



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT CHUKA

CONSTITUTIONAL PETITION NO. 2 OF 2019

IN THE MATTER OF THE CONSTITUTION OF KENYA 2010 IN SO FAR

AS THE CONSTITUTION HAS BEEN AND STANDS TO BE VIOLATED

AND

IN THE MATTER OF AN APPLICATION UNDER ARTICLE 22(1) OF THE CONSTITUTION OF KENYA (2010)

AND

IN THE MATTER OF THE CONTRAVENTION OF RIGHTS AND FUNDAMENTAL

FREEDOMS ENshrined IN THE CONSTITUTION OF KENYA, 2010

AND IN THE MATTER OF FUNDAMENTAL RIGHTS AND FREEDOMS

AND

IN THE MATTER OF AN ALLEGED CONTRAVENTION OF FUNDAMENTAL

RIGHTS AND FREEDOMS UNDER ARTICLE (2, 3, 10, 23, 28, 35, 47, 48,

294, 235, AND 259) OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF ARTICLE 159 OF THE CONSTITUTION OF KENYA, 2010 AND

IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS

AND FUNDAMENTAL FREEDOMS (PRACTICE AND PROCEDURE RULES, 2013)

BETWEEN

NDUYO SUSAN NGUGI.....PETITIONER

VERSUS

THE SPEAKER, COUNTY ASSEMBLY OF THARAKA NITHI COUNTY....1ST RESPONDENT

THE CLERK, COUNTY ASSEMBLY OF THARAKA NITHI COUNTY.....2ND RESPONDENT

THE COUNTY ASSEMBLY OF THARAKA NITHI COUNTY.....3RD RESPONDENT

R U L I N G

BACKGROUND:

1. **NDUYO SUSAN NGUGI**, the Petitioner/Applicant herein filed a petition herein and a Notice of Motion dated 8th February, 2019 seeking to stop an impeachment motion brought against her as Deputy Speaker, by Hon. Muchiri Godfrey Murithi, member of County Assembly Tharaka Nithi County Assembly. The Petitioner/Applicant had sought to stop the said impeachment motion and sought conservatory order to have her be retained as Deputy Speaker pending the hearing of the said application inter partes. Upon presenting the motion under certificate of urgency before this court, this court directed the Respondents herein to be served and the hearing of said application was slated for 12th February, 2019. On 12th February, 2019 this honourable court issued a temporary order stopping the impeachment motion in the County Assembly. It transpired that the impeachment motion was slated for debate the same day at the floor of the County Assembly situated at Kathwana. According to the Process Server, the order issued by this court was served on the same day (12th February, 2019) at 11 a.m at the County Offices in Chuka Town to a Secretary who reportedly declined to sign the same in acknowledgment. The impeachment motion went ahead and the applicant was impeached by the County Assembly on 12th February 2019.

2. Application dated 13th February 2019.

The applicant has now moved this court vide the above Notice of Motion dated 13th February, 2019 seeking the following orders namely:

i. That the Respondents be imprisoned in civil jail for such period as this honourable court be deemed fit and just.

ii. That the applicant be reinstated as the Deputy Speaker Tharaka Nithi County as per court order dated 12th February, 2019 premised in the prayers in the Notice of Motion and Supporting Affidavit annexed to this petition.

iii. Any other order deemed just and expedient in the circumstances.

3. The application is based on the grounds listed on the face of the application namely:

a) That this court issued an order suspending the impeachment motion against the applicant by the Respondents on 12th February 2019.

b) That despite being duly served with the said order and notice of penal consequences on 12th February, 2019 at 11 am, the Respondents failed and/or refused to comply and persisted in such refusal and impeached the applicant at 12 noon the same day.

c) That blatant refusal to obey a valid court order is contempt of court.

4. In her Supporting Affidavit, the applicant states that she is the MCA Marimanti Ward and the Deputy Speaker Tharaka Nithi County.

5. The Applicant further depones that the orders stopping or suspending her impeachment were issued in the presence of Respondent's counsel on 12th February, 2019. She further states that the order was served personally on the Respondents as per the Affidavit of service but despite service, the Respondents went ahead and impeached her at noon same day.

6. The question of service of the court order was central to this application and it was on that basis that the Process Server, Jackson Muriithi Robert was summoned to testify on how he effected service of the said order on the Respondent. The said Process Server testified on oath that he received instruction from Waklaw & Co. Advocate on 12th February, 2019 at around 10.45 am to serve an order issued by this court on 12th February, 2019 to the all Respondents. He added that having served them previously with an application dated 8th February 2019 at their offices situated at Former County Council Offices at Chuka Town, he proceeded to the same office and met two Secretaries one of whom he had earlier served. He further stated that the Secretaries received the copy of the order but refused to sign the same stating that their boss had instructed them not to sign any document. He however conceded that he made no attempt to serve the Speaker as he believed that the 2nd Respondent receives documents on behalf of the Speaker.

7. In her written and oral submission done through her learned counsel Mr. Kirimi Advocate, the Applicant citing the Black's Law Dictionary contended that a person has notice of fact the person if that person - has actual knowledge of it, has received information about, or has reason to know about it. She has submitted that the Respondents were duly served with the summons and pleadings on 8th September, 2019 and with a copy of the order issued on 12th February 2019.

The Applicant submits that the orders issued on 12th February, 2019 were binding. She contends that the Respondents were served with the Petition and an application the same way and in the same place on 8th February, 2019 as a consequence of which they appointed an Advocate to act on their behalf. The Applicant contends that the Respondents had notice and knowledge of the order which had been served on their offices at Chuka which was the publicly acknowledged place of service as per provisions of **Order 5 of the Civil Procedure Rules.**

8. The Applicant has asserted that personal service is neither requisite or mandatory adding that acknowledgement of the order and notification is sufficient. She contends that service was effected upon the Secretary, who was an agent of the Respondent. She further asserts that the Respondents' counsels were present in court when the orders were issued and therefore they were privy to the order.

9. The applicant points out that the Respondents filed their appearance on 11th February 2019 and in her view that indicates that the Respondents were aware of the proceedings in court and should have been aware of the sub judice rule which is stipulated under 3rd Respondent's Standing Order 112 (an order that provides that a matter that is actively before court is sub judice). The Applicant has cited a

decision in *Shimmers Plaza Ltd -vs- NBK [2015] eKLR* where she alleges that the Court of Appeal held that where an Advocate was present in court on instructions of their client, they have a duty to report back to their client on the proceedings of the court as relates to their client's case.

10. The Applicant contends that the provisions of **Order 5 Rule 8 and 10** recognize service on agents as proper service adding that the Respondents being public officers are difficult to be accessed and served personally and such service through Secretaries should be considered sufficient service.

11. The Applicant has faulted the Respondents' contention that the place of service was not their place of business, contending that the same is intended to mislead and ill-informed. The Applicant contends that it is irrefutable fact that the administrative offices of the County Assembly of Tharaka Nithi is situated at Chuka including offices of the Speaker and the Clerk to the County Assembly.

12. The Applicant further contends that the Respondents conducted their affairs on 12th February, 2019 violating subjudice rule contrary to Standing Order **No. 23 (5)** of the County Assembly, which in her view was to oust the jurisdiction of this court which amounted to impunity.

13. The Applicant insists that she has made out a case showing that the Respondents were in contempt of court and are now hiding under technicalities to avoid sanction. She prays for her reinstatement stating that there will be no prejudice to the Respondents. She urges this court to be affirmative in determining this application stating that she is the only female Deputy Speaker in the country. She insists that the 2nd Respondent was sent a text message on his phone regarding the order but that he blatantly disobeyed.

14. The Respondents have opposed this application through the grounds of opposition dated 18th February, 2019 and Replying Affidavit by the 1st and 2nd Respondents sworn on the same day.

15. The first objection raised by the Respondent is that the application has been brought to court vide a miscellaneous cause and filed in the main cause.

16. It is also contended that the application has invoked a wrong provision of the law instead of the correct provision which in their view is **Section 4 (1)** of the **Contempt of Court Act No.46 of 2018** which repealed the cited provisions by the applicants.

17. The Respondents have also faulted the form of the affidavit of service by Jackson Muriithi Robert sworn on 12th February, 2019 stating that the same is improper for not complying with the **Order 5 Rule 15** of the **Civil Procedure Rules**.

18. In his Replying Affidavit, David J. Mbaya, the 1st Respondent herein, has deposed that he was working at Kathwana the headquarters of Tharaka Nithi County on 12th February, 2019 though he concedes that he has administrative office situate at Former Meru South County Council Offices within Chuka Town.

19. The 1st Respondent has deposed that he conducted the business of County Assembly at Kathwana on 12th February, 2019 from 10 am to about 11.44 am when the Assembly was reportedly adjourned.

20. The 1st Respondent has further deposed that the proceedings in this honourable court on 12th February, 2019 went on contemporaneously with the session of the Assembly which he states was dealing with the same matter. He has denied having prior knowledge of the order stopping the Assembly from proceeding with the impeachment motion asserting that an officer of this court he would not disobey an order knowingly. He maintains that he was not served and that the process server has not shown efforts he made to serve him personally.

21. On his part, Erick Nthumbi, the 2nd Respondent, also has denied service of the court order issued on 12th February, 2019.

22. He has conceded that his administrative office is situate at Former Meru South County Council Offices in Chuka Town but added that the legislative business of 3rd Respondent is conducted at Kathwana where he also operates from.

23. The 2nd Respondent has deposed that on 12th February, 2019 he was aware that that the impeachment motion against the Applicant went on and it was concluded at around 11.44 am after which the Assembly adjourned.

24. The 2nd Respondent has further deposed that he was also aware that there was a matter in this court on 12th February, 2019 which was attended to by his Advocate and that on the said date he did not operate from Chuka Offices.

25. He has further deposed that on 12th February 2019 at around 1 pm a person visited his office at Chuka and left a document to one Joy Kagwiria Nkunja who had no authority to receive court process on behalf of the Respondents and that one Sarah Wanja Njagi is his Secretary.

26. In their written submissions done through G.K. Kibiria & Co. Advocate the Respondents have reiterated that they were not served with any order suspending the impeachment motion against the applicant on 12th February, 2019. They have pointed out the evidence of process server was inconsistent as he stated in chief that he knew the Secretaries only to state that he did not know them in cross-examination. The Respondents have on this score attacked the credibility of the process server submitting that the evidence of service was unreliable.

27. The Respondents have further faulted the affidavit of service filed stating that it does not indicate who was served on behalf of the

Respondents and have submitted that service on all the three Respondents was mandatory citing the provisions of **Order 5 Rule 7 & Order 48 Rule 2** of the **Civil Procedure Rules**. They have also cited *Halisbury's Law of England (4th edition) Vol. 9 page 37 paragraph 61* that states that;

"Necessity of personal service as a general rule; no order of court requiring a person to do or abstain from doing any acts may be enforced unless a copy of the order has been served personally on the person required to do or abstain from doing the Act in question."

28. The Respondents have further submitted that contempt proceedings are quasi-criminal in nature and that being the case the threshold for personal service is higher than in ordinary civil proceedings.

29. The Respondents have submitted that besides the improper affidavit of service, they have pointed out that the court proceedings on 12th February 2019 ended at around 11.10 am and that it is in their view a fallacy for the process to claim that he served the order at 10.50 am even before it was issued.

30. Analysis and Determination:

This court has considered this application and the grounds upon which it has been made. I have also considered the response made by the Respondents. This application and the response has brought up two issues for determination:

i. Whether the Respondents were duly served with the order issued on 12th February 2019 and if so whether they should be punished for disobedience or proceeding in contempt of court.

ii. Whether the Applicant should be reinstated to her position.

31. The Respondent took up preliminary issues of law in regard to the form of the affidavit of service by the process server which I consider important to delve into before I go into the main issues.

32. It is true as submitted by the Respondent that **Order 5 Rule 15(1)** of the **Civil Procedure Rules** stipulates the form in which an affidavit should be drawn and looking at the affidavit sworn by Jackson Murithi Robert sworn on 12th February 2019, it is clear that the affidavit of service largely in substance complies with **Form 4 of appendix A of Civil Procedure Rules** as required by the rules. What is perhaps wanting is the clear descriptions of the persons served but that will be a subject of determination in the next issue. I must also add that even if I had found the affidavit in question defective for want of form, I would still admitted it pursuant to the provisions of **Order 19 Rule 7** of the **Civil Procedure Rules** because justice demands that substance rather the form be given priority.

33. (a) Whether the Respondents were duly served with the order issued on 12th February, 2019.

It is not contested that the offices of both the 1st and 2nd Respondents are situate at Former Meru South County Council offices here within Chuka Town. As a matter of fact this court takes Judicial Notice of that fact as Chuka Town is relatively a small Town and having been here for some time I know that for a fact. I also take Judicial Notice of the fact that the County Assembly Chambers of Tharaka Nithi like the County Government headquarters is situate at Kathwana which is a small dusty Town currently struggling to make do with limited provisions of essential services like water, housing, paved roads and other basic necessities. It is therefore understandable for the 1st and 2nd Respondent to have their offices situate in Chuka Town rather than Kathwana. Having said that the critical question before me is whether the order I issued on 12th February, 2019 temporarily suspending the debate to impeach the applicant as Deputy Speaker was duly served on the Respondents.

34. This court has looked at the Affidavit of service sworn on 12th February, 2019 and the evidence tendered by the Process Server known as Jackson Murithi Robert. It is clear that none of the Respondents were personally served with the order issued by this court on 12th February 2019. The said process server told this court on oath that he received instructions and an order from Waklaw & Co. Advocate at around 10.45 a.m. and effected service on the offices of 1st and 2nd Respondent at around 11 am. I have considered the response made by the Respondent that the court rose on that date at around 11 am and it would be fallacious to state that the order was served even before the court rose for break. While it may be correct that this court may have broken off for a break at 11 am as alleged, it is difficult to really recollect what time I exactly dealt with this matter on the said date and when the order was actually extracted and taken before the Deputy Registrar of this court for signature and the eventual sealing of the order at the Civil Registry. There is no doubt that those processes take time and the Applicant's counsel was really squizzed because he was running against time.

35. It is also difficult to tell the exact time the impeachment motion kicked off at the County Assembly given that the hansard from the County Assembly was not availed by the 1st Respondent. However his assertion that the session began at 10 am and ended shortly before noon has not been challenged by the applicant herein.

36. Given the obtaining circumstances above, it is difficult to know at this stage whether it is correct as suggested by the 1st Respondent that the proceedings were taking place contemporaneously in this court and also at the County Assembly.

37. I have looked at the earlier affidavit of service sworn by the same Process Server on 8th February 2019 where he affirms that he effected service on the Respondents through a Secretary named Christine Nyaga. The question posed is if that is the same Secretary the Process Server met on 12th February, 2019 at the 1st and 2nd Respondent's offices, what was difficult in stating so even if the two Secretaries found in the offices refused to identify themselves? The Process Server in my view was not very consistent in his evidence on whether or not the

persons he served were well known to him. Under such circumstances I agree with the Respondent's position that contempt proceedings being quasi-criminal in nature, the threshold for personal service is higher than in ordinary civil proceedings. As held in Nyanza Sugar Co. Ltd -vs- Patrick Okello Obillo [2013] eKLR, for a party to be condemned in contempt proceedings, it must be demonstrated satisfactorily that the party accused for contempt is indeed in contempt. It goes without saying that the burden rests on the person bringing the contempt proceedings. It was incumbent upon the applicant to demonstrate to this court that all Respondents were properly served with the order issued on 12th February 2019 and/or that they knew or were aware of the orders issued when they embarked on the acts of disobedience.

38. There is no dispute that the 3rd Respondent was not served and no attempt was ever made to serve them. They cannot therefore be accused for going on with the impeachment motion in disobedience of the court order when they probably had no knowledge of in the first place. As held in the case of Shimmers Plaza Ltd -vs- National Bank of Kenya Ltd [2015] eKLR service of court order with the penal consequences is a requisite in commencing contempt proceedings against a party.

39. The Applicant has submitted that the Respondents were aware of the order on account of being represented by counsel who was present in court when the order was made and should be punished on account of that with that. I would have no hesitation agreeing with that because in the case of Shimmers (supra) the Court of Appeal held as follows:-

" The notice of the order is satisfied if the person or his agent can be said to either have been present when the Judgment or order was made or given or was notified of its terms by telephone, email or otherwise. In our view "otherwise" would mean any other action that can be proved to have facilitated the person having come into knowledge of the terms of the Judgment and/or order. This would definitely include a situation where a person is represented in court by counsel. Once the applicant has proved notice, the Respondent bears the evidential burden in relation to willfulness and mala fides disobedience. This court in Wambora case affirmed the application of these requirements. "

40. Looking at the present scenario, it is apparent that the Respondents were in court on 12th February 2019 when the matter came up for hearing inter partes and when this honourable court was informed for the first time about the urgency of the matter. However the complication here is that the applicant appears to have raised the basis of urgency rather belatedly and as I have observed above, it is unclear as to whether by the time this court issued the temporary order the motion on the floor of the house had already kicked off perhaps in earnest knowing that the matter was also coming up that day in court. It is therefore a matter of conjecture whether the counsel for the Respondent had time and did inform his clients about what the court had ordered or directed. It is not fair in the circumstances to punish the Respondents for contempt based on conjectures or assumptions. It must be established satisfactorily that the Respondent's representative was present and must have informed or should have informed his/her client about the order before the principle in "Shimmers Plaza Ltd" is used to punish for contempt. I am not satisfied that given the circumstances obtaining in this case that the principle can apply here.

41. This court further notes that Kenyan courts have variously held that personal service of orders and penal notice is a requirement in contempt proceedings and reference is made in the Court of Appeal decisions in Nyamogo & Another -vs- Kenya Posts and Telecommunication Corporation (1994) KLR1 and Ochino & Another -vs- Okombo and 4 Others (1989) KLR 165.

42. It is also a common position as has been held in several Judicial decisions that if personal awareness of the court orders by the alleged contemnors is demonstrated, they will be found culpable of contempt even though they had not been personally served with the orders and penal notice. (In this regard see Kenya Tea Growers Association -vs- Francis Atwoli & Others [2012] eKLR, Husson -vs- Husson (1962) 3 All ER, and Davy International Ltd -vs- Tazzyman (1987) 1 WLR1256).

In this case, the applicant has not demonstrated the culpability of the Respondents in committing acts of contempt. As I have observed above the threshold in contempt proceeding is slightly higher than in ordinary civil proceedings. I have no hesitation in finding that the applicant has failed to reach that threshold. I am also not persuaded enough that the applicant had sufficient time to extract the order and serve all the Respondents herein given that she was really pressed against time. It is also my observation that given that perhaps the 3rd Respondent fully aware that the matter was slated for hearing that day in court, it is not hard to see that perhaps the business of the Assembly unusually started pretty early that day and concluded the business early perhaps to beat an eventuality that would have thwarted their obvious intentions. In my view although their actions may reek of mischief, it is not sufficient to punish them for contempt for the aforesaid reasons.

43. (ii) Whether the Applicant should be reinstated to her position.

The Applicant has made a passionate and interesting plea for me to make affirmative determination and reinstate her given the fact that she is the only female Deputy Speaker in the entire country well though this is an issue of fact which of course is subject to prove, certainly this is not a matter of law or a subject of the petition herein if it was, may be then I would have been called upon to make a finding whether an affirmative or any finding. But having said that this court notes that it had given directions that the question of contempt of court be determined first before the issue of reinstatement can be canvassed. I shall therefore reserve any finding on that question until I hear all the parties herein substantively. That issue is also indirectly the main issue in the petition itself pending for determination.

44. Before I conclude, there is an issue which was pointed out by the Respondents regarding the procedure adopted by the applicant in moving this court. It is true that the applicant erred procedurally by filing a Miscellaneous Cause within this main cause. There was absolutely no need for her to do that when the subject of the application was an order emanating from this petition involving the parties in this petition. The Applicant should have simply made her application within the petition but the omission in my view is not fatal and it is one of those procedural errors curable under **Article 159 (d)** of the Constitution. It is in that spirit that I entertained and determined this application.

In the conclusion this court for the reason aforesaid finds no merit in prayer 1 of the application dated 13th February, 2019. The same is disallowed. Cost shall be in the main petition. As I had directed earlier, prayer 2 of the application regarding reinstatement can now either be canvassed substantively. Alternatively, parties can agree and record a consent.

Dated, signed and delivered at Chuka this 28th day of May, 2019.

R.K. LIMO

JUDGE

28/5/2019

Ruling signed, dated and delivered in the open court in presence of Kirimi for Petitioner and Mutani holding brief for Kiriba for Respondent.

R.K. LIMO

JUDGE

28/5/2019