE DIRECTOR GENERAL NAIROBI METROPOLITAN SERVICES.....2<sup>ND</sup> DEFENDANT**

**THE HONOURABLE ATTORNEY GENERAL.....3<sup>RD</sup> DEFENDANT**

**RULING**

1. This is a Notice of Motion dated 17<sup>th</sup> November 2020 brought under section 5(1) of the Judicature Act Cap 8 Law of Kenya, Section 3A and 63(c) of the Civil Procedure Act Cap 21 Laws of Kenya, Rule 81.4 of the English Civil Procedure Rules, Article 159(1) of the Constitution of Kenya and all other enabling provisions of the law.

2. It seeks orders:-

**1. That this court be pleased to order the Director General, Nairobi Metropolitan Services, Major General Mohammed. A. Badi be committed to civil jail for a period of six (6) months or any other period or any other sanction as the honourable court may deem fit and appropriate for disobedience of the orders made on 17<sup>th</sup> September 2020 and issued on 13<sup>th</sup> October 2020.**

**2. That an order that costs of and occasioned by this motion be paid by the said Director General Major General Mohammed A. Badi.**

**3. Any other order which this honourable court may deem expedient in the circumstances.**

3. The grounds are on the face of the application and are set out in paragraphs (a) to (c).

4. The application is supported by the affidavit by Robinson Kioko Mutuku, the Project Manager of the Plaintiff/Applicant herein sworn on the 17<sup>th</sup> November 2020.

5. The application is opposed. There are replying affidavits sworn by Geoffrey Cheruiyot, Assistant Director Survey in the Directorate of Land, Housing and Urban Renewal, Urban Planning and Development, within Nairobi Metropolitan Services sworn on the 24<sup>th</sup> April 2021 and 24<sup>th</sup> June 2021.

6. On the 19<sup>th</sup> July 2021 the court with the consent of the parties directed that the Notice of Motion be canvassed by way of written submissions.

7. The Plaintiff's/Applicant's submissions are dated 30<sup>th</sup> August 2021. It is the Plaintiff's/Applicant's case that they have attached photographs of a complete construction undertaken by the 2<sup>nd</sup> Respondent.

8. As at the time of writing this ruling, there are no submissions filed by the 2<sup>nd</sup> Respondent.

9. I have considered the notice of motion, the affidavit in support and the annexures. I have considered the affidavits in response, the written submissions filed and the authorities cited. The issue for determination is whether this application is merited.

10. In the case of **Mutitika vs Baharini Farm Ltd [1985] KLR 229, 234** it was stated that:-

**“.....the standard of proof in contempt proceedings must be higher than proof on the balance of probabilities almost, but not exactly, beyond reasonable doubt.....The standard of proof beyond reasonable doubt ought to be left where it belongs, to wit in criminal cases. It is not safe to extend it to an offence which can be said to be quasi-criminal in nature”.**

I am also guided by the case of **Nyamogo & Another vs Kenya Posts and Telecommunications (1999 – 94) EA 464** where it was expressed that service of a court order on the company does not constitute service on the directors and personal service on each officer is required to be effected by law.

11. Similarly in the case of **Alken Communications Ltd vs Safaricom Limited & 2 Others [2013] eKLR**, it was stated that where committal for contempt is sought for breach of an injunction, it must be made clear what each defendant is alleged to have done and whether it was in breach of the injunctive order.

12. This court on the 13<sup>th</sup> October 2020 issued the following orders:-

**“1. That an order of injunction is hereby issued restraining the respondents through their agents, servants and/or employees or anyone claiming under them from trespassing on, encroaching, constructing on, alienating or otherwise interfering or dealing with the plaintiff’s property being LR NO 209/12824 Ngara area Starehe District, Nairobi pending hearing and determination of this suit.**

**2. That pending the hearing and determination of this suit, the plaintiff/applicant is allowed to erect a permanent perimeter wall around the property the subject matter of this suit to forestall further encroachment, trespass and alienation by anyone without the plaintiff’s/applicant’s express authority.**

**4. That the Officer Commanding Pangani Police Station do enforce compliance of the orders above.**

**5. That costs of this application be provided for.**

**6. That mention on 10<sup>th</sup> February 2021 for pretrial directions before the Deputy Registrar.**

**7. That defendants be served.”**

13. Prayer No 1 of the Notice of Motion dated 17<sup>th</sup> November 2020 seeks the following orders:-

**“That this court be pleased to order the Director General, Nairobi Metropolitan Services, Major General Mohammed. A. Badi be committed to civil jail for a period of six (6) months or any other period or any other sanction as the honourable court may deem fit and appropriate for disobedience of the orders made on 17<sup>th</sup> September 2020 and issued on 13<sup>th</sup> October 2020.”**

14. The above prayer is supported by the Affidavit of Robinson Kioko Mutuku, Project Manager of the Plaintiff’s Company. In paragraph 12 he deposes:-

**“That despite service of the court order, agents, employees and/or workers of the 2<sup>nd</sup> Respondent are in complete disregard to the orders of injunction still encroaching on, trespassing on, alienating, carrying out construction and interfering with the plaintiff’s property known as LR No 209/12824 having personally gone to the plot and witnessed the illegal acts by the 2<sup>nd</sup> Respondent after service of the order (see photos marked “RKM 2”).**

In paragraph 13 he deposes:-

**“That I am advised by the Applicant’s Advocate on record which advice I verily believe to be true that the Director General, Nairobi Metropolitan Services, Major General Mohammed A. Badi is the accounting officer to the 2<sup>nd</sup> Respondent and is thus answerable to the blatant disobedience of the order so the court.”**

From the foregoing averments, I find that the Plaintiff has failed to specify the acts of disobedience by the 2<sup>nd</sup> Defendant/Respondent and specifically the Director Major General Mohammed A. Badi.

15. The photographs annexed to be Application appear to be some incomplete structures. This is contrary to the Plaintiff’s/Applicant’s claim that the structures are complete. The photographs annexed in fact confirm the averments of Geoffrey Cheruiyot who swore an affidavit on behalf of the 2<sup>nd</sup> Defendant/Respondent where he stated in paragraph 11:

**“That I am aware that in early 2020, the aforementioned toilet was being renovated by the Nairobi Metropolitan Services**

**and the renovation stopped when the Nairobi Metropolitan Services was served with the court order dated 13<sup>th</sup> October 2020<sup>o</sup>.**

15. I find that the Plaintiff/Applicant has failed to demonstrate that Major General Mohammed A. Badi willfully and deliberately disobeyed the court orders issued on 13<sup>th</sup> October 2020. I find no merit on this application and the same is dismissed with no orders as to costs.

It is so ordered.

**DATED, SIGNED AND DELIVERED IN NAIROBI ON THIS 25<sup>TH</sup> DAY OF NOVEMBER, 2021**

.....

**L. KOMINGOI**

**JUDGE**

**In the presence of:-**

Mr. Mbindyo for the Plaintiff

No appearance for the Defendants

Steve – Court Assistant