

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILINMANI LAW COURTS

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 584 OF 2012

IN THE MATTER OF THE CONSTITUTION OF THE REPUBLIC OF KENYA 2010

AND

**IN THE MATTER OF LAND REGISTRATION ACT, NO. 3 OF 2012, THE LAND ACT, NO. 6
OF 2012**

AND

**IN THE MATTER OF CONTRAVENTION AND/OR APPREHENDED CONTRAVENTION OF
FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 19, 20, 21, 22, 23 (10 (2) (3),
40, 47, 48 AND 50 (10, 165 (3) OF THE CONSTITUTION OF KENYA, 2010, SECTIONS 111 AND
150 OF THE LAND ACT NO. 6 OF 2012, SECTIONS 24, 25 AND 26 OF THE LAND
REGISTRATION ACT, NO. 3 OF 2012**

AND

IN THE MATTER OF THE CONSTRUCTION OF THE NAIROBI SOUTHERN BY-PASS

AND

**IN THE MATTER OF THE COMPULSORY ACQUISITION OF LAND PARCELS NOS.
MUGUGA/GITARU/842/59, MUGUGA/ GITARU/842/62, MUGUGA/ GITARU/1042
(ORIGINALLY MUGUGA/GITARU/487/85), MUGUGA/GITARU/1078 AND
MUGUGA/GITARU/842/1 ALL ORIGINALLY MUGUGA/GITARU/842**

BETWEEN

JOHN GITONGA GACHUHI.....1ST PETITIONER

EILEEN WAMBUI NJOROGE.....2ND PETITIONER

PETER NJOROGE REGERU.....3RD PETITIONER

SAMUEL KARANJA MURIAKIARA.....4TH PETITIONER

**SALOME NJAMBI GITAU (AS ADMINISTRATRIX AND LEGAL REPRESENTATIVE
OF THE ESTATE OF ANDREW GITAU NG'ANG'A-DECEASED.....5TH PETITIONER**

AND

THE COMMISSIONER OF LANDS.....1ST RESPONDENT

MINISTRY OF ROADS.....	2 ND RESPONDENT
THE KENYA NATIONAL HIGHWAYS AUTHORITY.....	3 RD RESPONDENT
THE HONOURABLE ATTORNEY GENERAL.....	4 TH RESPONDENT
THE COUNTY COUNCIL OF KIAMBU.....	5 TH RESPONDENT
THE TOWN COUNCIL OF KIKUYU.....	6 TH RESPONDENT

RULING

Introduction

On 7th December 2016, the Hon. Justice Muriithi issued an order couched in the following terms, namely:-

***That** Fidelis Kamwana Mburu and Emma Njogu of the National Land Commission be committed to prison for contempt of court for deliberately obstructing the due realization of the Decree of this court herein.*

***That** Dr. Zwazuri A. Mohammad-Chairman National Land Commission be committed to prison for such term(s) as the Honourable Court shall deem just and appropriate for contempt of court.*

***That** directions on 18th January 2017.*

On 18th January 2017, the above named persons, though served did not attend court, hence this court issued warrants of arrest against them to be brought to court on or before 1st February 2017 to show cause why they cannot be punished for contempt of court. On the said date **Mr. Mbuthia** Advocate appeared in court on their behalf and stated that he had filed an application dated 30th January 2017 seeking to set aside the orders committing the Respondents' for contempt and asked for the said application to be heard first.

Mr. Njuguna, counsel for the petitioners opposed the said request insisting that the Respondents ought to have attended court personally since they had been found guilty of contempt. I nevertheless allowed the adjournment and scheduled the said application for hearing on 28th February 2017.

On 28th February 2017 **Mr. Njuguna** raised an objection premised on two points, **(a)** **Mr. Mbuthia** counsel was not properly on record since he had not complied with the provisions of Order 9 Rule 9 of the Civil Procedure Rules, 2010; and **(b)** that the applicant had no right of audience unless they purged the contempt. Counsel relied on **Hadkinson vs Hadkinson**^[1] which was cited in **Rose Ndeto vs Ratalil Automobiles Ltd & 6 Others**.^[2]

Mr. Mbuthia submitted that the provisions of the Civil Procedure Rules, 2010 do not apply to constitutional petitions which are governed by The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013.^[3]

The first ground raises the question whether or not the Civil Procedure Rules apply to constitutional petitions, and if they do, by virtue of Order 9 Rule 9 cited above, whether the Respondents counsel is properly on record.

I think it is important to bear in mind that Article 259 (1) of the constitution enjoins the court to interpret the constitution in a manner that promotes its purposes, values and principles, advances the rule of law, human rights and fundamental freedoms in the bill of rights and in a manner that contributes to good

governance. This court is obliged under Article 159 (2) (e) of the constitution to protect and promote the purposes and principles of the constitution. Also, the constitution should be given a purposive, liberal interpretation. The provisions of the constitution must be read as an integrated, whole, without any one particular provision destroying the other but each sustaining the other.[4] The Constitution of Kenya gives prominence to national values and principles of governance which include human dignity, equity, social justice, inclusiveness, equality, human rights, Rule of law etc.[5]

At the outset in determining this issue, I would stand guided by the clear provisions of the constitution which is the supreme law of the land which binds all persons and all state organs.[6] It is important to bear in mind that in exercising judicial authority, the courts and tribunals are under article 159 (2) (d) required to administer justice without undue regard to procedural technicalities.

My strong view is that conduct of judicial proceedings and exercise of judicial authority is now entrenched in our constitution and this ought to be reflected in the court decisions and any decision making process that does not adhere to the constitutional test on procedural fairness, the right to a fair trial, the right to legal representation and access to justice cannot stand court scrutiny.

Rule 3(1) of The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013[7] provides that the overriding objective of the Rules is to facilitate access to justice for all persons as required under Article 48 of the constitution.

Rule (3) of the Rules, provides that the rules shall be interpreted in accordance with Article 259 (1) of the constitution and shall be applied with a view to advancing and realizing the-

(a) rights and fundamental freedoms enshrined in the Bill of Rights; and

(b) values and principles in the constitution.

Rule 8 provides that nothing in the rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.

The constitution is an effective document that is the basis of our laws. Considering the principles, purposes and objectives of the constitution enumerated above, the right to legal representation, I find myself unable to uphold the objection by the petitioners counsel that the Respondents counsel is not properly on record. Instead, in exercise of my discretion, I hereby grant an order regularizing his being on record and a further order that the notice of change of advocates and all the documents filed by the said advocate be deemed to be properly on record.

On the second issue, as was correctly held by the court of Appeal in *A.B & another v R.B*[8] under our constitutional framework, there is no general rule that a court cannot hear a person(s) in contempt of court before they have purged their contempt. The importance of the right to fair hearing which is expressly underpinned by Article 50(1) of the Constitution, and in particular the right to access the court for purposes of ventilating a grievance cannot be gainsaid. A general rule curtailing those rights in all and sundry cases of contempt of court would not easily pass constitutional muster.[9]

Way back in 1952, Lord Denning, LJ. articulated the balancing act that is required when a court is confronted with two contending principles of great legal and constitutional moment pitting, on the one hand the need to uphold the constitutional right to a fair hearing, and on the other the need to protect and uphold the rule of law without which civilized society is in peril.[10] In *Hadkinson vs.Hadkinson*,[11] which was also cited by **Mr. Njuguna** in support of his objection, the eminent Law Lord stated:-

"I am of the opinion that the fact that a party to a cause has disobeyed an order of the court is not of itself a bar to his being heard, but if his disobedience is such that, so long as it continues, it impedes the course of justice in the cause by making it more difficult for the court to ascertain the truth or to enforce the orders which it may make, then the court may in its discretion refuse to hear

him until the impediment is removed or good reason is shown why it should not be removed."

Counsel also cited the case of *Rose Detho v. Ratilal Automobiles Ltd & 6 Others*,^[12] in which the Court of appeal emphasized the sacrosanct nature of the right to be heard in the context of contempt of court applications. Speaking for the majority, Githinji, JA expressed himself as follows:-

"Has the contemnor a right to be heard. This is indeed an everyday question in all our courts. While the general rule is that a court will not hear an application for his own benefit by a person in contempt unless and until he has first purged his contempt, there is an established exception to the general rule where the purpose of the application is to appeal against, or have set aside, on whatever ground or grounds, the very order disobedience of which has put the person concerned in contempt"(Emphasis added)

Clearly, before me, there is an application seeking to set aside for whatever grounds the very order of disobedience. This case clearly falls under the exceptions referred to by Githinji JA in the above cited case. Further Githinji JA went further to state that:-

"The courts in this country, both this court and superior court, have adopted the more flexible treatment of the jurisdiction as one of discretion to exercised in accordance with the principle stated by Denning L.J. in Hadkinson's case (Supra)"

The reason why, depending on the circumstances of each case, the court must retain the discretion, albeit to be exercised sparingly, to decline to hear a contemnor is because our entire constitutional edifice is predicated on respect for the rule of law. The moment a party hacks at that foundation, the entire system is threatened. The Constitutional Court of South Africa, in *Burchell v. Burchell*^[13] underlined the importance to the rule of law, of compliance with court orders in the following terms:-

"Compliance with court orders is an issue of fundamental concern for a society that seeks to base itself on the rule of law. The Constitution states that the rule of law and supremacy of the Constitution are foundational values of our society. It vests the judicial authority of the state in the courts and requires other organs of state to assist and protect the courts. It gives everyone the right to have legal disputes resolved in the courts or other independent and impartial tribunals. Failure to enforce court orders effectively has the potential to undermine confidence in recourse to law as an instrument to resolve civil disputes and may thus impact negatively on the rule of law."

In exercising the discretion the court will have to satisfy itself on the question "whether, taking into account all the circumstances of the case, it is in the interests of justice to hear or not to hear the contemnor." Refusing to hear a contemnor is a step that the court will only take where the contempt himself impedes the course of justice. What is meant by impeding the course of justice in this context comes from the judgment of Lord Justice Denning cited above in *Hadkinson v Hadkinson*^[14] and means making it more difficult for the court to ascertain the truth or to enforce the orders which it may make.

An order passed by a competent court interim or final has to be obeyed without any reservation. If such an order is disobeyed or not complied with, the court may refuse the party violating such order to hear him on merits. I am not unmindful of the situation that refusal to hear a party to the proceeding on merits is a drastic step and such a serious penalty should not be imposed on him except in grave and extraordinary situations. As mentioned above, this case fall under the exceptions stated Githinji JA in the above cited judgment.

It is clear on the true construction of the law and from established practice that the court has a wide discretion to do what is just and reasonable in the circumstances to ensure proper administration of justice^[15] bearing in mind that the right to a hearing has always been a well-protected right in our constitution and is also the cornerstone of the rule of law. This is why even if the courts have inherent jurisdiction to dismiss suits or deny a contemnor the right to be heard, this power ought to be exercised sparingly and with extreme care and caution and only in cases clearly aimed at protect the integrity of the court process from abuse that would amount to injustice and at the end of the day there should be

proportionality.[16] This explains why there are exceptions to the general rule discussed above, and secondly why, the discretion ought to be exercised carefully.

Talking about discretion, it is important to bear in mind that the court is not powerless to grant relief when the ends of justice and equity so demand, because the powers vested in the court are of a wide scope and ambit.[17] The inherent power, as observed by the Supreme Court of India[18]"has not been conferred on the court; it is a power inherent in the court by virtue of its duty to do justice between the parties before it."

The fundamental duty of the court is to do justice between the parties. It is, in turn, fundamental to that duty that parties should each be allowed a proper opportunity to put their cases upon the merits of the matter. It is fundamental principle of natural justice, applicable to all courts whether superior or inferior, that a person against whom a claim or charge is made must be given a reasonable opportunity of appearing and presenting his case. If this principle be not observed, the person affected is entitled, *ex debito justitiae*, to have any determination which affects him set aside. Discussing the nature and objects of the inherent powers of the court, Sir Dinshah Mulla in *The Code of Civil Procedure*[19]observes that:-

*"... The court has, therefore, in many cases, where the circumstances so require, acted upon the assumption of the possession of an inherent power to act **ex debito justitiae**, and to do real and substantial justice for the administration, for which alone, it exists...."*

Discretion vested in the court is dependent upon various circumstances, which the court has to consider among them the need to do real and substantial justice to the parties to the suit.[20] Discretion must be exercised in accordance with sound and reasonable judicial principles. The principles governing the exceptions laid down by Githinji JA, are in my view sound judicial principles which I embrace. These are there is an established exception to the general rule where the purpose of the application is to appeal against, or have set aside, on whatever ground or grounds, the very order disobedience of which has put the person concerned in contempt"

As the King's Bench in Rookey's Case[21] stated as follows:-

"Discretion is a science, not to act arbitrarily according to men's will and private affection: so the discretion which is exercised here, is to be governed by rules of law and equity, which are to oppose, but each, in its turn, to be subservient to the other. This discretion, in some cases follows the law implicitly, in others or allays the rigour of it, but in no case does it contradict or overturn the grounds or principles thereof, as has been sometimes ignorantly imputed to this Court. That is a discretionary power, which this nor any other Court, not even the highest, acting in a judicial capacity is by the constitution entrusted with."

I am persuaded that this is a matter falls squarely on the exceptions stated above. I am also persuaded that the process of the judicial system requires that all parties before the court should be given an opportunity to present their cases before a decision is given unless the alleged contempt impedes and continues to impede the course of justice in the cause by making it more difficult for the court to ascertain the truth or to enforce the orders which it may make.

In the final analyses, I find that the preliminary objection viewed in light of the constitutional tests discussed above and the above authorities has no merits and I dismiss it with no orders as to costs.

Orders accordingly. Right of appeal 30 days.

Dated at Nairobi this 13th day of March, 2017

John M. Mativo

Judge

-
- [1] {1952}2ALL 567 at page 567 at 569-570
- [2] {2007}eKLR
- [3] Legal Notice No. 117 of 28th June 2013
- [4] See Tinyefunzavs A G of Uganda, Constitutional Petition No. 1 of 1997 { 1997}, UGCC 3
- [5] Article 10 (1) (a)-(e)
- [6] See Article 2 (1) of the constitution
- [7] Supra
- [8] {2016} eKLR
- [9] Ibid
- [10] Ibid
- [11]{1952} 2 All ER 567
- [12] CA No. 304 of 2006 (171/2006 UR):
- [13] Case No 364/2005
- [14]{1952} P 285
- [15] Bayer AG v Winter and others[1986] 1 All ER 733
- [16] Richard Nchapai Leiyangu vs IEBC & 2 others
- [17] See Mamraj vs Sabri Devi, AIR 1999 P & H 96
- [18]in Raj Bahadur Ras Raja vs Seth Hiralal, AIR {1962} AC 527
- [19] 18th Edition Reprint 2012
- [20] See Sir Dinshah F. Mulla, Supra, at page 1381.
- [21] [77 ER 209; (1597) 5 Co.Rep.99]