



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT GARISSA
CONSTITUTION PETITION NO 8 OF 2013 CONSOLIDATED WITH
MISCELLANEOUS APPLICATION NO 10 OF 2013

ABDIWAHAB ABDULLAHI ALI.....APPLICANT

VERSUS

THE GOVERNOR, COUNTY GOVERNMENT OF GARISSA.....1ST RESPONDENT

THE CLERK, COUNTY ASSEMBLY OF GARISSA.....2ND RESPONDENT

RULING

The Application

[1] This application is brought by way of Originating Notice of Motion under the provisions of Section 5 of the Judicature Act (Cap. 8) Laws of Kenya, Section 1A, 3A and 63 (e) of the Civil Procedure Act and Order 52 of the Supreme Court Practice Rules, United Kingdom. The application is dated 6th August 2013. It seeks the following orders:

- i. That this honourable court do issue an order for committal to civil jail of the 1st Respondent being the Governor, County Government of Garissa and the 2nd Respondent being the Clerk, County Assembly of Garissa, for disobedience of the Court Orders issued on 18th July 2013 by Hon. Justice S.N. Mutuku arising from High Court Constitutional Petition No. 8 of 2013 at Garissa.
- ii. That costs of this application be provided for.

[2] Leave to commence contempt of court proceedings was granted by this court on 6th August 2013. On the same date the court fixed the matter down for hearing inter partes on 26th August 2013.

[3] The application is supported by the grounds found on the face of the application and in the verifying affidavit of the Abdiwahab Abdullahi Ali (the applicant). The grounds in support of the application can be summarized as follow, that following the service of the court order dated 18th July 2013 upon the respondents, they disobeyed the same and the 1st Respondent went ahead to swear into office the members of the County Public Service Board (CPSB). The orders is question sought to temporarily stay the forwarding of the list of nominees of the CPSB to the Garissa County Assembly for

approval pending service of the application and inter partes hearing.

[4] It is alleged that the said orders were served on the 2nd Respondent on 18th July 2013 at 2.30pm and on the 1st Respondent on 22nd July 2013 at 9.32am. It is further alleged that despite service the 1st Respondent proceeded on the same day around 3.30pm and forwarded the list of nominees to the County Assembly Speaker for approval; that the Respondents swore into office the nominees on 23rd July 2013; that the general public and Garissa residents will suffer irreparably if the Respondents choose to disobey court orders at will.

[5] The 1st and 2nd Respondents in Miscellaneous Application No 10 of 2013 filed a Notice of Preliminary Objection that the order of this court was not directed at the 1st Respondent; that the order dated 18th July 2013 did not have a Penal Notice without which no contempt proceedings can be founded thereon; that the said order was not capable of obedience as it was served after the event and that this Application has been brought by a firm of Advocates whose participation in this suit was by orders of this court issued on 25th July 2013 is held in abeyance.

[6] Further in opposition of this application, the 1st Respondent avers that the Committal Application has not named him or any person to be committed to civil jail; that the order dated 18th July 2013 was not served on him personally; that by the time the order came to his attention the names of the nominees to the CPSB of Garissa had been approved by the Garissa County Assembly, the approval notified to him and the names presented for gazette.

[7] On his part the Clerk to the Garissa County Assembly, 2nd Respondent in Misc. Application No 10 of 2013 but 3rd Respondent Constitutional Petition No 8 of 2013 following consolidation of the both files, avers that he has not been named in the committal proceedings; that the control of proceedings of the County Assembly Garissa is the mandate of the Speaker and not his mandate; that the orders of the court issued on 18th July 2013 were not specifically directed at him; that there is no Penal Notice hence no committal proceedings are capable of being founded on the said Order; on Thursdays, the County Assembly sitting commence at 2.30pm; on the Thursday of 18th July 2013, the County Assembly had already approved the names of the nominees before service of the court's orders was effected.

[8] The Honourable Attorney General, who appears as 2nd Respondent in the consolidated case, filed grounds of opposition in which he contents that the application is unmeritorious due to non-disclosure of the disobedience of the Court Order; that the application is an abuse of the process of the court and the same ought to be dismissed with costs.

[9] By consent of all the parties on 25th July 2013, written submissions were filed with the intention of highlighting them on 26th August 2013. On the latter date all parties through their legal representatives asked the court to adopt the written submissions and give a ruling on the application without the parties' highlighting the submissions.

Submissions by the Applicant

[10] The Applicant identified two issues for determination, to wit:

- i. Whether the Respondents are liable for contempt of court punishable by this court
- ii. Whether contempt of court proceedings can be founded if no penal notice is indorsed on a court order

[11] On the first issue, counsel for the applicant submitted that under Section 5 of the Judicature Act the court is empowered to punish for contempt of court; that the procedure applicable in contempt of court proceedings is provided by Civil Procedure Rules, 1998, Schedule 1, Rules of the Supreme Court Order

52 United Kingdom which gives the High Court power to punish for contempt by an order of committal; that committal proceedings are meant to safeguard the rule of law. On the second issue, counsel submitted that the Respondents cannot hide behind the veil of lack of penal notice as this is not founded in any statute; that unless the court's order is discharged, it has to be obeyed even if it is null and void (**see John Mbasio & 4 others versus City of Nairobi & 2 others (2006) eKLR**); that strict adherence to the procedure of personal service in contempt of court proceedings was waived in **Teachers Service Commission vs. Kenya National Union of Teachers & 2 others (2013)eKLR** and that this court can likewise waive the requirement of penal notice.

Submissions by 1st and 3rd Respondents

[12] Through their counsel, the 1st and 3rd Respondents submit that this court ought to exercise restraint when dealing with other arms of the government in tandem with the doctrine of separation of powers; that failure to name the contemnor, the person against whom criminal consequences are intended is fatal to the applicant; that service of the court order was not effected personally and that by the time the order was served its shelf life had expired; that no penal notice was attached to the court order and the law requires that no person shall be convicted of an offence that did not exist in a written law at the time of the alleged commission of the act complained of; that the court order was served at 2.30pm on Thursday 18th July 2013 when the County Assembly was in session and that as at that time the list of nominees was with the County Assembly and not the 3rd Respondent; that Standing Order Numbers 1 and 95 of the House Standing Orders vests the power to direct the proceedings of the House exclusively with the Speaker and not the 3rd Respondent; that the Applicant did not bring up the issue of contempt of court, if any existed as at 25th July 2013, when Petition No 8 of 2013 came up for hearing; that these contempt of court proceedings are meant to derail and forestall the hearing of the Preliminary Objection in Petition No. 8 of 2013 and ought to be dismissed; that costs must follow the event and in this case ought to be awarded to the Respondents.

Submissions by the 2nd Respondent

[13] The 2nd Respondent has framed three issues thus:

- i. **Whether there was a court order capable of enforcement.** In respect of this issue counsel submitted that parties are bound by their pleadings and the court only issues to parties before it what they ask for in their pleadings; that the order is vague to the extent that it is not clear to whom it is directed and that the service of the order was overtaken by events and not capable of enforcement.
- ii. **If the answer to the 1st issue is in the affirmative, whether the Respondents disobeyed the court order hence liable to contempt.** In respect of this issue, the 2nd Respondent has submitted that contempt of court is committed when a person does an act in willful contravention of the court order thereby undermining the court authority, dignity or tending to impede or frustrate the administration of justice; that the applicant must prove existence of a court order of which the alleged contemnors were personally served with and they expressly and willfully violated the said order while aware of the consequences of such violation. It was further submitted that before a person is held in contempt for violating a court order, the order must be in definite terms as to the duties thereby imposed upon each recipient.
- iii. **Conditions precedent for an enforceable court order.** On this issue it was submitted that for a court order to be enforceable it must expressly identify its recipients by name; it must expressly state in no uncertain terms what it prohibits; It must be personally served upon the contemnors; It must have a penal notice setting out in express terms the consequences of disobeying the same and the contemnors must have been served with the order before the actions sought to be stopped have occurred; that the order in this application lacked all the above requirements; that penal notice is mandatory and lack of it is inexcusable in contempt proceedings. The 2nd Respondent submits that the application is misconceived and ought to be dismissed with costs.

Determination

[14] The parties did not agree on the issues for determination. Each defined what they perceive to be the issues in his own style. This court will therefore combine the issues and determine them under the umbrella issue: **Are the Respondents liable for contempt of court?** Under this issue this court will determine whether the orders of this court issued on 18th July 2013 are capable of enforcement; whether there was personal service to each Respondent; whether failure to serve penal notice renders the application fatally defective; whether failure to identify the contemnor is fatal and whether the order was served late and therefore overtaken by events.

[15] The basis for contempt of court proceedings in Kenya is Section 5 (1) of the Judicature Act. Under this section the High Court is empowered to punish for contempt of court. This section reads as follows:

“The High Court and the Court of Appeal shall have the same powers 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 the subordinate courts”.

[16] The law in England under reference is the Contempt of Court Act 1981 and the procedure is defined under Order 52 of the Rules of the Supreme Court in Schedule 1 of the Civil Procedure Rules. These two guide contempt of court proceedings in Kenya. Contempt of court proceedings are used by the courts to enforce its orders. When a party disobeys a courts order to do a certain act within a specified period or to abstain from doing such a specified act he is said to have disobeyed the court’s order and is therefore held in contempt of court. Every person against whom an order is made by a competent court is under an unqualified obligation to obey it even in cases where that person believes the order is irregular or even void. This obligation exists until that person has discharged the order (see Hadkinson vs. Hadkinson (1952)CA).

[17] Contempt of court proceedings are criminal in character. In Re Bramblevale (1969) 3 All E.R 1062 Lord Denning MR said:

“Contempt of court is an offence of a criminal character. A man may be sent to prison for it. It must be satisfactorily proved. To use the time honoured phrase, it must be proved beyond all reasonable doubt. ...”.

[18] On the issue of standard of proof in contempt of court proceedings, see also Joseph Peter Gichoya Mbogo c/o Stephen Macharia Kimani Advocate v. Patrick Dennis Ok’eefee & another (2006) eKLR and Housing Finance Company of Kenya Ltd v. Ngige Kitson Mondo (2006) eKLR in which the court appreciated the criminal nature of these proceedings and the requirement of a higher standard of proof.

[19] The order of this court in issued in line with prayer number 2 of the application dated 18th July 2013 reads in part and reads as follows:

“That a temporary order do issue staying the forwarding of the list of nominees of the County Public Service Board to the County Assembly of Garissa for approval pending service of this application and hearing inter partes.”

[20] The application leading to this order was filed on 18th July 2013 and it was intended to ultimately stop the forwarding of the nominees for approval until the Petition challenging the constitutionality of their appointment is determined. It was filed by a firm of advocates going by name and style of Nyasani E. & Company Advocates. However the contempt of court proceedings are brought by a firm of advocates known as Nzaku & Nzaku Advocates. The affidavit of service sworn by Nyasani Evanson states that on 18th July 2013 at 2.30pm he served the Clerk of the Garissa County Assembly (2nd Respondent) who acknowledged service by stamping and signing on the front of the court order. Another

affidavit of service by one James M. Mukuni shows that he served one Ruth Kungu who is indicated as a secretary on 22nd July 2013.

[21] My reading of the documents being served and the affidavits of service show that there was no penal notice attached to that order.

[22] The order does not name the 1st or the 2nd Respondent in person and it is argued that without naming them expressly the order is vague. In my view the office of the Clerk to the Garissa County Assembly is currently occupied by an officer who is known and there can be no ambiguity as to who the order is referring to. The same case applies to the Governor. However it is important to specifically state the names of the persons being accused of contempt because what is being sought in contempt proceedings is to commit a particular person, who occupies a certain office as the Clerk or Governor as the case may be. In my view failure to specifically state the name of the person where it is clear which officer the order is referring to on its own cannot make contempt proceedings fatal.

[23] On the issue of service, I wish to reinstate that this must be personal to the alleged contemnor (**see Kariuki & 2 others vs. Minister of Gender, Sports, Culture & Social Services and 2 others [2004] 1 KLR**). It is true the Clerk was served on the day the order was issued, 18th July 2013. The affidavit of service shows a stamp and signature which was appended at 2.30pm. The 2nd Respondent is not denying service. What he is contesting is that by the time service was effected on him, the names of the nominees was already under discussion by the relevant Vetting and Appointment Committee. According to him by the time he was served with the order he had no control over the list of nominees.

[24] Service on the 2nd Respondent was effected on 22nd July 2013 not personally to him but to the Secretary. I need not belabor the point that this was long after the date the approval of the nominees is said to have taken place. I also need not belabor that the 2nd Respondent was not served personally as the law required.

[25] On the issues of penal notice, I agree that Penal Notice should be served with the order. **In Nyamondi Ochieng Nyamogo & Another vs. Kenya Posts and Telecommunications Corporation, Civil Application No NAI 264 of 1993**, the Court of Appeal said that omitting endorsement of penal consequences on the Notice rendered the application incompetent. This case was distinguished in **Misc. Case No. 1097 of 2002 Wachuri Farmers Co-op. Society & another vs. Mburu Mungai t/a Mburu Mungai & Associates & another** where the judge stated that the Court of Appeal decision while binding to the High Court was based on 1982 Order 45 Rules of the Supreme Court but this had been changed by the time the latter case above was decided because the contempt proceedings were governed by Order 52 of RSC and the Contempt of Court Act 1991. The court in Wachuri case held that the omission to join a penal notice did not vitiate the Notice. The latter is a High Court decision and while not binding to this court, it is persuasive.

[26] I have taken time to read the pleadings and submissions by all parties as presented before me by their legal representatives. I have also read the authorities cited by the parties. I wish to distinguish the **Teachers Service Commission case** above. Counsel for the applicant has cited this case in support of his contention that this court ought to waive the requirement of penal notice just like the judge in that case waved the requirement for personal service. In that case the respondents had made it difficult for service to be effected on them. That court went further to state that the respondents had knowledge that there was an order against them by reading the publicized case. This case is different. I have however pronounced myself on the issue of the penal notice.

[27] The burden of proof lies with the applicant to demonstrate to this court that the Respondents disobeyed the orders of this court. My view is that the applicant has failed to discharge the burden of proof. The Respondents have on the other hand demonstrated that by the time the orders were served, the names of the nominees had already been forwarded to the County Assembly for debate and therefore the order had been overtaken by events. It is incumbent upon a litigant to exercise due diligence to ensure the orders he/she is seeking will not be in vain. Failure to do this amounts to an abuse of the court's process. I

have taken note that the applicant used different firms of advocates to bring the application dated 18th July 2013 which was filed contemporaneously with the Petition No 8 of 2013 and to this application. I have also taken note of the fact that this application was filed in a separate file a fact I commented on in court before directing that this file in which this application was brought be consolidated with the file in Petition No. 8 of 2013.

[28] Having carefully considered the rival submissions of all the parties and the cases they have relied on. My conclusion of this matter is that the orders of this court dated 18th July 2013 are not capable of enforcement for the reasons that they were served late and therefore overtaken by events and that the said orders were not personally served on the 1st Respondent. Secondly, the applicant has failed to meet the threshold of the standard of proof in committal proceedings. The result of this is that the Respondents are not liable for contempt of this court. Consequently, this court hereby declines to grant the orders sought in this application. Therefore the application dated 6th August 2013 is hereby dismissed with costs to the Respondents to be taxed to scale. I made orders accordingly.

S. N. MUTUKU

JUDGE

Dated, signed and delivered this 9th day of September 2013 in open court.

Counsels

Mr. Nzaku instructed by M/s Nzaku & Nzaku Advocates for applicant

Mr. Mogaka instructed by M/s Musyoki Mogaka & Co. Advocates for the 1st and 3rd Respondents

Mr. Mohamed instructed by the Attorney General for the 2nd Respondent.