



**Republic v County Secretary & 3 others; Charpenel Enterprises Limited
(Exparte Applicant) (Judicial Review Miscellaneous Application
35 of 2012) [2023] KEHC 24082 (KLR) (27 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 24082 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
JUDICIAL REVIEW MISCELLANEOUS APPLICATION 35 OF 2012**

**OA SEWE, J
OCTOBER 27, 2023**

BETWEEN

REPUBLIC APPLICANT

AND

COUNTY SECRETARY 1ST RESPONDENT

THE COUNTY ATTORNEY 2ND RESPONDENT

THE CHIEF REVENUE OFFICER 3RD RESPONDENT

THE COUNTY GOVERNMENT OF MOMBASA 4TH RESPONDENT

AND

CHARPENEL ENTERPRISES LIMITED EXPARTE APPLICANT

RULING

[1] The Notice of Motion dated 7th February 2023 was filed by the ex parte applicant, Charpenel Enterprises Limited, pursuant to Articles 47, 48, 50 and 159(2) and Section 33 of the Sixth Schedule of the *Constitution of Kenya, 2010*. The applicant also relied on Sections 27(b) and 28 of the *Contempt of Court Act*, No. 46 of 2016, Sections 1A, 1B, 3, and 3A of the *Civil Procedure Act*, Chapter 21 of the Laws of Kenya as well as Order 40 Rule 3 and Order 51 Rule 1 of the Civil Procedure Rules, 2010, for orders that:

- (a) Spent
- (b) The Court be pleased to cite the respondents jointly and severally for contempt of the Court Order given on 18th September 2013 and be committed to civil jail for such period as the Court may deem fit and just.



- (c) The Court do issue an order directing the County Secretary through the officers manning the Likoni Barrier to release forthwith to the applicant's Motor Vehicles Registration No. KCG 959F and KCA 674A in compliance with the Order of the Court issued on 18th September, 2013 pending the hearing of the application inter partes.
- (d) The Court be pleased to issue any other appropriate order in the circumstances.
- [2] The application was premised on the grounds that the respondents have refused to abide by the orders given herein on 18th September 2013 and have continued to hold the applicant's motor vehicles, thereby showing disdain for the orders of the Court. The applicant further averred that it has no other way of enforcing the said order; hence its application for contempt. The grounds were further explicated vide the Supporting Affidavit sworn on 7th February 2023 by the applicant's Operations Manager, Mr. Jackson R. Munene, to which the applicant attached several documents in proof of its assertions. The documents included the Court Order dated 18th September 2013, the Registration Certificates for the subject motor vehicles, as well as receipts issued by the County Government of Kwale for royalties paid for sand. The applicant also annexed a copy of the M-Pesa Statement for 27th January to demonstrate that it was required to pay and did pay Kshs. 3,400 at the Likoni Barrier for cess. It was therefore on the basis of the foregoing that the applicant prayed for committal of the respondents to civil jail for such period as the Court may deem fit and just.
- [3] The respondents relied on a Replying Affidavit sworn on 11th April 2023 by Jimmy Waliaula, the County Attorney. He pointed out that this suit was filed during the Municipal era before devolution came into play; and that after the promulgation of *the Constitution*, 2010, respective counties were given powers under Article 209 to impose taxes and charges for their services. He further stated that the current law in place with regard to the imposition of taxes and charges is the Mombasa County Finance Act, 2023. He added that the County Government of Mombasa is alive to Article 209(5) of the *Constitution* and therefore does not impose any charge or taxes on goods that are in transit.
- [4] At paragraph 11 of the Replying Affidavit, the respondent deposed that, since the office of the Town Clerk is non-existent in the current dispensation of the devolved units of Government, the application is a non-starter. The respondent further averred that the *Contempt of Court Act* No. 46 of 2016 pursuant to which the application has been brought having been declared unconstitutional, the instant application lacks sound basis. In addition, the respondent deposed that the conditions as to personal service and proof of willful disobedience have not been demonstrated. It was therefore the respondent's prayer that the application be dismissed with costs.
- [5] In response to the respondents' Replying Affidavit, the applicant filed a Further Affidavit sworn by Jackson R. Munene on 16th May 2023. There is however no indication that leave was obtained for that purpose. I have nevertheless considered the contents of that affidavit in the spirit of Article 159(2) (d) of the *Constitution*. The applicant thereby reiterated that the Silica sand it was transporting from Kwale was purely for transit purposes and was therefore not intended for the County of Mombasa. The application further reiterated that the respondents are under obligation under Section 33 of the Sixth Schedule of the Constitution of Kenya to adhere to all the orders previously issued to the defunct Municipal Council of Mombasa. The applicant accordingly annexed copies of receipts to demonstrate that the respondents have continued to blatantly disobey the order of the Court by charging cess upon it.
- [6] Directions were thereafter given that the application be canvassed by way of written submissions. Accordingly, counsel for the applicant, Mr. Lisanza, relied on his written submissions dated 16th June 2023. He proposed one issue for determination, namely, whether the Court should exercise its



discretion and cite the respondents for contempt. He pointed out that the order dated 18th September 2013 has never been challenged, set aside or appealed; and therefore that the respondents are guilty of intentional and willful violation of the order by continuing to charge the applicant cess for transit cargo.

- [7] Counsel further relied on Section 33 of the Sixth Schedule of the Constitution and the cases of *Sheila Cassatt Issenberg & Another v Machatha Kinyanjui* [2021] eKLR, *Henry Musemate Murwa v Francis Owino, Principal Secretary, Ministry of Public Service, Youth and Gender Affairs & Another* [2021] eKLR and *Basil Criticos v Attorney General & 8 Others* [2012] eKLR for the proposition that the respondents had knowledge of the order and did not have to be personally served with the Order in question. Counsel concluded his submissions by placing reliance on the Supreme Court decision in *Base Titanium v County Government of Mombasa & Another (Petition 22 of 2018)* [2021] KESC 33 (KLR) (16 July 2021) (Judgment) in which it was held that:

...Whereas a County can levy charges, it must do so in exchange for an amenity. Put differently, a County does not have the authority to charge a cess, levy or tax where they do not offer anything in return...The cess imposed by the County Government of Mombasa under Item 90 of the schedule to the Mombasa County Act 2014 was improperly imposed as a charge for services rendered for services provided by the County Government and is not a charge for service as contemplated by Article 209(4) of *the Constitution* of Kenya.”

- [8] Accordingly, the applicant prayed that the respondents be jointly and severally cited for contempt of the order of the Court.

- [9] I have given careful consideration to the application in the light of the averments in the parties’ respective affidavits. It is indeed true that this suit was filed on 1st November 2012; and that it was filed against the Municipal Council of Mombasa for an order of prohibition against the Town Clerk at the time. The application was premised on the affidavit of one of its directors, Peter Karuga Kariuki; and the main ground for complaint was that the applicant was being subjected to double cess payment by County Council of Kwale and Municipal Council of Mombasa. The applicant contended that it was being put to extreme financial strain as the charges would translate to Kshs. 441,000/= per month for the its 7 lorries deployed for the purpose.

- [10] In support of its case, the applicant relied on a directive by the Ministry of Local Government dated 8th June 2007 by which double payment of cess was prohibited. Accordingly, the applicant’s application was allowed and orders granted on 18th October 2013 in the following terms:

- (a) An order of prohibition to go to the Town Clerk of the Municipal Council of Mombasa to prohibit him from levying cess when the applicant has already paid the same to the County Council of Kwale.
- (b) The costs occasioned by this motion be taxed and paid by the respondent to the applicant.

- [11] It was on the basis of the foregoing that the applicant approached the Court vide its Notice of Motion dated 7th February 2023 for the respondents to be cited for contempt of court upon the detention of its motor vehicles for non-payment of cess. Several issues emerge for determination from a consideration of the application and the response thereto by the respondent. They are:

- (a) Whether the application is tenable following the nullification of the *Contempt of Court Act*, No. 46 of 2016.



- (b) Whether the application is competently before the Court granted that it was filed against the County Government of Mombasa and its officers yet the initial suit was against the defunct Municipal Council of Mombasa.
- (c) Whether contempt of court has been satisfactorily proved herein; and whether justifiable cause has been shown for the grant of the orders sought.

A. The applicable law:

[12] As has been pointed out hereinabove, although the application was expressed to have been brought under the provisions of the *Contempt of Court Act*, 2016, that legislation was declared invalid on 9 November 2018 for lack of public participation in *Kenya Human Rights Commission v Attorney General & Another* [2018] eKLR. In effect therefore, the applicable law in this regard is that which obtained prior to the passing of the *Contempt of Court Act*; as guided by Section 5 of the *Judicature Act*, Chapter 8 of the Laws of Kenya. That provision states:

- (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 such power shall extend to upholding the authority and dignity of the 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 criminal jurisdiction of the High Court.”

[13] In this posturing, I find succour in the decision of Hon. Nyamweya, J. (as she then was) in case of *Republic v Kajiado County & 2 others Ex parte Kilimanjaro Safari Club Limited* [2019] eKLR, in which it was held:

26. The applicable law as regards contempt of court existing before the enactment of the *Contempt of Court Act* was restated by the Court of Appeal in *Christine Wangari Gachege vs. Elizabeth Wanjiru Evans & 11 Others*, [2014] eKLR. In that case the Court 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 applied by virtue of section 5(1) of the *Judicature Act* which provided 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.”

27. This section was repealed by section 38 of the *Contempt of Act* of 2016, and as the said Act has since been declared invalid, the consequential effect in law is that it had no legal effect on, and therefore did not repeal section 5 of the *Judicature Act*, which therefore continues to apply. In addition, the substance of the common law is still applicable under section 3 of the *Judicature Act*. This Court is in this regard guided by the applicable English Law which is Part 81 of the English Civil Procedure Rules of 1998 as variously amended, and the requirement for personal service of court orders in contempt of Court proceedings is found in Rule 81.8 of the English Civil Procedure Rules.



[14] Accordingly, not much turns on the respondents' argument that the application has been brought under a repealed statute. Indeed, in *Nancy Nyamira & Another v Archer Dramond Morgan Ltd* [2012] eKLR, the point was aptly made thus:

31. Next, the Defendant argues that the Plaintiffs' application must fail because it cites the wrong provisions of law. The Enforcement Application cites Order XLIV, Rule 17. The Defendant correctly points out that there is no such rule. As many cases have now held, and notwithstanding Sir Udoma's remarks in *Salume Namukasa v Yozefu Bukya* (1966) EA 433, invoking the wrong provision of law does not necessarily spell doom to an otherwise meritorious application. This was the holding in *Gitau v Muriuki* [1986] KLR 211 which I now follow to hold that in as long as a party's invocation of the wrong provision of law is not in bad faith, meant to mislead or otherwise causes injury or prejudice to the other side, the Court will not dismiss an application solely on account of wrong invocation of a provision of the law on which the application is grounded."

B. On whether the County Government of Mombasa is a proper party to the instant application:

[15] There is no gainsaying that, by November 2012 when this suit was filed, the Country was in the process of transition from the old constitutional order to the current one. It is therefore not surprising that the judicial review application was brought against the Municipal Council of Mombasa and specific reference made to the office of the Town Clerk. Indeed, the documents annexed to the Supporting Affidavit of the applicant in support of the judicial review application were documents issued by the County Council of Kwale and the Municipal Council of Mombasa. Thus, the question to pose is whether the County Government of Mombasa is the automatic successor of the Municipal Council of Mombasa against which the order of 18th September 2013 was made.

[16] In this regard, the respondents relied on Section 33 of the Sixth Schedule of the Constitution, which provides that:

An office or institution established under this Constitution is the legal successor of the corresponding office or institution, established under the former Constitution or by an Act of Parliament in force immediately before the effective date, whether known by the same or a new name."

[17] It is noteworthy however that, in the majority decision of the Court of Appeal in *(Interim) County Secretary, County Government of Kakamega v Republic, Ex parte Ali Adam & another* [2017] eKLR, it was acknowledged that the High Court has reached varied findings on this issue. The cases of *Argos Furnishers Ltd v Municipal Council of Mombasa* HCCC No. 13 of 2008, *Republic vs. Town Clerk of Webuye County Council & Another* HCCC 448 of 2006, *Gateway Insurance Company Limited vs. Jimmy Kiamba, Treasurer Nairobi County Government & 2 others* [2015] eKLR, *Republic vs County Secretary Murang'a County Government exparte Thiga Thuita* [2014] eKLR and *County Government of Busia & Another vs Julius Orina Manwari & 12 Others* [2015] eKLR were cited as examples of the disparate positions taken by the High Court. The Court of Appeal then proceeded to hold (Per the Judgment of Hon. Murgor, JA) that:

Since offices or institutions as defined by *the Constitution* are limited to those within the national or county governments or the public service, it clearly was not intended that county governments were to be construed to be the offices or institutions contemplated by



section 33. To the contrary, County Governments were established under Article 176 of *the Constitution* as a newly created tier of self-government, with a different structure and orientation from the defunct local authorities. Without any express provision to designate them as legal successors of the defunct local authorities, it cannot be inferred that County Governments should be included within the definition of legal successors as provided by section 33.

The absence of an express provision on the successorship of County Governments, was perhaps deliberate on the part of the framers of *the Constitution*, and was intended to take into account the situations where, not all defunct local authorities as previously existed, were directly assumed and subsumed by the County Governments within the geographical areas in which they exist today. One of the key findings of the Transition Authority: Mechanisms and Criteria for transfer of Assets and Liabilities of Government and other Public Entities Manual, at page 15 is instructive. It was observed thus;

“8. More than 50% of the 40 counties visited had defunct Local Authorities whose boundaries transcend more than one county, thereby raising questions on sharing of assets and resources.”

The direct consequence of this is that, a defunct local authority may have had more than one county government as its successor, begging the question of, which of the affected county governments would be considered the legitimate successor, and to which of the county governments would the assets, resources, and might I add, the liabilities be ascribed.

In view of the foregoing, I find that it was not intended that county governments would be the direct legal successors of the defunct local authorities.”

[18] Granted the foregoing, the impugned actions of the County Government of Mombasa, as set out at paragraph 23 of the applicant’s Supporting Affidavit, ought to have formed the basis of a new cause of action against the respondents. It is important to bear in mind that contempt is an offence of a criminal character, therefore an application of this nature requires credible proof beyond the standard applicable to ordinary civil cases to warrant imprisonment of an alleged contemnor. Consequently, where it is manifest, as in this case, that the application has been brought against the wrong party, there would be no justification for considering the merits of the contempt application as proposed hereinabove under Issue No. [c].

[19] That being my view of the matter, it would follow that the instant application is misconceived and must fail on that score. The same is hereby struck out with no order as to costs.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 27TH DAY OF OCTOBER 2023

OLGA SEWE

JUDGE

