



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT KISII

MISC APPLICATION NO. 6 OF 2017

DR. J.A.S KUMENDA.....1ST APPLICANT

FLORENCE W GATUNE.....2ND APPLICANT

VERSUS

THE GOVERNOR (COUNTY GOVERNMENT OF KISII).....1ST RESPONDENT

THE EXECUTIVE COMMITTEE MEMBER (FINANCE).....2ND RESPONDENT

**THE EXECUTIVE COMMITTEE MEMBER (LAND, HOUSING,
PHYSICAL PLANNING & URBAN DEVELOPMENT).....3RD RESPONDENT**

**THE EXECUTIVE COMMITTEE MEMBER (ENERGY, WATER,
ENVIRONMENT AND NATURAL RESOURCES).....4TH RESPONDENT**

THE EXECUTIVE COMMITTEE MEMBER (HEALTH SERVICES).....5TH RESPONDENT

THE COUNTY GOVERNMENT OF KISII.....6TH RESPONDENT

R U L I N G

1. The applicants Dr. J.A.S Kumenda and Florence W Gatune through a Notice of Motion dated 11th May 2017 have sought orders for the 1st to 5th Respondents to be required to attend before the court for them to show cause, if any, why contempt of court proceedings should not be initiated against them under section 30 (1) & (2) of the contempt of Court Act No.46 of 2016 for the disobedience of a lawful court order dated 13th December 2016 issued on 17th January 2017.

2. Before the applicants application could be finally heard and disposed of, the High Court of Kenya sitting in Nairobi in the case of *Kenya Human Rights Commission –vs- Attorney General & Another (2018) eKLR* rendered a judgment declaring the specific provision under which the applicants application was founded and indeed the entire Contempt of Court Act of 2016 unconstitutional. This development prompted the respondents to give the notice of preliminary objection to the applicants application dated 9th May 2019 filed in court on 13th May 2019. The respondents set out the following grounds in support of the preliminary objection:-

1. The Contempt of Court Act, No.46 of 2016, was declared unconstitutional by the High Court of Kenya at Nairobi in the case of Kenya Human Rights Commission –vs- General & Another (2018) eKLR.

2. The said Notice of application dated 11th May 2017 and the prayers sought in the application are based on Section 30 (1) and (2) of the Contempt of Court Act, No.46 of 2016, which Act is unconstitutional.

3. The instance contempt of Court proceedings against the Respondents are anchored on the Contempt of Court Act, which Act is unconstitutional. Therefore, the Notice of Motion application dated 11th May 2017 is incompetent and void ab initio, and the subsequent proceedings, the notice to show cause thereto, and all consequential orders based on the said application are equally null and void ab initio.

4. The instant Application does not disclose a reasonable cause of action against the Respondents.

5. The application is therefore bad in law and an abuse of the Court process as against the Respondents and ought to be dismissed with costs.

3. As the preliminary objection taken by the Respondents essentially challenged the competency of the contempt proceedings initiated before the court, the jurisdiction of the court to entertain the applicants application was put to question. As is the norm whenever an issue of jurisdiction of the court is raised, the court determined that the issues of competency of the application and jurisdiction of the court be disposed as a priority and in that regard the court on 8th May 2019 directed the parties to canvass the preliminary objection by way of written submissions.

4. The Respondents filed their submissions in support of the preliminary objection on 21st May 2019 while the applicants submissions in reply thereto were filed on 13th June 2019.

5. The respondents submissions were simply that since the Contempt of Court Act No.46 of 2016 had been declared unconstitutional in the case of *Kenya Human Rights Commission –vs- AG & Another (2018) eKLR* the applicants application for contempt which was predicated on the provisions of the Act had lost the legs to stand on and was unsustainable. The Respondents submitted the court lacked the jurisdiction to hear any matter or proceedings based on a statute that had been declared unconstitutional. The respondents contended the instant proceedings were a nullity and placed reliance on the decision of the Supreme Court in the case of *Mary Wambui Munene –vs- Peter Gichuki King’ara & 2 others (2014) eKLR* and the Court of Appeal decision in the case of *Suleiman Said Shabhal –vs- Independent Electoral & Boundaries Commission & 3 others (2014) eKLR*.

6. In the case of *Mary Wambui Munene –vs- Peter Gichuki Kigara (Supra)* the Supreme Court stated at Paragraph 68 of the judgment as follows:-

“The issue, whether proceedings were a nullity abinitio is an issue that goes to the jurisdiction of this court to entertain the matter. The question of jurisdiction is a pure question of law. This court has on several occasions adopted the dictum of Nyarangi JA in the owners of Motor Vessel “lithian-S” –vs- Caltex Oil (Kenya) Ltd (1989) KLRI that it has to be determined from the start and that where the court finds it has no jurisdiction, it should down tools-- we will therefore consider this issue of nullity first, as it touches on the jurisdiction of this court”

7. In the case of *Suleiman Said Shabhal -vs- IEBC & 3 others*

(*Supra*) the court of appeal stated, as follows:-

“ We do not believe that it would be promoting the purpose of the Constitution, or advancing its principle and values or contributing to good governance to ignore Articles 2(4) and hold on the facts of this case, that a statute that is blatantly violative of the constitution can form the foundation of valid legal claims”.

8. The Respondents submitted that as the High Court decision that declared the Contempt of Court Act unconstitutional had not been appealed and it still stood, the instant proceedings which were based on the provisions of the annulled Act cannot be sustained. The Respondents, argued it would be in violation of the Constitutional dictates to proceed with the matter when the statute on which the applicants application is anchored upon, has been held to be unconstitutional.

9. The Applicants in response to the Respondents submissions on the preliminary objection went into considerable detail to outline the application of the law of contempt by our courts before the enactment of the Contempt of Court, Act No.46 of 2016. The applicable law on contempt prior to the enactment of the Contempt of Court Act No.46 of 2016 was as provided under Section 5 of the Judicature Act, Cap 8 of the Laws of Kenya which required that the prevailing and applicable law by the High Court of Justice in England be resorted to in contempt proceedings initiated before our courts.

Section 5 of the Judicature Act provides as follows:-

“5(1) The High Court and the Court of Appeal shall have the same power to punish for contempt of court as is for the time being possessed by the High Court of Justice in England, and that power shall extend to upholding the authority and dignity of subordinate courts.

(2) An order of the High Court made by way of punishment for contempt of court shall be appealable as if it were a conviction and sentence made in the exercise of the ordinary original criminal jurisdiction of the High court”

10. The cases of *Christine Wangari Gachege – vs- Elizabeth Wanjiru Evans & 11 others (2014) eKLR* and *Woburn Estate Limited –vs- Margaret Vashforth (2016) eKLR* both decisions of the Court of Appeal rendered before the contempt of Court Act No.46 of 2016 came into force clearly outlined that in applying section 5 of the Judicature Act in regard to contempt proceedings the applicable procedural law was the law applicable in the High Court of Justice in England in regard to contempt of court proceedings. The enactment of the Contempt of court Act No.46 of 2016 was intended to make provisions for the applicable law in regard to contempt of court proceedings in our jurisdiction. The Act now declared unconstitutional having made provisions in regard to the applicable procedure in commencing contempt of court proceedings and punishment for contempt repealed section 5 of the Judicature Act such that henceforth it was the provisions of Contempt of Court Act that was to be applicable to all contempt of court proceedings .

11. In the present matter the contempt proceedings were instituted after the Contempt of Court Act had come into force and therefore its provisions were invoked to anchor the application. The Act was declared unconstitutional before the contempt proceedings had been concluded and the issue raised in the preliminary objection taken by the Respondents is whether or not the proceedings have now not become null and void . It is the respondents position that the proceedings cannot be continued as they were premised on legal provisions that have since been declared unconstitutional.

12. The applicants however contend the declaration of the Contempt of Court Act No. 46 as unconstitutional cannot and does not render the instant contempt proceedings null and void. The Applicant’s counsel has in his submissions referred the court to the case of *Kiru Tea Factory Co. Ltd – vs- Stephen Maina Githiga & 13 others (2018) eKLR* where the court of Appeal faced with a situation similar to the situation in the present matter, where contempt proceedings had been initiated during the subsistence of the Contempt of Court Act, but the Act was invalidated before the matter had been finalized, the Court of Appeal held the court had to revert back to the existing law before the Act was enacted and the proceedings did not need to be started afresh. The court of Appeal under

paragraphs 16 and 17 of the judgment stated thus :-

16. In this matter it has been urged the contempt of court Act having been declared unconstitutional and section 5 of the Judicature Act having been deleted by the Contempt of Court Act, this court has no legal framework to punish for contempt in this matter.

17. We wish to dispose of this argument at this point. By section 38, section 5 of the Judicature Act was repealed by deleting it. Similarly Sections 39 and 40 of the Contempt of Court Act repealed by deleting sections 36 and 35 of the High Court (Organization and Administration) Act, respectively. It must be stressed that once an Act has been declared unconstitutional, it is void abinitio as if it had never been enacted. Consequently the Contempt of Court Act having been declared unconstitutional, it follows that anything done under or pursuant to it is a nullity and for that reason section 5 of the Judicature Act section 36 of the High Court (Organization and Administration) Act as well as section 35 of the Court of Appeal (Organization and Administration) Act were never deleted and remain in force as the legal framework for this court to punish for contempt (see Supreme Court decision in *Mary Wambui Munene – vs- Peter Gichuki King'ara & 2 others (2014) eKLR*.

13. The import of the above Court of Appeal decision was that following the declaration of the Contempt of Court Act No.46 as unconstitutional there was no lacuna created in regard to dealing with contempt of court proceedings as the position reverted to the period prior to the enactment of the Act. As stated by the Court of Appeal the position is that with the declaration of the Contempt of Court Act as unconstitutional, section 5 of the Judicature Act kicked in as if it was never repealed. This is because an Act that was void abinitio could not operate to repeal a substantive provision of an existing Act of Parliament. Thus section 5 of Judicature Act is deemed not to have repealed as its purported repeal was void abinitio.

14. In the circumstances of the present matter it is my view that notwithstanding the invalidation of the provisions of the Contempt of Court Act No. 46 of 2016, the contempt proceedings commenced by the applicants against the respondents were valid and the Court has jurisdiction to entertain the application. The court as it were, would be exercising jurisdiction under section 5 of the Judicature Act. There would be no requirement to commence the proceedings afresh as the issues for determination would be whether the respondents had appropriate notice of the application and notice of the acts and /or omission giving rise to the contempt complained about by the applicants. The court in making that determination is conscious also it has inherent jurisdiction to punish for contempt for violation and/or disobedience of its orders. The Court of Appeal in the case of *Woburn Estate Limited -vs- Margaret Bashforth (2016) eKLR* stated as follows in regard to the jurisdiction of the court in contempt of court 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 the High Court the power, like those of the High Court of Justice of England to punish any party who violates its orders, the court, by virtue 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. See *Refrigeration and Kitchen Utensils Ltd –vs- Gulabchand Popriatial Shah & Another Civil application No.39 of 1990*, where it was observed.

A party who knows of an order, whether null and void, 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 question---- he should apply to the court that it might be discharged. As long as it exists it must not be disobeyed”.

15. Halsbury's laws of England, 4th Edition Vol.37 paragraph 14 states as follows as regards the inherent powers of court:-

“The jurisdiction of the court which is comprised within the term “inherent” is that which

enables it to fulfill itself, properly and effectively, as a court of law. The overriding feature of the inherent jurisdiction of the court is that it is part of procedural law, both civil and criminal, and not part of substantive law, it is exercisable by summary process, without plenary trial, it may be invoked not only in relation to the parties in the pending proceedings, but in relation to anyone, whether a party or not, and in relation to matters not raised in litigation between the parties; it must be distinguished from the exercise of judicial discretion; it may be exercised even in circumstances governed by rules of court. The inherent jurisdiction of the court enables it to exercise control over process by regulating proceedings, by preventing abuse of the process and by compelling the observance of the process--In sum, it may be said that the inherent jurisdiction of the court is a virile and viable doctrine and has been defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them."

16. In my view the invalidation of the Contempt of Court Act No.46 of 2016 for being unconstitutional does not render the contempt proceedings commenced against the respondents herein null and void. The proceedings can be properly proceeded with as if they were initiated under section 5(1) of the Judicature Act Cap 8 Laws of Kenya. The Respondents should accordingly be called upon to show cause, if any, why they should not be held to be in contempt of court as per the Notice to show cause served upon them. The preliminary objection taken by the respondents has no merit and is ordered dismissed with costs to the Applicants.

Ruling dated and signed at Nakuru this 9th of October 2019.

J M MUTUNGI

JUDGE

Ruling delivered at Kisii this 23rd Day of October 2019.

J ONYANGO

JUDGE