



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MACHAKOS

ELC. PETITION NO. E009 OF 2021

CHRISTOPHER MUSYOKA MUSAU.....1ST PETITIONER

ROOSEVELT NZOMO NGUKU.....2ND PETITIONER

ANTONY MUTISYA MWENDANDU.....3RD PETITIONER

VERSUS

THE NATIONAL LAND COMMISSIONRESPONDENT

RULING

What is before Court for determination is the Petitioners' Amended Notice of Motion Application dated the 14th December, 2021 where they seek the following orders:

1. Spent

2. That Notices to show cause be issued to Mr. Sammy who is in charge of the construction site, Mr Josephat the Highway Engineer in charge of the construction site, the Chairperson and Chief Executive Officer of the 1st Respondent ('the Respondent's Agents'), respectively to attend to and appear before the Honourable Court and show cause why they should not be committed to jail or penalized for contempt of court.

3. That pending the hearing and determination of the Petition, an order do issue compelling the Respondent to pay the:

a. 1st Petitioner Kenya Shillings Two Hundred and Twenty Six Million, Five Hundred and Eighty Seven Thousand, Two Hundred and Three (Kshs. 226, 587, 203/=) and the payment be done within 7 days of issuance of the Order:

b. 2nd Petitioner Kenya Shillings Five Million, Five Hundred and Fifty-Two Thousand, Seven Hundred and Twenty-Six (Kshs. 5, 552, 726/=) and the payment be made within 7 days of the issuance of the Order

c. 3rd Petitioner Kenya Shillings One Million, Four Hundred and Twenty-Five Thousand, Three Hundred and Eighty Three (Kshs. 1, 425, 383/=) and the payment be made within 7 days from issuance of the Order.

4. That Mr. Sammy who is in charge of the construction site, Mr Josphat the Highway Engineer in charge of construction, the Chairperson and Chief Executive Officer of the 1st Respondent be committed to jail for six months or penalized on such

terms as the Honourable Court may determine, for contempt of court for having deliberately disobeyed orders of this court issued on the 13th July, 2021 and extended on the 27th July, 2021.

5. The costs of this Application be borne by the Respondents.

The application is premised on the grounds on the face of it and supported by the affidavit of ROOSEVELT NZOMO NGUKU wherein the Petitioners claim that on 13th July, 2021 the court issued an order of injunction as against the Respondents which was served upon them and on 27th July, 2021, the said order was extended. Further, that despite service and knowledge of the Court Orders by the Respondents, they took possession of the Petitioners' properties, started excavation and construction thereon. They reiterate that the Respondents' and their agents' conduct smacks of impunity, bad faith and failure to accord due respect to this court. Further, that they continue to suffer irreparable damage and loss because the compensations due to them have not been paid to date.

The 1st Respondent opposed the application and filed a Replying Affidavit sworn of Gershom Otachi Bw' Omanwa, its Chairman, where he deposes that whereas he is named alongside other persons as intended Contemnors, the acts constituting contempt are not set out for purposes of a specific response. He denied that personal service of the order issued on 13th July, 2021 which was extended on 27th July, 2021 including the Penal Notice were effected upon him nor to anyone in their offices. He explains that the 1st Respondent has no mandate to construct roads and highways, but the same is carried out by the Kenya National Highway Authority (KENHA). He contends that the Petitioners admit the construction of the highway is being undertaken by a contractor on behalf of KENHA. Further, he denies knowledge of persons named as overseeing the roadworks. He avers that the 1st Respondent has no control over KENHA. He reiterates the averments in an earlier affidavit sworn by one FIDELIS MBURU and states that the dispute herein relates to compensation dating back to 2018 when EACC commenced investigations into the proprietary including integrity of the process, whereupon payments were halted. Further, following conclusion of the investigations, the Awards which are subject matter of the claim herein were found to have assessment errors whereupon the 1st Respondent withdrew the Awards and issued fresh ones, upon re evaluation of the suit lands. He reaffirms that some property owners accepted the fresh Awards. Further, the said Awards are subject to acceptance for purposes of payment which the Petitioners have declined. He reiterates that the 1st Respondent is ready and willing to make compensation in line with the revalued Awards once the Petitioners herein accept the Awards of compensation.

The application was canvassed by way of written submissions.

Analysis and Determination

Upon consideration of the Amended Notice of Motion application dated the 14th December, 2021 including the respective affidavits, annexures and rivaling submissions, the following are the issues for determination:

- Whether the abovementioned persons/officers should be cited for contempt and punished as provided by law.
- Whether the Petitioners should be paid Kshs. 226,587,203/= for 1st Petitioner; Kshs. 5,552,726/= for 2nd Petitioner and Kshs. 1,425,383/= for 3rd Petitioner respectively.
- Who should bear the costs of this application.

The Petitioners in their submissions, reiterated their averments as per the supporting affidavit to the instant application and contended that the Respondents agents should be cited for contempt of court and punished as provided by law. They submitted that the Respondents were served and were aware of the impugned court orders which they deliberately disobeyed. Further, that the said orders were unambiguous. They insist they have proved all the requisite elements for contempt. To buttress their averments, they relied on the following decisions: *Republic V Ahmad Abolfathi Mohammed & Another, Cr App cited in the case of Michael Sistu Mwaura Kamau V Director of Public Prosecutions & 4 Others (2018) eKLR*; *Dr. Fred Matiangi V Miguna Miguna & 4 Others, Crim App. Nai 1 of 2018 (UR)*; *Shimmers Plaza Ltd V National Bank of Kenya (2015) eKLR*; *Amos Mathenge Kabuthu V Simon Peter Mwangi (2015) eKLR*; *Jiban Freighters Ltd V Hardware & General Stores Ltd (2015) eKLR*; *A. B & Another V R. B (2016) eKLR*; *Thomas Kimagut Sambu V National Land Commission & 2 Others (2018) eKLR*; *Patrick Musimba V National Land Commission & 4 Others (2016) eKLR*; and *Cecilia Karuru Ngavu V Barclays Bank of Kenya Ltd & Another (2016) eKLR*.

The 1st Respondent in its submissions insist it is not in contempt of the impugned orders of the court. It claimed service of the orders

of the Court dated the 13th July, 2021 were defective as its Chairman and Chief Executive Officer have designated offices at the 7th Floor ACK Garden Annex Building and insists no personal service was effected upon them on that date. It disputes the averments in the affidavit of service of Kyalo Makau dated 23rd July, 2021. It insists it is KENHA that has the mandate to construct the highway and not the 1st Respondent. Further, that the proper parties who should be engaged in contempt proceedings are not before court. It reiterates that the 1st Respondent has not formally taken possession of the suit lands as the same is still registered in the Petitioners' names. Further, the Petitioners have not exhibited any notice of formal taking of possession as there is a subsisting dispute which forms the basis of this Petition. It contends that payment of compensation is tied to acceptance of the Award by the property owner and in this instance, the Petitioners declined the Award and filed the Petition to challenge the basis of quantum. Further, compensation will only become due once this Court determines the instant Petition or the Petitioners accept the Awards as final payments. To support its arguments, it relied on the following decisions: *Justus Kariuki Mate Vs Hon. Martin Nyaga Wambora & Another, Civil Appeal No. 24 of 2014 and cited in Shimmers Plaza Limited V National Bank of Kenya Limited (2015) eKLR and Ex parte Langley 1879, 13 Ch D. 110 (C.A) at p. 119.*

Before I make a determination of the issues herein, it is pertinent to highlight the background of this dispute. The fulcrum of this dispute revolves around compulsory acquisition of land for purposes of construction of the Highway. The Petitioners claimed the 1st Respondent issued them with Awards in compensation of their land but later revised them downwards. Further, that they were not notified of the revision of the respective Awards. The 1st Respondent vide its affidavit sworn by FIDELIS K MBURU dated the 6th September, 2021 which was annexed to the supporting affidavit to the instant application, confirmed that indeed the suit lands were compulsorily acquired. He explained that before the 1st Respondent could process and release the Compensation, it received a letter from Ethics and Anti-Corruption Commission (EACC) dated 16th August, 2019 indicating they were investigating cases of fraud emanating from the said process of compensation including compulsory acquisition. Further, EACC advised it to withhold payments of compensation until the project affected persons were verified and re-evaluation of the properties affected by the 20 – kilometer stretch conducted. He avers that KENHA vide its letter dated 30th July, 2019 informed it of the revision of the road design at Athi River and the same entailed omission of service roads and review of the main road alignment with minimal acquisition of land. He explains that KENHA had forwarded to them a revised map and schedule of the properties that it subsequently gazette vide Gazette Notice No. 9526 of 29th October, 2017 culminating in the exercise of re-evaluation which it conducted. It insists the project affected persons were duly notified vide its letter dated 28th June, 2021 and a consultative meeting held at Chumvi Interchange on 29th June, 2021. Further, properties were revalued and that the claim presented by the Petitioners contained in their valuation is erroneous as it took into consideration an erroneous acreage for purposes of arriving at the compensation payable. Further, the Petitioners are free to collect their Awards and funds subject to their acceptance and availing all the supporting documents as required by law.

The Petitioners have now sought for payment of compensation of what they call the *undisputed sum* based on the Award. Section 115 (1) (b) of the Land Act provides an exception in making just and prompt compensation in instances where the person entitled to receive the Award does not consent to it. Since the fulcrum of the Petition revolves around the assessment of compensation, I find that the Petitioners at this juncture, will have to await the outcome of the Petition to enable the court receive viva voce evidence and make a proper determination on what is just compensation for them.

On the issue of contempt of court, I wish to refer to the definition of the same as stated in Black's Law Dictionary (Ninth Edition):-

“Conduct that defies the authority or dignity of a court. Because such conduct interferes with the administration of justice, it is punishable usually by fine or imprisonment.”

In *Halsbury's laws of England at para 463 Vol 9(1) (Re-issue) 3*, it was stated as follows:-

“.....and a person not a party against whom any judgement or order may be enforced is liable to the same process for enforcing obedience to it as if he were a party.”

While Section 29 of the Environment and Land Court Act stipulates that:

“Any person who refuses, fails or neglects to obey an order or direction of the Court given under this Act, commits an offence, and shall, on conviction, be liable to a fine not exceeding twenty million shillings or to imprisonment for a term not exceeding two years, or to both.”

In the case of *North Tetu Farmers Co. Ltd v. Joseph Nderitu Wanjohi (2016) eKLR* Justice Mativo stated that:

“writing on proving the elements of civil contempt, learned authors of the book Contempt in Modern New Zealand have authoritatively stated as follows:-

there are essentially four elements that must be proved to make the case for civil contempt. The applicant must prove to the required standard (in civil contempt cases which is higher than civil cases - (a) the terms of the order (or injunction or undertaking) were clear and unambiguous and were binding on the defendant; (b) the defendant had knowledge of or proper notice of the terms of the order; (c) the defendant has acted in breach of the terms of the order; and (d) the defendant's conduct was deliberate.”

In this instance, the 1st Respondent has denied being served with the Court Orders in question. Further, I note KENHA that took possession of the land is no longer a party to these proceedings. On a keen perusal of the affidavits of service sworn by Kyalo Makau which were annexed to the supporting affidavit to the instant application, I note there was no personal service effected upon the two officers from the 1st Respondent. The deponent admits he proceeded to the legal Department of the 1st Respondent and left the Court Orders therein. As for Mr. Sammy and Mr. Josphat, there is no indication whether they were indeed officials of the contractor. Further, there is no confirmation if they were indeed served with the Penal Notice. I further note the impugned interim orders are yet to be confirmed. In the case of *Augustine Marete Rukunga vs. Agnes Njeri Ndungire & Anor, HCCC 2160* the court held that:

“The consequence of a finding of contempt is penal. The standard of proof is beyond reasonable doubt. The applicant therefore had to prove service beyond reasonable doubt and I must be satisfied that the respondents disobeyed the court order made on the 9th December 1998 and that they did so willfully or intentionally.”

Further in the case of *Shimmers Plaza Limited Vs. National Bank of Kenya Ltd (2015) eKLR* the court held as follows:

“the notice of the order is satisfied if the person or his agent can be said to either have been present when the order was given or made; or was notified of its terms by telephone, email or otherwise. In our view, ‘otherwise’ would mean any other action that can be proved to have facilitated the person having come into knowledge of the terms of the judgement and/or order. This would definitely include a situation where a person is represented in court by counsel. Once the Applicant has proved notice, the Respondent bears an evidential burden in relation to wilfulness and mala fides disobedience.”

In associating myself with the decisions cited above, I am of the view that the Petitioners have not proved that the alleged contemnors were indeed personally served with the two Court Orders and Penal notice which they purportedly disobeyed. Further, from the background I have provided above, it is clear that there is a dispute in respect to the Awards for compensation and from one of the annexures to the Petition, the Petitioners actually granted consent to KENHA to take possession of their land and proceed with the project. To my mind, I find that they are not being candid. I opine that the issues being raised in the instant application can only be determined once the Petition has been set down for hearing. Further, from the averments in the respective affidavits, there is no demonstration that there was wilfulness and *mala fides* disobedience of the orders of this court.

It is against the foregoing that I find the Petitioners’ Amended Notice of Motion application dated the 14th December, 2021 unmerited and will disallow it.

Costs will be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 28TH DAY OF MARCH, 2022

CHRISTINE OCHIENG

JUDGE



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