



REPUBLIC OF KENYA



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Abdilah & 2 others v County Government of Wajir (Constitutional Petition E007 & E008 of 2023 (Consolidated)) [2024] KEHC 11513 (KLR) (30 September 2024) (Ruling)

Neutral citation: [2024] KEHC 11513 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT GARISSA
CONSTITUTIONAL PETITION E007 & E008 OF 2023 (CONSOLIDATED)
JN ONYIEGO, J
SEPTEMBER 30, 2024
IN THE MATTER OF THE CONSTITUTION OF THE REPUBLIC OF
KENYA
(SUPERVISORY JURISDICTION AND PROTECTION OF
FUNDAMENTAL RIGHTS AND FREEDOMS) HIGH COURT OF
PRACTICE AND PROCEDURE RULES (2013)
AND
IN THE MATTER OF ALLEGED CONTRAVENTION OF
FUNDAMENTAL RIGHTS UNDER ARTICLES 2(1), 3, 10, 22(1),
27(1), 39(1), 43,47(1) AND (2) AND ART 196 OF THE
CONSTITUTION OF KENYA
AND
IN THE MATTER OF ARTICLES 22 AND 23(1) OF THE
CONSTITUTION OF KENYA
AND
IN THE MATTER OF THE COUNTY GOVERNMENTS ACT NO. 17 OF
2012
AND
PET NO. 7 OF 2023 AS CONSOLIDATED WITH PET. NO. 08 OF 2023 PAGE 1 OF 22
IN THE MATTER OF A CONSTITUTIONAL PETITION AGAINST
ARBITRARY INCREASE OF CESS RATES BY THE COUNTY
GOVERNMENT OF WAJIR



BETWEEN

ALI ABDILAH 1ST PETITIONER
KUSO DAHIR 2ND PETITIONER
ABDULLAHI SHARUBU 3RD PETITIONER

AND

THE COUNTY GOVERNMENT OF WAJIR RESPONDENT

RULING

1. The applicants herein approached this court vide a petition and notice of motion dated 22-06-2023 seeking orders restraining the respondents from imposing Kes. 35,000/- (*petition No.E008 of 2023*) and 20,000/- (*Petition No.E008 of 2023*) or more as cess rates for miraa trucks passing through Wajir County until the petition was heard and determined. Upon canvassing the consolidated applications, the court delivered its ruling dated 09-10-2023 thus ordering as follows:
 - i. That pending the hearing and determination of both petitions interpartes, a temporary injunction is hereby issued restraining the respondents, its officers, agents, servants and/or representatives either acting on instructions or otherwise from levying, collecting and/or imposing Kes. 20,000 as cess rates for miraa trucks passing through Wajir County.
 - ii. The petitions herein be heard on a priority basis.
 - iii. That for avoidance of doubt, the new cess rates are hereby suspended pending the hearing and determination of the petitions herein.
 - iv. That in the meantime, the respondents shall revert to the old cess rates pending the hearing and determination of the petitions herein.
 - v. That costs shall abide the outcome of the petitions.
2. Subsequently, the respondents filed an application for stay of execution of the orders above. However, the same was dismissed by the court on 03.05.2024. Having failed to comply with the said orders, the petitioners/applicants moved to this court vide a motion dated 01.12.2023 pursuant to sections 1A,1B, and 3A of the *civil procedure Act*, order 40 rule 3(1) of the *CPRS*, Sections 5 of the *judicature Act*, Section 3 and 4 of the contempt Act and Article 23 of *the constitution* of Kenya seeking orders as follows.
 - i. Spent.
 - ii. The county attorney for the County Government of Wajir be arrested/ and or committed to civil jail for such time as the Honourable Court shall deem just and expedient for being in disobedience of this Honourable Court's orders of 16.10.2023.
 - iii. The county secretary for the County Government of Wajir be arrested and/or committed to civil jail for such time as the Honourable Court shall deem just and expedient for being in disobedience of this Honourable Court's orders of 16.10.2023.



- iv. The Inspector General of police to enforce these orders by arresting and prosecuting the above-mentioned contemnors by bringing them to court for sentencing and committal.
 - v. Costs of this application be provided for.
3. The application is premised on the grounds on the face of it and further amplified by the annexed affidavit of Ali Abdillah sworn on 01.11.2023. it was averred that despite the court order suspending collection of the new cess pending hearing and determination of the petition, the respondents had continued collecting the impugned cess thus committing an act of contempt calling for punishment.
 4. In response, Naema Ibrahim, the County Attorney through the firm of Gedi Advocates filed a replying affidavit sworn on 18.12.2023 opposing the application. Counsel urged that the application was fatally defective in so far as the applicants did not comply with section 30(2) of the Contempt of Court Act, 2016. That the aforementioned Act provides that before any civil contempt of court proceedings is instituted in disobedience of a judgment, decree or order, the applicant must first move the court to issue a notice to show cause against the accounting officer of the state organ, a government department, ministry or corporation concerned.
 5. It was deposed that the Act further provides that such a notice is to be served on both the accounting officer and the attorney general. That as a counsel, her responsibility is to the extent of representing the county in court proceedings and that she does not wield any executive power to implement compliance of the said orders. She urged that the county secretary is not the organ responsible for the implementation of court orders in matters that touch on the financial affairs of the county as the body charged with that responsibility is the County Executive Committee through the CECM Finance.
 6. That the allegation by the applicants that the county still charges Kes. 20,000 and Kes. 35,000/- as cess fees is just a mere allegation as no evidence was provided before the court to substantiate the same. The court was further directed to refer to its previous decision in constitutional Petition No. E006 of 2023, Mohamed Jelle t/a Alamagan Enterprises & 2 others v County Government of Wajir & Another where the court delivered a judgment in direct contrast of the orders herein.
 7. That if there is any non-compliance, the same has been occasioned by the conflict of the two decisions and therefore, the respondent cannot be cited for contempt as there exists ambiguity in terms of two conflicting decisions. In the end, the respondent urged that the application be dismissed in the interest of justice.
 8. The court directed that the application be canvassed by way of written submissions which order was complied with.
 9. The applicants in their submissions dated 20.05.2023(sic) raised three issues for determination as follows:
 - i. Whether the county attorney and the county secretary of Wajir county Government have committed contempt of court in light of the court order dated 16.10.2023. (sic)
 - ii. Whether the court should mete out a punishment upon the county attorney and the county secretary in light of such contempt.
 - iii. Whether the respondent should reimburse the excess cess levy on the old rates from the date of service of the court order to date.
 10. On the first issue, counsel urged that court orders are not issued in vain thus it is incumbent upon those upon whom the order is issued to obey and oblige accordingly. That the ruling was issued in



court in the presence of counsel for the respondent and further, the said order upon extraction by the counsel for the applicant, was served upon counsel for the respondents and the county secretary. That despite the said orders being clear, the respondents failed to act on them and instead continued to levy the new rates of Kes. 20,000/- and 30,000/- respectively on both petitions thus making the petitioners continue to suffer.

11. The foregoing being the case, this court was urged to find the county attorney and the county secretary culpable of contempt. Reliance was placed on the case of *Econet Wireless Kenya Limited vs Minister for Information and Communication of Kenya authority* [2005] eKLR where Hon Justice Ibrahim (as he was then) stated that the court will not condone deliberate disobedience of its orders.
12. Contending that the court orders were clearly disobeyed hence leading to the applicants suffering huge financial losses, this court was urged that it was fair that the respondents be compelled to refund the applicants the extra amount collected. That after all the respondents have admitted non-compliance. To that end, reliance was placed on the case of *T.N. Gadavarman Thiru Mulpad vs Ashok Khot and Another* [2005] 5 SCC, where the Supreme court of India stated that it is imperative and invariable that court orders are to be followed and complied with.
13. In conclusion, the applicants contended that the facts herein had established that the actions of the respondents were tainted with unreasonableness and disregard of the law and therefore, the same should not go unpunished.
14. On the other hand, the respondents in opposing the application filed submissions dated 01.02.2024 submitting on four grounds.
 - i. Whether the applicants have complied with section 30(2) of the [Contempt of Court Act, 2016](#).
 - ii. Whether the county attorney can be committed to civil jail.
 - iii. Whether the applicant has met the fundamental and well established threshold of being granted contempt of court orders.
 - iv. Whether the orders granted by the Honourable Court contradict the orders in constitutional petition [e006 of 2023; Mohamed Jelle t/a Alamagan enterprises & 2 others vs County Government of Wajir & another](#).
15. On the first issue, it was contended that time and again, courts have emphasized on the importance of statutory provisions being adhered to. That section 30(2) of the [Contempt of Court Act, 2016](#) provides a well laid out procedure for instituting civil contempt proceedings. To that extent, counsel placed reliance in the case of *Republic vs Attorney General & another exparte Orbit Chemicals Limited* [2017] eKLR where the court held that there is a laid down procedure for institution of civil contempt proceedings in that; before any civil contempt of court proceedings are instituted in disobedience of a judgment, decree or order, the applicant must first move the court to issue a notice to show cause against the accounting officer of the state organ.
16. That a county attorney's functions include acting as a legal adviser to the county government and to represent the county executive in court proceedings. It was contended that a county attorney does not wield any executive power to implement compliance of court orders.
17. In the same breadth, it was opined that a county secretary is not the organ responsible for implementation of court orders in matters that touch on financial affairs of the county. As such, the county attorney and the county secretary are therefore not the persons directly responsible for implementation of the court order and therefore cannot be committed to civil jail for any disobedience occasioned by the relevant organs.



18. On whether the applicant had met the fundamental and well established threshold of being granted contempt of court orders, counsel stated that the applicant did not furnish the court with any proof in the form of a receipt that showed that there was a willful disobedience of the court's orders hence the contention of disobedience is merely an allegation.
19. The respondents relied on the case of *Samuel M. N. Mweru & others vs National Land Commission & 2 others* [2020] eKLR where it was held that in order to succeed in civil contempt proceedings, the applicant has to prove the terms of the order, knowledge of the terms by the respondent and failure by the respondent to comply with the terms of the order. That upon proof of these requirements, the presence of willfulness and bad faith on the part of the respondent would normally be inferred but the respondent could rebut the inference by a contrary proof on a balance of probabilities. Counsel contended that the requirements listed above were not established and therefore, the allegations herein remain baseless.
20. On whether the orders granted by the court contradict the orders in constitutional petition *e006 of 2023*; Mohamed Jelle t/a Alamagan enterprises & 2 others vs County Government of Wajir & another, it was submitted that in the foregoing case, the judgment therein allowed the respondent to continue collecting the cess fees as contained in the Wajir Finance Act, 2023. In the end, this court was urged to dismiss the application herein for the same was fatally defective.

Determination.

21. I have considered the application herein together with the replying affidavit and submissions by the respective parties. Issues that germinate for determination are:
 - i. Whether the contempt application is properly before court.
 - ii. Whether the application is seeking orders which are in contrast to the judgment entered in petition number E008 of 2023 Garissa high court
 - iii. Whether the application has met the threshold for grant of contempt orders.
 - iv. Whether the respondents are in contempt of the court order.
 - v. Whether the applicants are entitled to a refund of the excess cess paid after the impugned court order.
22. Before I proceed, I wish to clarify that the orders alleged to have been breached were issued on 09-10-2023 and not 16-10-23 as claimed. I will take the confusion on the date as a typographical error.
23. Equally, I wish to clarify that the contempt Act heavily relied on by the respondents is not operational as it was declared unconstitutional by the high court. See Kenya Human Rights Commission v Attorney General & Another [2018] eKLR. To that extent, I will not be making any reference to the non-existent Act or law.
24. I am therefore obliged to revert to the provisions of the law that operated before the enactment of the *Contempt of Court Act* to avoid a lacuna in the enforcement of Court orders. It was in this respect observed in *Republic v Returning Officer of Kamkunji Constituency & The Electoral Commission of Kenya HCMCA No. 13 of 2008*, that the High Court has the responsibility for the maintenance of the rule of law, hence there cannot be a gap in its application.
25. The Court of Appeal in *Christine Wangari Gachege v Elizabeth Wanjiru Evans & 11 Others*, [2014] eKLR found that the English law on committal for contempt of court under Rule 81.4 of the English



Civil Procedure Rules, which deals with breach of judgment, order or undertakings, was applicable by virtue of Section 5(1) of the *Judicature Act* which provides that:

“The High Court and the Court of Appeal shall have the same power to punish for contempt of court as is for the time being possessed by the High Court of Justice in England, and that power shall extend to upholding the authority and dignity of subordinate courts.”

Whether the application is properly before the court

26. It was the respondents’ argument that the applicant cannot seek to commit the respondents to civil jail without first seeking notice to show cause. The requirement for 30 days’ notice to issue to a contemnor before contempt proceedings commences was contained in section 30 of the contempt *Act No.16 of 2016* which was declared unconstitutional. This requirement is therefore not mandatory under the current applicable law on contempt proceedings pursuant to the English civil procedure rules aforesaid. In my view, the application is properly before the court.

Whether the application is seeking orders which are in contrast to the judgment entered in petition number E006 of 2023 Garissa high court

27. The respondents contended that the applicants are seeking to enforce an order that is already overtaken by events given that the subject cess or rates was vindicated by the judgment in Garissa petition number E006 of 2023 which found that the Wajir Finance bill 2023 /2024 met the threshold for enactment as a statute.
28. In petition *No. E006 of 2023*, the clamour was that the finance bill 2023 / 2024 did not meet the threshold required before enactment. Particularly, it was contended that there was no public participation before enactment. After canvassing the petition, there was proof that there was sufficient public participation before enactment. What was in question was the process of enactment and not the constitutionality of the Act or part of it. That holding did not nor does it in any way stop the court from declaring the whole, part or Section of the Act unconstitutional on account of contravening the applicants’ fundamental or bill of rights or in public interest.
29. If the court were to be convinced in these proceedings that the Act or specified sections are unconstitutional, it will pronounce as such notwithstanding the judgment in petition number E006 of 2023 which dwelt on the enactment process as properly conducted and not its constitutionality against breach of specific or individual fundamental or bill of rights or those in the public interest. Counsel for the respondents should be able to distinguish the two prayers. To that extent, it is my finding that there is no ambiguity in the wording or interpretation in my judgment in Petition number E006 of 2023 hence no excuse for anybody not to comply with any orders under this file.

Whether the application has met the threshold for grant of contempt orders.

30. There is no dispute that the orders in question were made and served upon the respondents. It is trite that an applicant in contempt proceedings must prove the existence of; a lawful and clear court order; that the order has been brought to the knowledge of the contemnor; that the contemnor has disobeyed the order and ; that the disobedience is deliberate.
31. In *Katsuri Limited v Kapurchand Depdor Shah [2016] eKLR, citing Kristen Carla Burchell v Barry Grant Burchell* (Eastern Cape Division Case No. 364 of 2005) it was stated that “in order for an applicant to succeed in civil contempt proceedings, the applicant has to 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 of the order.
32. Upon proof of these requirements, the presence of willfulness and bad faith on the part of the respondents would normally be inferred or that the respondents could rebut this inference by contrary proof on a balance of probabilities.
33. In the instant case, there is no dispute that there was a court order issued by a court of law hence a lawful order; The issues that beg for answers are; whether the order in question was served; whether it was clear and unambiguous and; whether there was deliberate disobedience to the order in question hence contempt proceedings which are quasi criminal in nature.
34. It is trite that unless the court dispenses with service, a judgment or order may not be enforced by way of an order for contempt unless a copy of it has been served on the person required to do or not do the act in question.
35. However, It has been held in several judicial decisions that if personal awareness of the court orders by the alleged contemnors is demonstrated, they will be found culpable of contempt even though they had not been personally served with the orders and penal notice. [See Court of Appeal decision in *Shimmers Plaza Limited vs National Bank of Kenya Limited* [2015] eKLR] where it was held that: –
- “Would the knowledge of the judgment or order by the advocate of the alleged contemnor suffice for contempt proceedings” We hold the view that it does. This is more so in a case such as this one where the advocate was in Court representing the alleged contemnor and the orders were made in his presence. There is an assumption which is not unfounded, and which in our view is irrefutable to the effect that when an advocate appears in court on instructions of a party, then it behoves him/her to report back to the client all that transpired in court that has a bearing on the client’s case.”
36. In the same breadth, in *Basil Criticos v Attorney General and 8 Others* [2012] eKLR Lenaola J. (as he then was) pronounced himself as follows: -
- “... the law has changed and as it stands today knowledge supersedes personal service ... where a party clearly acts and shows that he had knowledge of a Court Order; the strict requirement that personal service must be proved is rendered unnecessary.”
37. In the circumstances of this case, the order which is clear and lawful was duly served upon the respondents who acknowledged service. They however gave contradictory explanations. Firstly, they argued that there was no proof of non-compliance as no receipts of the impugned rates were tabled. Secondly, they could not comply because there was a judgment in place being petition number E006 of 2023 which recognized the validity of the impugned finance bill.
38. These two contradictory explanations are not sustainable. Simply put, they should have shown that they had issued receipts reflecting old rates as per the court order. Equally, it amounts to an admission to say that they did not comply with the court order on the basis of the wording of the judgment in petition number E006 of 2023. Therefore, the applicant was right to say there was non-compliance. To that extent, that explanation is not tenable.



Whether the respondents are in contempt of the court order

39. On the issue whether the county attorney ought to be held liable for contempt, it follows that the attorney as an agent, her responsibility ends in offering advice to the principal who thereafter proceeds to act on the said advice. The matter herein involves a case on the implementation of court orders in matters that touch on the financial affairs of the county. In the case of *Council of Governors & Others vs The Senate* [2015] eKLR the court stated as follows;

“The Petitioners have also sought the interpretation of the term “Accounting Officer”. In that regard, Article 226 of *the Constitution* provides;

- (1) Act of Parliament shall provide for -
 - (a)
 - (b) The designation of an accounting officer in every public entity at the National and County level of Government.
- (2) The Accounting Officer of a National public entity is accountable to the National Assembly for its financial management, and the Accounting Officer of a County public entity is accountable to the County Assembly for its financial management.

Pursuant to this provision, Parliament enacted the *Public Finance Management Act*. The appointment and designation of a County Government Accounting Officer is provided for under Section 148 of that Act, as follows;

1. A County Executive Committee member for finance shall, except as otherwise provided by law, in writing designate accounting officers to be responsible for managing the finances of the county government entities as is specified in the designation.
2. Except as otherwise stated in other legislation, the person responsible for the administration of a County Government entity, shall be the Accounting Officer responsible for managing the finances of that entity.

It therefore follows that “an accounting officer” for a County Government entity is the person so appointed and designated as such by the County Executive Committee Member for Finance under Section 148 of the *Public Finance Management Act*. Indeed, Section 148(3) of the *Public Finance Management Act* mandates the County Executive Committee Member for Finance to ensure that each County government entity has an accounting officer as provided for under Article 226(2) of *the Constitution*.

As regards the Accounting Officer for the County Assembly, Section 148(4) of the *Public Finance Management Act* provides that; “The Clerk of the County Assembly shall be the accounting officer of the County Assembly”.

Having found as we have, it follows that the question posed by the Petitioners as to whether the County Governor is an Accounting Officer, must be answered in the negative. He is not an Accounting Officer and we have said why.”

The Executive Committee member of a County Government responsible for finance has the duty to appoint an accounting officer and where he fails to appoint one or does not disclose such a designated officer, the responsibilities of an accounting officer fall on his shoulders.



In *Solo Worldwide Inter-Enterprises vs County Secretary Nairobi County and Another* [2016] eKLR the court held;

“It therefore follows that the person who has the overall financial obligation for the purposes of the affairs of a County Government must be the County Executive in Charge of Finance and unless he shows otherwise, he is the one under obligation to pay funds, in the capacity as the accounting officer. It must always be remembered that a judicial review application is neither a criminal case nor a civil suit hence the application ought to be brought against the person who is bound to comply with the orders sought therein. In an application for mandamus where orders are sought to compel the satisfaction of a decree against a County Government, the proper person to be a respondent ought to be the said County Executive in Charge of Finance unless he discloses that he had in fact appointed an accounting officer for that purpose...”

40. In the case of *Peter Anyang' Nyong'o & 10 Others vs. Solicitor General* [2011] eKLR, Warsame J. expressed himself as follows:

“No doubt the decree is against the Attorney General but in his representative capacity. As stated earlier the Attorney General was representing one arm of the Government and if any costs or liability accrues from his representation, he is obliged to pay the costs. It is for the Attorney General to advise his clients to pay the costs which attracted his representation on behalf of the said client. Being a constitutional representative and being the principal legal advisor to the three arms of the Government, he is required to direct any arm of Government he represented to pay the costs of any suit which he acted on its behalf. Clearly, it is the duty and the function of the Attorney General to advise his client and if a particular organ refuse to pay he will be responsible on behalf of his agent. In that regard the Solicitor General being the accounting officer of the Attorney General was rightly sued by applicants. In my mind the applicants clearly and correctly sued the Solicitor General and are entitled to the orders sought.”

41. In the circumstances of this case, the county attorney was not directly sued as a party nor cited as a contemnor in the notice of motion before court. She can not be held liable on behalf of the county government to which she is only duty bound to give legal advice. Had she been sued directly, the peter Nyong'o case above would have applied.

42. However, the county secretary being the overall accounting officer of the county government is liable for any liability affecting his or her county government's departments unless he or she specifically assigns the parent department's accounting officer(CEC) to honour the court order. Ideally, it is the CECM finance who directly ought to have been cited instead of the county secretary. Failure to enjoin the CECM finance is a mere misjoinder which is not fatal to the application.

43. In view of the above holding, it is my holding that the county attorney was improperly connected to these proceedings although that joinder is not fatal to the application.

44. Regarding the county secretary having had knowledge of this order, and fully aware of its content, he deliberately ignored its implementation and instead kept insisting that they could not honour the order in view of the court judgment in petition number E006 of 2023. Court orders must be obeyed to maintain court's authority, dignity and sanctity, rule of law and certainty regardless whether the contemnor is of a different opinion or perceives the order not to be correct. [See *Econet Wireless Kenya*



Ltd vs. Minister for Information & Communication of Kenya & Another [supra]Ibrahim, J (as he then was)].

45. Having held as above, it is my finding that the county secretary is in contempt of the court order dated 09-10-2023. Accordingly, he is given 21 days to purge the contempt in default, the court shall pronounce the appropriate punishment.

Whether the applicants are entitled to a refund of the excess cess paid after the impugned court order.

46. There is no doubt that any excess money paid after the order was made is subject to recovery. This can only be done at the conclusion of the main petition. This will require adduction of evidence as to how much was paid in excess after the order in case the petition succeeds and if not, no need for refund.

47. In view of the above holding, it is my finding that the application herein is merited and the same allowed with orders that;

- a. The county secretary Wajir County government is found to be in contempt of the court order dated 9th day of October 2023
- b. That the said county secretary shall purge the contempt within 21 days by honouring the said order and tender an apology in writing to the court and a copy to the applicants for the said disobedience
- c. That in default of orders (a) and(b) above, the court shall be at liberty to impose any punishment it may deem fit including but not limited to a term of imprisonment
- d. That parties shall expedite hearing of the petition
- e. That costs shall be in the cause

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 30TH DAY OF SEPTEMBER 2024.

J. N. ONYIEGO

JUDGE

