



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MISCELLANEOUS APPLICATION NO. 414 OF 2013**

**REPUBLIC.....APPLICANT**

**VERSUS**

**THE SPEAKER OF COUNTY ASSEMBLY OF**

**NYANDARUA .....RESPONDENT**

**SAMUEL KIMANI GACHUHI.....INTERESTED PARTY**

**EX PARTE DAVID MWANGI NDIRANGU**

**RULING**

**Introduction**

1. On 21<sup>st</sup> October, 2014, I delivered a judgement in this matter in which I granted the following orders:
  1. An order of certiorari is hereby issued bringing to this Court the decision, ruling order and or proceedings made between the 8<sup>th</sup> day of August, 2013 to 10<sup>th</sup> day of September 2013 by the Respondent for the purposes of being quashed which decisions are hereby quashed.
  2. An order of mandamus is hereby issued compelling the speaker of the County Assembly of Nyandarua Honourable Ndegwa Wahome to swear in Mr. David Mwangi Ndirangu the Applicant herein to the County Assembly of Nyandarua and offer him all the benefits that flows to the office holder of a nominated member to the County Assembly of Nyandarua unless he is otherwise lawfully disqualified.
  3. The costs of this application are awarded to the applicant.
2. The Applicant, **David Mwangi Ndirangu**, is back before this Court by way of a Chamber Summons dated 23<sup>rd</sup> June, 2015, seeking the following orders:
  1. The application be certified as urgent and the service of the notice of the same be dispensed with at first instance, as an order for early mention date before the honourable Mr. Justice Odunga is made.
  2. The honourable court be pleased to issue directions to fully put to effect the order of Mandamus issued on 21<sup>st</sup> October 2014, directing the Respondent namely the Speaker of Nyandarua County Assembly Mr. Ndegwa Wahome to swear in David Mwangi Ndirangu as a nominated Member of County Assembly, and to offer him all the benefits that follows to the said office.

3. **The honourable court do give further directions that in addition to swearing in the aforesaid Ex parte Applicant the Speaker of the County Assembly of Nyandarua is directed to pay the Ex parte Applicants all the salaries and allowances that are payable (should have been paid) commensurate to his officer, from the effective date of Nomination, being part of the Order issued on 21<sup>st</sup> October 2014.**
4. **In the alternative there be a direction and/or settlement of the terms of the order that clarifies for avoidance of doubt the effective date and the quantum of the unpaid salaries and allowances that is payable by the speaker to the Ex parte applicant.**
5. **Further in the alternative and without prejudice, an order be issued attaching the bank accounts/funds and assets of Nyandarua County Assembly in satisfaction of the unpaid salaries and allowances to the ex parte applicant in the sum of Kenya Shillings four Million Eight Hundred and Seventy Nine Thousand Eight Hundred and Forty Nine (Kshs 4,879,849/-) or such other sum of money/benefits, as the honourable court may find fair and just.**

### **Applicant's Case**

3. According to the Applicant, following the delivery of the judgement herein, an order was extracted which on the 22<sup>nd</sup> day of October, 2014 was duly served on the Speaker, the Respondent herein.
4. However, upon being served, the Respondent only complied with a part thereof when the Applicant was sworn in as Member of the County Assembly (MCA) of the County Assembly of Nyandarua, on the 4<sup>th</sup> November, 2014. The Respondent, however, refused, ignored and or failed to comply with all the components of the said Order, to offer the Applicant the monetary benefits without any reason or reasonable explanation despite the Applicant having personally visited him at his office and that of the County treasurer and raised the issue.
5. The applicant averred that at one time in early April, 2015, the Speaker informed him that he was waiting for a clarification from the Salaries and Remuneration Commission, but when he made a follow up visit to their offices, they gave him a copy of a letter dated 2<sup>nd</sup> March, 2015, by which they had advised him to seek clarification on the commencement date of payment of the remuneration and benefits from Court, an advice that he did not take up. Despite correspondences and visits to the Respondent by the Applicant, seeking that the Respondent complies with the Court Order, as more concerned the 2<sup>nd</sup> limb of the Order, that directed him to offer the Applicant all the benefits that flow to the holder of the office of the nominated member to the County Assembly of Nyandarua, this has not been done.
6. To the Applicant, based on his inquiries with respect to payments and allowances made to a relatively and modestly remunerated Member of County Assembly (MCA) of his status and the monetary dues, he found that these are in the aggregate sum of Kenya Shillings Four Million Eight Hundred and Seventy Nine Thousand Eight Hundred and Forty Nine (Kshs. 4,879,849/=).
7. Despite availing his workings, no payments have been made. It was therefore the applicant's belief that the Respondents together with their Advocates owe a duty to the Administration of justice, to adhere with the principle overriding objective of the Administration of justice, as more succinctly now set out in the Law hence the instant application.

### **Respondent's Case**

8. In response to the application the Respondent contended that by virtue of being the Speaker of the Nyandarua Assembly, he is also the Chairman of the County Assembly Service Board (CASB) thereof pursuant to section 12 of the **County Government Act No. 17 of 2012**. The Respondent conceded that he was served with a court order in this matter on the 22<sup>nd</sup> October, 2014 which inter-alia provided and/or directed him to do the following:-

***“To swear in Mr. David Mwangi Ndirangu the Applicant to the County Assembly of Nyandarua and offer him all the benefits that flows to the office holder of a nominated member to the County Assembly of Nyandarua unless he is otherwise lawfully disqualified.”***

9. In his view, on receiving the said order, he strictly and wholesomely complied with the same by doing the following:-

- i. By swearing the ex parte applicant into office on the 4<sup>th</sup> November 2014 in an elaborate ceremony conducted at the Assembly Chambers
- ii. By exercising his discretion under the Standing Orders and allowing the ex parte applicant to sit in any committee of the Assembly that he desired.
- iii. By affording him opportunities including delegating for him as a representative of the speaker in forums.
- iv. By having him admitted into the Assembly's car and mortgage loan scheme.
- v. Generally affording him all the benefits that accrues to all members of the Assembly as per the law established

10. It was the Respondent's view that he had fully complied with the same and what the ex parte applicant requires of him has no merit and is not founded on any sound principles of good governance and prudent charge on public resources.

11. He contended that the ex parte applicant only became a member of the Nyandarua County Assembly on being sworn in as such on the 4<sup>th</sup> November, 2014 and he has since then been offered by his office and the County Assembly Service Board all the benefits that flows to the office he holds. To the applicant, before the ex parte applicant was sworn in as a member of the County Assembly pursuant to section 9(3) of the **County Government Act**, he was a stranger to the Assembly and could not therefore have accrued any benefits as he held no office in the Assembly and further never discharged any duties and/or functioned in anyway as a member as per the requirements of the office. He added that for the office of the member of the County Assembly to be functional, the member must take such oath as is provided for under the 1<sup>st</sup> Schedule to the said **County Government Act**. The Respondent asserted that all other members of the Nyandarua County Assembly started enjoying the benefits accruing to their offices on the dates they were sworn in which was as here below:-

- i. The twenty five (25) elected members of the Assembly effective the 22<sup>nd</sup> day of March 2013.
- ii. The other fifteen (15) specially nominated members of the Assembly effective the 8<sup>th</sup> day of August 2013.

12. To the Respondent, his mandate and that of the County Assembly Service Board under section 12(7) of **the County Government Act** is to only facilitate and take care of the welfare of those members of the Assembly who are such members by virtue of having been sworn in and effective the date of such swearing in. Further, even for the members who are sworn in, including the ex parte applicant any payment is made purely for work done and/on strict proof of attendance to the work venue and evidence of work done by way of reports generated thereof.

13. He added that payments particularly those charged on public funds cannot be made without precedence and without any basis in law as established as in the present case. He based his argument on Article 201(d) of the Constitution which provides that:

***Public money shall be used in a prudent and responsible way.***

14. In the Respondent's view, it cannot be prudent application of public money where the same is paid for work not done. To him, if the ex parte applicant felt aggrieved for not having been sworn in at the expected time he should have sued and proved damages suffered if at all in the circumstances and not claim damages for work not done which is contrary to generally accepted

protestant work ethics and values.

15. The Respondent therefore re-asserted that he had fully complied with the court orders as issued and that the ex parte applicants claim lacks in merit and is unfounded since in his view, the prayers sought by the applicant were merely adventurous.

### **Determinations**

16. I have considered the issues raised herein.
17. There is no doubt whatsoever that this Court has residual power in the fulfilment of its obligation to ensure that the orders it issues are not issued in vain. This was recognised by the Court of Appeal in **Nicholas Mahihu vs. Ndima Tea Factory Ltd & Another Civil Application No. Nai. 101 of 2009** where it was held that the Court has the duty to ensure that its orders are at all times effective.
18. In my judgement herein I expressed myself, *inter alia*, as follows:

**“In this case the applicant had acquired a legal right to be sworn in as a Member of the County Assembly for Nyandarua. It is clear that there is no specific legal remedy for enforcing that right. In these circumstances a mandamus would issue. Whether his nomination was proper or not is another matter altogether. However the Respondent had no powers to bar him from or decline to swear him as such. If there was a problem with his nomination the Respondent and the interested party ought to have resorted to legal means of declaring him unsuitable or unqualified to sit in the Assembly in the capacity in which he was nominated but had no powers to take upon themselves to declare the applicant unsuitable to serve as a nominated member in the Assembly. To urge this Court to find that the applicant was not qualified to sit in the said Assembly amounts to urging the Court to usurp the powers of the IEBC. That this Court cannot do so more so when there is no application or petition before this Court seeking such a remedy. I therefore have no hesitation in finding that the Respondent’s action was ultra vires.”**

19. In effect the Court found that the Respondent had no powers to take the action he purported to have taken. In **Central Bank of Kenya & Another vs. Ratalil Automobiles Limited & Others Civil Application No. Nai. 247 of 2006**, the Court of Appeal held that Judicial power in Kenya vests in the Courts and other tribunals established under the Constitution and that it is a fundamental tenet of the rule of law that court orders must be obeyed and it is not open to any person or persons to choose whether or not to comply with or to ignore such orders as directed to him or them by a Court of law. The consequences of failure to obey Court orders are that any action taken in breach of the court order is a nullity and of no effect. See **Commercial Bank of Africa Ltd. vs. Isaac Kamau Ndirangu Civil Appeal No. 157 of 1995 [1990-1994] EA 69.**
20. Where an act is a nullity it is trite that it is void and if an act is void, then it is in law a nullity as it is not only bad but incurably bad and there is no need for an order of the Court to set it aside, though sometimes it is convenient to have the Court declare it to be so. Where the Court finds this to be so the actions taken in pursuance of actions taken in breach of a Court order must therefore break-down once the superstructure upon which it is based is removed since you cannot put something on nothing and expect it to stay there as it will collapse. See **Macfoy vs. United Africa Co. Ltd [1961] 2 ALL ER 1169 at 1172 & Omega Enterprises (Kenya) Ltd. vs. KTDC & 2 Others Civil Appeal No. 59 of 1993.**
21. The decision of this Court in the said judgement was clear. Either the Respondent has not bothered to read the same or is with due respect simply being mischievous. By deliberately interpreting Court orders with a view to evading or avoiding their implementation can only be deemed to be contemptuous of the Court. Where a party is for some reason unable to properly understand the Court order one ought to come back to Court for interpretation or clarification. This was the advice that the Respondent was given by the Salaries and Remuneration Commission but due to reasons only known to the Respondent he decided to ignore the same. When the Court gave orders it was well aware that due to unlawful actions of the Respondent, the Applicant had not been sworn in. However the failure to swear in the applicant was a result of invocation of powers which the Respondent did not have. The Respondent cannot now be permitted to rely on

his own unlawful action to deprive the applicant of the benefits which the applicant was unconditionally entitled if the Respondent had properly applied his mind to the law and the Constitution. A party ought not be allowed to take advantage of an absurd situation created by himself as the Respondent is attempting to do in these proceedings.

22. The law being a living thing, a court would be shirking its responsibility were it to say, assuming that there be no existing recognised remedy covering the facts of a particular case, “Why then, this must be an end to it”. The law may be thought to have failed if it can offer no remedy for the deliberate acts of one person which injures another. See **Bollinger vs. Costa Brava Wine Co. Ltd [1960] 1 Ch. 262 at 238.**

23. As was held in **Chege Kimotho & Others vs. Vesters & Another [1988] KLR 48; VOL. 1 KAR 1192; [1986-1989] EA 57** citing **Midland Bank Trust Co. vs. Green [1982] 2 WLR 130:**

**“The law is a living thing: it adopts and develops to fulfil the needs of living people whom it both governs and serves. Like clothes it should be made to fit people. It must never be strangled by the dead hands of long discarded custom, belief, doctrine or principle.”**

24. The law must, of necessity, adapt itself; it cannot lay still. It must adapt to the changing social conditions. The court in the modern society in which we live cannot deny a deserving litigant a remedy. The courts have recognised that unlawful interference with a citizen’s rights give rise to a right to claim redress and if the ex parte applicant has a right he must of necessity have the means to vindicate it and a remedy if they are injured in the enjoyment or exercise of it: and indeed, it is a vain thing to imagine a right without a remedy; for want of right and want of remedy are reciprocal. See **Rookes vs. Barnard [1964] AC 1129** and **Ashby vs. White [1703] 2 Ld Raym.938; 92 ER 126.**

25. In **Republic vs. Returning Officer of Kamkunji Constituency & The Electoral Commission of Kenya HCMCA No. 13 of 2008** it was held that just as nature abhors a vacuum, even the enforcement of the rule of law abhors a vacuum or a gap in its enforcement and proceeded to uphold the jurisprudence that helps to “illuminate the dark spots and shadows in all circumstances, so that justice as a beacon of light and democratic ideals are practiced and hailed at all times over the hills, valleys, towns and homes in this beautiful land of Kenya. The mantle of justice and the rule of law must cover all corners of Kenya in all stations. Courts have a continuing obligation to be the foremost protectors of the rule of law”.

26. It is therefore upon the Court to fashion appropriate remedies to meet the situation.

27. As an officer of this Court of 18 years standing the Respondent ought to know only too well what he is required of under Article 10 of the Constitution. He is expected to adhere to the national values and principles of governance one of which is the respect for the rule of law. Respect of the rule of law requires that State Officers do obey the Constitution and the law as interpreted by the Courts and where one is aggrieved by a particular interpretation, the option is not to disobey the same but to appeal against it to a higher Court if there is one.

28. As was held in **Teacher’s Service Commission vs. Kenya National Union of Teachers & 2 Others Petition No. 23 of 2013:**

**“A party who walks through the justice door with a court order in his hands must be assured that the order will be obeyed by those to whom it is directed. A court order is not a mere suggestion or an opinion or a point of view. It is a directive that is issued after much thought and with circumspection. It must therefore be complied with and it is in the interest of every person that this remains the case. To see it any other way is to open the door to chaos and anarchy and this Court will not be the one to open that door. If one is dissatisfied with an order of the court, the avenues for challenging it are also set out in the law. Defiance is not an option.”**

29. It was therefore appreciated by Ojwang, J (as he then was) in **B vs. Attorney General [2004] 1 KLR 431** that:

**“The Court does not, and ought not to be seen to, make Orders in vain; otherwise the Court would be exposed to ridicule, and no agency of the Constitutional order would then be left in**

**place to serve as a guarantee for legality, and for the rights of all people.”**

30. As this Court held in Republic vs. Kenya School of Law & 2 Others exp Juliet Wanjiru Njoroge & 5 Others [2015] eKLR:

**“Court orders, it must be appreciated are serious matters that ought not to be evaded by legal ingenuity or innovations. By deliberately interpreting Court orders with a view to evading or avoiding their implementation can only be deemed to be contemptuous of the court.”**

31. Where it has been brought to the Court’s attention that its orders are being abrogated or abridged by brazen or subtle schemes and manoeuvres, this Court cannot turn a blind eye to the same. It must however be remembered that Court orders are not made in vain and are meant to be complied with. If for any reason a party has difficulty in complying with court orders the honourable thing to do is to come back to court and explain the difficulties faced by the need to comply with the order. Once a Court order is made in a suit the same is valid unless set aside on review or on appeal.
32. By deliberately interpreting Court orders with a view to evading or avoiding their implementation can only be deemed to be contemptuous of the Court.
33. Although the Respondent has contended that even for the members who are sworn in, including the ex parte applicant any payment is made purely for work done and/on strict proof of attendance to the work venue and evidence of work done by way of reports generated thereof, payment of monthly salaries is not conditional to the work done. Accordingly I find that the applicant is entitled to the salaries with effect from the 8<sup>th</sup> of August, 2013 when, but for the unlawful actions of the Respondent, he ought to have been paid. Similarly, the applicant is entitled to airtime which according to the Salaries and Remuneration Commission is calculated at the rate of Kshs 5,000/- per month from the same date.
34. With respect to the other allowances I agree that the same are only due and payable when actual work has been. I therefore agree that pursuant to the provisions of Article 201 of the Constitution, the applicant is not entitled to the same.
35. In conclusion, I wish to remind the Respondent that the principle of accountability mandates that State and public officers be prepared to face the consequences of their actions when such actions are manifestly taken with impunity and *mala fides*. It is only when such officers are personally made to take the responsibility for their actions that the rule of law shall be upheld. The Courts in my view have a duty and a responsibility to ensure that the public does not suffer at the expense of actions or inactions of officers deliberately designed to bring judicial process into disrepute and turn Courts of law into circuses. To blatantly and brazenly disregard legal processes or to turn them into a mockery in the execution of state authority is in my view an affront to the rule of law, an assault on the Constitution and constitutionalism and a recipe for chaos and anarchy. Courts of this country will not sit back and watch as the country slowly slides into lawlessness by way of scurrilous disparagement of its processes and decisions. In exercising its judicial authority, this Court is enjoined by Article 159(2)(e) of the Constitution to be guided by *inter alia* the need to protect and promote the purpose and principles of the Constitution and one such principle is good governance. Good governance in my view dictates that the public ought not to unduly shoulder the burdens of persons whose actions are themselves contrary to their expectations.
36. Therefore where a State Officer seems intent in persistently taking unlawful actions as the Respondent herein seems to be doing, such action not only amounts to violation of the principles under Article 10 but may also invite the Court’s wrath in directing the Respondent to take personal responsibility for any loss that may have been occasioned to the public by such deliberately unlawful action.
37. Accordingly I hereby direct the Respondent in conjunction with the Accounting Officer of the County Government of Nyandarua to proceed and calculate the applicant’s dues in accordance with this decision and ensure that payment therefor is effected within 45 days from the date of service of this decision.
38. The applicant will have the costs of this application.

**Dated at Nairobi this 22<sup>nd</sup> day of January, 2016**

**G V ODUNGA**

**JUDGE**

**Delivered in the presence of:**

**Mr Wilson for the Applicant**

**Miss Kiongi for the Respondent**

**Ms Wafula for the SRC**

**Cc Patricia**