



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Misc Appli 1299 of 2007

JUSTUS WANJALA KISIANGANI 1ST APPLICANT
JOSIAH MUSILI SYANDA.....2ND APPLICANT
HEZRON ARUNGA.....3RD APPLICANT
(suing in their capacity as the registered Trustees of GOSPEL LIGHTHOUSE)

VERSUS

CITY COUNCIL OF NAIROBI.....RESPONDENT

AND

M. N. NG'ETHE.....1ST RESPONDENT
PETER MBURU KIBINDA.....2ND RESPONDENT
JOHN GAKUO.....3RD RESPONDENT

R U L I N G

The applicants filed a notice of motion pursuant to the provisions of **Section 5 (1)** of the **Judicature Act**, **Order 52 Rule 2 (3)** of the **Rules of the Supreme Court of England 1999**, **Section 3A and 63(c)** of the **Civil Procedure Act** and **Order XXI Rule 28** of the **Civil Procedure Rules**. The applicants seek the committal to prison of M. N. Ng'ethe, the director of legal affairs, Peter Mburu Kibinda, the director of city planning and John Gakuo, the town clerk (*hereinafter referred to as the respondents*) respectively of the respondent for being in contempt of the orders of the court. The applicants contend that the respondents had disobeyed the order issued by the subordinate court on 23rd February 2007 and which was extended on 25th June 2007 in Nairobi CMCCC No. 1383 of 2007 (*Milimani*) compelling all parties to the suit to maintain *status quo* pending the hearing interpartes of the plaintiffs' application dated 23rd February 2007.

The applicants stated that upon the court issuing the said order, M. N. Ng'ethe was served with

the duly extracted order together with the notice of penal consequences. The applicants stated that at the times the subordinate court extended the interim order, the same was done in the presence of the advocate of the respondent. It was the applicants' contention that by virtue of their offices, Peter Mburu Kibinda and John Gakuo were aware of the existence of the order issued by the court. The applicants stated that in blatant breach and willful disobedience and disregard of the said order, the respondents on 3rd August 2007 instructed their officers to descend on the applicants' premises with a bulldozer resulting in the complete demolition of the church, offices and other utility facilities constructed on the suit premises. The said demolition caused the applicants to suffer substantial damage. The applicants urged the court to punish the respondents for being in contempt of the orders of the court in order to uphold the dignity and the authority of the subordinate court. The application is supported by the annexed affidavit of Justus Wanjala Kisiangani. The applicants filed a statement pursuant to the provisions of **Order 52 rule 2** of the **Rules of Supreme Court of England, 1999**.

The application is opposed. M. N. Ng'ethe, one of the respondents swore a replying affidavit in opposition to the application. In the said affidavit, she denied that she had been served with the order and the notice of penal consequences as alleged by the applicants. She further deponed that under the **Local Government Act**, the only person who was legally supposed to be served on behalf of the respondent (*Nairobi City Council*) was the town clerk. She deponed that the town clerk was not served with the said order was allegedly breached. She explained that there were contradictions in the pleadings filed by the applicants in the subordinate court, particularly regarding when the particular order was issued. She deponed that the applicants had been served with the notice to remove the structures illegally erected on the suit premises without the authority of the respondent. She stated that the applicants failed to abide by the notice hence the respondents' decision to remove the said structures. During the hearing of the application, it was contended on behalf of the respondents that the order that was issued did not specify the particular parcel of land that it related to nor was it specific on what the respondent was restrained from doing.

Peter Kibinda, the other respondent swore another replying affidavit in opposition to the application. He denied being served with the order or the notice of penal consequences. He admitted being aware of the proceedings before the subordinate court but denied issuing instructions for the structures on the suit property to be demolished. He denied being party to the proceedings in the subordinate court that resulted in his being cited for being in contempt of the orders of the court. He reiterated that under the **Local Government Act** to constitute proper service to the respondent, the only person recognized in law as the proper person to be served on behalf of the respondent was the town clerk. Since the town clerk was not served, he maintained that there was no proper service of the order and the notice of penal consequences upon the respondent. He urged the court to dismiss the application with costs.

At the hearing of the application, I heard the submissions made by Mr. Kang'ethe on behalf of the applicants and by Mr. Kiangoi on behalf of the respondents. I have carefully considered the said submissions. I have also read the pleadings filed by the parties in support of their respective opposing positions. The issue for determination by this court is whether; firstly, the applicants obtained the order restraining the respondent from demolishing the structures on the suit property; secondly, whether the said order together with the notice of penal consequences was served upon the respondent; thirdly, whether the respondents disobeyed the said order and therefore are liable to be punished for being in contempt of the orders of the court. As regard the first issue, although the respondents argued that by the time the applicants came to court on 23rd February 2007, the respondent had already demolished the structures on the suit properties, upon evaluation of the facts in support of the application, it was evident that the said structures were demolished on 3rd August 2007 as asserted by the applicants.

According to the proceedings of the subordinate court, when the applicants appeared before the court on 23rd February 2007 seeking to argue their application for the interim relief of injunction, an order was issued by the court requiring a *status quo* to be maintained pending the hearing and determination of the application interpartes. What constituted the *status quo* was not stated in the order which was extracted by the applicants. The said order was served upon M. N. Ng'ethe, the director of legal affairs of the respondent. She was served with the order together with a notice of penal consequences. She acknowledged receipt of the said order on 23rd February 2007 at 5.00 p.m. She acknowledged receipt of the notice of penal consequences on 27th February 2007 at 3.00 p.m. To discern whether the said M. N. Ng'ethe was aware of the purport and the true meaning of the said order requiring the respondent to maintain *status quo* pending the hearing of the application interpartes, the applicants served the said M. N. Ng'ethe with a copy of the letter written by their advocates Messrs Kagwimi Kang'ethe & Co. Advocates dated 21st February 2007. The said letter explained the complaints of the applicants against the respondent. It also mentioned the parcel of land which the said order was in regard to. The said M. N. Ng'ethe acknowledged receipt of the said letter on 23rd February 2007 at 5.00 p.m. She was further served with the pleadings that the applicants had filed in court. It cannot therefore be said that the said M. N. Ng'ethe was unaware of the order which was issued by the subordinate court.

Further, Peter Kibinda swore the replying affidavit in reply to the application filed by the applicants in which they sought the order of injunction before the subordinate court. In the said affidavit, he swore that he was conversant with the facts of the case. He cannot therefore, in response to this application seeking to cite him for being in contempt of the orders of the subordinate court, claim that he was unaware of the order that was issued by the said court. In the same breath, he cannot claim that he was not the one who authorized the demolition of the structures on the suit property yet he is in charge of the city planning, the department that was responsible for issuing the notice which the applicants sought to challenge in the suit filed before the subordinate court.

The respondents submitted that the Nairobi City Council was not properly served with the order and the notice of penal consequences, since in accordance with **Section 129** of the **Local Government Act**, the only person who was authorized to receive any legal processes on behalf of the council was the town clerk. I have read the said section of the **Local Government Act**. It is evident that apart from being authorized to receive legal summons on behalf of the local authority, the town clerk was authorized to assign or delegate certain functions to officers acting under him. In the present application, it was clear that the town clerk had authorized the director of legal affairs to receive legal summons on behalf of the council. When M. N. Ng'ethe was served with the said order of the court, she accepted the service and went ahead to instruct an advocate to appear on behalf of the council. The said advocate entered appearance and filed a defence to the suit. He also filed a replying affidavit sworn by Peter Kibinda in response to the application for injunction which was pending before the subordinate court. It cannot therefore be said that the director of legal affairs of the council lacked legal capacity to be served with summons on behalf of the council.

I have perused the proceedings before the subordinate court. It is evident that the initial order granted by the subordinate court on 23rd February 2007 was extended from time to time till 3rd August 2007 when the respondent breached the said order by demolished the structures built on the suit property. During all this time that the interim orders were extended, the respondent's advocate was present in court. The respondents in this application cannot therefore be heard to say that they were unaware of the existence of the said order requiring them to maintain *status quo*. I think the respondents are labouring under misconception that since they were not served with the subsequent orders in regard to the interim orders, then they were under no obligation to obey the same. It is trite law that any party who is aware of a court order is required to obey the same. The fact that the respondents' counsel was present in court when the said interim orders were extended bound the respondents (see **Commercial**

Bank of Africa vs. Isaac Kamau Ndirangu CA Civil Appeal No. 157 of 1991) (*unreported*) per Kwach JA. It was not necessary for the applicants to again serve the respondents once the respondent (*Nairobi City Council*) appointed an advocate to act on their behalf. The said advocate, being an agent of the respondents, was expected to notify the respondents the orders that the court issued.

It is apparent from the response of M. N. Ng'ethe and Peter Kibinda that they deliberately disobeyed the orders of the subordinate court after assuming that they would escape liability or culpability on technical grounds that they were not served with said order and further that if they were so served, they were not bound to obey the said order since the applicants had failed to serve the town clerk of the respondent. That explanation does not wash with this court. Court orders are issued to be complied with. Disobedience of court orders cannot be explained away on technicalities. Upon evaluation of the facts of this case, it is clear that the applicants made a case for the appropriate citing of M. N. Ng'ethe, the director of legal affairs and Peter Mburu Kibinda, the director of city planning of the respondent for contempt of court. The two officers authorized officers subordinate to them to proceed with the demolition of the church and the buildings erected on the suit property during the existence of a valid court order prohibiting the council from undertaking the said demolition. The said respondents tried to justify their action by deliberately failing to acknowledge the existence of the order. That will not do. The applicants failed to establish any case against John Gakuo, the town clerk of the respondent. I therefore dismiss the application seeking to cite him for being in contempt the orders of court.

As regard M. N. Ng'ethe and Peter Mburu Kibinda, I do find that they were in contempt of the orders of the subordinate court. They will be appropriately punished for being in contempt of the said orders of the subordinate court. The two respondents should take note that orders of the court must be obeyed at all times. Clever attempts to avoid compliance with the orders of the court will not do. I therefore sentence the said M. N. Ng'ethe and Peter Mburu Kibinda to pay a fine of KShs.100,000/= each or in default they shall serve sixty (60) days imprisonment. As regard the Nairobi City Council, (*the respondent*) shall restore to its original position the structures of the applicants that it destroyed during the subsistence of a valid court order. The applicants may in the alternative quantify the damages that they incurred when their properties that were destroyed for appropriate compensation by the Nairobi City Council. Each party shall be at liberty to apply. The applicants shall have the costs of the application.

DATED at NAIROBI this 12th day of NOVEMBER, 2008.

L. KIMARU

JUDGE



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