



REPUBLIC OF KENYA.

IN THE ENVIRONMENT & LAND COURT AT KISII.

MISCELLANEOUS CIVIL APPLICATION NO.11 OF 2019

In the matter of an application for enforcement of the order of this Honourable court given on 31st October, 2017 in Kisii ELC Misc. Civil Appl. No.4 of 2017 (Judicial Review)

In the matter of section 5 of the Judicature Act – Cap 8 of the Laws of Kenya.

In the matter of section 3A of the Civil Procedure Act – Cap 21 of the Laws of Kenya.

In the matter of Articles 1(3)(c), 10, 40, 47 and 159 of the Constitution of Kenya, 2010.

In the matter of the Civil Procedure Rules of England and Practice Directions thereunder as applicable

A. JIWA SHAMJI LIMITED.....APPLICANT

VERSUS

THE CHAIR, NATIONAL LAND COMMISSION.....1ST RESPONDENT

CHIEF LAND REGISTRAR.....2ND RESPONDENT

PACIFICA MWANGO.....3RD RESPONDENT

BIRIA MOKEIRA.....4TH RESPONDENT

ESTHER KEMUNTO GICHANA.....5TH RESPONDENT

MELLEN MOOCHI ONSONGO.....6TH RESPONDENT

KENNEDY AMWOMA SIMEON.....7TH RESPONDENT

JANE MORAA SIMEON.....8TH RESPONDENT

MARICELLA KERUBO NYAANGA.....9TH RESPONDENT

CLEMENSIA RUTH SIMON.....10TH RESPONDENT

LAND REGISTRAR, KISII COUNTY11TH RESPONDENT

DIRECTOR OF LAND SURVEYS12TH RESPONDENT

DIRECTOR OF LAND ADMINISTRATION.....13TH RESPONDENT

N.M. MACHARIA

(OFFICE OF THE DIRECTOR OF SURVEYS).....4TH RESPONDENT

RULING

INTRODUCTION

1. This ruling is in respect of the Plaintiff's Notice of Motion dated 13th May, 2019 brought pursuant to Section 5 of the Judicature Act, Cap 8 of the Laws of Kenya, Section 3A of the Civil Procedure Act Cap 21 of the Laws of Kenya Article 1(3) (c), 10, 40,47 and 159 of the Constitution of Kenya 2010, the Civil Procedure Rules of England and Practice directions applicable. The applicant seeks the following orders:

- a) Spent
- b) Spent
- c) The Respondents/contemnors be punished for disobeying the order of this Honourable court given on 31st October, 2017
- d) Consequent upon (c) above, this Honourable court be pleased to sentence the Respondents /contemnors to imprisonment in jail for a term not exceeding six months
- e) Further to (d) above, this Honourable court be pleased to sentence the Respondents /contemnors to such fines as are appropriate and/or order the attachment and sale of their personal properties in satisfaction of such fines as may be meted out.
- f) In any event the Respondents /contemnors do purge their contempt by undoing/recalling their joint and several actions which have resulted in the revocation of the applicant's proprietary interest over land parcel No. L.R. No. Kisii Municipality/Block III/157 and vesting of the same upon the 3rd to the 10th Respondents/contemnors as a portion of the resultant Land parcel L.R No. Kisii Municipality/Block III/648.**
- g) Further to (b) above and in the alternative to (c), (d), (e) and (f) above, leave be granted to the applicant to commence substantive contempt proceedings against the Respondents for disobeying the court order of 31st October, 2017.
- h) The costs of this application be borne by the Respondents in any event.

2. The application is anchored on the grounds stated on the face of the Notice of Motion and the supporting affidavit of **Jamaludin S.A Shamji** sworn on the 13th May, 2019 in which the applicant has detailed the events and acts constituting the alleged contempt of the court order issued on 31.10.2017.

Despite being served with the application, and being granted time to file their response, the Respondents did not file any response. The application was canvassed by way of written submission and the applicant filed his submissions.

3. In order to put this matter into perspective, it is necessary to set out the background of the case.

4. The undisputed facts are that the applicant was at all material times the registered proprietor of the leasehold comprised in land parcel **L.R. No. Kisii Municipality/Block III/157** (hereinafter referred to as "parcel no.157").

5. By a Gazette Notice (Vol. CXIX – No.97), the National Land Commission after hearing a complaint lodged by the 3rd respondent, made a recommendation to the effect that the Chief Land Registrar revokes the title held by the applicant and vests the same in the 3rd Respondent herein.

6. The applicant being aggrieved by the recommendation of the National Land Commission filed Judicial Review Application No.4 of 2017.

7. When the application came up for leave to commence Judicial Review proceedings, the court issued an order on 31st October, 2017 in the following terms: -

“Leave is granted in terms of prayers (b) and (c) of the Chamber Summons and the leave so granted shall operate as a stay in terms of prayer (d) of the Chamber Summons, to wit, leave so granted to seek judicial review orders do operate as a stay upon implementation by the 2nd Respondent of the recommendation of the 1st Respondent published in Kenya Gazette Vol. CXIX – No.97 of 17th July, 2017 to the intent that the 2nd Respondent do revoke the ex parte applicant's title to land parcel Kisii Municipality/Block III/157 and the same be vested in the interested party in her capacity as administrator of the estate of Simon Kegesa”

8. The said order was served upon the National Land Commission, the Chief Land Registrar and the 3rd Respondent herein, as interested party, in JR 4 of 2017. The 1st Respondent subsequently filed a Memorandum of Appearance and a Replying Affidavit. The 2nd Respondent

did file any reply while the 3rd Respondent filed a Notice of Appointment of advocates, Replying Affidavit challenging the manner in which the applicants obtained their title. They also filed their submissions.

9. While the said order was still in existence, the 2nd Respondent caused parcel No.157 to be amalgamated with other parcels of land, namely **Kisii Municipality/Block III/289, 300, 301, 330, 599-606** to create Land parcel **No. Kisii Municipality/Block 3/648**. The 3rd – 10th Respondents had paid Kshs.500/= for registration and were notified by the 2nd Respondent to attend the 11th respondent's office to execute the lease and collect their lease document. It is at this point that the applicant filed the instant application against the Respondents.

ISSUES FOR DETERMINATION.

10. Having considered the Notice of Motion, supporting affidavit and the applicant's submissions, the singular issue for determination is whether the Respondents ought to be cited for contempt of the court order issued on 31st October, 2017.

ANALYSIS AND DETERMINATION

Black's Law Dictionary Ninth Edition) defines contempt of court as follows:-

“Conduct that defies the authority or dignity of a court. Because such conduct interferes with the administration of justice, it is punishable usually by fine for imprisonment”

11. The rationale for contempt orders is set out in the case of **Teachers Service Commission V Kenya National Union of Teachers & 2 others (2013) eKLR** where **Ndolo J** observed as follows:

“38.The reason why courts will punish for contempt of court 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 safeguarding the rule of law”

Furthermore, in **Econet Wireless Kenya Ltd VS Minister for Information & Communication of Kenya & Another (2005) 1 KLR 828 Ibrahim, J** (as he then was) stated:

“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 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 void”.

12. In the case of **Kenya Human Rights Commission V Attorney General and Another (2018) eKLR**, the Court observed as follows:

“Article 159 of the Constitution recognizes judicial authority of the courts and tribunals established under the Constitution. Courts and Tribunals exercise this authority on behalf of the people and for that reason they must not only be respected and obeyed but must also be complied with in order to enhance public confidence in the Judiciary which is vital for our Constitutional democracy. The Judiciary acts in accordance with the laws (Article 160) and exercises its authority through its judgments, decrees and orders or directions to check government power, keep it within the Constitutional stretch, hold the Legislature and Executive to account and thereby secure the rule of law, administration of justice and protection of Human rights. For that reason, the authority of the courts and dignity of their processes are maintained when court orders are obeyed and respected thus courts become effective in the discharge of their Constitutional mandate...”

*It is therefore a fundamental rule of law that court orders be obeyed and where an individual is enjoined by an order of the court to do or refrain from a particular act, he has a duty to carry out that order. The court has a duty to commit that individual for contempt of its orders where he deliberately fails to carry out such orders. See **Louis Ezekiel Hart V Chief George1 Ezekiel Hart SC 52/2983 2nd February, 1990**.”*

...The fact that the power to punish for contempt is inherent and not granted by statute follows the recognition by the Constitution in Article 159 that judicial authority is derived from the people and vests in and is exercised by courts and tribunals established by or under the Constitution”

13. In order to make a case for civil contempt the applicant must prove certain elements which were set out in the case of **Cecil Miller V Jackson Njeru (2017)**. The court cited the book entitled “Contempt in Modern New Zealand which sets out the elements of Civil contempt as follows:

- a) That the terms of the order (or injunction or undertaking) were clear and unambiguous and were binding on the defendant.
- b) That the Defendant had knowledge of or proper notice of the terms of the order.

c) That the Defendant acted in breach of the terms of the order.

d) That the Defendant's conduct was deliberate.

14. The Court of Appeal in the case of **Micheal Sistu Mwaura Kamau V Director of Public Prosecutions & 4 Others [2018] eKLR** restated the essentials required to be established in contempt proceedings as follows:-

The court must be satisfied that the alleged contemnor has willfully and deliberately disobeyed a court order that he was aware of. This was observed by the Supreme Court in **Republic v. Ahmad Abolfathi Mohammed & Another**. Secondly, as this Court emphasized in **Jihan Freighters Ltd V Hardware & General Stores Ltd** and in **A.B. & Another V R. B. [2016] eKLR**, to sustain committal for contempt of court, *the order of the court that is alleged to have been deliberately disobeyed must be clear and precise so as to leave no doubt as to what a party was supposed to do or to refrain from doing. Lastly, the standard of proof in committal proceedings is higher than proof on a balance of probabilities, though not as high as proof beyond reasonable doubt.* (See **Mutitika V Baharini Farm** (supra) and **Republic V Ahmad Abolfathi Mohammed & Another** (supra).

15. In order for the court to punish a party for contempt, it must apply the principles in the above authorities. I will therefore proceed to analyze the instant case against the said principles:

Were the terms of the order clear and unambiguous?

16. The order in question has been set out earlier in this ruling and in my considered view the terms are clear and unambiguous in that the order specifically stated that the leave would operate as a stay with regard to **implementation by the 2nd Respondent of the recommendation of the 1st Respondent published in Kenya Gazette Vol. CXIX – No.97 of 17th July, 2017 to the intent that the 2nd Respondent do revoke the ex parte applicant's title to land parcel Kisii Municipality/Block III/157 and the same be vested in the interested party in her capacity as administrator of the estate of Simon Kegesa**”.

Were the respondents served with the order?

17. Counsel for the applicant submitted that the National Land Commission, the Chief Land Registrar and 3rd Respondent herein were aware of the Court Order as they were personally served with the said order. Besides, the 1st and the 3rd Respondent were active participants in JR No.4 of 2017 where the court order of 31/10/2017 was issued – as they filed their responses/submissions.

18. Counsel submitted that the 4th – 10th Respondents were aware of the court order. Further, the 3rd respondent purportedly acted in her capacity as administrator of the estate of the late Simion Kegesa, which the 4th – 10th Respondents were beneficiaries of. Being an estate administrator, the 3rd Respondent herein who was sued as an interested party in JR No.4 of 2017, was for all intents and purposes an agent of the 4th – 10th respondents in JR No.4 of 2017. The 4th – 10th Respondents had an interest/a stake in the implementation of the recommendation of the National Land Commission. They must have enquired why the recommendation had not been implemented and must have been informed by the 3rd Respondent that the non -implementation by the Chief Land Registrar was due to the court order.

19. He argued that Knowledge by the 4th – 10th Respondents of the court order can be construed by the court. He relied on the case of **Basil Criticos V Attorney General & 8 Others & 4 Others [2012] eKLR** where the court construed knowledge on the part of parties before it by virtue of a consent had been entered into by counsel:-

“The Orders of 17th February 2012 were issued on consent basis and in the presence of the parties advocates. Accordingly, the 4th, 5th and 7th Respondents ought to have had knowledge of those orders for the obvious reason that they were presumed to have been party to the consent before and after it was recorded. Having satisfied myself that the 4th, 5th and 7th Respondents had knowledge of the consent order, I must now determine whether they are in contempt of that order.”

20. It was his submission that the 15th Respondent authored and signed the letter dated 27/03/2019 and the **grant “for”** the Chief Land Registrar who had been served with the court order of 31st October, 2017. He argues that the 15th Respondent having been served with the application before court, and being an officer who works closely with the Chief Land Registrar, must be deemed to have been aware of the court order of 31/10/2017.

Did the respondents act in breach of the court order?

21. It is not in dispute that the 2nd Respondent caused parcel No.157 to be amalgamated with other parcels of land, namely **Kisii Municipality/Block III/289, 300, 301, 330, 599-606** to create land parcel **No. Kisii Municipality/Block 3/648** despite that order of 31st October, 2017 which was to act as a stay of such actions.

22. I have taken the liberty of reading the ruling of Justice Mutungi in ELC Misc Application No. 4 of 2017 delivered on 19th July 2019 where he quashed the decision of the 1st Respondent (National Land Commission) to revoke title No. **Kisii Municipality/Block III/157**. This reinforces my finding that the court order of 31st October, 2017 was disobeyed.

DISPOSITION

23. From the foregoing analysis it is clear that the persons who actively disobeyed the court order are the 1st, 2nd and 15th Respondents. As

correctly submitted by counsel for the applicant some of the Respondents, particularly the 11th, 12, 13th and 14th Respondents have not been accused of disobeying the court order though they are alleged to have unknowingly facilitated the contempt. The only reason that they have been enjoined in these proceedings is that their joint actions are lawfully necessary for the restoration of the applicant's status as proprietor of the **L.R No. Kisii Municipality/Block III/157**. Even though the other respondents may have had notice of the order through their proxies, I would be hesitant to hold them to be in contempt. I say so because the standard of proof in contempt proceedings is slightly higher than in an ordinary civil suit. As regards prayers (a) to (e) I must say that I do not think that this is the right forum for seeking restoration of the applicant's title unless this is achieved by the 2nd Respondent's action of purging the contempt. As I understand it, an application for contempt should be limited to seeking punishment for disobedience of a court order as opposed to restoration, particularly where persons who were not privy to the disobedience are involved. I agree with the principle in **Mbaki & Others VS Macharia & Another (2005) 2 EA 206**, that the court cannot issue orders against a person that is not party to the suit without giving him a hearing.

The upshot is that the 1st, 2nd and 15th Respondents are culpable of disobeying the court order dated 31st October, 2017.

The matter shall be mentioned on 20th January, 2020 for sentencing and further orders.

Dated, signed and delivered at **Kisii** this 5th day of December, 2019

J.M ONYANGO

JUDGE