



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Misc Appli 234 of 2004

JOHN MBASIO & 4 OTHERS.....APPLICANTS

Versus

THE CITY OF NAIROBI

THE TOWN CLERK OF THE NAIROBI CITY COUNCIL

**THE CITY TREASURER OF THE NAIROBI CITY
COUNCIL..RESPONDENTS**

RULING

On 5th March 2004, the Applicants filed the Chamber Summons dated 5th March 2004 seeking leave of the court to bring Judicial Review Proceedings. The court granted the following orders:-

“1. That leave be and is hereby granted to the Applicants to apply for an order of certiorari directed upon the City Council of Nairobi, Town Clerk of the City Council of Nairobi, and the Treasurer by bringing to this court the decision to retire the applicants from 31st December 2003 for purposes of quashing the same and reinstating the Applicants to their normal duties until their total dues are paid in full as per the Act.

2. That leave be and is hereby granted to the Applicants to apply for an order of prohibition against the Respondents prohibiting the said Respondent from withholding the Applicants’ salaries until their benefits are paid in full.

3. That leave be and is hereby granted to the Applicants to apply for an order of mandamus against the Respondents, compelling them as per the provision of the Pensions Amendment Act, to reinstate the Applicants to their positions and continue earning their salaries until their benefits are paid in full.

4. That the leave granted herein do operate as stay till 31st March 2004 when the motion will be heard and the same will lapse unless extended.

5. That the substantive motion be filed and served within the next eight days hereof.

6. That costs of this application be in the cause”

The said court’s orders were served on the Respondents on 31st March 2004 and were duly stamped as

received.

An Affidavit of Service was filed in court on 22nd March 2004. Along with the Application was filed the Penal Notice. On 23rd March 2004 the Applicants filed the Notice of Motion dated the same date seeking the following orders.

1. That the 2nd and 3rd Respondents be committed to Civil Jail for a term not exceeding 6 months for blatant breach or disobedience of this honourable court's order of 5th March 2004.
2. That this honourable court do impose a further mandatory penalty to be paid by the Respondents personally.
3. That this honourable court do compel the Respondents to enforce the orders granted.
4. the Respondents do pay the costs.

The Application was based on grounds that the Respondents had disregarded the court's order of 5th March 2004, yet it had been served on them and that the Respondents seem to be taking the court for granted. The application is supported by the Affidavit of the 5 Applicants who depone that the Respondents have taken the court for granted having failed to obey the order.

Thereafter the record shows that the parties started negotiating as to how to pay the Applicants but it seems there was no compromise. The Respondents had been represented by the firm of Njage Wanjeru & Co. Advocates and Counsel appeared in court for the Respondents until 22nd March 2006 when he took up a Preliminary Objection on the present Application but Preliminary Objection was dismissed by the court on 19th May 2006.

Though served with hearing notice, the counsel did not appear at the hearing of this Application and the Respondents. Legal Officer Mr. Mung'alla was also served but failed to appear.

The court gave stay orders which were to last until 31st March 2004 but the Applicants contend that the Respondents did not comply with the order even after the orders were extended by the court severally. The contempt proceedings arise from the Application seeking the payment of dues, which Mr. Nyaberi submitted have not been paid to date.

Upon service of this Application, Franklin Magaju, the then Town Clerk of the 1st Respondent swore an affidavit dated 28th April 2004 and filed in court on 23rd May 2004 in which he denies having been served with the court's order of 5th March 2004 and the Penal Notice. He deponed that it is the Administrative secretary who was allegedly served with the court order on 8th March 2004 was only given a copy of the order without any other documents which the process server promised to serve later. The Town Clerk denied being in the office at the time of service but later learnt of it and sought the interpretation of the order from their Counsel. He then apologized for the apparent disobedience of the court order which was not deliberate nor intentional. He implored the court to consider the intricate process of restoring the Applicants on the payroll of the Council and asked the court to consider the technicalities that would be involved in implementing the court's order.

The Preliminary Objections filed by the Applicant does confirm that the Town Clerk was not served with the court's order personally. The Treasurer was however served on 9th March 2004. In an Application of this nature it is a requirement that the person cited for contempt be served with the court's order and the Penal Notice personally. The Town Clerk was not served personally which may have been an irregularity but he admits having been made aware of the order. He did not indicate when. But the City Treasurer became aware of the order on 9th March 2004.

Despite the fact that the Town Clerk talks of the difficulty they would have in implementing the court

orders, they indicated that they would revert back to the court for verification. Since then, nothing has been done by the Respondents towards obeying the court's orders. Even if the court's orders are impossible to implement, which may have been so in this case, to the court's orders must be obeyed until such a time that they are discharged.

In the case of **HADKINSON V HADKINSON (1952) ALL ER 567**, it was held that the court's order unless it is discharged, has to be obeyed even if the order is null or void or irregular.

In this case, the Respondents have been aware of the pendency of this matter. Their Advocate has declined to come to court any more and the Respondents though served, declined to come to court. In light of the Town Clerk's Affidavit, there has been willful disobedience of the court's orders, even to attend court I wish to echo the Court of Appeal's observation in the case of **COMMERCIAL BANK OF AFRICA LTD. V NDIRANGU CA 157/1991** where it held that court orders must be obeyed in order to uphold the dignity and authority of the court. The Respondents have taken the court for granted and not even attended the court's hearings and I am satisfied that the 2nd and 3rd Respondents have been contemptuous of this court's orders of 5th March 2004 and a warrant of arrest is hereby issued for the 2 officers, 2nd & 3rd Respondents to appear before this court for further orders of this court.

Dated and delivered this 28th day of November 2006.

R.P.V. WENDOH

JUDGE

28th November, 2006

Wendoh, J.

Ojijo: Court Clerk

Mrs. Lunani holding brief Mr. Nyamberi – Applicant

Mrs Lunani

We served and have filed a Return of Service filed in court on 21st November 2006

Court:

The 2 Respondents have been served

Ruling read.

R.P.V. Wendoh

Judge

Court

Warrant of arrest do issue as ordered in the judgment.

R.P.V. Wendoh

Judge