



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT**

**AT MOMBASA**

**ELC CASE NO. 4 OF 2007**

**SERGIO LIEMAN.....PLAINTIFF**

**VERSUS**

**1. TONICA INVESTMENTS LTD.**

**2. NATIONAL MUSEUMS OF KENYA.....DEFENDANTS**

**RULING**

1. The notice of motion dated 26<sup>th</sup> April 2017 was filed by the plaintiff. It sought orders that Dr. Mzalendo Kibunja be committed to Civil Jail for a period of six (6) months or such period as the court deems fit. The plaintiff also prayed that the court makes such orders as the justice of the case may demand.

2. The motion is premised on the grounds inter alia that the contemnor has and continues to disobey the orders of this court given on 12<sup>th</sup> June 2015 from the date of service. The application was also hinged on the affidavit of Sergio Lieman, the plaintiff. Mr Lieman deposed that since 30<sup>th</sup> July 2015, the 2<sup>nd</sup> defendant has not taken any steps and/or further steps to open up the access road as ordered by the court.

3. The 2<sup>nd</sup> defendant against whom the order is sought opposed the application vide his replying affidavit dated 19<sup>th</sup> July 2017. Dr. Mzalendo Kibunja denied being in contempt of the orders of the court. Instead he deposed that they have been unable to comply with the court order mainly on the following two reasons;

**(i) The opening of the road as per the surveyed maps will contravene the mandate of the 2<sup>nd</sup> defendant in so far as its role to manage, protect and conserve monuments cultural and national heritage of Kenya is concerned. This is premised on the findings of their report annexed as SL 5(a) which confirmed that this road passes through a path filled with natural trees, dense bush and ancient ruins on either side standing or buried (from archaeological point of view).**

**(ii) That the 2<sup>nd</sup> defendant have no funds for purposes of clearing the bushes and trees along the access road and since the plaintiff had rejected the recommended alternative access as per the aforementioned report, 2<sup>nd</sup> defendant allowed the plaintiff to clear the trees along the surveyed roads under their supervision to ensure there was no encroachment beyond the designated access with the rescue team salvaging any archaeological materials that might be excavated from the ground.**

4. It is indeed true that on 12<sup>th</sup> June 2015 this court made a site visit to understand the nature of the dispute. The same was done in the presence of the parties and their advocates. On this day, the 2<sup>nd</sup> defendant admitted the existence of the disputed road as per the survey maps available. Mr. Mogaka informed the court that their client wished to have an E.I.A done to establish the impact of opening that road. Parties agreed to this proposal and consequently part 2 of the order provided that NEMA does an E.I.A report within 30 days of being served and file the same in court.

5. The consent order recorded that the access road should be opened as it appears in the survey map which map all the parties had. That to allow for the clearance of the undergrowths, the 2<sup>nd</sup> defendant in collaboration with NEMA (as the agency in charge of co-ordinating management of all natural resources) to immediately undertake an E.I.A on the trees/bushes that were to be cleared and decide what to do with the trees that were cut. The E.I.A report was to be filed in court within 30 days from the date the order was served on NEMA. The court was to make further orders on opening of the road upon receipt of the report.

6. When the matter came up in court next on 30<sup>th</sup> July 2015, the report given to the court by the advocates was by the advocates was that a substantial part of the road had been cleared and the process was still on-going. From the reading of the order of 12<sup>th</sup> June 2015, I find three issues were settled to be done;

**(a) Carrying out of an E.I.A report and the filing of the same in court after engaging NEMA.**

**(b) The 2<sup>nd</sup> defendant together with NEMA were to undertake out supervisory role during the clearing exercise so that the cut trees (read and or excavated ruins) are preserved and or protected and or handled in the best way that was environmentally friendly.**

**(c) The court giving further orders on opening of the road after the filing of the E.I.A report.**

7. What appears to have happened however is that parties got the work of pening the road rolling on and began clearing exercise. No mention was thus made on 30<sup>th</sup> July 2015 whether NEMA had been served and if an E.I.A report had been prepared and filed. The problems occurred only when the ongoing process stalled as reported in the proceedings of 22<sup>nd</sup> September 2015. The question then arises whether the 2<sup>nd</sup> defendant is in contempt of the orders of 12<sup>th</sup> June 2015 as issued. My answer is on the negative for the reasons I give in the subsequent paragraphs.

8. The Plaintiff appears to have interpreted the impugned order that the 2<sup>nd</sup> defendant had been directed to open the access road. Assuming this presumptions was correct, the exercise ought not to have been undertaken unless the E.I.A report had been filed and the court giving further orders. The 2<sup>nd</sup> defendant deposed that this report was prepared but was never field due to the negotiations that were on-going between the parties. Under these state of affairs where the E.I.A report has not been filed it is my considered opinion that the application for contempt is premature.

9. Secondly, if the parties opted to clear the road irregardless of further orders of this court, the 2<sup>nd</sup> defendant did commence the exercise and when the project stalled, it allowed/granted permission to the plaintiff to continue on condition of supervision from its technical team. The plaintiff on its part did not take up this offer/responsibility. This suit has not been heard on its merits so that we have a conclusion reached that the 2<sup>nd</sup> defendant is indeed obligated to open the access road. The presumption made by the plaintiff that the 2<sup>nd</sup> defendant was under a duty pursuant to the Order of 12<sup>th</sup> July 2015 was made in error as it is clear from the order that this court made no such directive.

10. In contempt proceedings, it is settled law that a party cannot be punished for contempt which is not proved and that the balance of proof required in contempt proceedings is above the standard that is applicable in civil cases see holding in **(Mutilaka –versus- Baharini Farm Ltd (1985) KLR 227)**. In summary, I find that the application for contempt by the plaintiff was prematurely brought as the acts of contempt complained of had not matured. Accordingly, I decline to commit Dr. Mzalendo Kibunja as prayed. The application is hereby dismissed with costs to the 2<sup>nd</sup> Defendant/Respondent.

**Dated, Signed and Delivered at Mombasa this 14<sup>th</sup> day of June 2019.**

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**A. OMOLLO**

**JUDGE.**