



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MACHAKOS**

**ELC. PETITION NO. 2 OF 2019**

**PATRICK MWENDWA FRANCIS.....PETITIONER**

**VERSUS**

**COUNTY GOVERNMENT OF KITUI.....RESPONDENT**

**RULING**

1. In the Notice of Motion dated 29<sup>th</sup> March, 2019, the Petitioner has prayed for the following orders:

***a. That this Honourable Court be pleased to order that Musee Mati, a Director of Timax Building & General Contractors Limited, one Alex Kimanzi, the County Secretary, Kitui County Government, one Meshack Nyenze, the Kitui County Government Municipality Manager and one Eng. Jacob Kakundi, the CEC, Land and Infrastructure, Kitui County Government and/or any other person holding such positions in the Kitui County Government at the time of the hearing and determination of this Application be committed to civil jail for a term of six (6) months and/or for such a term as the court may determine and/or property of the Respondent herein and/or such property of the said Musee Mati and/or Timax Building and General Contractors Limited, Alex Kimanzi, Meshack Nyenze and Eng. Jacob Kakundi be attached for disobedience of this Honourable Court's orders made on 20<sup>th</sup> February, 2019 and 5<sup>th</sup> March, 2019.***

***b. That this Honourable Court be pleased to give further orders and/or directions as it may deem fit and just to grant.***

***c. That costs of this Application be provided for.***

2. The Application is supported by the Affidavit of the Petitioner who has deponed that on 20<sup>th</sup> February, 2019, this court issued injunctive orders restraining the Respondent either by itself, agents, employees or otherwise from alienating, demolishing or interfering with the Plaintiff's ownership of land known as Plot No. P34 and P35 situate within Kitui County pending the hearing and determination of the Petition.

3. According to the Petitioner, the orders of the court were served upon the Respondent on 25<sup>th</sup> February, 2019; that when the orders were extended by the court, they were again served on the Respondent on 6<sup>th</sup> March, 2019 and that the said orders were also affixed on the buildings erected on plot numbers P34 and 35.

4. The Petitioner has deponed that despite the said orders having been duly served upon the Respondent, the said Musee Mati, Alex Kimanzi, Meshack Nyenze and Jacob Kakundi jointly and severally, either by themselves or their duly authorized agents, demolished or caused to be demolished the buildings and structures erected on land known as plot number P35 situated within Kitui Municipality, Kitui County.

5. According to the Petitioner, the adjournment of this matter on 27<sup>th</sup> June, 2019 was a calculated and deliberate move by the Respondent to defeat the substratum of the Petition; that when the said Musee Mati started demolishing the buildings on Plot No. 35, he reported the issue to the OCPD, Kitui Police Station and that when Mr. Musee was summoned, he intimated to the police that he was "not a small man to be intimidated by small courts."

6. The Petitioner finally deponed that the failure by the contemnors to comply with the orders of 20<sup>th</sup> February, 2019 and 5<sup>th</sup> March, 2019 is an open contempt and direct deviance of the court; that the obedience of the court orders is one of the tenets of the rule of law and that the substratum of his Appeal has been deliberately defeated by the acts of the contemnors.

7. In response, Meshack Nyenze deponed that he is the Municipal Manager of the Respondent; that the Petitioner never served the court orders on him; that the Respondent was not aware of these proceedings and that the Respondent's Legal Officer is known as Maryann Wanza.

8. According to Mr. Nyenze, the Respondent's office does not have a Secretary by the name of "Jane"; that the persons cited for contempt were not served with the court orders; that under Order 40 Rule 4 of the Civil Procedure Rules, ex-parte orders should be served within three (3) days from the date of issue and that in default of service, the injunction order lapses automatically.
9. Mr. Nyenze deponed that plot numbers 34 and 35 do not exist in the record of the Respondent; that the suit land is a road reserve; that the Respondent's officials held a meeting with the traders of Bondeni area and informed them of the intention to improve and expand the road and that the Respondent never approved the construction of permanent structures on a road reserve.
10. The alleged contemnor deponed that the Application is an abuse of the court process and calculated to frustrate the development projects of the Respondent; that the Application has been overtaken by events and that the same should be dismissed with costs.
11. Musee Mati, the Director of Timax Building and General Contractors Limited, deponed that upon execution of all the documentation between the Respondent and Timax Building and General Contractors Limited (Timax), Timax began works of improving Naivas-National Oil Road to Bituminous Standard; that the effective date of the contract was from 10<sup>th</sup> January, 2019 and that it was his understanding that the surveys and boundaries of the road as done were correct.
12. According to the Director of Timax, Timax is not a party to the proceedings herein; that he was not served with the orders of the court issued on 20<sup>th</sup> February, 2019 and 5<sup>th</sup> March, 2019 and that he was not aware of the existence of this suit.
13. In his Supplementary Affidavit, the Petitioner averred that the Respondent has not denied that it ordered for the demolition of the suit property; that the said demolition was carried out on 27<sup>th</sup> March, 2019 despite the orders of the court which were issued on 20<sup>th</sup> February, 2019 being confirmed on 5<sup>th</sup> March, 2019 in the presence of the Respondent and that the said orders were served on the Respondent on 5<sup>th</sup> March, 2019.
14. The process-server was cross-examined on his Affidavits of Service. According to the process-server (PW1), he served the Petition, the Chamber Summons and the order of this court on the Respondent's Legal Officer on 25<sup>th</sup> February, 2019; that he again served on the Respondent with the order of the court on 6<sup>th</sup> March, 2019 and that on both occasions, the said Legal Officer stamped on his copies acknowledging receipt of the orders.
15. In cross-examination, PW1 stated that the order was received by a Ms. Jane, who is the Secretary of the Respondent's Legal Officer; that he never served Musee Mati and Timax Limited with the court order and that he does not know Musee Mati or Timax.
16. Counsel for the Petitioner submitted that there was a valid court order which was served on the Respondent. Reliance was placed on the Affidavit of Service of the court order on the legal officer and the case of **Justus Kariuki Mate & Another vs. Martin Wambora & Another (2014) eKLR** where it was held that service on an officer attached to the County Assembly can be deemed as proper service on the Speaker and the Clerk of the County Assembly.
17. It was submitted that knowledge of a court order superseded personal service. In this regard, reliance was placed on the case of **Basil Criticos vs. Attorney General & 8 Others (2012) eKLR**. The Petitioner's counsel submitted that Timax Building and General Contractors Ltd did not need to be a party to the proceedings for the orders to be binding on them, and that the Applicant legally acquired the suit property and paid rates.
18. Counsel for the Respondent submitted that the Secretary, Director and Principal Officer of the Respondent were not served with the order; that the service of the order was beyond the three days permitted by Order 40 Rule 4(1) of the Civil Procedure Rules and further that the process server was not qualified to serve hence the Application dated 28<sup>th</sup> March, 2019 was irregular and ought to be struck out.
19. On the issue of contempt proceedings, it was submitted that the Respondent, being a body corporate, cannot be cited for contempt and that no service of the order was effected on the Respondent. Counsel placed reliance on Section 30 of the Contempt of Court Act that requires that service on a state organ be effected on the accounting officer of the organ.
20. On the issue of encroachment, it was submitted, placing reliance on the case of **Shadrack Kuria Kimani vs. Stephen Gitau Nganga & Another (2017) eKLR**, that temporary structures on the suit land amounted to trespass; that the suit land belongs to the Respondent and that the Applicant had not proved that he owned the same.
21. The advocate for Mr. Mati submitted that Timax is not a party to the proceedings; that the proposed contemnors were never served with the orders of 20<sup>th</sup> February, 2019 and 5<sup>th</sup> March, 2019 and that the process-server did not have a license authoring him to serve court process.
22. The record shows that on 19<sup>th</sup> February, 2019, the Petitioner herein filed the Petition together with the Chamber Summons dated 19<sup>th</sup> February, 2019. In the said Chambers Summons, the Petitioner sought for the following orders:
  - a. ***That pending the hearing and determination of this Petition and/or further orders, this Honourable Court be pleased to issue a conservatory order restraining the Respondent either by itself, its authorized agents, servants, employees or otherwise whomsoever from alienating, repossessing, threatening to demolish, demolishing, appropriating and/or otherwise whatsoever from interfering with the Plaintiff's ownership, possession, occupation and/or use of all that property known as Residential Plot No. P34 and Plot No. P35 situated within Kitui Municipality, Kitui County.***
  - b. ***That this Honourable Court be pleased to give such orders or other conservatory orders and/or directions as would preserve the set of circumstances in such a way that the constitutional petition is not rendered nugatory.***

*c. That this Honourable Court be pleased to give such directions and other orders and/or directions as to the hearing of the Petition filed as it may deem just in the light of all the circumstances.*

*d. That the Petitioner be at liberty to apply for such other or further orders and/or directions as this Honourable Court may deem fit and just to grant.*

23. On 20<sup>th</sup> February, 2019, this court heard the Chamber Summons dated 19<sup>th</sup> February, 2019 ex parte. The court granted to the Applicant the prayer for injunction for fourteen (14) days. The said order restrained the Respondent from “*alienating, repossessing, threatening to demolish, demolishing and or otherwise interfering with the Plaintiff’s ownership, possession, occupation and use of Plot No. P34 and P35 situated within Kitui Municipality, Kitui County*”.

24. When the matter came up for inter-partes hearing on 5<sup>th</sup> March, 2019, the Respondent’s representative was not in court. The court allowed the Application dated 19<sup>th</sup> February, 2019 in its entirety.

25. It would appear that the structures or building on plot number P35 were demolished after the issuance of the orders of 19<sup>th</sup> February, 2019 and 5<sup>th</sup> March, 2019. This necessitated the filing of the current Application for contempt of court. The Petitioner is seeking to cite Musee Mati, a Director of Timax Building and General Contractors Limited; Alex Kimanzi, the Respondent’s County Secretary; Meshack Nyenze, the Respondent’s Municipality Manager and Jacob Kakundi, the Respondent’s County Executive, Land Infrastructure, for contempt.

26. All the alleged contemnors have denied that they were served with the order of the court of 20<sup>th</sup> February, 2019 and 5<sup>th</sup> March, 2019.

27. According to the Affidavit of Service of Boniface M. Kyenza (PW1), sworn on 26<sup>th</sup> February, 2019 and filed in court on 5<sup>th</sup> March, 2019, he was directed to the offices of the Respondent’s Legal Officer by a Secretary, one Jane, whom after he introduced himself to him and explained to him the purpose of the visit, directed Jane to receive the copies of the order, which she accepted by signing and stamping on the front page of his copy with the official rubber stamp. The process-server further deponed that the said legal officer and Jane were known to him since he had earlier served them with court documents relating to other matters. The service was purportedly done on 25<sup>th</sup> February, 2019.

28. In the second Affidavit of Service, the process-server deponed that on 14<sup>th</sup> March, 2019, he served “*mention notices dated 13<sup>th</sup> March, 2019*” upon the Respondent’s Legal Officer’s Secretary.

29. The process-server (PW1) admitted that he did not have a practicing certificate at the time he served the two orders of the court. In cross-examination, PW1 informed the court that the Respondent’s Legal Officer is a lady and that he knows her personally. However, he did not know her name.

30. When asked if he served Musee Mati of Timax Limited with the orders of the court, the process-server stated that he did not. Indeed, it was his evidence that he neither knew Musee Mati nor the company.

31. Contempt of court consists of conduct which interferes with the administration of justice or impedes or perverts the course of justice. Civil contempt consists of a failure to comply with a Judgment or order of the court or breach of an undertaking of court. – Osborne’s Concise Law Dictionary, P. 102.

32. In the case of *Sam Nyamweya & Others vs. Kenya Premier League Ltd and Others (2015) eKLR*, Justice Aburili stated that:

***“Contempt of court is constituted by conduct that denotes wilful defiance of or disrespect towards the court or that wilfully challenges or affronts the authority of the court or the supremacy of the law, whether in civil or criminal proceedings.”***

33. It is trite that for an Applicant to succeed in an Application for contempt, the Applicant must prove that the terms of the order were clear and unambiguous; the Defendant had knowledge of or proper notice of the terms of the order; the Defendant has acted in breach of the terms of the order; and the Defendant’s conduct was deliberate.

34. In the case of *Sam Nyamweya & 3 Others vs. Kenya Premier League Limited & 2 Others (2015) eKLR*, the court held as follows:

***“It is important that the court satisfies itself beyond any shadow of doubt that the person alleged to be in contempt committed the act complained of with the full knowledge or notice of the existence of the order of the court forbidding it. The threshold is quite high as it involves possible depravity of a person’s liberty.”***

35. According to the process-server, he served the orders of this court of 20<sup>th</sup> February, 2019 and 5<sup>th</sup> March, 2019 on the Secretary of the Respondent’s Legal Officer and that he knew the said Legal Officer and “*his*” Secretary personally. However, the said Legal Officer has not been mentioned as one of the persons who should be cited for contempt.

36. Indeed, the contradictory evidence of the process-server on the gender of the Respondent’s Legal Officer shows that the process-server neither knows the said Legal Officer nor met her as alleged in the Affidavit of Service.

37. The process-server, who did not have a license at the time of the alleged service of the orders of 20<sup>th</sup> February, 2019 and 5<sup>th</sup> March, 2019, did not serve the alleged contemnors with the orders of this court. That being the case, the alleged contemnors cannot be said to have

disobeyed the orders of this court of 20<sup>th</sup> February, 2019 and 5<sup>th</sup> March, 2019.

38. In the circumstances, I dismiss the Application dated 29<sup>th</sup> March, 2019 but with no order as to costs.

**DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 31<sup>ST</sup> DAY OF JANUARY, 2020.**

**O.A. ANGOTE**

**JUDGE**