

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MOMBASA

CONSTITUTIONAL PETITION NO. 36 OF 2022

ALBA PETROLEUM LIMITED.....PETITIONER

-VERSUS-

THE NATIONAL LAND COMMISSION.....1ST RESPONDENT
KENYA NATIONAL HIGHWAY AUTHORITY...2ND RESPONDENT
NATIONAL MUSEUMS OF KENYA.....3RD RESPONDENT
THE LAND REGISTRAR, MOMBASA.....4TH RESPONDENT
THE HON. ATTORNEY GENERAL.....5TH RESPONDENT

RULING

1. By a Notice of Motion dated 17th March 2025, Alba Petroleum Limited (the Petitioner/Applicant) prays for orders that:

1) Spent;

2) Spent;

3) Gershom Otachi Bwoma, the Chairman of National Land Commission; Alister Murimi Mutugi, Commissioner and Chairman of the Land Valuation and Taxation Committee of the National Land Commission; Kabale Tache Aeroro, the Secretary/

Chief Executive Officer of the National Land Commission; and Engineer Kungu Ndungu, the Director General of Kenya National Highways Authority jointly and severally be summoned by this Court to show cause why they should not be committed to civil jail for up to six (6) months for disobeying this Honourable Court's order made vide the Judgment delivered on 26th February, 2024: and

4) Costs of this Application be paid by the 1st and 2nd Respondents jointly.

2. The application is supported by two Affidavits sworn by the Petitioner's Director Alnoor Habib Jiwan and is premised on the grounds inter alia, that:

- i. A Judgment was delivered on 26th February, 2024 compelling the 1st and 2nd Respondents to pay full, adequate, fair reasonable and just compensation to the Petitioner for compulsorily acquiring the Petitioner's properties. In addition, a valuation of the suit land was to be undertaken and payment made within the next 30 days from the Judgment;**

- ii. The Petitioner's Advocates extracted the Decree and served both the 1st and 2nd Respondents;**
- iii. By Gazette Notice No. 3352 dated 13th February 2025, published on 14th March 2025, the 1st Respondent on behalf of the 2nd Respondent has turned back the wheel by purporting to recommence the compensation process by calling for a fresh inquiry;**
- iv. The 1st Respondent had conducted an inquiry on 23rd February, 2022 and the same cannot be reopened;**
- v. The 1st and 2nd Respondents have disobeyed and continue to disobey the court orders to-date as they have deliberately failed, refused declined and neglected to:**
 - a) Undertake a valuation of the suit property;**
 - b) Pay compensation to the Petitioners; and**
 - c) Pay general and exemplary damages at 5% of the value of the suit property to the Petitioner.**

3. The National Land Commission (the 1st Respondent) is opposed to the application. In a Replying Affidavit filed herein on 22nd April 2025 and sworn on its behalf by its Senior Valuation Officer Danson Njenga, the 1st Respondent avers that the value of the suit land and the improvements thereon when computed at 15% statutory disturbance allowance was valued at Kshs. 546,367,300/=.
4. The 1st Respondent avers that it has not yet received money from the 2nd Respondent to enable it make compensation to the Petitioner. The 1st Respondent avers that the Gazette Notice dated 13th February 2025 invited the Petitioner for an inquiry on 3rd April 2025 for the purposes of clarifying the reimbursable costs which the Petitioner had presented.
5. The Kenya National Highways Authority (the 2nd Respondent) is equally opposed to the application. In a Replying Affidavit sworn on its behalf by its Director General Eng. Kungu Ndung'u, the 2nd Respondent avers that the 1st Respondent issued the Gazette Notice dated 13th February 2025 in the ordinary course of their mandate and the 2nd Respondent did

not participate in any inquiry in respect to the properties listed in the said Gazette Notice.

6. The 2nd Respondent avers that it was aggrieved by the judgment delivered on 26th February 2024 and has lodged an Appeal at the Court of Appeal. In addition, the 2nd Respondent applied for an order of stay of execution in this court but in a Ruling delivered herein on 17th October 2024, the court declared itself *functus officio* and stayed the application pending the determination and outcome of an application currently before the Court of Appeal.
7. The 2nd Respondent further avers that it has initiated processes to ensure compliance with orders (e) and (h) of the judgment dated 26th February 2024 by requesting for a compensation schedule and a Valuation Report from the 1st Respondent vide a letter dated 14th November 2024. On 24th January 2025, the 2nd Respondent received a valuation Report which valued the suit land at Kshs. 546,367,300/= . The 2nd Respondent asserts that it has taken actions and steps in good faith in a quest to ensure swift compliance with the court orders.

8. I have carefully perused and considered the Petitioner's application as well as the response thereto by both the 1st and 2nd Respondents. I have similarly perused and considered the submissions and authorities placed before me by the Learned Advocates representing the parties.
9. By this application before the court, the Petitioner herein prays for orders that Gershom Otachi Bw Omanwa, the Chairman of the 1st Respondent Commission, Alister Murimi Mutugi, a Commissioner of the 1st Respondent and Kabale Tache Aeroro, the Secretary Chief Executive Officer of the 1st Respondent be summoned to this court to show cause why they should not be committed to civil jail for disobeying this court's orders made vide the judgment delivered herein on 26th February 2024. In addition, the Petitioner has urged the court to summon Eng. Kungu Ndung'u, the Director General of the 2nd Respondent Authority to equally show cause why he should not be equally committed to civil jail for disobeying the same orders.
10. The Petitioner asserts that the 1st and 2nd Respondents have disobeyed and continue to disobey the court orders to-date

as they have deliberately failed, refused, declined and/or neglected to:

- i) Undertake a valuation of the suit property;**
- ii) Pay compensation to the Petitioner; and**
- iii) Pay general and exemplary damages at 5% of the value of the suit property to the Petitioner.**

11. It was further the Petitioner's case that the 1st Respondent had reinvented the wheel by conducting an inquiry purporting to re-commence the compensation process by calling for a fresh inquiry.
12. The 1st and 2nd Respondents have separately denied being in contempt of the said orders. It is the 1st Respondent's case that it could not compensate the Petitioner as ordered as the Commission was yet to receive funds from the 2nd Respondent. It was further the 1st Respondent's case that the Petitioner had misconstrued the purpose of its Gazette Notice No. 3352 dated 13th February 2025 as the same was merely meant to clarify the reimbursable costs due to the Petitioner

and not to commence the process afresh as stated by the Petitioner.

13. On its part, the 2nd Respondent avers that it was aggrieved by the said judgment and that it had lodged an Appeal before the Court of Appeal. The 2nd Respondent avers further that despite the pendency of the proceedings in the Court of Appeal, it had taken steps to comply with the court order and that it had already requested for a compensation schedule and a Valuation Report from the 1st Respondent for purposes of compliance.
14. As it were, contempt of court has been defined as conduct or action that defies or disrespects the authority of the court. In that regard, Section 5 of the Judicature Act confers jurisdiction on the Superior Courts to punish for contempt. Additionally, Section 29 of the Environment and Land Court Act confers jurisdiction upon this court to punish a party found to be in disobedience or breach of its orders.
15. As the Court of Appeal did state in the case of ***Econet Wireless Kenya Limited -vs- Minister for Information and Communication of Kenya & Another (2005 eKLR:***

“..... It is essential for the maintenance of the rule of law and good order that the authority and dignity of our courts are upheld at all times. This court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proven contemnors.

In HADKINSON -V- HADKINSON (1952) 2 All ER. 567, it was held that:

“It is the plain and unqualified obligation of every person against or in respect of whom an order is made by a court of competent jurisdiction to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or even void.”

16. Considering a similar matter as the one before me in ***Samuel M.N. Mweru & Others -vs- National Land Commission & 2 Others (2020) eKLR***, Mativo J., (as he then was) held as follows:

“40. It is an established principle of law that in order to succeed in civil contempt proceedings, the applicant has to prove (i) the terms of the order, (ii) knowledge of these terms by the Respondent, (iii) failure by the Respondent to comply with the terms of the order. Upon proof of these requirements the presence of willfulness and bad faith on the part of the Respondent would normally be inferred, but the Respondent could rebut this inference by contrary proof on a balance of probabilities. Perhaps the most comprehensive of the elements of civil contempt was stated by the learned authors of the book Contempt in Modern New Zealand who succinctly stated:-

"There are essentially four elements that must be proved to make the case for civil contempt. The applicant must prove to the required standard (in civil contempt cases which is higher than civil cases) that:-

(a) the terms of the order (or injunction or undertaking) were clear and unambiguous and were binding on the defendant;

- (b) the defendant had knowledge of or proper notice of the terms of the order;**
- (c) the defendant has acted in breach of the terms of the order; and**
- (d) the defendant's conduct was deliberate.**

17. On the Standard of Proof required in a matter such as this, the Court of Appeal in the case of ***Mutitika -vs- Baharini Farm Limited (1985) KLR 229, 234***, held as follows:

“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.... 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 an offence which can be said to be quasi - criminal in nature. The rationale for this standard is that if cited for contempt, and the prayer sought is for committal to jail, the liberty of the contemnor will be affected. As such, the standard of proof is higher than the standard in civil cases. This power, to commit a person to

jail, must be exercised with utmost care, and exercised only as a last resort. It is of utmost importance, therefore, for the respondents to establish that the alleged contemnors conduct was deliberate, in the sense that he or she willfully acted in a manner that flouted the court order.”

18. In the matter herein, it was not in dispute that in a judgment rendered on the said 26th day of February 2024, the Honorable Justice L. Naikuni found merit in the Petition dated 9th November 2022 and faulted the decision of the 1st Respondent granting the 2nd Respondent access to the Petitioner’s properties known as Mombasa/MS/Block I/107 and 108 before compensating the Petitioner. In particular, the Learned Judge proceeded to grant prayers (e), (h) and (i) of the Petition as follows:

“e. That an order of mandatory injunction and and is hereby issued to compel the 1st and 2nd Respondents to pay full, adequate, fair, reasonable and just compensation to the Petitioner for the compulsory acquisition of the Petitioner's properties known as MSA/MS/ Block

1/107 (Mombasa/ Mainland South/Block 1/107) and MSA/MS/Block 1/108 (Mombasa/Mainland South/ Block I/108) situate in Likoni in Mombasa County within the next thirty (30) days from the delivery of this Judgment.

h. That an order be and is hereby issued that the valuation of the suit land be undertaken, the value of which shall be paid to the Petitioner by the 1st Respondent within the next 30 days of this Judgment.

i. That an order is hereby issued that the Petitioner be awarded general and exemplary damages at 5% of the value of the suit property arising from the delay in the payment of the award of compensation from the compulsory acquisition of the suit land being that the same was not.”

19. It was apparent that despite the strict timelines given by the court, some one (1) year down the line, the Petitioner was yet to be compensated as directed. It was then that the Petitioner instituted this application urging the court to summon the named individual officers to show cause why

they should not be committed to civil jail for up to six (6) months for disobeying the court's orders.

20. From a perusal of the record herein it is apparent that the judgment was delivered in the absence of the Respondents. Cognisant of that fact, the Petitioner asserts that the 1st and 2nd Respondents together with all their senior, relevant and concerned officers were served with the decree and a letter dated 19th April 2024 and that they were therefore aware of the said orders. As to the mode of service, the Petitioner's director Alnoor Habib Jiwan avers as follows at Paragraphs 3 and 4 of the Supporting Affidavit:

“3. I am aware and have been informed by Mr. Willis Oluga, Advocate which information I verify believe to be correct, that the Petitioner's advocates extracted the decree containing the above orders and served the same upon the National Land Commission, the 1st Respondent herein and Rachier & Amollo LLP Advocates on behalf of the 2nd Respondent, Annexed herewith and marked as “AJ2” is a true copy of the duly served decree which bears the stamp of the said recipients.”

4. I am aware and have been informed by Mr. Willis Oluga Advocate which information I verily believe to be correct, that the service of the decree was effected on 18th April 2024 by Mr. Gordon Odhiambo, a licenced court process server. Annexed herewith and marked as "AJ3" is a true copy of the Affidavit of Service."

21. I have looked at the annexed affidavit of the Process Server sworn on 19th March 2024. In regard to the 1st Respondent, he deposes at paragraph 5 thereof as follows:

"5. That on the same day, 18th March 2024, I effected service of the decree upon the Legal Registry of the National Land Commissions (sic)."

22. In respect of service of orders issued by the Courts, Order 48 Rule 2 of the Civil Procedure Rules provides as follows:

"All orders, notices and documents required by these Rules to be given to or served on any person shall, save where other provision is made, be served in the manner provided for the service of summons."

23. Order 5 Rule 3 of the Civil Procedure Rules on the other hand provides as follows:

“Subject to any other written law, where the suit is against a corporation the summons may be served—

(a) on the secretary, director or other principal officer of the corporation; or

(b) if the process server is unable to find any of the officers of the corporation mentioned in rule 3(a)—

(i) by leaving it at the registered office of the corporation;

(ii) by sending it by prepaid registered post or by a licensed courier service provider approved by the court to the registered postal address of the corporation;

(iii) if there is no registered office and no registered office or physical address of the corporation, by leaving it at the

place where the corporation carries on business; or

(iv) by sending it by registered post to the last known postal address of the corporation.

24. As it were, by virtue of Article 252 as read with Article 253 (a) of the Constitution, the 1st Respondent being a Constitutional Commission is a body corporate with perpetual succession. That being the case, the provisions of Order 5 Rule 3 of the Civil Procedure Rules as cited hereinabove would apply to it and to service of its Commissioners and other principal officers.

25. In the matter herein, there was no evidence of service of the court orders on the Secretary of the 1st Respondent or any of its Commissioners and/or officers. As the Court of Appeal stated in the case of ***Nyamodi Ochieng Nyamogo & Another -vs- Kenya Posts & Telecommunications Corporation (1994) KECA 114 (KLR)***:

“The law on the question of service of order stresses the necessity of personal service. In Halsbury’s Laws of England (4th Ed) Vol 9 on p 37 para 61 it is stated:

“61. Necessity of personal service. As a general rule, no order of court requiring a person to do or abstain from doing any act may be enforced unless a copy of the order has been served personally on the person required to do or abstain from doing the act in question.

Where the order is made against a company, the order may only be enforced against an officer of the company if this particular officer has been served personally with a copy of the order.

Keeping the importance of personal service of the order in mind we now take a look at the aforesaid two copies of the order both of which bear the stamp of Wetangula & Co Advocates, in acknowledgement of receipt of the said orders. Service on Wetangula & Co does not constitute personal service on any of the three officers. It is a personal service on each one of them that is required to be effected by law. Service of the two

orders on Wetangula & Co, Advocates, on 25th October, 1993, and 1st November, 1993, therefore, is a wasted effort.”

26. A similar position applied in the case of the 2nd Respondent. At paragraph 3 and 4 of the Affidavit of Service of the Process Server, he deposes as follows:

“3. That I travelled to Nairobi on 17th March 2024 and spent there; and

4. That the following day, on 18th March 2024, I proceeded to the offices of Rachier & Amollo LLP Advocates at Mayfair Centre along Ralph Bunche Road where I effected service of the decree on the said firm.”

27. There was again in this case no personal service upon the Director General of the 2nd Respondent who is sought to be cited herein for contempt. As the Court of Appeal did find in the Nyamodi Ochieng Nyamogo case (supra), such service upon the Law Firm was a wasted effort.

28. In my considered view all the alleged contemnors herein ought to have been personally served with the decree if the

Petitioner intended to bring contempt proceedings against them as individuals. Otherwise I was not persuaded that the persons cited herein had knowledge of or proper notice of the terms of the orders issued herein on 26th February 2024.

29. In addition, it was clear to me that the Respondents were not sufficiently warned of the consequences of their failure to comply with the decree. A perusal of the decree said to have been served by the Process Server upon the Respondents did not incorporate a penal notice notifying the parties of the consequences of failure to abide therewith. The mandatory nature of such a notice was emphasized by the Court of Appeal in the Nyamodi Ochieng Nyamogo Case (Supra) where the court expressed itself thus:

“This Court in Court of Appeal Civil Appeal No 95/1988 Mwangi H C Wang’onde v Nairobi City Commission (UR) confirmed the mandatory nature of the requirement of endorsement of notice of penal consequence on the order in the following words:

“In the present case, according to the affidavit of the appellant sworn on 26th January, 1988, in support of his application, the order alleged to

have been disobeyed by the respondent was served on the respondent on 31st August, 1987, and a copy of that order which was annexed to the affidavit did not carry a notice of the penal consequences of disobedience as required by the Rules. It is clear from this that the appellant did not comply with the mandatory provisions of section 5(1) of the Judicature Act with the result that his application was incompetent. It must follow that there was no valid application for contempt of court before the judge.”

30. In the matter herein, while the court sympathizes with the position in which the Petitioner finds itself herein, I was not persuaded that there was willful failure to comply with the court orders on the side of any of those cited herein.
31. In the premises, I did not find merit in the Motion dated 17th March 2025 and I hereby dismiss the same.
32. For the ends of justice and in order that the Petitioner is not left with any recourse in law, the 1st and 2nd Respondents are hereby directed to comply fully with the orders issued herein on 26th February 2024 within 90 days from today.
33. Each party shall bear their own costs.

Ruling dated, signed and delivered in open court and virtually at Mombasa this 11th day of December, 2025

.....
J.O. OLOLA
JUDGE

In the presence of:

- a) Ms. Firdaus Court Assistant.
- b) Mr. Oluga Advocate for the Petitioners
- c) Mr. Nderitu Advocate for the Alleged Contemnors
- d) Mr. Wahome Advocate for the 2nd Respondents

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