



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MISC. APPLICATION NO 607 OF 2004**

KABUTO CONTRACTORS LTD.....PLAINTIFF

VERSUS

NAIROBI CITY COUNCIL.....DEFENDANT

This is an Application by the decree-holder in High Court Civil Case No. 1323 of 1999, Messrs. Kabuto Contractors Limited against the Nairobi City Council. This Court granted leave to the applicant to commence contempt proceedings against the Town Clerk, Nairobi City Council on 26th May, 2004.

The applicant has abandoned a prayer for the freezing of the Council's bank accounts and prosecuted prayer 1 and 2 which are for Orders:-

1. A Declaratory Order that the Respondent is in contempt of this Honourable Court,
2. An Order that the Respondent's Accounting Officer, the Town Clerk or Ag. Town Clerk, be committed to Civil jail in suitable remand home for a period not exceeding six months or until such period as may be deemed appropriate for the purpose of purging the contempt.

I have read the Affidavit of service sworn by Mr. Nzuki Musyoki on 28.7.2004.

The process server who is by his appointment an agent of this court when effecting service of process, went to City Hall on 11th June, 2004 and met with a Mr. Nyaga in the Town Clerk's office. The said Mr. Nyaga introduced himself as the personal assistant to the Town Clerk. He was handed the following documents on his suggestion that he will deliver them to the Town Clerk, Mr. Maganu:-

1. Notice of Motion dated 9th June, 2004 with a hearing date for 29th July, 2004 written thereon.
2. Court Order given on 26.5.2004.
3. Ex parte, Chamber Summons dated 26th May, 2004 has was under Certificate of Urgency, the statement, the affidavit and all annexures thereto.

Mr. Nyaga went to give the documents to the Town Clerk. Mr. Nyaga returned and told him that Mr. Magaju had requested him to return at 2.30 p.m. for his copies. This was to give time to Mr. Magaju to read the documents. Upto his return at 2.30 p.m. the process server was given his copies of the documents bearing the stamp of the Town Clerk and a signature acknowledging receipt.

I am satisfied that this application was duly served on the Town Clerk and the Affidavit was acknowledged by the Town Clerk personally or an authorized officer who inscribed his/her signature on

the official stamp.

I am satisfied that this application duly served on the Town Clerk and the Affidavit was acknowledged by the Town Clerk personally or an authorized signature on the official stamp.

This court is therefore, truly perturbed by the absence of the Town Clerk in Court to deal with such a serious application.

I have also carefully read the application. I do hereby find that on 4th June, 2003, the council was served with this court's Order issued on 28th April, 2003 the **MISC CIVIL APPLICATION NO. 1410 OF 2002**. The said order completed the Council through its Town Clerk as the Accounting Officer to make payment to **KABUITO CONSTRUCTORS LIMITED** in terms of the decree issued by this court of 17.9.2002 in the **HCCC NO. 1323 of 1999**. The said Order and decree were received on the said date by none other than one **FRANKLIN R. MAGAJU** who was then the Council's Senior Counsel. He received it on behalf of the Town Clerk.

On the 30th March, 2004, the same process server served the Town Clerk with a certified copy of the order issued on 28th April 2003 and a Penal Notice attaching thereto the Decree herein. By this time, the town Clerk was none other than Mr. Magaju himself who had been elevated to the said position. The service was effected **personally** on him.

I am therefore, satisfied that the present town Clerk, Mr. Magaju was personally served with the Court Order in Misc. Appl. No. 1410 of 2002 the Decree and the Penal Notice. Apart from this personal service, Mr. Franklin Magaju and the Council were aware of the decree. On 18th August, 2003 the Council sent a cheque for Kshs.200,000/= to the Applicant as part payment. The covering letter was signed by none other than Mr. Magaju who signed as Deputy Town Clerk (L).

In the case I was referred to of Civil Suit No. 1330 of 1991 **AARON GITONGA RINGERA -v- P.K. MUIITE**, the Judge observed that:

“...contempt proceedings were filed on 17.5.91. With such knowledge was it then necessary to serve the respondents? Not at all. They already had knowledge of the orders that service could have been brought to their attention. It could be dangerous to hold that a person who had notice knowledge of a court order restraining him/her one way or the other could disregard it unless and until that order is served”

I have been asked to hold that the Town Clerk was aware of the existence of the Decree and the subsequent Order. In my view, there is no need for any deduction.

On a balance of probability from the Affidavits of service in this matter, I do hold that the City Council of Nairobi and its present Town Clerk not only knew of the orders but were **personally** served.

From the conduct of the Town Clerk and the Respondent it would appear that there is no intention on the latter's part to satisfy the Decree. This conclusion is reasonable from their conduct. After paying the said sum of Kshs.200,000/=. The Respondent went to slumber and does not even make any proposals to pay the balance by installments or otherwise. I would agree that payment of the said sum of Kshs.200,000/= was by itself contemptuous of the Decree considering the total amount involved and the deafening silence as to the balance.

This court is particularly disappointed by the Town Clerk, Mr. Franklin Magaju whom I am told is an Advocate of this court. He should know that he holds a public office and is accountable to discharge his duties. This is not a personal liability against him. As on the Town Clerk and a lawyer, he should know the importance of respecting and obeying Court Orders. If the Council is unable to pay, all he had to do is come to court personally or through an advocate to present the Council's position. The law then would take its course. In my view, even a local Authority can become insolvent and he declared bankrupt, de facto. The Town Clerk should have the courage to say so, if the Council cannot pay its debtors and other

service providers. It is not a solution for him as the Accounting Officer to burry his head in the sand, or wish the debt/or decree away or to show contempt of the court order. Contempt here is not only disobeying the order by non-payment but also by totally and shamelessly disregarding it and not coming to court to explain the recourse reasons for non-payment or default.

In the case of **HADKINSON –v- HADKINSON (1952)** C.A. 285, Rover L.J, saud

“It is the plain and unqualified obligation of every person against or in respect of who an Order is made by a court of competent jurisdiction to obey it until that order is discharged. The uncompromising nature of this obligation is shown by the facts that it extends even to cases where the peron affected by an order believes it void”

This principles have been applied in our legal system. It is the law of the land.

Considering all facts and documents presented to me, I do hereby find and hold that the Respondent is in contempt of Orders of this court and therefore this court. This finding is in terms of prayer 1 which I hereby grant.

I am inclined to grant and I shall, grant prayer 2 if the court’s Orders are flagrantly disobeyed and contempt is shown to this court and its orders. However, as obstinate, un-co-operative naïve or even arrogant as the Town Clerk, may be, I do note that this is not his personal liability and his liberty is a fundamental right. This right or enjoyment thereof can be curtailed as long as he remained the Town Clerk and a Public Officer and disobeys court orders. The law provides for such curtailment and he has submitted to such action first by his appointment and secondly, by the manner he is purportedly discharging his public duties i.e. showing contempt of court orders. The latter flows from his personal demeanour and that is why the court is strongly offended.

For the moment, I do hereby order that a Warrant of Arrest do issue against the person of the Town Clerk, Mr. Franklin Magaju and for him to be arrested and brought before this court forthwith **TO SHOW CAUSE** why he should not be committed to Civil jail in a suitable remand home for a period not exceeding six months or until such period as may be deemed appropriate for the purpose of purging the contempt. The Warrant of Arrest should be executed and enforced by the Bailiff of this Court and the Officer-In-Charge of the Central Police Station is hereby directed to assist the Bailiff in the **enforcement of the Order** and providing security for the said exercise.

Further Orders/directions shall be given upon execution of the above Order.

Dated and delivered at Nairobi this 29th July, 2004.

MOHAMMED K. IBRAHIM

JUDGE

2.30 P.M.

Ruling was read in the presence of

Mr. Rebello for the Applicant and

Mr. Ngagi Wanjeru for the Respondent having been appointed today.

MOHAMMED K. IBRAHIM

JUDGE

