



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KERUGOYA

ELC CASE NO. 47 OF 2018

KANGARA MUTUGI KAMAU

JECINTA WAIRIMU MWANGI

LUCY WAKIMATHI MUTUGI

ROSEMARY NJERI IRIMU

EUNICE WANGUI MUSILI.....PLAINTIFFS/APPLICANTS

VERSUS

NANCY WANJIKU MAINA.....DEFENDANTS/RESPONDENTS

EUNICE WANGUI WANJOHI

RULING

The application before me is the Ex-parte Chamber Summons dated 19th November 2018 brought under Order **51 Rule 1 CPR, Section 5 of the Judicature Act** and all enabling provisions of law. The Ex-parte Applicant is seeking leave to commence contempt proceedings against Nancy Wanjiku Maina and Eunice Wangui Wanjohi for disobeying the order of this Court. In the supporting affidavit of the 1st Ex-parte Applicant sworn on 19th November 2018, the Ex-parte Applicant deponed that on 12th October 2018, they made an application for a temporary injunction restraining the Respondents from interfering, partitioning and/or dealing with land parcels No. KIINE/NYANGIO/504 and KIRINYAGA/MARURUMO/57 and that on 31st October, 2018, the said orders were granted by this Honourable Court. It is further deponed that on 3rd November 2018, they served the said Court order upon the Respondents who have disregarded the said order.

I have considered the said Notice of Motion and the averments contained in the affidavit evidence in support thereto. Section 5 of the Judicature Act under which this application has been brought is an applied law which must be read with such formal alterations the circumstances may permit. **Section 5 (1) of the Judicature Act** confers power on the High Court of Kenya to punish for contempt of Court as is for the time being possessed by the High Court of justice of England. Under **Section 11 of the Interpretation and General Provisions Act Chapter 2 Laws of Kenya**, the law provides as follows:

“11. An applied law shall be read with such formal alternations as to names, localities, courts, officers, persons, moneys, penalties or otherwise as may be necessary to make it applicable to the circumstances, and in particular a reference to a Probate Court, Bankruptcy Court or Admiralty Court or similar expression, shall be constrained as a reference to the High Court exercising the appropriate jurisdiction”.

The English rule that a person who disobeys a Court order can be punished by the High Court only is not obtained in Kenya. It is no longer the position in Kenya that an application for leave to commence contempt proceedings can be brought Ex-parte without notifying the opposite party the same way Judicial Review proceedings for mandamus certiorari and prohibition used to be done. The practice in Kenya now is that applied law must be read with necessary modification as to the circumstance applicable in each case. This has been put into perspective by the Court of Appeal in the case of **REPUBLIC VS JUDICIAL COMMISSION OF INQUIRY INTO THE GOLDENBERG AFFAIR & ANOTHER EX-PARTE KOINANGE & 3 OTHERS (NO. 2) (2003) K.L.R at Page 606** where it was held:

“(1) Section 5 (1) of the Judicature Act (Cap) confers powers on the High Court of Kenya to punish for contempt of Court as is for the time being possessed by the High Court of Justice of England.

(2) The English rule that an application for leave to file contempt proceedings is modeled on the application for Judicial Review orders is applicable in Kenya by reason of Section 5 (1) of the Judicature Act (Cap 8).

(3) The requirement that in Judicial Review proceedings for mandamus, certioraris and prohibition, the application for leave is normally ex parte and the party to whom the orders are intended to be directed are normally not served or allowed participation cannot hold good in all cases.

(4) The power conferred on the High Court by Section (5(1) of the Judicature Act (Cap 8) to punish for contempt is in addition to the unlimited power conferred by Section 60 (1) of the Constitution of Kenya.

(5) The extent to which English Courts do not have discretion to allow a party to participate in ex parte applications, such rule would be in conflict with the Constitution and would have no application in Kenya.

(6) In deciding whether to permit a party to participate in an ex parte application for leave, Kenyan Courts will be guided by consideration, and whether ends of justice will be better served by an inter-parties hearing.

(7) The Courts will readily allow a party to participate in an ex parte application where that party intends to adduce relevant material without which the Court would not have a complete picture.

(8) As in this case, where leave is sought in an on-going litigation, the Court will readily allow a party to participate in an ex parte application if it is shown that no prejudice is caused and that such party intends to adduce material which will assist the Court to fairly reach its decision.

(9) Where a party has patiently and beyond peradventure been in flagrant breach of the Court order, the dictates of justice demand that such party be shut out”.

The position in law has aptly been put by the Superior Court in that decision. It has not been shown what prejudice the Ex-parte Applicant will suffer if the Intended party is served with this application. It is my view that the ends of justice will be better achieved if the Intended party is served with this application and to adduce such materials as may assist the Court in arriving at a fair and just decision. Having said that, I make the following directions:

1. This application for leave to commence contempt proceedings as against the Respondents be served for inter-partes hearing on 25th February 2019.

2. The costs of the application to abide the event.

READ and SIGNED in open Court at Kerugoya this 25th day of January, 2019.

E.C. CHERONO

ELC JUDGE

25TH JANUARY, 2019

In the presence of:

Mr. Gori for Applicants

Respondents/Advocate – absent

Mbogo Court clerk