REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW MISC. APPLICATION NO. 690 OF 1997

LEPAPA OLE KISOTU..APPLICANT

-AND-

NTULELE GROUP RANCH...1ST RESPONDENT

DISTRICT COMMISIONER, NAROK...........................2ND RESPONDENT

-AND-

SANKALE OLE KISOTU

SALAU OLE KILUSU

SALASH OLE MATINDA SILAU

KOIOM OLOLOISONGA KISOTU

KAPALE OLE SIMIREN

OLNGASHAR OLE PUNYUA

KIPAYIAN OLE SHONKO

NTARI OLE SHONKO

KONTEA OLE KILUSU

SITONIK OLE KALIKI

PARSAPIYO OLE KILUSU..................................INTERESTED PARTIES

RULING

The Application

1. Lepapa ole Kisotu, who is the Applicant herein, was issued with an order of certiorari on 2nd July, 1998 by this Court (Mbogholi J.), which order quashed the decision of the District Commissioner, Narok in Land Appeal No. 240/88 which had ordered the Applicant to vacate the land surrounding his homestead, and disentitled him of developments he had made on the said land. Subsequently, the court issued various orders on 12th May 1999, 31st July 2003, 16th November, 2005 and on 24th October, 2016, and the Applicant alleges that the said court orders were blatantly disregarded by the Ntulele Group Ranch and the District Commissioner of Narok who are the 1st and 2nd Respondents herein, and the Interested Parties, who are committee members of Ntulele Group Ranch.

2. The Applicant therefore filed the instant Notice of Motion dated 12th February 2018, in which he is seeking the following orders:

1. That the matter be certified urgent and heard ex-parte in the first instance.

2. THAT the Honorable Court be pleased to issue a notice to show cause of not less than 30 days to the respondent/intended contemnors herein named; DIRECTOR LAND ADJUDICATION AND SETTLEMENT, MINISTRY OF LANDS AND HOUSING, OKENYI S. ODARI, DISTRICT LAND ADJUDICATION AND SETTLEMENT OFFICER(*FORMER*), NAROK NORTH, P.M. MUNYALO, DISTRICT LAND ADJUDICATION AND SETTLEMENT OFFICER, NAROK (*FORMER*), RUTH M. MULI, DISTRICT LAND ADJUDICATION AND SETTLEMENT OFFICER,NAROK NORTH DISTRICT, DISTRICT SURVEYOR, CEC in CHARGE OF LAND HOUSING, PHYSICAL PLANNING AND URBAN DEVELOPMENT NAROK COUNTY, DEMARCATION OFFICER NTULELE ADJ SECTION, NAROK,CHAIRMAN NTULELE GROUP RANCH, THE AREA CHIEF, KEEKONYOKIE LOCATION, Hon. KEN KILOKU MP, NAROK EAST,THE ASSISTANT CHIEF, NAIREGIA ENKARE SUB LOCATION, SALAU OLE KILUSU, SALASH OLE MATINDA SILAU, KOSIOM OLOLOISONGA KISOTU, KAPALE OLE SIMIREN, OLNGASHAR OLE PUNYUA, KIPAYIAN OLE SHONKO, NTARI OLE SHONKO, KONTEA OLE KILUSU, SITONIK OLE KALIK, PARSAPIYO OLE KILUSU, JOHN OLE KOONYO AND MASILA DAVID K. PRIVATE SUEVEYOR to show cause why contempt of proceedings should not be instituted against them for disobedience of the court orders made on the 2nd July 1998, 12th May 1999, 31st July, 2003 and 16th November, 2005, and most recently the orders of the 24th October, 2016 which orders were extended from time to time.

3 That in default the intended contemnors cited in prayer 2 above to show cause within thirty (30) days of receipt of Notice to show cause them then the court should proceed and commence a contempt of court proceeding against DIRECTOR LAND ADJUDICATION AND SETTLEMENT, MINISTRY OF LANDS AND HOUSING, OKENYI S. ODARI, DISTRICT LAND ADJUDICATION AND SETTLEMENT OFFICER(*FORMER*), NAROK NORTH, P.M. MUNYALO, DISTRICT LAND ADJUDICATION AND SETTLEMENT OFFICER, NAROK (*FORMER*), RUTH M. MULI, DISTRICT LAND ADJUDICATION AND SETTLEMENT OFFICER,NAROK NORTH DISTRICT, DISTRICT SURVEYOR, CEC in CHARGE OF LAND HOUSING, PHYSICAL PLANNING AND URBAN DEVELOPMENT NAROK COUNTY, DEMARCATION OFFICER NTULELE ADJ SECTION, NAROK,CHAIRMAN NTULELE GROUP RANCH, THE AREA CHIEF, KEEKONYOKIE LOCATION, Hon. KEN KILOKU MP, NAROK EAST,THE ASSISTANT CHIEF, NAIREGIA ENKARE SUB LOCATION, SALAU OLE KILUSU, SALASH OLE MATINDA SILAU, KOSIOM OLOLOISONGA KISOTU, KAPALE OLE SIMIREN, OLNGASHAR OLE PUNYUA, KIPAYIAN OLE SHONKO, NTARI OLE SHONKO, KONTEA OLE KILUSU, SITONIK OLE KALIK, PARSAPIYO OLE KILUSU, JOHN OLE KOONYO AND MASILA DAVID K. PRIVATE SUEVEYOR

4. THAT arising from order 3 above that the above intended contemnors be found guilty of contempt of court and put to civil jail or ordered to pay fine or both.

5. THAT upon commencement of contempt of court proceedings, a warrant of arrest be issued to the County Commandant Narok to effect the arrest of the contemnors/respondents named above.

6. THAT the Respondents/ intended contemnors be ordered to pay the cost of this Notice to Show Cause.

3. The Application is supported by the grounds on the face of the motion and the Applicant's Supporting Affidavit sworn on 12th February, 2018 and filed in court on 13th February, 2018. The 1st Respondent did not file any response to the application, while the 2nd Respondent opposed the application in a Replying Affidavit sworn on 28th August, 2018 by Patrick M. Munyalo, the Land and Adjudication Officer for Narok North and East Sub –Counties, and for the Ntulele Adjudication Section where Ntulele Group Ranch emanated from.. The application was also opposed by the Interested Parties through an affidavit sworn on their behalf on 4th June 2018 by Salau Ole Kilusu, the 2nd Interested Party. The Applicant also filed two supplementary affidavits sworn on 30th August 2018 and 12th September 2018 in response.

4. This Court directed that the said application be canvassed by way of submissions, and Arusei and Company Advocates for the Applicant filed submissions dated 11th September 2018, while L. Odhiambo, a Litigation Counsel at the Attorney General's Chambers, filed submissions dated 11th November 2018 for the 2nd Respondent. Tobiko, Njoroge & Company Advocates for the Interested Parties filed submissions dated 25th September 2018. The respective cases by the said parties as stated in the said pleadings and submissions are as follows.

<u>The Applicant's Case.</u>

5. The Applicant's case is that on the 2nd July 1998, Mbogoli J. issued an order of certiorari in his favour quashing the decision of District Commissioner, Narok on the Applicant's land, and in effect confirmed that the Applicant was entitled to the land in question. That on 12th May 1999, the Court ordered the members of Ntulele Group Ranch who were still interfering with the Applicant's land by being on it as trespassers thereon and that they be evicted.

6. Further, that on 29th May 2003, the Applicant took a notice to show cause for the Director Land Adjudication and Settlement Officer, Narok District to attend court and produce the map relating to the plot no 1 and upon hearing the application, the court directed that the land adjudication officer do adjudicate the applicants land with the help of the District Surveyor and the Chairman Ntulele Group Ranch. In addition, that orders were given by the court on 22nd March 2009 dismissing the Interested Parties' application for leave to amend the judicial review application, and on 3rd December 2009 dismissing the Interested Parties' application for review and/or settling aside of the order made of the 2nd July 1998 and subsequent orders.

7. Lastly, that an order was made on 24th October, 2016 declaring that the *status quo* in respect to the suit parcel of land maintained. Therefore, that the matter of the land dispute between the Applicant and Ntulele Group Ranch and others has finalized in favour of the Applicant. The Applicant annexed copies of the said court orders.

8. The Applicant stated that the said court orders were duly served upon. upon the District Land Adjudication and Settlement Officer, Narok, the Director of Land Adjudication and Settlement, and the Ntulele Group Ranch, and that the same have not been implemented despite seeking assistance from several Government offices. Further, that the orders indorsed with a penal notice and a letter showing service upon the Respondents was annexed.

9. The Applicant further alleged that the said Government officers and the interested parties have given all manner of excuses for not implementing court orders including insecurity and the lack of the map for the area, all the while the interested parties have continued to occupy, settle and sub-divide the suit land among themselves with no regard to the court case or the court orders in place. The Applicant annexed copies of letters by the District Land Adjudication and Settlement officer Narok in support these averments.

10. Additionally, that there has been correspondence by the District Land Adjudication and Settlement Officer, Narok directed to the Director of Land Adjudication and Settlement and to the Applicant's counsel, and the said District Land Adjudication and Settlement has been directed by the Director of Land Adjudication and Settlement Officer on several occasions to implement the order. The Applicant annexed copies and gave details of the said letters as follows:-

a) A letter of 13th August 2002 in which the District Land Adjudication and Settlement Officer, Narok was advised by the Director of Land Adjudication and Settlement to obey the court order in force, and use all means available to ensure the Applicant is secured in his land and boundaries remain unaltered.

b) A letter dated 12th February 2010 in which the said officer was directed by the Director of Land Adjudication and Settlement to liase with all the relevant parties and implement the order on the ground relating to Plot No. 1 Ntulele Group Ranch.

c) A letter of 29th April 2005 in which the said officer was ordered by the Director of Land Adjudication and Settlement Officer to implement the order so that "the old man rests."

11. Therefore, that the said officials, by their agents and the other parties name herein including the local chiefs are intended on disrupting the *status quo* in place so as to make it difficult to administer justice and above all to deny the applicant the fruits of his judgement.

12. The Applicant in his supplementary affidavits further stated that the Respondents and Interested Parties had not shown any cause as per the notice and that he complied with section 30 of the Contempt of Court Act. He further stated that his claim was in respect of Plot No. 1 Ntulele Group Ranch whose acreage is 612 acres now known as Oltepesi section, and that the mere fact that he resides at the Oltepesi section does not mean that he doesn't have a claim against Ntulele Group Ranch.

13. On the notice of 28th November 1992 creating seven adjudication sections, the Applicant contended that the same has no validity and is a nullity in law. He also stated that the orders in Misc. Application No. 871 of 2005 merely stopped the splitting of Ntulele Group Ranch into seven adjudication sections, and did not take away his claim to the land which had been validated by a court of law, neither it bar the Respondents from implementing the orders in the present suit. In addition, that a Land Adjudication Officer has no power to effect a cancellation of a land adjudication section under the Land Adjudication Act, and therefore the cancellation of the Ntulele Adjudication section is null and void. In any event, that the Interested Parties came to court, filed applications, lost and never appealed or applied for review, and cannot be allowed to have *"a second bite at the cherry"*.

14. Mr. Arusei, the counsel for the Applicant, submitted that the judicial review application herein arose as a result of the acts of the Land Adjudication Officer vide Ref. No. LA/4/169 dated 28th November, 1992, when he cancelled the original declaration notice of Ntulele Group Ranch dated 1st September, 1970 by a declaration dated 28th November, 1992, purporting to create seven new adjudication sections out of the original Ntulele Adjudication Section and which gave rise to inter-clan disputes. The Applicant thereupon filed this suit challenging the decision of the District Commissioner, whereby the Applicant had been ordered to vacate the land surrounding his homestead and disentitled of developments already carried out by him and the suit succeeded in his favour.

15. However, that it has been impossible to implement the said order and other subsequent orders thereto as the Applicant's land which originally fell under the Ntulele Group Ranch before the splitting into the seven adjudication sections, now falls under Oltepesi Adjudication Committee consisting of the interested Parties herein. It is however his submission that the clan disputes have no bearing on the Applicant's claim neither is it directed to a clan based committee.

16. Counsel relied on the case of **Kenya Tea Growers Association vs Francis Atwoli & 5 Others, (2012) eKLR** to buttress the argument that willful disobedience of court orders is punishable as a contempt of court. He further submitted that a Notice to Show Cause was served on all the intended contemnors on 26th February, 2018 to show cause why contempt of court proceedings should not be initiated/commenced against them in compliance with Section 30 of the Contempt of Court Act. However, the Respondents and the Interested Parties in their Replying Affidavits have not shown any cause why contempt proceedings should not be commenced against them.

17. The Applicant argued that the law on contempt was well settled in the case of **Republic vs Chesang Resident Magistrate & Another Ex-Parte Paul Karanja Kamunge T/a Daviso Agencies & 2 Others, (2016) eKLR**. It was his further submission that court orders are not made in vain and are meant to be complied with, and if for any reason a party has a difficulty in complying with the same, then they ought to come back to court and explain the difficulty in complying with the same. In any event, once a court order is made, the same is valid unless set aside on review or appeal.

18. Similarly, that in the case of **Econet Wireless Kenya Limited –vs- Minister for Information & Communication of Kenya & Another, (2005) 1 KLR 828**, Ibrahim J (as he then was) held that *"…the court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors…''* and that the same position was taken by the Court of Appeal in **Refrigerator & Kitchen Utensils Ltd vs Gulabchand Popatlal Shah & Others, Civil Application No. 39 of 1990** and **Wildlife**

Lodges Limited vs County Council Of Narok & Another, (2005) 2 EA 344 HCK .

19. Counsel also relied on the Court of Appeal decision in **Central Bank of Kenya & Another vs Ratilal Automobiles Limited & Others, Civil Application No. 247 of 2006** which held that judicial power in Kenya vests in the courts and other tribunals established under the constitution and that it is a fundamental tenet of the rule of law that court orders must be obeyed. The cases of **Awadh vs Marumbu (No 2), (2004) KLR 458**, **Teachers' Service Commission vs Kenyan National Union of Teachers & 2 Others, Petition No. 23 of 2013, B vs Attorney General, (2004) 1KLR 431** and **Moses P. N Njoroge & Others vs Reverend Musa Njuguna & Another, Nakuru HCCC No. 247 "A" of 2004** were also relied on by the Applicant for this position.

20. Further, counsel argued that contempt of court is an affront to judicial authority, and therefore is not a remedy chosen by a party but is invoked to uphold the dignity of the courts. Therefore, that the mere fact that a party offended by a disobedience of a court order has floated his idea on what should be done to the contemnor, does not tie the court's hand as to that mode of punishment although the court may well take into account the suggested modes of punishment in appropriate cases. He further argued that it is trite law that where it has be brought to the court's attention that its orders are being abrogated by brazen or subtle schemes in the name of technical procedures, the court should not turn a blind eye to the same, as was held in the case of **Gatharia K. Mutitika & 2 Others –vs- Baharini Farm Ltd ,(1985) KLR 227.**

21. The Applicant relied on Section 3 of the Contempt of Court Act to reiterate the objectives of the Act, and submitted that they complied with the procedure laid down in section 30 of the Act which requires that before any civil contempt proceedings are instituted, the applicant must first move the court to issue a notice to show cause against the accounting officer of the state organ, government department, ministry or corporation concerned, and that such a notice was served upon both the Attorney General and the accounting officer pursuant to the order issued by Odunga J on 26th February, 2018.

22. Further, that in order to succeed in civil contempt proceedings, three elements must be proved: (a) Applicant must demonstrate terms of orders; (b) Applicant must demonstrate knowledge of terms by Respondent; and (c) Applicant must demonstrate failure of the Respondent to comply with court order. This decision by Mativo J. in the case of **North Tetu Farmres Co. Limited vs John Nderitu Wanjohi (2016) eKLR** and of the South African High Court in **Kristen Carla Burchel –vs- Barry Grant Burchell** were cited by the Applicant in this regard.

23. Counsel further relied on the case of **Johnson vs Grant (1923) SC 789 at 790** where Clyde L J noted that 'contempt of court' is an offence consisting of interfering with the administration of the law. Similarly, in the case of **Teachers Service Commission vs Kenya National Union of Teachers & 2 Others, (2013) eKLR** it was held that the reason court will punish for contempt of court is to safeguard the rule of law which is fundamental in the administration of justice. In addition, that a similar position was taken by Mwita J in **Silverse Lisamula Anami vs Justus Kizito Mugali & 2 Others, (2017) eKLR**. Accordingly, they argued that a party must comply with an order despite what they think of such order.

24. Lastly, the counsel argued that the instant application was not time barred, as the Applicant has persistently followed up on implementation of the Court orders , which have therefore not been lying idle as was held by Aburili J in the case of **Associated Automobile Distributors (K) Limited vs Town Clerk Municipal Council of Mombasa (2017) eKLR.** In the same breath, the Applicant relied on the cases of **Republic vs Kenya School of Law & Another, Misc. Application No. 58 of 2014** and **B vs-Attorney General, (supra)** to argue that court orders must be appreciated and ought not to be evaded through ingenuity and innovations, neither do the courts make orders in vain. Further, the Applicant argued that the court has the responsibility to uphold the rule of law as was held in **Republic vs Returning Officer of Kamukunji Constituency & the Electoral Commission of Kenya, HCMCA No. 13 of 2008** and failure to do so would be abetting an injustice.

The 2nd Respondent's Case

25. The 2nd Respondent contended that application was barred in law and ought to be dismissed, since the Applicant had not complied with section of 30 of the Contempt of Court Act which required him to serve the notice of intention to institute contempt proceedings on the 2nd and 3rd Respondents who are government officials. The Respondent explained that Ntulele Adjudication Section was established on 1st September, 1970 in accordance with Land Adjudication Act of 1968. Further, that during the demarcation only three parcels of land were issued, and that Parcel No. 1 which was recorded in the name of the Ntulele Group Ranch, the 1st Respondent herein, and which is the subject matter of this suit, was owned by 2222 members recorded as at the time of publishing the complete register on 1st December, 1982.

26. The 2nd Respondent further averred that a total of 120 objections were raised during the inspection of the register among them being objection no. 31 by the Applicant, demanding that his parcel of land be demarcated and surveyed separately, but the same was dismissed since the Ntulele Group Ranch had not been subdivided. That the Applicant appealed the decision of the Land Adjudication Officer to the Minister of Lands being Appeal No. 240 of 88 which appeal was dismissed leading to the filing of this suit. In addition, that while the Applicant succeeded in his application before this court , the court failed to specify the extent in form of acreage or description of physical features marking the extent of the Applicant's land.

27. That subsequently and in the circumstances, the court ordered the Land Adjudication Officer to adjudicate on the Applicant's land with the aid of the District Surveyor and the Chairman of Ntulele Group Ranch. However, that it has been impossible to enforce the order for various reasons including insecurity. The 2nd Respondent annexed correspondence written by the deponent n his attempts to enforce the court orders and the challenges he met in terms of hostility from the ranch members.

28. The 2nd Respondent contended that as a result of the hostility between the clans in Ntulele Adjudication Section, the sections were split into seven adjudication sections with each section having a boundary description. Consequently, the Applicant's land being unmarked, unnumbered or described made it impossible to comply with the court order. Further, before the sections were demarcated so that each member could have an individual parcel number, some members went to court challenging the splitting of the section to seven triggering a flurry of court cases the latest being **Misc. Application No. 871 of 2005** which is yet to be determined, and touches on the entire Ntulele

Group Ranch P/No. 1 where the Ildamat clan claims 56,000 acres of land. Therefore that to proceed with implementation of the previous orders of this suit would amount to acting *sub judice*.

29. The 2nd Respondent denied that it or its officers had committed any acts of omission or commission that are in any way in contempt of in breach of the Court orders. They also urged the court to issue directions on the actual acreage of the Applicant's land, to consider the consequences of the orders in Application No. 871 of 2005 if granted and to issue a direction on the rest of the occupants and members of Ntulele Group Ranch who are the Interested Parties herein before granting the Applicant's orders.

30. Mr. Odhiambo who appeared for the 2nd Respondent submitted that the Applicant did not serve all the government officials cited for contempt in this application with a notice as required by Section 30(2) of the Contempt of Court Act, which required this Honourable Court to serve all the government officials or the Attorney General with a notice of intention to institute contempt of court proceedings and not the Applicant herein. Further, they argued that the application was wrongfully before court as no malice and willful disobedience has been demonstrated by the Applicant, neither has the Applicant satisfied the provisions of Section 30(5) of the Act in that the alleged contempt has not been as a result of negligence and with consent.

31. He further submitted that the 2nd Respondent faced various challenges in the attempt to implement the order and relied on the case of **<u>Ram Kishan –vs- Sir Tarun Bajah & Others</u>- Contempt Petition No. 336 of 2013** in the Supreme Court of India which has been cited for the proposition that in order to punish a contemnor, it has to be established that disobedience of the order is willful to support their argument that the disobedience was not willful. They also argued that the contempt application was time barred pursuant to Section 35 of the Limitation of Actions Act which requires that contempt proceedings be brought within six months yet it was over 12 years since the alleged contempt occurred.

32. Counsel also argued that the order the Applicant seeks to implement is not enforceable as Ntulele Group Ranch was never incorporated as a recognized group ranch, and is therefore non-existent in law. Further, by a notice of declaration issued on 26th November, 1992, the District Land Adjudication Officers, Narok cancelled the original declaration notice of Ntulele Adjudication Section and created seven new adjudication sections out of the original Ntulele Adjudication section. As such, there are no maps indicative of the Applicant's parcel of land as well as for the current adjudication section.

33. Lastly, they argued that the orders obtained by the Applicant were obtained *ex-parte* and the parties accused of contempt together with the Interested Parties were not heard during the hearing and obtaining of the said orders. Further, the orders were not obtained in good faith and fairly, as the Applicant's intention was to displace other members of the ranch and his clan members. Similarly, in the order served on the Respondents, the court did not ascertain and/or have any documentation to base its allocation of land to the Applicant. The same was ambiguous and cannot be ascertained without the adjudication of the whole Ntulele Group Ranch which was stopped vide another court order. In conclusion, they urged court to dismiss the application on the ground that justice will not be served by holding government officials in contempt and the issues raised herein cannot be resolved through a contempt of court application but to grant each member of Ntulele Group Ranch his own parcel of land.

<u>The Interested Parties' Case</u>

34. The Interested Parties contended that they sought to set aside the orders of Mbogholi J issued on 2nd July, 1998 and 12th May, 1999 by an application of 1st December, 2003, but that their application was dismissed by Wendo J on 3rd December, 2009, and as such they no longer had a standing in the matter. Further, they stated that they had no role in the implementation of the court orders as the Applicant resides and continues to reside on his parcel of land without the interference of the Interested Parties.

35. Further, it is their contention that implementation of the said court orders has been fraught with challenges beyond the Interested Parties' control such as the cancellation of the original Declaration of Ntulele Adjudication Section (formerly known as Ntulele Group Ranch) and creating seven new adjudication sections, the effect being the Applicant and quite a number of the members of the old Ntulele Adjudication section to fall within Oltepesi Adjudication Section.

36. However, that due to inter-clan court cases, there has never been a register prepared for Oltepesi Adjudication section nor a committee constituted for the same. In any event, the Applicant does not reside in the now Ntulele Adjudication Section occupied by the ildamat clan yet the Applicant is from the Keekonyokie clan. Indeed they contended that as members of Keekonyokie clan, they hold the position that the creation of the seven adjudication sections was unlawful. In conclusion, they stated that the Applicant has not proved which persons, if any are in actual occupation of his land and as such urged court to dismiss the application.

37. Mr. Sankole who appeared for the Interested Parties submitted that on 2nd July 1998, Mbogoli J. issued an order of certiorari in favour of the Applicant herein quashing the decision of the District Commissioner, Narok and further ordered that the status quo be maintained. However, the ruling alluded to non-interference with the Applicant's land but failed to specify the extent in form of acreage or description of physical features marking the extent of the Applicant's land. Further, at the time of the ruling, the Applicant's, Interested Parties' and other members of the now defunct Ntulele Group Ranch's parcels of land had not been demarcated, surveyed and recorded in their respective names which has still not been done to date.

38. Subsequently, on 31st July, 2003, an order was made that the Land Adjudication Officer do adjudicate on the Applicant's land with the aid of the District Surveyor and the Chairman of the Ntulele Group Ranch so as to ascertain the acreage of the Applicant. Further, the orders of 16th November, 2005 ordered that the land in dispute be surveyed and demarcated according to the survey which has not been done to date.

39. In the circumstances, counsel submitted that the title document issued by the Registrar of Lands is the only conclusive evidence that the person named therein as proprietor of land is the absolute and indefeasible owner thereof, and relied on the cases of **<u>Wreck Motor</u>**

Enterprises –vs- Commissioner of Lands & 3 Others, (1997) eKLR and **Gitwany Investment Limited –vs- Tajmall Limited & 3 Others, (2006) eKLR** . Accordingly, the Applicant cannot claim a parcel of land that is not recognized by law as being his.

40. He further submitted that they had no role to play in the implementation of the said order and/or that some of the orders were outright impossible for the reasons stated above. In any event, the orders of adjudication, demarcation and survey were supposed to be implemented by public bodies, and judicial review orders are invariably directed to public bodies and authorities. In this regard, they relied on the cases of **Humphrey Makhoha Nyongesa & Anor vs Communication Authority of Kenya & 2 Others ,(2018) eKLR** and **In Re Matter of an Application by Peter Anyang' Nyong'o, Misc. Civil Application No. 1078** to buttress that argument.

41. Counsel further submitted that they were not parties to the judicial review application and as such could not be held liable as no orders had been issued against them, and relied on the case of **Republic –vs- Governor Central Bank of Kenya & 2 Others, Ex-Parte Ratilal Automobiles Ltd & 3 Others, (2006) eKLR**, the case of **Sakina Sote Kaittany & Anor vs Mary Wamaitha, (1995) eKLR,** and the case of **Earnest Orwa Mwai vs Abdul S. Hashid & Another, (1995) eKLR** in support of that argument. They further submitted that in any event, the implementation of the said orders is fraught with challenges beyond the control of the Interested Parties as stated hereinabove.

42. Further, he submitted that the standard of proof in contempt proceedings must be higher than proof on a balance of probabilities and should be consistent with the gravity of the alleged contempt as was held in **Mutitika vs Baharini Farm Ltd, (1985) eKLR** and in the case of **Kimanja Kamau (suing as the personal representative of the estate of Gideon Gitundu deceased) vs Francis Mwangi Mwaura, (2017) eKLR**. The Applicant having failed to prove which persons, if any, are in actual occupation of his land, it is wrong to accuse or punish the Interested Parties herein for failing to comply with orders not capable of being enforced, and relied on the case of **Nyamodi Ochieng Nyamogo & Anor vs Kenya Posts & Telecommunications Corporation, (1994) eKLR**. In conclusion, they submitted that the Applicant had not proved his case beyond the balance of probabilities and urged the court to dismiss the application against them.

The Determination

43. I have considered the submissions made by the Applicant, 2nd Respondent and Interested Parties, and note that at the time of the filing of the Applicant's application, the applicable law on the procedure in contempt of Court proceedings against a government officer such as the 2nd Respondent and some of the alleged contemnors who are government officials was provided in section 30 of the Contempt of Court Act of 2015, which states as follows:

> **"(1) Where a State organ, government department, ministry or corporation is guilty of contempt of court in respect of any undertaking given to a court by the State organ, government department, ministry or corporation, the court shall serve a notice of not less than thirty days on the accounting officer, requiring the accounting officer to show cause why contempt of court proceedings should not be commenced against the accounting officer.**
>
> **(2) No contempt of court proceedings shall be commenced against the accounting officer of a State organ, government department, ministry or corporation, unless the court has issued a notice of not less than thirty days to the accounting officer to show cause why contempt of court proceedings should not be commenced against the accounting officer.**
>
> **(3) A notice issued under subsection (1) shall be served on the accounting officer and the Attorney-General.**
>
> **(4) If the accounting officer does not respond to the notice to show cause issued under subsection (1) within thirty days of the receipt of the notice, the court shall proceed and commence contempt of court proceedings against the accounting officer.**
>
> **(5) Where the contempt of court is committed by a State organ, government department, ministry or corporation, and it is proved to the satisfaction of the court that the contempt has been committed with the consent or connivance of, or is attributable to any neglect on the part of any accounting officer, such accounting officer shall be deemed to be guilty of the contempt and may with the leave of the court be liable to a fine not exceeding two hundred thousand shillings.**
>
> **(6) No State officer or public officer shall be convicted of contempt of court for the execution of his duties in good faith."**

44. However, on 9th November 2018, the High Court (J. Chacha Mwita) in a judgment delivered in **Kenya Human Rights Commission v Attorney General & Another, [2018] eKLR** declared sections 30 and 35 of the Contempt of Court Act to be inconsistent with the Constitution and null and void, and also declared the entire Contempt of Court Act No 46 of 2016 invalid for lack of public participation as required by Articles 10 and 118(b) of the Constitution, and for encroaching on the independence of the Judiciary.

45. I am therefore obliged to revert to the provisions of the law that operated before the enactment of the Contempt of Court of Act, to avoid a lacuna in the enforcement of Court's orders**.** It was in this respect observed in **Republic vs. Returning Officer of Kamkunji Constituency & The Electoral Commission of Kenya, HCMCA No. 13 of 2008,** that the High Court has the responsibility for the maintenance of the rule of law, hence there cannot be a gap in the application of the rule of law.

46. In addition, where there is a lacuna with respect to enforcement of remedies provided under the Constitution or an Act of Parliament, or if, through the procedure provided under an Act of Parliament, an aggrieved party is left with no alternative but to invoke the jurisdiction of the Court, the Court is perfectly within its rights to adopt such a procedure as would effectually give meaningful relief to the party aggrieved, in exercise of the inherent jurisdiction granted to the Court by section 3A of the Civil Procedure Act to grant such orders that meet the ends of justice and avoid abuse of the process of Court.

47. The procedure existing before the enactment of the *Contempt of Court Act* was restated by the Court of Appeal in **Christine Wangari Gachege vs. Elizabeth Wanjiru Evans & 11 Others, [2014] eKLR**. In that case the Court found that under Rule 81.4 of the English *Civil*

Procedure Rules, which deals with breach of judgment, order or undertaking. The English law on committal for contempt of court was applied by virtue of section 5(1) of the Judicature Act which provided that:

> **"The High Court and the Court of Appeal shall have the same power to punish for contempt of court as is for the time being possessed by the High Court of Justice in England, and that power shall extend to upholding the authority and dignity of subordinate courts."**

48. This section was however repealed by section 38 of the Contempt of Act, and while the said Act is now no longer operative, the substance of the common law is still applicable under section 3 of the Judicature Act. This Court is in this regard guided by the applicable English Law which is Part 81 of the English Civil Procedure Rules of 1998 as variously amended, and the requirement for personal service of court orders in contempt of Court proceedings is found in Rule 81.8 of the English Civil Procedure Rules.

49. The said rule provides that unless the court dispenses with service, a judgment or order may not be enforced by way of an order for committal unless a copy of it has been served on the person required to do or not do the act in question. Rule 81.6 of the English Civil Procedure Rules specifically provides that the method of service shall be personal service, which is effected by leaving the order with the person to be served.

50. This Court notes that Kenyan courts have also held that personal service of orders and a penal notice is a requirement in contempt of court proceedings, and reference is made to the Court of Appeal decisions in **Nyamogo & Another v Kenya Posts and Telecommunications Corporation, (1994) KLR 1,** and **Ochino & Another v Okombo & 4 others (1989) KLR 165** in this respect.

51. It is also the position and it has been held in several judicial decisions that if personal awareness of the court orders by the alleged contemnors is demonstrated, they will be found culpable of contempt even though they had not been personally served with the orders and penal notice. See in this regard the decisions in **Kenya Tea Growers Association vs Francis Atwoli & Others , Nairobi High Court Constitutional Petition No 64 of 2010, Husson v Husson, (1962) 3 All E.R. 1056, Ronson Products Ltd v Ronson Furniture Ltd (1966) RPC 497,** and **Davy International Ltd vs Tazzyman (1997) 1 WLR 1256** .

52. As regards culpability, no person will be held guilty of contempt for breaking an order unless the terms of the order are themselves clear and unambiguous as held in **Iberian Trust Ltd vs Founders Trust and Investment Co. Ltd (1932) 2 KB 913**. Furthermore, if the court is to punish anyone for not carrying out its order the order must in unambiguous terms direct what is to be done. It was held in **Radkin-Jones vs Trustee of the Property of the Bankrupt, (1965) 109 Sol. Jo. 334** that an order should be clear it its terms, and should not require the person to whom it is addressed to cross-refer to other material in order to ascertain its precise obligation.

53. In addition, the act or omission constituting disobedience of an order may be intentional, reckless, careless or quite accidental and totally unavoidable. An intentional act may be done with or without an intention to disobey the order, and with or without an intention to defy the court.

54. The element of contumacy, which requires flagrant defiance of, the authority of the court, is no longer necessary to establish breach of a court order. It is now established that the mental element for liability for contempt arising out of disobedience is simply that the disobeying party either intended to disobey, or made no reasonable attempt to comply with the order. See in this respect the English House of Lords decision in **Heatons Transport (St Helens) Ltd v Transport and General Workers Union (1973) AC 15.**

55. Lastly on the applicable principles, it was held in **Mwangi H.C. Wangondu vs Nairobi City Commission, Nairobi Civil Appeal No. 95 of 1998** that the threshold of proof required in contempt of Court is higher than that in normal civil cases, and one can only be committed to civil jail or otherwise penalized on the basis of evidence that leaves no doubt as to the contemnor's culpability.

56. Applying these principles to the present application, the proceedings in this matter show that it has had a chequered history. It is notable that in addition to the proceedings summarized by the Applicant, 2nd Respondent, and Interested Parties leading to the various court orders granted herein, the Applicant also sought to enforce the court orders of 2nd July, 1998 and the subsequent orders of 31st July, 2003 by filing various applications before this court on 26th April, 2012 and on 16th December, 2015, upon which this Court (Odunga J.) on 18th May 2016 directed the parties to approach the Commission on Administrative Justice and the Ombudsperson to see whether the office can undertake the arbitration.

57. Pursuant to those directions, the Commission on Administrative Justice filed a report in court on 1st March, 2017 recommending that:-

> **a) The officials of the group ranch or committee (whichever applicable) together with all the members in the presence of the of the County Land Adjudication Officers and County Land Surveyors do determine acreage due to each and every member taking into cognizance the present actual possession of each member, the developments made by each member and the allocation done hitherto.**
>
> **b) Maps be prepared of the entire area that would be used for eventual subdivision.**
>
> **c) The interests in above exercise be recorded and form the basis upon which absolute ownership is to be ascertained.**
>
> **d) Any person who will be aggrieved with any decision, be at liberty to appeal following procedures laid out in the relevant laws.**
>
> **e) Any previous purported adjudication or subdivision be set aside and the relevant government agencies be ordered to effect the same.**

f) Upon conclusion of the said exercise each member be given individual titles to their portion.

g) The above exercise be conducted in the presence of the relevant government departments and a report of the same filed in court. In the meantime, all suits concerning the said matters be consolidated and stayed.

58. However, these recommendations did no augur well with the Applicant, who claimed that the recommendations on a glance required the good will and co-operation even by parties not before this court and in a sense was to open a "Pandora's box' to all manner of claims real or imagined dating back to 1970. The court therefore rendered itself in a ruling delivered by Odunga J on 9th November, 2017 directing parties to move court for orders that they may deem fit, the matter having not succeeded in arbitration giving rise to the present application. The Applicant then filed the instant application.

59. It is also evident from the annexures by the 2nd Respondent, that P.M Munyalo, the Land Adjudicator Officer for Narok and one of the alleged contemnors, was aware of the Court of orders and made several attempts at enforcement of the same. As regards the awareness of this Court's orders by the other alleged contemnors, the Applicant relied on an undated letter annexed as Annexture "LOK 6" to its supporting affidavit that is addressed to various persons annexing the orders granted by this Court and penal notices. The only visible stamps acknowledging receipt is that of the District Surveyor of Narok, which showed receipt on 17th February 2015, and of the Regional Coordinator in Nakuru who is shown to have received it on 18th February 2015. There are a number of stamps on the face of the copy of the letter that are not clear. No affidavit of service was however annexed by the Applicant of service of the letter or orders on any of the other alleged contemnors

60. In addition, from the pleadings filed by the 2nd Respondent and annextures thereto, it has been brought to light that there are other suits that have been filed and orders given therein, that affect the Applicant's land that was the subject matter of this Court's orders, and which the Respondents have alleged have made it impossible to enforce the orders granted herein. Furthermore, arising from the uncertainty as regards the acreage and extent of the Applicant's land which was the subject matter of the Court's orders, it became necessary for further orders to be given to address this ambiguity. The Respondent in this respect brought evidence of correspondence on attempts made to enforce the said orders, and the hostility they encountered from the Ntulele Ranch Group members. Another difficulty in enforcement raised by the 2 nd Respondent and Interested Parties was that of the legal status of the 1st Respondent, which it was alleged has not been legally established arising from the disputes among the members. This allegation was not addressed by the Applicant, nor did it provide any evidence of the existence of the 1st Respondent.

61. Lastly, other than the admission by the Land Adjudication Officer for Narok that they have not been able to enforce the Court orders due to the difficulties noted in the foregoing, the Applicant did not provide any evidence of what was required of the other alleged contemnors by the Court orders, and how the said contemnors had disobeyed the orders of the Court in this respect.

62. I accordingly find even though some of the alleged contemnors may have been aware of the orders issued by this Court on 2nd July 1998 and thereafter, they have demonstrated that they have taken steps to satisfy the said orders, and they are thus not is culpable of disobeying the same and for contempt of court. It is notable in this respect that the orders granted on 31st July 2003 was pursuant to an agreement entered by the Land Adjudication Officer for Narok to in an effort to comply with the said orders.

63. In this regard, the initial substantive orders granted by Mbogholi J. on 2nd July 1998 quashed the decision of the Narok District Commissioner made on 12th March, 1997 in Land Appeal No. 240/88 ordering the Applicant to vacate the land surrounding his homestead and disentitled of developments and improvements carried out by him. The court further directed that *status quo* be maintained including non-interference with the Applicant's land. The orders of 12th May, 1999 declared the members of the 1st Respondents as trespassers and ordered for their eviction.

64. The difficulties in enforcement of the said orders became apparent on 18th April, 2000, when the Applicant through his advocates filed another application against the Respondents for interference with the Applicant's quiet possession, however; the said orders could not be executed due to the lack of a map showing the boundaries since the group ranch had not been demarcated as evidenced in the letter dated 19th April, 2002 from Sanjomu Auctioneers. On 31st July, 2003, the court ordered that the Land Adjudication Officer do adjudicate on the Applicant's land with the aid of the District Surveyor and the Chairman of the Ntulele Group Ranch. The court further ordered on 17th September, 2003 that the Land Adjudication Officer to liaise with the Local Administration and the Committee members of Ntulele Group Ranch to comply with the court orders of 31st July, 2003.

65. Multiple suits and conflicting orders on the same land that was the subject of this Court's orders have compounded the uncertainty as regards the status of this Court's orders, and the Applicant did not dispute the existence of these other suits.

66. Lastly, the Applicant did not prove to the required standard that a substantive majority of the alleged contemnors were served with the said orders, and even if they may have been aware of the same, the Applicant did not bring evidence of their culpability in breaching the said orders.

67. In conclusion, I note that it is becoming evident that the enforcement of the initial orders granted herein by Mbogholi J. can only be possible upon resolution of the emergent disputed facts and conflicting court orders, and the Applicant will need to seek additional remedies in this respect in the appropriate fora, as it is not the remit of this Court as a judicial review Court to resolve disputed facts. The alternative fora may at this stage not only be necessary, but also the more realistic and effective mechanism available for the Applicant to realize and enjoy the fruits of this Court's orders.

68. In the premises the prayers in the Applicant's Notice of Motion dated 12th February 2018 are denied and the said Notice of Motion is dismissed. There shall be no order as to costs, as the circumstances giving rise to these orders are not of the Applicant's own making.

69. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 13TH DAY OF MARCH 2019

P. NYAMWEYA

JUDGE