



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

MISC. APPLICATION NO. 3 OF 2019

JOSEPH MUGERA NYAMU (Suing on behalf of himself

and all other members of a group known as

NGUCWI & MIUU TRADING COMPANYAPPLICANT

VERSUS

THE PRINCIPAL SECRETARY MINISTRY OF LANDS.....1ST RESPONDENT

CHIEF LANDS ADJUDICATOR.....2ND RESPONDENT

DISTRICT LANDS ADJUDICATOR, MBEERE DISTRICT.....3RD RESPONDENT

RULING

This is the determination of a Notice of Motion dated 6th December 2017 seeking the following orders:

(1) Spent.

(2) That this Honourable Court be pleased to find the Respondent guilty of contempt of Court for failure to comply with the judgment of this Honourable Court dated 2nd November 2007 and the decree issued on 2nd November 2016.

(3) That this Honourable Court be pleased to commit the Respondent to civil jail for contempt of Court orders issued on 2nd November 2007 and the subsequent decree issued on 2nd November 2016.

(4) That the costs of this application be borne by the said Respondents.

The application is premised on 11 (eleven) grounds shown on the face of the said application and an affidavit sworn by Joseph Mugera Nyamu on 6th December 2017. The said application is supported by a 52 page Ruling by Hon. Mr. Justice Isaac Lenaola (as he then was) in HCCC No. 71 of 2006 (Meru) formerly HCCC No. 19 of 2005 (Embu).

According to the Applicants, they had been living in the suit property described as Land Reference No. NGARIAMA/LOWER NGARIAMA/431 measuring about 17,000 acres and it constituted their ancestral home since time immemorial until they were forcefully and violently evicted.

The Applicants further contends that they initiated civil proceedings in 1978 seeking redress from their trustee, Kirinyaga County Council and Ngariama Ranching Society vide HCCC No. 800 of 1978 (Nairobi). Later on, that case was consolidated with ELC No. 71B of 2014 (formerly HCCC No. 71 of 2006, Embu HCCC No. 19 of 2005) Embu HCCC No. 41 of 1998 and HCCC No. 57 of 2000. A ruling was issued on 2nd November 2007 by Hon. Justice Lenaola (as he then was) in which the following orders were given:

(a) That the County Council of Kirinyaga immediately, it is has not commenced the process of setting apart the disputed land including setting up of divisional committees, upon that action being finalized, the leasehold interest by South Ngariama Ranching Scheme will lapse.

(b) That thereafter and since it was agreed that the land should be sub-divided, the process envisaged by both the Trust Land Act, Cap 288 and the Land Adjudication Act, Cap. 284 should be faithfully adhered to with full participation so far as possible, of all parties to this litigation. The process should lead to the ascertainment of all interested persons and their interests properly

resolved.

(c) That thereafter, the ascertained interests should be lawfully registered.

(d) That in order for this Court to keep an eye on all the processes, each party is at liberty to apply and in the meantime a mention date should be mutually agreed upon for further orders and/or directions. In the meantime and pending registration of all lawful interests, the status quo obtaining as of today should be maintained.

(e) That each party should bear its own costs as none can be said to have succeeded in any of the suits instituted by any of them against any of them.

It is further deponed that a decree on the said Court order was issued by the High Court of Kenya at Embu on 2/11/2016 which was served upon the Department of Land Adjudication and Settlement, main Registry on 13th September 2017 and on 18th September 2017 to the District Land Adjudicator and Settlement, Mbeere District.

The order and the decree was also directed upon the Department of Land Adjudication and Settlement and the District Land Adjudicator and Settlement to comply fully with the orders of 2nd November 2007.

A Notice of penal consequences dated 5th September 2017 outlining that any party served with the said order and disobeys the same shall be guilty of contempt of Court and liable to imprisonment for a term not exceeding six (6) months or both fine and imprisonment was issued and also served upon the Department of Land Adjudication and Settlement, main Registry on 13th September 2017 and on 18th September 2017 to the District Land Adjudicator and Settlement, Mbeere District.

The Applicants contend that the Principal Secretary, Ministry of Lands, Chief Lands Adjudicator and the District Lands Adjudicator, Mbeere District have a public duty to obey orders of this Honourable Court and any other Court of competent jurisdiction and that their disobedience of a valid Court order is in breach of that duty.

The Applicants state that the conduct of the said Principal Secretary, Ministry of Lands, Chief Lands Adjudicator and the District Lands Adjudicator, Mbeere District amounts to disobedience of the Court's order and decree and exposes the dignity of the Court to public ridicule.

In conclusion, the Applicants urged that the interest of justice demands that this Honourable Court do issue summons upon the said Principal Secretary, Ministry of Lands, Chief Lands Adjudicator and the District Lands Adjudicator, Mbeere District to show cause why they should not be committed to civil jail for contempt.

In reply to that application, the acting Director, Land Adjudication and Settlement within the Ministry of lands and Physical Planning, one Paul Mwangi Kiiru swore an affidavit stating that following the delivery of the judgment issued by Hon. Justice Lenaola on 2/11/2007, the Government sought to review the said judgment and set it aside vide an application dated 9th October 2012.

The Respondent further deponed that the judgment by Hon. Justice Lenaola did not immediately quash or nullify the leases to South Ngariama Ranching Co-operative Society Ltd and therefore the Gazettement as envisaged by the Court would give rise to further litigation over the same property meant to be adjudicated upon.

It was further deponed that on 29th May 2013, the Government sought to withdraw the application to pave way for implementation of the judgment by Hon. Justice Lenaola on 2nd November 2007.

The Respondent averred that during the withdrawal of the said application, the Court directed the office of the Attorney General to organize and invite stakeholders through their advocates for a series of meetings at which proposals on how to proceed with the matter would be made and explore how the parties could reach a consensus that would lead to closure of the matter.

Pursuant to the said directive, meetings were held between the Attorney General and representatives of the stakeholders involved on 26th July 2013 and 16th August 2013.

In the consultative meeting held on 16th August 2013, a proposal was made that a site visit to the contentious land by the members of the committee was vital to establish occupation and usage of the land which would be facilitated by the National Land Commission.

The Respondent gave a 42 paragraphs detailing what they have been doing towards the implementation of the said Court order.

ANALYSIS AND DETERMINATION

These proceedings for contempt are civil in nature which requires that an applicant must prove the elements beyond reasonable doubt, at least higher than the standard in civil cases. The requirement for proof beyond reasonable doubt is informed by the fact that the liberty of the defendants could be affected. The law therefore requires proving that the defendants conduct was deliberate in the sense that he deliberately or willfully acted in a manner that breached the order. The Applicants in this application are seeking to cite the Respondents for contempt. I am mindful that the power to commit for contempt is one that must be exercised with extreme care. Such an order should be exercised only as a last resort.

The other issue I wish to mention is that an application for committal to civil jail is quasi-criminal in nature where the applicant has to prove

the elements beyond reasonable doubt. The elements required to be proved in an application of this nature was clearly set out by the learned author of the book titled **“Contempt in Modern Zew Zealand” (Page 36 publications. law com.govt.NZ):**

“There are essentially four elements that must be proved to make the case for civil contempt. The applicant must prove to the required (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 defendants conduct was deliberate”.**

The acting Director Mr. Paul Mwangi Kiiru in his replying affidavit has clearly elaborated the efforts the Government embarked on implementation process of the judgment and decree of this Court. Those depositions on oath have not been controverted by the Applicants. The acting Director Land Adjudication and Settlement officer has also stated that from the judgment and decree of this Court, both the National and County Government should put in place a mechanism to ensure implementation of the decree. I find that the Applicants have not proved the elements required to commit the Respondent to civil jail for contempt of the orders of this Honourable Court. In the contrary the Respondent has explained the mechanism the Government has put in place to implement the same. I would also wish to state that the Applicant has not shown that the Respondent who is sought to be cited for contempt was served with the order complained of and a penal notice indicating the consequence of his failure to obey the same. That was the reasoning in the case of **DANIEL MANUEL MURIGI VS KENYA RAILWAYS CORPORATION [2008] e KLR** where the Court held as follows:

“In the proceedings of this nature the applicant must prove personal service upon the contemnor in order to succeed. Although the contemnor is aware of the orders allegedly disobeyed going by the evidence on record, he has not been personally served and the applicant cannot succeed in this application. The applicant must adhere to the strict procedure laid down in order to succeed in the proceedings of this nature”.

Again in the case of **REPUBLIC VS COUNTY CHIEF OFFICER, FINANCE & ECONOMIC PLANNING, NAIROBE CITY COUNCIL EX-PARTE STANLEY MUTURI [2017] e KLR, ODUNGA J.** held as follows;

“It is therefore clear that before any civil contempt of Court proceedings are instituted in disobedience of a judgment, decree or order, the applicant must first move the Court to issue a notice of show cause against the accounting officer of the State organ, Government Department, Ministry or Corporation concerned. Such notice is to be served on both the Accounting officer and the Attorney General. If no response to the notice is received, the Court may then at the expiry of the said “thirty days” notice proceed to commence contempt of Court proceedings against the concerned Accounting officer. In my view the “thirty days” period is meant to enable the Attorney General to give legal advice to the entity concerned and this avoid the necessity of contempt proceedings. Where however the entity believes that contempt of Court proceedings ought not be commenced, the entity is required to within the said period show cause in my view preferably by way of an affidavit why the said proceedings ought not to be commenced. The Court will then determine whether the cause has been shown or not based on the material before it. Without the rules of procedure having been promulgated, it is therefore my view that an application for notice ought to be accompanied by an affidavit and that application may be heard ex-parte since the merits thereon may be dealt with when the cause is shown by the entity or public officer concerned”.

I agree with the decision of the Learned Judge. The Applicant in this case failed to demonstrate that he served the contemnor personally with the order and penal notice. The Applicant simply averred that the decree was served to the Department of Land Adjudication and Settlement, main Registry on 113th September 2017 and on 18th September 2017 to the District Land Adjudication and Settlement Mbeere District. There is no indication that the contemnor who is the Accounting officer sought to be cited for contempt was personally served. It has been decided in numerous decisions of this Court that proceedings of this nature require prove of personal service upon the contemnor in order to succeed.

For the reasons I have given above, I find and hold that the Applicant having failed to effect personal service upon the alleged contemnor, the application must fail and the same is hereby dismissed with no order as to costs.

DATED and SIGNED at Kerugoya in open Court this 19th day of July, 2019.

E.C. CHERONO

ELC JUDGE

19TH JULY, 2019

In the presence of;

1. Mr. Dachi holding brief for Mr. Muriithi for Applicant

2. Respondent