



Koluna & 5 others v County Assembly of Vihiga (Being sued through its Honourable Speaker); Governor of the County of Vihiga (Interested Party) (Constitutional Petition E006, E005 & E007 of 2021 (Consolidated)) [2023] KEHC 203 (KLR) (20 January 2023) (Ruling)

Neutral citation: [2023] KEHC 203 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VIHIGA
CONSTITUTIONAL PETITION E006, E005 & E007 OF 2021 (CONSOLIDATED)
PJO OTIENO, J
JANUARY 20, 2023**

BETWEEN

**AMOS KUTWA KOLUNA 1ST PETITIONER
PAMELA MBAGAYA KIMWELE 2ND PETITIONER
KENNETH ELVUNA KESEKO 3RD PETITIONER
PAUL JISEVE MBUNI 4TH PETITIONER**

AND

**COUNTY ASSEMBLY OF VIHIGA RESPONDENT
BEING SUED THROUGH ITS HONOURABLE SPEAKER**

AND

GOVERNOR OF THE COUNTY OF VIHIGA INTERESTED PARTY

**AS CONSOLIDATED WITH
CONSTITUTIONAL PETITION E005 OF 2021**

BETWEEN

STEPHEN LUMWAJI CHAHASI PETITIONER

AND

**COUNTY ASSEMBLY OF VIHIGA RESPONDENT
BEING SUED THROUGH ITS HONOURABLE SPEAKER**

AS CONSOLIDATED WITH



CONSTITUTIONAL PETITION E007 OF 2021

BETWEEN

STEPHEN LUMWAJI CHAHASI 1ST PETITIONER

JULIUS OBUGA MASIVA 2ND PETITIONER

AND

COUNTY ASSEMBLY OF VIHIGA RESPONDENT

BEING SUED THROUGH ITS HONOURABLE SPEAKER

AND

GOVERNOR OF THE COUNTY OF VIHIGA INTERESTED PARTY

RULING

1. As an arm of government which demands confidence from the citizenry, the court is bound by the national values and principles of governance and is thus obligated to, among other things, in a task like interpretation of the *Constitution* now before it, to ensure that justice is not delayed and administered with undue regard to procedural technicalities.
2. The consolidated petitions came to court on or about June 8, 2021 and alleged various violations to the *Constitution* but today, fourteen months, thereafter, the court is still embroiled in trying to undue a web of legal conundrum knitted around interlocutory application. I consider it sad that the very substratum of the petition, the protection of the tenure of the petitioners in petition No E006/2021, as members of the County Executive Committee, tied to the tenure of the Governor, has resided in court even as the said tenure faded away. It is of concern to the court that even the interlocutory application filed with the petition and seeking conservatory orders is yet to be dealt with to conclusion. Instead, parties have since July 2021, more than one and half years now, engaged the court in pursuit of contempt proceedings.
3. By a ruling dated December 10, 2021, the application intended to be a determination on whether or not there had been disobedience to court orders issued on June 17, 2021, the court, for reasons disclosed in the ruling directed that all the alleged contemnors as well as any other person cited by the applicants accused of contempt attend court and be cross examined.
4. In the court's words, such was necessary because:-

“The only person who can speak to a person's knowledge, understanding and state of mind is that person. The one who is being accused, and not a hired gun. That is a fundamental pillar of a fair hearing and/or process.

In the circumstances, the court has no option but to list this matter for an oral hearing where alleged contemnors shall attend in person to show cause why they should not be committed for contempt of court. There will be oral evidence, on oath and there will be cross-examination.

The following persons shall attend for cross-examination:



1. H.E Wilbur Ottichillo, the Governor of the County of Vihiga
2. The Speaker of the County of Vihiga
3. Mr Ezekiel Ayego
4. Ms Esther Andisi

In order to allow the alleged contemnors to understand the case against them and the allegations that they shall answer, they shall be afforded an opportunity to consider what is alleged and an opportunity to respond, personally, on oath.”

There was equally a direction that the applicants file and serve a list of all considered to have been in contempt as well as the facts showing contempt. That was to be done within four (4) days of the ruling but was not done till July 21, 2022.

5. Pursuant to that ruling, the said contemnors attended court and were cross examined on various dates. In the interviewing period, one of the alleged contemnors, the Speaker of the County Assembly where the impeachment proceedings ensued, found it fit to communicate to the Governor, copied to court and counsel on record, his position in the matter and said:-

“Recall of the impeachment communication dated June 18, 2021

Your Excellency,

I make reference to the above stated communication and hereby advise as follows:-

1. That following my personal court attendance of December 16, 2021 and perusal of the court proceedings filed by parties in High Court Constitutional Petition No E005 of 2021 (as consolidated with E006 and E007);
2. That having noted and became aware that on the June 17, 2021 the honourable court did issue an order restraining the Assembly from implementing and/or executing of the subject ad-hoc report herein.
3. That it is apparent that the debate and resolutions by the Assembly made on the June 18, 2021 were in violation of the aforesaid existing court order;
4. That it is on this premise that I hereby forthwith recall my aforestated communication to you in compliance with the said court order.

Yours Faithfully,

Hon Hasna Mudeizi

Speaker Vihiga County Assembly

6. The most I get from that letter is a veiled concession that there had been contravention of the order of June 17, 2021 albeit not deliberately but on account of lack of service and an effort to purge same by recalling the proceedings admittedly conducted in the assembly in disobedience thereto.
7. The applications the court is called to determine are dated July 21, 2021 and June 22, 2021 sought orders that:-

Application dated July 21, 2021:

“



- “(a) Spent.
- (b) Spent.
- (c) Hasnah Mmbone Mudeizi, the Speaker Vihiga County Assembly be enjoined to these proceedings as interested party.
- (d) The honourable court be pleased to cite Hasnah Mmbone Mudeizi, the Speaker of the County Assembly of Vihiga in contempt of the court’s orders issued on June 17, 2021.
- (e) Consequent upon order 2 above being granted, the honourable court be pleased to order that Hasnah Mmbone Mudeizi, the Speaker of the County Assembly of Vihiga be summoned to attend court on a date to be fixed by the court to show cause why she should not be committed to civil jail for a term not exceeding six (6) months for disobeying the court’s orders issued on June 17, 2021.
- (f) Consequent upon orders 2 and 3 above being granted, the honourable court be pleased to order that Hasnah Mmbone Mudeizi, the Speaker of the County Assembly of Vihiga be committed to civil jail for a term not exceeding six (6) months for disobeying the court’s orders issued on June 17, 2021, and to consequently purge the disobedience of the court’s orders.
- (g) The costs of this application be personally borne by Hasnah Mmbone Mudeizi, the Speaker of the County Assembly of Vihiga.”

Application dated June 22, 2021:

- “(a) Spent.
- (b) Spent.
- (c) Spent.
- (d) The honourable court be pleased to cite Wilber Khasilwa Ottichilo, the Governor Vihiga County in contempt of the court’s orders issued on June 21, 2021 and or court orders issued on June 17, 2021.
- (e) Consequent upon order 4 above being granted, the honourable court be pleased to order that Wilber Khasilwa Ottichilo, Governor Vihiga County be summoned to attend court on a date to be fixed by the court to show cause why she should not be committed to civil jail for a term not exceeding six (6) months for disobeying the court’s orders issued on June 21, 2021 and or court orders issued on June 17, 2021.
- (f) Consequent upon order 4 and 5 above being granted, the honourable court be pleased to order that Wilber Khasilwa Ottichilo, Governor Vihiga County be committed to civil jail for a term not exceeding six (6) months for disobeying the court’s orders issued on June 21, 2021 and or court orders issued on June 17, 2021, and to consequently purge the disobedience of the court’s orders.
- (g) The costs of this application be personally borne by Wilber Khasilwa Ottichilo, Governor Vihiga County.”



8. Clearly, the two applications seek orders against the Speaker and interested party Governor, Wilber Ottichilo. It remains the law that parties and the court are bound by pleadings so that a party cannot depart from such pleadings and the court is bound to only make a determination based on pleadings and prayers sought. It is thus axiomatic that only the two against whom he orders have been sought are subject to be affected by this determination.
9. The court has had the benefit of reading the applications and the affidavits, as well as the affidavits filed in opposition thereto. That endeavour yields the result that indeed the proceedings at the assembly were conducted on June 18, 2021 while there was a court order in force. What is in dispute is whether the two persons cited for contempt were served or made aware of the order and acted in a deliberate manner to defeat it or just spite the court.
10. In every contempt application once there is proved, acts contrary to the dictates of the court order, the court must then interrogate whether the failure to comply was willful. In *Cecil Miller v Jackson Njeru & others* [2017] eKLR the court set out the ingredients to be proved to the satisfaction of the court to be:-
 - i) The terms of the order must be clear and unambiguous and binding upon the respondent.
 - ii) The respondent had knowledge or proper notice of the terms of the order.
 - iii) The respondent has acted in breach of the terms of the order.
 - iv) The respondent's conduct was deliberate.

The Context:

11. The pleadings show that on the May 12, 2021, the respondent adopted a report christened "Ad Hoc Committee Report On The Unrest Of Health Workers, Coodination Of County Public Service, Pending Bills And Implimentation Of County Assembly Resolutions By The County Executive." The petitioners were not comfortable with that report and challenged it by the three petitions consolidated in this matter. Contemporaneous with the petition, the petitioner in No E005 of 2021 filed an application seeking conservatory orders, which orders were granted by the court on the June 17, 2022, thus suspending the implementation of that report.
12. It is contended by the petitioners/applicants that the order was duly served upon the respondent, the Speaker of the Assembly, hence the Speaker and the respondent filed an application seeking to stay those orders. The court certified same urgent and fixed application for mention on the June 21, 2022 without tinkering with the orders. That notwithstanding, the Speaker, with full knowledge of the order, presided over the proceedings of the Assembly on the June 18, 2022 which purported to impeach the petitioners.
13. The events complained of to demonstrate contempt are the proceedings in the assembly on June 18, 2022 and the implementation of the report by the executive headed by the Governor on the same day.
14. In sum, the court issued orders on June 9, 2021, June 17, 2021, June 21, 2021 and December 10, 2022. The accusations according to the applications are that the speaker breached the orders by conducting the impeachment against the orders of June 17, 2022 which the Governor is accused of implementing the impeachment against the dictates of the same orders by terminating the 1st – 4th petitioners and serving the termination letters.
15. On the face of the two applications and the law that parties and the court are bound by the pleadings filed, this determination must only concern the Governor and the Speaker as the persons the petitioners



have cited for contempt. I respectfully consider that it is not for the court to direct parties on who to seek orders against. I therefore at this juncture exclude Ms Esther Andisi and Mr Ezekiel Ayiego from the proceedings. The court will however take their evidence upon cross examination into account to determine whether or not there was knowledge on the two cited for contempt.

Were the terms of the order of June 17, 2021 clear, ambiguous and binding upon the respondents?

16. As extracted, the orders concluded that:-

- “1. This matter be mentioned on July 8, 2021 together with High Court constitutional petition No E006 of 2021.
2. Pending the hearing and determination of this application inter partes, there be a conservatory order in the interim, staying/suspending the implementation and or execution of the report of the respondent/County Assembly of Vihiga titled, “Ad Hoc Committee Report On The Unrest Of Health Workers, Coodination of County Public Service, Pending Bills And Implimentation Of County Assembly Resolutions By The County Executive” passed and adopted by the respondent/County Assembly of Vihiga on May 12, 2021.
3. The stay in (2) above shall subsist till July 8, 2021.”

17. The language and terms of the order cannot be said to be unclear or difficult to understand. The court finds it to be plain and unambiguous. When so clear and unambiguous, the person concerned has no otherwise but to obey and observe the terms of the order from the moment the order is brought to his attention and knowledge.

Did the Speaker and the Governor have knowledge of the terms of the order beforehand?

18. The position taken by the applicants jointly in the summary of events ordered by the court and filed well outside the timelines set, is that the order of June 17, 2021 was served upon the respondents on June 19, 2021, a Saturday at 10.43 a.m. It is however not said when the Speaker was served.
19. In cross examination, the County Secretary Mr Ezekiel Ayiego was assertive that by the June 18, 2021 when he received the communication from the Speaker about the impeachment, he had not been served with an order issued by the court and that the Governor then immediately implemented the resolution the same day by dismissing the petitioners and had by June 21, 2021 appointed other persons in the said positions.
20. On her part, the Principal Legal Officer Esther Andisi did swear an affidavit insisting that he only learnt of the matter when the Governor had been joined on the June 21, 2021 before which date no court order had been served upon her. she made inquiries including with the County Secretary but was unable to confirm service of the order and that he later attended court and represented the Governor and informed the court that Governor had already made acting appointments. To the Principal Legal Officer, it is not accurate that the Governor had been notified of the order or was aware of it prior to the June 21, 2021.
21. The Speaker did attend court for cross examination, was cross examined and re-examined by counsel but the notes recorded by the court as typed are not easily comprehensible. What comes out however is that the Speaker had not swore any affidavit and respectively requested for an opportunity to respond to the accusation against her and that she was not made aware of the orders. She conceded that from



- the affidavit of Mr Rakewa Advocate, the counsel was aware of the order by the June 19, 2021 but did not communicate same to the Assembly as at the date the impeachment proceedings took place.
22. When the file landed before this judge, and after disposal of other interlocutory applications, the court conducted cross examination of the two persons; the Governor and the Principal Legal Officer.
 23. The further cross examination of Esther Andisi did not yield more than her position in the affidavit filed only adding that she was not the legal advisor to the Governor and that her instructions were from the County Secretary and not from the Governor directly.
 24. The last witness to be cross examined was the Governor, who had sworn no affidavit and was in court to confirm if the two affidavits sworn by Ms Esther Andisi and the Ezekiel Ayiego were sworn on his behalf. From the onset, he disowned the two affidavits as having not been sworn with his blessings nor authority. He equally disowned the attendance in court by Esther Andisi on June 21, 2021 and that he was even as of that date unaware of the orders. He however admitted having acted on the report of impeachment of the four petitioners but without knowledge of the existence of any court order. He however ambivalently admitted being aware of the application for contempt but not the orders.
 25. From the evidence obtained in both affidavits and cross examination, the court must determine if by the 18th June when the Assembly proceeded with the impeachment proceedings and when the Governor acted on the report from the Assembly, the Speaker and the Governor had been served or otherwise made aware of the orders by the court.
 26. In the submissions filed by the respective parties, the applicants/petitioners mention that the respondents were served with the orders or had a reason to know the existence of the order but deliberately and blatantly disobeyed same. On the other side the respondents deny being aware of the order on account that by the time the interested party/respondent acted on the recommendations of the Assembly they had no notice or knowledge of the court order.
 27. While traditionally personal service was a precondition before one could be convicted for contempt, the law has since changed and it is now enough that the respondent was made aware, however that may have been done, of the order and its imports.
 28. In *Basil Criticos v Attorney General & 8 others* [2012] eKLR the court did observe, and I am wholly persuaded that to be the correct proposition of the law, as follows:-

“...the law has changed and as it stands today, knowledge supercedes personal service ...

Where a party clearly acts and shows that he had knowledge of a court order, the strict requirement that personal service be proved is rendered unnecessary.”
 29. The court must however satisfy itself that, and beyond a shadow of doubt, the person accused of contempt, did commit an act forbidden by the court order with full knowledge or notice that it was so forbidden. Even though civil contempt proceedings do take place within civil proceedings, the standard of proof is way beyond the balance of preponderance. The Court of Appeal in *Shimmers Plaza Ltd v National bank of Kenya Ltd* [2015] eKLR did reiterate the position of the law when it said:-

“The standard is quite high as it involves possible deprivation of a person’s liberty. This standard has not changed since the old celebrated case of *ex parte Langley* 1879, 13 Ch D. 110 at Page 119 where the court stated as follows:-



... And, in matters of this kind, bearing in mind that the liberty of the subject is to be affected, I think that those who assert that there was such a notice ought to prove beyond reasonable doubt.”

30. But, what would be the evidence that one had notice of the order where there is no proof of personal service? The position taken by the superior courts of this country, is that notice or knowledge of a court order is construed where he has received information about, he has reason to know about it or where he know its related facts. It is therefore accepted that knowledge by an agent constitutes notice and knowledge of the order.
31. In *Shimmers Plaza’s case* (supra), the Court of Appeal did add its voice to that position of the law where it held:-

“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.”
32. Indeed in both civil and criminal cases not only direct evidence is admissible as founding a decision by the court. Even circumstantial evidence suffices.
33. In this matter there is no direct evidence of service upon the Speaker but there is an affidavit of service sworn by Evans Lumara Jattia stating that there was service of the order by email to an address of the Governor on June 19, 2021. That has not been controverted.
34. However, the Speaker has by his letter to the Governor dated reproduced above owned up to the Assembly having conducted its proceedings against the dictates of a court order. He however in that letter denies knowledge and notice of the order till the day he attended court personally. That was indeed well after the event. That letter is therefore not a confession nor confirmation that the Speaker had notice of the order before the impugned proceedings in the Assembly.
35. However, all through, and upto the date the Speaker was cross examined in court, the Assembly was represented by a counsel, one Mr Rakewa advocate. That representation of the Assembly is not evident between the June 17, 2021 when the orders were made and when the assembly proceeded on the June 18, 2021. In the entire record kept by the court and the record provided by the parties at the request of the court, there is no evidence by any affidavit of service that either the Speaker or the Governor had been served prior to the June 18, 2021.
36. It is however not disputed that the Assembly had its special meeting on June 18, 2021, made its resolutions the same day, communicated to the Governor who then took steps against the members of County Executive Committee, also the same day. To that extent, I find no satisfaction that the two cited persons were ever served or had notice of the court order before taking the actions they admittedly took on the June 18, 2021. This is not to say that the court must be shown personal service. It would be sufficient if persons working closely with the two or their counsel who subsequently represented them, like Ms Andisi and Mr Rakewa had been served or were in fact present when the orders were made.
37. In the absence of proof of knowledge by the two of the court orders brought to their knowledge and notice before the action of June 18, 2021, the court finds that contempt has not been proved.



The inevitable consequence is that the application fails and the same is dismissed. The costs of the application shall be costs in the petition as amended which must now be fast tracked towards conclusion.

38. Let the respondent file responses to the petitioners within fourteen (14) days from today for submissions to be filed by both side within thirty (30) days.
39. Mention on March 6, 2023.

Dated, signed and delivered in Kakamega, online, this 20th day of January 2022.

PATRICK J. O. OTIENO

JUDGE

In the presence of

Mr. Malenya for the Petitioner/Applicant in E006/2021

Mr. Sore for the Petitioner/Applicant in E005/2021

Mr. Masiva Petitioner in E007/2021

Mr. Rakewa for the Respondent and Speaker

Mr. Echesa for the Interested Party

Mr. Arwanda for the County Secretary

Court Assistant: Polycap

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