Mereka v Sikalieh - Chairman, Karen Langata District Association (KIDA) (Constitutional Petition E299 of 2022) [2023] KEHC 1676 (KLR) (Constitutional and Human Rights) (24 February 2023) (Ruling)

Neutral citation: [2023] KEHC 1676 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CONSTITUTIONAL AND HUMAN RIGHTS

CONSTITUTIONAL PETITION E299 OF 2022

M THANDE, J

FEBRUARY 24, 2023

BETWEEN

DAVID MUKII MEREKA ..... PETITIONER

AND

SAMORA M SIKALIEH - CHAIRMAN, KAREN LANGATA DISTRICT ASSOCIATION (KIDA) ..... RESPONDENT

RULING

1. By an Application dated 2.11.22, the Petitioner seeks the following orders:

    1. That the Respondent Samora M. Sikalieh -Chairman, Karen Langata District Association (KLDA) be committed to Civil Jail for being in contempt of Court.

    2. That the costs of this Application be borne by the Respondent.

2. The grounds upon which the Application is premised as set out in the Application and in the affidavit of the Petitioner sworn on even date are that this Court made an order on 12.10.22 restraining the Respondent from discussing Agenda No. 6 of the Special General Meeting (SGM) of the Karen Langata District Association on 12.10.22. The Applicant asserts that the Respondent was aware of the said order, the same having been made in the presence of his counsel. Further that the Petitioner's advocates served the said order upon the Respondent vide an email dated 12.10.22. In spite of this, the Respondent willfully and without any justifiable reason, chose to ignore, neglect and/or disobey the said order by discussing Agenda 6 at the SGM which was held on 12.10.22. He exhibited minutes of the meeting and stated that Agenda SGM/Min 2/1 conclusively discussed Agenda No. 6, the discussion of which the Court by its order had prohibited. It is the Petitioner's case that the Respondent by his conduct scandalized and lowered judicial authority and dignity of the Court, interfered with the

judicial process and obstructed the administration of justice. In view of the foregoing, the Petitioner averred that it is only proper that the Respondent faces punitive measures by being committed to civil jail or otherwise as this Court may deem fit.

3. In spite of service and being given an opportunity to file a response and submissions, he failed to do so. The Application is thus undefended.

4. Kenya is a country governed by the rule of law. Article 10 of the *Constitution of Kenya, 2010* sets out the national values and principles of governance that bind all persons. The rule of law is one of the values included therein. Compliance with court orders is the hallmark of the rule of law. Court orders are not made in vain and once a court order is made, it must be obeyed by every person bound by the same. Failure to comply with court orders is a serious threat to the maintenance of the rule of law and due administration of justice.

5. In the case of in *Hadkinson v Hadkinson* [1952] 2 ALL ER 567 Romer, LJ had this to say about the obligation of every person to obey Court orders:

> It is the plain and unqualified obligation of every person, against, or in respect of, whom an order is made by a court of competent jurisdiction to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or even void. Lord Cottenham, LC, said in Chuck v Cremer (1) (1 Coop temp Cott 342):
>
> > "A party, who knows of an order, whether null or valid, regular or irregular, cannot be permitted to disobey it... It would be most dangerous to hold that the suitors, or their solicitors, could themselves judge whether an order was null or valid- whether it was regular or irregular. That they should come to the court and not take upon themselves to determine such a question. That the course of a party knowing of an order, which was null or irregular, and who might be affected by it, was plain. He should apply to the court that it might be discharged. As long as it exists it must not be disobeyed."

6. The jurisdiction of this court to punish for contempt of court is contained in section 5(1) of the *Judicature Act* which provides:

> 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 such power shall extend to upholding the authority and dignity of subordinate courts.

7. This was restated by the Court of Appeal in the case of *Woburn Estate Limited v Margaret Bashforth* [2016] eKLR, as follows:

> The jurisdiction of the High Court (or any other court for that matter) to punish for the violation of its orders cannot be in question. Apart from section 5 (1) of the *Judicature Act* that vests in the High Court the power, like those of the High Court of Justice in England, to punish any party who violates its orders, the court, by virtue only of being a court has inherent powers to make sure its process is not abused and its authority and dignity is upheld at all times.

8. In the case of *Sam Nyamweya & 3 others v Kenya Premier League Limited & 2 others* [2015] eKLR, Aburili, J addressed the objective of the power of the Court to punish for contempt and stated:

> [T]he power to punish for contempt is an important and necessary power for protecting the cause of justice and the rule of law, and for protecting the authority of the court and the supremacy of the law. In the Scottish case of Stewart Robertson v Her Majesty's Advocate, 2007 HCAC63, Lord Justice Clerk stated that:
>
> > "contempt of court is constituted by conduct that denotes willful defiance of or disrespect towards the court or that willfully challenges or affronts the authority of the court or the supremacy of the law, whether in civil or criminal proceedings"

The learned Judge further stated that:

> " The power of the court to punish for contempt is inherent in a system of administration of justice and that power is held by every judge."

9. And in the case of *Gulabchand Popatlal Shah & another* Civil Application No 39 of 1990, (unreported), the Court of Appeal observed:

> It is essential for the maintenance of the Rule of Law and good order that the authority and dignity of our courts are upheld at all times. This court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors.

10. A party who seeks that another be punished for contempt of a court order, must bring the application within the threshold required, namely demonstration of the terms of the order in question, knowledge of the terms by the respondent and disobedience by the respondent of the order.

11. In the case of *Katsuri Limited v Kapurchand Depar Shah* [2016] eKLR, Mativo, J (as he then was stated:

> The High Court of South Africa in the case of Kristen Carla Burchell v Barry Grant Burchell[20] held that in order 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.
>
> 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 this inference by contrary proof on a balance of probabilities.

12. Similarly, in the case of *Sheila Cassatt Issenberg & another v Antony Machatha Kinyanjui* [2021] eKLR Mwita, J had this to say on the 3 elements of contempt of court:

> The Cromwell J, writing for the Supreme of Canada in Carey v Laiken, 2015 SCC 17 (April 16, 2015), expounded on the three elements of civil contempt of court which must be established to the satisfaction of the court, thus:

i) The order alleged to have been breached "must state clearly and unequivocally what should and should not be done." This ensures that a party will not be found in contempt where an order is unclear. An order may be found to be unclear if, for example, it is missing an essential detail about where, when or to whom it applies; if it incorporates overly broad language; or if external circumstances have obscured its meaning.

ii) The party alleged to have breached the order must have had actual knowledge of it. It may be possible to infer knowledge in the circumstances, or an alleged contemnor may attract liability on the basis of the willful blindness doctrine.

iii) The party alleged to be in breach must have intentionally done the act that the order prohibits or intentionally failed to do the act that the order compels. (emphasis).

13. For this Court to punish the Respondent herein for contempt, the Petitioner must demonstrate that the Respondent was aware of the terms of the order and that he failed to comply with the order and that failure to comply with the order was deliberate and willful.

14. It is the Petitioner's case that the order was clear and unambiguous and was binding on the Respondent. Further that the Respondent was aware of the order because his advocate was present in Court when the order was made. Further pursuant to oder 5 rule 22 of the Civil Procedure Rules, the Petitioner served the order upon the Respondent vide an email sent on the same date.

15. The order in question was made by this Court on 12.10.22. The terms of the order were as follows:

> The Respondent is hereby restrained from discussing Agenda 6 at the SGM of KLDA to be held on 12.10.22 given that the matter is pending in Court.

16. The terms of the order were clear and unambiguous. The order stated clearly what the Respondent was not to do. He was restrained from discussing Agenda 6 at the SGM to be held later that day.

17. As to whether the Respondent aware of the Court order, the Court notes that the order was made on 12.10.22 in the presence of Mr. Agwara, learned counsel for the Respondent, who informed the Court that he was on record for the Respondent. He also informed the Court that he had been served with the application giving rise to the order and asked Court for time to respond to the same. The Court granted the Respondent the time to file a response as requested and proceeded to issue the order in question. It is expected that Counsel informed or ought to have informed his client, the Respondent, of the order. Further, the order was sent to the Respondent and his lawyers via email on 12.10.22 at 11.37 am, by the Petitioner. Service via email is permitted under Order 5, Rule 22B of the Civil Procedure Rules. I am therefore satisfied that the Respondent was fully aware of the Court order.

18. It is now well settled that proof of personal service is no longer necessary and knowledge of a court order suffices. In the case of *Shimmers Plaza Limited v National Bank of Kenya Limited* [2015] eKLR Court of Appeal stated:

> "On the other hand however, this Court has slowly and gradually moved from the position that service of the order along with the penal notice must be personally served on a person before contempt can be proved. This is in line with the dispensations covered under 81.8 (1) (*supra*).

> 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."

19. Having found as I have that the order was clear and that the Respondent had knowledge of the same, I now turn to the issue as to whether the Respondent disobeyed the order.

20. *Black's Law Dictionary* Tenth Edition defines Agenda as:

> A list of things to be done, as items to be considered at a meeting.

21. The Petitioner exhibited the agenda of the SGM to be held on 12.10.22 that is to say a list of things to be done and items to be discussed at the meeting. Agenda 6 is reproduced verbatim below:

> Ratification of Resignation of Vice Chairman, & call to Resign on Hon Secretary Election of Replacements.

22. The Petitioner contends that Agenda 6 was conclusively discussed in spite of the Court order. The order restrained the Respondent from discussing Agenda 6 at the SGM of 12.10.22. Agenda 6 as I understand contained 3 components. First, the ratification of resignation of Vice Chairman. Second, the call to resign on the Hon Secretary and third, election of replacements of these 2 officers.

23. In order to understand the Petitioner's complaint and to determine whether the order was disobeyed or not, it is necessary to reproduce the relevant parts of minutes of the SGM and specifically SGM/Min2/1 under the heading "Unrest in KLDA":

> The Chairman opted to first discuss the issues that were not clear to the members on why they seemed to be some sort of unrest within KLDA. Mr. Shikalieh stated that in trying to fix KLDA, tough decisions were made, which have since created slight instability within KLDA.
>
> The Chairman noted, that when KLDA committee members are elected at our AGM annually, in most circumstances, the committee members are new to each other and most likely interact on a first-time basis. The Chairman noted that as committee members, we get to familiarize ourselves with each other gradually.
>
> Having stated that, the Chairman noted that the committee suspended its secretary and advised members on the same in the month of May this year. The committee found his behavior not to be workable with other committee members. The committee also unanimously concluded that he was not acting in the best interest of KLDA and its members. The suspended secretary wrote to statutory bodies single handedly approving a project that did not conform to the Karen Local Physical Development Plan.
>
> The Chairman noted that such behavior was not acceptable because one committee member could not single handedly approve projects without the consent of the full committee and KLDA members affected by a particular project.
>
> The Chairman informed members that the suspended Secretary had stated via email that he would resign from his position and would be handing over his resignation letter. But this was not the case, because a few days later, the suspended Secretary took his suspension matter to court and sued the Chairman instead of reverting to the members who he claims elected him.

> The Chairman informed members that as the matter was in court, he could not discuss the matter in detail as he would have wanted to elaborate to KLDA members more on the decision that was made to suspend the Secretary.

24. Minutes contain a true record of deliberations of a meeting. I have carefully read the extract of the minutes of the SGM as exhibited by the Petitioner. Nowhere do they have a minute reflecting Agenda 6. The minute referred to by the Petitioner is titled Unrest in KLDA. I do not see anywhere in the minutes a discussion on the ratification of resignation of the Vice Chairman, the call to resign on the Hon Secretary or the election of replacements of these 2 officers. What is contained in the minutes is a report by the Respondent, as chairman of KLDA, of the suspension of the Secretary and the reasons for the same. The minutes do not show that a call to resign on the Hon Secretary was discussed at the meeting. Indeed, the Respondent informed members that the matter was in court, he could not discuss the matter in detail as he would have wanted to elaborate to KLDA members more on the decision that was made to suspend the Secretary.

25. It is trite law that he who alleges must prove. Section 107 of the *Evidence Act* provides:

    1. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

    2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

26. The burden of proof lay on the Petitioner who was required to prove the alleged disobedience of the Court order by the Respondent, to the required standard.

27. The standard of proof in contempt proceedings is well established and though it is higher than proof on a balance of probabilities it is not proof beyond reasonable doubt as that remains in the realm of criminal cases. This is as was held in the case of *Mutitika v Baharini Farm Limited* [1985] KLR 229, 234, where the Court of Appeal stated:

> In our view, the standard of proof in contempt proceedings must be higher than proof on the 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, in criminal cases. It is not safe to extend it to an offence which can be said to be quasi-criminal in nature.

28. It is trite law that a party seeking orders in contempt proceedings has the burden of proving that the terms of the order were unambiguous and binding on the respondent. Such party must also prove that the actions of the respondent are deliberate and in clear violation of the terms of the said orders.

29. A successful prosecution of contempt proceedings may result in a party being deprived of their liberty. As such an applicant must discharge the burden of proof placed upon him to the required standard, which is higher than proof on a balance of probabilities but not beyond reasonable doubt. This was the holding in the case of *Mutitika v Baharini Farm Limited* [1985] KLR 229, 234, where the Court of Appeal stated:

> In our view, the standard of proof in contempt proceedings must be higher than proof on the 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, in criminal cases. It is not safe to extend it to an offence which can be said to be quasi-criminal in nature.

30. And in the case of *Geoffrey Kiania Kamwara v Mwikamba Kagembe* [2022] eKLR, Yano, J stated:

> Given that contempt of court orders seek the imprisonment of a party and denial of liberty of the person, the Applicant cannot wish away the duty to prove beyond a shadow of doubt the requirements expected of him. The criminality of punishing a party for disobeying a court order places a greater burden on to the Applicant to prove to court that despite the party being fully aware of the orders, he or she chose to disobey and for that reason should be punished.

31. In the instant case, no evidence was placed before the Court to demonstrate that the Respondent disobeyed the Court order of 12.10.22 by having Agenda 6 discussed at the SGM. In order to succeed in his Application, the Petitioner was required to lay before this Court proof beyond a balance of probabilities that the Respondent disobeyed the Court order in question. This, the Petitioner has not done.

32. Without proof that Agenda 6 was discussed at the SGM of 12.10.22, I am not persuaded that there was disobedience of the Court order of 12.10.22 or intentional violation of the Court's dignity, repute or authority, on the part of the Respondent as alleged. In light of this, I do not consider that the Petitioner has made out a case to warrant the grant of the orders sought. Accordingly, the Application dated 2.11.22 being devoid of merit, is hereby dismissed. Given that no response was filed, there shall be no order as to costs.

DATED AND DELIVERED IN NAIROBI THIS 24TH DAY OF FEBRUARY 2023

M. THANDE

JUDGE

In the presence of: -

..... for the Petitioner

..... for the Respondent

.....Court Assistant