



**Musebe & 13 others v Bungoma County Assembly Service Board & 4 others;
Kituyi & 14 others (Proposed Interested Parties) (Constitutional Petition
2 of 2020) [2024] KEHC 15981 (KLR) (27 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 15981 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CONSTITUTIONAL PETITION 2 OF 2020
REA OUGO, J
NOVEMBER 27, 2024**

**IN THE MATTER OF ALLEGED INFRINGEMENT ON ARTICLES 1(1) (3), (2),
(2), & (4), 3(1), 10, 19, 20, 22, 27, 28, 35, 43, 47, 73, 173 (C), (D), 176, 179, 185,
186, 187, 201, 207, 220, 224, 225, 227, 228, 232 & 236 OF THE CONSTITUTION**

BETWEEN

**FREDRICK MUSEBE 1ST PETITIONER
ROSE MUCHINA IMBEGA 2ND PETITIONER
WINNIE ATIENO NYAMBOK 3RD PETITIONER
CAVINY SAKWA LUKOSI 4TH PETITIONER
JANE CHEPERENKER INGO 5TH PETITIONER
HILDABEDA KHAYELE LUKULU 6TH PETITIONER
CHRISTINE CHEBET NEGELCH 7TH PETITIONER
BEATRICE NEKESA WEKESA 8TH PETITIONER
JERUSA ALEU SIKUKU 9TH PETITIONER
EUNICE YEKO KIRUI 10TH PETITIONER
REBAH NAFULA WABWILE 11TH PETITIONER
SOPHIA AKOTH MARUMBU 12TH PETITIONER
METRINE NANGALAMBA 13TH PETITIONER
JAMES CHESIBOK 14TH PETITIONER**

AND

BUNGOMA COUNTY ASSEMBLY SERVICE BOARD 1ST RESPONDENT



**EXECUTIVE COMMITTEE MEMBER FOR FINANCE & ECONOMIC
PLANNING BUNGOMA COUNTY 2ND RESPONDENT**

**CHIEF OFFICER FINANCE & ECONOMIC PLANNING BUNGOMA
COUNTY 3RD RESPONDENT**

CONTROLLER OF BUDGET, BUNGOMA COUNTY 4TH RESPONDENT

CONTROLLER OF BUDGET KENYA 5TH RESPONDENT

AND

CATHERINE MATING KITUYI PROPOSED INTERESTED PARTY

DORCAS NAKUMICHA NDASABA PROPOSED INTERESTED PARTY

LINDA KHARAKHA WEKESA PROPOSED INTERESTED PARTY

EVERLINE WABWILE ANYANGO PROPOSED INTERESTED PARTY

METRINE NAGILA WILSON PROPOSED INTERESTED PARTY

MOUREEN KHANJILA WAFULA PROPOSED INTERESTED PARTY

BRIDGIT LUSIKE KATASI PROPOSED INTERESTED PARTY

FLORENCE THERESIA JUMA PROPOSED INTERESTED PARTY

ALICE NANYAMA KIBABA PROPOSED INTERESTED PARTY

RUGUT ANGELINE CHELAGAT PROPOSED INTERESTED PARTY

SIFUMA SHEILA PROPOSED INTERESTED PARTY

JOHN KENNEDY WANYAMA PROPOSED INTERESTED PARTY

MILDRED APIYO BARASA PROPOSED INTERESTED PARTY

AGGREY ONYIEGO BOSIRE PROPOSED INTERESTED PARTY

ALLAN NYONGESA WANYAMA PROPOSED INTERESTED PARTY

RULING

1. This ruling relates to the Notice of Motion dated 1st October 2024 where the applicant seeks the following orders:
 - a. SPENT
 - b. That the proposed interested parties be joined in these proceedings as interested parties.
 - c. That pending the hearing and determination of this application, the 1st, 2nd and 3rd respondents and all their organs, officers, servants and agents be restrained from preparing and presenting to the County Assembly of Bungoma a Supplementary Budget or any other budget that does not make a budgetary allocation under ward expenditure for the nominated members of the County Assembly for use in running the offices of the constituencies they were nominated to represent in similar terms to those of elected members of the County Assembly; and in case it has already been prepared, the County Assembly of Bungoma be restrained from tabling, debating and approving the supplementary or other budget so presented.



- d. That the honourable court be pleased to find EMMANUEL MUKHEBI SITUMA and CHARLES WAFULA, Chairman and Secretary of Bungoma County Assembly Service Board respectively, in contempt of the court for wilful disobedience of the court's order issued on 17.11.2021 and commit them to civil jail for a period to be determined by the honourable court.
 - e. That consequent to prayer (d) herein above being granted, the honourable court be pleased to issue summons to EMMANUEL MUKHEBI SITUMA and CHARLES WAFULA, Chairman and Secretary of the Bungoma County Assembly Service Board respectively to attend court to show cause why they should not be committed to civil jail and in default of such attendance, warrants of arrest to issue against them.
 - f. That the honourable court be pleased to order the Officer Commanding Bungoma Police Station to assist in implementing the above orders upon their issuance.
 - g. That this Honourable Court be pleased to issue such other or further orders in respect of the decree herein as may be necessary for the ends of justice to be met.
2. The application is based on the grounds on the face of the application and the supporting affidavit by Metrine Nangalama.
 3. The 10th and 13th petitioners/applicants and the proposed interested parties are nominated members of the County Assembly and assumed office in 2022. On 17/11/2021, this Court issued mandatory orders directing the 1st respondent to make budgetary allocation under ward expenditure for the nominated members of the County Assembly for use in running the offices of the constituencies they were nominated to represent in similar terms to those of the elected members of the County Assembly. The judgment was transmitted to all the parties to the suit through their emails on 17/11/2021. It is averred that the 1st respondent has neglected to comply with the court's orders in making budgetary allocations under ward expenditure for the nominated members of the county assembly.
 4. That in the financial year 2024-2025, the 1st respondent in defiance of the court orders issued a circular by the controller of budget, resolutions of the committee of Justice, Cohesion and Legal affairs of the County Assembly of Bungoma as adopted by the County Assembly of Bungoma, prepared a budget for the running of the officers of the members of the County Assembly of Bungoma for elected members at the exclusion of the nominated members. The 1st to 3rd respondents are currently preparing a supplementary budget to be submitted to the House Business Committee Bungoma County Assembly for processing and ultimate consideration and adoption by the County Assembly.
 5. The applicants accuse the Chairman and Secretary of the 1st respondent, Emmanuel Mukhebi Situma and Charles Wafula, of neglecting to implement the orders made by the court in the judgment dated 17/11/2021. It is averred that Court orders are not made in vain and that disobedience of court orders breeds anarchy and threatens the existence of the state and that the honorable court owes the country a duty to enforce court orders and severely punish those who disobey them. The individuals responsible for running the 1st respondent, Emmanuel Mukhebi Situma and Charles Wafula, should bear the consequences of disobedience of the court order issued herein.
 6. In the supporting affidavit by Metrine Nagalama, the 13th Petitioner/Applicant, averred that nominated members after assuming office in 2022 have been financing their official operations using personal finances causing a financial strain. The nominated members have rallied the elected members of the County Assembly of Bungoma in urging the 1st respondent to comply with the orders without success. The supplementary budget offers the 1st respondent an opportunity to redeem itself by



complying with the court orders. However, the supplementary budget prepared does not provide for the running expenses of the nominated members of the County Assembly of Bungoma. It is imperative that the preparation and processing of the unlawful supplementary budget, which perpetuates impunity and disobedience of the court orders be halted pending the hearing and determination of this application.

7. The application was opposed. The Speaker of the County Assembly of Bungoma, Emmanuel Mukhebi Situma (3rd respondent), swore a replying affidavit on his behalf, the 1st respondent and the 2nd contemnors. He averred that no court orders have ever been extracted and served on the 2nd & 3rd respondents and the 2nd contemnor. No court order with an explicit penal notice has been extracted and served against the county assembly clerk or the 3rd respondent. The application is therefore frivolous, vexatious and an abuse of the court process.
8. He explained that the 2nd contemnor and the 3rd respondent do not approve any budget in respect of the 1st respondent, but the budget is approved by the members of the County Assembly including the applicants. The members of the County Assembly scrutinize, make adjustments and approve the budget for implementation by the 1st respondent. In any event, the 1st, 3rd, 4th, 5th, 7th and 9th proposed interested parties are members of the County Assembly Committee on Labour Relations, Members Service and Facilities which handles all matters related to the County Assembly Service Board (1st respondent) including the budget for the 1st respondent. The committee is responsible for receiving and considering the members' views on the services and facilities provided for their benefit and well-being. Therefore, the proposed interested parties must allocate funds as part of their functions including any further supplementary functions. The 1st contemnor and the 3rd respondent only implemented the budget approved by members of the County Assembly and were not in control of the budgeting and approval.
9. It was further averred that since the judgment, the members have also been given furnished offices at the County Assembly offices block. The county assembly has also established offices in all the wards in the County, therefore creating multiple offices within the same ward will amount to duplicity.
10. The 2nd respondent filed a replying affidavit dated 15/10/2024. He avers that his duties have been listed under section 46 of the County Government Act and sections 103, 104, and 107 of the [Public Finance Management Act](#) 2012. As the County Executive Committee Member in charge of Finance and Economic Planning, he ensures that Bungoma County Government's recurrent expenditures do not exceed its total revenue.
11. The County Assembly is semi-autonomous and originates its budget proposal. The budget proposal is then approved by the County Assembly Service Board in consultation with the County Assembly where the Executive have no role to dictate their needs and allocations. The 2nd respondent consolidates the budget estimates and submits them to the County Executive Committee for approval before approval by the County Assembly. He avers that he has no veto powers to vet estimates provided by the County Assembly during the preparation of the Annual and Supplementary Budget. The County Assembly is limited to 7% of the total revenue of the County Government or twice the personnel Emoluments of that County Assembly whichever is lower as per Regulation 25 (1) (F) of the Public Finance Management Regulation 2015 which the petitioners have failed to demonstrate. He avers that the County Government of Bungoma is keen to see that the Decree and Orders of this Honourable Court are complied with and there has been a deliberate act to obstruct or delay the realization and implementation of the Decree and or Orders as would amount to disobedience of the Court Order.
12. The 3rd respondent filed a supplementary affidavit dated 13/10/2024. According to the 3rd respondent, the division of Revenue Bill and County Allocation of Revenue has not been approved by the Senate



to cater for the setting of a new ceiling to allow for the 1st supplementary budget. The withdrawal of the Finance Bill and without the Division of Revenue Act and County Allocation of revenue bills there can be no revision of the ceiling of the County Assemblies since there are no new ceilings.

13. The cabinet is not currently sitting to process respective budgets and the county assembly has adjourned to attend CASA games slated for 18/10/2024. The recommendations of the Committee on Justice, Cohesion and Legal Affairs of the County Assembly of Bungoma do not compel the Clerk or 3rd respondent to act but rather are directed to the County Attorney.

SUBMISSIONS

14. The applicant in his submissions identified the following issues for determination:
 - a. Whether the terms of the order were clear and unambiguous and were binding on the respondent.
 - b. Whether the respondents had knowledge of or proper notice of the terms of the order.
 - c. Whether the respondent has acted in breach of the terms of the order; and
 - d. Whether the respondent's conduct was deliberate.
15. On the first issue, it was submitted that no contention was raised by the 1st respondent, 1st and 2nd contemnors in respect to clarity and correctness of the terms of the orders issued by the honorable court on 17/11/2021. In *Fred Matiang'i, The Cabinet Secretary, Ministry of Interior and Co-ordination of National Government v Miguna Miguna & 4 Others* [2018] eKLR the court stated:

“When courts issue orders, they do so not as suggestions or pleas to the persons at whom they are directed. Court orders issued ex cathedra, are compulsive, peremptory and expressly binding. It is not for any party; be he high or low, weak or mighty and quite regardless of his status or standing in society, to decide whether or not to obey; to choose which to obey and which to ignore or to negotiate the manner of his compliance. This Court, as must all courts, will deal firmly and decisively with any party who deigns to disobey court orders and will do so not only to preserve its own authority and dignity but the more to ensure and demonstrate that the constitutional edicts of equality under the law, and the upholding of the rule of law are not mere platitudes but present realities.”

16. On whether the respondent had knowledge of or proper notice of the terms of the order, reliance was placed on the holding by the Court of Appeal in *Shimmers Plaza Limited v National Bank of Kenya Limited* [2015] KECA 945 (KLR):

“Kenya's growing jurisprudence right from the High Court has reiterated that knowledge of a court order suffices to prove service and dispense with personal service for the purposes of contempt proceedings. For instance, Lenaola J in the case of *Basil Criticos Vs Attorney General and 8 Others* [2012] eKLR 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”

17. The applicants argue that the judgment was served on the 1st respondent through its advocate on record. The judgment was also transmitted to the parties through email addresses supplied by the court. In any event, the copy of the judgment annexed by the applicants as exhibit M-2 was obtained from



the County Assembly of Bungoma on 15/7/2024 as evidenced by their stamp which appears on the left-hand side.

18. The applicants argue that during the debate of the County Assembly of Bungoma over the Committee on Justice, Cohesion and Legal Affairs report on the status of pending cases, the County Assembly presided over by the 1st contemnor debated at length the need for the 1st respondent to comply with the orders made on 17/11/2023. As per the Hansard exhibits M-3 (a) and (b) the report urged compliance with the orders made on 1

ANALYSIS AND DETERMINATION

19. The main issues raised by the application are whether the applicants have proved a case of contempt of court orders against the contemnors and whether the court should issue the restraining orders as sought prayer (c) of the application.
20. In Samuel M. N. Mweru & Others v National Land Commission, Nairobi City Water and Sewerage Company Limited & Nairobi City Water County [2020] KEHC 9233 (KLR), Mativo J (as he then was) while citing the Book titled “ A contempt in New Zealand” stated:

“ 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) that:-

 - 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.
21. On whether the orders in question were clear, I have reproduced the orders made in the judgment as follows:
 1. The petition is hereby allowed to the extent that any budgetary allocation of ward expenditure to the elected members of the County Assembly to the exclusion of the nominated members on account of their being nominated members is discriminatory and goes against the spirit of Article 27 of *the Constitution*.
 2. The 1st respondent is hereby directed to make budgetary allocation under ward expenditure for the nominated members of the County of Assembly for use in running the offices of the constituencies they were nominated to represent in similar terms to those of the elected members of the County Assembly.
 3. The petitioners have established no cause of action against the 4th and 5th respondents.
 4. Since the matter is a public interest litigation, each party shall bear its own cost of the petition.
22. Notably, order (2) directed the 1st respondent to allocate budgetary provisions under ward expenditure for the nominated members of the County of Assembly. In this regard, I find that the order was unambiguous.
23. On whether the respondents and contemnors had knowledge of the order, there was evidence that the respondents and the contemnors knew of the orders made by this court in its judgment dated



17/11/2021. The Committee on Justice, Cohesion and Legal Affairs compiled a report on the status of pending cases by the Bungoma County Government as of February 2023. The committee made the following general recommendation:

9. That the County Attorney should ensure compliance with lawful court orders to avoid lawful sanctions case no Bgm HC Petition No. 2 of 2020 between Fredrick Musebe and 14 others v County Assembly Service Board on office operation fund.
24. According to the Hansard for 30/03/2023, the County Assembly also discussed implementing this court's orders. The Court of Appeal in *Christine Wangari Gachege v Elizabeth Wanjiru Evans & 11 Nairobi Civil Application No. 233 of 2007 [2014] eKLR*

“Others, 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 applied by virtue of section 5(1) of the *Judicature Act*; and that leave to commence contempt of court proceedings is not required under Rule 81.4 where committal proceedings relate to a breach of a judgment, order or undertaking. In *Shimmers Plaza Limited v National Bank of Kenya Limited [supra]*, it was held that Rule 81.5 governs service of the judgment or order which must carry a penal notice; the service must be carried out before expiry of the period to perform an act, and that Rule 81.6 provided that service must be done personally, but this may be dispensed with by the court under rule 81.8. The Court acknowledged that Kenya's growing jurisprudence has reiterated that knowledge of a court order suffices to prove service and dispense with personal service for the purposes of contempt proceedings, but emphasized that:

“it is important however that the court satisfies itself beyond any shadow of a doubt that the person alleged to be in contempt committed the act complained of with full knowledge or notice of the existence of the order of the Court forbidding it. The threshold is quite high as it involves possible deprivation of a person's liberty”.

25. Therefore, there is evidence that the respondents who were represented by counsel during the hearing of the petition were aware of the judgment and further had discussions on how to implement the said orders of this court.
26. On whether the disobedience of the order was deliberate, the 3rd respondent and 2nd contemnor contend that despite the court order, they are not mandated to approve any budget on behalf of the 1st respondent, however, that responsibility is bestowed on the Members of the County Assembly. The 3rd respondent and the 2nd contemnor argue that they are not in control of budgeting and approval.
27. The duties of the 1st respondent are listed in section 11 (1) (a) – (c) of the County Assembly Service Act which provides:

“The Board shall—

- (a) direct and supervise the administration of the services and facilities provided by, and exercise budgetary control over, the Service;
- (b) determine and review the terms and conditions of service of persons holding or acting in the offices of the Service;
- (c) initiate, co-ordinate and harmonize policies and strategies relating to the development of the Service;” [Emphasis added]



28. It is clear that the 1st respondent is responsible for budgetary control as opposed to budgetary allocation. Therefore, 1st respondent is responsible for managing finances by overseeing and comparing actual income and expenditures against the planned budget.
29. On the other hand, the county assembly is mandated to approve the budget and expenditure of the county government in accordance with Article 207 of *the Constitution*, and the legislation contemplated in Article 220(2) of *the Constitution*, guided by Articles 201 and 203 of *the Constitution* (Section 8 (1) (c) of the County Government Act). The petitioners, the proposed interested parties, and elected members of the county assembly were therefore entrusted with the responsibility of ensuring that Bungoma County Government's budget adhered to the requirements of Article 27 of *the Constitution*. It was not challenged that the 1st, 3rd, 4th, 5th, 7th and 9th interested parties were members of the County Assembly Committee on Labour Relations, Members Services and Facilities which was mandated to receive views of the members on service and allocate funds.
30. Therefore, having considered the duties of the 1st respondent under the County Assembly Service Act, the 1st respondent is not mandated to make budgetary allocations. In the circumstances, I find that the petitioners/applicants have failed to prove to the required standard that the disobedience on the part of the contemnors was deliberate. In *Gatharia K. Mutikika – Versus - Baharini Farm Limited [1985] KLR 227*, the court held that:

“ A contempt of court is an offence of a criminal character. A man may be sent to prison. It must be proved satisfactorily.... It must be higher than proof on a balance of probabilities, almost but not exactly, beyond reasonable doubt. The standard of proof beyond reasonable doubt ought to be left where it belongs, to wit criminal cases. It is not safe to extend it to offences which can be said to be quasi-criminal in nature. However, the guilt has to be proved with such strictness of proof as is consistent with the gravity of the charge... Recourse ought not to be had to process of contempt of court in aid of a civil remedy where there is any other method of doing justice. The jurisdiction of committing for contempt being practically arbitrary and unlimited, should be most jealously and carefully watched and exercised with the greatest reluctance and the greatest anxiety on the party of the judge to see whether there is no other mode which is not open to the objection of arbitrariness and which can be brought to bear upon the subject... applying the test that the standard of proof should be consistent with the gravity of the alleged contempt... it is competent for the court where contempt is alleged to or has been committed, and or an application to commit, to take the lenient course of granting an injunction instead of making an order for committal or sequestration, whether the offender is a party to the proceedings or not.

31. The petitioners failed to prove all the essential elements necessary to establish a case for civil contempt.
32. The applicants sought an injunction to prevent the 1st, 2nd, and 3rd respondents from preparing or submitting to the Bungoma County Assembly any supplementary or other budget that fails to allocate funds for ward expenditures to nominated County Assembly members, comparable to those provided for elected members. Alternatively, they requested that, if such a budget has already been prepared, the County Assembly be barred from tabling, debating, or approving it. Before I consider the merits of the applicant's case on this issue, the court must ascertain whether or not it is *functus officio* and has the jurisdiction to entertain the application on this ground. The Supreme Court in *Raila Odinga*



& 2 Others V Independent Electoral & Boundaries Commission & 3 Others [2013] eKLR the court held that:

“This principle has been aptly summarized further in Jersey Evening Post Limited v A1 Thani [2002] JLR 542 at 550:

‘A court is functus when it has performed all its duties in a particular case. The doctrine does not prevent the court from correcting clerical errors nor does it prevent a judicial change of mind even when a decision has been communicated to the parties. Proceedings are only fully concluded, and the court functus, when its judgment or order has been perfected. The purpose of the doctrine is to provide finality.’”

33. In Bellevue Development Company Limited v. Vinayak Builders Limited & another (2014) eKLR, the court observed that:

“...care should be taken not to inadvertently or otherwise overstretch the application of the concept of functus officio; for, in all senses of the law, it does not foreclose proceedings which are incidental to or natural consequence of the final decision of the court such as the execution proceedings including contempt of court proceedings, or any other matter on which the court could exercise supplemental jurisdiction.”

34. In this case, it is important to note that this court has already pronounced itself in its judgment of 17/11/2021 on the prayers sought by the applicants/petitioners in the petition. Therefore, this court is functus officio and hence bereft of jurisdiction to consider the application in terms of prayer (c).

35. In the upshot, I find the Notice of Motion dated 1st October 2024 as lacking in merit and it is dismissed. Each party to bear its own costs.

DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 27TH DAY OF NOVEMBER 2024.

R.E. OUGO

JUDGE

In the presence of:

Mr. Maloba - For the 10th and 13th Petitioners & Interested Parties

1st Respondent - Absent

2nd Respondent - Absent

3rd Respondent - Absent

Miss Wanyama -h/b for Mr. Bw'Onchiri -For the 4th & 5th Respondents

1st Contemnor - Absent

2nd Contemnor - Absent

Wilkister -C/A

