



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

MISCELLANEOUS APPLICATION NO. 181 OF 2015

PATRICK NDUNG’U WAITHAKA.....1ST APPLICANT

JOHN GATHARA MAINGI.....2ND APPLICANT

DONALD WALKER ANDOLO.....3RD APPLICANT

VERSUS

NOL TURESH LOITOKITOK WATER AND SANITATION CO. LTD

(Successor in the title of NATIONAL WATER CONSERVATION

AND PIPELINE CONSERVATION).....1ST RESPONDENT

TANATHI WATER SERVICES BOARD.....2ND RESPONDENT

(Arising from Appeal No. 19(Ws) of 2014, in the Water Appeal Board- Nairobi)

BETWEEN

PATRICK NDUNG’U WAITHAKA.....1ST APPELLANT

JOHN GATHARA MAINGI.....2ND APPELLANT

DONALD WALKER ANDOLO3RD APPELLANT

AND

NOL TURESH LOITOKITOK WATER AND SANITATION CO. LTD

(Successor in the title of NATIONAL WATER CONSERVATION

AND PIPELINE CONSERVATION)1ST RESPONDENT

TANATHI WATER SERVICES BOARD.....2ND RESPONDENT

RULING OF THE COURT

Introduction

1. The Notice of Motion application before the court is dated **2nd September, 2015** filed pursuant to **Order 52 rule 3(1)** of the **Supreme Court of England Rules**, and the inherent powers and jurisdiction of this court. The applicants seeks the following orders;

- a. That this application be certified as urgent and service be dispensed with in the first instance owing to the urgency of the matter and the same be admitted to hearing during this Court's vacation.
- b. That an order of this court compelling the 1st respondent, to comply with the orders of the Water Appeal Board issued on 18th December, 2014 and re-issued or extended on 15th January, 2015 which were duly served upon the 1st and 2nd respondents respectively on 29th December, 2014.
- c. That an order of this court cite for contempt the officers of the 1st respondent (namely: **Jeremy T. Mutende** (*the manager*), for disobeying the court orders issued by the Water Appeal Board issued on 18th December, 2014 and re-issued or extended on 15th January, 2015 which were duly served upon the 1st respondents respectively on 29th December, 2014.
- d. That an order of this court directing that; the 1st respondent and the officers of the 1st respondent (namely; **Jeremy T. Mutende** (*the manager*) upon whom the court orders issued by the Water Appeal Board issued on 18th December, 2014 and re-issued or extended on 15th January, 2015 which were duly served upon the 1st and 2nd respondents respectively on 29th December, 2014, were directed upon and properly served with the same, (*"The Contemnors*) be cited for contempt of valid court orders and be committed to civil jail for a period of 6 months or such period as deemed just and sufficient by this court and such further orders be made as the court may deem necessary for contempt of court by disobeying this court orders, facts which are well within their knowledge.
- e. That the said Contemnors, be ordered to comply with the court orders issued by the Water Appeal Board issued on 18th December, 2014 and re-issued or extended on 15th January, 2015, particularly orders Number; 3, ***"That the 1st respondent Nol Turesh/Loitokitok Water and Sanitation Co. Ltd be and is hereby ordered to reconnect supply to the accounts held by the appellants ie. Nos. 060002191, 060040399, 06000642 and 06000175 for commercial and No.0600010316 domestic forthwith and permit the appellants carry on with the business of water vendors without any interference pending the hearing of the application inter-partes. As well the orders given on 15th January, 2015, being order No. 2 which directed as follows" "The respondents must without any further delay reconnect water supply to the applicants or face the dire consequences of having in contempt of court"***
- f. That the court do impose a mandatory penalty to be paid by the 1st respondent and the officers of the 1st respondent (namely; **Jeremy T. Mutende** (*the manager*).
- g. The officer commanding Sultan-Hamud police station and/or the relevant police station with the requisite territorial jurisdiction do execute the orders herein.
- h. Costs of this application be provided for.

The application

2. The application is premised on the grounds set out therein and is supported by affidavit of **Patrick Ndung'u Waithaka** sworn on **2nd September, 2015**. The applicant's case is that the 1st respondent and the officers of the 1st respondent (namely; **Jeremy T. Mutende** (*the manager*), have refused to re-connect water in favour of the applicants as was directed by the orders by the Water Appeal Board issued on 18th December, 2014 and re-issued or extended on 15th January, 2015 which were duly served upon the 1st

and 2nd respondents respectively on 29th December, 2014. (***Annexed to the application and marked exhibit "p1" are certified copies of the court orders attached together, with the affidavit of service***). The Contemnors should be cited for contempt of valid court orders and be committed to civil jail for a period of six (6) months or such period as deemed just and sufficient by this court and such further orders be made as the court may deem necessary for contempt of court by disobeying this court orders, facts which are well within their knowledge. The applicants resides in Sultan Hamud and were granted licenses by the predecessor in the Title of the 1st respondent in respect of water supply to several water kiosks being water account Nos. 060002191, 060040399, 06000642 and 060010175 for commercial use and water account number 060010316 for domestic use. The circumstance giving rise to the orders which were disobeyed by the 1st respondent are as that, the applicants had entered into an agreement with the predecessor in the title of the 1st respondent to engage in commercial usage of the water. Since the 1st respondent took over the company, it has reverted the rates of water usage from commercial usage to domestic which is in violation of the agreement which was signed with WASREB. On 18th December, 2014, the applicants filed at the Water Appeals Board the Notice of Motion application dated 17th December, 2014 and filed on 18th December, 2014, which was heard and orders issued directing the 1st respondent to re-connect water, which orders were re-issued or extended on 15th January, 2015 but have been disobeyed. The 1st respondent and the officers of the 1st respondent (namely; **Jeremy T. Mutende** (*the manager*), upon whom the court orders issued by the Water Appeal Board issued on 18th December, 2014 and re-issued or extended on 15th January, 2015 were served on behalf of the 1st and 2nd respondents respectively on 29th December, 2014, have in total and willful and/or blatant disobedience to the aforementioned court orders refused to re-connect the water to date, willfully and knowingly despite having been served with the court orders; the actions of the 1st respondent and the officers of the 1st respondent (namely **Jeremy T. Mutende** (*the manager*), has caused the applicant serious financial losses, serious prejudice and suffering and if allowed to continue would endanger the health, mental and economic status of the said applicants and will complicate the case further, making any orders issued by the court in favour of the applicants against the respondents impossible to execute, hence a nullity.

The Response

3. The application is opposed by the respondents vide a Replying Affidavit of **Jeremy T. Mutende** sworn on **22nd September, 2015**. The respondent's case is that he believes to be true that currently there are no subsisting court orders served upon the management of the respondents with a notice of penal consequences as required by the law to warrant any cause of action for contempt and thus the application is not only premature but calculated to intimidate the 1st respondent to allow illegal water connections by the applicants who have no license to sell water commercially as they are seeking to do. The respondent's case is that its trite law that no interim ex-parte orders are perpetual and unless such orders are expressly extended by the court and the extended order served upon the party with a notice of penal consequences to justify citing the party for contempt, there is no law breached by the respondent. The orders alleged were obtained irregularly and lapsed without formal extension by the court and this court lacks jurisdiction to entertain an application for contempt springing from non-existing orders. The respondent's case is that under the **Water Act (2002)**, only the 1st respondent herein can sell water commercially within the subject area which falls under the 1st respondent's jurisdiction or license as agent and the applicants who had initially applied for domestic water connection cannot illegally connect the water point use for commercial use, sale and distribution of water without approval and license from the 1st respondent and therefore it will be wrong and irregular to mislead this court ex-parte to seek to enforce orders obtained irregularly to perpetuate an illegality. Further, the respondents state that they are aware that on 26th February, 2015 the Water Appeals Board was not sitting and thus parties were to take a hearing date at the registry for the applicants' Notice of Motion application under a certificate of urgency dated 17th December, 2014 seeking orders for the 1st respondent to be compelled to reconnect the water system to their kiosks. The applicants' counsel was not in attendance and no orders were extended. The said application was set for hearing on 5th March, 2015, but the same could not proceed as the Board was not complete. The Board however extended the interim orders till 16th April, 2015 on which date no sitting took place. With this lapse, the order lapsed in law. The matter was afterwards fixed for mention

on 9th July, 13th July and 10th August, 2015 however the Board was not sitting and furthermore the tenure of the members of the Water Appeals Board had already expired and thus had no jurisdiction or any authority to act. Due to the foregoing and in the absence of any subsisting orders, it would be absurd and preposterous for the applicants to allege that the 1st respondent has been in contempt of court by failing to obey the said court order.

The Submissions

4. Parties filed submissions which I have considered. The issue I raise is whether there exists orders whose observance this court can enforce.

5. The applicants submitted that the Court orders by the Water Appeal Board issued on 18th December, 2014 and re-issued or extended on 15th January, 2015 directed the 1st respondent to re-connect water, which orders were re-issued or extended on 15th January, 2015 but have been disobeyed, despite the said orders being duly served upon the 1st and 2nd Respondents respectively on 29th December, 2014. The applicants draw the attention of the court to the directives/orders/observations made by the Water Appeal Board on 15th January, 2015 at page 13 of the contempt application, in which the Board stated **“court orders are not requests which the respondents can choose to disobey”** and goes on to state at paragraph 2 that the respondents must obey the order and re-connect the water forthwith. Despite this, the respondents have taken the court orders for granted and disobeyed the same to date.

6. The applicants submitted that personal services was effected upon the Respondents as stated in the affidavit of service, and that it is on the basis of service that the respondents came on record and started participating in the matter. However they choose to disobey the court orders at will. Court orders are not issued in vain, a party who is bound to obey court orders cannot disobey the same and then come before the court and try to justify why he has disobeyed the court orders. Such a person does not deserve any prayers he is craving for before the court. It was submitted that the conduct of the respondents is bad for the image and reputation of the court, and if that would be allowed, it would amount to a travesty of justice. The applicants relied on the case of ***The Director of Pensions vs Abdul Majid Cockar, Civil Application No. Nai. 290 of 1999 (108/99 UR), Court of Appeal at Nairobi, Hon. Justice P.K. Tunoi, J.A (1999) eKLR***, decision delivered on 27th October, 1999. In a case where the applicant had disobeyed court orders, the judge held that **“should I certify this application urgent so that the Director of Pensions, who has manifestly shown that she has no use for and will not obey court orders, should not go to jail? I do not think so. If I acceded to the application it would amount to a travesty of justice”** **“these actions clearly demonstrate that the applicant is a person who does not deserve the prayers of which she craves”**. The judge then declined to certify the application as urgent and dismissed the same with costs. The respondents, specially the 1st respondent has blatantly disobeyed and ignored the court orders and is nurturing seeds of impunity against the authority of the court. The applicant submitted that the 1st respondent deserves severe punishment of this court; the 2nd respondent was served by the present application as evidenced by the affidavit of service filed in court on 24th September, 2015 but they neither entered appearance nor filed any response/reply. Thus they did not oppose this application at all; the 1st respondent filed a replying affidavit sworn by Jeremy Mutende in which they tried to mislead the court that the orders had expired. It is the applicant’s submission that the orders had not expired as falsely stated by the 1st respondent. Moreover, even as of 15th January, 2015 the court had observed that the orders had not been complied with at all by the respondents; the 1st respondent filed an replying affidavit sworn by Jeremy Mutende in which they admitted that they disobeyed the court orders, but tried to justify the illegality by stating that they disobeyed the orders because there was no penal notice attached. That the orders were not extended. This is not true. In any event, no evidence has been advanced by the respondents to show that the orders were never extended. Further, issues of the expiry of the term of the Water Appeal Board members which expired long after the orders had been issued, served and disobeyed cannot be a ground for the 1st respondent to enjoy disobedience to the court orders; the applicants submitted that it is imperative that the orders of the court must be obeyed as a cardinal basis for endurance of judicial authority and dignity. To do otherwise would erode the dignity and authority of the courts. A flagrant disobedience of a court order, if allowed to go unchecked, will result in the onset of an

erosion of judicial authority. As such the untrue allegations of lack of Penal Notice does not give the 1st respondent a latitude to disobey the court orders. The Applicants relied on the case of; **Commercial Bank of Africa Limited –vs- Ndirangu, Court of Appeal at Nairobi, Civil Appeal No. 157 of 1991, KLR (1992), decision of the Hon. Justices; Kwach, Cockar & Muli, JJ.A.**, pages 30-31, judgment delivered on **26th June, 1992**. The judges held while dismissing the appeal that **“it is imperative that orders of the court must be obeyed as a cardinal basis for endurance of judicial authority and dignity. To do otherwise would erode the dignity and authority and authority of the courts. A flagrant disobedience of the court order, if allowed to go unchecked, will result in the onset of an erosion of judicial authority”**.

7. On their part the respondents’ case is that the said orders were not extended or re-issued on **30th January, 2015** as the applicant’s counsel was not present in court where upon the Water Appeals Board set down the matter for hearing on **26th February, 2015**. On that day, the Board did not sit and consequently no orders were issued.

8. To construe the issue before the court, the court must adopt a purposive mode of interpreting statute. The law of contempt is meant to protect the dignity of the courts and that of judicial system. It aims to punish, even so severely, parties who intentionally seek to bring the reputation of the court to disrepute. So the conduct of such a party, and the history of that conduct, must be interrogated so as to give the statute a purposive interpretation.

9. It is clear that on **18th December, 2014** orders were issued by the Water Appeal Board. Those orders were not obeyed by the respondents. The said orders were re-issued or extended on **15th January, 2015**, and were served upon the respondents. The respondents still refused to obey the said orders. This caused the Appeal Board to correctly state that;

“Court orders are not requests which the respondents can choose to disobey”

10. On **15th January, 2015**, the court did not extend the said orders but merely stated that

“The respondents must without any further delay reconnect water supply to the applicant or face the dere (sic) consequences of having (sic) contempt of court”

11. In my view, the fact that the said orders were not extended is irrelevant. The respondents had shown a history of refusing -even deliberately-to obey court orders, and they cannot wait for the same to lapse and plead that lapse as a defence. But again, even if the orders were not extended, the direction by the Appeal Board on **15th January, 2015 (above quoted)** was itself afresh order of the court which was to be obeyed by the respondents. That was the last order, and it was an order which did not require any extension. It only required obedience. The respondent’s defence is that these orders were illegal and so they could not observe the same. That is wrong. An order of court cannot be illegal even if it is founded on wrong principles of law. An order is an order. It has to be obeyed unless it has been set aside, reviewed or successfully appealed against. There is no evidence that the respondents tried to set aside, the said orders. They simply chose to ignore the same. That is what is called impunity. No court of law will allow a party to disobey the law with impunity, and contempt proceedings are meant to restore and assure the dignity of court. This court is satisfied that there existed lawful orders which were duly served upon the respondents, and which the respondent’s willfully chose to disobey. They must suffer the consequences thanks to these contempt proceedings.

12. Pursuant to the foregoing the application before the court is merited and is allowed in the following terms;

a. Orders are hereby issued in terms of prayers (b) (c), (e) and (g) of the application.

b. That the contemnors **Jeremy T. Mutende** and other officers of the 1st respondent who were served with the said orders which they disobeyed are hereby jailed for five (5) months in Civil Jail.

c. In alternative to Order (b) above the said contemnors shall pay a fine of Shs. 1,500,000=each.

DATED AND DELIVERED AT MACHAKOS THIS 24TH DAY OF NOVEMBER, 2016.

E. OGOLA

JUDGE

In the presence of:

Mr. Kiambi holding brief for Jaoko for applicant

No appearance for respondent

Court Assistant – Mr. Munyao