



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

CONSTITUTIONAL PETITION NO. 15 OF 2017

BANDARI INVESTMENT CO. LIMITED.....PETITITER

-VERSUS-

NATIONAL POLICE SERVICE & 22 OTHERS.....RESPONDENTS

RULING

1. The application before Court is the one dated 3rd April 2018 brought under the provisions of Order 40 rule 3 & 4 of the Civil Procedure Rules. The Petitioner/Applicant sought the following orders:

1) Spent

2) That the agents of the 1st, 2nd and 3rd respondents namely:

a) The County Commissioner, Mombasa namely Mr. Evans Achoki

b) The Officer Commanding Police Division, Kisauni namely Mr. Sangura Musee

c) The Officer Commanding Police Station, Kiembeni Mr. Wasonga be personally ordered to appear in Court and explain under what circumstances the Wall partially constructed on plot LR SUB-DIVISION NO 817 (ORIGINAL NUMBER 324/2 SECTION II/MN) under their watch and protection was demolished and materials carried away from site between the night of 21st March 2018 and 24th March 2018 and by who. These proceedings to take place in camera away from the parties as the Court may direct.

3) That going forward,

a) The County Commissioner, Mombasa namely Mr. Evans Achoki.

b) The Officer Commanding Police Station, Kiembeni Mr. Wansonga and their successors in title/replacements be personally liable for the full implementation of orders of this Court.

4) That the 6th, 12th, 20th 21st, & 23rd Respondents, be punished for contempt of Court as the Court may direct by being detained in prison until the hearing and determination of the Notice of Motion dated 1st December 2017.

2. The motion is premised on the several grounds listed on the face of it inter alia that the 6th, 12th, 20th, 21st & 23rd Respondents have rubbished the Court order demolished the Wall and carried away the materials so demolished. Secondly that the actions of these Respondents fortified the foundation of this petition that we are dealing with an invasion by criminals not ready to be subject to the rule of law. Thus the Court must intervene to ensure that the rule of law prevails.

3. The application is opposed by the 1st – 3rd Respondent through the affidavit of Sangura M. Musee and the affidavits of the 6th, 12th, 20th, 21st & 23rd Respondents. The 1st – 3rd Respondents detailed the steps they took in providing security during the construction of the wall. On the demolition of the wall, the 1st – 3rd Respondents deposed that they received reports on the destruction of the property and are currently investigating the same. Mr Sangura blamed the petitioner for not filling the form that would have allowed for multi-security agencies in provision of the security. He went on to state that three people had been charged with offences relating to the destruction of the wall as per the charge sheet annexed as *SMM 3*.

4. The 6th Respondent deposed that the order of 19.12.17 did not require them to guard the demolished wall. That he had no control of how the police did their work to give effect to Court orders. The 6th Respondent avers that the residents of Nguu Tatu Village arrested 3 people who were damaging the wall and handed them over to the police. The 6th Respondent also deposed that the builder built the wall to over 2 feet high in contravention of the Court order. He denied that together with the 12th, 20th, 21st, & 23rd Respondents they demolished the wall and carted away the materials. Therefore he should not be punished for alleged disobedience of Court order by unknown individuals. The depositions of the 6th Respondent was reiterated in each of the replying affidavits of the 12th, 20th, 21st, & 23rd Respondents.

5. The parties' advocates rendered oral submissions supported by case law. Mr Muniyithya for the applicant in brief submitted his clients could not identify those who demolished the wall because of insecurity caused by those living on the suit land which includes the 6th, 12th, 20th, 21st & 23rd Respondents. That they have demonstrated that these people including the 6th, 12th, 20th, 21st & 23rd Respondents are armed criminals. That there is no denial that they are in control of the suit land and have the names of the other occupants of the property. That because of their control, they are the ones who demolished the wall. Mr Wachira State Counsel representing the 1st – 3rd Respondents submitted in support of the grant of order 4 of the motion (i.e. punishment of the names Respondents excluding his clients for being in contempt of Court order).

6. Mr Kimani for the 6th, 12th, 20th, 21st & 23rd Respondents on his part submitted that the applicants had failed to link his clients with the demolition of the wall and that his clients are mere scapegoats. That it would be improper to issue notice to show cause to Nguu Tatu residents yet they are not parties to this application or suit. He put reliance in the holding of **Kasturilal Lapyia vs Mityana Staple Cotton & Another (1958) E. A 194** in support of his submissions. Mr Kimani submits that those who demolished the wall cannot be inferred from previous acts or undertakings of his clients. That the contempt remedy should not be used to dispossess his client from the land. He urged the Court to dismiss the motion with costs.

7. From the pleadings in regard to this motion and the submissions rendered, it is not disputed that the parties herein were aware of the import of the Court order of 19.12.2017 and 21.3.2018. The parties equally admit a wall was put round the suit premises pursuant to the said order and that this wall has been demolished and the materials used in building it carted away to unknown place.

8. The only issue that is in dispute is who caused the demolition and therefore should be punished for the contempt. Contempt of Court has a criminal label as the punishment can result in denying a party his/her liberty by being sent to prison. For this reason, the law therefore set the standard of proof to be above that of balance of probabilities. The Petitioner accedes that it did not see and could not identify who demolished the wall because of the state of insecurity to the lives of its members created by the 6th, 12th, 20th, 21st & 23rd Respondents. The Petitioner however wishes to have the named Respondents punished by virtue of the fact that they are persons who are in control of the suit premises. The question for this Court to answer is whether criminal liability can be inferred from conduct of parties.

9. In the case of **Justus Kariuki Mate vs Martin Wambora (2014) eKLR** the Court of Appeal emphasized “*that the Court must satisfy itself beyond any shadow of doubt that the person alleged to be in contempt committed the act complained of with full knowledge or notice of the order forbidding it. The threshold is quite high as it involves possible deprivation of a person’s liberty.*” This standard has not changed since the old celebrated case of **Ex parte Langley 1879, 13 ch. D 110 (C A)**.

Further the Court of Appeal in the case of **Shimmers Plaza Ltd vs NBK Ltd (2015) eKLR** held that it cannot be gainsaid that the duty to obey the law by all individuals & institutions is paramount in the maintenance of the rule of law, good order and the due administration of justice. Similar position was restated in the case of **Refrigeration & Kitchen Utensils Ltd vs Gulabchand Popatlal Shah & Another Court of Appeal No 39 of 1990**.

10. Having appreciated the importance of obeying the Court orders and the requirement to prove disobedience to be on a higher standard. Can the Court punish the 6th, 12th, 20th, 21st & 23rd Respondents based on indirect evidence by inference that being among the persons living on the suit property, they are the ones guilty of the demolition? Although the Petitioner shifted blame on their part for not giving the names of the 3 people they arrested demolishing the wall, the burden in law did not shift on them at any given time in the circumstance of the case. Mr Sangura deposed that some 3 people had been charged in connection to the demolition of the wall. He however fell short of explaining to this Court who arrested the 3 and where they were arrested. The 3 people could probably be the same 3 arrested by the 6th, 12th, 20th, 21st & 23rd Respondents. The Petitioner’s pleading in regard to this application does not suggest that the people arrested were acting for or as agents of the named Respondents. I am unable therefore to impute the contempt to the 6th, 12th, 20th, 21st & 23rd Respondents.

11. Mr Muniyithya submitted that the prayer 2 of the motion was resolved by the filing of a replying affidavit of Mr Sangura Musee. Prayer 3 is merely an executory process of implementing the order previously issued and still in place. I do not need to revise the orders as earlier given as this application was not brought to amend the orders of 19.12.17 and or 21.3.18. In regard to prayer 4, it’s unfortunate the wall was demolished but I find the same is not proved and accordingly I decline to find the named Respondents as the ones responsible for the demolition of the wall in contravention of this Court’s order. This Court however gives warning that I will not spare to punish the named Respondents in the future for obstruction of justice if they continue to deny the Petitioner and her representatives access to the property and in the process hide under the defence of not being responsible for guarding the wall yet the demolitions continue. Finally I make an order that each party shall bear their respective costs of the application.

Dated, Signed & delivered at Mombasa this 18th September 2018

A. OMOLLO

JUDGE