



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT EMBU

E.L.C. JUDICIAL REVIEW NO. 8 OF 2014

REPUBLIC.....APPLICANT

VERSUS

THE CHIEF LAND REGISTRAR.....1ST RESPONDENT

THE DIRECTOR OF LAND ADJUDICATION AND SETTLEMENT.....2ND RESPONDENT

THE DIRECTOR OF SURVEYS.....3RD RESPONDENT

THE DISTRICT SURVEYOR MBEERE.....4TH RESPONDENT

THE ATTORNEY GENERAL.....5TH RESPONDENT

AND

NJIRU KITHUA.....EX-PARTE APPLICANT

RULING

1. By a notice of motion dated and filed on 5th April 2018 filed under the provisions of **sections 1A, 1B, 3A and 63 of the Civil Procedure Act (Cap 21)**, the *ex-parte* Applicant (hereinafter the *Applicant*) sought an order for committal to civil jail of the Respondents for alleged disobedience of the order of *mandamus* issued by this court on 12th October 2017.
2. The said application was based upon the grounds stated on the face of the said motion which indicated that the Respondents had failed to implement the Minister's decision made in *Land Appeal Case No. 143 of 1996* as directed by this court on 12th October 2017 despite written demand. It was contended that there was no other viable way of enforcing the said order.
3. The said motion was supported by an affidavit sworn by the Applicant on 5th April 2018. The said affidavit detailed the attempts the Applicant and his advocate had made to have order of *mandamus* complied without success hence the instant application.
4. None of the Respondents filed a replying affidavit to controvert any of the factual allegations in the Applicant's supporting affidavit. The Attorney General, however, filed a statement of grounds of opposition dated 18th May 2018 in which the competency of the application was challenged. It was contended that the said application was defective and misconceived. It was further contended it contravened the procedure laid down in the **Contempt of Court Act, 2016** and in particular **section 30** thereof.
5. When the said application was listed for hearing on 22nd May 2018, Ms Rose Njeru for the Applicant prosecuted the said application on the basis of the grounds set out in the motion and the supporting affidavit. It was submitted that the Respondents were not willing to comply with the order of *mandamus* made on 12th October 2017. It was pointed out that they had not filed any affidavit to explain reasons for non-compliance or any cause why they should not be punished for contempt of court.
6. The Applicant's counsel further submitted that the Respondent's grounds of opposition merely raised technicalities of procedure which should not be entertained by the court. The court was urged to invoke the provisions of **Article 159 (2) (d) of the Constitution of Kenya, 2010** and dispense substantive justice without undue regard to procedural technicalities. The court was urged to allow the said application dated 5th April 2018 and to commit the Respondents to civil jail for contempt of court.
7. Ms Ngelechei for the Attorney General for the Respondents opposed the Application on the basis of the grounds of opposition dated 18th May 2018. It was submitted that the application was fatally defective for failing to comply with the mandatory provisions of **section 30 of**

the Contempt of Court Act, 2016. It was submitted that a notice of 30 days to the Attorney General was not issued and served before commencement of the contempt of court proceedings. It was submitted that violation of a statutory provision is not matter of mere technicality. The court was consequently asked to dismiss the said application.

8. The court has considered the Applicant's said notice of motion, the Respondents' grounds of opposition thereto as well as the oral submissions on behalf of the parties. The court is of the opinion that two issues arise for determination in this matter. The 1st is whether or not the application is fatally defective for failure to comply with **section 30 of the Contempt of Court Act, 2016.** The 2nd is whether the Applicant has demonstrated wilful disobedience of the order of *mandamus* dated 12th October 2017 on the part of the Respondents.

9. The material provisions of **section 30 of the Contempt of Court Act, 2016** states as follows;

“(1) Where a state organ, government department, ministry or corporation is guilty of contempt of court in respect of any undertaking given to a court by the state organ, government department, ministry or corporation, the court shall serve a notice of not less than ninety days on the accounting officer, requiring the accounting officer to show cause why contempt of court proceedings should not be commenced against the accounting officer. (Underlining added).

(2) No contempt of court proceedings shall be commenced against the accounting officer of a state organ, government department, ministry or corporation, unless the court has issued a notice of a not less than thirty days to the accounting officer to show cause why contempt of court proceedings should not be commenced against the accounting officer.

(3) A notice issued under subsection (1) shall be served upon the accounting officer and the Attorney General.” (Underlining added).

10. The court has carefully considered the said provisions of the Act. It would appear that the said provisions apply to a situation where an *undertaking* has been given to the court with respect to the matter alleged to constitute contempt of court or where an *accounting officer* is sought to be punished for contempt of court. The section does not appear to be of general application to ordinary applications for contempt of court alleging disobedience of a court order. Accordingly, the court holds that **section 30 of the Act** is not applicable to the instant application since no undertaking of any nature was given to the court at any stage of the judicial review proceedings which resulted in the issuance of the order of *mandamus*. There is also no evidence on record to demonstrate that the alleged contemnors are accounting officers within the meaning of **section 30 of the said Act.**

11. The second issue is whether or not the Applicant has demonstrated disobedience of the order of *mandamus* issued on 12th October 2017. In order to succeed in an application for punishment of an alleged contemnor for disobedience of a court order, it must be demonstrated that such person was aware of the court order; that the terms of the order were clear and unambiguous; and that there was wilful disobedience of the order. The Respondents were at all material times represented by the Hon. Attorney General. It was not contended by Ms Ngechelei that the Respondents were unaware of the court order made on 12th October 2017 which is more than one year ago. It was not contended that the terms of the order of *mandamus* were unclear or ambiguous.

12. The court has noted that none of the Respondents who were required to comply with the order filed an affidavit to explain the reasons for non-compliance with the order. They did not ask for more time to enable them comply. They simply kept quiet. The court, therefore, accepts the contents of the Applicant's supporting affidavit as true and unchallenged. The court finds and holds that the alleged contempt of court has been proved against the 1st to 4th Respondents.

13. The courts have always held that court orders must be obeyed by all. The mighty and the lowly are bound to obey them. The rich and the poor are equally bound to obey them. The public officials as well as the civilians are duty bound to obey court orders. In the case of **Hadkinson Vs Hadkinson [1952] ALLER 567** it was held, *inter alia*, that;

“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 even void.”

14. In the case of **Refrigeration and Kitchen Utensils Ltd Vs Gulabchand Papatlal Shah & Another, Civil Application No. 39 of 1990**, the Court of Appeal held, *inter alia*, that;

“...It is essential for the maintenance of the rule of law and good order that the authority and dignity of our courts is upheld at all times. This court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors...”

15. Similarly, in the case of **Shimmers Plaza Ltd Vs National Bank of Kenya Nairobi Civil Appeal No. 33 of 2012 [2015] eKLR**, the Court of Appeal held that;

“We reiterate that court orders must be obeyed. Parties against whom such orders are made cannot be allowed to trash them with impunity. Obedience of court orders is not optional, rather, it is mandatory and a person does not choose whether to obey a court order or not. For as Theodore Roosevelt, the 26th President of the United States of America once said:

“No man is above the law and no man is below it; nor do we ask any man's permission to obey it. Obedience to the law is demanded as a right; not as a favour.”

The courts should not fold their hands in helplessness and watch as their orders are disobeyed with impunity left, right and centre. This would amount to abdication of our sacrosanct duty bestowed upon us by the Constitution...”

16. The upshot of the foregoing is that the court finds and holds that the contempt of court alleged against the 1st – 4th Respondents has been proved to the required standard. They are accordingly convicted. However, the 1st – 4th Respondents shall be accorded an opportunity to offer mitigation, if any, before sentencing. It is hereby ordered that the 1st – 4th Respondents shall attend court personally on date to be fixed by the court upon delivery of the ruling for mitigation and sentencing. The Applicant is awarded costs of the application to be borne by the 1st – 4th Respondents.

17. It is so decided.

RULING DATED, SIGNED and DELIVERED in open court at **EMBU** this **15th** day of **NOVEMBER, 2018**.

In the presence of Ms Nzekele holding brief for Ms Rose Njeru for the Applicant and Mr Siro holding brief for Ms Nyawira for the Respondents.

Court clerk Muinde.

Y.M. ANGIMA

JUDGE

15.11.18