



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Miscellaneous Civil Application 264 of 2010

IN THE MATTER OF THE LAW REFORM ACT &

THE CIVIL PROEDURE ACT

AND

IN THE MATTER OF THE CONSTITUENCIES DEVELOPMENT FUND ACT, ACT NO. 10 OF 2003

REPUBLIC.....APPLICANT  
VERSUS

THE CONSTITUENCY DEVELOPMENT BOARD..1<sup>ST</sup> RESPONDENT

THE KENYA ANTI-CORRUPTION

COMMISSION.....INTERESTED PARTY

B. W. MWAI.....3<sup>RD</sup> RESPONDENT

EX PARTE: THOMAS MONGARE MOINDI, PHILEMON M. APIEMI, MARY K. ONDIEKI AND JOHN A. ONYANCHA AS OFFICIALS OF THE MILLENIUM FORUM FOR UNITY AND DEVELOPMENT

RULING

1. Before me is a Motion on Notice dated 5<sup>th</sup> June 2012 expressed to be brought under the provisions of section 5 of the Judicature Act, Chapter 8 Laws of Kenya, Sections 1A, 1B and 3A of the *Civil Procedure Act*, Chapter 21 of the Laws of Kenya, Order 52 of the Supreme Court Rules and all the enabling provisions of the law seeking the following orders:

**1 THAT leave be granted to the Applicant to cite and institute contempt proceedings in this suit against the Chief Executive Officer of the Constituency Development Fund Board [hereinafter referred to as CDF Board] for breach of the orders issued by this Honourable Court on the 8<sup>th</sup> April 2011.**

**2 THAT the Chief Executive Officer of the Constituency Development Board be committed to civil jail forthwith for six months or such period as this Honourable Court may deem for disobedience of court orders issued on the 8<sup>th</sup> April 2011.**

**3 THAT the costs of this application be paid by the said Chief Executive Officer of the Constituency Development Fund Board in any event.**

2. The application is supported by the annexed affidavit sworn by **Thomas Mongare Moindi**, the Chairman of **Millennium Forum for Unity and Development**. According to him this Court restrained the Respondent from mismanagement of the West Mugirango Constituency Development Fund and compelled the Respondent to set in motion a process of reconstituting the said Constituency's CDF Committee in accordance with the CDF Act 2003 on 8<sup>th</sup> April 2011. Despite the service of the Court orders and correspondence seeking compliance therewith, it is deposed that the said orders have not been complied with.

3. In the deponent's view based on advice from the applicant's advocates, the acts of the CDF Board have displayed outright arrogance of the Court orders made by this Court which warrants urgent leave sought.

4. There are also affidavits sworn by **Gilbert Atei, Jeremiah Nyang'au, Ochieng Sese, Henry Nyakundi Nyagaya** and **Alice Mokeira Oboso**, in which the deponents have particularised what in their views are the omissions by the Respondent to comply with the orders of the Court.

5. In opposition to the application, the Respondent filed a replying affidavit sworn by **Yusuf Mbuno**, its acting Chief Executive Officer on 20<sup>th</sup> September 2012. According to him, although he has never been personally served with the court orders mentioned as well as the penal notice, when he became aware of the same through the Respondent's advocates on record, he complied therewith. While acknowledging the seriousness of contempt allegations which the Respondent would not wish to be a party to, he deposes that in compliance with the said order the Board froze the West Mugirango bank accounts to avoid mismanagement of funds as the existing Committee had been declared illegal and wrote to the Constituency Member of Parliament to constitute a new committee pursuant to the CDF Act under section 23 which the MP complied with. The Board also instructed the MP to reconstitute the various Committees in accordance with the CDF Act which was achieved and the Patron informed the respondent that he had fully complied and meetings were to be held as soon as they were able to access the accounts. According to him the Respondent has advised the MP to reimburse Kshs 1,050,000.00 to the constituency CDF account and to ensure compliance the Constituency CDF account is still frozen. However, the criminal case in which the MP was charged with embezzlement of public funds has been determined in favour of the MP. According to him the Respondent has complied with all the court orders issued on 14<sup>th</sup> April 2011 by freezing the CDF Account though the refund of Kshs 1,050,000.00 to CDF has since been successfully challenged in court. According to him the *ex parte* applicant is introducing new issues and the respondent does not have the power to reconstitute the CDF Committee as the said powers are vested on the serving MP. In his view there is no entity known as West Mugirango Development Fund Board which the Respondent has failed to constitute. On receipt of the updated list of members of the Constituency Development Fund Committee, the Respondent updated its records and acknowledged the same. In his view the Respondent has complied with the court order and has in particular having the MP restore Kshs 1,050,000.00 to CDF through various meetings and correspondence. According to the deponent, the new issues raised ought to be referred to the Board for intervention pursuant to the Act. It is deposed that **Alice Mokeira Oboso** has been disbursing bursary funds allocated to the constituency and that the *ex parte* applicants have brought the application out of malice, having earlier applied but failed to be considered as members of West Mugirango Constituency Development Fund Committee hence the application is brought in bad faith and is an abuse of the court process and should therefore be dismissed with costs.

6. There is a further affidavit sworn by the same deponent on 10<sup>th</sup> October 2012 in which it is stated that in the spirit of reconstituting the said Constituency's CDF Committee members, the MP furnished the Board with a list of committee members of various committees and the locations they hail from and further that the Respondent has made every effort to have the court complied with and to that end the MP has deposited Kshs 1,050,000.00 to the West Mugirango Constituency Development Fund account. In order to ensure that the new committee does not mismanage funds, the Board has issued a directive to the District Development Officer to ensure that there is proper adherence to the Government Financial Regulations on the use of Authority to Incur Expenses.

7. In the submissions filed on behalf of the *ex parte* applicant, it is reiterated that the Respondent has not shown that it has complied with the court orders and in instances where it has done so, it has been spurred into action by these contempt of court proceedings and therefore to the extent that some of the Court Orders have not been complied with the application to commit the Respondent's Chief Executive Officer, **Mr Yusuf Mbuno** to civil jail is appropriate.

8. On behalf of the Respondent it is submitted that contempt being a serious matter allegations of contempt cannot be made either against a person who has not been served with a court order or who has complied therewith. It is reiterated that the Respondent was never served with the court order or penal notice to warrant its agents being in contempt of the Court orders. According to the respondent the orders must be served personally on the contemnor in order for an application of this nature to succeed and reliance is placed on **Jacob Zedekiah Ochino and Another vs. George Aura Okombo Civil Appeal No. 36 of 1986, Kariuki & 2 Others vs. Minister for Gender, Sports Culture & Social Services & 2 Others [2004] 1 KLR** and **Naftali Ruthi Thuita & Another vs. Patrick Thuita Gachure & Another Environmental & Land Case No. 462 of 2011**. It is therefore submitted that the application is incompetent and should be dismissed with costs. It is further submitted that the Respondent has complied with the Court orders despite having not been properly served hence the contempt application ought to fail.

9. I have considered the foregoing. The law is well established that Court orders are not made in vain and are meant to be complied with and therefore a party should not take it upon himself to decide on the validity or otherwise of Court orders. Once a Court order is made in a suit the same is valid unless set aside on review or on appeal. If parties and their counsel were given a blank cheque to decide on the validity of court orders, the dignity of the courts would be severely eroded. It must always be remembered that contempt of court proceedings are meant to maintain the dignity of the Courts and therefore the validity or otherwise of the suit in which the orders are granted cannot sanitise contemptuous actions by a party or his legal adviser. In **Econet Wireless Kenya Ltd vs. Minister for Information & Communication of Kenya & Another [2005] 1 KLR 828 Ibrahim, J** (as he then was) stated:

**“It is essential for the maintenance of the rule of law and order that the authority and the dignity of our Courts are upheld at all times. The Court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors. It is the plain and unqualified obligation of every person against, or in respect of whom, an order is made by a Court of competent jurisdiction, to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or void”.**

10. This position was confirmed by the Court of Appeal in **Refrigerator & Kitchen Utensils Ltd. vs. Gulabchand Popatlal Shah & Others Civil Application No. Nai. 39 of 1990**.

11. In **Wildlife Lodges Ltd vs. County Council of Narok and Another [2005] 2 EA 344 (HCK)** the Court expressed itself thus:

**“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 until that order was discharged, and disobedience of such an order would, as a general rule, result in the person disobeying it 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. A party who knows of an order, whether null or valid, regular or irregular, cannot be permitted to disobey it...It would be most dangerous to hold that the suitors, or their solicitors, could themselves judge whether an order was null or valid – whether it was regular or irregular. That they should come to the court and not take upon themselves to determine such a question. That the course of a party knowing of an order which was null or irregular, and who might be affected by it, was plain. He should apply to the court that it might be discharged. As long as it existed it must not be disobeyed...If there is a misapprehension in the minds of the defendants as to the reasonable meaning of the order, then the expectation of them is that they would have made an application to the court for the resolution of any**

misunderstanding and this would have been the lawful course...In cases of alleged contempt, the breach for which the alleged contemnor is cited must not only be precisely defined but also proved to the standard which is higher than proof on a balance of probabilities but not as high as proof beyond reasonable doubt...The inherent social limitations afflicting most people in a developing country such as Kenya have the tendency to restrict access to the modern institutions of governance, and more particularly to the judiciary which is professionally run, on the basis of complex procedures and rules of law. Yet, this same Judiciary is generally viewed as the impartial purveyor of justice, and the guarantor of an even playing ground for all, a perception which ought to be strengthened, through genuine respect for the courts of justice, and through compliance with their orders. Consistent obedience to court orders is required, and parties should not take it upon themselves to decide on their own which court orders are to be obeyed and which ones overlooked, in the supposition that this oversight will not impede the process of justice...Justice dictates even-handedness between the claims of parties; and if it be the case that the plaintiff/applicant has not been accorded a level playing ground for the realisation of its economic activities, a matter that of course can only be established through evidence in the main suit, then the court ought to provide relief, by applying the established principles of law, one of these being the law of contempt...An *ex parte* order by the court is a valid order like any other and to obey orders of the court is to obey orders made both *ex parte* and *inter partes* since the Court by section 60 of the Constitution is the repository of unlimited first instance jurisdiction, and in this capacity it may make *ex parte* orders where, after a careful and impartial consideration, it is convinced that issuance of such an order is just and equitable. There is nothing potentially oppressive in an *ex parte* order, since such an order stands open to be set aside by simple application, before the very same court... Where a party considers an *ex parte* order to cause him undue hardship, simple application will create an opportunity for an appropriate variation to be effected thereto; and therefore there will be no excuse for a party to disobey a court order merely on the grounds that it had been made *ex parte* and this argument will not avail either the first or the second defendant”.

12. However Musinga, J (as he then was) in *Moses P N Njoroge & Others vs. Reverend Musa Njuguna & Another Nakuru HCCC No. 247 “A” of 2004* while recognizing that the rule of law requires that orders of the Court be respected and obeyed and that duty equally applies even where a party is dissatisfied with an order and has appealed to an appellate court against the order, ruling or judgement; that contemnors undermine the authority and dignity of the Courts and must be dealt with firmly so that the Court’s authority is not brought into disrepute; was, however of the view, which view I respectfully share, that recourse ought not to be to a process of contempt in aid of a civil remedy where there is any other method of doing justice, and the jurisdiction of committing for contempt should be most jealously and carefully watched, and exercised with greatest reluctance and greatest anxiety on the part of the Judges to see whether there is no other mode which is open to the objection of arbitrariness, and which can be brought to bear upon the subject.

13. The conditions necessary for an order of committal for contempt are now well established. It is trite law that where committal is sought for breach of an injunction, it must be made clear what the defendant is alleged to have done and that it is breached. The notice of motion must state exactly what the alleged contemnor has done or omitted to do which constitutes a contempt of court with sufficient particularity to enable him to meet the charge. The necessary information must be given in the notice itself. The slightest ambiguity to the order can invalidate an application for committal as ambiguity can in turn lead to the standard of proof, which is the criminal standard, not being attained especially on affidavit evidence. Therefore the law is that no order requiring a person to do or abstain from doing any act may be enforced by contempt unless a copy of the order has been served personally and endorsed with a notice informing him that if he disobeys the order he is liable to the process of execution. In other words the Court will only punish for contempt of injunction if satisfied that the terms of the injunction are clear and unambiguous and that the defendant has a proper notice of the terms and the breach of the injunction has been proved beyond reasonable doubt. See **Republic vs. Commissioner of Lands & 12 Others Ex Parte James Kiniya Gachira Alias James Kiniya Gachiri Nairobi HCMA No 149 of 2002** and **Jacob Zedekiah Ochino & Another vs. George Aura Okombo & 4 Others Civil Appeal No. 36 of 1989 [1989] KLR 165.**

14. There is an affidavit sworn by **Julius Kariuki Mundia** on 21<sup>st</sup> May 2012 in which he states that he received copies of the Court order dated 14<sup>th</sup> April 2011 to which was attached a copy of the penal notice which he served on a **Mr Ombara** who he was informed was acting on behalf of the Chief Executive Officer who was on leave. However, the said **Mr Ombara** declined to sign the same on the ground that what was served was a copy and not the original court order.
15. On my part I have perused the said affidavit and I am satisfied that the same is evidence of good service. The Respondent has maintained deafening silence on whether or not the said **Mr Ombara** is its employee and if so service on him has not been disputed. The details contained in the said affidavit in my view required the respondent to respond thereto and in the absence of sufficient response, the Court has no option but to believe that the said court order was duly served.
16. On the issue whether there has been disobedience thereof, the replying affidavits have detailed actions which have been taken by the Respondent to ensure compliance with the Court order. Having considered the same, I am not satisfied that the Respondent has wilfully and deliberately disobeyed the Court order. To the contrary the Respondent seems to have taken steps to ensure compliance therewith some of which were frustrated by court decisions.
17. Having considered the totality of the material placed before the Court, I am unable to find that this is a case where a party has deliberately sought to evade compliance with a Court order. It must be noted that the purpose of contempt of court proceedings is not to inflict injury but to compel compliance with court orders so that where a party alleged to be in contempt has shown that he has done all he can to comply therewith and is willing to ensure compliance with the rest of the orders, the Court would be disposed to grant indulgence to such a party. That seems to me to be the circumstances prevailing in this case.
18. In the foregoing premises, this Court is not amenable to the grant of the orders sought in the Notice of Motion dated 5<sup>th</sup> June 2012.
19. Apart from the foregoing, Order 52 rule 2 of the Rules of the Supreme Court of England provides an elaborate procedure for the institution and prosecution of contempt of court applications. Under rule 2 subrule (3) of the Order 52 of the Rules of the Supreme Court, it is stated, in mandatory language, that the notice of the application for leave is to be given to the Crown Office not later than the preceding day and the applicant must at the same time lodge in that office copies of the statement and affidavit. It is settled that the equivalent of the Crown Office in Kenya is the Office of the Attorney General. Order 52 rule 2(1) of the Rules of the Supreme Court of England provides that no application to a Divisional Court for an order of committal against any person may be made unless permission to make such an application has been granted in accordance with the rule. Subrule (2) provides that an application for such permission must be made *ex parte* to a Divisional Court and must be supported by a statement setting out the name and description of the applicant, the name, description and address of the person sought to be committed and the grounds on which his committal is sought and by an affidavit to be filed before the application is made verifying the facts relied on.
20. Under both Section 5 of the Judicature Act and Order 52 of the Rules of the Supreme Court of England, the applicant must first seek leave to institute the proceedings and once leave is granted under rule 2, the substantive application is thereby made and it is required under Order 52 rule 3(3) that it should be served personally on the person sought to be committed. Under Order 52 Rule 3(2) of the Rules of the Supreme Court of England, an application for contempt of court must be filed within 14 days from the date when permission to apply for the same was granted and any application filed outside the prescribed time without any extension being sought renders the order made pursuant to the said application a nullity having been made without jurisdiction since the subrule states that “unless within 14 days after such permission was granted the claim form is issued, the permission shall lapse”. See **Andrew Kamau Mucuha vs. The Ripples Limited Civil Appeal No. 19 of 1998 [2001] KLR 75.**
21. From the foregoing it is clear that a party who intends to institute contempt of court proceedings ought to prepare a notice of intention to institute contempt of court proceedings. That notice is to be

accompanied by copies of the statement and affidavit setting out the name and description of the applicant, the name, description and address of the person sought to be committed and the grounds on which his committal is sought and an affidavit verifying the facts relied on. Those documents are required to be served on the Attorney General at least one day before the application for leave is made. In other words the documents being served on the Attorney General are to be so served before the same are filed in Court to notify the Attorney General of the processes that the applicant intends to institute.

22. It is not clear whether this procedure was adhered to though the provisions of the said Order 52 of the Supreme Court Rules are relied upon in this application. However, what is clear is that the prayers seeking leave and the one seeking substantive committal order are contained in the same application contrary to the foregoing provisions.

23. The totality of the foregoing is that the Notice of Motion dated 5<sup>th</sup> June 2012 fails and is dismissed but with no order as to costs.

**Dated at Nairobi this 25<sup>th</sup> day of April 2013**

**G V ODUNGA**  
**JUDGE**

In the presence of Mr Parantai for the applicant.