



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KABARNET
CONSTITUTIONAL AND JUDICIAL REVIEW DIVISION
JUDICIAL REVIEW CAUSE NO. 3 OF 2018

**SIMON KIBOWEN (SUING ON BEHALF OF
47 RESIDENTS OF KIBINGOR SUB-LOCATION.....APPLICANT**

VERSUS

NANCY JEPKEMOI KOLUM & 2 OTHERS.....RESPONDENT

RULING

[1] By a Notice of Motion dated 24th April 2019, the applicant herein Simon Kibowen, principally sought the following Orders:

1.

2. *THAT NANCY JEPKEMOI KOLUM, MICHAEL ANGAYO- ASSISTANT COUNTY COMMISSIONER MARIGAT WARD, and JOB ANUNDA- DEPUTY COUNTY COMMISSIONER BARINGO SOUTH be committed to civil jail for a term of six months for contempt of Court for having deliberately disobeyed orders of this Court issued on 3RD DECEMBER 2018 and 4th DECEMBER 2018 respectively.*

3. *THAT the Honourable Court grants any other or further orders of the Court geared towards protecting the dignity and authority of this Honourable Court deemed expedient in the circumstances.*

4. *THAT costs of this application be provided for.*

[2] The application was based on grounds set out in the application as follows:

1. *THAT The 1st, 2nd and 3rd defendants deliberately disobeyed the orders of this Court issued on 3rd and 4th December 2018 despite having been served with the said orders.*

2. *THAT the 1st respondent – NANCY JEPKEMOI KOLUM has proceeded to assume the office of the Assistant Kibingor Sub-Location despite existence of a Court Order barring her not to do so.*

3. *THAT The dignity and authority of the Court must be protected at all times;*

4. *THAT The culture of disobeying Court orders and decision has reached very high levels in Kenya and the Courts must now exercise their constitutional authority of punishing people for contempt of Court.*

5. *THAT acts of this nature shall cause a breach of the peace.*

Facts of the Case

[3] The factual position of the matter is disputed. While the applicant urges that the 1st respondent has been installed as assistant chief and is indeed performing the functions of the office, the respondents aver to have in obedience of the order of the court halted the inauguration, and await the court's determination as to dispute.

[4] The Replying affidavit of the 1st respondent of 17th June 2019 states at paragraphs 6-7 that there has not been any breach of the court

order, as follows:

6. *That despite being the successful candidate to the position, I have not been inaugurated to assume the position, my personal number has not been processed and I have not begun conducting the official duties of an assistant chief despite having been given the uniform awaiting inauguration.*

7. *That it is therefore not true that I was inaugurated to fill the position, have begun discharging my duties but I only sit in the office as the permanent Secretary for interior and Coordination of National Government has approved my appointment and what pends is the processing of my personal number and inauguration which is pegged on the outcome of proceedings before the Honourable Court which I believe will be positive as I am advised by my Counsel on record, advise which I verily trust in, that the laid down procedures for my appointment was fully followed.”*

[5] The principal actor in the inauguration procedure, the 3rd Respondent herein. Mr. Job Anunda, Deputy County Commissioner, similarly states in his replying affidavit of 17th June 2019 as follows:

3RD RESPONDENT'S REPLYING AFFIDAVIT

3 **THAT** the 1st Respondent is yet to be inaugurated as evidenced by a letter to the Area Chief through the assistant county commissioner, to the effect that following new developments, that is, a Court order against inauguration, the planned inauguration would not take place. (Annexed and attached herewith is a copy of the circular Marked “JA 1”

4 **THAT** on the said date whatever took place was a normal “Baraza” overseen by the Assistant County Commissioner who had planned to conduct the inauguration but this was overtaken by events by the letter advising against it and clearly indicating that there was in place a Court order hence acknowledging the supremacy of the Court orders. (Annexed and attached herewith is list of the attendees of the said Baraza marked “JA 2”)

5 **THAT** there was therefore no inauguration whatsoever that took place and what happened on the day was a normal “Baraza” by the assistant county commissioner as is the mandate by the provisional administration to conduct such meetings to collect such meetings to collect views from the people otherwise known as public participation.

6 **THAT** the winning candidate, the 1st Contemnor is in office inauguration, she is not working as has not been given the instruments of power, does not have a personal number and better yet her salary cannot be processed and as yet does not have the mandate to conduct official duties.

7 **THAT** I am not the appointing authority, my duty is to recommend three (3) successful candidate and forward the names to the Permanent Secretary of Interior and Coordination of national government for approval and appointment and essential once I forward the names, from then on my hands are tied and will only await the appointed person who is to assume office.

8 **THAT** it is therefore the prerogative of the appointing authority to appoint or decline the recommendation and give instructions that the position is advertised for fresh application and this has not been done and therefore unless an order of this Honourable Court issues the appointment stands.

9 **THAT** this matter is causing anxiety and we would wish the Court to handle the matter conclusively and bring the matter to a close.”

[6] By a Further Affidavit of 8th August 2019, the applicant reiterates that the respondents are in breach as follows:

“FURTHER AFFIDAVIT

8 **THAT** on the merits of the affidavit of Job Anunda, I would wish to state that the 1st respondent was inaugurated and or introduced to the Members of the public as the Area Assistant Chief on 6th December 2018 at Kibingor Centre which is contrary to clause or paragraph 3 of the said replying affidavit. (See photographs of the Chief being introduced to the members of the public marked as SK 1)

9 **THAT** the Area Assistant County Commissioner inaugurated the area assistant chief by introducing her alongside other assistant chiefs from the location with instructions that they do work together.

10 **THAT** it is apparently true that there was a feast in celebration of the said inauguration. (See photographs of sodas and a fat bull being slaughtered marked as SK2).

11 **THAT** it is far from the truth that the said inauguration was turned to be a normal ‘baraza’ as a roll of the participants was taken out, an act which has never happened before in any baraza.

12 **THAT** the said 3rd respondent admits that a meeting occurred where the participants were addressed by the Assistant County Commissioner. This meeting had been restrained by an Order of this Court and this was against the said Orders. This Court should not take this fact lightly as the said meeting worked well with abusing the process of this Court.

13 **THAT** paragraph 6 it is far from the truth to state that the 1st contemnor is not office. As a matter of fact, the 1st contemnor is in office, in her capacity as the area assistant chief. She has always been in the office signing and writing letters. A good example is a letter she wrote on 29th March 2019 where she addressed herself as Nancy Kolum assistant Chief Kibingor Sub Location. (See a copy of the letter marked as SK 3)

14 **THAT** to this end it is apparent that the 1st Contemnor is in office contrary and against the Court Order issued on 6th December 2019.

15 **THAT** the residents of Kibingor are really anxious this matter should come to a rest. They are eager, and are extremely enthusiastic to know their fate as all their hopes lies firmly and squarely within the armpits of this Honourable Court.

16 **THAT** the 1st contemnor is always in the office of the assistant Chief Kibingor location and definitely she has been working for a pay. She has been sorting small village issues as well as always ever dressed in full uniform donning a cane stick. This clearly manifests the fact the said 1st contemnor does not respect the Orders of the Court, as her behavior has always implied that she is the assistant chief Kibingor Location.

17 **THAT** to this end it is apparent and true to say that the 1st contemnor has been conducting herself as the area assistant chief Kibingor Sub Location despite the existence of a Court Order barring her not to do so.

18 **THAT** it is apparent that it is the 2nd Contemnor working under the instructions of the 3rd Contemnor who elevated the 1st Contemnor, to that new acquired status of the Area Assistant Chief – Kibingor Sub Location; against the existence of a Court Order which barred them from conducting that exercise.”

Submissions by the parties

[7] In urging the court to punish the respondents for contempt of court, the applicant’s counsel by written submissions dated contended as follows:

“Why should this Honorable Court Punish for Contempt of Court?”

The 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 VS HER MAJESTY’S ADVOCATE, 2007 HCAC 63, 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 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.

In the decided case of Refrigeration and Kitchen Utensils Ltd v Gulabchand Popatlal Shah & Another, Civil Application No. 39 of 1990, it was observed.

“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... He should apply to the Court that it might be discharged. As long as it exists it must not be disobeyed.”

Who should be punished for contempt the said Orders

Your lordship

The applicant in person filed a notice of motion dated 29th November 2018, of which this honorable Court deem it fit to grant him the following Orders on the strength of his motion;

THAT the 2nd and 3rd Respondents are HEREBY RESTRAINED from inaugurating the 1st Respondent as the area Assistant Chief pending hearing and determination of this application inter-parties.

For the purpose of the record the 2nd and 3rd respondents are **MICHAEL ANGAYO-ASSISTANT COUNTY COMMISSIONER MARIGAT WARD, and JOB ANUNDA- DEPUTY COUNTY COMMISSIONER BARINGO SOUTH**

The said ORDER was extracted and served upon the respondents by a process server in the name of JOHN OKUTOTO, who duly

filled and affidavit of service to the effect of the said service.

On 4th December 2018 when the matter came up for inter-parties hearing, all the 3 respondents did not show up. The Court extended the interim Orders which it had granted the applicant in person, barring the said inauguration and introduction of the 1st respondent as the area assistant Chief Kibingor Sub-Location. On 6th December 2018 the respondent without any color of right and in full disregard of the Court Order proceeded to inaugurate and install the 1st respondent as the area assistant Chief Kibingor Sub-Location despite the existence of a Court Order from this Honorable Court barring them not to do so. To this end, the respondent activities were illegal, irresponsible, a blatant abuse and attempt to degrade and erode the dignity of this Honorable Court.

Your lordship, it would be just and fair to Order that:

NANCY JEPKEMO KOLUM, MICHAEL ANGAYO- ASSISTANT COUNTY COMMISSIONER MARIGAT WARD, and JOB ANUNDA- DEPUTY COUNTY COMMISSIONER BARINGO SOUTH be punished for contempt of Court for having deliberately disobeyed orders of this Court issued on **3RD DECEMBER 2018** and **4TH DECEMBER 2018** respectively.

By ordering so my lord, the said Order shall work best to the protection of the dignity of this Court which is at the verge of being eroded by the actions of the respondents.

[8] For the respondents, it was argued in Submissions dated that there was no breach of the court orders and that, in fact, the counsel for the Attorney General had advised the respondents to halt the intended inauguration of the first respondent as follows:

“RESPONDENT’S SUBMISSIONS

May it please Your Lordship, Your humble Respondent’s submissions are as follows:

The Applicants herein filed a Notice of Motion Application, one dated 15th December, 2018 alleging that the Respondents have proceeded to inaugurate the 1st Respondent as an assistant chief and they are now of the opinion that in itself is blatant disobedience of Court orders issued on 4th December, 2018. The Respondents insist that after advisement from their advocates on record, the process of inaugurating the assistant chief was halted and that the 1st Respondent is yet to be appointed and that her name has only been forwarded for consideration for appointment among two other names though she is the 2nd and 3rd Respondents candidate of choice.

Your Lordship, the question that posits and which we believe are issues for determination are:

(a) Has the Petitioner proved any violation of the Court orders by the Respondents as alleged or at all?

(b) Is the Petitioner entitled to the reliefs sought?

Issue A

The petitioner were dissatisfied with the manner of appointing the assistant chief and hurriedly rushed to Court to stop the process. By the time of coming to Court, the process of appointing the assistant chief of Kibingor Sub-Location were already at an advanced stage. At the tail end of the process, the top three candidates’ names are forwarded to the Regional Commissioner, the permanent secretary, Ministry of Interior and Coordination of National Government plus the public service commission for consideration. The 2nd and 3rd Respondents only recommend whoever they feel is fit to execute the duties well.

Your Lordship, a person who wishes the Court to believe existence of specific facts must prove the alleged facts on a balance of probabilities. The petitioner alleges that the 1st Respondent was inaugurated, introduced to the public and has assumed office. As earlier stated, prior to coming to Court, the appointment process was at the home stretch, the 1st Respondent was due for appointment and inauguration. The ceremony had already been commissioned and was set to take place. It was actually turned to a chief’s baraza as plans had hit top gear. At the intended inauguration; as it is clearly stated in the replying affidavits the residents were engaged on the issues affecting them as they had received advice from the office of the Attorney General that inaugurating the assistant chief would go against the express orders the Court. It has also been stated on oath she has assumed office officially having not attained a personal number which is the ultimate process of appointment and is only hanging around to know her fate which is this Honourable Court’s interpretation of the selection process.

Your Lordship, the residents continue to suffer lack of leadership on a very key and integral part of their lives which is security. Your Lordship will take judicial notice of the fact that the provincial administration plays an integral part of matters security in the Country right from the grass root level and especially considering that this is an area marred from time to time with security concerns. Your Lordship no shred evidence has been adduced to prove the 1st Respondent has assumed office and the pictures annexed to the application only allude to a botched inauguration and the letters annexed as having been drawn by the 1st Respondent are from the fact that the 1st Respondents appointment was approved and she is only awaiting a pronouncement from this Honourable Court as to the legality of her appointment and not whether she should be in office or not. She only reports to duty to familiarize herself with the job but never to execute the same. In any event your Lordship, the burden of proof has not shifted from the applicants to the respondents and they cannot be heard to shift the burden of proof on the Respondents.

The issue for determination

[9] The sole issue for determination in this matter is whether breach of the court order has been proved to the required standard of proof applicable to cases of contempt of court.

Determination

Whether there has been breach of the court order

[10] The court's jurisdiction to punish for contempt is to be exercised with caution as held in *Mutitika v. Baharini Farm Limited* (1985) KLR 227, as follows:

1. "A person one who, knowing of an injunction, or an order of stay, willfully does something, or causes others to do something, to break the injunction or interfere with the stay, is liable to be committed for contempt of Court as such a person has by his conduct obstructed justice.

2. **The standard of proof in contempt proceedings must be higher than proof on a balance of probabilities, and almost, but not exactly, beyond reasonable doubt as it is not safe to extend the latter standard to an offence which is quasi-criminal in nature. The guilt of a contemnor has to be proved with such strictness of proof as is consistent with the gravity of the charge.**

3. **The principle must be borne in mind that the jurisdiction to commit for contempt should be carefully exercised with the greatest reluctance and anxiety on the part of the Court to see whether there is no other mode which can be brought to bear on the contemnor.**

4. *It had not been shown that the respondents intended to drive the applicants out of the land and the language of the Court order was such that it could be said that the respondent's conduct amounted to constructive eviction."*

[11] The sanction for breach of court orders being, among other penalty) the committal to civil jail makes the matter of proof of disobedience of court order a serious allegation which must be proved to a high degree of probability by cogent evidence. The standard of proof is beyond the normal balance of probabilities. In England, the House of Lords has considered the heightened standard of proof on a balance of probabilities in cases of serious or criminal allegations as observed by the learned authors of *Phipson on Evidence* 1^{6th} ed. London (Sweet & Maxwell) (2005) at paragraph 6-54 and 6-55 as follows:-

"b) Serious or criminal allegations

6 - 5.4 *Where a serious allegation is made in a civil case, such as an allegation of criminal conduct, the standard of proof remains the civil standard. Otherwise, where there was a claim for fraudulent misrepresentation and breach of warranty, the court might hold that the warranty claim was proven and the fraud claim was not proven on the same facts. However, if a serious allegation is made, then more cogent evidence may be required to overcome the unlikelihood of what is alleged, and thus to prove the allegation. Courts have for some time sought to grapple with the logical difficulty of requiring more cogent evidence to prove fraud, but still holding that the allegation must be proved on a balance of probabilities. The matter was explained by Lord Nicholls in Re H (minors) -*

*"The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on occurrence of the event was more likely than not. **When assessing the probabilities the court will have in mind the factor, to whatever extent is appropriate in the particular case, that the more serious the allegation the less likely it is that the event occurred and hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability. Fraud is usually less likely than negligence. Deliberate physical injury is usually less likely than accidental physical injury.** A step father is usually less likely to have repeatedly raped and had a non-consensual oral sex with his stepdaughter than on some occasion to have lost his temper and slapped her. Built into the preponderance of probability standard is a generous degree of flexibility in respect of the serious of the allegation.*

*Although the result is much the same, this does not mean that where a serious allegation is in issue, the standard of proof required is higher. It means only that the inherent probability or improbability of an event is itself a matter to be taken into account when weighing the probabilities and deciding whether, on balance, the event occurred. **The more improbable the event, the stronger must be the evidence that it did occur before, on the balance of probability, its occurrence will be established."***

6 – 5.5 *Whilst the House of Lords confined their decision to issue of care orders under s. 31(2) of the Children Act 1989, where it had to be shown that the child would suffer significant harm, it means unlikely that the court will in future apply any standard other than the civil standard in civil cases.*

*Re H does not mean that in every civil case where a serious allegation is made, that allegation will necessarily require proof somewhere approaching a criminal standard. Lord Nicholls explained that the heightened standard derives from the fact that "the more serious the allegation the less likely it is that the event occurred." **Attention should be paid to the nature of the allegation, the alternative version of the facts suggested by the defence (which may not be that the event did not occur, but rather that it occurs in a different way, or at someone else's hand), and the inherent probabilities of such alternative having occurred. It may be the version of events which is inconsistent with innocence of wrongdoing."***

[emphasis added]

[12] The copy of letter attached to the further affidavit as demonstration of the posturing of the 1st respondent as assistant chief is unclear and in any event, is introduced in the further affidavit without opportunity for the respondents to adduce evidence or give an explanation to rebut it or make comment thereon.

Findings of fact

[13] In view of the requirement of cogent proof and the alternative version of the facts by the respondents that the intended inauguration did not occur and that the disputed fact that the 1st respondent has been conducting the duties of the office of the assistant chief, the court does not find the alleged disobedience of the court order restraining the inauguration of the 1st respondent as assistant chief of Kibingor, the area of local administration jurisdiction which is the subject of this petition.

Remedies for breach of court orders

[14] Even where breach of a court order is established the court may make orders for redressing the breach by directions for purging of the contempt including, where appropriate, the order for an injunction in lieu of committal for contempt, as observed in *Halsbury's Laws of England* on the possible remedies for contempt of court, as follows:

- a) ***“Committal of the contemnor or sequestration of his property or imposition of a fine;***
- b) ***The court may, in its own discretion, grant an injunction, in lieu of committal or sequestration, to restrain the commission or repetition of a civil contempt.***
- c) *The court may in lieu of any other penalty require the contemnor to pay the costs of the motion on a common fund basis.*
- d) ***In a doubtful case, the court may, instead of proceeding for contempt, grant an order requiring the defendant to state whether he has complied with an undertaking.***
- e) *If an order of mandamus, a mandatory order, injunction or judgment or order for the specific performance of a contract is not complied with, the court may*
 - (a) *proceed with contempt application, or*
 - (b) *besides or instead of proceeding for contempt, direct the act to be done by some person appointed for that purpose.”*

See *Halsburys Laws of England*, 4th Ed Vol. 9 pp. 62-63, para. 104.”

Conclusion

[15] Having considered this matter, the court while finding that the alleged contempt of court is not proved, the justice of the case requires that the dispute between the parties be adjudicated in an expedited fashion as it involves the governance by national government of an area of local administration with security interests justifying prompt appointment and installation of an administrator to coordinate the implementation and oversight of national government policy and directives in the sub-location. There is an obvious public interest in the expedited determination of the dispute for the effective administration of the local unit of governance. In the meantime, for the avoidance of any confusion as to the authority of the 1st respondent and therefore the validity of her administrative actions, the court must preserve the status quo before the impugned appointment by restraining the person whose appointment is challenged from exercising the functions and duties of the office of Assistant Chief.

[16] As the 2nd and 3rd respondents have intimated that they have not inaugurated the 1st respondent, the appropriate remedy is a direction that they confirm that they undertake not to inaugurate the 1st respondent in breach of the court orders. This accords with the holding in *Mutitika, supra*, that ***“the jurisdiction to commit for contempt should be carefully exercised with the greatest reluctance and anxiety on the part of the Court to see whether there is no other mode which can be brought to bear on the contemnor.”***

Orders

[17] Accordingly, for the reasons set out above, the court makes the following orders:

1. The 1st respondent is restrained from further exercising any pretended powers of the office of Assistant Chief as the assistant chief of Kibingor sub-location of Marigat Location of Baringo South Sub-County of Baringo County, the area subject of this suit.
2. The 2nd and 3rd Respondents shall, within **seven (7) days** file in court a suitable undertaking not to inaugurate the 1st respondent or take any action that violates the order of the court for the preservation of the *status quo ante*.
3. The petition shall be fixed for hearing within the next **thirty (30) days** on the basis of its urgency to have an expedited determination of the validity of the appointment of the 1st respondent to the office of assistant chief, Kibingor sub-location.
4. The costs of this application shall be costs in the cause.

Order accordingly.

DATED AND DELIVERED THIS 31ST DAY OF JANUARY 2020.

EDWARD M. MURIITHI

JUDGE

Appearances:

M/S Kemboi S.L. & Co., Advocates for the Applicant.

Mr. Macheso Dan Weche, Litigation Counsel for the Respondents.