



Fidei Holdings Limited v Kenya Railways Corporation & another; Ethics & Anti-Corruption Commission (Proposed Interested Party) (Environment & Land Case 263 of 2019) [2024] KEELC 7568 (KLR) (14 November 2024) (Ruling)

Neutral citation: [2024] KEELC 7568 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 263 OF 2019
JO MBOYA, J
NOVEMBER 14, 2024**

BETWEEN

FIDEI HOLDINGS LIMITED PLAINTIFF

AND

KENYA RAILWAYS CORPORATION 1ST DEFENDANT

THE NATIONAL LAND COMMISSION 2ND DEFENDANT

AND

ETHICS & ANTI-CORRUPTION COMMISSION PROPOSED INTERESTED PARTY

RULING

Introduction and Background

1. Vide a Notice of Motion Application dated 5th March 2024, brought pursuant to the provisions of Section 5 of the *Judicature Act*, Section 3A of the *Civil Procedure Act* Cap 21 Laws of Kenya and Order 51 Of the Civil Procedure Rules, 2010; the Plaintiff/ Applicant approached the court seeking the following Reliefs:
 - i. This Application be Certified Urgent and heard Ex-parte in the first instance.
 - ii. This Honorable Court do find that the 1st Defendant's Managing Director, Philip Mainga, 2nd Defendant's Chairperson, Gershom Otachi; the Chief Executive Officer, Kabala Tache Arero and the Director of Finance, Ben Cherutich, are in contempt of Court for willful and deliberate disobedience of the decree issued by this Honourable Court on 5th June, 2023, in ELC No. 263 of 2019 for failure to pay the interest in the sum of Kshs.72,000,000/=.



- iii. The 1st Defendant's Managing Director, Philip Mainga, 2nd Defendant's Chairperson, Gershom Otachi; the Chief Executive Officer, Kabala Tache Arero and the Director of Finance, Ben Cherutich be committed to civil jail for such period as this Honourable Court may deem fit and just, for willful and deliberate disobedience of the decree issued by this Honourable Court on the 5th day of June, 2023 for failure to pay the interest in the sum of Kshs. 72,000,000/=
 - iv. The Court be pleased to order the Defendants to compensate the Plaintiff 14% interest per annum on the compensation sum being the interest awarded by the Court in the sum of Kshs. 72,000,000/=.
 - v. The Court do specifically order that the conditions of purging the said contempt be that the Defendants to compensate the Plaintiff 14% interest per annum on the compensation sum being the interest awarded by the Court in the sum of Kshs. 72,000,000/=.
 - vi. Such further or other consequential orders as the Court may deem just to grant in furtherance of justice.
 - vii. The Defendants be liable to pay the Plaintiff costs of and occasioned by these proceedings.
 - viii. The costs of this application be borne by the Defendants.
2. The instant application is premised on the various grounds which have been highlighted in the body thereof. Furthermore, the application is further supported by the affidavit of George Ngure Kariuki sworn on the 5th March 2024 and to which the deponent has annexed two documents [annexures].
 3. Upon being served with the subject application, the 1st Defendant responded thereto vide grounds of opposition dated the 13th March 2024 and wherein the 1st Defendant contended inter-alia that the compulsory acquisition under reference was undertaken by the 2nd Defendant/Respondent. Furthermore, the 1st Defendant also averred that same deposited the monies for compulsory acquisition with the 2nd Defendant and hence no claim lies as against her [1st Defendant/Respondent].
 4. Though served with the subject application, the 2nd Defendant/Respondent does not appear to have filed any response thereto or at all. Notably, there is no Replying affidavit or Grounds of opposition, filed by and on behalf of the 2nd Defendant herein.
 5. Suffice it to point out that the application beforehand came up for hearing on numerous occasions during which the Plaintiff/Applicant and the 2nd Defendant/Respondent intimated to the court that same [parties] were engaged in negotiations in an endeavor to settle. Nevertheless, despite various indulgence by the court, the parties kept on shifting goalpost.
 6. Arising from the foregoing, the court finally ordered and directed that the parties do file and exchange written submissions. In this regard, the court also circumscribed the timelines for the filing and exchange of written submissions.
 7. Pursuant to the directions of the court, the Plaintiff/Applicant filed written submissions dated the 16th October 2024. However, the Defendant/Respondent did not file any written submissions. For good measure, no written submissions are obtainable from the record of the court.



Parties' Submissions:

a. Applicant's Submissions:

8. The Applicant herein filed written submissions dated the 16th October 2024 and wherein same [Applicant] adopted the grounds contained at the foot of the application and thereafter reiterated the averments in the body of the supporting affidavit. In addition, the Applicant has highlighted and canvassed two [2] salient issues for consideration by the court.
9. Firstly, learned counsel for the Applicant has submitted that the 2nd Defendant/Respondent herein undertook compulsory acquisition of the Applicant's properties. In this regard, it was contended that the 2nd Defendant/Respondent thereafter proceeded to and generated letters of award to and in favor of the Applicant.
10. Nevertheless, it was contended that despite generating the letters of award and which awards were duly accepted, the 2nd Defendant/Respondent failed to timeously pay the compensation money. In this regard, learned counsel for the Applicant has submitted that the Applicant was thereafter constrained to file the instant suit before the court.
11. Additionally, it was submitted that following the filing of the instant matter same was heard and thereafter disposed of vide judgment rendered in favor of the Plaintiff/Applicant. Nevertheless, it was contended that despite the clear terms of the judgment rendered by the Court, the 2nd Defendant/Respondent failed to liquidate and /or fully settle the decretal sum.
12. Secondly, learned counsel for the Applicant has submitted that the 2nd Defendant/ Respondent herein has been privy to and knowledgeable of the terms of the judgment and in particular, the aspect pertaining to payments of the interests. Nevertheless, it has been contended that despite being aware and knowledgeable of the terms of the judgment, the 2nd Defendant/Respondent has failed, neglected and/or refused to abide by and or comply with the terms of the judgment.
13. Owing to the foregoing, learned counsel for the Applicant has submitted that the conduct by and on behalf of the 2nd Defendant/Respondent, namely, failing to compute and pay the interests in accordance with the judgment of the court constitutes willful disobedience and contempt of court. In this regard, learned counsel for the Applicant has therefore implored the court to find and hold that the 2nd Defendant/Respondent and/or her officers are guilty of contempt.
14. To buttress the submissions that the 2nd Defendant/Respondent is guilty of wilful disobedience and contempt of Court, learned counsel for the Applicant has cited and referenced various decisions including, A. B & Another v R. B [2016]eKLR and Republic v The Principal Secretary, Ministry of Defense ex-Parte George Kariuki Waithaka [2018]eKLR, respectively.

b. 1st Defendant's/Respondent's Submissions:

15. Though the 1st Defendant filed grounds of opposition dated the 13th march 2024, same [1st Defendant/ Respondent] did not file any submissions. In any event, learned counsel for the 1st Defendant intimated to the Court that same [1st Defendant/Respondent] shall not be filing any written submissions.

c. 2nd Defendant's/Respondent's Submissions:

16. The 2nd Defendant herein sought for and obtained various indulgence[s] from the court to file and serve written submissions. However, despite accommodation, learned counsel for the 2nd Defendant did not deem it apposite to file and serve any written submissions.



17. At any rate, this court has reviewed the entirety of the documents filed on the e-platform [CTS of the court], but no submissions are discernible. In particular, the court reviewed the e-platform for the very last time on the 13th November 2024 at 10:00 pm. In this regard, it is apparent that the 2nd Defendant is equally not keen to defend her conduct.
18. Simply put, the 2nd Defendant did not file any written submissions. For coherence, the only set of written submissions on record, are the ones filed by the Plaintiff/Applicant.

Issues For Determination:

19. Having reviewed the application beforehand and the response thereto and having taken into account the written submissions by the Plaintiff/Applicant, [being the only submissions on record] the following issues crystalize and are thus worthy of determination;
 - i. Whether the 2nd Defendant/Respondent and/or her officers are guilty of willful disobedience of lawful court orders.
 - ii. What remedies, if any; ought to be granted.

Analysis and Determination

Issue Number 1 Whether the 2nd Defendant/Respondent and/or her officers are guilty of willful disobedience of lawful court orders.

20. The 2nd Defendant/Respondent herein is an independent constitutional commission established pursuant to the provisions of Article 67 of *the Constitution* 2010. Furthermore, the powers of the 2nd Defendant herein are well articulated at the foot of Article 67[2] of *the Constitution* as read together with Section 5 of the *National Land Commission Act*, 2012.
21. In particular, the 2nd Defendant is charged with various statutory functions including undertaking compulsory acquisition for and on behalf of various public bodies subject to the provisions of Article 40 of *the Constitution* 2010.
22. In respect of the instant matter, the 2nd Defendant carried out and undertook compulsory acquisition on behalf of the 1st Defendant. In this regard, the 2nd Defendant indeed compulsorily acquired land belonging to and registered in the name of the Plaintiff. For good measure, the facts pertaining to the compulsory acquisition and issuance of the awards, are not in contest.
23. Nevertheless, despite undertaking the compulsory acquisition of the Plaintiff/Applicant's parcels of land, the 2nd Defendant failed to process and pay out the compensation. Consequently, the Plaintiff/Applicant was constrained to and filed the instant matter.
24. First forward, the instant matter was heard and determined culminating into the rendition of a judgment in favor of the Plaintiff/Applicant. Instructively, the judgment was delivered on the 20th March 2023.
25. Following the delivery of the judgment, it was incumbent upon the 2nd Defendant/Respondent to process and pay the decretal sum, [principal sum plus the accrued Interests] unless there was a lawful impediment. However, there is no gainsaying that no appeal was filed against the judgment.
26. Other than the foregoing, it is not lost on the court that the 2nd Defendant proceeded to and paid the principal sum amounting to Kes.69,000,000 only. However, the 2nd Defendant has since failed and neglected to pay the interests that was decreed at the foot of the judgment.



27. Suffice it to point out that the 2nd Defendant has been aware of the terms of the judgment including the necessity to pay interests. However, for some strange reasons the 2nd Defendant has declined to compute and pay the interests that was awarded to the Plaintiff/Applicant.
28. Furthermore, it is worth recalling that the 2nd Defendant/Respondent through her advocates on record has variously posited that same is ready and willing to pay the interests. In addition, the 2nd Defendant/Respondent is also on record as indicating that same [2nd Defendant] is processing the payment of the interests.
29. Despite the foregoing averments [which color the record of the court], the 2nd Defendant/Respondent has remained elusive and evasive for more than six months since the filing of the instant application. Quite clearly, the conduct by and on behalf of the 2nd Defendant herein does not portend/ augur well with the rule of law and the general administration of justice.
30. Pertinently, there is no debate concerning the payment of the interests. For good measure, the judgment of the court that underpins the payments of interests to and in favor of the Plaintiff/Applicant has never been set aside or impugned.
31. Arising from the foregoing, the question that comes to the fore is whether or not the 2nd Defendant is knowledgeable of the terms of the court order and if so, whether the failure to comply therewith is intentional and deliberate.
32. To start with, there is no contest that the 2nd Defendant/Respondent is knowledgeable of the court order. For good measure, the 2nd Defendant participated in the hearing of the matter up to and including the delivery of the judgment. Furthermore, there is no gainsaying that the 2nd Defendant has been making various intimation about her readiness to pay.
33. Secondly, even though the 2nd Defendant was served with the instant application and which highlights the willful disobedience by the 2nd Defendant same [2nd Defendant] did not find it apposite to respond to the averments. In particular, the 2nd Defendant has neither accounted for nor explained her failure, neglect and/or refusal.
34. In the absence of any explanation by and on behalf of the 2nd Defendant/Respondent, the court is left with no response at all. To this end, the obvious inference is to the effect that the 2nd Defendant is deliberately ignoring and/or disregarding lawful court orders. Such conduct does not augur well with the due process of the law.
35. Simply put, it is my finding and holding that the 2nd Defendant has willfully disregarded and disobeyed lawful court orders. Further and in any event, it was incumbent upon the 2nd Defendant/Respondent to comply with and/or adhere with the orders of the court.
36. As pertains to the obligatory nature attendant to compliance with court orders, it suffices to cite and reference the decision in the case of Hadkinson Vs. Hadkinson [1952] ALL E.R. 567 where Denning L.J. said at pp. 574 - 585 –

“...It is a strong thing for a court to refuse to hear a party to a cause and it is only to be justified by grave considerations of public policy. It is a step which a court will only take when the contempt itself impedes the course of justice and there is no other effective means of securing compliance I am of the opinion that the fact that a party to a cause has disobeyed an order of court is not itself a bar to being heard, but if his disobedience is such that, so long as it continues, it impedes the course of justice in the cause, by making it more difficult for the court to ascertain the truth or to enforce the orders which it may make, then the court may



in its discretion refuse to hear him until the impediment is removed or good reason is shown why it should not be removed."

37. The unqualified nature of the obligation to comply with and adhere to lawful court orders was also highlighted [underscored] in the case of *Shimmers Plaza Limited v National Bank of Kenya Limited (Civil Appeal 33 of 2012)* [2015] KECA 945 (KLR) (Civ) (18 February 2015) (Ruling), where the court held as hereunder;

Further, this Court in Refrigeration and Kitchen Utensils Ltd. –vs- Gulabchand Popatlal Shah & Another, -Civil Application No.39 of 1990 held,

“ ... 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.”

The above pronouncements of law ring true now as they did over sixty years ago when they were made in Hadkinson’s case. Unfortunately what we have now is persons both ordinary mortals and persons in authority treating Court orders with unbridled contempt with blatant impunity.

38. The importance of obeying lawful orders was also emphasized by the Court of Appeal in the case of *A.B & HB v R.B (Civil Application 4 of 2016)* [2016] KECA 597 (KLR) (22 April 2016) (Ruling), where the court stated as hereunder

The moment a party hacks at that foundation, the entire system is threatened. The Constitutional Court of South Africa, in Burchell v. Burchell Case No 364/2005 underlined the importance to the rule of law, of compliance with court orders in the following terms:

“Compliance with court orders is an issue of fundamental concern for a society that seeks to base itself on the rule of law. *The Constitution* states that the rule of law and supremacy of *the Constitution* are foundational values of our society. It vests the judicial authority of the state in the courts and requires other organs of state to assist and protect the courts. It gives everyone the right to have legal disputes resolved in the courts or other independent and impartial tribunals. Failure to enforce court orders effectively has the potential to undermine confidence in recourse to law as an instrument to resolve civil disputes and may thus impact negatively on the rule of law.”

39. From the foregoing analysis, my answer to issue number one [1] is twofold. Firstly, the 2nd Respondent has been privy to and knowledgeable of the terms of the judgment. In particular, the 2nd Defendant is aware of the aspect pertaining to payment of the interest.
40. Secondly, despite being aware of the terms of the judgment of the court, the 2nd Defendant has paid scant respect to the terms of the said Court order. In any event, it is not lost on this court that the monies at the foot of the dispute herein arose from compulsory acquisition and wherein the 2nd Defendant was obligated to make prompt and timeous payment of the compensation.
41. In short, the conduct of the 2nd Defendant/Respondent and her officers constitutes willful disobedience and contempt of lawful court orders. In this regard, the 2ND Defendant and her officers merit citation in accordance with the Law.



Issue Number 2 What remedies, if any ought to be granted.

42. The Plaintiff/Applicant has sought for a plethora of reliefs. However, it is imperative to underscore that the only available reliefs are the ones directed against the 2nd Defendant/Respondent. For good measure, it is the 2nd Defendant/Respondent who is chargeable with undertaking compulsory acquisition and paying the compensation money in accordance with Article 40 of *the Constitution*.
43. Secondly, even though the compulsory acquisition is and was undertaken on behalf of the 1st Defendant, the 1st Defendant herein is statutorily obligated to remit the money to the 2nd Defendant. In any event, it is the obligation of the 2nd Defendant to procure and obtain the compensation money from the designated authority beforehand.
44. Owing to the foregoing, the 1st Defendant herein and her officers cannot be said to have disobeyed the orders of the court. For good measure, the 1st Defendant has no statutory or constitutional obligation to the land owner whose property has been compulsory acquired. Notably, such obligation lies at the door-step of the Commission.
45. To this end, it suffices to take cognizance of the holding in the case of *Five Star Agencies Limited & another v National Land Commission & 2 others (Civil Appeal E290 & 328 of 2023 (Consolidated))* [2024] KECA 439 (KLR) (12 April 2024) (Judgment), where the Court of Appeal discussed the role of the Commission and thereafter stated thus:
107. Under section 107 of the *Land Act*, it is the mandate of the Commission (read the NLC) to acquire land for a public purpose and it is also obligated with the coming up of a criteria and guidelines to be adhered to by the acquiring authorities in the acquisition of land. The role of an acquiring authority under section 107 is restricted to notifying the NLC of its intention to acquire some particular land under section 110. Similarly, under the provisions of section 107A and 107B of the said Act, the criteria for assessing the value of the compulsorily acquired land is a preserve of the NLC. The next identified role of an acquiring authority is to be found in section 111 which relates to compensation for compulsorily acquired land. The said section provides that:
- “111. Compensation to be paid(1)If land is acquired compulsorily under this Act, just compensation shall be paid promptly in full to all persons whose interests in the land have been determined. (1A)The acquiring authority shall deposit with the Commission the compensation funds in addition to survey fees, registration fees, and any other costs before the acquisition is undertaken.”[Emphasis added]
108. Section 112 on the other hand provides for the process known as an inquiry, wherein the NLC hears issues of propriety and claims for compensation by persons interested in the land that is the subject of the compulsory acquisition. If an acquiring authority has any issues of propriety and claims regarding the anticipated compensation, it will be heard at this stage. Indeed, section 112 (6) provides that:
- “The public body for whose purposes the land is being acquired, and every person interested in the land, is entitled to be heard, to produce evidence and to call and to question witnesses at an inquiry.” [Emphasis added]
109. After the inquiry is concluded, the NLC prepares the written award pursuant to section 113 and serves upon each person it has determined to be interested in the land, a notice of the award and offer of compensation as provided under section 114 of the said Act. After notice



of an award has been served on all the persons determined to be interested in the land, the NLC is required, pursuant to the provisions of section 115, to promptly pay compensation in accordance with the award to the persons entitled thereunder. However, in instances such as when the person entitled does not consent to receive the amount awarded, the NLC may at any time pay the amount of the compensation into a special compensation account held by the NLC such as the one held with NBK. Pursuant to the provisions of section 120 (4), upon taking possession and payment of just compensation in full, the compulsorily acquired land vests in the national or county governments absolutely free from encumbrances.

110. From the aforesaid provisions of the *Kenya Roads Act* and the *Land Act*, the involvement of the acquiring authority in the acquisition process is, in our view, limited to notifying the NLC of its intention to acquire some particular land under section 110, depositing with the NLC the compensation funds in addition to survey fees, registration fees, and any other costs before the acquisition is undertaken, and participation in the inquiry, wherein any issues of propriety and claims for compensation by persons interested in the land subject of compulsory acquisition are heard.
46. In view of the foregoing, the limb of the current application that adverts to and touches on the 1st Defendant/Respondent and her Managing Director; is misconceived. However, the limb of the application touching on the 2nd Defendant is merited.

Final Disposition:

47. Arising from the foregoing analysis, I come to the conclusion that the Plaintiff/Applicant herein has placed before the court plausible and credible material to warrant a finding that the 2nd Defendant/Respondent and her officers are guilty of willful disobedience and/or disregard of lawful court order.
48. Consequently, and in the premises, the application dated the 5th March 2024; be and is hereby allowed as hereunder;
- i. The 2nd Defendant and the 2nd Defendant's Chairperson, Gershom Otachi, the Chief Executive Officer, Kabala Tache Arero and the Director of Finance, Ben Cherutich, be and are hereby found guilty for willful disobedience and contempt of the judgment of the Court delivered on the 5th June 2023, in ELC No. 263 of 2019 for failure to pay the interest in the sum of the decretal sum.
 - ii. The 2nd Defendant and the 2nd Defendant's Chairperson, Gershom Otachi, the Chief Executive Officer, Kabala Tache Arero and the Director of Finance, Ben Cherutich be and are hereby cited accordingly.
 - iii. The 2nd Defendant and in particular the 2nd Defendant's Chairperson, Gershom Otachi, the Chief Executive Officer, Kabala Tache Arero and the Director of Finance, Ben Cherutich shall appear before the court for purposes of mitigation and necessary sentencing.
 - iv. The date for mitigation shall be set/fixed upon the delivery of the ruling.
 - v. Cost of the Application shall be borne by the 2nd Defendant/Respondent.
 - vi. The Limb of the application touching on and concerning the 1st Defendant be and is hereby dismissed.
49. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 14TH DAY OF NOVEMBER 2024.



OGUTTU MBOYA,

JUDGE.

In the Presence of;

Benson Court Assistant

Ms. Mwikali h/b for Mr. Murimi Murango for the Plaintiff/Applicant.

Mr. Siboe for the 1st Defendant/Respondent.

Mr. S Mbuthia for the 2nd Defendant/Respondent.

