



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISUMU

ELC PETITION CASE NO. 10 OF 2019

IN THE MATTER OF THE CONSTITUTION OF THE REPUBLIC OF KENYA

AND

IN THE MATTER OF ARTICLE 2 (1) (2) (4) (5) (6) ARTICLE 3 (1) ARTICLE 20 (1) (2)

(3) (4) ARTICLE 21 (1) ARTICLE 22 (1) (3) (4) ARTICLE 23 (1) (3) ARTICLE 24 (1)

(2) (3) ARTICLE 40, ARTICLE 50 (1) ARTICLE 60 (1) (b) AND ARTICLE 64 (b)

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL

RIGHTS OF AN INDIVIDUAL AS ENSHRINED IN ARTICLES

40 & 47 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE LAND REGISTRATION ACT SECTIONS 24, 25 & 26

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF FUNDAMENTAL

RIGHTS AND FREEDOMS OF THE INDIVIDUAL) HIGH COURT PRACTICE

RULES, 2006 AS READ WITH CLAUSE 19 OF THE CONSTITUTION OF THE

REPUBLIC OF KENYA TRANSITIONAL CLAUSE AND COSNEQUENTIAL

PROVISIONS OF THE SCHEDUEL TO THE CONSTITUTION

BETWEEN

KATANGI DEVELOPERS LIMITED.....PETITIONER

VERSUS

THE ATTORNEY GENERAL.....1ST RESPONDENT

KENYA RAILWAYS CORPORATION.....2ND RESPONDENT

RULING

PETITIONERS CASE

The application before court is dated 18/10/2019 wherein the Petitioner seeks orders that **the Principal Secretary Ministry of Interior and Co-ordination of National Government be arrested and/or committed to civil jail for such time as the Honorable Court shall deem just and expedient for being in disobedience of this Honorable Courts' orders of the 27th day of September 2019 and 7th October, 2019. The Managing Director and the Corporation Secretary of the Kenya Railways Corporation be arrested and/or committed to civil jail for such time as the Honorable Court shall deem just and expedient for being in disobedience of this Honorable court's orders of the 27th day of September, 2019 and 7th October, 2019. The Inspector General of Police to enforce these orders by arresting and prosecuting the above cited contemnors and bringing them to court for sentencing and committal. The costs of this application be paid by the Respondents in any event.**

The application is based on grounds that **this Honourable Court issued mandatory orders directed at the Respondents on the 27th day of September 2019 compelling the Cabinet Secretary for Interior/Coordination of National Government, the Cabinet Secretary for Transport, Infrastructure, Housing and Urban Development and the Managing Director Kenya Railways Corporation by themselves, their subordinates, agents, representatives and any other person acting on their instructions or directions to remove 20 metres of the fence, barrier, blockade, blockage, beacon, beacon marks and any other objects hitherto blocking, barring, impeding or interfering with access ingress or egress to or from the properties of the Petitioner registered as Kisumu Municipality/Blok 7/414, 415, 417, 419, 420, 421, 422, 424, 425, 426, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439 and 440^o.**

On 7th October, 2019 the Honorable Court ordered the Respondents to comply with the said order within 10 days.

The extracted order of 27th September 2019 was served on the State Counsel for the 1st Respondent and also on the Corporation Secretary of the 2nd Respondent on the 1st of October, 2019 and on the advocates on the 2nd Respondent on 2nd October, 2019.

The State Counsel and the advocates of the 2nd Respondent were personally present in court when the orders were made. The Respondents have refused to comply with the said orders. The Respondents have compounded their disobedience by erecting more barriers on the Petitioner's only access to is go downs thereby aggravating the Petitioner's pain, loss and damages.

The Respondents have by their actions made it clear that they will not comply with the court's orders unless punitive measures are threatened or actually taken against them.

The orders prayed for herein are necessary in order to preserve the dignity of this Honourable Court and to uphold the rule of law.

The application is supported by the affidavit of Dipak Panachand Shah who reiterates the contents of the grounds.

1ST RESPONDENTS CASE

The 1st Respondent filed grounds of opposition and a replying affidavit of Dr Engineer Kibicho stating that there is no evidence of service of the court order. Dr. (Eng) Karanja Kibich states that the Ministry is not a party to the petitioner and that he did not participate in the alleged activities that involving the suit property of land. He states that the National Youth Service that erected the fence is not domiciled in the state department of interior and Citizen services.

2ND RESPONDENTS CASE

David Njogu the legal manager of Kenya Railways Corporation filed a replying affidavit stating that the application is technically defected and the applicants do not deserve the orders sought. The deponent states that he was not served with court orders made on 27/09/2019 and 7/10/2019. He states that he was not the one who fenced the Petitioners suit land. The 2nd Respondent states that the complaint is against a multi-agency unit of the government. The order was never served properly.

SUBMISSIONS

The applicant submitted that this court issued a mandatory order in the presence of counsel or the parties **compelling the Cabinet Secretary for Interior/Coordination of National Government, the Cabinet Secretary for Transport, Infrastructure, Housing and Urban Development and the Managing Director Kenya Railways Corporation by themselves, their subordinates, agents, representatives and any other person acting on their instructions or directions to remove 20 metres of the fence, barrier, blockade, blockage, beacon, beacon marks and any other objects hitherto blocking, barring, impeding or interfering with access ingress or egress to or from the properties of the Petitioner registered as Kisumu Municipality/Blok 7/414, 415, 417, 419, 420, 421, 422, 424, 425, 426, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439 and 440^o.**

According to the applicant, none of the Counsel raised any issue regarding the same. The said order was extracted and served on the 1st Respondent's advocates on 27/9/2019 on the Corporation Secretary of the 2nd Respondent on 1/10/2019 and on their advocates on 2/10/2019. The motion came up for mention on 7/10/2019 when the Petitioner's advocate raised the issue of non-compliance with the Court's order for creation of access for the Petitioner by both Respondents.

The advocate for the 1st Respondent is on record as saying that she believed her clients had complied. The advocate for the 2nd Respondent stated that he could not comment on the averment by the Petitioner's advocate that there was non-compliance by his client in the absence of a formal application. Neither counsel said that they were unaware of the order or that it had not been served on their client or that their client

had not been made aware thereof by anybody including themselves. The petitioner submits that upto the time of filing these submissions the order has not been complied with hence this motion for contempt. The court ordered the Respondents to comply within ten (10) days.

When the Respondents were served with the motion, they decided to embark on a course of subjecting this Honourable Court to ridicule and utter disrespect. With regard to the 1st Respondent his advocate has filed only grounds of opposition. He does not deny that the order that the Multi-sectorial Agency open an access for the Petitioner was made. Nor does he deny that the order has not been complied with.

According to the applicant, the grounds of opposition are purporting to raise legal niceties by alleging that there has been no service of the extracted order on the Principal Secretary for Interior and Co-ordination of National Government. The said Principal Secretary is the Executive Officer charged with responsibility of implementing The Ministry's obligations including effecting Court Orders.

The Petition, the Notice of Motion of 16/9/2019 the order and this application were served on its Corporation secretary the 2nd Respondent has brazenly chosen to get David Njogu a Legal Service Manager to swear an affidavit denying that the Corporation Secretary was served with the order yet she was served.

The 1st Respondent submits that the notice of motion dated 18/10/2019 is defective bad in law and abuse of court processes as the Ministry of Interior and Coordination of National Government did not erect any fence or barrier or block any access roads to the suit property of land. The fence is erected by the National Youth Service. The 1st Respondent further submits that no order was extracted and served to enable counsel to act.

The 2nd Respondent submits that the orders dated 27/09/2019 were not clear on the timelines within which to remove the fence. It is submitted that the order was neither extracted nor served upon the 2nd respondent. The 2nd respondent further submits that the order was never extracted nor served. The 2nd Defendant submits that they are not the one who fenced off the land hence can't be held liable in contempt.

ANALYSIS AND DETERMINATION

According to the Black's Law Dictionary **Contempt is "a disregard of, disobedience to, the rules or orders of a legislative or judicial body, or an interruption of its proceedings by disorderly behavior or insolvent language, in its presence or so near thereto as to disturb the proceedings or to impair the respect due to such a body"**

The case of **Econet wireless Kenya Limited Vs minister for information & Communication of Kenya & Another**, the court stated as follows;

"It is essential for the maintenance of the rule of law and order that the authority and the dignity of our courts are upheld at all times. The court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors. It is the plain and unqualified obligation of every person against or in respect of whom, an order is made by the 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 void."

Again, in the case of **Teachers Service Commission Vs Kenya National Union of Teachers & 2 others (2013) eKLR Ndolo J** observed that;

"The reasons why courts will punish for contempt of court then is to safeguard the rule of law which is fundamental in the administration of Justice. It has nothing to do with the integrity of the judiciary or the court or even the personal ego of the presiding Judge. Neither is it about placating the applicant who moves the court by taking out contempt proceedings. It is about preserving and safeguard the rule of law"

The judge went further to state;

"I am of the same persuasion that the reason why power is vested in courts to punish for contempt of court is to safeguard the rule of law which is fundamental in the administration of justice. The law of contempt has evolved over time in order to maintain the supremacy of the law and the respect for law and the respect for law and order. As it was in the time of Chief Justice Mckean in 1786 so it is today that courts have a duty to ensure that Citizens bend to the law and not vice versa./ Indeed, if respect for law and order never existed, life in society would be but short, brutish and nasty. It is the supremacy of the law and the ultimate administration of justice that is usually under challenge when contempt of court is committed. This is so because, a party who obtains an order from court must be certain that the order will be obeyed by those to whom it is directed. As such, the obedience of a court order is fundamental to the administration of justice and the rule of law. A court order once issued binds all and sundry, the mighty and the lowly equally, without exception. An order is meant to be obeyed and not otherwise."

I have carefully considered the application and the replying affidavits and the rival submissions and do find that this land is allegedly owned by Kenya Railways Corporation and has been fenced off by National Youth Service.

The petitioners also allege to own part of the land that has been fenced therein. The court visited the site and had a pictorial view of the same. The court ordered the 1st and 2nd respondents to open a 20-meter road to allow petitioners access to their alleged parcels of land pending the hearing of the petition. The Respondents have failed to comply with the order. This court made the order in the presence of all

counsel and therefore no party can feign ignorance. The extracted order was served upon the Attorney General and the Corporation secretary on 1/10/2019. I do find the affidavit of Jotham Okidi to be truthful and I believe the corporation secretary was served.

The order is clear and unambiguous but has not been complied with. The respondents do not show any interest to comply with the court order. I do grant orders that:

1. The Principal Secretary Ministry of Interior and Co-ordination of National Government be committed to civil jail for one month for being in disobedience of this Honorable Courts' orders of the 27th day of September 2019 and 7th October, 2019. In the alternative the principal secretary to pay a fine of Ksh 200,000.

2. The Managing Director and the Corporation Secretary of the Kenya Railways Corporation, each be committed to civil jail for a period of one month for being in disobedience of this Honorable court's orders of the 27th day of September, 2019 and 7th October, 2019. In the alternative each to pay a fine of Ksh 200,000.

3. The Inspector General of Police to enforce these orders by arresting the above cited contemnors and bringing them to court for committal.

4. Costs of the application to be borne by P.S. Ministry of Interior and Coordination of National Government and the managing director Kenya Railways. Orders accordingly.

A. O. OMBWAYO

ENVIRONMENT & LAND

JUDGE

DATED AND DELIVERED THIS 15TH DAY OF NOVEMBER, 2019.

In the presence of:

Mr Qeu for Wasuna for the applicant

M/S Lang'at for first respondent

Mr. Juma for 2nd Respondent.

A. O. OMBWAYO

ENVIRONMENT & LAND

JUDGE