



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KISII**  
**MISCELLANEOUS CIVIL APPLICATION NO. 44 OF 2014**

**BENSON OKERA MAGANA**

**ABDI HUSSEIN**

**NATHAN LUGAKA NUNU**

**DAVID AGESA**

**WYCLIFFE ASUGA**

**ABDI FATA HASSAN**

**ABSALOM M. AMBAKA ..... APPLICANTS**

**KHALIF ABDI HASSA**

**FATUMA MOHAMED HASSAN**

**EATRICE OVOLEZA MOKUZI**

**GEOFFREY OMAMBIA MOSETI**

**DENNIS OMWOYO ONCHIEKU**

**SOLOMON ONDEGO SILINGI**

**VERSUS**

**PITALIS NYATUNGA**

**MERCY SAU MWAKIO**

**JABES WILLIS OKOTH ..... RESPONDENTS**

**FRANCIS MICHAEL OKUMU**

**MARTIN OGOLLA DIMA**

**ROBI MABANGA (All sued as members of the Migori County Public Service Board)**

**RULING**

### The application

1. The application before court is the Notice of Motion dated 21<sup>st</sup> February 2014 brought pursuant to Section 5 of the Law Reform Act seeking, *inter alia*, for orders that the applicant be granted leave to cite the respondents for disobeying and disregarding the lawful orders made in **Constitution Petition No.34 of 2013– Benson Okera Magana and 12 others –vs- The Migori County Public Service Board and 2 others** on the 6<sup>th</sup> day of February 2014 restraining them as members of Migori County Public Service Board not to undertake or perform their statutory duties prescribed by the County Government Act more particularly employing or appointing persons to fill the vacancies in the offices under their jurisdiction without embracing the prescribed constitutional requirements. Further that costs of this application be provided for.
2. The application which is said to be brought pursuant to **Section 5** of the **Law of Reform Act** is premised on the grounds on the face of the application and supported by the affidavit sworn by Benson Okera Magana dated 21<sup>st</sup> February 2014. The deponent states that on the 6<sup>th</sup> February 2014 this Honourable Court issued an order in Kisii High Court Constitutional Petition No.34 of 2013. That the said order was served upon the Respondents and that on the 14<sup>th</sup> day of February 2014 his attention was drawn to pages 56 and 57 of the daily nation newspaper for that day in which a paid advertisement had been put up by the Migori County Public Service Board inviting applications from persons to fill the vacant positions in the offices of the town committee, chief of staff, economic advisor, political advisor, director governors press service, director legal services director of civic education and transport manager. The said advertisement has been annexed to the Supporting Affidavit and is marked as **BOM 3(a)** and **(b)**.
3. He further states that the advertisement put up in the newspaper was an open and express contempt and disobedience of the court orders issued on the 6<sup>th</sup> February 2014. That by putting up the advertisement calling for applications for employment, the respondents clearly intended to go ahead and employ persons, an act that the Honourable court had prohibited and restrained thus treating the court with disrespect, disdain and disrepute.
4. The application is opposed. There are 2 replying affidavits sworn by Peterlis Nyatuga the Chairman of Migori County Public Service Board in which all other respondents serve as members. The deponent says he has the authority to swear the affidavit on their behalf.
5. In the affidavit Peterlis Nyatuga states that the entire application is founded on pure misinterpretation of the order of this honourable court made on 6<sup>th</sup> February 2014 which did not bar the County Public Board Migori County from performing or undertaking its statutory duties as enshrined in the County Government Act rather this Honourable Court directed that the said board could only carry out such mandate while embracing the prescribed constitutional requirements.
6. He further states that since the issuance of the said order the board has not done any filling of vacant positions without adhering to the prescribed constitutional requirements. He confirms that the board advertised for the vacancies in the daily nation of 14<sup>th</sup> February 2014 so that public participation as required by the constitution could be complied with. He adds that upon receipt of the applications from interested members of the public for the various positions advertised, the board would then short list candidates for interviews and advertise names of the shortlisted candidates conduct interviews and then recruit as prescribed by the constitution. That it is premature at this stage to talk about non compliance with constitutional requirements.
7. He states further that he believes that this honourable court had no intentions at all to gag the board from carrying out its statutory mandate but rather the court required and reminded the board to uphold the rule of law and obedience to the constitution. That what this court must be shown before leave to commence contempt proceedings is granted is where and when the board carried out recruitment of personnel since 6<sup>th</sup> February 2014 without compliance with the constitutional requirements and who has been recruited. He adds that the paid up advertisement in the daily nation of 14<sup>th</sup> February 2014 is in compliance with and not defiance of prescribed constitutional requirements.

### The Oral Submissions

8. In their oral arguments before court on 7<sup>th</sup> March 2014, counsel for the applicants Mr. Minda

- submitted that they are seeking leave to commence contempt proceedings against the respondents for disobeying court orders issued by this court in petition No.34 of 2013 on 6<sup>th</sup> February 2014.
9. He submits further that the said court order exists and was served upon the Respondents who in disobedience thereto went ahead and put up a paid up advertisement in the daily nation of 14<sup>th</sup> February 2014 at pages 56-57 in which the Respondents were calling upon persons to be considered for employment to submit their applications.
  10. Mr. Minda also says that putting up the said advertisement is a step towards employing and recruiting and that the operative part of the order was that respondents be stopped from carrying out employment.
  11. Further Mr. Minda submits that court orders are not issued in vain and that if there was any uncertainty about the court order, the Respondents ought to have come to court to seek an interpretation of the order. He cites **Article 165** of the **Constitution** which gives this court the power to interpret a law or an order issued by a court.
  12. He submits therefore that upon service of the said court order, and if they were uncertain of or dissatisfied with same, respondents ought to have filed an application to court asking court to interpret the order instead of making their own interpretation. Counsel submits that parties have no powers to interpret court orders to suit their whims. Counsel's position is that what the respondents have done in posting the paid up advertisement in the Daily Nation of 14<sup>th</sup> February 2014 is wrong and they ought to have awaited the hearing and determination of the petition.
  13. Mr. Modi for the 1<sup>st</sup> to 6<sup>th</sup> Respondents in opposing the application submitted that he relied on the contents of the replying affidavits by Peterlis Nyatuga sworn on the 5<sup>th</sup> of March 2014 and the grounds of opposition already filed. I wish to state at the onset that there are no grounds of opposition filed and/or in the court records.
  14. Be that as it may, Mr. Modi submitted that the application is misconceived and is premature, on grounds that the order in question in his understanding meant that respondents were restrained from employing without embracing the constitutional requirements.
  15. He argues further that as the order stands, respondents were at liberty to conduct employment but subject to constitutional requirement such as ethnic diversity, and that the board could only perform its functions in compliance with the constitution and law.
  16. Mr. Modi confirms that the advertisement was made on the 14<sup>th</sup> February 2014 calling upon residents of Migori County to submit their applications; fill posts set out in the advertisement; that the said advert did not bar or limit members of the various communities of Migori County from applying for the advertised posts and that it does not mention ethnic qualifications or ethnic bias. He submits that further steps were to be taken thereafter as stipulated in the replying affidavit sworn by Peterlis Nyatuga on 5<sup>th</sup> March 2014 in recruiting employees for the advertised posts, for example by advertising, short listing and interviewing candidates which would then be followed by recruitment and so disobedience of the court order could only be manifested if the board at the time of re-advertisement of shortlisted candidates or actual recruitment was found to be in contravention of the Constitution and the Law.
  17. He adds that applicants' counsel has reconstructed the order in question, because the order as issued was conservatory in nature to ensure equity in employment as entrenched in the constitution and that the same did not paralyze the functions of the Migori County Government. Finally, Mr. Modi submits that contempt of court proceedings call for higher level of proof as opposed to ordinary proof of balance of probability in civil cases. In this regard, Mr. Modi placed reliance on **Nairobi HCCC No.242 of 2013 – International Limited –vs- Joseph Mathenge Mugo (Access Business Management) & another** and **Industrial Court of Kenya at Nairobi Petition Number 23 of 2013 – The Teachers Service Commission –vs- The Kenya National Union of Teachers &**

**2 others.**

18. Mr. Kisera who appeared together with Mr. Modi for the respondents associated himself with the submissions of Mr. Modi. He submitted that the instant application arose from misinterpretation of the orders of 6<sup>th</sup> February 2014. He submits that the court did not disband the board nor did it order the board dysfunctional; that the court only required the board to do nothing without

embracing the constitutional requirements and that since the respondents are doing what they should do within the law they cannot be said to be in contempt of the said court order.

19. On the issue of the advertisement, Mr. Kiseru submitted that the same was a constitutional requirement for public participation as ordered by court. He also submits that before the leave sought is granted the applicant must show a *prima facie* case; that there is no such case because the newspaper advertisement is not published in disobedience of but in compliance with both the constitution and the order. He urges the court to warn the parties, since, in his view this court's order of 6<sup>th</sup> February 2014 did not aim at paralyzing the operations of the Respondents.

### Background

20. Before I move on to consider the merits of the instant application, a brief history of the facts is necessary. By the petition dated 23<sup>rd</sup> December 2013 and filed in court on 24<sup>th</sup> December 2013, the applicants herein complained that the composition of the 1<sup>st</sup> Respondent did not meet the constitutional thresholds for its composition as it was not reflective of the national values and principles of governance stipulated in **Articles 10, 174 and 232** of the **Constitution of Kenya**. The applicants also complained that the 1<sup>st</sup> Respondent's 7 members were all from the Luo and Kuria ethnic extractions and that such composition had resulted in unconstitutional constitution of the said offices and appointment of officers to fill those offices as the appointments were said not to be representative of the diverse communities living within Migori County. Wherefore the applicants prayed for judgment/orders against the Respondents jointly and severally for:-

- a. *A declaration that the appointment of the members of the Migori County Assembly Service Board and the County Public Service Board did not follow open and competitive process and that its composition or constitution does not meet the constitutional threshold.*
- b. *An order prohibiting the Migori County Assembly Service Board and County Service Board from further undertaking their duties and responsibilities under the County Governments Act unconstitutionally or as comprised.*
- c. *Costs of the petition.*

21. Contemporaneously with the petition, the applicants filed a Notice of Motion of even date seeking the following orders:-

1. ***THAT*** *this Application be certified urgent and be heard on priority basis.*
2. ***THAT*** *pending the hearing of this Application Inter Parties a conservatory order of temporary injunction do issue restraining or prohibiting the 1<sup>st</sup> and 2<sup>nd</sup> Respondents from undertaking or performing their statutory duties prescribed by the County Government Act more particularly employing or appointing persons to fill the vacancies in the offices under their jurisdiction without embracing the prescribed constitutional requirements.*
3. ***THAT*** *pending the hearing of this Petition a conservatory order of temporary injunction do issue restraining or prohibiting the 1<sup>st</sup> and 2<sup>nd</sup> Respondents from undertaking or performing their statutory duties prescribed by the County Government Act more particularly employing or appointing persons to fill the vacancies in the offices under their jurisdiction without embracing the prescribed Constitutional requirements.*
4. ***THAT*** *the costs of this Application be borne by the Respondents.*

22. After hearing the application interparties, this court granted prayer 3 thereof namely **“that pending the hearing of this petition a conservatory order of temporary injunction do issue restraining or prohibiting the 1<sup>st</sup> and 2<sup>nd</sup> Respondents from undertaking or performing their statutory duties prescribed by the County Government Act more particularly employing or appointing persons to fill the vacancies in the offices under their jurisdiction without embracing the prescribed constitutional requirements.”** [Emphasis is mine].

### Finding and Conclusions

23. I have now carefully considered the rival arguments in this matter and appreciate the fact that no court makes any orders in vain. Court orders are issued for the proper administration of justice in accordance with the rule of law, and courts will not hesitate to punish for contempt where it is clear that a party upon whom a court order has been served is in breach of that order. In the **International Limited case** (above) Mabeya J quoted a passage from the **Teachers' Service Commission case** (above) in which Ndolo J made the following general statement on why courts punish for contempt:-

**“The reason why courts will punish for contempt of court then 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 proceedings. It is about preserving and safeguarding the rule of law.”**

24. The above observation, with which I agree, gives the correct basis for punishing those who breach court orders. Where orders are disobeyed at whim with no attendant punishment, anarchy must surely rear its ugly head. Where there is anarchy, the rule of law dies a painful death at the peril of the law-abiding citizens of the land.

25. In the instant application, the applicants are praying for leave to cite the respondents for disobedience of the order issued by this honourable court on 6<sup>th</sup> February 2014. The argument underlying this application is that the respondents are in breach of the said order by putting out an advertisement when the court told them, by the order issued on 6<sup>th</sup> February 2014 that there should be no recruitment of staff.

26. While there is no argument that the order issued on 6<sup>th</sup> February 2014 subsists; that the said order was duly served upon the respondents, there is divergence of opinion as to whether the order barred the respondents from carrying out any recruitment whatsoever before the petition was heard, or whether the order required the respondents to recruit but ensure that they embrace the prescribed constitutional requirements. It follows therefore that this court must determine whether the advertisement of 14<sup>th</sup> February 2014 amounts to recruitment without following the laid down constitutional requirements or whether this is only a step towards complying with the provisions of the constitution, which means that the stage at which non-compliance of the said court order is yet to come, thus making the instant application premature in the circumstances.

27. Taking the contents and the prayers of the petition, together with the application accompanying the petition, I am of the considered view that the instant application is premature. Throughout the pleadings, there is no place where the applicants sought or obtained an order rendering the respondents dysfunctional or impotent, pending hearing and determination of the petition. The prayer that was granted was in the very same words that the respondents' counsel framed his prayer 3 of the application.

28. The applicants have not demonstrated that by the advertisement carried in the Daily Nation of 14<sup>th</sup> February 2014, the Respondents have failed to comply with the requirements of the constitution and of the County Government Act; 2012. I have no doubt in my mind that recruitment of officers of the Respondents is a process and the only time at which breach of the constitution and the law can be seen is at short listing time.

29. What I am saying here is that the applicants have not only misconceived the court order but have also misconceived their own prayer which gave rise to the court order of 6<sup>th</sup> February 2014.

30. I must also state here that the order of 6<sup>th</sup> February 2014 was conservatory in nature, and the question that the court has had to ask itself is whether the said order was intended to stay the hands of the respondents in respect of their (respondents') obligations touching upon matters of recruitment to fill vacancies so that the respondents can fully function for purposes of fulfilling their mandate under the County Government Act, 2012.

31. At the time of pronouncing the order of 6<sup>th</sup> February 2014, this court was aware of the provisions of **Article 159 (1) of the Constitution of Kenya, 2010** to the effect that **“Judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals**

- established by or under this Constitution.”** The above being the position the order of 6<sup>th</sup> February 2014 has to be seen in that light. The order was not meant to be inconsistent with the Constitution or to stay the hands of the Respondents who are constitutionally and statutorily mandated to run the affairs of the County Government in accordance with the constitutional and statutory provisions.
32. It is clear from the pleadings in Petition No.34 of 2013 that the parties are engaged in a very vigorous contest and it is therefore only fair that at the interlocutory stage, the substance of the contest is left for determination at the full hearing of the petition. What is expected of the respondents is that whatever they do in the pursuit of their mandate takes into account the general welfare of the people of Migori County; that they observe the national values and principles of governance as set out in **Article 10** of the **Constitution**. If the respondents fail to do so after this first step in the recruitment process for the various vacancies carried in the paid advertisement of 14<sup>th</sup> February 2014, then, and only then, can the applicants come back to this court to seek the leave that they seek vide the instant application.
33. The upshot of what I have said above is that the instant application is misconceived, is premature and is a misapprehension of this honourable court's order issued on 6<sup>th</sup> February 2014. Accordingly, the application be and is hereby dismissed with costs to the respondents
34. Orders accordingly.

**Dated and delivered at Kisii this 19<sup>th</sup> day of March, 2014**

**R.N. SITATI**

**JUDGE.**

In the presence of:-

Mr. Minda (present) for Applicants

M/s Bunde for Modi and Mr. O. Kisera (present) for Respondents

Mr. Bibu - Court Clerk