



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 210 OF 2015

WASTE AND ENVIRONMENT MANAGEMENT

ASSOCIATION OF KENYA (WEMA).....APPLICANT

VERSUS

NAIROBI CITY COUNTY.....RESPONDENT

DIRECTIONS

1. By a Notice of Motion dated 20th May, 2015, the Petitioner herein sought inter alia an order that pending the hearing and determination of the application a Conservatory order be issued restraining the Respondent from preventing the Petitioner's members from providing waste collection and disposal services to its clients anywhere within Nairobi County.
2. When the matter came before me on the 21st May, 2015, after hearing learned counsel for the Petitioner, I granted the said prayer and directed that the Motion be heard *inter partes* on 3rd June, 2015.
3. According to the Petitioner's advocates, before the said order could be extracted, the file went missing. That the file has been misplaced has been confirmed by the Deputy Registrar of this Court.
4. What is a Court of law expected to do when the Court file for some unexplained reasons cannot be traced in the registry before an order made by the Court is extracted? It is unfortunate that in this era we still operate in circumstances under which a party may by simply engineering the misplacement of a Court file, thwart the course of justice. It was this state of affairs that made the judiciary to authorise parties to make copies of the handwritten proceedings. Whereas in this case the Court cannot state with certainty the circumstances under which the original Court file was misplaced, to leave the petitioner in limbo where the Court is certain in its mind that it granted an order in favour of the petitioner and the nature of the said order would be to abet an injustice occasioned by acts of persons who are intent in obstructing the course of justice. To fail to give a remedy to the petitioner would amount to unjustly conferring an undeserved benefit on a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice
5. The course of justice must not be deflected and interfered with and those who strike at it, strike at the very foundation of our society. As was appreciated by the Court of Appeal in **Kenya Commercial Bank Limited vs. Benjoh Amalgamated Limited & Another Civil Appeal No. 276 of 1997.**

“To review a consent order on the ground that the original court file went missing can only bring

the law into disrepute and provide a field day for unscrupulous litigants who wish to obstruct the course of justice. If by simply arranging for the Court file to disappear you can put back the clock and postpone the day of reckoning, the Courts will be forced to enlist the services of armed guards to secure the safety of its files.”

6. Where the Court finds that it would in effect be abetting such actions, it is my view that the Court is entitled to take appropriate measures to right the wrong in order to send a strong message to persons who believe that by simply engineering the disappearance of the Court file they would have their way. That message must be clear that such actions would not pay.
7. In The Matter of The Estate of George M’mboroki Meru HCSC No. 357 of 2004, Ouko, J (as he then was) expressed himself *inter alia* as follows:

“the court retains certain intrinsic authority in the absence of specific or alternative remedy, a residual source of power, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent abuse of its process, to do justice between the parties and to secure a fair trial between them.”

8. Similarly Kimaru, J in Rev. Madara Evans Okanga Dondo vs. Housing Finance Company of Kenya Nakuru HCCC No. 262 of 2005 held:

“The court will always invoke its inherent jurisdiction to prevent the abuse of the due process of the court. The jurisdiction of the court, which is comprised within the term “inherent”, is that which enables it to fulfil itself, properly and effectively, as a court of law. The overriding feature of the inherent jurisdiction of the court is that it is part of procedural law, both civil and criminal, and not part of the substantive law; it is exercisable by summary process, without plenary trial, it may be invoked not only in relation to the parties in pending proceedings, but in relation to anyone, whether a party or not, and in relation to matters not raised in litigation between the parties; it must be distinguished from the exercise of judicial discretion; it may be exercised even in circumstances governed by rules of the court. The inherent jurisdiction of the court enables the court to exercise control over process by regulating its proceedings, by preventing the abuse of the process and by compelling the observance of the process. In sum, it may be said that the inherent jurisdiction of the court is virile and viable doctrine and has been defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them.”

9. In Meshallum Wanguhu vs. Kamau Kania Civil Appeal No. 101 of 1984 1 KAR 780 [1987] KLR 51; [1986-1989] EA 593, Hancox, JA (as he then was) emphasised that it is a residual jurisdiction, which should only be used, in special circumstances in order to put right that which would otherwise be a clear injustice.
10. One of the instances in which the court exercises this residual power is 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.
11. In the premises I invoke this Court’s inherent jurisdiction and re-affirm the order I made in this petition on 21st May, 2015 to the effect that the respondent is restrained from preventing the Petitioner’s members from providing waste collection and disposal services to its clients anywhere within Nairobi County. The date for the *inter partes* hearing remains 3rd June, 2015. The said *inter partes* hearing to be before the Constitutional and Human Rights Division.
12. I further direct that this file be kept in a safe and secure custody.

Dated at Nairobi this 28th day of May, 2015

G V ODUNGA

JUDGE

Given in the presence of:

Mr Saende for the Petitioner

Cc Patricia