



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MURANG'A

E.L.C PETITION NO 5 OF 2018

IN THE MATTER OF ARTICLE 22 (1) & (2) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF ARTICLES 10,19,20,21,22,23,24 AND 25 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF NATIONAL LAND COMMISSION ACT, 2012

AND

IN THE MATTER OF WATER ACT, 2002 (REPEALED), AND WATER ACT, 2016

AND

IN THE MATTER OF THE LAND ACT, 2012

AND

IN THE MATTER OF THE ACCESS TO INFORMATION ACT, 2016

AND

IN THE MATTER OF THE FAIR ADMINSTRATIVE ACTION ACT, 2015

AND

IN THE MATTER OF THE LAND (ASSESSMENT OF JUST COMPENSATION) RULES, 2017

AND

IN THE MATTER OF THE ALLEGED CONTRAVENTION OF RIGHTS AND FUNDAMENTAL FREEDOMS UNDER ARTICLES 27,35,40,47,48,50,60 (1) (b), 232 AND 249 OF THE CONSTITUTION OF THE REPUBLIC OF KENYA

BETWEEN

STEPHEN MBUGUA GITUTHI..... 1ST APPLICANT

EUNICE NJERI NYOIKE..... 2ND APPLICANT

ALLAN MWANGI MAINA3RD APPLICANT

(All Applicants suing on their own behalf and on behalf of 57

other Applicants)

VS

NATIONAL LAND COMMISSION1STRESPONDENT

ATHI WATER SERVICES BOARD2NDRESPONDENT

RULING

1. This ruling is in respect to the Chamber Summons application dated 22/10/2019 and filed under certificate the following day by the Applicants for the following orders;

- a. Spent.
- b. That this Honourable Court be pleased to find the Acting Chief Executive Officer of the National Land Commission and the Chief Executive Officer of Athi Water Services Board is in contempt of the judgement and decree of 31st July 2019 Court.
- c. That the said Acting Chief Executive Officer of the National Land Commission and the Chief Executive Officer of Athi Water Services Board be punished for contempt of the judgement and decree of 31st July 2019. Court
- d. That this Honourable Court be pleased to order that the said Acting Chief Executive Officer of the National Land Commission and the Chief Executive Officer of Athi Water Services Board not be heard by the Court until they purge the contempt.
- e. That this Honourable Court be pleased to issue such other or further punitive orders in respect of the said contempt as may be necessary for the ends of justice to be met.
- f. That the costs of the application be in the cause.

2. The application is premised on the following grounds;

- a. THAT on 31/7/2019, the Court rendered its judgment in the Petition that;
 - i. A declaration is hereby made that the acquisition of the suit properties and improvements undertaken by the Respondents was carried ultra vires the Constitution, and Statutory law, thus infringing and violating the petitioner's rights to property.
 - ii. An order of Prohibition be and is hereby issued prohibiting the Respondents, their servants, agents in any manner whatsoever from vesting the right of way (wayleave) in favour of the 2nd Respondents unless due process is followed and prompt payment of just compensation is made to the Applicants.
 - iii. The following prayers are declined a, b, e, f, g, h, I, j, k, l, m, n, o, q, r, s, t and w.
 - iv. Costs of the Petition to be met by the Respondents jointly.
- b. That the said judgment was delivered in presence of the counsels for the parties herein, certified copies of the judgements were thereafter obtained and served on the Respondents along with the penal notice to both the Respondents and their Advocates on the 9/8/19.

3. That in complete disregard of the decree, the Respondents have continued taking possession of the suit properties and improvements on the disclosed suit lands namely Nos. LOC 1/KIRIANI/734, LOC 1/KIRIANI /1110, LOC 1/KIRIANI/ 568 and LOC 1/KIRIANI/ 552. That the Respondents are continuing with the clearing of a corridor of more than 20 meters and laying down the pipeline.

4. That the Applicants' Advocates also wrote to the Respondents on the 15/8/19 and 30/10/19 demanding they stop the works which they ignored. The letter was served on the County Commissioner under whose command the security officers on the ground were.

5. That the 2nd Respondent in its letter dated the 12/9/19 fully acknowledged the judgement and decree and stated that it was committed to complying with the Court orders. That as a corrective measure it was awaiting the issuance of the gazette notices by the 1st Respondent once the Commission was properly constituted. In the said letter the 2nd Respondent intimated to the Applicants that it had filed a notice of appeal in the matter. See the Notice of Appeal dated the 9/8/19.

6. The Applicants aver that no stay orders have been sought or issued on the Decree of the 31/7/2019. That unless the disobedience of the Court order is immediately arrested and the perpetrators punished, the Applicants will continue to suffer injustice in the hands of the Respondents, they aver.

7. The application is supported by the affidavit of the 1st Applicant in which he reiterates the grounds on the face of application and annexes

copies of the judgement, decree, demand letters to the Respondents dated the 15/8/19 demanding that they stop the works, the notice of appeal by the 2nd Respondent and a couple of photos he claims to have been taken of the ongoing works on his parcel of land LOC.1/RWEGETHA /552 between the periods of 07/10/2019 and 21/10/2019 in utter disregard to the Court orders. He prays that their application be allowed in order to uphold the dignity of this honourable Court and the rule of law.

8. In the 1st Applicant's further affidavit sworn on the 02/12/2019 he avers that after nullification of the acquisition process by this Court, the same could not be remedied by the Applicants accepting enhanced compensation by the Respondents. That the consents have not been communicated to the Applicants' Advocates and that if indeed there are such consents, the same are illegal for being acts not only in furtherance of contempt of the judgment of the Court but also being the result of professional misconduct on the part of the 2nd Respondent for interfering with the clients of the Advocates on record, that is to say the Applicants.

9. Further that the Applicants are strangers to allegations of theft of machinery alleged by the 2nd Respondent which alleged incidents cannot be used to justify the continuing trespass on the Applicant's suit lands and contempt of the Court orders by the Respondents. That the averments by the 2nd Respondent that the works had been completed on the disclosed suit lands before the delivery of the judgement are untruths and perjurious to the 2nd Respondent.

10. Going by the record the 1st Respondent was duly served with the application on the 29/10/19. (See the affidavit of service dated the 29/10/19 and filed on the 18/11/19). The hearing notice for the chamber summons was served on the 21/11/19 according to the affidavit of service duly sworn by the process server on the 22/11/19 and filed on the 3/12/19. A further mention notice was served on the 18/12/19 as per the affidavit of service by the process server dated the 18/12/19 and filed on the 14/1/2020. Lastly another affidavit of service of the process server filed on the 27/1/2020 depicts service of the mention notice on the 1st Respondents on the 16/1/2020. That despite service the 1st Respondents did not file any response to the application. That it has not shown any intention to oppose the application.

11. In opposition to the application Ms Martha Wanjiku, the Legal Officer of the 2nd Respondent swore an affidavit on the 25th of November 2019 on behalf of the 2nd Respondent in which she admits knowledge of the delivery of the judgement and the orders issued there under and reiterates the commitment by the 2nd Respondent to comply with the said orders in its letter dated the 12/9/19. That during the pendency of the suit and after its conclusion some of the Project Affected Persons (PAPS) totaling 19 in number voluntarily approached the 1st Respondent indicating their willingness to accept the amounts that had been earlier disclosed and awarded to them and rescinded their decision to reject the said awards. She annexed a number of such letters dated on various dates in October 2019 addressed to the 1st Respondent and calling for payment of compensation as per the awards given on the 11/4/2018 as the works have since been effected by the 2nd Respondent. The nature of the second correspondence annexed to her affidavit was a notice of withdrawal of instructions dated variously between May and July 2019 by the PAPS claiming to have withdrawn instructions from their lawyers and notifying them to discontinue further representation and dealing in the matter.

12. Further she contends that the construction works on the properties number LOC 1/KIRIANI/734, LOC 1/KIRIAINI /1110, LOC 1/KIRIAINI/ 568 and LOC 1/KIRIAINI/ 552 were completed before this judgement was delivered.

13. That the only staff of the 2nd Respondent on the ground are security officers providing security to the machinery on the ground who were engaged after an incident of theft of one of the machines (caterpillar 320D) which incident was reported to Kirwara Police Station under OB No 10/17/08/2019. In addition, she denied that any intimidation has been visited on the PAPS in any way as alleged by the Applicants.

14. Further that the 2nd Respondent has been waiting for the gazettelement of the 1st Respondent's newly appointed commissioners in order for them to regularize the acquisition process as per the judgment of the Honorable Court.

15. I have read and considered the written submissions frilled by the Applicants and the 2nd Respondent. On the 27/1/2020 in the absence of the 1st Respondent, the Applicants and the 2nd Respondent made oral submissions and highlighted the submissions in Court.

16. The key issues for determination are; whether the officials of the Respondents can be held in contempt of the Court orders issued on the 31/7/19 and whether they should be punished accordingly.

17. According to **Black's Law Dictionary 10th Edition**, Contempt of Court is defined as;

“Contempt (also termed as contempt of Court, judicial contempt) is a disregard of, disobedience to, the rules, or orders of a legislative or judicial body, or an interruption of its proceedings by disorderly behaviour or insolent language, in its presence or so near thereto as to disturb the proceedings or to impair the respect due to such a body.”

18. The Court in the case of **Samuel M. N. Mweru & Others v National Land Commission & 2 others [2020] eKLR** set out the legal framework for contempt of Court. This follows the decision of the High Court in the case of **Kenya Human Rights Commission v Attorney General & Another, [2018] eKLR** which declared the entire Contempt of Court Act No 46 of 2016 inconsistent with the Constitution and therefore null and void. The effect of this declaration means that the law in force now and at the time the impugned conduct of the Respondents is complained of is the law of contempt as set out in the Judicature Act.

19. **Section 5 of the Judicature Act** provides that: -

(1) 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.

(2) An order of the High Court made by way of punishment for contempt of Court shall be appealable as if it were a conviction and sentence made in the exercise of the ordinary original criminal jurisdiction of the High Court.

20. The import of the above provision is that the High Court and the Court of Appeal have the same power to punish for contempt of Court as was possessed by the High Court of Justice of England and that power extended to upholding the authority and dignity of subordinate Courts. Therefore, the law that governed contempt of Court proceedings is the English law applicable in England at the time the application was filed. The Court has a duty to ascertain what the applicable law of contempt in the High Court of Justice in England was. I shall make reference to rules 81.4.-81.9 of the 2012, Rules as obtains in England in respect to the enforcement of judgements orders and decrees, service of the judgments and or where service could be dispensed with.

21. There are a number of decisions on why contempt of Court is necessary for the proper functioning and exercise of the authority of the Court as enacted under Art 159 of the Constitution. Under Art 159 (1) of the Constitution, judicial authority is derived from the people of Kenya and vests in and shall be exercised by the Courts and tribunals established by or under the Constitution.

22. In the case of **Martin Nyaga Wambora & 4 Others vs. Speaker of the Senate & others (2014 eKLR)** it was rightly observed that:

“... the disobedience of a Court order is a grave issue as it undermines the rule of law. Article 10 of the Constitution identified the rule of law as one of the guiding principles of governance. Article 3 of the Constitution is very clear that every person has an obligation to respect and defend the Constitution. So that any person who disobeys a Court order violates the Constitution.”

23. On the importance of obeying Court orders, it was held in the case of **Shimmers Plaza Limited Vs. National Bank of Kenya Limited [2015] eKLR** thus:-

“The Courts should not fold their hands in helplessness and watch as their orders are disobeyed with impunity left, right and centre. This would amount to abdication of our sacrosanct duty bestowed on us by the Constitution. The dignity, and authority of the Court must be protected, and that is why those who flagrantly disobey them must be punished, lest they lead us to a state of anarchy. We think we have said enough to send this important message across.”

24. Further in the case of **Kenya Human Rights Commission v Attorney General & another [2018] Eklr** the Court observed;

“Contempt is the willful disobedience or disregard of Court orders, judgments, decrees or directions. It is therefore the offence of being disobedient or discourteous towards Courts and their officers in the form of behavior that opposes or defies the authority, justice and dignity of the Court. Contempt manifests itself in the willful and intentional disregard of or disrespect for the authority of the Courts, a behavior that is regarded illegal because it does not obey or respect the authority of the Courts and their processes and tends to lower the dignity of the Courts.

The Constitution Article 4(2) declares Kenya a democratic state founded on national values and principles of governance which include the rule of law and democracy. Disobedience and disregard of the authority of the Courts violates national values and the Constitution. In that regard, Courts punish for contempt in order to maintain their dignity, authority, the rule of law, democracy and administration of justice as foundational values in our Constitution.

Article 159 of the Constitution recognizes the judicial authority of Courts and tribunals established under the Constitution. Courts and tribunals exercise this authority on behalf of the people. The decisions Courts make are for and on behalf of the people and for that reason, they must not only be respected and obeyed but must also be complied with in order to enhance public confidence in the judiciary which is vital for the preservation of our Constitutional democracy. The judiciary acts only in accordance with the Constitution and the law (Article 160) and exercises its judicial authority through its judgments, decrees, orders and/or directions to check government power, keep it within its Constitutional stretch hold the legislature and executive to account thereby secure the rule of law, administration of justice and protection of human rights. For that reason, the authority of the Courts and dignity of their processes are maintained when their Court orders are obeyed and respected thus Courts become effective in the discharge of their Constitutional mandate”.

25. Punishing for contempt of Court goes towards safeguarding the dignity and the authority of the Court. This was the holding in the case of **Nthabiseng Pheko v Ekurhuleni Metropolitan Municipality & another CCT 19/11(75/2015)** when the Court observed that;

“The rule of law, a foundational value of the Constitution, requires that the dignity and authority of the Courts be upheld. This is crucial, as the capacity of Courts to carry out their functions depends upon it. As the Constitution commands, orders and decisions issued by a Court bind all persons to whom and organs of state to which they apply, and no person or organ of state may interfere in any matter, with the functioning of the Courts. It follows from this that disobedience towards Court orders or decisions risks rendering our Courts impotent and judicial authority a mere mockery. The effectiveness of Court orders or decisions is substantially determined by the assurance that they will be enforced.”

26. Courts therefore punish for contempt to insulate its processes for purposes of compliance so that the rule of law and administration of justice are not undermined. Without this power or where it is limited or diminished, the Court is left helpless and its decisions would mean nothing. This ultimately erodes public confidence in the Courts; endangers the rule of law, administration of justice and more importantly, development of society. That is why the Court stated in **Carey v Laiken [2015] SCC17** that;

“Contempt of Court rests on the power of the Court to uphold its dignity and process. The rule of law is directly dependent on the ability of the Courts to enforce their process and maintain their dignity and respect”.

27. It is therefore a fundamental rule of law that Court orders be obeyed and where an individual is enjoined by an order of the Court to do or to refrain from doing a particular act; he has a duty to carry out that order. The Court has a duty to commit that individual for contempt of its orders where he deliberately fails to carry out such orders. And as held in the case of **Martin Nyaga Wambora and Another v Justus Kariuki Mate & Another [2014] eKLR**, the duty to obey the law by all individuals and institutions is cardinal in the maintenance of rule law and administration of justice.

28. The necessary factors to consider in a matter relating to contempt of Court are;

- a. Whether there was an order made by the Court which was clear and unambiguous.
- b. Whether the party alleged to be in contempt of Court was aware of the Court order.
- c. Whether the party alleged to have acted in contempt indeed acted in a manner contra to the order issued by the Court.

29. I shall now examine the application vis a vis the law. The Judgement of the Court delivered on the 31/7/19, *inter-alia*, declared that the acquisition of the suit properties and improvements undertaken by the Respondents was carried ultra vires the Constitution, and statutory law, thus infringing and violating the petitioner's rights to property. In addition, the Court prohibited the Respondents, their servants, agents in any manner whatsoever from vesting the right of way (way leave) in favour of the 2nd Respondents unless due process is followed and prompt payment of just compensation is made to the Applicants.

30. The said judgement and orders have been duly acknowledged by the 2nd Respondent and at no time has any of the Respondents shown that the said orders suffered from any cloud of ambiguity. The Court holds that orders are clear and free from ambiguity.

31. The Court must satisfy itself that the person alleged to be in contempt committed the act complained of with full knowledge or notice of the existence of the order of the Court forbidding it. The threshold is quite high as it involves possible deprivation of a person's liberty. In the case of **Ex parte Langley 1879**, 13 the Court observed; -

“...the question in each case, and depending upon the particular circumstance of the case, must be, was there or was there not such a notice given to the person who is charged with contempt of Court that you can infer from the facts that he had notice in fact of the order which has been made" And, in a matter of this kind, bearing in mind that the liberty of the subject is to be affected, I think that those who assert that there was such a notice ought to prove it beyond reasonable doubt.”

32. Did the Acting Chief Executive Officer(CEO) of the 1st Respondent have knowledge of the judgement/orders in this suit? The record shows that the judgement was delivered in the absence of the 1st Respondent and its counsel despite evidence of service of judgement notice. I have seen the affidavit of service deponed by Lemer keto Isaya, the process server dated the 18/10/19 where he deponed that on the 9/8/19 at 11.23 am he served the decree and the penal notice to the Secretary at the offices of the 1st Respondent who informed him that she was authorized to accept service. She accepted and acknowledged service by signing and stamping with the official stamp. The Process of effecting service on a corporation is described by law. The proper service permitted by law is on a Director, Chief Executive (Principal Officer) or Board Secretary or other persons authorised by the Corporation. In this case service is said to have been effected on an undisclosed secretary. If after the service upon the secretary, the 1st Respondent responded, then knowledge would be inferred. In this case there is no evidence that the Acting CEO was served with the judgement in person and I am unable to hold that the Acting CEO had knowledge of the Judgment. I find that the applicant failed to proof knowledge on the part of the Acting CEO of the 1st Respondent.

33. According to the record the judgement was delivered in the presence of the Advocates of the Applicants and the 2nd Respondent. The 1st Respondent and its advocates were absent in Court despite service. It is borne of the record and acknowledged by the 2nd Respondent that the Respondents were duly served with the judgement, the decree and the penal notice on the 9/8/19. The 2nd Respondent duly acknowledged the orders in its letter dated the 12/9/19 and further made representations in Court through its legal officer namely Martha Wanjiku. Going by the provisions of the contempt of Court rules the Court may dispense with service of a copy of the judgment or order in accordance with rules 81.5 to 81.7 if it is satisfied that the person has had notice of it – (1) by being present when the judgment or order was given or made; or by being notified of its terms by telephone, email or otherwise. In answer to the 2nd limb of the issue is that the CEO of the 2nd Respondent had knowledge of the judgement, decree and the penal notice.

34. I shall now examine whether the contemnor(s) acted willfully against the orders of the Court.

35. Part a). of the orders aforementioned was a declaration or a statement that the actions of the Respondents in taking over the suit lands of the Applicants and constructing a water pipeline were contrary the Constitution and statutory law. That their actions when matched with the provisions of the law in respect to the acquisition of the rights of wayleaves fell outside the law. It is clear that the orders of this Court did not permit the Respondents to go on with the works because their actions were already illegal and had to be stopped. At the pronouncement of the orders, the Respondents were to halt any works and such other acts and remedy the violations as ordered by the Court.

36. The 2nd Respondent failed to show any efforts or evidence that the above have been complied and or redressed. Other than the letter dated 12/9/19 stating that it was committed to comply with the orders and that it was awaiting the gazettelement of the 1st Respondents Commissioners into office. Their defences therefore was a general denial. The 2nd Respondent has admitted that there are machinery placed on the suit lands by its contractor. It also admitted that it carried out works on the suit lands of the 19 or so Applicants after negotiating to purchase the land on a willing buyer willing seller basis. The legal responsibility in law to acquire a way leave is vested in the 1st Respondent. In my view the actions of the 2nd Respondents, in the absence of compliance with the Court orders of this Court, are clearly in furtherance of the contempt of the Court orders.

37. The Photographs presented by the Applicants show recent undertakings on the ground such as digging of pipeline, felling of trees (see freshly felled trees and vegetation) which as averred by the 1st Applicant were taken in the month of October 2019 way after the delivery of the judgement. See the certificate dated the 22/10/19 under section 65(8) of the Evidence Act on record. The 2nd Respondent did not rebut or challenge this evidence by tabling evidence to the contrary. This lends credence that the claim of the Applicants that the Respondents have entered their land, stationed machinery and carried out the works is not farfetched.

38. Even though it may be argued that the Acting CEO of the 1st Respondent may have had notice of the orders through their proxies, I would be hesitant to find for contempt. I say so because the standard of proof in contempt proceedings is slightly higher than in an ordinary civil suit.

39. It is the finding of the Court that the 2nd Respondent willfully disobeyed the Court orders. In the upshot I hold the CEO of the 2nd Respondent in contempt of the Court orders dated 31st July 2019.

40. The matter shall be mentioned on 7/7/2020 for mitigation and sentencing and or further orders.

41. It is so ordered.

DATED, DELIVERED AND SIGNED AT MURANGA THIS 18TH DAY OF JUNE 2020.

J.G. KEMEI

JUDGE

Delivered and transmitted via email to the parties.

Njeri, Court Assistant