



Munjuri & 3 others (Suing as members and on behalf of members of Nyambene Miraa Traders Association and the citizens of Meru County) v Head of Public Service and Chief of Staff Hon Joseph Kinyua & 3 others; County Government of Meru (Interested Party) (Petition 10 of 2017) [2022] KEHC 15504 (KLR) (21 November 2022) (Ruling)

Neutral citation: [2022] KEHC 15504 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
PETITION 10 OF 2017
TW CHERERE, J
NOVEMBER 21, 2022
(FORMERLY MILIMANI PETITION NO 154 OF 2017)**

BETWEEN

**KIMATHI MUNJURI 1ST PETITIONER
JACOB MIRITI 2ND PETITIONER
NAFTALY KATHURIMA 3RD PETITIONER
NYAMBENE MIRAA TRADE ASSOCIATION 4TH PETITIONER
SUING AS MEMBERS AND ON BEHALF OF MEMBERS OF NYAMBENE
MIRAA TRADERS ASSOCIATION AND THE CITIZENS OF MERU COUNTY**

AND

**HEAD OF PUBLIC SERVICE AND CHIEF OF STAFF HON JOSEPH
KINYUA 1ST RESPONDENT
CABINET SECRETARY, MINISTRY OF FINANCE 2ND RESPONDENT
CABINET SECRETARY, MINISTRY OF AGRICULTURE, LIVESTOCK AND
FISHERIES 3RD RESPONDENT
ATTORNEY GENERAL 4TH RESPONDENT**

AND

COUNTY GOVERNMENT OF MERU INTERESTED PARTY



RULING

1. By petition amended on May 25, 2017, the petitioners claimed the infringement and threatened infringement of the *Constitution of Kenya*. They alleged that in or about June, 2016, the President of the Republic of Kenya appointed a 14-member Task Force (hereinafter “the Task Force) to research, investigate and give recommendations on the development of the Miraa industry.
2. They further alleged that on April 4, 2017, the Task Force presented its report to the President and on receipt of the said report, the President directed that the said Task Force be transformed into the Implementation Committee and a sum of Kshs 1.2 billion be released to that Committee. That the whole exercise of the conduct of the mandate of the Task Force and the expected implementation of its report was in serious breach of various provisions of the *Constitution*. The petitioners therefore prayed for the following orders:
 - a) A declaration that the provisions of article 1(1), 2(1) & 2, 3(1), 6(2), 10, 27, 174, 186, 187 and Sections 1 and 7 of Part 2 of the Fourth Schedule of the *Constitution 2010* were violated, contravened, and infringed by the Respondents though the Presidential orders and directives
 - b) A conservatory order do issue suspending the implementation of the Task Force report on the development of the Miraa industry presented to the President on April 4, 2017 until a joint consultative team is set up for the two levels of government ie the National Government and the County Government of Meru to study the report and all the stakeholders ie Miraa Traders Association, Meru Council of Elders (Njuri Nceke), the Independent Miraa Farmers and Traders be involved in the implementation process of the Task Force Report
 - c) That an order of prohibition do issue prohibiting the Respondents either by themselves, their representatives, assigns, agents, employees or whomsoever acting on their behalf from transforming the 14 member Task Force Committee into Implementing Committee of the said Task Force
 - d) An order directing that the Task Force Report be published for the benefit of the Petitioners, Miraa Trade Associations and all stakeholders and interested parties within the County Government of Meru
 - e) An order do issue directing all monies and funds intended for the implementation of the Task Force be channelled through the County Government of Meru for easy access and not through Saccos
 - f) An order do issue compelling the Respondents to disclose the budget, the source of the funds and an account for all the monies/funds used by the Task Force during its tenure in office
3. Simultaneous with the Amended Petition, 1st Petitioner filed a Motion on Notice amended on May 25, 2017 under Articles 19, 20, 21, 22, 23 and 27 of the *Constitution* and Rules 13, 23 and 24 of the *Constitution of Kenya (protection of rights and fundamental freedoms of the individual) Practice and Procedure Rules*. The Motion sought five prayers two of which were granted on June 29, 2017 pending delivery of this ruling. The remaining prayers for orders to restrain the transformation of the Task Force into the Implementation Committee and the release of the sum of Kshs 1.2 billion until further orders of the court were argued before Mabeya J on June 29, 2017.
4. After hearing the parties, the court by a ruling dated October 5, 2017 allowed the application by a conservatory order of injunction restraining the Respondents, their agents, representatives, employees



or any government agency from proceeding with the implementation or transformation of the 14-member Task Force into the implementation committee of the Task Force Report on Miraa Industry presented to the president on April 4, 2017 and against release of Kes 1.2 billion through undisclosed and unidentified Saccos pending the hearing of the Petition.

5. Exactly one month after the foregoing orders were issued and more particularly on November 6, 2017, Petitioners, Respondents and the Interested Party filed a consent that:

- 1) The Miraa Task Force Report the subject of this matter be implemented without further delay
- 2) The National Government shall consult and cooperate with the County Government in the Miraa value chain in the implementation of the Report
- 3) In implementation of the Report, the National Government and the County Government shall involve the 1st to 4th Petitioners and other stakeholders in the Miraa value chain
- 4) Each party shall bear its own costs

6. The said consent was adopted as the judgment of the court on November 9, 2017.

7. The matter appears to have been settled until June 22, 2020 when 1st Petitioner filed a notice of motion dated June 19, 2020 seeking 10 reliefs. For ease of reference, the notice of motion is framed as follows:

Kimathi Munjuri (Suing on his own behalf and on behalf of Nyambene Miraa Traders Association (Nyamita)).....1st Petitioner

Jacob Miriti.....2nd Petitioner

Naftaly Kathurima.....3rd Petitioner

And

The Head of Public Service and Chief of Staff Hon Joseph Kinyua.....1st Respondent

CS, Ministry Of Finance.....2nd Respondent

CS, Ministry of Agriculture, Livestock and Fisheries.....3rd Respondent

The Honourable Attorney General.....4th Respondent

And

County Government of Meru1st I Party

Commissioner of Cooperatives.....2nd Intended I Party

Mwenge Sacco aka Mwenge Miraa Sacco aka Nyambene Miraa Sacco.....3rd Intended I Party

8. Out of the 10 reliefs in the notice of motion dated June 19, 2020, the 1st to 3rd, 7th to 10th reliefs were abandoned when 1st petitioner's advocate informed the court that 1st petitioner wished to pursue the contempt reliefs and other reliefs as follows:

- 1) abandoned
- 2) abandoned



- 3) abandoned
 - 4) The Court be pleased to declare that the Respondents are in contempt of orders issued by this court on April 9, 2017
 - 5) 1st Petitioners be granted leave to amend the pleadings in the suit herein and bring on record the Intended 2nd and 3rd Interested Parties
 - 6) Intended 2nd and 3rd Interested Parties be deemed as properly on record
 - 7) abandoned
 - 8) abandoned
 - 9) abandoned
 - 10) abandoned
9. Before the notice of motion dated June 19, 2020 could be heard and determined, the Petitioners yet again filed a notice of motion dated September 22, 2020. The said application was subsequently amended on October 8, 2020. For ease of reference, the notice of motion is framed as follows:
- Kimathi Munjuri (Suing on his own behalf and on behalf of Nyambene Miraa Traders Association (Nyamita)).....1st Petitioner
- Jacob Miriti.....2nd Petitioner
- Naftaly Kathurima.....3rd Petitioner
- And
- The Head of Public Service and Chief of Staff Hon Joseph Kinyua.....1st Respondent
- CS, Ministry of Finance.....2nd Respondent
- CS, Ministry of Agriculture, Livestock and Fisheries.....3rd Respondent
- The Honourable Attorney General.....4th Respondent
- And
- County Government of Meru1st I Party
- Commissioner of Cooperatives.....2nd Intended I Party
- Mwenge Sacco aka Mwenge Miraa Sacco aka Nyambene Miraa Sacco.....3rd Intended I Party
- The Commodities Fund.....4th Intended I Part
10. The notice of motion amended on October 8, 2020 seeks 7 reliefs as follows:
- 1)spent
 - 2) That the court be pleased to grant leave to the 1st Applicant to commence committal proceedings against the Government and/or its officers



- 3) The court be pleased to issue an order of committal to civil jail against the PS Ministry of Finance, Managing Trustee Commodities Fund, the 4th Intended Interested Party, the PS Ministry of Agriculture for 6 months or for such period as the court may deem fit and just in that they have disobeyed court orders dated November 9, 2020 inter alia:
- 4)spent
- 5) That the court be and is hereby pleased to order PS Ministry of Finance to reverse any funds from the Ministry of Agriculture and/or Commodities Fund in respect to Miraa Revolving Funds without consultation and/or compliance to court orders dated November 9, 2020
- 6)spent
- 7) Costs be in the cause

Determination

11. I have considered the notice of motion dated June 19, 2020 and notice of motion amended on October 8, 2020, the supporting affidavits thereto, the grounds of opposition filed on behalf of the Interested Party on March 11, 2020, the replying affidavit sworn on October 29, 2020 by Nancy Chelagat Cheruiyot, the Managing Trustee of the 4th Intended Interested Party, submissions filed on behalf of Petitioners on January 25, 2021, submissions filed on behalf of 1st to 4th Respondents and the 4th Intended Interested Party filed on April 8, 2021 and two sets of submissions filed on behalf of 3rd Intended Interested Party on October 7, 2021 and the cited authorities and I have deduced the following issues for determination.
 - 1) Whether a case has been out for joining the 2nd, 3rd and 4th Intended Interested Parties to this suit
 - 2) Whether a case has been made for an order for committal to civil jail for contempt of court orders dated November 9, 2017

Joinder

12. In *Pravin Bowry vs John Ward & another* [2015] eKLR, the Court of Appeal considered the principles to be considered in an application for joinder of parties to a suit and referred to the Ugandan case of *Deported Asians Custodian Board v Jaffer Brothers Ltd* [1999] 1 EA 55 (SCU) as well as *Civicon Limited v Kivu Watt Limited and 2 others* [2015] eKLR in which the court observed as follows:

“Again the power given under the Rules is discretionary which discretion must be exercised judicially. The objective of these Rules is to bring on record all the persons who are parties to the dispute relating to the subject matter, so that the dispute may be determined in their presence at the time without any protraction, inconvenience and to avoid multiplicity of proceedings. Thus, any party reasonably affected by the pending litigation is a necessary and proper party, and should be enjoined...from the foregoing, it may be concluded that being a discretionary order, the court may allow the joinder of a party as a defendant in a suit based on the general principles set out in Order I rule 10 (2) bearing in mind the unique circumstances of each case with regard to the necessity of the party in the determination of the subject matter of the suit, any direct prejudice likely to be suffered by the party and the practicability of the execution of the order sought in the suit, in the event that the plaintiff should succeed. We may add that all that a party needs to do is to demonstrate sufficient



interest in the suit; and the interest need not be the kind that must succeed at the end of the trial.” (emphasis added)

13. As stated at paragraphs 5 and 6 of this judgment, this suit was settled as between the Petitioners, Respondents and the Interested Party by consent of the parties dated and adopted as the judgment of the court on November 9, 2017.
14. No doubt the dispute in the Petition as between the Petitioners, Respondents and the Interested Party is determined. The moment the matter was determined by the consent of the parties; the court became *functus officio*. The *functus officio* doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. That once such a decision has been given, it is (subject to any right of appeal to a superior body or functionary) final and conclusive, as stated in the “[Application in Administrative Law](#),” [2005] 122 SALJ 832.
15. The Court of Appeal in the case of; [Telkom Kenya Limited v John Ochanda](#) [2014] eKLR, stated that: -

“Functus officio is an enduring principle of law that prevents the re-opening of a matter before a court that rendered the final decision thereon...

The doctrine is not to be understood to bar any engagement by a court with a case that it has already decided or pronounced itself on. What it does bar; is a merit-based decisional re-engagement with the case once final judgment has been entered and a decree thereon issued.”
16. There is no pending dispute as between the parties to which this court can of necessity join the 2nd, 3rd and 4th Intended Interested Parties to defend.
17. For the foregoing reasons, I find this court is functus officio as concerns the determination of the dispute in the Petition and finds that application to amend pleadings of a determined suit and an order seeking to join the 2nd, 3rd and 4th Intended Interested Parties to an already determined suit is an abuse of the court process.

Contempt

18. The jurisdiction of the court to punish for contempt is drawn from Section 5 of the [Judicature Act](#) and section 36 of the [High Court \(Organization and Administration\) Act](#) which form the legal framework for this Court to punish for contempt.
19. The essence of the power to punish for contempt is to ensure that the dignity and authority of courts is maintained. Obedience to court orders is to ensure that there is law and order. 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”.
20. In the case of [Board of Governors, Moi High School, Kabarak & another v Malcolm Bell](#) [2013] eKLR the Supreme Court of Kenya described the power to punish for contempt as a power of the court “to safeguard itself against contemptuous or disruptive intrusion from elsewhere” and identified that power as one of the indisputable attributes of the court’s inherent power without which power, protection of citizens’ rights and freedoms would be virtually impossible thereby reducing the courts of law to futile institutions spewing forth orders in vain.



21. In the case of *Econet wireless Kenya Limited v Minister for Information & Communication of Kenya & Another*, the court stated as follows;
- “It is essential for the maintenance of the rule of law and order that the authority and the dignity of our courts are upheld at all times. The court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors. It is the plain and unqualified obligation of every person against or in respect of whom, an order is made by the 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 void.”
22. Similarly, in the case of *Teachers Service Commission v Kenya National Union of Teachers & 2 others* [2013] eKLR, the court observed that;
- “The reasons why courts will punish for contempt of court then is to safeguard the rule of law which is fundamental in the administration of Justice. It has nothing to do with the integrity of the judiciary or the court or even the personal ego of the presiding Judge. Neither is it about placating the applicant who moves the court by taking out contempt proceedings. It is about preserving and safeguard the rule of law”
23. The foregoing authorities demonstrate that contempt of court is frowned upon for the reason that it is not about protecting judges’ feelings, egos or dignity but to safeguard the rule of law and to assure a party who walks through the justice door with a court order in his hands that the order will be obeyed by those to whom it is directed. (See *Sam Nyamweya & 3 others v Kenya Premier League Limited & 2 others* [2015] eKLR).
24. The above authorities demonstrate that any person seeking an order to punish for contempt of court has a duty to prove the contempt beyond reasonable doubt for the reason that “A contempt of court is an offence of a criminal character. A man may be sent to prison for it. It must be satisfactorily proved showing that when the man was asked about it, he told lies. There must be some further evidence to incriminate him.” (See *Bramblevale Ltd* [1970] CH 128 at P 137 where Lord Denning Master of Rolls).
25. To that end, the court has a duty to satisfy itself that each stage and step of the procedure is scrupulously followed and observed and more particularly that Respondents are aware of the existence of the court order. Courts have 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. (See The Court of Appeal decision of *Justus Kariuki Mate & another v Martin Nyaga Wambora & another*).
26. Courts have reiterated that knowledge of a court order suffices to prove service and dispenses with personal service for the purposes of contempt proceedings. (See *Basil Criticos v Attorney General & 8 others* [2012] eKLR and *Sbimmers Plaza Ltd v NBK* [2015] eKLR).
27. In this case, there is neither evidence of personal service of the order on PS Ministry of Finance, Managing Trustee Commodities Fund, the 4th Intended Interested Party, the PS Ministry of Agriculture (3rd Respondent) nor has it been demonstrated that they had knowledge of the court order dated November 9, 2017.



28. And even if for argument's sake the Managing Trustee of the 4th Intended Interested Party had been served or had knowledge of the court order November 9, 2017, the Intended 4th Interested Party was not a party to suit and was not bound by the consent orders issued on November 9, 2017.
29. Whereas there is no doubt that the Respondents were represented by the 4th Respondent and must therefore have been made aware of the court order dated November 9, 2017, Petitioners have not demonstrated that the court order dated November 9, 2017 along with the Penal Notice were served or brought to the attention of the PS Ministry of Finance and PS Ministry of Agriculture.
30. Further to the foregoing, the orders issued on November 9, 2017 were unambiguous and specific and Petitioners cannot be permitted to introduce a new parties and new cause of action at this stage.
31. It has not been demonstrated what role the PS Ministry of Finance, Managing Trustee Commodities Fund, the 4th Intended Interested Party and the PS Ministry of Agriculture had to play in ensuring and how they failed to ensure:
 - (a) That the Miraa Task Force Report the subject of this matter was implemented without further delay
 - (b) That the National Government consulted and cooperated with the County Government in the Miraa value chain in the implementation of the Report
 - (c) That in the implementation of the Report, the National Government and the County Government, the 1st to 4th Petitioners and other stakeholders in the Miraa value chain were involved
32. From the foregoing, I find that it has not been demonstrated that PS Ministry of Finance, Managing Trustee Commodities Fund, the 4th intended interested party and the PS Ministry of Agriculture disobeyed the court order dated November 9, 2017 and the application to commit them to civil jail is therefore unmerited.
33. From the totality of the foregoing analysis, the orders which commend to me and which I hereby issue are as follows;
 1. The notice of motion dated June 19, 2020 and the notice of motion amended on October 8, 2020 have no merit are hereby dismissed
 2. Costs shall be borne by the 1st Petitioner.

DATED AT MERU THIS 21ST DAY OF NOVEMBER 2022

WAMAE. T. W. CHERERE

JUDGE

Appearance

Court Assistant - Morris Kinoti

For 1st Petitioner - N/A for Kobia Michubu & Co. Advocates

2nd Petitioner - N/A

3RD Petitioner - N/A

For 1st Respondent - N/A

For 2nd Respondent - N/A



For 3rd Respondent - N/A

For Interested Party - N/A

For 2nd Intended I. Party - N/A

For 3rd Intended I. Party - Ms. Asuma for Mutembei & Kimathi Advocates

For 4th Intended I. Party - N/A

