



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT ELDORET

JUDICIAL REVIEW NO. 4 OF 2019

PAUL GATHINGU GACHIE.....APPLICANT

VERSUS

CABINET SECRETARY FOR LAND & PHYSICAL PLANNING.....RESPONDENT

RULING

[NOTICES OF MOTION DATED THE 17TH MAY, 2021 AND 21ST JUNE, 2021]

1. This ruling concerns the two applications dated the 17th May, 2021 and 21st June, 2021 and shall be dealt with sequentially. The first application is by the Respondent and seeks for the following orders *inter alia*:

(a) Spent.

(b) Spent.

(c) *The order issued on 26th July 2019 staying the implementation of the Legal Notice No. 106 contained in Kenya Gazette Supplement No. 101 of 1st July, 2019 and permitting officers who, prior to the promulgation of Legal Notice No. 106, were issuing leases or licences at the Ministry Lands and Physical Planning to continue issuing such leases or licences in relation to private land be set aside, discharged or reviewed forthwith.*

(d) *The costs of this application be provided for.*

The application is founded on the eleven (11) grounds on its face, and supported by the affidavit sworn by Hon. Farida Karoney, the Cabinet Secretary of Lands and Physical Planning, on the 17th May, 2021. That the Respondent's case is *inter alia* that the power vested in her office by dint of **Sections 2 and 23(2) of the Land Act** can be exercised through delegation, and since the impugned Legal Notice flowed from the amendment to the Land Act, it could not be stayed without staying the substantive provisions as to do so would create chaos and absurdities in the process of issuing leases and licenses.

2. That the application is opposed by the Applicant, through the replying affidavit sworn by **PAUL GATHINGU GACHIE** on 16th August, 2021. It is his case that the application is *inter alia* an abuse of the court process. That the grounds relied on had been rejected by the court in its ruling of the 25th November, 2020 on an application for contempt, and that Respondent has continued to be in contempt of the court order.

3. That following directions issued on the 24th June 2021, the learned counsel for the Applicant and Respondent filed their written submissions dated the 22nd September, 2021 and 1st November, 2021 respectively.

4. The following are the issues for the court's determinations;

(a) ***Whether the Respondent has met the threshold for setting aside, varying and or discharging the stay order.***

(b) ***Who pays the costs of the application?***

5. The court has carefully considered the grounds on the notice of motion, the affidavit evidence by both parties, the submissions by learned counsel, the superior courts decisions cited therein, and come to the following conclusions;

(a) That **Order 51 Rule 15 of the Civil Procedure Rules** provides for setting aside of ex parte orders in appropriate cases. The court in the case of **ZEBEDEE MMATA INJERA V BENSON ANUBI LUHONG; JOANNE C.K. LUHONGO (INTERESTED PARTY) [2021] eKLR**, expressed itself as follows on **Order 51 Rule 15**;

“... while Order 51 Rule 15 of the Civil Procedure Rules gives the court power to set aside any order made ex parte, the court's discretionary power should, however, be exercised judiciously, with the overriding objective of ensuring that justice is done to all the parties. That the court's discretion to set aside an ex parte ruling/judgment is not restricted, but should be so exercised not to cause injustice to the opposite party. It is incumbent upon the party seeking the court's favor or discretion to adduce sufficient and plausible reasons that are demonstratable, and persuasive to the court...”

(b) The Respondent has approached the court seeking to set aside the order of the court issued on 26th July, 2019 which order has the effect of staying Legal Notice No. 106. The Respondent has urged the court to set aside the aforementioned order because the same was obtained through material non-disclosure of facts, and that the subsistence of the stay order has resulted in an illegality in that it seems to be granting officers the power to issue out leases and licences in contravention to the mandate conferred by **section 23(2) of the Land Act No. 6 of 2012**.

(c) The learned counsel for the Respondent submitted that under **Order 40 Rule 7 of the Civil Procedure Rules, sections 1A, 1B, 1C, and 3A of the Civil Procedure Act**, the court has the power to set aside or discharge interim orders made without full disclosure. The counsel cited several superior courts decisions on the need to make full disclosure of relevant facts in injunction applications. On their part, the learned counsel for the Applicant submitted that the review application is defective as it relies on the same grounds already dealt with in the earlier application dated the 6th February, 2020 that was determined through the ruling delivered on the 25th November, 2020. That the application is an attempt to validate the illegal actions of the Respondent and her officers, that have been done in deliberate contempt of a valid court order. That as this court cannot sit on appeal of its own order, the application should be rejected and the Respondent sanctioned for contempt. That having considered the grounds on the application, the prayers sought, evidence tendered and the rival submissions it is apparent that the order in issue in the instant application is not in respect of an injunction, but a stay order granted alongside the leave to file a judicial review application. That the cases cited by the learned counsel for the Respondent are about injunctions that prohibits or requires the performance of some particular act(s), while stay orders have the effect of suspending or postponing or halting something.

(d) That the Respondent contention that the stay order was obtained with material non-disclosure of the import of **Sections 2 and 23(2) of the Land Act**, is baseless and unfounded for the reason that the Legal Notice No. 106 was attached on to the application seeking leave to file a judicial review application, and it clearly indicates the source of the power that the Cabinet Secretary sought to confer to the officers named on the Legal Notice. The court therefore had full sight and appreciation of the content and the meaning of the provision of **Section 23(2) of the Land Act** when it made its ruling granting the Applicant leave to file a judicial review application and the stay of Legal Notice No. 106. I therefore find that the allegations of material non-disclosure on the part of the Applicant does not hold water.

(e) That the Respondent's second contention is that the subsistence of the stay order has resulted in a situation where the power to issue leases and licences has reverted to persons who are not authorized by law to issue the said documents. The stay order subject matter of this application directed as follows;

“3. Moreover, the leave granted should operate as a stay of the decision contained in or action taken pursuant to Legal Notice No. 106 contained in the Kenya Gazette Supplementary No. 101 issue of 1st July, 2019. In particular and for the avoidance of doubt, the officers responsible for issuing leases or licences at the Ministry of Lands and Physical Planning immediately prior to the promulgation of Legal Notice No. 106 on 1st July, 2019 do continue to issue such leases or licences in relation to private land.”

That my reading and understanding of the above order is that it merely reverted the mandate to issue leases and licences over private land to the officer mandated under **section 23(2) of the Land Act**, and that is the Cabinet Secretary. That section provides as follows;

“23. (2) A lease or licence to private land within the meaning of Article 64 (b) of the Constitution shall be issued by the Cabinet secretary and registered by the Chief Land Registrar.”

The claim that the stay order had the effect of conferring upon persons not authorised under the statute to issue the leases and licences in respect of private land has therefore no legal basis. The Respondent has no option but to comply with the said order, and if aggrieved, file an appeal at the earliest.

(f) I find that the Respondent has failed to persuade the court that it is necessary to exercise its discretion to set aside, vary and or discharge the stay order issued on 26th July, 2019. In any event, if the court was to set aside the stay order that was issued alongside the leave granted to the Applicant, the judicial review application that is pending determination before the court would be rendered moot and a purely academic exercise.

6. That in view of the foregoing findings, the Respondent's application dated 17th May, 2021 is therefore without merit and is dismissed with costs to the Applicant.

7. The second application is the one dated 21st June, 2021 wherein the Applicant seeks for the following orders, *inter alia* that;

i. *The Cabinet Secretary Ministry of Lands and Physical Planning, Hon. Farida Karoney be found to be in contempt of court for disobeying the orders that were given by the “Court on 26th July, 2019 and 25th November, 2020 vide the ruling delivered on 25th November, 2020”.*

ii. *Upon being found to have disobeyed the orders that were given by the Court on 26th July, 2019 and 25th November, 2020, Hon. Farida Karoney be detained in prison or any other rehabilitation facility for a period of Two (2) years and be made to pay a fine of Kshs.20,000,000.*

iii. *Costs of this application be provided for.*

The application is based on the fifteen (15) grounds on its face and supported by the affidavit of **Paul Gathingu Gachie**, the Applicant, sworn on the **21st June, “2020”**. The Applicant’s case is that upon the stay order being granted with the leave to apply for the prerogative writs on the 26th July 2019, the same was extracted and a copy served on the Ministry of Lands and Physical Planning on the 29th July, 2019. That he then filed the contempt application on the 6th February, 2020 and in its ruling of the 25th November 2020, the court granted the Respondent thirty (30) days to ensure compliance with the stay order. That the Applicant brought the attention of the ruling of the 25th November, 2020 to the Hon. Attorney General and the Respondent by serving them with a letter dated the 11th March, 2021. That there has been no compliance on the part of the Respondent as Mr. Nyangweso, Kamau, Maina, and Koech have continued to exercise the powers conferred by the Legal Notice No. 106 of 14th June 2019, that was stayed under the order of 26th July, 2019. That the Respondent should therefore be found in contempt of court order and be jailed for two (2) years and fined Kshs.20,000,000.00.

8. That the application is opposed by the Respondent through the replying affidavit sworn by **HON. FARIDA KARONEY** on 29th July, 2021. It is the Respondent’s case that the application is bad in law and the supporting affidavit full of misrepresentations. That the impugned Legal Notice had come into force by the time the stay order issued on the 26th July, 2019 was brought to her attention. That the Legal Notice is incapable of being reversed by a court order without revisiting the parent statutory foundation under which it was issued. That the Applicant has been coercing and intimidating her and her staff to comply with the order since the ruling of the 25th November, 2020. That so as not interrupt the operations of the Ministry in respect of issuance of leases and licences, the order of the 26th July, 2019 should be set aside or varied. That the Respondent would not be acting in the best interest of Kenyans if she was to allow the leases and licences to be issued by officers other than those appointed in accordance with **Sections 2 and 23(2) of the Land Act**. That the said legal provisions had not been stayed, and mandates the Respondent by herself or through delegation to issue the leases and licences.

9. The submissions filed by the learned counsel for the Applicant and Respondent dated the 22nd September, 2021 and 1st November, 2021 respectively, that I referred to earlier, also covered the instant application.

10. The following are the issues for the court’s determinations;

(a) ***Whether the Respondent’s actions amount to breach of the stay order issued on 26th July, 2019 or conversely put, whether the Applicant has shown that the Respondent is guilty of contempt of court.***

(b) ***Who pays the costs of the application?***

11. That I have considered the grounds on the application, the affidavit evidence tendered, the submissions, the superior courts decisions cited therein, and come to the following findings;

(a) That the court has had the occasion through the ruling delivered on the 25th November, 2020, to consider whether the Respondent’s actions raised herein, and which are similar to those complained of in the Notice of Motion dated the 6th February 2020, amounted to a disobedience of court order. The court need not repeat its already rendered findings on the said grounds. That it suffices to restate that the application dated the 6th February, 2020 was dismissed for reasons that the Applicant had failed to prove to the standard required that the Respondent had wilfully and deliberately breached the stay order issued on 26th July, 2019. The court however went ahead and granted the Respondent a window of thirty (30) days to comply with the stay order. The Applicant’s new contention that the court has not pronounced itself on is that the Respondent did not comply with the stay order within the time given in the ruling of 25th November, 2020 or at all, and hence this application.

(b) That following the filing of an *Ex Parte* application dated 25th July, 2019, the court granted the Applicant leave to file a judicial review application, and an order staying the implementation of Legal Notice No. 106, on the 26th July, 2019. The judicial review application subsequently filed by the Applicant has not been heard and determined on its merits, and the order staying the implementation of the Legal Notice issued on 26th July, 2019 is still in force. The Applicant subsequently filed an application dated 6th February, 2020 seeking to cite the Respondent for being in contempt of court that was unsuccessful, as the Applicant failed to prove that the Respondent had wilfully and deliberately breached the stay order of 26th July, 2019. The court went on to direct in its ruling delivered on 25th November, 2020 that the Respondent was to ensure compliance with stay order No. 3 of the court order issued on 26th July, 2019 within thirty (30) days. That the stay order is meant to be discharged once the substantive judicial review application that has since been filed is heard and determined. That in view of the findings in the ruling of the 25th November 2020, there is no doubt that the Respondent is fully aware of the stay order issued on 26th July, 2019.

(c) The Applicant filed the application dated 17th May, 2021 seeking to have the Respondent cited for being in contempt of court long after the thirty (30) days period given under the court order issued on 25th November, 2020 had lapsed. To prove the allegation of contempt on the part of the Respondent, the Applicant adduced evidence that despite the existence of the stay order, the Legal

Notice No. 106 had been implemented. He has annexed copies of lease certificates issued by the following Land Administration Officers:

(i) James E. O. Nyangweso - Nanyuki - Issued on 3rd June, 2021.

(ii) Kamau J. H. Maina - Kiambu - Issued on 9th June, 2021.

(iii) Kipngeno Koech – Eldoret - Issued on 4th June, 2021.

The Respondent has not disputed the documentary evidence provided by the Applicant that shows the stay order of the 26th July, 2019 has continued being disobeyed post the period granted to her vide the court's ruling of 25th November, 2020.

(d) That in the case of **REPUBLIC V PRINCIPAL SECRETARY, MINISTRY OF DEFENCE EX PARTE GEORGE KARIUKI WAITHAKA [2019] eKLR**, the court cited with approval the decision of the court in **Teachers Service Commission vs Kenya National Union of Teachers and Two Others, (2013) eKLR**, in respect of the observation made in **Johnson vs Grant, (1923) SC 789**, that the law and punishment for contempt of court does not exist to protect the personal dignity of the Judiciary nor private right of the parties or litigants, but the fundamental supremacy of the law which is challenged.

(e) The Applicant has in the submissions cited some authorities that I find useful in the determinations of this application, including the case of **KENYA TEA GROWERS ASSOCIATION VS FRANCIS ATWOLI AND 5 OTHERS (2012) eKLR, ECONET WIRELESS LTD VS MINISTER FOR INFORMATION & COMMUNICATION OF KENYA & ANOTHER, (2005) eKLR, TEACHERS SERVICE COMMISSION V KENYA NATIONAL UNION OF TEACHERS & 2 OTHERS (2013) eKLR, SAM NYAMWEYA & 3 OTHERS V KENYA PREMIER LEAGUE LIMITED & 2 OTHERS (2015) eKLR AND REPUBLIC V KENYA SCHOOL OF LAW & 2 OTHERS EX PARTE JULIET WANJIRU NJOROGE & 5 OTHERS [2015] eKLR**. The decisions in the foregoing cases support the position that court orders must be obeyed so as to uphold the rule of law.

(f) The Respondent has blatantly disregarded the stay order issued on 26th July, 2019 even after being given an extension of the time to comply vide the ruling of 25th November, 2020. The Respondent is obviously in contempt of court, and in the circumstances, should be sanctioned in accordance with the provisions of **Section 29 of the Environment and Land Court Act, 2011** which provides as follows;

“Any person who refuses, fails or neglects to obey an order or direction of the Court given under this Act, commits an offence, and shall, on conviction, be liable to a fine not exceeding twenty million shillings or to imprisonment for a term not exceeding two years, or to both.”

(g) That the Applicant having succeeded in his application is entitled to costs in accordance of **Section 27 of the Civil Procedure Act Chapter 21 of Laws of Kenya**.

12. That flowing from the foregoing, the court finds merits in the Applicant's Notice of Motion dated the 21st June, 2021 and the same is allowed with costs. The court further orders as follows;

(a) That the Respondent is granted the last opportunity to comply with the court order No. 3 issued on the 26th July, 2019 within thirty **(30)** days from today; and

(b) In default of complying with **(a)** above, the Respondent shall be liable to pay a fine of Kshs.20,000,000.00 **(Twenty Million)**, to be remitted to the court within ninety **(90)** days from today, and in default warrant of her arrest and committal to jail for two **(2)** years to issue.

(c) The warrant of arrest in **(b)** above to be executed by the Inspector General of Police, Kenya.

(d) That as indicated in **(6)** above, the Respondent's application for review dated the 17th May, 2021 is without merit and is dismissed with costs.

It is so ordered.

DATED AND VIRTUALLY DELIVERED THIS 8TH DAY OF DECEMBER, 2021.

S. M. KIBUNJA

ENVIRONMENT AND LAND COURT JUDGE

IN THE PRESENCE OF:

APPLICANT: ABSENT

RESPONDENT: ABSENT

COUNSEL: MR. AWUOR FOR EXPARTE APPLICANT

MR. ODONGO FOR RESPONDENT

ONIALA: COURT ASSISTANT