



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAKURU**

**PETITION NO. 7 OF 2019**

**KITALE INDUSTRIES LIMITED.....PETITIONER**

**VERSUS**

**COUNTY GOVERNMENT OF NAKURU..... RESPONDENT**

**KENYA RAILWAYS CORPORATION..INTERESTED PARTY**

**RULING**

1. This ruling is in respect of two applications: Notice of Motion dated 31<sup>st</sup> May 2019 and Notice of Motion dated 14<sup>th</sup> April 2020, both filed by the petitioner. The following orders are sought in Notice of Motion dated 31<sup>st</sup> May 2019:

1. Spent

2. Spent

3. That a conservatory order in the form of an injunction be issued to restrain the respondent whether by itself or through its agents, servants or employees or howsoever else from interfering with your petitioner's proprietary rights or its quiet possession or occupation of the property measuring 3.6 acres situate at Kenya Railways Corporation's S.I.O.W. yard in Nakuru and which is leased to the petitioner for a term of 15 years from 30<sup>th</sup> July 2007 ('the Demised Premises') or in any other manner howsoever interfering with or from causing embarrassment to your petitioner by refusing it County Government services or renewing its or its group companies Single Business Licenses pending the hearing and determination of this petition.

4. That the costs of this application be granted to the petitioner.

2. When Notice of Motion dated 31<sup>st</sup> May 2019 initially came up for inter parte hearing on 24<sup>th</sup> June 2019, the respondent sought an adjournment. Being satisfied that it had been accorded ample time file a response, the court granted interim orders as follows:

**A conservatory order in the form of an injunction is issued to restrain the respondent whether by itself or through its agents, servants or employees or howsoever else from interfering with the petitioner's proprietary rights or its quiet possession or occupation of the property measuring 3.6 acres situate at Kenya Railways Corporation's S.I.O.W. yard in Nakuru and which is leased to the petitioner for a term of 15 years from 30<sup>th</sup> July 2007 or in any other manner howsoever interfering with or from causing embarrassment to the petitioner by refusing it County Government services or renewing its or its group companies Single Business Licenses pending the hearing and determination of this application inter-partes.**

**Provided however that Single Business License will only be issued to the petitioner upon the petitioner complying with the usual requirements applicable to such licences.**

3. Subsequently, allegations arose that the respondent acted in violation of the order. As a result, the petitioner filed Notice of Motion dated 14<sup>th</sup> April 2020 seeking the following orders:

1. Spent

2. Spent

3. Spent

4. Spent

5. That this Honourable Court order that the Inspector General of Police, the Regional Commander, the County Commissioner and the OCPD Nakuru, Railways ensure that the property measuring 3.6 acres situate at Kenya Railways Corporation's S.I.O.W. yard in Nakuru and which is leased to the petitioner for a term of 15 years from 30<sup>th</sup> July 2007 ('the Demised Premises') is adequately secured and the petitioner is not wrongfully, illegally and unlawfully evicted therefrom by the second respondent and the same is preserved pending the hearing of this petition;

6. That a conservatory order in the form of an injunction be issued to restrain the second respondent whether by itself or through its agents, servants or employees or howsoever else from interfering with your petitioner's proprietary rights or its quiet possession or occupation of the property measuring 3.6 acres situate at Kenya Railways Corporation's S.I.O.W. yard in Nakuru and which is leased to the petitioner for a term of 15 years from 30<sup>th</sup> July 2007 ('the Demised Premises') or in any other manner howsoever interfering with or from causing embarrassment to your Petitioner by purporting to grant to or granting to the first respondent any rights in respect thereof pending the hearing and determination of this petition.

7. That a conservatory order in the form of a mandatory injunction be issued to compel the First Respondent to restore your petitioners' property being the 3.6 acres situate at Kenya Railways Corporation's S.I.O.W. yard in Nakuru leased to it by the Second Respondent for a term of 15 years from 30<sup>th</sup> July 2007 ('the Demised Premises') to the same condition it was in on the 11<sup>th</sup> April 2020 by re-building the boundary wall and installing the gate to secure the said premises and restoring all the developments thereon to the state they were in before the wanton acts of destruction carried out by the First Respondent and/or unknown group of persons (under security provided by the County Government's unit) on 12<sup>th</sup> April 2020 through acts of vandalism and theft and causing physical damage to its property and injury to its guards at about 8.00 PM during the curfew imposed by the Government of Kenya.

8. That the Governor of Nakuru County, the County Secretary and the County Attorney be ordered to appear before this Honourable Court to show cause why they should not be found to have conducted themselves in utter disregard for the dignity of the court process and/or rule of law and for appropriate penalty to be imposed upon them as this Honourable Court may deem fit;

9. That this Honourable Court find and declare that the Governor of Nakuru County, the County Secretary and the County Attorney have, by their wrongful, unlawful and illegal conduct without any regard for the dignity of the Court process or rule of law as a result of which this application has been necessitated, infringed and breached the provisions of Article 10 of the Constitution and are, as such, unfit to continue to hold their respective offices and that, in addition to the first respondent, they ought to also personally be ordered to bear liability for and pay to the petitioner such loss and damaged as may be adjudged at the hearing of this petition to have been caused by such conduct.

10. That the costs of this application be granted to the petitioner.

4. The applications were supported by affidavits sworn by Charles Onyiego Bwogari who described himself as the legal adviser of the petitioner. He deposed that through lease dated 25<sup>th</sup> September 2012, the petitioner leased a parcel of land measuring 3.6 acres situate at Kenya Railways Corporation's S.I.O.W. yard in Nakuru (hereinafter the 'suit property') for a term of 15 years from 30<sup>th</sup> July 2007 from the interested party. Subsequently on 24<sup>th</sup> August 2018, the respondent wrote to the petitioner informing it that it had entered into discussions the interested party with a view to having the suit property relinquished to it for purposes of infrastructure development. That on 31<sup>st</sup> October 2018, the respondent wrote to the petitioner seeking to know the petitioner's position on the proposed takeover failure to which the respondent would explore other avenues to take possession of the suit property. Ultimately, a meeting was held on 22<sup>nd</sup> January 2019 between petitioner, the respondent and the interested party where it was agreed that the interested party would provide suitable alternative land for the petitioner to relocate to once a fresh lease in respect of the new premises was entered into between the petitioner and the interested party. That despite the agreement, the respondent continued to interfere with the petitioner's quiet possession of the suit property and also refused to renew its application for a Single Business Licence.

5. In the context of Notice of Motion dated 14<sup>th</sup> April 2020, he deposed that notwithstanding the order issued by the court on 24<sup>th</sup> June 2019, the respondent trespassed onto the suit property on 12<sup>th</sup> April 2020 at 8.00 pm through itself and a large group of unknown people and interfered with the petitioner's quiet enjoyment and possession thereof by causing wanton destruction of property, vandalism and physical injury to the petitioner's guards. That the respondent again attempted to trespass into the suit property during the morning of 13<sup>th</sup> April 2020 under the pretext of clearing debris. He further deposed that the respondent's said actions took place despite the fact that the petitioner's advocates had written to the respondent on 11<sup>th</sup> April 2020 warning it not to engage in such acts.

6. The respondent opposed both applications through affidavits sworn by Francis Mwangi Njuguna, its County Executive Committee member in charge of Land Housing and Physical Planning. He deposed that owing to inadequate parking space within Nakuru town, the respondent through his department embarked on a programme to decongest the town by identifying and acquiring suitable land. In that regard, the suit property was identified as suitable for putting up a modern bus park. Consequently, the respondent approached the interested party as owner of the suit property and the interested party agreed to lease it to the respondent subject to successful negotiations between the petitioner as the current lessee and the respondent. He added that an alternative parcel of land was identified for the petitioner to relocate to and that the respondent has no objection to the petitioner using the new parcel subject to compliance with physical planning and land use law. He further deposed that the suit property belongs to the interested party which is a public entity and that it is being acquired by the respondent in the interest of the wider public which overrides the petitioner's private claims.

7. In regard to Notice of Motion dated 14<sup>th</sup> April 2020, he deposed that due to the outbreak of the COVID-19 pandemic, a multi-agency team comprising the respondent and the national government was constituted to decongest the central business district (CBD) in line with guidelines given by the Ministry of Health. That consequently, all matatus and other public service vehicles that are eastern bound were relocated from the CBD to Ziwani area while all matatus and other public service vehicles that are western bound were relocated to the space near the showground. He added that this was done due to scarcity of land and owing to need to take extraordinary measures to protect the general public from COVID-19 infections. He added that through letter dated 14<sup>th</sup> November 2019, the interested party offered the respondent a lease in respect of the suit property and the respondent made payments of stand premium to the interested party.

8. Parties did not make any submissions in regard to Notice of Motion dated 31<sup>st</sup> May 2019. They opted to rely entirely on the material on record. As for Notice of Motion dated 14<sup>th</sup> April 2020, the petitioner filed written submissions. Additionally, counsels for both the petitioner and the respondent made oral submissions. For the petitioner, it was argued that the respondent's actions of 12<sup>th</sup> and 13<sup>th</sup> April 2020 were in disobedience of the orders issued by the court on 24<sup>th</sup> June 2019 and that therefore the respondent and its officers who are state officers are in contempt of the said order. Citing the cases of **Ramesh Popatlal Shah & 2 others v National Industrial Credit Bank Limited [2005] eKLR** and **Republic v Kenya School of Law & 2 others Ex parte Juliet Wanjiru Njoroge & 5 others [2015] eKLR** among other cases, it is argued that COVID-19 pandemic is not an excuse for what the respondent did and that the orders sought in Notice of Motion dated 31<sup>st</sup> May 2019 should be granted and additionally the court should not grant the respondent any further audience until the contempt is purged.

9. In his oral submissions, counsel for the respondent generally reiterated the matters deposed to in the two replying affidavits and invited the court to take judicial notice that the respondent's actions were due to COVID-19 pandemic.

10. The interested party did not file any response to Notice of Motion dated 31<sup>st</sup> May 2019. Notice of Motion dated 14<sup>th</sup> April 2020 was totally withdrawn as against the interested party.

11. I have considered the applications, the affidavits and submissions.

12. The orders sought in Notice of Motion dated 31<sup>st</sup> May 2019 are what are generally referred to as conservatory orders. They are public law remedies aimed at preserving the subject matter of a dispute pending hearing and determination of the main petition. In **Judicial Service Commission v. Speaker of the National Assembly & Another [2013] eKLR**, Odunga J stated as follows:

**Conservatory orders in my view are not ordinary civil law remedies but are remedies provided for under the Constitution, the Supreme law of the land. They are not remedies between one individual as against another but are meant to keep the subject matter of the dispute in situ. Therefore such remedies are remedies in rem as opposed to remedies in personam. In other words they are remedies in respect of a particular state of affairs as opposed to injunctive orders which may only attach to a particular person.**

13. The Supreme Court emphasized the public law nature of conservatory orders in **Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others [2014] eKLR** as follows:

**[86] "Conservatory orders" bear a more decided public-law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the Court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as "the prospects of irreparable harm" occurring during the pendency of a case; or "high probability of success" in the supplicant's case for orders of stay. Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes.**

14. In Notice of Motion dated 14<sup>th</sup> April 2020, the respondent and its officers stand accused of acting in violation of the order issued by the court on 24<sup>th</sup> June 2019 and thereby being in contempt of the court. This court like any other court has inherent jurisdiction to ensure that judicial authority, dignity and the rule of law are upheld at all times. The Court of Appeal stated in **Woburn Estate Limited v Margaret Bashforth [2016] eKLR** as follows:

**The jurisdiction of the High Court (or any other court for that matter) to punish for the violation of its orders cannot be in question. Apart from section 5 (1) of the Judicature Act that vests in the High Court the power, like those of the High Court of Justice in England, to punish any party who violates its orders, the court, by virtue only of being a court has inherent powers to make sure its process is not abused and its authority and dignity is upheld at all times. ...**

15. Regarding the test for establishing contempt of court, Court of Appeal stated as follows in **Micheal Sistu Mwaura Kamau v Director of Public Prosecutions & 4 others [2018] eKLR**:

**... It is trite that to commit a person for contempt of court, the court must be satisfied that he has willfully and deliberately disobeyed a court order that he was aware of. That is made absolutely clear by section 4 of the Contempt of Court Act and the ruling of the Supreme Court in Republic v. Ahmad Abolfathi Mohammed & Another ... Secondly, as this Court emphasized in Jihan Freighters Ltd v. Hardware & General Stores Ltd and in A.B. & Another v. R. B. [2016] eKLR, to sustain committal for contempt of court, the order of the court that is alleged to have been deliberately disobeyed must be clear and precise so as to leave no doubt as to what a party was supposed to do or to refrain from doing. Lastly, the standard of proof in committal proceedings is higher than proof on a balance of probabilities, though not as high as proof beyond reasonable doubt. ...**

16. It is not in dispute that the petitioner is the proprietor of a leasehold interest in respect of the suit property obtained from the interested party for a term of 15 years from 30<sup>th</sup> July 2007 and further that the respondent is also interested in leasing the suit property with a view to putting up a bus park. Indeed, all three parties have been engaged in discussions on how the interested party can lease to the petitioner alternative land so as to allow the respondent to take over. Although it seems that the alternative land has been identified, arrangements to relocate the petitioner have not been concluded. From the material on record, it is clear that the respondent descended on the suit property on the night of 12<sup>th</sup> April 2020 and took possession of it. In the process, there was damage to the petitioner's property as well as bodily injuries. The activities of the night of 12<sup>th</sup> April 2020 are not denied by the respondent. If anything, the respondent has confirmed them by stating in the replying affidavit that owing to the outbreak of the COVID-19 pandemic, it acted to decongest the CBD in line with guidelines given by the Ministry of Health and relocated matatus and other public service vehicles to the suit property. It justified its actions by stating that there was need to take extraordinary measures to protect the general public from COVID-19 infections.

17. While it is true that the COVID-19 pandemic is an extraordinary phenomenon of the type that the world has not experienced in perhaps a century or so and that it has changed our lives in ways that were hitherto unimaginable, while it also true that government and public servants both at the national and devolved levels have had to deploy new, unique and oftentimes heroic measures to combat the scourge for the good and safety of the general public, it must be remembered that the law remains firmly in place and that the ultimate end of the law is public good. The opposite is anarchy. One can hardly achieve any good by trashing the law. It is precisely in moments of crises such as the present one that the rule of law must be meticulously upheld since the risk of injustice under the guise of 'necessity' rises significantly. It is in that context that the non-negotiable nature of court orders should be seen. The Court of Appeal rendered itself in **Fred Matiang'i the Cabinet Secretary, Ministry of Interior and Co-ordination of National Government v Miguna Miguna & 4 others** [2018] eKLR as follows:

**When courts issue orders, they do so not as suggestions or pleas to the persons at whom they are directed. Court orders issue ex cathedra, are compulsive, peremptory and expressly binding. It is not for any party; be he high or low, weak or mighty and quite regardless of his status or standing in society, to decide whether or not to obey; to choose which to obey and which to ignore or to negotiate the manner of his compliance. ...**

**In deserving cases, this Court has itself set its face firmly against granting contemnors audience until and unless they first purge their contempt and it shall continue to do so in such cases as evince a headstrong contumaciousness proceeding from a bold impunity, open defiance or cynical disregard for the authority of the Court and the integrity of the judicial system. Such pernicious conduct cannot be countenanced and those hell-bent on it will find neither help, nor refuge under a convenient and self-serving appeal to natural justice when their impudent conduct threatens the very foundation of the rule of law.**

18. The orders of 24<sup>th</sup> June 2019 were made in the presence of the respondent's in-house counsel and it expressly restrained the respondent from interfering with the petitioner's proprietary rights or its quiet possession or occupation of the property. The respondent was thus fully aware of the order as well as its tenor and effect. From the correspondences exhibited, it is apparent that the respondent has wanted to have the suit property for a long time, long before the advent of COVID-19. The letters from the respondent in that regard are variously authored by the respondent's Governor and the County Secretary. The respondent made absolutely no effort to approach the court for a variation of the orders in view of the circumstances that were presented by the pandemic. By acting as did on the night of 12<sup>th</sup> April 2020, the respondent and its officers deliberately disobeyed a clear and precise court order which left no doubt as to what they were to do or to refrain from doing. I agree with the petitioner that COVID-19 and the need to protect the public from infections cannot be an excuse for open and flagrant disobedience of a court order. I therefore find and hold that the respondent, the respondent's Governor and the respondent's County Secretary are in contempt of court. The County Attorney's involvement in the matter was that of an advocate representing a client and I therefore see no basis to extend the finding of contempt to him.

19. The petitioner has urged the court to declare that the respondent's Governor, the respondent's County Secretary and the County Attorney are unfit to continue holding their respective offices owing to the contempt and that in addition to the respondent they ought to also personally be ordered to bear liability for and pay to the petitioner the loss and damage caused by their conduct. Those are final orders which must be left for determination by the trial court at the hearing of the petition itself. I have also agonised over how to punish the respondent, its Governor and its County Secretary for the contempt of court. If I were to impose a fine against the respondent, the funds to offset the fine will be drawn from public resources. That will certainly not be a desirable or even an efficient outcome. On the other hand, an order that the Governor and the County Secretary personally pay a fine from their own resources does not also commend itself to me in the unique context of the COVID-19 pandemic and the sacrifices made by public servants to combat it. While condemning the disobedience of the court order herein, I consider it adequate in the particular circumstances of this case, to reiterate as I hereby do, that court orders must be obeyed by all and sundry. The court will not hesitate to mete out appropriate punishment including personal sanctions where deemed fit.

20. Regarding Notice of Motion dated 31<sup>st</sup> May 2019 as well as prayer 5 of Notice of Motion dated 14<sup>th</sup> April 2020, I take into account the general rule that conservatory orders should be granted on the inherent merit of a case, the public interest, the proportionate magnitudes and priority levels attributable to the claims before the court. The respondent having taken possession of the suit property and put it to the use of the general public, the aforesaid prayers are overtaken by events and public interest in the context of the COVID-19 pandemic militates against reversing the respondent's actions at this point in time. Parties are at liberty to make such claims as are appropriate in the circumstances for determination at the trial of the petition. The same applies to prayer 7 of Notice of Motion dated 14<sup>th</sup> April 2020 while prayer 6 thereof cannot issue since the application was withdrawn in so far as the interested party is concerned.

21. Costs of the two applications are awarded to the petitioner and shall be borne by the respondent.

22. This ruling is delivered remotely through video conference and e-mail pursuant to the Honourable Chief Justice's "Practice Directions for the Protection of Judges, Judicial Officers, Judiciary Staff, other Court Users and the General Public from the Risks Associated with the Global Corona Virus Pandemic" (Gazette Notice No. 3137 published in the Kenya Gazette Vol. CXXII—No. 67 of 17<sup>th</sup> April, 2020).

**Dated, signed and delivered at Nakuru this 21<sup>st</sup> day of May 2020.**

**D. O. OHUNGO**

**JUDGE**