



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

MISC. CIVIL APPLICATION NO. 388 OF 2009

IN THE MATTER OF AN APPLICATION BY JOSHUA KASINA FOR LEAVE TO APPLY FOR
JUDICIAL REVIEW ORDERS OF MANADAMUS

AND

IN THE MATTER OF THE LAW REFORM ACT

AND

IN THE MATTER OF THE ORDER LIII OF THE CIVIL PROCEDURE RULE AND ALL ENABLING
PROVISIONS OF LAW AND PROCEDURE

AND

IN THE MATTER OF THE HIGH COURT CIVIL CASE NO. 37 OF 2000(MACHAKOS) JOSHUA
KASINA VS. THE DISTRICT WORKS OFFICER MWINGI. SIMON KIERU, ATTORNEY
GENERAL AND MWINGI TOWN COUNCIL

AND

IN THE MATTER OF THE LOCAL GOVERNMENT ACT, CAP 265

IN THE MATTER OF THE JUDICATURE AVT AND SUPREME COURT PRACTICE RULES AND
IN THE MATTER OF AN APPLICATION TO COMMIT THE TOWN CLERK, MWINGI COUNTY
COUNCIL TO CIVIL JAIL

BETWEEN

REPUBLIC APPLICANT

VERSUS

THE TOWN CLERK MWINGI TOWN COUNCIL..... RESPONDENT

THE COUNTY GOVERNMENT OF KITUI..... INTERESTED PARTY

RULING

1. On 16th December 2008, the ex parte applicant obtained an order of Mandamus for the payment by Town Clerk of Mwingi Town Council of Ksh.1,460,765 being the decretal sum, plus interest at court rates in satisfaction of the judgment debt in High Court Civil Suit No. Machakos HCCC NO. 37 of 2000 (per Lesiit, J.).

2. Upon an application for committal to civil jail of the Town Clerk of Mwingi Town Council for failure to satisfy the judgment debt, the Court by **Order dated 3rd October, 2012, herein, (Waweru, J.) directed as follows:**

1. The Town Clerk Mwingi Town Council (whoever the individual might be) be arrested forthwith and be committed to civil jail for six (6) months unless he or she pays fully the decretal sum in Machakos H.C.C 37 of 2000.

2. The warrant of arrest shall be executed by the Officer Commanding Mwingi Police Station.

3. Upon arrest the Town Clerk shall be produced before the High Court at Machakos for further appropriate orders.

4. Costs of this application are awarded to the ex-parte applicant.

3. Following the establishment of Kitui County Government, the ex-parte applicant sought to execute the orders of the Court against the Secretary of the County Government whereupon the Interested Party filed **Notice of Motion** dated 16th December 2013 seeking orders as follows:

1. That this application be certified urgent and the same be heard exparte in the first instance.

2. That a temporary stay of execution be granted pending the hearing and determination of the application.

3. That the Orders directing that the Secretary County Government of Kitui be served with the Notice to Show Cause against him in this matter and all the consequential orders made thereafter be set aside.

4. That a declaration be made that the applicant has been dragged into these proceedings unlawfully, irregularly and in total disregard of the law.

5. That the costs of this application be provided for.

4. The application was expressed to be based on grounds as follows:

1. The applicant's employer The County Government of Kitui has not been joined as a party in the case.

2. The summons issued to the Secretary County Government of Kitui were irregular unlawful and blatant abuse of the court process.

3. The County Government of Kitui is not the successor of the defunct Town Council of Mwingi.

4. All the liabilities of the former Local authorities were transferred to the Transition Authority by virtue of Section 35 of The Transition to Devolved Government Act, 2012 and not to the County Government.

5. The Legal Position has been clarified through a Government Circular dated the 2nd August, 2013.

6. It will be in contravention of the Law to require the Secretary, County Government of Kitui to pay the Respondent's claim."

5. The ex parte applicant raised a Preliminary Objection dated 23.01.2014 in which he seeks that the application dated 16.12.2013 be struck out. He raised the Preliminary Objection on grounds of law that the interested party had no audience before the court until it purges the contempt and that the said application was therefore untenable, as follows:

"Notice of Preliminary Objection

1. That the interested party has no audience before this honourable court until it purges the contempt.

2. That the said application is therefore untenable."

6. The ex parte applicant further filed a replying affidavit dated 23.01.14 where he averred that:

a. The court had issued a Notice to show cause why execution should not issue against the County Secretary and the same was duly served on Fredrick Muli, the acting County Secretary.

b. The County Secretary ought to have appeared to court on the date indicated on the Notice to Show Cause in order to raise the issues that he was raising in the application.

c. The County Secretary ignores the invite and subsequently the court issued a warrant of arrest.

d. The court has severally been informed that the County Government of Kitui has always been willing to settle the amount tied in contempt by the then Town Clerk Mr. Anthony Naunga.

e. The handing over of assets and liabilities from the Town Council of Mwingi to the County Government of Kitui was to be to the incoming County Governor and not the Transitional Authority. They referred to annexure 'FMMI' which was produced in court.

f. The annexure marked 'FMM2' creates a continuing contempt yet Court Orders are there to be obeyed and respected by all.

g. The application herein was brought in bad faith and an abuse of court and should thus be dismissed.

Submissions

7. The ex-parte applicant filed submissions dated 11.11.14 arguing that the only known reasons which the court may accommodate in exercising its discretion in determining whether or not to give audience to the interested party before it purges the contempt in question was if it is satisfied that; the applicant intends to appeal against the order of the superior court finding it guilty of contempt on the grounds of both facts and law; and the interested party denies that it has, as a matter of fact, disobeyed the court orders. In addition it was urged that the interested party does not seem to suggest that it will be challenging the orders finding its predecessor in contempt and neither is the interested party in denial that it is in contempt of the Court Orders herein. It was further submitted that the interested party has had knowledge of the existing debt arising from the proceedings herein. Several decisions were relied on as follows:-

a. **Rodgers Muema Nzioka & 2 Others V Tiomin Kenya Ltd (2001) eKLR** where Hayanga J. put the principle governing contempt of court vis-à-vis the administration of justice in the following words:-

"The guiding principle is that the rules of contempt are not because judges should be protected, but so that justice should not be interfered with. In the case of Attorney

General –vs- Times Newspaper Ltd. [1991] 2 WLR 994 (H.L.), the House of Lords said:-

“Contempt of court is based not on any exaggerated notion of the dignity of individuals, be they judges, witnesses or others but on the duty of preventing any attempt to interfere with the administration of justice.”

b. Rose Detho V Ratilal Automobiles Ltd & 6 Others (2007) eKLR where J.A P.K Tunoi (as he then was) explored the question as whether a contemnor had the right to be heard and stated:

“This is indeed an everyday question in all our courts. While the general rule is that a court will not hear an application for his own benefit by a person in contempt unless and until he has first purged his contempt, there is an established exception to that general rule where the purpose of the application is to appeal against, or have set aside, on whatever ground or grounds, the very order disobedience of which has put the person concerned in contempt. See EXITO NAVEGACION S.A. V SOUTHLAND ENTERPRISES CO. LTD, THE MESSIANIK TOLMI [1981] 2 LLOYD’S REP. 595 at page 602. In his speech Brandon LJ said:-

“----- that there may be cases where an appeal by a party in contempt against the very order disobedience of which has put him in contempt, can be shown to be, for one reason or another, an abuse of the process of the Court. In such a case the exception to the general rule discussed above would not apply.”

It is worthy of note that the learned law Lord before reaching this conclusion discussed a number of authorities both in the nineteenth and twentieth centuries, including the case of **HADKINSON V. HADKINSON** [1952] 2 ALL ER 567 at page 567, at 569-570. This authority by Denning LJ contained a learned and scholarly historical account of the origins and development of the rule that a contemnor will not be heard until he has purged his contempt and it appears that the in depth analyses thereof led Denning LJ to formulate what he described as the “modern rule” which is in the following terms:

“I am of the opinion that the fact that a party to a cause has disobeyed an order of the court is not of itself a bar to his being heard, but if his disobedience is such that, so long as it continues, it impedes the course of justice in the cause, by making it more difficult for the court to ascertain the truth or to enforce the orders which it may make, then the court may in its discretion refuse to hear him until the impediment is removed or good reason is shown why it should not be removed.”

The Courts in this country, both this Court and the superior court, have adopted the more flexible treatment of the jurisdiction as one of discretion to be exercised in accordance with the principle stated by Denning LJ in Hadkinson’s case (supra). See **MAWANI V MAWANI** [1977] KLR 159 and **JOSEPH SCHILLING & 2 OTHERS V STARDUST INVESTMENTS LTD & ANOTHER** Nairobi Civil Appeal No. 134 of 1997 (unreported).”

c. Argos Furnishers Ltd V Municipal Council of Mombasa (2014) eKLR. Where Kasango, J. in dismissing a Notice of Motion application held that:

“Even if the Notice to Show Cause was issued without the amendment to substitute the names, in my view, that would not be a reason for the Secretary, County Government of Mombasa to fail to honour the Notice because the same was clearly addressed to him, with the full knowledge that the County Government of Mombasa is now mandated to satisfy the decree in place of the defunct Municipal Council of Mombasa. I will nevertheless grant the Plaintiff leave to amend the Notice to Show Cause to reflect the name of the Secretary, County Government of Mombasa in place of the defunct Municipal Council of Mombasa.”

d. Alken Connections Ltd V Safaricom Ltd & 2 Others (2013) eKLR where J. Odunga dismissed a Chamber Summons application stating that whereas a Court order is effective whether made *ex parte* or *inter partes*, the fact that it was made *ex parte* may properly be taken into account in the exercise of the discretion whether to hear a party alleged to be in contempt of court or not and that all the circumstances of the case must be taken into account before the Court can decide that such a party ought not to be heard.

8. The interested party filed submissions dated 29.11.14 in reply to the Preliminary Objection arguing, principally, that *ex parte* applicant had not complied with the law under which a party can be made party to a suit and, therefore, the orders made previously in this case are not binding on the interested party. In addition it was submitted that the interested party in this case was not the Town Council of Mwingi but the County Government of Kitui. The argument being that the former Town Clerk of Mwingi Town Council Anthony Naunga had been bonded to appear before court and pay the decretal amount and the court had directed that no further application would be entertained in this case on behalf of the respondent before the said Anthony Naunga or the Town Council of Mwingi had purged the contempt. It was further submitted that the acting County Secretary Martin Muli had been arrested before the correct procedure was followed. Finally it was stated that the orders issued against the Town Council of Mwingi only bound parties to the case.

Determination

9. There remains a question whether the Interested Party, the County Government of Kitui is the successor of the Mwingi Town Council, the defendant in the Civil Suit Machakos HCCC NO. 37 of 2000 and the respondent in the present Miscellaneous Application. This is a question that must be decided before the liability against the latter may be imposed on the latter with the attendant consequences.

10. As I understand it, the discretion whether to hear a contemnor arises after a determination that a party is in contempt, as was determined of the Town Clerk of Mwingi Town Council, in the order of the Court made on 28th September 2012. That is the meaning of the general rule “that a court will not hear an application for his own benefit *by a person in contempt* unless and until he has first purged his contempt”.

11. The principle requires *a person [to be] in contempt*. It is not the case here where the question of liability of the Interested Party and, therefore, its County Secretary remains to be determined. It must first be determined that the Interested Party is liable and therefore its County Secretary would be in contempt if he does not pay, before the question whether to hear him as a contemnor or not arises. If the liability to pay has not been established against the interested party, its County Secretary or itself cannot be held to be in contempt by failure to pay.

12. The Court takes the view that in accordance with the leading decision on Preliminary Objections, ***Mukisa Biscuits Co. v. West End Distributors Ltd***, (1969) EA 696, this is not a proper case for the taking of a Preliminary Objection, where apart from calling for the exercise of discretion, it calls for examination of facts and law in the determination of liability of the County Government of Kitui for the debts of the Town Council of Mwingi. Sir Newbold, P. with whom Duffus, V-P and Law JA. agreed in ***Mukisa*** lamented the improper raising of Preliminary Objections and stated as follows:

*“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. **It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.** The improper raising of points by way of Preliminary Objection does nothing but unnecessarily increase costs and, on occasion, confuse the issues. **This improper practice should stop.**” [Underlining mine]”*

13. I find that the Preliminary Objection herein dated 23rd January 2014 is not well founded and decline to uphold it.

Orders

14. Accordingly, for the reasons set out above, the Preliminary Objection taken by the ex parte applicant is declined and the court directs that the Notice of Motion dated 16th December 2013 proceeds to hearing on a date to be fixed by the Court. On the basis of its old age, the application of 16th December 2013 will be listed for hearing in consultation with the parties on priority basis. Costs in the cause.

DATED AND DELIVERED THIS 16TH DAY OF MARCH 2016.

EDWARD M. MURIITHI

JUDGE

In the presence of: -

No appearance for the Applicant

Mrs. Nyaata for the Respondent

Ms. Doreen - Court Assistant.