



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**HIGH COURT CIVIL 571 OF 2011**

**EVERLYNE ACHIENG.....PLAINTIFF**

**VERSUS**

**MOMBASA WATER SUPPLY & SANITATION CO. LTD.....DEFENDANT**

**RULING**

1. For determination is the plaintiffs application dated 22/6/2016 and praying for orders that on Peter Kimathi Mbuvi, the Managing Director of the Defendant be committed to jail for a period of not exceeding six(6) months for alleged wilfull and deliberate disobedience court orders of 20/12/2012 and consent orders of 8/5/2013.

2. To begin with I take the view that the interim orders of 20/12/2016 could not have been intended to run concurrently with the consent orders of 8/5/2013. I take it that the consent orders effectively replaced or subsumed the interim orders and therefore if there was to be any disobedience after the 8/5/2016 then it can only be in relation to the consent orders. I will therefore consider the application as being hinged on the consent order and not otherwise.

3. The grounds upon the application is made are that the consent order was entered into with the participation of the defendant and was thus deserving no service. The defendant being a parastatal or state corporation is a state organ which is bound to show the way in the rule of law in this case the obedience to the law and due process. It is indeed a creature of the law and cannot purport to Act outside the law.

4. Where one stands in the position of the Respondent as a near monopoly there are always designed safeguards to ensure fairness. For this matter, a policy exhibited to court by the respondent itself at clause 4.9 mandates that there be served a notice before water supply is disconnected. To this court that policy must be seen as an apparatus in for furtherance of right to be heard before condemnation. No attempt was made by the defendant respondent that indeed any notice was served as required by its own policy and at all. It then follows that over and above the consent order which bind on the parties as an order. The defendant was even prepared to circumvent its own regulating policy. That is an action not expected of a state organ under article 75(1) b & c of the Constitution.

5. It was an indiscretion and an unlawful in discretion at that. It need to be and must corrected by the management of the Respondent being told that the law is binding on all irrespective of status.

6. Judge G V ODUNGA in **Judicial Service Commission v Speaker of the National Assembly & another [2013] eKLR** had this to say on failure to obey court orders:-

“The people of Kenya in enacting the Constitution recognized in the preamble thereto that they aspired for a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law. Article 4(1) of the Constitution, declares the national values and principles of governance as the foundation upon which Kenya as a multi-party democratic state is grounded. In Article 10 of the Constitution, the people of the Republic of Kenya enacted that national values and principles of governance bind all State organs, State officers, public officers and all persons whenever any of them—(a) applies or interprets the Constitution; (b) enacts, applies or interprets any law; or (c) makes or implements public policy decisions. One of the values and principles of governance under that Article is the rule of law and under Article 255 of the Constitution the people of Kenya took these values and principles of governance so seriously that they provided that any amendment thereto must be subjected to a referendum. It is therefore clear that an attempt to ignore the same may amount to attempt to usurp the powers of the people which the people reserved unto themselves under the said Article 255. (emphasis provided)

In this case it is in effect contended that the orders of this Court issued on 6<sup>th</sup> November 2013 have been abrogated or abridged by brazen or subtle schemes and manoeuvres in the name of Article 251 of the Constitution.

In **Central Bank of Kenya & Another vs. Ratilal 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.** 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**”.

7. In its resistance to the application the Defendant has not denied disconnecting water but insisted that it was enforcing a policy that limited the number of water kiosks an individual is allowed to operate. To this court, that could as well be the position. The question however is whether that policy would supersede or allowed to run affront the law regarding right to be heard now enshrined in the constitution. I have no doubt that policy, as said before, fully appreciate the right to be heard before condemnation and that right was never accorded for the plaintiff but was instead infringed. Coupled with the fact that there was a court order in place which prohibited such action, such was done in defiance and disobedience thereof and in law it is a nullity and of no effect and anybody persisting on it can only be seen to perpetuate contempt. The flip side is that it stands out to be remedied by being undone by the person who effected it. That person has the option to remedy same voluntarily or be coerced by the dictates of the law.

8. For these reasons, I find the Respondent and its Chief Executive Officer, **Mr. Peter Kimathi Mbuvi**, to be in disobedience of the court orders of 8/5/2013. He shall attend court on 15/12/2016 and show cause why he should not be punished for that contempt.

**Dated and delivered this 21<sup>st</sup> day of November 2016.**

**HON. P.J.O. OTIENO**

**JUDGE**

**21/11/2016**

Before P.J.O. Otieno J

Court Asst. – Linda

Ms. Moka for Odongo for plaintiff/applicant

Mr. Mugambi for Munyao for defendant/applicant

Ruling delivered.

**Hon. Justice P.J.O. Otieno**

**21/11/2016**

**MR MUGAMBI**

I pray for copies of the proceedings and certified copy of the ruling. If leave is necessary, I pray for leave to appeal.

**MISS MOKA**

I oppose the application for leave to appeal because this matter is due for 15/12/2016 for the Defendant to show cause.

**COURT**

Let a formal application for leave be filed and served. Meanwhile the proceedings and ruling shall be typed upon payment of requisite court fees and supplied to the parties upon certification.

**Hon. Justice P.J.O. Otieno**

**21/11/2016**