



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**JUDICIAL REVIEW NO. 251 OF 2012**

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW ORDERS OF  
CERTIORARI AND PROHIBITION**

**AND**

**IN THE MATTER OF THE LAW REFORM ACT CAP 26 LAWS OF KENYA**

**AND**

**IN THE MATTER OF THE COMPANIES ACT CAP 486 LAWS OF KENYA**

**BETWEEN**

**KENYA NATIONAL CHAMBER OF COMMERCE & INDUSTRY.....APPLICANT**

**VERSUS**

**1. THE REGISTRAR OF COMPANIES**

**2. KIPRONO KITTONY**

**3. LABAN ONDITI RAO.....ALLEGED CONTEMNORS/RESPONDENTS**

**EX PARTE**

**STEPHEN MBUGUA.....THE SUBJECT APPLYING**

**EDWARD KINGS ONYANCHA MAINA.....27<sup>TH</sup> INTERESTED PARTY /APPLICANT**

**RULING**

1. The Applicant /27<sup>th</sup> Interested party **EDWARD KINGS ONYANCHA MAINA** lodged an application dated 18<sup>th</sup> June, 2012 ex parte under certificate of urgency to which Hon. Justice Githua granted the following orders:-

*a. That leave be and is hereby granted to the Applicant to commence judicial review proceedings to apply for an order of prohibition directed against the Respondent, his officers or any other person acting under his authority prohibiting the registration of any Directors of the Applicant purported*

*to have been elected following the impugned Annual General Meeting held on 18<sup>th</sup> June, 2012 at the Railway Club, Nairobi.*

*b. That leave be and is hereby granted to the Applicant to commence judicial review proceedings to apply for an order of certiorari to quash the decision of the Respondent herein, his officers and/or any other person acting under his authority in registering any Directors of the Applicant purported to have been elected following the impugned Annual General Meeting held on 18<sup>th</sup> June, 2012 at the Railway Club, Nairobi.*

*c. That the substantive motion be filed and served within the next 15 days.*

*d. That leave granted do operate as stay of registration of any new Directors of the Applicant and/or the taking over of office by any such Directors purported to have been elected following the impugned Annual General Meeting held on 18<sup>th</sup> June, 2012 at the Railway Club, Nairobi until 9<sup>th</sup> July, 2012 when the case will be mentioned for directions.*

2. The applicant interested party then claimed that the above orders were breached by the alleged contemnors and has now filed a motion dated 29<sup>th</sup> May, 2014 seeking to have the alleged contemnors/Respondents punished for contempt of the said orders. The motion is premised on the grounds set out in the body of the application and the applicant's supporting and further affidavit sworn on 30<sup>th</sup> May, 2014 and 4<sup>th</sup> June, 2014 respectively. He lamented that despite the alleged Contemnors privity to this court's proceedings and the fact that the said orders have neither been varied, set aside nor appealed against, the Contemnor have defied the said orders. He particularly stated that the acts of contempt included; registration of Directors in the Applicant on 27<sup>th</sup> March, 2013 into File C. 4073 by the 1<sup>st</sup> Alleged Contemnor; the disclosures in the press release on 30<sup>th</sup> May, 2015 in the Star Newspaper and in the Standard Newspaper depicting Mr Kittony's intercession over Machakos County Branch Chairman and Machakos County Government wrangles; letter signed by Dr. Samuel Thiunguri Warwathe dated 25<sup>th</sup> May, 2014 on Limuru Sub-Branch leadership status; the election of Dr. Samuel Thiunguri Warwathe and James Ndungu Mureu as County Chairman and elected directors by elections held on 19<sup>th</sup> June, 2012 and 18<sup>th</sup> June, 2012. That the 2<sup>nd</sup> and 3<sup>rd</sup> alleged Contemnors are enforcing tyrannical management within the Applicant demonstrating they are law unto themselves and already have sacked former Chief Executive of the Chamber Ms. Lucy Wanja now replaced by their crony to escalate expropriation of chamber funds and to illegally alienate Chamber properties from Ufanisi House to rented premises without mandate under Articles of Association and the rule of law. It was further alleged that the alleged Contemnors are in the habit of defying court orders and taking the court in vicious cycle. For example. That they defied the orders of Mwera J. of 19<sup>th</sup> July, 2011 as he then was, in HCCC No. 253 of 2009 and bankrolled the 3<sup>rd</sup> alleged Contemnor to institute Nairobi HCCC No. 306 of 2011 to legalize sham elections and defeat orders of 19<sup>th</sup> July, 2011.

3. In response to the applicant/ interested party's above application, the 2<sup>nd</sup> and 3<sup>rd</sup> alleged Contemnors filed a preliminary objection dated 14<sup>th</sup> May, 2015 on grounds that this court lacks jurisdiction to deal with this matter since the matter as presented was adjudicated upon by a court of competent jurisdiction, that this matter was brought up by the Applicant before Korir J. and later before Ougo J. That the issues before this court were litigated before Korir J. in Judicial Review case No. 169 of 2013 and judgment was delivered on 21<sup>st</sup> February, 2014 wherein the application was dismissed. That the application does not disclose any issues capable of adjudication by this court. That it does not disclose the orders that were disobeyed and how they have been disobeyed by the Respondents. That there is currently Court of Appeal No. 129 of 2014 to which the Applicant is a party. That the said appeal came up on 11<sup>th</sup> May, 2015 when the Applicant attended court in person. That the said application raises similar issues and that it would be prejudicial for this application to be heard concurrently with the application in the appeal. That on 19<sup>th</sup> March, 2013 the interested party appeared before Ougo J. but ignored, neglected or was not interested in extending the interim orders and as such the orders lapsed automatically. That on 28<sup>th</sup> March, 2013 the interested party without serving a mention notice appeared before Korir J. seeking extension of orders

which had not been extended, which clearly demonstrates that there are no orders that were disobeyed by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents as there were no orders at all. Finally it was contended that the application is incompetent frivolous and vexatious as the same was overtaken by events.

4. In opposition to the preliminary objection the interested party filed grounds of opposition dated 22<sup>nd</sup> October, 2015 wherein he contended that the preliminary objections infringes and offends section 8(5) of the Law Reform Act; that they were filed in court after the court had called up the matter in breach of the three clear days period under Order 51 rule 14; the respondents seek to achieve extension of tenure of illegal officer for the applicant especially Kiprono Kittony in his alleged contempt to masquerade the legally elected National Chairman of the applicant, that the perpetration of tenure of office by Kiprono Kittony in the management of the affairs of the applicant is a pervasion of law justice and equity and the alleged contemnors are holding and treating the court as the theatre of the absurd.

5. It was submitted on behalf of the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents that this court has no jurisdiction to hear this application for contempt. That the doctrine of *functus officio* applies. That the order alleged to have been contravened by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents does not exist. That the matter had come up vide JR No. 169 of 2013 before Korir J who observed that there was no orders since the stay order had lapsed and were never extended. Reliance was placed on **Dhanji Jadra Ramji v. Commissioner of Prisons & others (2014) eKLR**. It was argued that the application was *res judicata* and the authority of **Benard Mugo Ndegwa v. James Nderitu Githae & 2 others (2010) eKLR** was cited in that respect. It was further argued that no order with a penal notice was served on the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents.

6. The 1<sup>st</sup> Respondent and ex parte applicant in the Judicial Review application associated themselves with the submissions of the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents. For the ex parte applicant in the Judicial Review it was added that the matter was finalised by Korir J and that there is an appeal against Ougo J's order refusing to extend stay orders which the interested party claims were disobeyed. It was stated that Onyancha J upheld the current leadership of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.

7. The Interested party/applicant submitted in opposing the preliminary objection on four points. First, that the preliminary objection, the notice of appointment dated 14<sup>th</sup> May, 2015 and the submissions filed on 26<sup>th</sup> June, 2015 do not disclose the author and that therefore it cannot be ascertained that the said documents were drawn by a competent advocate. Thereby the court is sitting on no pleadings. Secondly, that the jurisdiction of this court is given by section 5 of the Judicature Act and Article 165 of the Constitution which gives it unlimited jurisdiction. It was argued that the order was attached to the application and was never appealed against. Citing section 8 of the Law Reform Act, the interested party argued that there was leave for Judicial Review to commence and it has been appealed against. Thirdly, it was argued that the issue of *res judicata* is misplaced. That there is no contempt of court order granted in this matter. Finally, it was stated that the court should take judicial notice that any party can seek leave to come back to court and that *res judicata* does not apply until pleadings are correct. He argued that the adoption of submissions is against the rule of law.

8. In a rejoinder to the interested party's submissions Mr. Ngarua argued that the issue of appointment of their law firm was canvassed and decided by Onyancha J. On jurisdiction, he stated that the applicant sought registration of the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents. That the Interested party has not shown an order that was infringed by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents. He stated that *res judicata* applies because the orders he sought to enforce had lapsed and the court did not allude to that fact. That the Attorney General can align himself with facts and submissions made by other parties. That there is no constitutional basis for attacking the integrity of the Attorney General.

9. I have given consideration of the parties' dispositions herein. It is important to first determine whether or not the preliminary objection filed in opposition to the motion herein meets the threshold of what constitutes a preliminary objection. The threshold of a preliminary objection was discussed in the case of **Mukisa Biscuits Manufacturing Co. Ltd v. West End Distributors (1969) EA 696**. At page 700 as follows:

***“...a ‘preliminary objection’ consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”***

Sir Charles Newbold P. added as follows at page 701:

***“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.”*** (Emphasis mine)

10. Clearly, the preliminary objection does not meet the threshold set out in the above judicial decision since it calls for factual material to be placed before the court by way of evidence for example-allegations by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents raised in the preliminary objection that the appeal came up on 11<sup>th</sup> May, 2015 when the Applicant attended court in person; that on 19<sup>th</sup> March, 2013 the interested party appeared before Ougo J but ignored, neglected or was not interested in extending the interim orders, as such the orders lapsed automatically and that on 28<sup>th</sup> March, 2013 the interested party without serving a mention notice appeared before Korir J seeking extension of orders which had not been extended, which clearly demonstrates that there are no orders that were disobeyed by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents as there were no orders at all will require factual material to be put before court to prove or disapprove their truthfulness. In the circumstances, the preliminary objection ought not to be considered.

11. The order claimed to have been defied was issued on **18<sup>th</sup> June, 2012**. In the said order leave was granted to enable the applicant therein to file a judicial review application for orders of prohibition and certiorari against the Respondents stopping them from registration of directors which order was clear that the said leave was to operate as stay of registration of any new Directors of the Applicant and/or the taking over of office by any such Directors purported to have been elected following the impugned Annual General Meeting held on 18<sup>th</sup> June, 2012 at the Railway Club, Nairobi until 9<sup>th</sup> July, 2012 when the case would be mentioned for directions. It has not been contended that registration of Directors was done on 18<sup>th</sup> June, 2012 or 19<sup>th</sup> June, 2012. There is no factual evidence as to the exact date when the registration of officials was done and neither does the letter of the Registrar of Companies dated 27<sup>th</sup> March, 2013 specify the date when the registration was done, which is a matter of fact that would require an inquiry by this court, such that the arguments that the order was not extended hence the registration of officials is a matter of factual evidence not capable of being determined as a preliminary objection. It can however be determined by affidavit evidence during the hearing of the substantive motion to enable the court examine the entire record and determine whether as a matter of fact, the application has merit. In addition, although the plea for Resjudicata was raised, it is clear that indeed there has been no other application for contempt of court filed and or determined on merit by any court of competent jurisdiction. As such, to determine this application by the interested party applicant as Resjudicata would be ousting him prematurely from the judgment seat without according him an opportunity to be heard to ventilate his grievances.

12. In the end, I would decline the preliminary objections raised and dismiss them accordingly and order that the application by the applicant for contempt of court be set down for hearing on its merits. Parties to fix a suitable hearing date in the new term in the registry. Costs of the preliminary objection shall be in the cause.

Dated, signed and Delivered at Nairobi this 17<sup>th</sup> day of December, 2015.

**R.E.ABURILI**

**JUDGE**