



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KAKAMEGA
PETITION NO. 13 OF 2014

CLEOPHAS WAKHUNGU MALALA.....PETITIONER

V E R S U S

SPEAKER, KAKAMEGA COUNTY ASSEMBLY.....1ST RESPONDENT

CLERK, KAKAMEGA COUNTY ASSEMBLY.....2ND RESPONDENT

KAKAMEGA COUNTY ASSEMBLY.....3RD RESPONDENT

R U L I N G

The application dated 7.7.2014 seeks the following orders:-

1.
2. **THAT this Honourable Court be pleased to find that the 1st and 3rd respondents/Contemnors are in contempt of court for disobedience of the Court Orders issued on 1st day of July 2014.**
3. **THAT upon grant of prayer (2) above, the Honourable Court be pleased to issue an order to commit the 1st Respondent/Contemnor to civil jail for a period of 6 months for contempt of court.**
4. **THAT upon grant of prayer (2) above, this Honourable Court be pleased to impose a penalty of a fine of KShs.10,000,000/= against the 3rd Respondent/Contemnor and in default of payment thereof all its movable and immovable assets including but not limited to land and buildings be attached and sold to satisfy the penalty for contempt of court.**
5. **THAT a conservatory order do issue reinstating the Petitioner to the office as Acting Speaker of the 3rd Respondent as existing ante 2nd day of July 2014 pending the hearing and determination of this application inter partes.**

The application is supported by the petitioner's affidavit sworn on the same dated. The 1st respondent filed a replying affidavit sworn on 17.7.2014. Counsels for both parties agreed to determine the application by way of written submissions and they both complied.

It is contended by the applicant that this court issued an order on the 1.7.2014 restraining the respondents from impeaching the petitioner. The order was served upon the 1st respondent at his office

but the respondent ignored the order and proceeded to deliberate on the issue of impeachment of the petitioner and ultimately made the 3rd respondent to impeach the petitioner. The 1st respondent was fully aware of the court orders but decided to disobey it. The proceedings were conducted on the 2.7.2014 when the case was being discussed in court. This was a total abuse of the rule of law and it is a breach of the principals of natural and administrative justice.

The petitioner further contends in his supporting affidavit that the 1st respondent while aware of the court order convened the house business committee of the County Assembly at 10.30 a.m. and deliberated on the issue of impeachment that had been stopped by the court. The 1st respondent acknowledged having been served with a court order and was fully aware of it. He then caused the full assembly to convene and deliberate on the impeachment of the petitioner the same day and had the motion passed. The petitioner was not given the opportunity to defend himself.

In his written submission counsel for the petitioner contends that the acts of the 1st respondent were unlawful. The 1st respondent gave guidance to the members of the county assembly that they would not be breaking any law if they went ahead and deliberated on the issue despite the restraining orders. That shows defiance and total disregard to the orders issued by the court. The 1st respondent is an officer of the court and should be punished for disregarding the court order. Counsel cited two cases namely that of **BASIL CRITICOS V ATTORNEY GENERAL & 8 OTHERS [2012] eKLR** and that of **TEACHERS SERVICE COMMISSION V KENYA NATIONAL UNION OF TEACHERS & 2 OTHERS [2013] eKLR**.

On his part counsel for the respondents contends that there was no breach of the court order. The order was issued on the 1.7.2014 and its life span ended on 2.7.2014 at 11.30 a.m. The order was not extended. There was no other order that was extracted and served after 11.30 a.m. on 2.7.2014 when the matter was to be heard. Further, the 1st respondent was not personally served with the order. The 1st respondent in his replying affidavit maintains that he was at the Kakamega Sports Club at 1.30 p.m. when the order was purportedly served at his office. The 2nd respondent was in Nairobi attending official duties and was not served. The applicant has not shown that there was willful disobedience of the court orders by the 1st respondent. The alleged service on the secretary cannot constitute personal service. Counsel relies on the case of **OCHIENG –NYAMOGO & ANOTHER V KENYA POSTS & TELECOMMUNICATIONS CORPORATION [1994] KLR, 1**.

It is further contended by the respondents that the 3rd respondent has over seventy members and there was no attempt to serve any of them with the order. Since the members were not served they cannot be cited for contempt. Counsel for the respondent is also relying on the case of **OKOTH V WODA & ANOTHER 1 [2005] KLR at 399** where the court indicated that a person seeking an order of contempt should show that there was willful disobedience of the court order. The 3rd respondent was never served with the orders and its members cannot be punished for contempt. Matters of contempt of court involve proof which is higher than the normal standard of proof in civil cases. Counsel relies on the case of **MUTIKA V BAHARINI FARM. [1985]. KLR. Pg.227**. It is also contended that the position of an Acting Speaker is an elective position. The allegations by the petitioner that the election did not meet the required standard as set out in the law are not supported by any proof. No law, rule or procedure alleged to have been breached has been cited by the petitioner.

The main issues for determination are:-

1. Whether the respondents were served with the court order.
2. Whether there was contempt by the respondents.
3. Whether the petitioner should be reinstated to the office as acting speaker.
4. If there was contempt what should be the punishment.

With regard to the first issue the petitioner contends that the 1st respondent was served with the court order on the 1.7.2014. I have seen the extracted order which has been exhibited and it bears a stamp of

the County Assembly of Kakamega dated 1.7.2014. According to the affidavit of service, the order was served on the secretary by the name Veronica who in turn went to give the documents to the 1st respondent. Mr. Masake advocate who served the order states in his affidavit of service that the 1st respondent was in his office and he saw him. On the other hand the 1st respondent maintains that on the material day he was at the Kakamega Sports Club having lunch at about 1.30 p.m. The 1st respondent contends that there was no personal service on him.

The jurisdiction to deal with contempt of court issues is derived from **section 5** of the Judicata Act and **section 63** of the Civil Procedure Act when the contempt is related to orders of injunction. **Section 5** of the Judicata Act states as follows:-

“5(1) The High Court and the Court of Appeal shall have the same power to punish for contempt of court as is for the time being possessed by the High Court of Justice in England, and that power shall extend to upholding the authority and dignity of subordinate courts.

(2) An order of the High Court made by way of punishment for contempt of court shall be appealable as if it were a conviction and sentence made in exercise of the original criminal jurisdiction of the High Court.”

The applicable law in Kenya on the issue of contempt is based on the law in England. The current law in England requires personal service. There are several authorities in Kenya whereby the courts have held that it is only important for the alleged contemnor to have knowledge of the order. **(see the case of Basil Criticos vs The Attorney General & 8 Others. 2012 eKLR and that of Justus Kariuki Mate & Another vs Martin Nyaga Wambora & Another herein below cited)**. The petitioner has strengthened his contention that the 1st respondent was served with the court order by annexing a copy of the Hansard for 2.6.2014. The person who signed the Hansard indicates that it was for 2.7.2014. The proceedings herein show that the Hansard report was for the 2.7.2014 and not 2.6.2014. It is indicated in the proceedings of the house business committee that the 1st respondent acknowledged that he had been served with the court order. I have seen the proceedings of that date. The 1st respondent contends that those proceedings are not official as they have not been confirmed by the members. It is not clear to me why Mr. Masake could not have asked the secretary permission to see the 1st respondent as he is a known advocate. There is no evidence that there was obstruction in effecting service. However, taking the totality of the information herein, I am satisfied that the 1st respondent was duly served with the court order. Even if it was not personal service and even if the 1st respondent was not in his office at the time of service, I do find that the service was proper on the 1st respondent and the 1st respondent had knowledge of the court order.

The petitioner concedes that the 2nd respondent was not served. The information is that he was in Nairobi attending official duties. The petitioner's application dated 7.7.2014 does not seek to have the 2nd respondent cited for contempt. Thus the 2nd respondent is not affected by the current application. The next issue is whether the 3rd respondent was duly served with the court order. The petition described the 3rd respondent as the Kakamega County Assembly. There is no contention from the petitioner that any of the members of the County Assembly was individually or personally served with the court order. It is contended by the 1st respondent that the County Assembly has more than seventy (70) members. Can it be said that service on the Speaker of the assembly is service on the individual members of the assembly? I do not think so. The timelines were quite short. The order was obtained on the 1.7.2014 and the matter was to be heard on the following day, 2.7.2014. It would have been better if the order had been advertised in the newspapers of 2.7.2014 for each of the county assembly members to take cognizance. It is possible that some of the members were not at the assembly on the 1.7.2014 and 2.7.2014. The court cannot conclude that those members who were not present were served with the order.

The membership of the house business committee according to the documents annexed by the 1st

respondent in reply to the petition comprises twenty four members. It is not clear to me whether during the meeting of the house business committee on the 2.7.2014 all the members were present. The Hansard report does not contain the list of members present. It is in that meeting when a decision was made to include the issue of impeachment on the order paper for the day. It is also in that meeting when the 1st respondent indicated that he had been served with a court order. Although it can be said that those members of that committee who were present in the meeting were aware of the court order, I cannot conclude that those members were duly served with the order.

The record shows that after a decision to include the issue of impeachment on the order paper, the assembly convened at about 11.00 a.m. on the 2.7.2014. I have gone through the proceedings of that day and there is nowhere in those proceedings where the issue of the court order is mentioned. The assembly conducted its business without the knowledge of the court order. Although some of the members of the house business committee could have been aware of the order, I have not seen anywhere in those proceedings where members were alerted about the court order. The impression given is that some of the members were walking in to the chamber and found the debate going on. Some members walked in when voting had started. It is possible that some of these members were not present on the 1.7.2014. I do find that the members of the Kakamega County Assembly did conduct their Constitutional mandate without knowing that there was indeed a court order. It is clear that the order had not been exhibited in the premises of the assembly. To conclude that all the members of the county assembly were served with the order is to cast the net very wide. In the end I do find that there was no service on the 3rd respondent.

The next issue is whether there was contempt by the respondents. This issue is tied with the contention by the 1st respondent that the order had lapsed. The record shows that the court certified the matter as urgent and fixed it for hearing on the 2.7.2014 at 11.30 a.m. On that date the respondents were not ready to proceed as they had not filed a replying affidavit. The matter was adjourned to the 3.7.2014 but there was no indication on the record as to whether the interim orders had lapsed or they were still in force. The extracted court order indicates that the respondents were restrained by an order of injunction pending the hearing of the application inter partes. If it were true that the orders had lapsed, then one can argue that the respondents sought an adjournment with a view of defeating the court order. The contention that the order was not extended is defeated by the order itself. It was to last until the matter was to be heard inter partes. That is why the court was fast tracking the matter so that the orders could not have stayed for long and the matter determined quickly. I do find that the 1st respondent was served with the order but decided to ignore it. He was therefore in contempt of the order. I also find that the 3rd respondent was not served with the court order and therefore cannot be held to be in contempt of the order.

The next issue is whether the petitioner should be reinstated to the position of acting speaker of the Kakamega County Assembly. In his notice of motion dated 30.6.2014 the petitioner was seeking restraining orders against the respondents from deliberating on the issue of his impeachment as an acting speaker. That application was not withdrawn and it was not canvassed. The petition itself sought the following orders:-

- a. **A Declaration be issued to declare the motion dated 24th day of June 2014 aimed at removing the Petitioner from office as unprocedural, malicious, an illegality and an abuse of the due process of the law.**
- b. **A Conservatory Order do issue retaining the Petitioner in office as Acting Speaker, Kakamega County Assembly.**
- c. **An order restraining the 3rd respondent from re-introducing and/or debating a motion for removal of the Petitioner as Acting Speaker Kakamega County Assembly as the same was dispensed with in the sitting of 25th day of June 2014.**

From the petition and the notice of motion of 30.6.2014 it is clear that the petitioner wanted to retain his office. In the current petition for contempt of court the petitioner wants to be reinstated in his office. Since the petition and the earlier notice of motion have not been determined, I do find that reinstating the petitioner in his office as prayed would be tantamount to granting the petition and the notice of motion without hearing them. The petitioner contended that his constitutional rights were being violated as the

manner in which the 3rd respondent was conducting itself was tantamount to mob lynching. The court has to hear the petitioner's earlier notice of motion and if possible the petition itself and make a conclusion that his rights were violated. If the court finds in favour of the petitioner then automatically he will be reinstated in his office. I do take cognizance of the fact that the 3rd respondent proceeded to conclude its earlier motion to impeach the petitioner. Once the court determines the earlier application then the proceedings of the 3rd respondent conducted on the 2.7.2014 would be rendered ultra vires and the effect would be to have the petitioner reinstated in his office. That is to say if the court finds in favour of the applicant. If the prayer for reinstatement is granted at this stage then it would mean that there will be no need to hear the petition.

An application for contempt of court is meant to have the contemnor punished for disobeying court orders. The court can also grant other prayers with a view to asserting the authority of the court and in line with the orders alleged to have been disobeyed. The court has to uphold its integrity and protect the rule of law. In such applications it is the authority of the court which is being challenged. If a party is found to be in contempt then the court can punish such a party. Such punishment can take many forms. The issue of reinstating the petitioner to his office is tied with the main dispute and cannot be granted at this stage.

As indicated herein the 3rd respondent was not served with the court order and therefore the deliberations of the assembly of 2.7.2014 cannot be held to be void ab initio. An order takes effect when it is served and not when it is issued. Members of the 3rd respondent were not aware of the court order and I cannot at this stage hold that the proceedings of the County Assembly of 2.7.2014 were void. The 1st respondent did not announce to the entire County Assembly that there was a court order restraining the assembly from deliberating on the issue. The court will determine the dispute and if it finds that the petitioner's rights were violated then the end result will be the same. Those proceedings will be of no effect. There is no record to show that elections for another acting speaker were conducted. Even if they were conducted, the same would be rendered void depending on the way the court will decide the pending application.

Counsel for the respondents maintains that the standard of proof in contempt of court matters is higher than that of ordinary civil cases. That aspect has been noted in various cases. That position was emphasized in the case of **MUTITIKA V BAHARINI LIMITED [2005] KLR 229, 234**. I do find that the 1st respondent was indeed served with the court order and therefore the petitioner has discharged the burden of proving contempt against him. Since the 3rd respondent was not served or had no knowledge of the court order I do find that the petitioner has not discharged its burden of proof against the 3rd respondent. Therefore when the 3rd respondent convened and deliberated on its motion that had been postponed due to alleged disruption on the 26.6.2014, the assembly was lawfully convened despite the fact that there was a court order. It is clear that the 1st respondent who was presiding over the assembly had knowledge of the court order but the members did not. It is therefore not the duty of the court to nullify the proceedings of the assembly that were conducted on the 2.7.2014 without the knowledge of the court order.

On the 3.7.2014 Mr. Masake, counsel for the petitioner sought adjournment and indicated to the court that he wanted leave to file an application for contempt. I did direct that substantive application for leave be filed. No such application was filed but the substantive application for contempt was filed. Parties have proceeded by way of consent and I believe the issue of leave has been settled. I also note that the orders that had been granted were orders of injunction and it is now settled that such orders do not need leave. **Section 63(c)** of the Civil Procedure Act empowers the court to grant an order of temporary injunction and where there is disobedience commit the person guilty thereof to prison and order that his property be attached and sold. The petition that has not been determined was brought under the provisions of the Constitution. The current application for contempt is brought under **section 5(1)** of the Judicata Act and **section 63** of the Civil Procedure Act. The application is brought within the relevant provisions of the law. As indicated herein above, the 1st respondent was aware of the court order. In the case of **MUTITIKA V BAHARINI FARM LIMITED [2005] 1 KLR 227** it was held that 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. The 1st respondent caused the assembly to deliberate on the impeachment issue without informing members about the existence of a court order. In the case of **JUSTUS KARIUKI MATE & JIM G. KAUMA V HON. MARTIN NYAGA WAMBORA & THE COUNTY GOVERNMENT OF EMBU – Nyeri Civil Appeal No. 24 of 2014 (C.A.)** the court found the Speaker of the County Assembly in contempt of a court order that had been served upon the County Clerk and had been advertised in the daily newspapers.

It is not the intention of the court to gag the members of the Legislative Assemblies. The court does not go out to call parties to file the cases. Whenever cases against the assemblies are filed by citizens the court cannot avoid determining them on the pretext that the doctrine of separation of powers stops the court from dealing with them. At times the legislative assemblies have declined to respond to such cases. Whenever the speakers of those assemblies are threatened with impeachment or are impeached they are the first ones to rush to the court to seek restraining orders. The courts have jurisdiction as enshrined in **Article 22** of the Constitution whereby where a litigant claims that a right or fundamental freedom is about to be violated or is threatened with violation he can move to the court to seek relief. Such a process does not discriminate between legislative or administrative functions of the assemblies. The current case involves administrative functions of the assembly whereby the petitioner was in the process of being impeached. The court has the duty to interrogate the process of impeachment and find out whether due process was followed. Even when the assemblies are dealing with legislative issues the court can intervene if it is convinced that the proposed laws are in contravention of the Constitution. The court can also wait until the legislation is passed and declare it unconstitutional.

The next issue is the punishment to be meted out on the 1st respondent. The 1st respondent caused the assembly to proceed with an impeachment motion without honouring the court order. Those who impeached the petitioner were not aware of the court order and therefore their actions do not amount to contempt. The 1st respondent is the legal adviser to the assembly and should always be the first one to obey the law. Contempt of court proceedings are quasi criminal cases in nature. That is why the burden of proof is higher than that of balance of probabilities. I do find that the 1st respondent is guilty of contempt of the court order made on 1.7.2014. The 1st respondent is fined **KShs.200,000/=** in default his personal property to be attached and sold to recover the above amount.

In the end the application dated 7.7.2014 is granted in terms of prayers **two (2)** and **three (3)** as herein above whereby the 1st respondent is found to be in contempt of court and is penalized to pay a fine of **KShs.200,000/=**. Prayers four (4) and five (5) of the application are disallowed. Costs of this application to the petitioner.

Delivered, dated and signed at Kakamega this 17th day of October 2014

SAID J. CHITEMBWE

J U D G E