



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL, HUMAN RIGHTS AND JUDICIAL REVIEW DIVISION

JUDICIAL REVIEW NUMBER 144 OF 2014

BETWEEN

DR. MUSSOLINI KITHOME.....
.....APPLICANT

AND

THE ATTORNEY GENERAL.....
1ST RESPONDENT

**THE CABINET SECRETARY, MINISTRY OF AGRICULTURE, LIVESTOCK AND
FISHERIES.....2ND RESPONDENT**

RULING

Introduction

1. On 26th March, 2015, this Court made the following orders in this matter:
 1. I decline to grant an order of certiorari quashing the 2nd Respondent's decision contained in Kenya Gazette Notice No. 1363 establishing a Task Force in the implementation of Agricultural Fisheries and Food Authority.
 2. I grant an order removing into this Court for the purposes of being quashed the decision of the Principal Secretary State Department of Agriculture, Livestock and Fisheries dated 27th March, 2014 directing the *ex parte* applicant to step aside and cease operating any official business relating to the Agricultural Sector Coordinating Unit and to hand over the office inventory and documents to Internal Auditor Mr Francis Njau, which decision is hereby quashed.
 3. I further grant an order of prohibition prohibiting the 2nd respondent from unilaterally interfering with the work and operations of the Agricultural Sector Co-ordinating Unit or taking any disciplinary actions against the *ex parte* applicant or any of the officers of the Unit.
 4. I however decline to grant an order prohibiting the 2nd respondent from initiating or continuing any criminal complaint and/or prosecution against the applicant or any of the officers of the Unit since to grant the order as sought would have the effect of permanently barring the 2nd respondent from taking such action whatever the circumstances.
 5. I grant an order of mandamus compelling the 2nd respondent to open and allow the *ex parte*

applicant and its staff access to their officers situated at Kilimo House Building, Nairobi to remove the property of the Unit therefrom to their new offices.

6. **As the applicant has not succeeded in all his prayers each party will bear own costs.**
2. It is contended which contention is not disputed that subsequently vide a letter dated 17th March, 2016, the Permanent Secretary in the 2nd Respondent Ministry, **Dr Richard Lesiyampe**, gave directions to the ex parte applicant herein whose effect was to disregard the orders made herein.
3. It is however the Respondents' position that following the change of guard in the Ministry, the new office holders in the Ministry were unaware of the said orders.
4. Via a letter dated 8th April, 2016, the said Permanent Secretary withdrew the contents of the offensive letter. However, it was clear even from the submissions made on behalf of the Respondents that the Respondents are yet to fully comply with the Court orders. In other words even by the time this matter came before me this morning the Respondents had yet to purge the contemptuous acts as the properties which were seized in violation of the Court order had not yet been restored and access to offices was yet to be given to the applicants.
5. I have considered the submissions made on behalf of the parties herein. I have also taken into account the fact that the Permanent Secretary, through his learned counsel, **Mr Odhiambo**, has expressed remorse. However, his conduct of not purging the contempt before he appeared before me today does not augur well for the *bona fides* of the said apology. It is not simply enough to offer an apology to Court in such serious matters as contempt of Court. The contemnor must go further and purge the contempt preferably before the Court appearance. In other words, once a person comes to know that his action may be contemptuous, he must expeditiously take appropriate steps to put right the mistake.
6. In this case I wish to remind the public in general and the executive in particular of the views expressed by **Lenaola, J**, in **Kariuki & 2 Others vs. Minister for Gender, Sports, Culture & Social Services & 2 Others [2004] 1 KLR 588** which views I associate myself with that:

“The instant matter is a cause of anxiety because of the increasing trend by Government Ministers to behave as if they are in competition with the courts as to who has more “muscle” in certain matters where their decisions have been questioned, in court! Courts unlike politically minded minister are neither guided by political expediency, popularity gimmicks, chest-thumping nor competitive streaks. Courts are guided and are beholden to law and to law only! Where Ministers therefore by their actions step outside the boundaries of law, courts have the constitutional mandate to bring them back to track and that is all that the courts do. Judicial review orders would otherwise have no meaning in our laws...Court orders must be obeyed whether one agrees with them or not. If one does not agree with an order, then he ought to, move the court to discharge the same. To blatantly ignore it and expect that the court would turn its eye away, is to underestimate and belittle the purpose for which Courts are set up.”

7. I similarly agree with the decision in **Teacher’s Service Commission vs. Kenya National Union of Teachers & 2 Others Petition No. 23 of 2013** that:

“The reason why courts will punish for contempt of court is to safeguard the rule of law which is fundamental in the administration of justice. It has nothing to do with the integrity of the judiciary or the court or even the personal ego of the presiding judge. Neither is it about placating the applicant who moves the court by taking out contempt of court proceedings. It is about preserving and safeguarding the rule of law. 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 on 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.”

8. The matter cannot be better expressed than in the words of **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.”

9. In **Kenya Country Bus Owners Association & Ors vs. Cabinet Secretary for Transport & Infrastructure & Ors JR No. 2 of 2014** this Court sent a warning in the following terms:

“Where such dishonourable conduct is traced to a State Officer, the consequences are even greater. The Court would particularly be less sympathetic to persons who swear to protect and defend the Constitution and thereafter violate the same with impunity. Our Constitution is still in its infancy. To violate it at this stage in my view amounts to defiling the supreme law of the land and that cannot be countenanced by any Court of law...Court proceedings and orders ought to be taken seriously and that it is their constitutional obligation to ensure that they are regularly appraised of the state of such proceedings undertaken by or against them or on their behalf and orders given by the Court and the Court will not readily accept as excusable the fact that they have delegated those duties to their assistants. Where there are pending legal proceedings they ought to secure proper legal advice from the Government’s Chief legal advisers before taking any steps which may be construed as an affront to the Court process or which is calculated to demean the judicial process and bring it into disrepute.”

10. As was held by **Musinga, J** (as he then was) in **Robert Kisiara Dikir & 3 Others vs. The Officer Commanding Keiyan General Service Unit (GSU) Post & 3 Others Kisii HCCP No. 119 of 2009**, if we show disrespect to the supreme law of the land, casual observance or breach with impunity by the Government or its servants and fail to punish or penalise those who violate important provisions we, as the temple of justice, will be encouraging such violation.

11. In the ***Country Bus Owners Case*** (supra), this Court stated thus:

“I have considered the actions of the 1st respondent herein and I am of the view that this is a proper case in which the 1st Respondent ought to be called upon to show cause why the costs of this application ought not be placed squarely on his shoulders rather than the tax payers of this country who are already reeling under the weight of harsh economic times. 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 executive 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. Whereas public and State Officers have a duty to protect the public they have no right and authority to do so unlawfully. The protection of the public must be done in accordance with the law as laid down in the Constitution and the existing legislation....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....Therefore in order to maintain the dignity of this court as the temple of justice as well as in compliance with the rules of natural justice the

order that commends itself to me is that the 1st Respondent be and is hereby called upon to show cause why the costs of this application cannot be borne by him personally. This action is not intended to send shivers down the spines of State and public officers but to ensure that the national values and principles of governance as engraved in the Constitution are upheld and adhered to at all times.”

12. Going by the current trends in which Court orders are themselves treated with contempt by some members of the executive, it seems that the said sentiments have never been taken seriously in that arm of the Government.
13. In this case I appreciate the allegations that current office holders in the 2nd Respondent Ministry may not have been in the office at the time the judgement was handed down. It was however their duty and obligation to appraise themselves on all legal status of the matters affecting the Ministry before taking any steps. To make matters worse, even after they were summoned to Court and became aware of the legal position of this matter they did not take appropriate steps to purge the contempt.
14. In **Republic vs. The Kenya School of Law & Another Miscellaneous Application No.58 of 2014**, this Court stated:

“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. 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.”

15. Court orders are not set aside by commencing subsequent proceedings before other arms of the Government but can only be set aside by a judicial process.
16. I therefore find that the conduct of the Respondents cannot be beyond reproach.
17. I find that by writing the letter dated 17th March, 2016, **Dr Richard Lesiyampe**, the Permanent Secretary in the 2nd Respondent Ministry is in contempt of this Court. I further find that the Respondents have not fully complied with the orders of this Court. This Court is constitutionally mandated and obligated to ensure the rule of law is adhered to by all no matter their status and will not sit back and watch as the country slides back into a state of anarchy due to impunity of certain individuals or authorities at the expense of Kenyans. Court orders, I reiterate, are not meant for cosmetic purposes. They are serious decisions that are meant to be and ought to be complied with strictly.
18. The applicant has sought a fine of Kshs 20,000,000.00 or committal for six months in prison.

Order

19. In the premises the order which commend itself to me and which I hereby make is that the 2nd Respondent shall pay a fine of Kshs 500,000.00 within the next 7 days and in default, both the Permanent Secretary and the said 2nd Respondent Cabinet Secretary will be committed to serve 30 days in prison.
20. I further direct the Respondents to strictly comply with the orders of this Court within the next three days and in default, the Cabinet Secretary, will be personally liable to pay of Kshs 20,000.00 for each day the default continues after the lapse of the said three days till full compliance.
21. The costs of the application dated 30th March, 2016 are awarded to the applicant against the 2nd Respondent.
22. Liberty to apply granted to parties.
23. Those then shall be the orders of this Court.

Dated at Nairobi this 25th day of April, 2016

G V ODUNGA

JUDGE

Delivered in the presence of:

Miss Okonjo for the ex parte applicant

Mr Odhiambo for the Respondent

Cc Mutisya