



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**MISC. CIVIL APPLICATION (JR) NO. 85 OF 2010**

**IN THE MATTER OF: AN APPLICATION FOR LEAVE TO APPLY FOR  
PREROGATIVE ORDERS OF CERTIORARI AND PROHIBITION**

**AND**

**IN THE MATTER OF: SECTIONS: 7, 8, 142 & 143 OF REGISTERED  
LANDS ACT CAP. 300 LAWS OF KENYA, GOVERNMENT LANDS ACT  
CAP. 280, SECTIONS 154 & 153 OF THE LOCAL GOVERNMENT ACT  
CAP. 265 LAWS OF KENYA AND ALL OTHER ENABLING LAWS.**

**REPUBLIC.....APPLICANT**

**VERSUS**

**THE LAND REGISTRAR, WUNDANYI, LAND REGISTRY.....1<sup>ST</sup> DEFENDANT**

**COUNTY COUNCIL OF TAITA TAVETA.....2<sup>ND</sup> DEFENDANT**

**PERMANENT SECRETARY OF THE MINISTRY OF**

**PUBLIC HEALTH AND SANITATION.....3<sup>RD</sup> DEFENDANT**

**AND**

**DAVID MUTURI KIMANA.....EX PARTE APPLICANT**

**RULING**

1. The *ex parte* applicant through an application dated 22<sup>nd</sup> June, 2015 brought under Order 1A, 1B and 3A of the Civil Procedure Act seeks the following orders:-

i. Spent;

ii. That the Governor of Taita Taveta County, John Mruttu be cited for contempt of court orders

made on 31<sup>st</sup> August, 2012; and

iii. The costs of this application be borne by the 2<sup>nd</sup> respondent.

The application is supported by the affidavit of Annie Nyawiri Muturi sworn on 22nd June, 2015 and the grounds on the face of the application.

2. The parties appeared before Judge P.J. Otieno on 19<sup>th</sup> April, 2016 where he allowed the application as drawn and issued orders for the Governor of Taita Taveta County, Hon. John Mruttu to be cited for contempt and ordered him to attend court on 25<sup>th</sup> May, 2016 to explain his non-compliance with the Judgment of the court dated 31<sup>st</sup> August, 2012.

3. On the 25<sup>th</sup> May, 2016 parties appeared before Emukule J. (as he then was) and sought for adoption of the consent dated 25<sup>th</sup> May, 2016 signed by M/s Muturi Gakuo Kibara Advocates for the 2<sup>nd</sup> respondent and Tumuti & Company Advocates for the *ex parte* applicant and an unnamed State Counsel on behalf of the office of the Attorney General. The said consent was adopted as orders of the court.

4. One of the orders in the said consent was for a joint valuation of all the parcels of land known as Bura/Nyolo/2524, Bura/Nyolo/2525 and Bura/Nyolo/2526 to be carried out by a Valuer appointed by the County Government and the *ex parte* applicant's Valuer. Another order was for the rental assessment of Bura/Nyolo/2525 to be done by the County Government of Taita Taveta Valuer and the *ex parte* applicant's Valuer covering the period from the delivery of Judgment to date.

5. On 8<sup>th</sup> September, 2016 parties appeared before this court whereof, Mrs. M. Kariuki for the *ex parte* applicant applied for the Valuers who had undertaken valuation of the properties in issue to be summoned to court for cross-examination. A Valuer by the name Ephantus Waweru, instructed by the *ex parte* applicant testified as PW1. He produced valuation reports for the 3 parcels of land in issue.

6. The 2<sup>nd</sup> respondent called DW1, Mr. N.M. Moto, who introduced himself as the Chief Valuer Taita Taveta County. An objection was raised to production of his valuation reports due to the low figures he had cited as the value for the 3 parcels of land. Counsel for the *ex parte* applicant sought orders for the witness to adduce further evidence by availing in court copies of the most recent valuation reports filed in the Wundanyi Land's registry for property in Bura/Nyolo area. The matter was scheduled for further hearing on 12<sup>th</sup> October, 2016.

7. On the said date Counsel for the 1<sup>st</sup> and 3<sup>rd</sup> respondents sought time to file an affidavit to show that Mr. N.M. Moto had retired from Government service as at the time he signed the valuation reports. In the intervening period, Counsel for the 2<sup>nd</sup> respondent filed an application dated 19<sup>th</sup> December, 2016 seeking orders to cease from acting for the 2<sup>nd</sup> respondent. The application was heard on 1<sup>st</sup> February, 2017 and this court granted the orders sought.

8. Mr. Ngari for the 1<sup>st</sup> and 3<sup>rd</sup> respondents filed an affidavit on 27<sup>th</sup> October, 2016 to show that Mr. Moto was an employee of the Ministry of Lands up to 30<sup>th</sup> June, 2016 as per the contents of a letter from his employer attached to the said affidavit. As a result of the foregoing, this Court expunged the evidence of Mr. N.M. Moto from the record as the said person left Government employment on 1<sup>st</sup> July, 2016 yet the valuation reports he had authored were dated 26<sup>th</sup> August, 2016. Arising from the foregoing, Mrs. Kariuki urged this court to make a ruling based on the valuation reports by Elite Africa Limited, that were produced by Mr. Waweru. She indicated that no joint valuation report was undertaken as the 2<sup>nd</sup> respondent was slow to act.

9. This court directed Mrs. Kariuki to file her written submissions on the application herein, which she did on 6<sup>th</sup> March, 2017. She proceeded to highlight her submissions by stating that the Taita Taveta County Government took vast parcels of land owned by the *ex parte* applicant from him. It was thus to

compulsorily acquire the said land or settle the *ex parte* applicant on another parcel of land but that was never done.

10. Mrs. Kariuki further stated that the 2<sup>nd</sup> respondent has violated the provisions of Article 40 of the Constitution of Kenya as it is gaining from the *ex parte* applicant's property at his expense. She cited the provisions of section 111 of the Land Act which provide that where the State acquires property from an individual, it should pay in full. She indicated that from the valuation reports produced on behalf of the *ex parte* applicant Bura/Nyolo/2524 was valued at Kshs. 9 Million, Bura/Nyolo/2526 was valued at Kshs. 3 Million and Bura/Nyolo/2525 was valued at Kshs. 5 Million.

11. Counsel prayed for the *ex parte* applicant to be paid in terms of the valuation reports and subject to the orders by Judge Muriithi dated 30<sup>th</sup> August, 2012. She also prayed for costs of the application.

## **ANALYSIS AND DETERMINATION**

The issue for determination is if the *ex parte* applicant has made out a case for contempt of court against the Governor of Taita Taveta County.

12. The application dated 22<sup>nd</sup> June, 2015 was partly compromised when Counsel for the *ex parte* applicant, for the 2<sup>nd</sup> respondent and that for the 1st and 3rd respondents filed a consent to have valuation undertaken for the 3 properties in issue. Fate seems to have conspired against the 2nd respondent when the Valuer who had undertaken the valuation on its behalf was reported to have retired from Government services on 1st July, 2016 yet the valuation reports were dated 26th August, 2016. As a result of the dishonored valuation reports, the 2<sup>nd</sup> respondent's Advocates ceased to act on its behalf. This left the 2<sup>nd</sup> respondent without representation.

13. An affidavit of service was filed on 13<sup>th</sup> March, 2017 by the *ex parte* applicant's Counsel to show that the 2<sup>nd</sup> respondent was served with a mention notice for 14<sup>th</sup> March, 2017. The said notice informed its recipient that this matter had been listed for mention for highlighting of submissions on 14<sup>th</sup> March, 2017. The 2nd respondent was also served with a notice of change of Advocates and written submissions for the *ex parte* applicant.

14. In my considered view, it was misleading for the Counsel for the *ex parte* applicant to word a notice for highlighting of submissions as a "**mention notice**". To my mind, highlighting of submissions is equivalent to the hearing of a case or an application as the case may be. This then means that the 2<sup>nd</sup> respondent may not have fully understood the full import of the "**mention notice**".

15. The law governing contempt of court was at the time of filing the present application provided in section 5(1) of the Judicature Act, Cap 8 Laws of Kenya. It provides that:-

***"The High Court and Court of Appeal shall have the same power to punish for contempt of court as if 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."***

16. The procedure for contempt of court in England is stipulated in Part 1 (on applications and proceedings in relation to contempt of court) and rule 81.4 of the Civil Procedure (Amendment No. 2 rules, 2012 of England.

17. Considering the circumstances of this case, Counsel for the *ex parte* applicant should have fully taken into account that the purpose for valuation being undertaken for the 3 properties was to determine the amount of money which the County Government of Taita Taveta should pay the *ex parte* applicant in compensation if it failed to hand over vacant possession of the said properties. No affidavit evidence was tendered to show that after the valuation, a demand notice was sent to the said Governor for him to settle the said amount within a given period of time, failing which he was to vacate the property in issue. This court cannot lose sight of the fact that the application herein was filed on 22nd June, 2015 whereas

valuation of the 3 properties was undertaken on 3rd June, 2016 as per the valuation reports produced by PW1. How then can this court hold the Governor of Taita Taveta County guilty of contempt of court for not making a consolidated payment of Ksh. 17 Million for the 3 properties and mesne profits of Kshs. 360,000/= per year from Bura/Nyolo/2525 from January 2013 to date?

18. The Judgment of Murithii J., delivered of 31<sup>st</sup> August, 2012 contained the following orders;

- i. An order of certiorari to quash the 1<sup>st</sup> Respondent's Gazette Notice No. 5561 as sought in prayer (a) of the Notice of Motion dated 18<sup>th</sup> August 2010;
- ii. A declaration that the applicant's title to the suit parcel of land is valid as prayed in prayer (b) of the Notice of Motion;
- iii. An order of prohibition in terms of prayer (c) of the Notice of Motion until further orders of this court;
- iv. That the Respondents **may** within the next sixty (60) days undertake the procedure for compulsory acquisition of the suit parcels of land including the payment of due compensation in money and or alternative parcels of land;
- v. In default of paragraph (4) above, the applicant will be at liberty to develop this property as he deems fitting;
- vi. An order for the removal of the cautions on the suit parcels of land forthwith; and
- vii. The Respondents will pay the Applicants the costs of these judicial review proceedings.

19. The effect of Muriithi J's orders was to quash the decision of the 1<sup>st</sup> respondent, the Land Registrar Wundanyi, dated 21<sup>st</sup> May, 2016 contained in Gazette notice No. 5561 purporting to revoke the *ex-parte* applicants' title to Bura/Nyolo/2524, Bura/Nyolo/2525 and Bura/Nyolo/2526. The *ex-parte* applicant's title to the suit parcels of land was declared valid. He is therefore the present owner of the said parcels of land following the order for removal of the cautions lodged in the said parcels of land by the then Town Clerk of the County Council of Taita Taveta. The demand letter dated 11<sup>th</sup> May, 2015 that was attached to the supporting affidavit of the *ex parte* applicant sought for vacant possession of the said properties. As stated herebefore, a consent was recorded on 25th May, 2016 thereby giving the application herein a different trajectory.

20. In the case of **Mutitika vs Baharini Farm Limited** [1985] KLR, the Court of Appeal stated thus on the burden of proof in contempt of court cases:-

***"In our view, the standard of proof in contempt proceedings must be higher than proof on the balance of probabilities, almost but not exactly, beyond reasonable doubt. We envisage no difficulty in courts determining the suggested standard of proof. The standard of proof beyond reasonable doubt ought to be left where it belongs, to wit, in criminal cases. It is not safe to extend it to offence which can be said to be quasi-criminal in nature."***

21. This court holds that Muriithi J's orders for compulsory acquisition of the properties in issue were not in mandatory terms. He stated that "***the Respondents may within the next sixty (60) days undertake the procedure for compulsory acquisition of the suit parcels of land including the payment of due compensation in money and or alternative parcels of land***". The said orders gave the *ex parte* applicant an alternative of developing his properties. He was however persistent on compensation but jumped the gun by moving the court to hold the said Governor guilty of contempt of court before making a demand for compensation based on the valuation reports. If such a demand was made after valuation of the properties in issue was undertaken, the same was not exhibited before this court as evidence.

22. The upshot of the foregoing is that I see no justifiable reason to grant the orders sought. The application dated 22<sup>nd</sup> June, 2015 is hereby dismissed with no order as to costs.

**DELIVERED, DATED and SIGNED at MOMBASA on this 11<sup>th</sup> day of May, 2017.**

**NJOKI MWANGI**

**JUDGE**

**In the presence of:-**

Mrs. Kariuki for the *exparte* applicant

No appearance for the 2nd the respondent

No appearance for the 1st and 3rd respondents

Oliver Musundi - Court Assistant