



IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND MISC. CIVIL APP. NO. 3 OF 2013 (JR)

IN THE MATTER OF AN APPLICATION BY DR. J. A KUMENDA & DR. FLORENCE W. GATUNE FOR JUDICIAL REVIEW IN THE NATURE OF CERTIORARI & PROHIBITION

BETWEEN

REPUBLIC APPLICANT

VERSUS

THE CLERK MUNICIPAL COUNCIL OF KISII 1ST RESPONDENT

THE MUNICIPAL COUNCIL OF KISII 2ND RESPONDENT

THE COUNTY COMMISSIONER (KISII COUNTY) 3RD RESPONDENT

THE COUNTY DIRECTOR OF ENVIRONMENT (KISII COUNTY) 4TH RESPONDENT

DISTRICT PUBLIC HEALTH OFFICER, KISII 5TH RESPONDENT

DISTRICT COMMISSIONER, KISII CENTRAL DISTRICT 6TH RESPONDENT

THE HON. ATTORNEY GENERAL 7TH RESPONDENT

AND

DR. J. A. S. KUMENDA 1ST EX PARTE

APPLICANT

DR. FLORENCE W. GATUNE 2ND EX PARTE APPLICANT

AND

KISII COUNTY GOVERNMENT

COUNTY SECRETARY & HEAD OF PUBLIC SERVICE

THE COUNTY DIRECTOR OF ENVIRONMENT .. INTERSTED PARTIES/CONTEMNORS

RULING

1. What is before me is the ex parte applicants' application by way of Notice of Motion dated 28th November 2013 seeking orders that; the Kisii County Government, The County Secretary and Head of Public Service and the County Director of Environment, the interested parties/contemnors herein be cited for contempt for disobeying the orders that were issued by this court on 14th June 2013 and that the said contemnors be punished by imprisonment for a maximum of six (6) months and/or by attaching and sale of their properties or by such form of punishment as the court may deem fit to impose. The applicants' application was supported by the affidavit of Dr. J. A.S. Kumenda sworn on 28th November 2013. The application was brought on the grounds that, at a meeting that was allegedly held on 14th February 2013 the resolutions of which were contained in a letter dated 19th February 2013, the respondents herein resolved among others to dump garbage on the applicants parcel of land known as **LR No. Kisii Municipality/ Block III/301** (hereinafter referred to as "**the suit property**"). This resolution prompted the applicants to move to this court to have the execution of the same halted.
2. On 14th June 2013, this court issued an order staying the implementation of the said resolution by the respondents. The said order was extracted and served upon one, Johnstone O. Ndege, who is said to be the Kisii County Secretary and Head of Public Service on 23rd October 2013. On the same day, the said order was served upon one, Vincent Oloo who is said to be a prosecution officer at the office of the County Director of Environment. The applicants have contended that despite the service of the said order upon the aforesaid officers staying the dumping of garbage on the suit property, the respondents have continued to do so in blatant disregard of the same. The applicants have annexed to the affidavit of Dr. J.A.S Kumenda aforesaid; a copy of the said court order that was issued herein on 14th June 2013, a copy of affidavit of service of the said court order upon the officers of the respondents mentioned above sworn by one, Juma William on 25th November 2013 and copies of photographs taken on the suit property showing the garbage said to have been dumped thereon by the respondents.
3. The applicants' application was served upon one, Johnstone Ndege who is said to be, the Kisii County Secretary and Head of Public Service, one, Vincent Oloo, who is said to be the prosecution officer at the office of the Kisii County Director of Environment, and the office of the Attorney General. Neither the respondents in the judicial review application herein nor the alleged contemnors responded to the application. They did not also appear in court for the hearing thereof. On 13th March 2014, I directed that the applicants' application be argued by way of written submissions. The applicants filed their submissions in court on 16th April 2014. I have considered the applicants' application together with the affidavit filed in support thereof. I have also considered the written submissions filed by the applicants' advocates together with the case law cited. In the case of **Hardkinson –vs- Hardkinson [1952] ALL ER 567**, it was held that;

“It was the plain and unqualified obligation of every person against or in respect of whom an order was made by a court of competent jurisdiction to obey it unless and until it was discharged and disobedience of such order would as a general rule result in the person disobeying being in contempt and punishable by committal or attachment and in an application to the court by him not being entertained until he had purged his contempt”.

In the Court of Appeal case of **Mwangi H.C Wangondu –vs- Nairobi City Commission, Civil Appeal No. 95 of 1998** (unreported), it was held that;

“...as a general rule an order of court requiring a person to do or abstain from doing any act may not be enforced unless a copy of the order has been served personally on the person required to do or abstain from doing the act in question. The copy of the order served must be endorsed with a notice informing the person on whom the copy is served that if he disobeys the order, he is liable to the process of execution to compel him to obey it. The requirement is important because the court will only punish as a contempt a breach of injunction if satisfied that the terms of the injunction are clear and unambiguous, that the defendant has proper notice of the

terms and that the breach of the injunction has been proved beyond reasonable doubt.”

In the case of **Mutitika –vs- Baharini Farm Ltd [1985] KLR 227** it was held that;

- i. **A person who knowing of an injunction, or an order of stay, willfully does something, or causes others to do something, to break the injunction, or interfere with the stay, is liable to be committed for contempt of court as such a person has by his conduct obstructed justice.**
- ii. **The standard of proof in contempt proceedings must be higher than proof on a balance of probabilities and almost but not exactly beyond reasonable doubt.**
- iii. **The principle must be borne in mind that the jurisdiction to commit for contempt should be carefully exercised with great reluctance and anxiety on the part of the court to see whether there is no other mode which can be brought to bear on the contemnor.**

4. Those are the principles on which I would consider the application herein. The application is not opposed. This fact however does not discharge the applicants from their obligation to prove that the interested parties/contemnors namely, **Kisii County Government, Kisii County Secretary and Head of Public Service and Kisii County Director of Environment** have disobeyed the order made herein on 14th June 2013 and as such are guilty of contempt of court. It is not in dispute that this court made an order on 14th June 2013 staying the decision that had been made by the 1st, 2nd, 3rd, 4th and 5th respondents on 14th February 2013 to dump garbage on the suit property which is owned by the applicants pending the hearing and determination of the judicial review application herein. The order as extracted by the applicants was on the following terms;

“That the leave granted herein to apply for an order of certiorari and prohibition shall operate as a stay of the decision of the respondents conveyed vide the letter dated 19th day of February, 2013 arising from a meeting purported to have been held by the respondents on the 14th day of February 2013.”

5. This is the order that the interested parties/contemnors are said to have disobeyed. The order as extracted was endorsed with a penal notice notifying the 1st, 2nd, 3rd, 4th, 5th and 6th respondents that if they disobey the same, they shall be cited for contempt of court and be liable to be committed to jail for a term not exceeding six (6) months and/or have their properties sequestered. There is no dispute that the order was served upon one, Johnstone O. Ndege who is said to be the Kisii County Secretary and Head of Public Service and one, Vincent Oloo who is said to be a prosecution officer at the office of the Kisii County Director of Environment. These are the only people who are said to have been served with the court order in question according to the affidavit of Juma William sworn on 25th November 2013. It should be noted that Vincent Oloo is not the Kisii County Director of Environment who is one of the respondents to the present application for contempt.
6. There is no evidence that Kisii County Director of Environment which is among those sought to be cited for contempt was served with the court order made on 14th June 2013. Kisii County Director of Environment having not been served with the court order of 14th June 2013, it cannot be accused of disobeying the same. The only party to the present application which was served with the court order is Mr. Johnstone O. Ndege. Proof of service of the order alone is not enough. The applicants had to go further and prove that the order was disobeyed.
7. As stated above, the order stayed the decision of the respondents to dump garbage on the suit property. The applicants have contended that the respondents have continued to dump garbage on the suit property despite the said court order. The applicants have exhibited photographs said to have been taken on the suit property which show heaps of garbage strewn all over the place. There is no evidence as to by whom and when the garbage in the photographs were dumped. There is also no evidence that the garbage aforesaid was dumped on the suit property by the Kisii County Government which is the employer of Mr. Johnstone O. Ndege and that Mr. Johnstone O. Ndege was by virtue of his position able to stop the said dumping. In addition to the foregoing, I am not satisfied that the order of this court as extracted was clear and unambiguous for Mr. Johnstone O.

- Ndege to have known upon looking at the same what he was expected to do.
8. For the foregoing reasons, I am not satisfied that the applicants have established that the interested parties/contemnors herein have disobeyed the order issued herein on 14th June, 2013 to warrant them being cited and punished for contempt of court. I therefore find no merit in the application dated 28th November 2013. Consequently, the application is dismissed with no order as to costs.

Delivered, signed and dated at KISII this 31ST of October, 2014.

S. OKONG'O

JUDGE

In the presence of:-

Mr. Ngogi	for the applicant
N/A	for the ex parte applicants
N/A	for the respondents
N/A	for the interested parties
Mr. Mobisa	Court Clerk

S. OKONG'O

JUDGE