



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KITUI**

**CONSTITUTION PETITION NO. E001 OF 2021**

**IN THE MATTER OF: ARTICLES 19, 20,21, 22, 23, 165 AND 258 OF**

**THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF: VIOLATION OF ARTICLES 1,2,3,10,19,20,21,22,23,24,40**

**43,47,62(1) (F), 62 (3), 93, 94 (6),109,110,124,191,199(1)**

**209,258,259 AND 260 OF THE CONSTITUTION OF KENYA**

**AS WELL AS THE FOURTH SCHEDULE THERETO.**

**AND**

**IN THE MATTER OF: SECTIONS 87, 91 AND 104 OF THE COUNTY**

**GOVERNMENT ACT NO. 17 OF 2012**

**AND**

**IN THE MATTER OF: SECTIONS 125 (2) AND 207 OF THE PUBLIC FINANCE**

**MANAGEMENT ACT OF 2012**

**AND**

**IN THE MATTER OF: THE FAIR ADMINISTRATIVE ACTIONS ACT, 2015**

**AND**

**IN THE MATTER OF: SECTIONS 6, 20, 136, 140, 183, 197 AND 200 OF THE**

**MINING ACT, 2016**

**AND**

**IN THE MATTER OF: SECTIONS 9, 125, AND 147 OF THE ENVIRONMENTAL**

**MANAGEMENT AND CO-ORDINATION ACT**

**AND**

**IN THE MATTER OF: KITUI COUNTY FINANCE ACT 2020**

**AND**

IN THE MATTER OF: KITUI FINANCE BILL 2020

AND

IN THE MATTER OF: ALLEGED ENACTMENT BY THE COUNTY ASSEMBLY  
OF KITUI OF A LAW THAT IS INCONSISTENT WITH AND/OR CONTRAVENTION  
OF THE CONSTITUTION

AND

IN THE MATTER OF: ALLEGED EXERCISE OF PARLIAMENTARY POWERS  
AND AUTHORITY IN CONTRAVENTION OF THE  
CONSTITUTION

AND

IN THE MATTER OF: ALLEGED VIOLATION OF FUNDAMENTAL RIGHTS AND  
FREEDOMS OF PERSONS ENGAGED IN THE BUSINESS  
OF QUARRYING ACTIVITIES AND CONSUMERS OF  
THEIR SERVICES

BETWEEN

KARSAN RAMJI & SONS LIMITED.....PETITIONER

AND

COUNTY ASSEMBLY OF KITUI.....1<sup>ST</sup> RESPONDENT

COUNTY GOVERNMENT OF KITUI.....2<sup>ND</sup> RESPONDENT

**R U L I N G**

1. Before this court is a **Notice of Motion** dated 29<sup>th</sup> June 2021 brought by the petitioner who has invoked the provisions of **Section 5 of the Judicature Act** as well as **Section 63 (e) of Civil Procedure Act and Section 36 of the High Court (Organization and Administration) Act** in seeking the following orders/reliefs namely: -

(i) *(spent)*

(ii) *That pending the hearing inter partes hearing and determination of this application, this Honourable Court be pleased to order that the Petitioner's truck Re No. KCL 459J be forthwith unconditionally released by/from the OCS Kabati Police Station*

(iii) *That pending inter partes hearing and determination of this application, this Honourable Court be pleased to stay and or suspend the arraignment of the Petitioner's driver Boniface Muta Kieti on account of case (police) file no CR 400/2021 slated for 20<sup>th</sup> June 2021*

(iv) *That this Honourable Court be pleased to cite the Respondent herein for Contempt of this court's orders of 10<sup>th</sup> June 2021*

(v) *That this Honourable Court be pleased to issue a sufficient custodial sentence as against the Respondents or in the alternative a commensurate penal fine for contempt of court.*

(vi) *That this Honourable Court be pleased to quash the purported charges as against the Petitioner's driver, Boniface Mutua Kieti for the alleged illegal transportation of limestone and evading of cess and the cash bail deposited be released forthwith*

(vii) *That this Honourable Court be pleased to order that the Respondents be and are hereby restrained from arresting, harassing and or impounding the Petitioner, its employees, agents and or assigns and its trucks in the purported enforcement of mining and quarrying levies suspended by this Honourable Court.*

***(viii) That the OCS Kabati Police Station and the OCPD Kitui ensure compliance with the order or orders together with those of 10<sup>th</sup> June 2021.***

2. The applicant has named Kitui Executive Member Environment, Tourism and National Resources and Kitui County Chief Enforcement Officer as the 1<sup>st</sup> and 2<sup>nd</sup> Respondents respectively.

3. The grounds upon which this application is based on the following grounds listed on the fact of the application namely: -

*a) That this court issued conservatory orders on 10<sup>th</sup> June 2021 restraining the Respondents whether acting jointly, severally or through servants or agents from interfering with the petitioner's mining activities in the permitted area in Kyuso.*

*b) That the respondents were further restrained from enforcing sections 401, 402, 404, 405, 406, 407 and 409 of Kitui Finance Act in respect to Petitioner's mining activities pending the hearing and determination of the petition herein.*

*c) That the respondents were further restrained from levying fees as per first schedule of Kitui Finance Bill 2020 in respect of mining and transportation activities pending hearing and determination of the petition herein.*

*d) That despite the express orders issued in the presence of the parties advocates the respondents have blatantly disobeyed the court orders by harassing and arresting the petitioner's employees and demanding fees and charges on account of their mining activities and transportation of mining products.*

*e) That on 16<sup>th</sup> June, 2021 six days after this court issued the aforesaid orders, the County Executive Committee (Member of Environment, Tourism and Natural Resources (CEC) Mr. Patrick Musau issued a circular to the petitioners referenced "stoppage of activities" and copied to numerous enforcement officers in disrespect of the said court orders.*

*f) That on 22<sup>nd</sup> June 2021, the applicant's truck transporting limestone from its Kyuso quarry was impounded on 22<sup>nd</sup> June 2021 and the driver arrested on the charge of illegal transportation of limestone and evading cess."*

*g) That the arrest and detention of the applicant's truck at Kabati Police Station was instigated by the respondents herein.*

*h) That it is essential for the maintenance of the rule of law and order that the authority and dignity of the courts is upheld at all times and that this court must act to send a warning against the trend of disobedience of court orders.*

4. In its written submissions done through the learned counsel Okwach & Co. Adv., the applicant has made submissions on the essential elements that an applicant must establish and prove for civil contempt to be sustained. It cites two decisions in ***Samuel M.N. Mweru & Others versus The National Land Commission and 2 Others [2020] Eklr and Amos Mathenge Kabuthu versus Simon Peter Mwangi [2015] eKLR***. In the two decisions the courts held that before a court makes a finding on civil contempt the following elements must be proved namely;

*i. That the Order was issued by court.*

*ii. That the Order was clear, unambiguous and binding to the party accused for contempt.*

*iii. That the Order was served on the contemnor or that the alleged contemnor had knowledge of the Order actual or constructive.*

*iv. That the Defendant acted in breach and deliberately.*

5. On whether the application is valid in absence of application for leave to institute contempt proceedings, the applicant submits that formal compliance cannot outweigh substantive compliance. The Applicant has relied on two cases for this submission being the case of ***Clerk Nairobi City Council Assembly v Speaker, Nairobi City County Assembly & Another; Orange Democratic Party & 4 Others (Interested parties) (2019) eKLR and Peter Munga v Africa Seed Investment Fund Limited Liability Company (2017) eKLR***

6. In the first case, the court was faced with a similar application of contempt where the Respondent sought dismissal of the same stating that the applicant had by Notice of motion to institute contempt proceedings instead of an Application for leave to institute contempt proceedings. The Court however found that instituting contempt proceedings by way of a Notice of Motion did not offend the law or cause prejudice to the Respondent.

7. The second case involved insolvency proceedings where the statutory demand notice provided for under ***Section 17 of the Insolvency Act 2015*** was served outside the 21 days provided for under the Act. Service was done two days late and the court had the view that the delay was not fatal as it did not prejudice the Respondent. The court also was of the view that compliance with timelines fell within the realm of procedural technicalities and was excusable unless consequences of non-compliance are expressly stated.

8. On Claims made by the respondent that Kitui County has no Chief Enforcement Officer, the applicant submits that the Chief Officer a Mr. Joseph Kimanga Mutua holds the said position.

9. The applicant contends that the chief Officer Mr. Joseph Joseph Kimanga Mutua is the de factor Chief Enforcement

## Officer in Kitui County and must be held accountable.

10. The 2<sup>nd</sup> Respondent has opposed this application through the grounds of opposition dated 22<sup>nd</sup> July, 2021. The 2<sup>nd</sup> respondent terms this application frivolous and an abuse of court process.

11. The respondents deny disobeying court orders and contend that it is unfair to cite them for contempt.

12. The 2<sup>nd</sup> respondent contend that the applicant has failed to follow legal procedure of first seeking leave before filing the contempt proceedings.

13. According to the 2<sup>nd</sup> Respondent, the orders were not served directly on the alleged contemnors and that the same ought to have been done pointing out that the absence of affidavit of service shows the orders were not served and that the application for contempt is premature.

14. In its written submissions dated 19<sup>th</sup> October, 2021, the 2<sup>nd</sup> respondent reiterates that it was not served with the orders issued by this court. It relies on the decision of ***Ochino & Another versus Okombo & 4 Others [1989] eKLR*** where the court of Appeal held as follows: -

*i. As a general rule, no Order of court requiring a person to do or to abstain from doing any act may be enforced (by committing him for contempt) unless a copy of the order has been served personally on the person required to do or abstain from doing the act in question.*

*ii. The copy of the Order served must be endorsed with a notice informing the person on whom the copy is served that if he disobeys the Order, he is liable to the process of execution to compel him to obey it.*

*iii. The court will only punish for contempt in case of a breach of injunction if it is satisfied that the terms of the injunction are clear and unambiguous.*

*iv. The defendant had proper notice of the terms and the breach of the injunction which must be proved beyond reasonable doubt.*

15. The 2<sup>nd</sup> respondent contends that it had no knowledge of the court orders and has relied on the decision of ***Sam Nyamweya & 3 Others versus Kenya Premier League Ltd. & 2 Others [2015] eKLR*** where the court held that the court must satisfy itself beyond any shadow of doubt that the person alleged to have committed the act complained did with full knowledge of existence of the Order of the court forbidding and that the threshold is high as it involves possible depravity of person's liberty.

16. The 2<sup>nd</sup> respondent further faults this application for having been brought without first seeking leave and that the applicant has not cited the specific people alleged to have committed contempt.

17. This court has considered this application and the response made by the 2<sup>nd</sup> respondent. What is not clear from the onset is who the 2<sup>nd</sup> respondent who opposed this application is for certain because the petition itself names the County Government of Kitui as the 2<sup>nd</sup> Respondent while this application has named Kitui County Chief Enforcement Officer as the 2<sup>nd</sup> Respondent. But I will get back to that issue shortly.

18. In this application, the applicant is seeking several other reliefs apart from seeking to punish the respondents for contempt. It would appear that the prayers for release of petitioner's truck Registration No. KCL 459 Judge reportedly held by Officer Commanding Station Kabati and stopping of Criminal proceedings against petitioner's driver were either not pursued by the applicant or the reliefs are uncontested.

The prayer for contempt is the only prayer highly contested by the 2<sup>nd</sup> respondent whoever that 2<sup>nd</sup> respondent is but that it the impression one gets from the grounds of objection and submission filed through learned counsel M/s Katunga Mbuvi & Co. Advocates.

19. The reason why courts punish for contempt is to uphold the dignity and authority of the court, ensure compliance with directions of the court, observance and respect of due process of law, preserve an effective and impartial system of justice, and maintain public confidence in the administration of justice by courts. Without sanctions for contempt, there would be a serious threat to the rule of law and administration of justice. For a party to be cited for contempt, he must have violated and or disobeyed an order that was directed at him (See ***Sheila Cassatt Issenberg & another versus Antony Machatha Kinyanjui [2021] eKLR***) The applicant's case is that despite being aware of this Court's Order which restrained the Respondents from interfering with the Applicant's mining activities in the permitted area in Kyuso, and enforcing certain sections of the of Kitui Finance Act 2020 in respect to the Applicant's mining activities pending the hearing of the Petition, the Respondents disregarded them.

20. In particular, in the body of its application the Applicant states that the County Executive Committee Member of Environment, Tourism and Natural Resources (CEC) Mr. Patrick Musau issued a circular dated 16th June 2021 to the applicants referenced '**Stoppage of Activities**' in reference to the applicant's mining activities. That the Applicant's truck transporting limestone from its Kyuso quarry was impounded on 22nd June 2021 and the driver arrested on the charge of 'illegal transportation of limestone and evading cess.

21. On their part, the 2<sup>nd</sup> Respondents has denied these allegations stating that they were not aware of the court orders as they were not served directly. They have also contended that the applicant should have sought leave to institute contempt proceedings.

22. The issues that have cropped up in this application are as follows: -

i. Whether failure to seek leave before filing this application was fatal.

ii. Whether the application before me is proper and has established a basis for sanction against the respondent.

23. (i) Whether leave of court is a prerequisite before filing for contempt.

The 2<sup>nd</sup> respondent contention in respect to the above issue is based on Section 5 of the Judicata Act which provides for punishment for contempt of Court. It states;

24. **“(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 the subordinate courts.”**

25. The Respondents submitted that the applicant ought

to have sought the Court’s permission before instituting contempt proceedings through an application notice.

26. *Part 81.3 of the English Civil Procedure Rules* on **How**

**to make Contempt Application** provides;

**(5) Permission to make a contempt application is required where the application is made in relation to—**

**a) interference with the due administration of justice, except in relation to existing High Court or county court proceedings;**

**b) an allegation of knowingly making a false statement in any affidavit, affirmation or other document verified by a statement of truth or in a disclosure statement.**

27. According to the above provision ‘permission’ or ‘leave’ is not required when the application is made in existing High Court proceedings.

28. In *Christine Wangari Gacheche* the Court of Appeal Appeal correctly pointed out that leave, now called “permission” is not required where committal proceedings relate to a breach of a judgment, order, or undertaking.

29. The respondent’s contention that leave is a prerequisite is in view of the above not entirely correct. An applicant can seek leave to commence contempt proceedings but it is not a must particularly where the acts complained of were issued in a specific matter pending in court. The applicant cannot be faulted for preferring this application within the proceedings herein. However, given that the applicant was seeking to punish other persons other than the named respondents herein, the viable option for the applicant was actually to seek leave to institute contempt proceedings against the alleged contemnors.

(ii) Whether the application before me is proper and able to sustain sanction for contempt.

It is now trite that for a party to succeed in an application for contempt the applicant has to prove the terms of order, knowledge of the terms by the respondent and failure by the respondent to comply with the terms of the order. The decision in *Samuel M.N. Mweru versus National Land Commission & 2 Others (Supra)* summarized the conditions aptly as follows: -

“

**i. (a) the terms of the order (or injunction or undertaking) were clear and unambiguous and were binding on the defendant;**

**ii. (b) the defendant had knowledge of or proper notice of the terms of the order;**

**iii. (c) the defendant has acted in breach of the terms of the order; and**

**iv. (d) the defendant's conduct was deliberate.”**

30. There is no dispute about the existence of court

orders issued by this court on 10<sup>th</sup> June 2021. The terms of the order were clear. The respondents in this petition herein were restricted from interfering with the mining activities of the petitioner herein pending the hearing and determination of the petition. They were also stopped from levying fees/charges as per 1<sup>st</sup> schedule of Kitui Finance Bill 2020.

31. This court finds that in this petition respondents were duly served. The arguments brought forward that they were unaware of the orders are evasive and dishonest particularly in the face of the respondent's application dated 29<sup>th</sup> June 2021 wherein the applicants are seeking review and setting aside of the said same Orders. Caroline Musango, the County Attorney swore an affidavit in support of the application for review and expressed discomfort the said orders had purportedly caused the respondents. The claim of lack of knowledge of the said orders by the same respondent (County Government of Kitui) is insincere to that extent and further to that, the record of proceedings herein shows that on 10<sup>th</sup> June 2021 when this court issued the injunctive reliefs, the 2<sup>nd</sup> Respondent was represented by Mr. Katunga Advocate who was present in court. Mr. Katunga did in fact after the delivery of the ruling sought for a stay of the ruling claiming that the community was hostile to the mining activities at Kyuso area. This court directed him to file a formal application and perhaps that is why the application dated 29<sup>th</sup> June 2021 was filed.

32. This court however takes the position that an alleged contemnor must have personal knowledge of the order before he can successfully be cited for contempt. He should also be cited personally.

33. *Mwita J in Sheila Cassatt Issenberg & another v Antony Machatha Kinyanjui [2021] eKLR* expressed similar view when he held as follows: -

*“The applicants submitted that respondent was aware of the order because his advocate was in court. There is no evidence that the respondent was aware of the terms of the order. Knowledge is a question of fact and one must be aware of the terms of the order. That is, he must know what the order required him to do or not to do but willfully and deliberately disobeyed it.”*

34. The application before as I have pointed out above is unclear as to who it wants to punish for contempt. In the first place the application has introduced new parties namely Kitui County Executive Committee Member Environment, Tourism & National Resources as the 1st Respondent and Kitui County Chief Enforcement Officer as the 2nd Respondent. The introduction of the two parties in place of the respondents sued in the main petition is irregular because apart from the attendant confusion as to who the respondents are in this matter, there was no leave sought to include the said new parties. The applicant has not also indicated whether the new respondents will take over from the original respondents or are only answerable to this application.

35. Secondly and more importantly, the applicant has not personally stated who the holders of the cited officers are. This court cannot be called upon to send an office to the civil jail for obvious reasons. There must be a holder in that office and the applicant in the body of the application has named one officer Mr. Patrick Musau as the alleged contemnor and the question posed is why didn't it simply seek to cite the person of Mr. Patrick Musau, the County Executive Committee(CEC) member of Environment, Tourism and Natural Resources so that this court could then call upon the said officer to show cause as to why he should not be committed to civil jail for contempt?

This court has not been told who the holder of Kitui County Chief Enforcement Officer is. How can this court punish an unknown officer? How can unknown officer be called to account for his contempt?

36. The applicant was required to show with specificity the Officer(s) it was seeking to have punished for contempt. The court would ordinarily call upon the specific officer to answer to the allegations before any sanction provided by law for contempt can be passed against such officer. This court cannot be asked to punish an officer because sometimes office holders change due to reshuffles, transfers etc. That is why the law requires personal service of the Order and personal citing for contempt so that the real or actual culprit is punished if found guilty for contempt. It is for the aforesaid reason that this court finds that the orders sought to punish the named respondents' in this application unsustainable. This court finds that because **prayer (ii) & (iii) and (vii)** of the application is **uncontested**, the same are granted in view of the **express Orders** issued on **10<sup>th</sup> June, 2021**. Otherwise the other **prayer (iv) and (v)** of the **application** is **disallowed**. Costs shall be in the **main cause**.

DATED, SIGNED AND DELIVERED AT KITUI THIS 24<sup>TH</sup> DAY OF FEBRUARY, 2022.

HON. JUSTICE R. K. LIMO

JUDGE