



REPUBLIC OF KENYA



**Issack v Issack & 3 others (Civil Case E004 of 2024)
[2024] KEHC 16629 (KLR) (19 December 2024) (Ruling)**

Neutral citation: [2024] KEHC 16629 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARISSA
CIVIL CASE E004 OF 2024
JN ONYIEGO, J
DECEMBER 19, 2024**

BETWEEN

ABDULLAHI MAALIM ISSACK PLAINTIFF

AND

ISMAIL MOHAMED ISSACK 1ST DEFENDANT

FKF MANDERA BRANCH 2ND DEFENDANT

FKF FEDERATION ELECTORAL BOARD 3RD DEFENDANT

THE SPORTS REGISTRAR 4TH DEFENDANT

RULING

1. The notice of motion for determination before me is dated 27.11.2024 wherein the applicant seeks for orders as follows:
 - i. That this Honourable Court be pleased to find that the defendants/respondents are in contempt of the court orders issued on 15.11.2024.
 - ii. That this Honourable Court be pleased to issue an order for committal to prison against the defendants/respondents for a period of six (6) months or fine each of the defendants/respondents the sum of Kes. 200,000/-
 - iii. That this Honourable Court be pleased to make such orders and or give directions as it deems fit and just.
 - iv. That cost of this application be in the cause.
2. The application is supported by the supporting affidavit sworn on 27.11.2024 by Abdullahi Malim Issack deponing that on 15.11.2024, this Honourable Court issued temporary conservatory orders stopping and or suspending the election of the Federation of Kenya Football (FKF) Mandera Branch



scheduled for 16.11.2024 pending inter partes hearing on 22.11.2024. That the orders were served and circulated at 08.00 a.m., on 16.11.2024 and later on followed up by service on 18.11.2024. That pursuant to the said service, some of the eligible teams withdrew from participating in the subject elections.

3. That the defendants/respondents in blatant disregard of the valid court orders went ahead to conduct the elections for Football Kenya Federation Mandera Branch and thereafter listed the 1st defendant/respondent as a delegate for participation in Federation of Kenya Football (FKF) National Elections. It was averred that due to the knowledge of the orders herein, the defendants/respondents informed the Sports Tribunal in Nairobi in Tribunal Case No. E043 of 2024 of the existence of the orders.
4. That the preliminary objection by the defendants/respondents also mentioned the said court orders. It was deposed that the authority, integrity, dignity and honour of this Honourable Court has been and continues to be exposed to ridicule and disrepute as a result of disobedience of the orders.
5. The 2nd defendant/respondent filed grounds of opposition dated 02.12.2024 urging that the application herein is incurably defective and devoid of any merit as the same was not premised on any factual foundation necessary to establish that the respondents had knowledge of or proper notice of the terms of the court order dated 15.11.2024 as at 16.11.2024 when the FKF Mandera Branch elections were held. That the application is not premised upon any factual foundation necessary to establish that either the respondents acted in breach of the terms of the court order or that the respondents' conduct was deliberate. It was urged that the application be dismissed for being vexatious and abuse of the court process.
6. Merceline Sande, on behalf of the 3rd defendant/respondent swore on 29.11.2024 a replying affidavit deponing that the 3rd defendant/respondent was not served the orders of the court despite its email being on its website. That the applicant did not show that he served the said orders as required and no contempt proceedings can be sustained against the board. She averred that they only became aware of the orders after a related matter before the SDT being SDT E043 of 2024 and instructed a counsel to appear. That there was no affidavit of service filed deponing that the 3rd respondent was indeed served.
7. The court directed that the application be canvassed by way of written submissions.
8. The 2nd defendant filed submissions dated 02.12.2024 urging that from the record, it is clear that the plaintiff/applicant instituted this suit on 15.11.2024 through a plaint filed contemporaneously with a notice of motion of even date. That the court's *ex parte* orders dated 15.11.2024 became available on the CTS at a date and time stamp of 2024.11.15; 20:03:09+03. It was argued that the plaintiff/applicant could only access the same on Friday evening after 2003 hours. Just like all other branches of FKF, the elections for the Mandera Branch were scheduled to take place the following morning which was 16.11.2024, and the FKF Mandera Branch elections proceeded as scheduled.
9. It was contended that the service of the court documents is paramount to proving that the respondents had knowledge of both the suit and orders issued by the court. That section 107 of the *Evidence Act* provides that he who alleges must prove and therefore, it was incumbent upon the applicants to prove that indeed the court's orders were served upon the respondents.
10. Without prejudice, it was alleged that the application cited legal persons without citing any specific natural persons who would be the alleged contemnors. To that end, it was urged that the purported evidence by the applicant is not only inadmissible but also insufficient to support his application. This court was therefore urged to dismiss the application with costs.



11. The 3rd defendant/respondent via submissions dated 02.12.2024 in opposing the application urged that the orders by the court were served upon the 1st respondent only and not upon the other parties. Reliance was placed on the case of Samuel M. N. Mweru & Others vs National Land Commission & 2 Others [2020] eKLR, where the court stated that for contempt proceedings to succeed, it must be established that there was an unambiguous court order, knowledge of the terms of the order and failure by the respondent to comply with the terms of the order.
12. It was contended that the application amounts to an abuse of the court process for the reason that there is a similar application filed in the Sports Disputes Tribunal being case No. E043 of 2024 where similar prayers were made and orders sought declined hence the filing of the suit herein. That this court should not be invited to such speculative mode of litigation as the same is akin to forum shopping.
13. It was further contended that the entire proceedings is sub judice and the court should declare them as such. This court was therefore implored to determine that it lacked the requisite jurisdiction at this point in time as the same is premature. To that end, reliance was placed on article 67 of the FKF constitution. In the end, it was urged that the application herein be dismissed as the court lacks requisite jurisdiction.
14. The 1st respondent did not participate in the proceedings herein despite being served.
15. I have considered the application, affidavits in support and in opposition, submissions and authorities relied upon by parties. The only issue that is discernible for determination is; whether the respondents' actions warrant citing them for contempt of court and therefore liable to punishment.
16. The first port of call with respect to the procedure for institution of contempt of Court proceedings is section 5 of the *Judicature Act* Cap 8 Laws of Kenya. [See Kenya Human Rights Commission vs Attorney General & Another, [2018] e KLR].
17. Section 5 of the *Judicature Act* does provide that:
 1. 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.
 2. An order of the High Court made by way of punishment for contempt of court shall be appealable as if it were a conviction and sentence made in the exercise of the ordinary original criminal jurisdiction of the High Court.
18. This court is 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 after the contempt Act was declared unconstitutional. It was in this respect observed in Republic vs *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 the application of the rule of law. [Also see the Court of Appeal in the case of Christine Wangari Gachege vs Elizabeth Wanjiru Evans & 11 Others, [2014] eKLR].
19. In *Katsuri Limited vs Kapurchand Depor Shah* [2016] eKLR, citing *Kristen Carla Burchell vs 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 those terms by the Respondent.



- iii. Willful failure by the Respondent to comply with the terms of the order.
20. Upon proof of these requirements, the presence of willfulness and bad faith on the part of the respondent would normally be inferred, although the respondent could rebut this inference by contrary proof on a balance of probabilities.
21. In the instant case, the court via the order made on 15.11.2024 directed issued a temporary conservatory order stopping and/or suspending the election of the Federation of Kenya Football (FKF) Manderu Branch scheduled for 16.11.2024 pending hearing and determination of the application.
22. From the above, it is clear that the order as reproduced was not only clear but also unambiguous. I say so for the reason that the respondents were directed to temporarily stop and/or suspend the elections of the Federation of Kenya Football (FKF) Manderu Branch scheduled for 16.11.2024 pending hearing and determination of the application.
23. On whether the respondents were aware of the said order mentioned above, the applicant stated that the orders were served and circulated at 08.00 a.m., on 16.11.2024 and later on followed up by service on 18.11.2024. On the other hand, the respondents urged that they were not served the said orders in time and further, that without prejudice, the application cited legal persons without citing any specific natural persons who would be the alleged contemnors. The 3rd respondent stated that the orders by the court were served upon the 1st respondent only and not upon the other parties.
24. From the affidavit of service sworn on 18.11.2024 by Hussein Wethow, an advocate of this court, it was deponed that on 18.11.2024, he received a copy of an application under certificate of urgency and plaint dated 15.11.2024 with instructions to serve upon the 1st defendant, Ismail Mohammed Issack. That he proceeded to serve him via the 1st defendant's WhatsApp number 0721717806. The annexures of Whatsapp screen shots were also filed together with the affidavit of service indicating time of service as 10.19.
25. The above notwithstanding, the applicant urged that the orders were served and circulated at 08.00 a.m., on 16.11.2024 and later on followed up by service on 18.11.2024. To that end, following the service, some of the eligible teams withdrew from participating in the elections once the orders were circulated through their known contacts.
26. From the supporting affidavit sworn by Abdullahi Maalim Issack on 27.11.2024, it was deponed at para 3 of the annexed affidavit of service and screenshots confirming service as marked as AMI1. Having perused the same, it cannot be denied that the applicant served the pleadings together with the orders to one Ismail Mohammed Issa, the 1st defendant, respondent. In as much as the same shows that the pleadings and the order were served at 10.19, what remains unclear is on which date were the said pleadings together with the order served? From the screen shots of WhatsApp, the date of service does not appear.
27. Of course, even the time indicated thereon, is 10.19 and therefore it remains a mystery whether the same was during day or night time. It is my belief that it was incumbent upon the applicant to prove that indeed he served upon the respondents, the orders by the court before elections were conducted. Even if we assumed that there was service on the 16-11.2024 at 10.19 as per the WhatsApp screen shots, what would have stopped elections being conducted before that time. This is the danger of approaching a court the last minute in seeking injunctions.
28. In the same breadth, there was no proof tendered that the 2nd and 3rd defendants/respondents were served with the court orders and if yes, when and at what time bearing in mind that the orders were issued a day to the election being held.



29. Noting that there remain unanswered questions as to whether the defendants/respondents were served the orders of this court before elections were held, it is my humble view that in determining whether the respondents willfully disobeyed the orders of this court would be an exercise in futility. To that end, it is my finding that the respondents cannot be found to be in contempt of the court orders delivered on 15.11.2024 for lack of proof of service. To that extent, I do not find merit in the application herein hence the same is dismissed. Costs in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 19TH DAY OF DECEMBER 2024

J. N. ONYIEGO

JUDGE

