



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO. 260 OF 2014

WANJALA MINNG COMPANY LIMITED.....PLAINTIFF/APPLICANT

-VERSUS-

NATIONAL LAND COMMISSION.....1ST DEFNDANT/RESPONDNET

MINISTRY OF LANDS, HOUSING &

URBAN DEVELOPMENT.....2ND DEFENDANT/RESPONDENT

CHIEF LAND REGISTRAR.....3RD DEFENDANT/RESPONDENT

KISHUSHE RANCHING CO-OP SOCIETY LTD.....4THDEFENDANT/RESPONDENT

RULING

1. In the application dated 5th February 2016 and predicated under the provisions of section 1A & B, 3A & 63 of the Civil Procedure Act and Order 40 Rules 3, 4, 5 & 7 of the Civil Procedure Rules, the Plaintiff/Applicant sought for the following orders:

1. Spent

2. That the following persons named hereunder be committed to civil jail for a term of six months for contempt of Court for having deliberately and wantonly disobeyed the Order of this Honourable Court made on the 24th October 2014. The said parsons are:

(1) Elistone Mbela -The Chairperson of the 4th Defendant

(2) Tom Aziz Chavangi -CEO & Commission Secretary NLC

(3) Ms. Jane Ndiba - Chief Land Registrar

(4) Mr. Kahuhu - Secretary, Ministry of Lands, Housing and Urban Development

(5) Ms. Mariam el Maawy - Principal Secretary, Ministry of Lands Housing and Urban

Development.

In addition thereto, this Honourable Court do order that the property of the National Land Commission and Kishushe Ranching Co-operative Society Limited be attached for disobedience of the aforestated Court Order.

3. That such part of the Order made on 23rd November 2015 as states that “*In the meantime both parties are barred from excavating for minerals till the next hearing date*” be set aside.

4. That on 24th August 2015 the Title issued to the 4th Defendant in contravention of the Order of this Honourable Court of 24th October 2014 be declared a nullity and void.

5. That the costs of this Application be provided for.

2. The application is supported by the grounds listed (a) – (f) on the face of it and supported further by the affidavits sworn by Mahmood Kassim Miyanji. In support of the present application Mr Mahmood deposed that the 4th defendant’s title was issued on 24th August 2015 (as contained in the affidavit of Ellistone Mbela). That the issuance of the title was in breach of the Order of this Court given on 24th October 2014 which Order he deposes was served on all the defendants.

3. Mr Mahmood deposed that all the defendants, their employees, servants, agents and/or officers were aware of the Order of 24.10.2014. Further that the conduct of the 1st – 3rd defendants in issuing the 4th defendant with a title contravened the Order of this Court and amounts to contempt and is an affront to the authority and dignity of this Court. He continued to depose that the Court in order to preserve and safe guard the rule of law ought to deal with the disobedience. Consequently this Court should also proceed to declare the title obtained in breach of its order as a nullity and void.

4. In further support of the orders sought, the applicant annexed a copy of the title issued to the 4th Respondent; copy of the order bearing the receiving stamps and dated 3rd November 2014 of the 1st, 2nd and 3rd defendants/respondents and an affidavit of service sworn by Josephat A. Muhandale dated 10th December 2014. The rest of the body of the affidavit refers to responses to another application not the subject of this determination.

5. The application is opposed separately by each of the Respondents. Initially the 2nd & 3rd Respondents filed grounds of opposition but later in the course of these proceedings they also filed their replying affidavits. The 1st Respondent stated that he had sworn two (2) affidavits with the first one said to be sworn on 10th May 2016 and a further affidavit sworn on 26th August 2016. On perusing the Court record, I only found the 1st Respondent’s grounds of opposition dated 8th March 2016 drawn by Ndegwa, Katisya & Sitonik & Associates. I was unable to find the replying affidavit dated 10.5.2016. Therefore I proceed that the 1st Respondent opposed the application based on the grounds of opposition dated 8.3.16 and the further affidavit of Mr Tom Chavangi dated 26.8.2016.

6. In the 1st Respondent’s grounds it gave reasons why this contempt application is a nullity and is an abuse of the Court process. Some of the reasons given is that the application of 24/10/14 was ordered to be served and heard interparties within 14 days. Secondly that Order 40 rule 4 (3) required the Order to be served within 3 days. Further that the applicant has failed to adhere with the procedures in bringing the present application. That the Order was never served upon the 1st Respondent. Lastly that the 1st Respondent has no mandate to issue and/or register titles and was thus not capable of processing title to the 4th Respondent.

7. In the further affidavit, Mr Chavangi deposed that the issuance of the title to the 4th Respondent by the 2nd & 3rd defendants was in bad faith and in violation of the Order of this Court. He deposed further that the suit land is public land since it has mineral deposits (as per provisions of article 62 (2) of the

Constitution). That under section 23 (2) of the Land Act, leases or grants for public land should be issued to National Land Commission to hold in trust for the County government. Therefore it is only the National Land Commission that could issue a title over the suit land. Lastly that the 1st Respondent has protested the issuance of the title to the 4th Respondent and consequently directed the Chief Land Registrar to revoke it. That the National Land Commission has not violated the orders of this Court.

8. On behalf of the 2nd Respondent, Mr Peter Kahuho deposed that the 2nd & 3rd Respondents have not disobeyed the orders of this Court. That although the Court Order was issued on 31.10.2014, there was no attempt to serve the said Order or register it in their records. Mr Kahuho deposed that the Principal Secretary Ministry of Lands & Physical Planning or himself were not personally served with the order. Therefore this application is made without merit and is an abuse of the Court process.

9. Ms Jane Wanjiru Ndiba, the ag Chief Land Registrar also swore an affidavit dated 13.9.2016 in opposing the present application. She deposed that she took over from Ms Sara Mwendwa on 7th April 2015. Therefore when the order was served, she was not in office. She also deposed that her officers charged with receiving Court papers were never served with the Order in question. Neither does the process server Josephat Muhande say the Ministry or herself was served. Ms Ndiba deposed that she is advised by her advocates on record that the Order issued on 31.10.14 was not served within 3 days as required by the rules therefore they lapsed automatically.

10. She deposed further that the restraining order was to the extent of the beneficial interest of the applicant being reflected in the grant and not a claim for land perse. She continued that the order has since been registered on the title as per annexure *JWN 2*. She deposed that she does not know about the protest letter by the 1st Respondent dated 1.4.16 and that it was written while this matter was pending. Further that the implementation of the Supreme Court advisory opinion is ongoing through meetings held between National Land Commission & the Ministry. Secondly that there are two cases to wit HC Petition No 250 of 2016 and 260 of 2016 which have stayed the implementation of the Supreme Court advisory opinion (*JWN 4*)

11. That they issued the title to the 4th Respondent pursuant to a letter of allotment dated 15.12.1973 and revised on 23rd June 1985 (*JWN 5 & 6*). Therefore this land ceased to be public land from the time it was alienated to the 4th Respondent. She deposed that article 62 (2) of the Constitution defines public land as land which at the effective date is unalienated government land as defined by an Act of Parliament. In this instant, she deposed that necessary consultations were done prior to the alienation to the 4th Respondent vide gazette notice No 3566 of 30th October 1973. She urged the Court to dismiss the application with costs.

12. In opposing the application, the 4th Respondent filed grounds of opposition and a replying affidavit sworn by Elistone Mbela. He deposed being the Chairman of the 4th Respondent. He deposed that the order was never brought to his attention nor is he responsible for issuing titles. In the grounds, it is pleaded that no grounds have been disclosed sufficient to warrant the granting of the orders sought.

13. The applicant and the 4th Respondent filed written submissions which were highlighted on 2.11.2016 while counsels for the 1st to 3rd Respondents made oral submissions. I have considered those submissions and taking them together with the pleadings I form the following three questions for my determination;

i) Whether there was a valid Order in force to be complied with.

ii) Whether the said Order was served on the Respondents or that the Respondents were aware of its existence.

iii) If the Order (in the event the answer to (i) & (ii)) is yes has been disobeyed by the people sought to be committed to civil jail in terms of prayer 2 of the application.

14. It is not in dispute that the plaintiff/applicant obtained ex parte orders of injunction against the Respondents which was initially given on 24th Oct 2014. It is submitted by Mr Kagram advocate for the applicant that the Order first granted on 24th October 2014 (and the record confirms) reads thus:

“I certify this application as urgent. I grant prayers (2), (3) & 4. The same shall be served and heard inter partes within fourteen days”.

15. On 17.10.14 in the registry the application was fixed for hearing on 6th November 2014. On 29th October 2014, Ms Muthee advocate for the applicant appearing before the Judge ex parte sought to substitute the prayers in the earlier application explaining she had forgotten to include the land reference number. The Court allowed the request stating that the prayers sought did not affect the interim orders earlier given. On 6.11.2014, the applicant through counsel requested for another 14 days to serve their papers. The Court thus adjourned the case to 21.11.2014 and extended the interim orders. On 21.11.2014, the applicant stated the 1st – 3rd Respondents had been served and sought time to serve the A.G & the 4th Respondent. The application was therefore fixed for hearing on 10.12.2014 with interim orders being extended again. By 10.12.14 the last proceedings before 24.8.15 the 4th Respondent had not been served and that the applicant was advised to serve their lawyers. Mr Mwakisha advocate for the 4th Respondent later informed Court that they only received the pleadings on 2nd October 2015. This fact was not disputed by the applicant.

16. All the defendants/respondents argue that because the order was not served within 3 days as is required under Order 40 rule 4(3), the order automatically lapsed. I do agree with the provisions of this rule entirely. However in the spirit of article 159 of the Constitution and the overriding objectives of the Civil Procedure Act together with case law, this rule must be applied while taking into account the circumstances of each case. The applicant in asking the court to find that the default to serve the order within three days does not invalidate it and referred the court to the case of **Harish Chandra B. Joban Putra & Another vs Paramount Universal Bank & 3 Others (2014)eKLR**, Gikonyo J. while quoting Munyao Sila J in the case of **Filista Chamai Sostan vs Samson Mutai (2012) eKLR** gave reasons of what Order 40 rule 6 was intended to cure to include but not limited to:

- a) *Instances where the suit has radically changed so that the injunction is no longer necessary*
- b) *The general conduct of the holder of the injunction is that the court is compelled to discharge the injunction.*
- c) *Where sustenance of the injunction will cause an injustice.*

17. The two cases cited above were however in respect of lapse of an order of injunction under order 40 rule 6 and not non-compliance with rule 4(3). Be that as it may, I find the decision in **Hadkiston vs Hadkiston (1952) All ER 567** that “*an order made by a court of competent jurisdiction must be obeyed until that order is discharged*” is still good law. In this case, although the record does show that the Order was not served within 3 days as is required by the law, there was still a valid Court Order as the Court had been extending the orders each time the matter came up. None of the Respondents have moved the Court so far to vary the said orders for contravening the rules. It is my considered view that the Respondents should not use this application to ask the court to discharge the orders in question. Therefore until the Order issued on 31.10.2014 and extended on the subsequent dates is discharged or set aside, I do hold that there was a valid Order in existence.

18. The second question is the issue of service of the order upon the four respondents and or the persons sought to be committed to jail for disobedience. For a person to be held that he is in contempt of Court there must be proof that he was personally served with the order or that he became personally aware of the existence/contents of this Order. The issue of service and or knowledge must be on the balance of beyond reasonable doubt as contempt proceedings are quasi-criminal in nature. There are several Court decisions upholding this position. For instance;

i) Ochiro & Another vs Okombo & 4 Others (1989) KLR

ii) Nyamogo vs KP & TC (1990 – 1994) E. A 464

iii) Shimmers Plaza Ltd vs NBK Ltd (2015) eKLR (*Kenya's growing jurisprudence has reiterated that knowledge of a court order suffices to prove service and dispense with personal service for the purpose of contempt proceedings*)

19. The action complained of by the applicant that amounts to the disobedience of the Court Order issued on the 31.10.2014 is the issuance of the title deed for LR No 28984 to the 4th Respondent by the 1st, 2nd & 3rd Respondents. This title deed was issued on 24TH August 2015. The applicant deposes that the Respondents were served with the Order on 3rd November 2014 as per copy of the Order annexed to the application. On 21.11.2014, I did indicate in the proceedings that there was no evidence of service of the application and orders as there was none placed in the Court file. On account of copy shown to the Court by the applicant, I saw receiving stamps made by the offices of the 1st, 2nd & 3rd Respondents.

20. The 2nd & 3rd Respondents have however denied being served as alleged. Although the copy of the order annexed shows the same was received by the 1st, 2nd & 3rd Respondents, the receiving stamps bear no signatures neither does it have any affidavit of service to explain who was served? Yet the applicant has named specific individuals to be punished for contempt. The 1st, 2nd and 3rd respondents are government departments that comprise several senior and junior officers. It was therefore incumbent upon the applicant to state who received the order/pleadings. Failure to do so makes it difficult for a finding to be made that any of the persons named were served or had personal knowledge of the order.

21. As regards the service on the 4th Respondent, Mr Josephat Muhandale the process-server deposed that he was unable to serve the chairman personally as his office was locked but that the chairman directed that their advocates Messers Mwakisha to be served. The process server does not give details in his affidavit whether he attempted to serve any officer of the 4th Respondent. In all I find none of the persons who are named to be punished for contempt was proved to have been served with the order of 31.10.2014 before the title was issued to the 4th respondent.

22. The Courts have also held that even where the Respondents have not been served but proof is made that they were aware of the order then they would still be punished. Beginning with the knowledge of the 4th Respondent, it is not clear from the affidavit of service of Josephat whether he read to the chairman what the content of the Order was as the affidavit of service is silent. Secondly the process server deposed that the chairman told him to serve their advocate Mr Mwakisha (as at 9th December 2014). From 10.12.2014, the matter came up before Court again on 28.9.15. From 10.12.14 – 28.9.15, there were appearances before the Judge. But it was not until 2nd October 2015 that Mr Mwakisha was served with the pleadings and probably the Order of 31.10.2014. This was after the alleged violation. There is no iota of evidence shown by the Applicant that the existence of the order was brought to the attention of any officer of the 4th Respondent or Mr Ellistone Mbella for this Court to find reason to punish him for contempt.

23. What about knowledge on the part of the 1st, 2nd & 3rd Respondents? The A.G appeared for the 2nd & 3rd Respondents for the 1st time on 10th December 2014. Ms Namaiya State Counsel informed Court that they were seeking instructions from the Chief Land Registrar as regards the main application. I had directed the applicant on 21st November 2014 that the A.G's office Mombasa be served on behalf of the 1st, 2nd & 3rd Respondents. The applicant did not file affidavit of service to state what documents were served on the Attorney General's office to confirm to court that the State counsel became aware of the order so as to notify her clients. The burden rested with the Applicant to bring evidence to show that the alleged contemnors particularly the 2nd & 3rd Respondents were personally aware of the existence of the Court Order.

23. The 1st Respondent although deposes that the 2nd & 3rd Respondents prepared the titles during the pendency of this suit but it does not state when it commissioner, Mr Chavangi became aware of the Order. The issues as to whether the land in dispute is public land or not is not an issue for determination in this application for contempt. As pointed out by Mr Mogaka for the 4th Respondent, the 1st Respondent appears to be approbating and re-probating. The content of his further affidavit is totally at variance with the grounds of opposition filed on 8th March 2016.

24. The applicant asked the court to nullify the 4th respondent's title because it was issued in flagrant disobedience of a court order. If the 1st Respondent holds the view that the same is public land as defined under article 62(2) then it is at liberty to move the court. However I cannot use this reason to nullify the title in an application for contempt and that argument did not form parts of the grounds presented for my determination. In summary on the second question I find that the Applicant failed to prove service on the respondents. The applicant has also failed to show that the persons named had personal knowledge of the Order for them to be punished for being in contempt of Court.

25. Has the Order been disobeyed? Since I have made a finding that there is no proof made that the Respondents were duly served nor were they aware of the existence of the Order prior to issuing the title, the answer to this question is negative. You cannot disobey what you do not know. As a consequence of this I find all the prayers sought in the application dated 5.2.16 not proved. The same is not merited and is hereby dismissed with costs to the Respondents.

Dated, Signed & Delivered at Mombasa this 1st day of February 2017

A.OMOLLO

JUDGE