



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANGA

CONSTITUTIONAL PETITION NO. 18 OF 2020

JOHNSON KIHATO MWATHA.....1ST PETITIONER

JOMWAK ENTERPRISE LIMITED.....2ND PETITIONER

VERSUS

OCS SAGANA POLICE STATION.....1ST RESPONDENT

THE INSPECTOR GENERAL OF POLICE.....2ND RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS.....3RD RESPONDENT

KENYA NATIONAL HIGHWAYS AUTHORITY.....4TH RESPONDENT

ATTORNEY GENERAL.....5TH RESPONDENT

RULING

1. The petitioners' Notice of Motion of 18th November 2020 is two-pronged: For an order of committal to prison of the respondents "and more particularly the OCS Sagana Police Station, the OC Juja Weighbridge Police Station and the Director General, Kenya National Highways Authority". Secondly, and in the alternative for a fine to be paid by the said respondents.

2. The 1st petitioner claims to be the "beneficial owner and legal operator" of motor vehicle registration number KCR 132J (hereafter *the truck*). He is also a director of the 2nd petitioner.

3. The orders sought are for disobedience of an interim order issued by the High Court at Nairobi (*Makau J*) on 10th September 2020 which required unconditional release of the truck and its cargo. In paragraph 4 of the supporting affidavit sworn by the petitioners' counsel, *Gideon Ogude*, it is deposed that the order was served on all respondents "on 27-11-06". I believe the date is erroneous as it is not borne out by the affidavit of service and for the obvious reason that the suit was filed in the year 2020.

4. The genesis of the dispute can be traced to 8th August 2020. The petitioners claim that the truck and its cargo of 400 bags of cement was parked outside the offices of the National Cereals and Produce Board when the respondents, alleged that it was overloaded. They broke in, impounded it and drove it Sagana Police Station. The petitioners aver at paragraphs 5,6,7 and 8 of the main petition that the police solicited a bribe of Kshs 300,000 which they refused to pay.

5. The petitioners aver that despite service with the order, the respondents have adamantly refused to comply. They depose that that the OCS Sagana said he could not release the truck without the express authority of the OC Juja Weighbridge Police Station and the Director General, Kenya National Highways Authority. The petitioners contend that they continue to incur business losses and that the cement has been destroyed by inclement weather.

6. The motion is contested is contested by the 1st to 3rd respondents through a replying affidavit sworn by Sebastian Mutinda, the Senior Assistant Director of Public Prosecutions. At paragraph 7, he insists that an order of contempt should not issue against the 3rd respondent (DPP). But at paragraph 8, he says that he does "not understand why the consent order was not obeyed by the 1st and 2nd respondents". It is not lost on me that he placed himself on record as acting for the 1st to 3rd respondents.

7. The 4th respondent also opposes the application. There is a replying affidavit sworn on 1st March 2021 by *Peter Mundinia*. One of the points taken is that the order of *Makau J* was made pursuant to a consent that excluded the 4th respondent. He contends that the truck cannot

be released because it is an exhibit in criminal proceedings in Gatundu Chief Magistrates court. He also avers that he has never been personally served with the order.

8. The Attorney General did not enter an appearance in the matter.

9. The petitioners filed skeleton submissions and a list of authorities on 5th March 2021. The 1st to 3rd respondents did not file written submissions but their learned counsel, *Mr. Mutinda*, made oral arguments. The 4th respondent filed its submissions on 8th March 2021.

10. On 22nd April 2021 I heard further arguments by all learned counsel for the petitioners and 1st to 4th respondents.

11. The main petition is *pending* for hearing. I thus decline the invitation to comment on the merits of the action at this stage. That will be the true province of the trial court.

12. Section 5 of the **Judicature Act** bestows upon this Court jurisdiction to punish for contempt. The jurisdiction is exercised to protect the dignity of the court. This was succinctly captured by *Odunga J* in **Republic v Kenya School of Law & 2 others ex parte Njoroge & 5 others**, High Court, Nairobi, Misc. Appl. 58 of 2014 [2015] eKLR.

13. An order issued by a court of competent jurisdiction must be obeyed *unless and until that order is varied or discharged*. **Econet Wireless Kenya Ltd v Minister for Information & Communication of Kenya & another** [2005] 1 KLR 828, **Wildlife Lodges Ltd v County Council of Narok & another** [2005] 2 E.A. 344 (HCK).

14. The procedure and conditions for a committal order were well stated in **Christine Wangari Gachege v Elizabeth Wanjiru Evans & 11 others**, Nairobi, Court Appeal Civil Appeal 233 of 2007 [2014] eKLR.

15. The orders of committal to prison fall in the genre of *criminal sanction* and can result in loss of *personal liberty*. It is for that reason that the burden of proof for contempt of an order is slightly higher than a balance of probabilities. It is incumbent for the applicant to prove personal service of the order (together with the notice of penal consequences) on the respondents. See generally **Mutitika v Baharini Farm Limited** [1985] KLR 229 at 234.

16. It is not seriously contested by the respondents that they have *not* complied with the order of *Makau J* of 10th September 2020. Doubt is removed completely because the truck is still being held by the 1st respondent. What the respondents seem to be doing is to try to justify the continued detention of the truck and its cargo. The issue for determination is whether their conduct is in *contempt* of the order; and, whether they should be *punished* for it.

17. There are four main reasons that militate against the grant of the orders sought. Firstly, the record and the annexed order show clearly that it was made pursuant to a *consent* made between the counsel for the petitioners and that of the 3rd respondents. The extracted order confirms in the preamble that counsel for the 1st, 2nd, 4th and 5th respondents were *absent* and *not* parties to it. So much so that it remains doubtful that the consent order was *binding* on those parties.

18. Secondly, the instant motion seeks to punish for contempt the respondents “*and more particularly the OCS Sagana Police Station, the OC Juja Weighbridge Police Station and the Director General, Kenya National Highways Authority*”. The affidavit of service sworn by *Kevin Okeya* states at paragraph 3 that-

I later proceeded to the said Government Offices where I served all the respondents with the said court documents which they received by stamping on all the service copies which I hereby return...duly served.

19. However, the returned copy of the court order contains a number of official stamps of the Kenya National Highways Authority, National Police Service, Kenya Police OCS Juja Weighbridge and Officer in Charge, Sagana Police Station. It is not clear which *particular* individuals were served. Like I said, this is paramount because the orders sought would affect *personal liberty*. It is not lost on me either that *Peter Mundinia*, the Director General of Kenya National Highways Authority deponed that he has never been personally served.

20. Thirdly, the supporting affidavit sworn by the petitioners’ counsel failed to discharge their burden of proof to the required *standard*. Like I stated the standard is slightly above balance of probabilities. It thus behooved the petitioners to prove *personal service* and that the respondents flagrantly breached the order. See **James H. Gitau Mwara v Attorney General & another**, Nairobi HCCC 2892 of 1993 [2018] eKLR. Some of the key elements missing are proper *notice* of the terms of the order and that the cited respondent’s conduct was *deliberate*. A detailed account of the actions taken by the petitioners and of the refusal by the those respondents to comply was critical to the success of the motion.

21. I resist the temptation to comment on the justifications urged by the respondents because the main petition is pending. For the same reasons I decline to delve into the merits of the Traffic Case now pending at Gatundu Chief Magistrates Court *No. WBTR No. 50 of 2020*.

22. Lastly, I am well guided by the words of the Master of the Rolls in **Re Clement** cited with approval in **Re Maria Anne Davies** (1988) 21 QBD 236 on the jurisdiction to punish for contempt-

I have always thought that necessary though it be, it is necessary only in the sense in which extreme measures are sometimes necessary to preserve men’s rights, that is, if no other pertinent remedy can be found. Probably, that will be discovered after consideration to be the true measure of the exercise of the jurisdiction.

23. The upshot is that the petitioners' Notice of Motion dated 18th November 2021 is *disallowed*. Costs shall abide the petition.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MURANG'A THIS 11TH DAY OF MAY 2021.

KANYI KIMONDO

JUDGE

Ruling read in open court in the presence of:

Mr. Odhiambo with him Mr. Karera for the petitioners instructed by Ario & Company Advocates.

Mr. S. Mutinda for the 1st, 2nd and 3rd respondents instructed by the Office of the Director of Public Prosecutions.

No appearance by counsel for the 4th and 5th respondents.

Ms. Dorcas Waichuhi & Ms Susan Waiganjo, Court Assistants.