



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC CIVIL SUIT NO. 123 OF 2009

KENYA NATIONAL ASSURANCE CO. (2001) LTD

KENCENT HOLDINGS.....PLAINTIFFS/APPLICANTS

-VERSUS-

NELSON MARWA REGIONAL COMMISSIONER COAST.....1ST RESPONDENT

EVANS ACHOKI

COUNTY COMMISSIONER MOMBASA COUNTY2ND RESPONDENT

INSPECTOR OF POLICE.....3RD RESPONDENT

SECRETARY TO THE COUNTY

GOVERNMENT OF MOMBASA.....4TH RESPONDENT

MOMBASA COUNTY SECURITY COMMITTEE.....5TH RESPONDENT

HONOURABLE ATTORNEY GENERAL.....6TH RESPONDENT

RULING

1. By an application dated 27th April 2016 brought under section 63 (c) and 3A of the Civil Procedure Act Cap 21, section 5 of the Judicature Act, Cap 8 Laws of Kenya, Rule 81 of the Applications and Proceedings in relation to Contempt of Court of England and Article 162 (2) of the Constitution of Kenya, the Applicant/2nd plaintiff seeks the following orders:

a) Spent

b) That the Honourable Court do find, hold and declare that Nelson Marwa, the Regional Commissioner of Coast and former County Commissioner of Coast and former County Commissioner Mombasa County; Evan Achoki the County Commissioner Mombasa County; the Secretary to the County Government Mombasa; Inspector General and all the members of the Mombasa County Secretary Committee are jointly and severally in contempt of Court order dated 4th March 2014 issued by Hon. S. Mukunya (Mr.) Justice.

c) That this Honourable Court commit Nelson Marwa, the Regional Commissioner of Coast and former County Commissioner Mombasa County; Evan Achoki the County Commissioner Mombasa County; the Secretary to the County Government of Mombasa; the Inspector General and all the members of the Mombasa County Secretary Committee to civil jail for the term of 6 months for contempt of Court for having deliberately disobeyed orders of the Court dated 4th March 2014 issued by Hon. S. Mukunya (Mr.) Justice.

d) That upon grant of prayer (2) above, the Honourable Court be pleased to impose a penalty of a fine of Kshs. 1,000,000 against Nelson Marwa, the Regional Commissioner of Coast and former County Commissioner Mombasa County; Evan Achoki the County Commissioner Mombasa County; the Secretary to the County Government Mombasa; the Inspector General and all the members of the Mombasa County Secretary Committee and in default of payment thereof all its movable and immovable assets including but not limited to land and buildings be attached and sold to satisfy the penalty for contempt of Court.

e) Any further orders of the Court towards protecting the dignity and honour of this Court.

f) That costs be in the cause.

2. The applicant deposed that on 4th March 2014 the High Court presided by Hon. Justice S. Mukunya ordered that eviction orders previously issued in the matter granting vacant possession of Plot No. L. R. NO. 397/(Original numbers 181 and 187) CR No. 1940 to the 1st and 2nd plaintiffs be enforced and supervised by the County Commissioner for Mombasa County, the Inspector General of Police and the Secretary to the County Government of Mombasa or the other relevant officer in the county.

3. It's the applicant's case that the aforementioned order was served upon the offices of the County Government of Mombasa, County Commissioner of Mombasa County and that of the Inspector General of Police. The applicants further aver that the Respondents have acknowledged awareness of the Court Order via media and meetings held between the applicants and the 1st – 3rd & 5th Respondents

4. The applicant deposed further that as a result of their meetings with the County Commissioner of Mombasa County together with the intervention of other government agencies including the National Treasury, the former Inspector General of Police, Mr. David M. Kimaiyo directed his officers to liaise with the applicants and ensure enforcement of the orders.

5. That despite their relentless efforts the Respondents have failed to obey the Court order thus denying the applicants their rights over the vacant possession of the suit land as decreed by the Court. That the letter dated 1st July 2015 in which the County Commissioner of Mombasa declared that it was practically impossible to implement the orders did not reflect the correct and factual position of the situation and was only meant to delay contempt proceedings. It is the applicant's case that by not supervising the evictions as ordered by the Court, the Respondents are in contravention of orders issued by this Honourable Court on 4th March 2014.

6. The application was served on all the Respondents and it is only the 4th Respondent who filed a replying affidavit as well as written submissions in opposition to the orders sought. The 1st, 2nd, 3rd and 5th Respondents were given time on various dates by the Court to file a reply to the application and or file written submissions but none was filed. Therefore the Court treats the application as not opposed by the said 1st 2nd 3rd and 5th Respondents although this Court is still under a duty to determine the application on its merit.

7. The 4th Respondent on his part via the replying affidavit deposed to on its behalf by Mr Francis Thoya said he has never been personally served with the impugned order. Secondly that the said order does not specify what he was required to do as county secretary neither has the particulars of disobedience been stated. He also deposed that the security docket was not devolved therefore the 4th Respondent can only

supervise the eviction process if the security is provided.

8. The parties agreed to canvass the application by way of written submissions. The 4th Respondent filed its written submissions on 3rd July 2017 while the Applicant filed its written submissions on 13th June 2017. Mr Kimathi advocate for the applicant submitted that contempt of Court constitutes conduct that signifies willful disobedience of or disregard towards the Court or conduct that deliberately defies the authority of the Court or the supremacy of the law. Counsel further stated that on this basis, the offence also involves interfering with the administration of the law and thus results in hampering and perverting the course of justice.

9. Mr. Kimathi submitted that Courts punish for contempt of Court in order to safeguard the rule of law. To support his assertion, Counsel cited the case of **Teachers Service Commission vs Kenya National Union of Teachers & 2 Others (2013) eKLR** where it was held that:

“The reason 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 safeguarding the rule of law.”

10. Mr. Kimathi submitted that this application was supported by the affidavit of Francis Kamau Kahi which proved how the Court order dated 4th March 2014 had not been complied and also that the Respondents were not taking any steps to obey the Court order. Counsel referred to the case of **Ex-parte peter Nyamu Muhuri vs Attorney General of Kenya & 5 others (2013) eKLR H.C at Nairobi**. where Odunga J. observed:

“The notice of motion must state exactly what the alleged contemnor has done or omitted to do which constitutes a contempt of Court with sufficient particularity to enable him to meet the charge. The necessary information must be given in the notice itself.”

11. Mr. Kimathi submitted further that despite various efforts including meetings, seeking intervention from the government agencies to have the respondents provide security to enable eviction as per the order, the Respondents have failed to enforce the order citing pertinent issues of fact that do not reflect the correct factual position of this matter. Counsel submitted further that the issues being raised by the Respondents were not raised at the trial for determination before the Court which issued the order and hence the order has not been varied and should be obeyed as it is. Counsel cited the case of **Bell vs Tuhoy & Another (2002) 2 All ER 975** where the Court opined as follows:

“That an order made by a Judge of unlimited jurisdiction, for instance in the High Court must be obeyed, and failure to observe it can amount to contempt of Court, however irregular it might be unless and until it is reversed or set aside.”

12. Miss Ngige learned counsel for the 4th defendant submitted that indeed a Court order was issued requiring the 4th Respondent together with the other Respondents to supervise eviction from the suit land. Counsel submitted that policing and security is not a devolved function under the 4th Schedule to the Constitution. She submitted that the 5th Respondent which is chaired by the 2nd Respondent is responsible for the day to day management of security and deployment of police within the county thus the 4th Respondent does cannot command or direct the police to do anything. Therefore without clarity in the Court order as to what particular role the 4th respondent was to play in its enforcement, it would be unfair and unjust to cite the 4th Respondent for contempt as it would be impossible to ascertain the acts and/or omission which constitute a breach of the Court order on the part of the 4th Respondent.

13. In the instant application, the applicant at page 2 of the Notice of Motion dated 27th April 2016, sets out the terms of the order that the applicant alleges the Respondents failed to honor. The application

gives the particulars of the orders issued by the Court and the persons whom the order is directed and what was required of these persons. The order complained to have been disobeyed read as follows:

“That it is hereby decreed and ordered that the Eviction Orders issued on the 12th October 2011 granting vacant possession of Plot No. L.R No. 397/MN/ (Original numbers 181 and 187) CR. No. 1940 to the 1st and 2nd Plaintiffs herein, be enforced and supervised by the County Commissioner for Mombasa County, the Inspector General of Police and Secretary to the County Government of Mombasa County or the relevant officer in the County.”

14 In the case of **Kristen Carla Burchell versus Barry Grant Burchell**, Eastern Cape Division Case No. 364 of 2005, it was held that in order to succeed in civil contempt proceedings, the applicant must prove **i) the terms of the order, ii) knowledge of these terms by the Respondent, iii) failure by the Respondent to comply with the terms that order.** In proving the above terms it must be noted that the standard of proof is higher than that of balance of probability in civil cases but not necessarily beyond reasonable doubt. Justice Mativo in the case of **Katsuri Limited versus Kapurchand Devar Shaha (2016) eKLR** explained why the standard of proof is above that of balance of probability in civil cases. He observed:

“... The fact that the liberty of the defendant could be affected means that the standard of proof is higher than the standard in civil cases. It is incumbent upon the applicant to prove that the defendant’s conduct was deliberated in the sense that he or she deliberately or willfully acted in a manner that breached the order.”

15. Having carefully analysed the application and the affidavit in support together with submissions filed, I am only satisfied that there is proved contempt of the Court order issued on 4th March 2014 against the 2nd Respondent. The order of 4th March 2014 was not directed against the 1st and 6th respondents. They did not get to participate in the hearing of the application that resulted in the order now in issue. I say so because the 2nd respondent did not make any attempt at enforcing the order. He formed a mindset not to comply based on the sworn affidavit and correspondences exchanged between them and the applicant. However I am satisfied by the explanation offered by the 4th Respondent that since it is not in charge of the security apparatus of the County, he cannot be blamed. Accordingly I find the orders sought as against the 4th Respondent to be without merit and is dismissed.

16. In conclusion I find that the application succeeds only as against the 2nd Respondent. The 3rd Respondent did his part by directing the 2nd Respondent to implement the order. The applicant has not apportioned any blame on him from the reading of the supporting affidavit. The 5th Respondent is an amorphous group of persons and I cannot issue an order in general to affect parties who may not have been served with the order to enable them defend themselves. Further just like the office of the 1st Respondent, the impugned order was not directed at the 5th Respondent.

17. Consequently I do allow the application in part on the following terms:

(a) This Court does find that former County Commissioner of Mombasa Mr Evan Achoki is in contempt of the Court Order dated 4th March 2014.

(b) The officer named above is punished for the contempt by being fined to pay Kshs 250,000 within 30 days. In default of payment thereof, their properties (movable and immovable) be attached and sold to satisfy the penalty for the contempt of the Court.

(c) Costs of the application ordered in the cause.

Dated, signed & delivered at Mombasa this 17th day of October 2017.

A. OMOLLO

JUDGE