



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

MISCELLANEOUS CIVIL APPLICATION NO. E009 OF 2020

MOSES MURIUKI.....1ST APPLICANT/CITOR
ALBAN NTORURU MUKIRE.....2ND APPLICANT/CITOR
LUCY KAGENDO.....3RD APPLICANT/CITOR
DANIEL KABARUA.....4TH APPLICANT/CITOR

VERSUS

JACOB BAITHILI.....1ST RESPONDENT/ CITEE
SILAS KATHAWE.....2ND RESPONDENT/CITEE
HARRIET MUKAMI.....3RD RESPONDENT/CITEE
MRS NKATHA, THE DISTRICT/SUB COUNTY
SOCIAL DEVELOPMENT OFFICER TIGANIA
(MINISTRY OF LABOUR, SOCIAL SECURITY
& SERVICES) MURIRI.....4TH RESPONDENT/CITEE

RULING

1. Court orders are not made in vain; they must and should be obeyed. Disobedience of court orders is a great hindrance to the Rule of Law. The application dated 17th August 2020 which is the subject of the instant Ruling raises the question of disobedience of Court orders and the Applicants are calling upon this Court to check whether there has been disobedience of previous court orders and if so, to cite and punish the Respondents for the same.

2. The application before the court seeks the following orders: -

i) Spent

ii) THAT the Respondents be cited for contempt of court for deliberate disobedience of court orders issued on 27th June 2019 by Hon. Mr. Justice A. Mabeya in Meru HCCCA No. 54 of 2018 Moses Muriuki & 4 Others v Ankamia Water Project (Suing through its officials, Jacob Baithili Mutiria (Chairman), Silas Kathawe (Secretary), & Harriet Mukami (Treasurer).

iii) THAT the Respondents be summoned to appear before the Court to show cause why they should not be punished for contempt of court orders dated 27th June 2019.

iv) THAT the Honourable Court be pleased to summon Mrs. Nkatha, the Sub County Social Development Officer (Ministry of Labour, Social Security & Services) Tigania, based at Muriri to personally appear before the Honourable Court and show cause why she should not be committed to civil jail for failing, neglecting and/or ignoring to call for and supervise elections for all office bearers of Ankamia Water Project as per the court order 27th June 2019 after the said orders were served upon her on 17th October 2019.

v) THAT the Respondents be compelled to conduct elections for all office bearers for Ankamia Water Project in terms of the court orders dated 27th June 2019.

vi) THAT the Honourable Court do make such further or other orders and issue such directions as will expeditiously ensure the ends of justice.

vii) THAT the said orders to be enforced by the Officer Commanding the nearest Police Station.

viii) THAT costs for this application be provided for.

Applicants' Case

3. The application is premised on the grounds on the face of it and it is supported by the supporting affidavit and the supplementary affidavit of Moses Muriuki, the 1st Applicant sworn on 17th August 2020 and 23rd November 2020. The Applicants also filed submissions dated 15th January 2021. It is averred that on 25th June 2019, the Applicants and the 1st to 3rd Respondents recorded a consent which was adopted as an order of the Court on 27th June 2019 in Meru HCCA No. 54 of 2018; The terms of the consent were to the effect that the Applicants would be re-admitted as members of Ankamia Water Project and that any member wishing to join the project would apply and pay the requisite fees as per Section 1 of the laid down by laws of the project; Elections for all office bearers of the project, when due, be conducted as per Section 7 of the Ankamia Water Project by laws under the supervision of district/sub county social development officer; That Section 7 of the project by laws provides that only the Chairman of the project shall call for election / relevant official authorized by the DSDO's office, the import of which is that apart from the Chairman, the 4th Respondent herein may call for the election of officials; That on 17th September 2019, the order was served upon the District Sub county Social Development Officer, the 4th Respondent herein and the Respondents were copied through their Advocates for compliance by conducting the elections of office bearers of the project considering that the current office bearers have held office for close to a decade contrary to Section 7 of the by laws; That subsequently, a demand notice was served upon the 4th Respondent on 11th October 2019 to comply with the court orders but this was not complied with; That the orders were served four (4) months before the outbreak of COVID 19 pandemic; That despite knowledge of the court order and the contents thereof, for more than six (6) months, they have knowingly, willfully, with utter impunity and disregard violated and/or disobeyed and/or disregarded and/or thwarted and undermined the effect and purpose of the orders and/or knowingly and willfully refused to take any steps in complying with the same; That the current office bearers have remained in office for close to a decade contrary to the stipulated tenure of five (5) years at the expense of the beneficiaries of the project.

4. In response to the Respondents' averments which will be outlined hereunder, the Applicants state that the Respondents are being untruthful and are guilty of collusion and distortion of facts so as to mislead the Court; The 1st Applicant reiterates the contents of the 1st, 2nd and 3rd Applicants' affidavits that on 19th April 2019, acting pursuant to the decree issued by the Court on 9th October 2017 in Meru CMCC No. 419 of 2014, they conducted elections and were re-elected into office and he also reiterates the contents of the 4th Respondents' affidavit that a meeting for electing officials was held on 20th December 2020 under the supervision of the area chief when the elections of 19th April 2019 were confirmed by members and the 1st, 2nd and 3rd Respondents re-elected into office. It is averred that the Respondents are lying to contend that as at 19th April 2019, they were unaware of the existence of any appeal whilst a Memorandum of Appeal dated 4th June 2018 and filed in Court on 14th June 2018 had been served upon their Advocates; That if indeed elections were conducted on 19th April 2019 as alleged, the 1st, 2nd and 3rd Respondents ought to have updated the Applicants' Advocates and the Court when the Appeal came up for hearing on 27th June 2019, barely two (2) months after the alleged elections; (The Applicant gave a recap of the facts relating to the dispute indicating that the project was registered in 1995; the 1st, 2nd and 3rd Respondents/Citees were elected to office in 2006; membership fee was Ksh 1,000/= with 560 founder members including all the Applicants; a fundraising was held and each member contributed Ksh 2,000/= and to date, the project has received Ksh 5,300,000/= from CDF; a bank account was opened at Dhabiti SACCO (Mikinduri Branch); that in 2014, members discovered that the officials had changed the account name to Mutethia Water Project and had unilaterally whittled down the list of membership from over 560 to only 162 and they had refused to call for elections as and when the same were due ie every 5 years or to render accounts of the funds to the members; that on 18th August 2014, members requisitioned an AGM and revolted against the said officials due to the irregularities aforesaid and mentioned and elected the 1st Applicant as the Chairman and the other Applicants as the new officials; that as the incoming officials, they reported the outcome of the elections to the then Tigania East Social Services Development Officer (S.S.D.O), Mr. Manyara (now retired) when it was agreed that the S.S.D.O would visit the association on 26th November 2014 either to supervise elections or to confirm the office bearers; that before the said date, the 1st, 2nd and 3rd Respondents/Citees served the Applicants with orders of temporary injunction issued in Meru CMCC No. 419 of 2014 and hence the dispute moved to Court.

5. That by the time Meru CMCC No. 419 of 2014 was instituted, vide which case the 1st, 2nd and 3rd Respondents forestalled their own removal from office after Court found elections of 18th August 2014 to have been irregular, the had been in office since 2006 without facilitating elections or rendering accounts contrary to the by laws requirements that elections be held every five (5) years; That the said decision as appealed vide Meru HCCA No. 54 of 2018 where the consent was recorded, which consent, should be interpreted in a holistic manner, within the context it was recorded while bearing in mind the mischief that was to be cured having regard to the three (3) court files involved and the history of the dispute; That as at the time of recording the consent in the appeal, it was common ground that elections were already overdue; That in flagrant disobedience of the consent order, the 1st, 2nd and 3rd Respondents imposed upon the Applicants and other members who they had excluded over the years a very onerous condition precedent for readmission by requiring the payment of Ksh 250,000/=, a sum which has never been paid by any of the members of the association, including the 1st, 2nd and 3rd Respondents; That if indeed the elections were conducted on 19th April 2019 under the supervision of the area chief, the said elections were a sham and a fraud calculated to defeat the ends of justice because:-

i) Neither the Applicants nor their Advocates nor other members were notified of any such impending elections and/or meeting as required by the by laws and to enable them participate despite the parties having had wrangles in Court since 2014.

ii) The Court order did not permit the 4th Respondent/Citee to delegate her responsibility of supervising the elections to the area chief.

iii) Even if the 4th Respondent/citee could delegate her authority to an officer of the provincial administration, the area chief could never have been the right person to be given such authority since he is heavily conflicted having testified in Court in Meru CMCC No. 419 of 2014 on behalf of the 1st, 2nd and 3rd Respondents'/Citees.

iv) Meetings for the association are usually held at Ankamia Coffee factory grounds but the meeting of 20th December 2019 is alleged to have taken place at the project's water tank.

That the 1st Applicant has on more than one occasion overheard the 1st Respondent/Citee conversing on telephone with the 4th Respondent/Citee discussing the association's matters, at the sidelines of previous association meetings, the contents of which conversations are never disclosed and that the two enjoy very cordial relations hence he is not surprised that a government officer is willing to support the 1st, 2nd and 3rd Respondents' lies; That the Respondents in their replying affidavit have merely altered old records to suit their situation evinced by the fact that in the list of members indicated to have attended the meeting of 20th December 2019, people who to the best of the 1st Applicant's knowledge died way before 2018 (No. 7 Clement Chokera, No. 11 Julius Nkubitu, No. 35 Naftaly Kaburunga, No. 83 Henry Tharamba, No. 90 Mwakithii Gitonga) have been indicated as having attended the meeting and that the Court should thereby order for the DCI to ascertain the truthfulness of the minutes of the said meeting or alternatively for the Respondent to avail to Court the said 5 members.

It is further averred that no notices and returns were filed with the 4th Respondent confirming that the said meeting and election of 20th December 2019 took place and that the purported minutes annexed by the Respondents are a creation of the Citees to mislead the Court that the elections and/or a meeting of the association took place on 20th December 2019; That the purported meeting of 20th December 2019 cannot be equated to elections since an election is a process and not an event, which process entails inter alia, contestants, voting, counting and tallying of votes, declaration of winner among other things; That Section 7 of the by laws require the 4th Respondent to call for election; That if the 1st, 2nd and 3rd Respondents are allowed to continue to hold office, they will have been in office for a cumulative 24 years, contrary to the by laws; That the 1st, 2nd and 3rd Respondents diverted the route the water was to take from intake in Thangatha River, Nyambene Forest by discarding a parcel of land donated for free by the 2nd Applicant for construction of the distribution tank as was agreed at the formation of the association because the said land is elevated ground for better distribution to many members and as a result, pressure for water distribution was negatively impaired to the detriment of the Applicant so and other members who have been denied access to water, a public utility; That the 1st, 2nd and 3rd Respondents clandestinely opened and operated a parallel bank account to evade audit of the project funds as requested by the Applicants which project is financed by CDF funds, money donated and money realized for distribution and sale of water to members; That the 1st, 2nd and 3rd Respondents have altered the lists of members of the project by maintaining only members allied to their faction to the detriment of the Applicants and other bona fide members; That the Respondents have disobeyed Court orders issued on 27th June 2019 and in order to maintain the dignity and sanctity of Court orders, they should be punished for contempt and be ordered to purge the contempt.

1st, 2nd and 3rd Respondents' Case

6. The 1st, 2nd and 3rd Respondents opposed the application vide the replying affidavit sworn by the 1st Applicant, the Chairman of the Ankamia Water Project, on 21st October 2020. It is averred that during the pendency of the tenure of the 1st, 2nd and 3rd Respondents' as officials of the Ankamia Water Project, the Applicants herein unlawfully and unprocedurally purported to hold an election in which they elected themselves as Ankamia Water Project office bearers, consequential thereof, they filed Meru CMCC No. 419 of 2014 challenging the same and on 9th October 2017, Judgment was delivered in their favour; That in execution of the said decree, they proceeded to conduct the Ankamia Water Project elections on 19th April 2019; That on 14th June 2018, long after the Judgment had been delivered, they were surprised to learn from their Advocates on record that the applicants had filed an appeal, Civil Appeal No. 54 of 2018 in court upon obtaining leave to file the same out of time vide Meru Miscellaneous Application No. 44 of 2018, almost 8 months later; That when they informed the members of Ankamia Water Project of the same, they resolved that they instruct their Advocates to pursue and out of court settlement, consequential whereof, on 25th June 2019, parties filed a consent on the Appeal and the same was adopted as an order of the Court on 27th June 2019; That clause 3 of the said consent sated that 'Elections for office bearers of Ankamia Water Project when due be conducted as per Section 7 of the Ankamia Water Project By Laws under the supervision of the District Sub County Social Development Officer (Ministry of Labour, Social Security & Services); That contrary to the Applicants' allegations, the election office bearers of Ankamia Water Project were conducted on 19th April 2019, a fact well known by the Applicants; That contrary to the Applicants' allegations, the consent order of 27th June 2019 clearly state that the election for all office of Ankamia Water Project when due be conducted as per Section 7 of the Ankamia Water Project By Laws under the supervision of District Count Social Development Office (Ministry of Labour, Social Security 7 Services) hence it goes without saying that if the same was conducted on 19th April 2019, it shall be due after 5 (five) years from 19th April 2019 to wit 19th April 2024; That in any case, the Applicants have not stated on whose behalf they are complaining as all the members are comfortable and happy with the state of affairs of Ankamia Water Project; That the Applicants' application is far fetched and misleading as the Applicants have not disclosed to the Court that elections were conducted on 19th April 2019 and the same is now due on 19th April 2024.

4th Respondents' Case

7. The 4th Respondent opposed the application vide the replying affidavit of Felicita Nkatha, the Sub County Social Development Officer, Tigania West sworn on 20th October 2020. She avers that she was neither a party to Meru CMCC No. 419 of 2014 nor Meru HCCA No. 54 of 2018 and that she only learnt of the existence of the dispute upon being served with the court orders issued on 5th July 2019; She avers that as per the court order, her role was only to supervise the elections of Ankamia Water Project when due and not to call for elections as alleged; That it was agreed among the members, the officials and the area chief that the meeting for elections of officials would be held on 20th December 2020; That she was however unable to attend the meeting due to other urgent official duties that she had to attend to on the

material date and she informed the area chief that she would not be available on the material date and requested him to supervise the elections on her behalf; That she is aware that the meeting proceeded as planned and the members confirmed the officials they had elected on 19th April 2019; That it is clear that the court order was complied with to the extent that she authorized the area chief to supervise the elections; That the role of her office is to supervise the elections and not to engage in the internal affairs of Ankamia Water Project as she is not a members or an official of the project and therefore, if the Applicants are dissatisfied with the internal affairs of the aforesaid water project, or the elections thereof, they should appeal the decision and/or seek to set aside the elections; That the allegations raised in the application are baseless and a waste of court's time and thus an abuse of court process.

Issue for Determination

8. The only issue for determination in this application is the question of whether or not there has been contempt of court on the part of the Respondents.

Determination

9. The High Court in the case of ***Samuel M. N. Mweru & Others v National Land Commission & 2 others [2020] eKLR*** discussed in depth the applicable law on contempt of court as follows: -

“It is an established principle of law 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”

10. The court in the aforementioned case proceeded to quote with approval the learned authors of the book; ***Contempt in Modern New Zealand*** thus;

“There are essentially four elements that must be proved to make the case for civil contempt. The applicant must prove to the required standard (in civil contempt cases which is higher than civil cases) that:-

- a) The terms of the order (or injunction or undertaking) were clear and unambiguous and were binding on the defendant;***
- b) The defendant had knowledge of or proper notice of the terms of the order;***
- c) The defendant has acted in breach of the terms of the order; and***
- d) The defendant's conduct was deliberate.”***

Terms of the Order

11. The Applicants attached the consent order dated 5th July 2019 to their supporting affidavit. The terms of the consent are as follows: -

- i) That the Appellants be re-admitted as members of Ankamia Water Project***
- ii) That any other members wishing to join Ankamia Water Project to apply and pay the requisite fees as per Section 1 of the laid down by laws of Ankamia Water Project.***
- iii) That the election for all office bearers of Ankamia Water Project when due, be conducted as per Section 7 of the Ankamia Water Project by laws under the supervision of the District/Sub-county Social Development Officer (Ministry of Labour, Social Security & Services)***
- iv) That the Appeal be marked as settled with each party bearing its own costs.***

12. To this Court's mind, the orders are clear and unambiguous. This Court will however discuss hereunder the apparent disconnect with respect to how parties perceived particularly order iii).

Notice of the terms of the Order

13. Since the order was one by consent of parties and merely adopted by the Court, this Court finds that the 1st, 2nd and 3rd Respondents who have been parties to the suit all along had notice of the terms of the order. As for the 4th Respondents, she admits that she was served with the order and the Court has also observed the correspondence (dated 17th September 2019) between the Appellants' Advocates and the 4th Respondent urging for compliance with the order.

Disobedience of the Order

14. The Applicants urge that the Respondents disobeyed the Court orders and particularly that they failed to conduct elections and the current office bearers have remained in office for close to a decade contrary to the stipulated tenure of five (5) years; and that the Respondents

required and made the Applicants pay the sum of Ksh 250,000/= as a condition for their re-admission into the water project.

15. The 1st, 2nd and 3rd Respondents on their part stated that there has been no disobedience and that they conducted elections on 19th April 2019, which elections were confirmed on 20th December 2020. According to the Respondents, it being that elections are conducted every 5 years, the next time elections will be due is on 19th April 2024. They urge that the order was to the effect that elections would be conducted **when due**.

16. To counter this assertion, the Applicants urge that no such elections were conducted on 19th April 2019 as purported by the Respondents. They urge that they were not given any notice of the said elections and that if at all these elections had been conducted, the Respondents would have so informed the Court when the Appeal came up for hearing on 27th June 2019, barely two months after the election.

17. The Applicants urge that in determining this matter, the Court has to bear in mind the history of the matter. It is clear that there has been tension between the Applicants and Respondents going by the fact that the Applicants had been expelled from membership in the project and that the Applicants appear to be disgruntled members who are aggrieved by the fact that the Respondents have continuously held on to office for over a decade.

18. This Court has analyzed the order with respect to conduct of elections. It indicates as follows : -

That the election for all office bearers of Ankamia Water Project when due, be conducted as per Section 7 of the Ankamia Water Project by laws under the supervision of the District/Sub-county Social Development Officer (Ministry of Labour, Social Security & Services)

19. It appears that when this order was made, it was not clear to the parties' mind when the next elections would be due. Whereas the Respondents thought that going by the fact that elections had been conducted on 19th April 2019, the next elections would be due on 19th April 2024, the Applicants expected that the next elections would be conducted shortly after the consent order was adopted by the Court. This is what informed the numerous letters that they wrote. It would have been helpful to indicate, in the order the specific date when the elections were to be conducted.

20. This Court has looked at the documents before the Court which purportedly evince that a meeting was held on 20th December 2019 during which meeting members confirmed the elections which were held on 19th April 2019. The same was stamped by the chief. The Applicant has argued that the 4th Respondent/Citee was not supposed to delegate her duty of supervising the meeting to the Chief. This Court however finds that this issue does not go into the root of the dispute herein which is on purported failure to conduct elections.

21. The application before the Court is one for contempt of Court and not one seeking to declare the elections alleged to have been conducted on 19th April 2019 null and void. In view of the fact that the order did not give a specific date when the elections were to be conducted, this Court finds no reason to punish the Citees.

22. As to the allegations made to the effect that the Respondents required the Applicants to pay Ksh 250,000/= as membership fee, this Court finds that the Applicants, having knowledge of the terms of the consent, they ought not to have paid. In doing so, they were acting as enablers and this Court finds that it was well within their power to refuse to make any such payments should they have deemed the same to be contrary to the contents of the court order.

ORDERS

23. In the end, this Court does not find merit in the application dated 17th August 2020 and, consequently, makes the following orders: -

i) The application dated 17th August 2020 is hereby dismissed in its entirety.

ii) Each party shall bear their own costs of the application.

Order accordingly.

DATED AND DELIVERED ON THIS 29TH DAY OF APRIL, 2021.

EDWARD M. MURIITHI

JUDGE

Appearances:

M/S C. B. Mwangela & Co. Advocates for the Applicants/Citors

M/S Kaberia Arimba & Co. Advocates for the 1st, 2nd and 3rd Respondents/Citees

M/S The Hon. Attorney General for the 4th Respondent/Citee