



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CONSTITUTIONAL & HUMAN RIGHTS DIVISION**

**JR MISCELLANEOUS NO. 6 OF 2018**

**OPULU CHARLES T/A OPULU & CO. ADVOCATES.....APPLICANT**

**VERSUS**

**COUNTY GOVERNMENT OF MOMBASA.....1<sup>ST</sup> RESPONDENT**

**COUNTY SECRETARY, COUNTY GOVERNMENT OF**

**MOMBASA.....2<sup>ND</sup> RESPONDENT**

**CHIEF OFFICER FINANCE, COUNTY GOVERNMENT**

**OF MOMBASA.....3<sup>RD</sup> RESPONDENT**

**RULING**

**The Application**

1. By way of an application dated 12<sup>th</sup> April, 2018 brought under Section 5 of the Judicature Act, the Applicant seeks to have Mr. Joab Tumbo and Ms. Asha Abdi, the holders of the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents' offices respectively, held in contempt of the Court Orders issued on 21<sup>st</sup> February, 2018 and committed to jail for six (6) months or by imposing a fine or both.
2. The Applicant alleges that he filed an application on 1<sup>st</sup> February, 2018 seeking the prerogative order of mandamus against the 1<sup>st</sup> and 2<sup>nd</sup> Respondents and that on 21<sup>st</sup> February, 2018 the Court granted the prayer sought by the Applicant and ordered the 1<sup>st</sup> Respondent to pay the Applicant Kshs. 5,393, 465/= being the decretal sum together with interest at court rates (14% per annum) from 1<sup>st</sup> February, 2017 plus costs until payment in full in respect of costs arising and taxed in MSA HC MISCELLANEOUS APPLICATIONS NUMBERS 227, 235, 233, 234, 268 and 232 of 2015.
3. The Applicant contends that on 23<sup>rd</sup> February, 2018 the order issued on 21<sup>st</sup> February, 2018 was served upon the Mr. Joab Tumbo and MS. Asha Abdi but the said individuals did not act on the order. Further, the Applicant faults the Respondents for adopting evasive and diversionary tactics to avoid payment of the decretal sum by diverting the issue to the County assets and liabilities committee vide letter dated 26<sup>th</sup> February, 2018.
4. It is the Applicant's case that it is the duty of every citizen to comply with the law and the Respondents, through their office holder, having failed to do so should be punished.

**The Response**

5. The Respondents responded to the application by way of a Replying Affidavit sworn by MTALAKI MWASHIMBE on 4<sup>th</sup> June, 2018.
6. The Respondents state that they have not absconded their duty to satisfy court ordered decretal sums. They claim to be unable to pay the sum on the ground that the fees owed were incurred by the defunct Municipal Council of Mombasa. The Respondents contend that they are unable to authorize any payments arising from the defunct Municipal Council of Mombasa as all assets of the defunct Municipal Council are

transferred to the County Government vide provisions of the Intergovernmental Relations Act, 2012. It is the Respondent's contention that Intergovernmental Relations Technical Committee vide Gazette Notice No. 2701 published on 24<sup>th</sup> March, 2017 has established institutional structures to facilitate the verification and transfer of assets and liabilities that belonged to the defunct local authorities.

7. The Respondents aver that they have taken steps towards payment of the sums owed and claim that upon receipt of the letter dated 26<sup>th</sup> February, 2018 demanding payment, the deponent, who is the County Attorney, wrote to the Chairman of the County Assets & Liabilities Committee directing the Chairman to validate the claims.

8. It is the Respondents' case that the application herein is premature as there is a moratorium in place on all payments/claims of all defunct local authorities pending submission by the Intergovernmental Relations Technical Committee of its final report to the National Government.

#### **Applicant's Response to Respondents' Replying Affidavit**

9. The Applicant responded to the Respondents by way of An Affidavit of Reply sworn on 11<sup>th</sup> June, 2018. The Applicant claims that certificates of taxation, judgment, orders, decrees and judicial proceedings of this court cannot be subject to verification, validation and scrutiny by the Respondents.

10. In relation to the application of the provisions of the Intergovernmental Relations Act, the Applicant contends that the said provisions cannot oust the jurisdiction of this court as espoused by Article 165 (3) of the Constitution.

#### **The Hearing**

11. The application came up for hearing on 12<sup>th</sup> June, 2018. The Applicant submitted that no concrete reason had been given as to why the Respondents did not pay the sum owed. Further, the Applicant pointed out that the alleged contemnors were not present in court to give reasons as to why action should not be taken against them.

12. Mr. Obinju, Counsel for the Respondents, submitted that the alleged contemnors who the Applicant seeks to punish could not depone to the facts of this matter and requested the court to defer the decision herein and await the report of the Intergovernmental Relations Technical Committee.

#### **The Determination**

13. I have carefully considered the application and the submissions by Counsel. The only issue that arises for determination by this court is whether the office holders of the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents, JOAB TUMBO and ASHA ABDI should be held in contempt of court orders issued on 21<sup>st</sup> February, 2018.

14. The Applicant has submitted that an order of mandamus was issued by this court on 21<sup>st</sup> February, 2018 compelling the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to pay Kshs. 5, 393, 465/= being the decretal sum together with interest at court rates (14% per annum) from 1<sup>st</sup> February, 2017 plus costs until payment in full in respect of costs arising and taxed in MSA HC MISCELLANEOUS APPLICATIONS NUMBERS 227, 235, 233, 234, 268 and 232 of 2015. The Applicant contends that despite service of the order and the penal consequences on the Respondents, the respondents have not taken any step to satisfy the order. The applicant thus opines that Mr. Joab Tumbo and Ms. Asha Abdi deliberately and evasively failed to comply with the order issued by this Court.

15. The Black's Law Dictionary Free Online Legal Dictionary 2nd Ed defines the term contempt of court to mean "*willful disregard of the authority of a court of justice or legislative body or disobedience to its lawful orders. Contempt of court is committed by a person who does any act in willful contravention of its authority or dignity, or tending to impede or frustrate the administration of justice, or by one who, being under the court's authority as a party to a proceeding therein, willfully disobeys its lawful orders or fails to comply with an undertaking which he has given*".

16. The Applicant contends that the Respondents, in particular the aforementioned two office holders of the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents, deliberately disregarded the orders issued by this Court on 21<sup>st</sup> February, 2018. The Respondents on the other hand claim that the sum claimed by the Applicant was incurred by the defunct municipal council of Mombasa whose assets and liabilities are yet to be transferred to the 1<sup>st</sup> Respondent after verification and validation by the Intergovernmental Relations Technical Committee.

17. The question that this court will address is whether the Respondents' office holders deliberately failed to comply with the order that is the subject of these proceedings. The Contempt of Court Act was enacted in 2016. The title to the Act states that the statute is intended to define and limit the powers of courts in punishing for contempt of court and for connected purposes. However, the court would like to point out that the said statute was recently, on 9<sup>th</sup> November, 2018, invalidated for lack of public participation as required by Articles 10 and 118 (b) of the Constitution, and for encroaching on the independence of the Judiciary by Mwita J in **Constitutional Petition No. 87 of 2017, Kenya Human Rights Commission vs. AG.**

18. I have carefully read through the Respondents response to the application made vide Replying Affidavit filed in court on 4<sup>th</sup> June, 2018. The defence of the Respondents in the said affidavit as I understand it is that the Respondents are awaiting verification and validation of the assets and liabilities of the defunct Municipal Council of Mombasa so that the same can be transferred to the 1<sup>st</sup> Respondent and once the claim by the Applicant is verified the 1<sup>st</sup> Respondent will pay. In my view, the Respondents and indeed the office holders of the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents do not seem to have intentionally ignored the order issued by this court. In the case of **Katsuri Limited v Kapurchand Depar Shah [2016] eKLR** Mativo J while referring to the book *Contempt in Modern New Zealand* listed the elements for the case of civil

contempt. The learned Judge opined that the Applicant must prove:

- (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.

19. The Applicant has proved the first two elements above. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents participated in these proceedings. Therefore, they were well aware of the terms of the orders. Also, the Respondents were served with the order and penal consequences on 23<sup>rd</sup> February, 2018. The third element has also been proved as the Respondents have not honored the claim by the Applicant. However, the breach of the order as explained above could not be said to be deliberate, and hence, the fourth element has not been proved to the satisfaction of this Court. Being that the liberty of the two office holders was at stake as the Applicant sought as one of the punishment for contempt imprisonment of the two for a period of six months, the Applicant needed to prove beyond peradventure that the two individuals have deliberately failed to comply with the order the subject of these proceedings.

20. Be that as it may, the court notes that the Respondents have not taken any positive steps to satisfy the order issued by this court. The Respondents in their response had indicated that the 1<sup>st</sup> Respondent would submit its report to the Intergovernmental Relations Technical Committee by 13<sup>th</sup> July, 2018 to facilitate auditing of the assets and liabilities of the defunct local authority. The Respondents have not informed the court of the progress of the said audit; whether the said audit was completed so as to enable them validate the Applicant's claim. The Respondents' defence could therefore be a delay tactic meant to wittingly postpone payment of the Applicant's claim or entirely evade payment of the said claim. In the case of **Econet Wireless Kenya Ltd vs. Minister for Information & Communication of Kenya & Another [2005] 1KLR 828** Ibrahim J (as he then was) discussed the need to obey court orders as follows:

*"It is essential for the maintenance of the Rule of Law and order that the authority and the dignity of our Courts are upheld at all times. The Court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors. It is the plain and unqualified obligation of every person against or in respect of whom, an order is made by Court of competent jurisdiction, to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or void."*

21. Accordingly, this court finds that there is need for the Respondents to explain why they are yet to comply with the order issued by this court on 21<sup>st</sup> February, 2018 so as to enable the court wholesomely determine whether they should be cited for contempt.

22. Orders are therefore issued as follows:

- a) The Respondents to show cause within 14 days from the date hereof as to why they should not be cited for contempt.
- b) Costs shall be in the cause.

**Dated, Signed and Delivered in Mombasa this 28<sup>th</sup> day of November, 2018.**

**E. K. O. OGOLA**

**JUDGE**

In the presence of:

Mr. Opolu for Applicant

No Appearance for Respondents

Mr. S. Kaunda Court Assistant