



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

JUDICIAL REVIEW APPLICATION NO. 4 OF 2018

(FORMERLY NAIROBI MISC. APPLICATION NO. 187 OF 2017)

IN THE MATTER OF: AN APPLICATION BY STEPHEN NJUGUNA MWANGI, JOHN GITATA MWANGI AND CHRISTOPHER MWAURA FOR LEAVE TO APPLY FOR JUDICIAL REVIEW PROCEEDINGS FOR ORDERS OF CERTIORARI AND PROHIBITION

AND

IN THE MATTER OF: THE LAW REFORM ACT CAP 26 LAWS OF KENYA

AND

IN THE MATTER OF: THE CIVIL PROCEDURE RULES, 2010

AND

IN THE MATTER OF: THE INTERLOCUTORY ORDERS DATED 23RD MARCH 2017, UNDER ARTICLE 62(1)(h) OF THE CONSTITUTION OF KENYA, 2010, SECTIONS 6&14(3)F THE NATIONAL LAND COMMISSION ACT NO. 6 OF 2012, LAWS OF KENYA AND OTHER ENABLING PROVISIONS OF THE LAW

AND

IN THE MATTER OF: THE FAIR ADMINISTRATIVE ACTION NO. 4 OF 2015

AND

IN THE MATTER OF: ARTICLES 40,47,62,64 AND 67 OF THE CONSTITUTION OF KENYA 2010

REPUBLIC.....APPLICANT

AND

STEPHEN NJUGUNA MWANGI.....1ST EX PARTE APPLICANT

JOHN GITATA MWANGI2ND EX PARTE APPLICANT

CHRISTOPHER MWAURA MWANGI.....3RD EX PARTE APPLICANT

VERSUS

NATIONAL LAND COMMISSION.....RESPONDENT

AND

KIU KENDA RESIDENTS WELFARE ASSOCIATION.....INTERESTED PARTY

RULING

The matter for determination is the **Notice of Motion** Application dated **18th March 2019**, by the Ex parte Applicants seeking for orders that:-

1. That this Honourable Court do issue a conservatory order suspending the implementation, enforcement and/ or executing of the special issue of the Kenya Gazette Notice No. 11714 dated 9th November, 2018 with regard to the Applicants property known as and Reference Number 6909/8 (originally No. 6909/7/2), pending the inter-parties hearing of this Application.
2. That this Honourable court do issue a Conservatory Order suspending the implementation, enforcement and execution of the Special Issue of the Kenya Gazette Notice Number 11714 dated the 9th November 2018 with regard to the applicants' property known as land reference number 6909/8 (originally No. 6909/7/2), pending the inter-parties hearing and determination of this application.
3. That this Honourable Court do issue a declaration that the Special Issue of Kenya Gazette Notice number 11714 dated 9th November, 2018 with regard to the Applicants' property known Land Reference Number 6909/8 (Originally No. 6909/7/2) is unlawful, illegal, null and void.
3. That this Honourable Court do find and issue an order that the Respondent is in contempt of the Court order that was issued by Honourable Lady Justice R.E Aburili in this matter on 19th April 2017.
4. The costs of this Application be in the cause.

The Application is premised on the grounds that on **19th April 2017**, the Court granted leave to commence Judicial Review proceedings, and ordered that the grant of the leave operate as stay of implementation, enforcement and/or execution of any proceedings or orders that were found on the purported Public Notice pending the hearing of the Notice of Motion Application which is pending before the court. That the Respondent was duly served with the order and filed a Replying Affidavit. However during the pendency of the suit, the Respondent through a special issue of the Kenya Gazette dated **9th November 2018**, purported to issue a determination of review of grants in respect of the subject property with utter disregard of the subsisting court orders. That the purported determination that the Chief Land Registrar shall revoke the Applicants title to the subject property being the suit property.

In his supporting Affidavit, the 1st Applicant, **Stephen Njuguna Mwangi** reiterated the contents of the grounds on the face of the Application and further averred that the review is blatant violation of a court order which the Respondent is aware of and participating in and therefore the Applicants stand to lose their property and that the Courts orders are not issued in vain.

The Application is opposed and the Respondent filed a Replying Affidavit through its Acting Director of Legal Affairs, **Brian Ikol**, and averred that the Respondents publication appearing vide notice No. **11714 of 9th November 2018**, purporting to revoke the Ex parte's Applicants title is publication in error as it did not conclude its review proceedings following issuance of the orders of stay and that no determination has been made into the legality of the suit land nor has it held any further proceedings into the matter following the orders of stay issued.

It was his contention that the Respondent undertook to publish a corrigendum striking out the gazette notice Number **11714 of 9th November 2018**. He further averred that the publication could not be done immediately as the commission was not properly constituted. It was his contention that contempt proceedings are actions in personam and they are criminal in nature and can only be brought against an individual. He averred that he had been advised by his Advocate that the orders of stay issued were pursuant to the provisions of **Order 51 Rule 1** of the **Civil Procedure Rules**, and therefore the provisions of **Order 40 Rule 7** do not apply.

The Application was canvassed through written submissions and the Ex parte Applicants through the **Law Firm of Kiragu Wathuta & Company Advocates** filed their written submissions on the **18th June 2019** and submitted that the Court issued an order on **20th April 2019**, granting them leave to file Judicial Review Proceedings and that that the grant of the **leave** was to **operate as stay** of implementation, and or execution of any orders founded on the purported public notice. It was further submitted that the Respondents had notice of the said Court order, having been served with the said order by the process server as indicated in the Affidavit of Service sworn on **15th May 2017**, and filed in Court on **16th May 2017**. It was further submitted that notwithstanding the knowledge of the Court Order, the Respondent went contrary to the Court Order, and purported to issue a determination regarding the suit land and therefore the Respondent's act amounted to contempt of Court Orders. It was their further submissions that the purported determination resulting thereof ought to be declared **illegal, null and void**. The Ex parte Applicants relied on various provisions of law and decided cases and urged the Court to purge the contempt and restore the status quo.

The Respondent through its **Advocate Wahome Murakaru**, submitted that the **Environment & Land Court**, though being of equal status to the **High Court** lacks jurisdiction to entertain and punish for contempt of Court order under the Judicature Act and the Court should therefore down its tools.

The Respondent further submitted that it did not deliberately or wilfully defy the Orders issued by court as the publication appearing vide Gazette Notice No. **11714 of 9th November 2018**, purporting to revoke the ex parte applicants title was publication in error. It was further submitted that contempt proceedings by their very nature are criminal in nature and hence the standard of proving the contempt must be higher than proof of balance of probability. The Respondent relied on various provisions of law and decided cases and urged the Court to dismiss the Notice of Motion Application dated **8th march 2019**.

The Court has now carefully read and considered the Notice of Motion Application, the Affidavit in support thereof and the Replying Affidavit in opposition. The Court has also carefully read and considered the submissions by the parties and renders itself as follows;

The jurisdiction of this Court has been called into question and therefore the Court must first determine whether or not it has jurisdiction over this matter as jurisdiction is everything and without it, the Court has no option but to down its tools. See the case of Owners of Motor Vessel 'Lillian S' ...vs... Caltex Oil (Kenya) Ltd (1989) KLR 1. Where the court held that:-

“Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

It is not in doubt that the **Contempt of Court Act** was declared unconstitutional by the Constitutional Court. However before its enactment there were provisions of law that guided the Court and these are the provisions therefore that the Court must use. **Section 29 of the Environment & Land Court Act** which is clear to the effect that;-

“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.”

The High Court has the responsibility of maintenance of the rule of law, and the **Environment & Land Court**, also having equal status to the High Court as specialized Court also bears the same responsibility. **Section 29 of the Environment & Land Court Act** having given the Court such power, also means that the Court has jurisdiction over contempt proceedings. See the case of Samuel Kahiu ...Vs... Jecinta Akinyi Soso Assistant County Commissioner Ilodokilani Ward/Division & another [2018] eKLR where the Court held that;-

“Despite the Constitutional underpinning of the power to punish for contempt of court deriving from the elevation of the rule of law to a national value and principle of governance as well as the recognition of judicial authority as the expression of the sovereign power of the people of Kenya, contempt of court in Kenya largely retains its common law ancestry. Before the promulgation of the Constitution in 2010 and the Contempt of Court Act 2016, section 5(1) (now repealed by the Contempt Act, 2016) of the Judicature Act, Cap 8 was mainly the substantive law on Contempt of Court which was only conclusive to the power of the High Court and Court of Appeal to punish for contempt of Court. Other courts, including the Supreme Court, the specialist courts and subordinate courts exercising civil jurisdiction, can punish for contempt of court as well. Section 63 of the Civil Procedure Act (cap 21) provides that the Legislative prescription foreseen in the interlocutory phrase to section 63 has been made through order 40 Rule 3 of the Civil Procedure Rules, 2010. The Rule provides that in cases of disobedience, or breach of any such terms, the court granting the Injunction may order the property of the person guilty of disobedience or breach to be attached, and may also order such person to be detained in prison for a term not exceeding six months unless in the meantime the court directs his release. All Applications under the order 40 of Rule 3 are to be made by a Notice of Motion within the Suit.”

Having analyzed the issues as above, the court finds that it has

Jurisdiction to deal with the issue of Contempt of court.

The next issue that this Court has to determine is whether the Respondent was in Contempt of the Court Order. The Court in Samuel Kahiu v Jecinta Akinyi Soso Assistant County Commissioner Ilodokilani Ward/Division & another (supra) defined contempt of Court as;

“Contempt of court, often referred to simply as "contempt", is the offense of being disobedient to or discourteous toward a court of law and its officers in the form of behavior that opposes or defies the authority, justice and dignity of the court. It manifests itself in willful disregard of or disrespect for the authority of a court of law, which is often behavior that is illegal because it does not obey or respect the rules of a law court.”

It is not in doubt that on the **19th April 2017**, the Court in Nairobi issued an order to the effect that the grant of leave to file the Judicial Review Proceedings to operate as stay of implementation, enforcement and execution of any proceedings and or orders that were founded on the purported Public Notice that appeared on the **Daily Nation Edition of 3rd March 2017**, until the determination of the Application. From the Affidavit of Service before this Court, it is clear that the Respondent was served with the said orders, a fact which has not been disputed.

Going by the definition of Contempt, it would mean that the carrying out of any act by the Respondent that disregard and or went against the Court order must then be regarded as contempt. It further follows that such an act will be illegal and therefore **null and void**.

This Court has seen the Special Issue of the Kenya Gazette Notice dated **9th November 2019**, which the Respondent has recommended that the **Chief Land Registrar** revokes the title to the suit property. It is this Court's considered view that the said recommendation is in complete violation of the Court order issued on **20th April 2017**, and dated **19th April 2017**, that prohibited the implementation or enforcement of any proceedings or orders that are founded on **Daily Nation Notice** dated **3rd March 2017**, wherein it declared its intention to review the legality and propriety of public land in Kiambu County. Therefore, the court finds and holds that the said actions were in total disregard of the said Court order and consequently, the Respondent's actions mounted to Contempt of Court. It then follows that the said Gazette Notice having been issued illegally is consequently null and void.

Having now carefully read and considered the pleadings, the affidavits, the annexures thereto, and the written submissions by the Parties,

this Court finds and holds that the Respondent was in contempt of the Court Order as prayed in the application dated **18th March 2019**.

For the above reasons, the court finds the said application merited and is allowed entirely in terms of prayers No. 3, 4 and 5. The applicant is also entitled to costs of this application.

Having found that the Respondent is in contempt of the Court Order, the court directs its Chairman to purge the said contempt within the next 30 days from the date hereof.

The matter will be mention on **21/4/2020** to confirm whether the said contempt has been purged and failure to do so, the court will not hesitate to issue other sanctions as provided by the law.

It is so ordered.

Dated, Signed and Delivered at Thika this **6th** day of **March 2020**.

L. GACHERU

JUDGE

6/3/2020

In the presence of

1st Plaintiff in person

2nd Plaintiff in person

3rd Plaintiff in person

No appearance for Defendants

Court Assistant - Lucy

L. GACHERU

JUDGE

6/3/2020