



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

PETITION NO. E002 OF 2021

HON. JAMES WAHOME NDEGWA.....PETITIONER/APPLICANT

VERSUS

HON ZACHARY MWANGI NJERU.....1ST RESPONDENT/1ST CONTEMNOR

HON.EDINALD WAMBUGU KINGORI.....2ND RESPONDENT/2ND CONTEMNOR

THE COUNTY ASSEMBLY OF NYANDARUA.....3RD RESPONDENT

THE GOVERNMENT PRINTER-GOVERNMENT PRESS.....4TH RESPONDENT

THE INSPECTOR GENERAL OF POLICE.....5TH RESPONDENT

THE HON. ATTORNEY GENERAL.....6TH RESPONDENT

AND

ELIZABETH WANJIKU MUTHUL.....3RD CONTEMNOR

JOHN DUBE KAMURIA.....4TH CONTEMNOR

BENSON LEPARMORIJO.....5TH CONTEMNOR

CONSOLIDATED WITH

CONSTITUTIONAL PETITION NO. E01 OF 2021

AND

IN THE MATTER OF THE PRINCIPLES OF NATURAL JUSTICE

BETWEEN

HON. ZACHARY MWANGI NJERU.....PETITIONER/APPLICANT

VERSUS

HON. JAMES NDEGWA WAHOME.....1ST RESPONDENT

HON. MR. MUKIRI MUCHIRI.....2ND RESPONDENT

AND

THE COUNTY ASSEMBLY OF NYANDARUA.....1ST INTERESTED PARTY

THE COUNTY GOVERNMENT OF NYANDARUA.....2ND INTERESTED PARTY

RULING IN RESPECT TO THE APPLICATIONS DATED 6TH MAY 2021 AND 30TH JUNE 2021.

1. The Petitioner/ applicant filed a **NOTICE OF MOTION** dated **6th May 2021** Under **Sections 1A, 1B, 3A of the Civil Procedure Act and Order 40, Order 51 Rule 1 of the Civil Procedure Rules 2010** and prayed for the following orders

1. Orders No 1 to 5 Spent

6. THAT this Honourable Court be pleased to issue an order directed towards the County Police Commander, Nyandarua County, County Administration Police Commander (Critical Infrastructure Police Unit - C.I-P.U), Nyandarua County and the County Commissioner Nyandarua County compelling them, jointly and individually, to ensure that the Nyandarua County Assembly gates are opened forthwith and unconditionally and that the County Assembly precincts remain accessible to the Applicant herein and the County Assembly members of staff to allow for normal business of the Assembly to resume pending the hearing and determination of the petition.

7. THAT in the alternative to prayer 6 above, and in the event that the persons named above do not comply with the said order, this Honourable Court be pleased to issue an order authorizing the County Assembly of Nyandarua to use necessary force to break into the County Assembly Precincts and/or any part of it thereof and/or carry out any other necessary action to ensure that Nyandarua County Assembly precincts are fully re-opened and operational pending the hearing and determination of the petition.

8. THAT pending the hearing and determination of this petition, this Honourable Court be pleased to issue an order directed towards the 1st Respondent herein compelling him to personally hand over the mace for Nyandarua County Assembly and the Nyandarua County Assembly Speaker's official Motor Vehicle Registration No. 18CG 093A, Toyota Prado - VXL to the Applicant herein and/or the duly appointed Acting Clerk of Nyandarua County Assembly being one GIDEON MUKIRI MUCHIRI forthwith and unconditionally and in any event within 48 hours from the date of this Order.

9. THAT pending the hearing and determination of this petition, this Honourable Court be pleased to issue a temporary order of injunction restraining the Respondents herein jointly and severally whether acting by themselves and/or through their agents, servants, employees and/or persons acting at their behest and/or direction from in any manner whatsoever interfering with the Applicant's performance of his lawful duties and functions as the Speaker, Nyandarua County Assembly.

10. THAT this Honourable Court be pleased to issue summons to the 1st, 2nd, 3rd, 4th and 5th Contemnors herein, being ZACHARY MWANGI NJERU, EDINALD WAMBUGU KINGORI, ELIZABETH WANJIKU MUTHUI, JOHN DUBE KAMURIA and BENSON LEARMORIJJO respectively directing them to appear in court in person and show cause why they should not be held in contempt for failure to comply with the orders of this court issued on 29th of April, 2021.

11. THAT ZACHARY MWANGI NJERU, EDINALD WAMBUGU KINGORI, ELIZABETH WANJIKU MUTHUI, JOHN DUBE KAMURIA and BENSON LEARMORIJJO be cited by this Honourable Court for being in contempt of the Orders of this Honourable Court issued on 29th April, 2021 and they be punished by imprisonment for six (6) months and/or any such period that the court may deem fit.

12. The costs of this Application be borne by the Respondents.

2. This application is premised on the grounds on the face of the record and the supporting affidavit of the petitioner in which he avers;

3. That the contemnors have disobeyed the orders of the court that were issued on the 29th April 2021 which allowed the applicant to continue to discharge his lawful duties as a speaker including being given full access to his chambers and the County Assembly precincts pending hearing and determination of the petition herein. The contemnors have gone against the said orders of the court by denying the petitioner access on 3rd May 2021 and on 4th May 2021 when they unlawfully closed the gates to the County Assembly and the officers manning the gate failed to allow him access without any lawful basis.

4. The petitioner thereafter complained to the OCS, Olkalou Police Station, but he was informed that the gates had been closed by officers from the Critical Infrastructure Police Unit (CIPU) as directed by the County Administration Police Commander (CIPU) Nyandarua County one John Dube Kamuria (4th contemnor) and the County Commissioner Nyandarua County one Benson Leparmorijo (5th contemnor).

5. The petitioner averred that despite numerous calls to the two explaining the orders of the court of 29th April 2021 and despite service of the said orders upon them through their WhatsApp Accounts, they have failed and or refused to authorize their officers to grant the petitioner access and as a result, the petitioner was illegally obstructed from presiding over the sittings of the Nyandarua County Assembly that were scheduled on the 4th of May 2021 at 9.30 am and 2.30 pm. The 1st contemnor colluded with the 4th and 5th contemnors and illegally and/or unlawfully purported to preside over the said sittings and continues to so preside up to now with no indication whatsoever that he intends to comply with the orders of 29th April 2021. Further the 2nd contemnor also purported to table motions on the floor for

debate during the said sittings which were illegally presided over by the 1st contemnor.

6. The petitioner deposed that the 3rd contemnor who has been usurping the powers of the Acting Clerk prepared and /or caused the preparation of the house business and order paper for unlawful sittings of 4th and 5th May 2021, without any authorization from the petitioner who is the substantive speaker and in defiance of the court's order of 29th April 2021. The petitioner averred that the 1st contemnor who is the Deputy Speaker and who was in charge of the Assembly during the pendency of the application dated 11th May 2021 has failed and/or refused to surrender the symbols of the Authority of the Nyandarua County Assembly, including the mace and the Speaker's official Motor Vehicle Registration No. 18 CG 093 A Toyota Prado- VXL which are or ought to be in his official possession and/or that of his staff and/or agents.

7. The petitioner averred that the 1st and 2nd contemnors recorded a video which was shared on social media through the face-book platform vowing that they would never allow the applicant/ petitioner to resume his duties as a speaker regardless of the orders of 29th April 2021, a clear indication that they knew of the existence of the said orders but still continue to act in contempt thereof.

8. The petitioner averred that the actions of the Contemnors complained of herein are unconstitutional, without any legal basis and a direct affront to the rule of law and democratic processes as the Assembly precincts are a public property that should be accessible to all and sundry subject to the necessary security checks and there can never be a justification for their being closed down from his access, Members of the County Assembly, members of the County Assembly Service Board and members of staff, such closure has the effect of bringing the whole operation of the Nyandarua County Assembly to a standstill.

9. The cumulative actions of the Contemnors herein are calculated to ensure that the petitioner does not resume his functions as the Speaker of Nyandarua County Assembly and to defeat the orders of this court of 29 April, 2021 by ensuring that they are rendered ineffective and of no consequence. Hence, this Honourable court has the jurisdiction to evoke its discretionary powers and grant the orders sought herein so as to give full effect to its orders of 29 April, 2021 as orders of the court cannot be seen to be given in vain.

10. Further, it is in great public interest that the orders sought herein be granted in order to safeguard the ability of the Nyandarua County Assembly to successfully carry out its mandates of oversight of the Nyandarua county Executive, which mandate has become impossible to perform, for the greater benefit of the Wanjiku of Nyandarua County.

11. The petitioner averred that the acts of the said ZACHARY MWANGI NJERU, EDINALD WAMBUGU KINGORI, ELIZABETH WANJIKU MUTHUI, JOHN DUBE KAMURIA and BENSON LEPARMORJO the 1st, 2nd, 3rd, 4th and 5th Contemnors respectively are in clear defiance and contempt of the orders of this honorable court of 29th April, 2021 which are fully within their knowledge and have therefore put the integrity and honor of this honorable court into public ridicule and vilification. Therefore, the orders sought are necessary for purposes of protecting the petitioner's fundamental rights and to maintain, enhance and promote the dignity of this honorable court and the rule of law.

12. The 1st contemnor filed a replying affidavit and admitted he was aware of the court's decision of 29th April 2021 and that the said decision was duly respected by the County Assembly and himself. The 1st contemnor averred that the said decision allowed the speaker to be impeached again and so the clerk received a fresh impeachment motion on the 30th day of April 2021 initiated by the 2nd respondent and the same was duly served upon the applicant. However, the applicant has intentionally and mischievously omitted this very crucial fact in a bid to seek the sympathies of this court. The impeachment motion dated the 15th day of December 2020 has been overtaken by events.

13. The 1st contemnor averred that in light of the foregoing, the applicant could not oversee the operations of the County Assembly and was mandated to step aside and await the processing of his impeachment motion in accordance with the principles of leadership and integrity. As such the provisions of Rule 15 of the Nyandarua County Assembly Standing Orders kicked in to allow the Deputy Speaker to preside over the affairs of the County Assembly in absence of the speaker.

14. The 1st contemnor averred that the orders sought by the applicant herein are no longer tenable, having been successfully impeached on the 8th of May 2021 by 31 out of 38 MCAs. The applicant was present during his impeachment motion and cannot feign ignorance of the same and that non-material disclosure disentitles a party the orders they seek. The applicant is no longer the Speaker of the County Assembly of Nyandarua and as such this Honorable Court cannot grant the orders sought.

15. The 1st contemnor averred that there has been a lot of anarchy and chaos surrounding the impeachment of the applicant on diverse dates endangering the lives of the staff and the MCA's thus there was need to beef up security to avert any potential acts of hooliganism which will bring to disrepute the County Assembly of Nyandarua. Peace and tranquility has since been restored and the County Assembly has resumed its normal functions hence, this Honorable Court cannot grant the orders sought.

16. The 1st contemnor averred in regards to the video that was recorded by the contemnors that freedom of speech is guaranteed in the Constitution. He added that instant application is an abuse of the Court process and should be struck out with costs to the 1st contemnor.

17. The application was canvassed by way of written submissions as directed by the court.

Petitioner's Submissions on the application dated 6/5/2021

18. The Petitioner submitted that the powers to punish by this Honourable Court are donated by section 5(1) of the Judicature Act, Section 63 (c) of the Civil Procedure Act and Order 40 Rule 3 of the Civil Procedure Rules. The court in its ruling dated 29th April 2021 granted a temporary injunction staying the execution of the decision to impeach dated 10/2/2021, however the contemnors continue to act as if the

petitioner was impeached and they have refused to pay regard to the said orders.

19. The Court's Jurisdiction to punish for contempt was confirmed in the Court of Appeal case of **Ramadhan Salim v Evans M. Maabi T/A Murhy Auctioneers & Anor (2010) eKLR.**

19. The Petitioner placed reliance on the case of **Katsuri Limited v Kapurchand Depar Shar [2016] eKLR** which provides for the essential elements that must be proved to make a case for civil contempt and submitted that the orders of this court did not require an interpretation for one to comply with them. All the contemnors were aware of the orders, none of them has sworn an affidavit to deny having knowledge of the orders but they have intentionally continued to disobey the orders of 29/4/2021.

20. The Petitioner submitted that the Powers to punish for contempt are vested in Courts to safeguard the rule of Law which is fundamental in the administration of justice. Courts have a duty to ensure that citizens bend to law and not vice versa. The kind of chaos and hooliganism witnessed at the 3rd Respondent is as a result of disobedience of Court orders in all matters pitting the Petitioner and the Contemnors. The Court should stamp its authority to protect its integrity, Supremacy of the Law and administration of justice by ensuring that its orders are obeyed.

21. All the Contemnors hold senior positions in the society which should inform them of the need of obeying court orders, the society at large which looks upon them are likely to follow suit on the disobedience unless a strong message is sent by the Court by punishing the contemnors for the disobedience by imposing a stiff punishment.

3rd Respondent's Submissions

22. The 3rd Respondent submitted that the 1st, 2nd and all the listed contemnors are in contempt of the court orders issued on 29th April 2021. The 1st and 2nd respondents have also blatantly disobeyed several orders that have been issued by this court. The 1st and 2nd Respondents who are working in cohort to remove the Petitioner from office are well aware of the orders of 29th April 2021 and they have even filed a Notice of Appeal and an application dated 30/04/2021 seeking to stay the implementation of the said orders.

23. The 3rd respondent submitted that there was clear, unequivocal and deliberate violation of the orders of the Court by the Contemnors, hence an attack against the dignity and authority of this court. The 3rd respondent urged the court to take a stand and make a decision that would see it that the orders it grants are not taken for granted by the contemnors. Court orders are not recommendations or proposals, and anyone who violates them, should face the consequences clearly indicated in the penal notice. The 3rd respondent submitted that the orders sought should be granted so as to give credibility to enforceability of court orders.

24. The 1st respondent (Hon. Zachary Mwangi Ndegwa) also filed an application dated 30th April 2021 seeking for orders interlia;

i. Spent

ii. That this Honourable Court be pleased to issue a THIRTY (30) DAY stay of execution of the Ruling and order in Nakuru Petition E002 OF 2021 by Honourable Justice Hillary Chemitei made on the 29th day of April 2021 together with all consequential orders thereof pending the hearing and determination of this Application.

iii. There be a stay of proceedings, Ruling and Order of the Honourable Justice Hillary Chemitei made on the 29th day of April 2021 together with all consequential orders pending the hearing and final determination of this Application.

iv. Such other orders be issued by this Honourable Court as may appear just and expedient.

v. Costs of this Application be provided.

25. The application is premised on grounds on the face of the record and the supporting affidavit of the 1st respondent who averred as follows;

26. That the net effect of the order of 29th April 2021 was to reinstate the speaker of the County Assembly of Nyandarua. The reinstatement was done despite him previously barred from exercising his functions as the Speaker of the County Assembly of Nyandarua from 23rd February 2021 till to date.

27. The applicant averred that he has an arguable appeal and so he has filed a Notice of Appeal and are in the process of lodging it's Appeal. He stated that the ruling made a final and definitive termination that the threshold for impeaching the petitioner had not been met at an interlocutory stage and in the absence of interrogation of evidence consequently undermining the substratum of the petition, hence he has a right to be heard.

28. The applicant averred that the Nyandarua County Assembly will become ungovernable owing to the fact that the petitioner had been impeached by a huge majority of twenty-seven (27) members and having been taken through impeachment twice is a clear show of dissatisfaction and loss of confidence in the speaker's regime. He further averred that resumption of normalcy in the operations of the Assembly had resumed and he is apprehensive that the rights of residents of Nyandarua will be adversely prejudiced as they will be deprived their right to see and benefit from a functioning County Assembly.

29. The applicant averred that this court erred in law and fact by ignoring and failing to address the issue that public interest did not tilt in favour of restoring the Petitioner into office despite being raised by the Respondents herein. The petitioner will not suffer any prejudice noting that he has been out of office from the 23rd day of February 2021 till the 29th day of April 2021. The applicant averred that the petition will be rendered nugatory if the orders he is seeking are not granted and prayed that this Honourable court grants him the orders sought.

30. The petitioner/respondent filed a replying affidavit and averred that the application is fatally defective and an abuse of the court process and the same ought to be dismissed with costs. The applicant has not satisfied the conditions of stay and that the application is in breach of the orders of 29th April 2021.

31. The petitioner averred that the applicant proceeded to preside over his illegal impeachment on the 8/5/2021 in a clear violation of the orders of 29/4/2021 and the petitioner has since filed a petition challenging the unlawful impeachment and the court did on 18/5/2021 grant conservatory orders pending trial.

32. The petitioner further averred that the applicant is in breach of the aforesaid orders of 18/5/2021 and he has cited him for contempt of court in Petition No. E008 /2021. In his further affidavit the petitioner/ respondent deponed that the issues for determination and the prayers sought therein are similar as those raised in an application dated 3rd June 2021 filed in Nairobi Court of Appeal Civil Case No. E299 of 2021. Consequently, this court lacks jurisdiction to deal with a matter that is pending determination at the Court of Appeal. In any event, the orders sought in the application dated 30th April 2021 are incapable of being granted as the same have been overtaken by events.

33. The petitioner averred that the applicant herein is not entitled to the Orders sought in the Application dated 30th April 2021, as he continues to be in contempt of the orders of 29th April 2021.

34. The petitioner averred that normalcy at the Assembly can only return if this Honourable Court upholds the orders of 29/4/2021 and ensures strict compliance thereof. The applicant has not demonstrated any injury he himself would suffer if the orders sought are not granted, unlike the County Assembly of Nyandarua which continues to incur heavy costs arising from the numerous suits that have been instituted against it and other expenses that have been incurred by the applicant through fraudulent and highly unnecessary activities and the assembly will continue to suffer irreparably if the orders sought by the applicant herein are granted. He thus prays that the application be dismissed with costs.

Petitioner/respondent's Submissions on the Application dated 30/4/2021

35. The petitioner submitted that the applicant should be denied audience for persistently disobeying the orders of 29th April 2021 as was in the Court of Appeal's case of **Matiangi, the cabinet secretary, Ministry of Interior and Coordination of National Government v Miguna Miguna & 4 others [2018]**. A similar application for stay is pending before the Court of Appeal in CIVIL APPEAL (APPLICATION) NO: E299 OF 2021 AT NAIROBI.

36. In the case of Court of Appeal of Kenya Nairobi Civil Application 254 of 2007, faced with a similar scenario, the court held that;

"On that admission, we are of the view that the application before us is an abuse of the court process, as stated earlier, by pursuing the same remedies in parallel courts which are competent to deal with the application. Such conduct must be deprecated and discouraged. It is for that reason that we order that the Notice of Motion dated 25/10/2007 be and is hereby struck out".

36. The petitioner submitted that the application lacks merit as the principles set out in Order 42 Rule 6 of the Procedure Rules have not been met and that the Order sought to be stayed is a negative Order of stay which is incapable of being stayed. The 1st respondent/applicant has not demonstrated that he stands to suffer substantial loss. As the deputy speaker his functions are as spelt out under Article 178 (b) of the Constitution and they are limited to presiding over the sittings of the assembly in the absence of the speaker. The order of 29/4/2021 shall not in any way stop him from representing his people of Nyakio Ward or performing his statutory duties as the deputy speaker.

37. The applicant has not furnished security noting that if the application is granted, the petitioner shall lose both his position as the speaker and the chairman of the County Assemblies forum. The applicant has thus not met the conditions for stay pending appeal and prays that the application be dismissed with costs.

Issues for determination

38. The court's orders of 29th April 2021 were as follows;

i. There be a temporary injunction and or stay of execution of the 3rd respondent's decision dated 10th February 2021 which impeached the applicant pending the hearing and determination of the petition herein.

ii. This court's orders dated 23rd February 2021 are hereby superseded by this ruling for all intent and purposes.

iii. The costs of this application shall await the outcome of the main petition.

39. The crux of the application dated 6th May 2021 is to cite the 1st to the 5th contemnors for contempt for failing to obey the above stated orders of 29th April 2021. The only question for determination is whether the applicant has established any basis for the orders sought to be

granted.

40. After the nullification of our Contempt of Court Act, we reverted to Section 5 of the Judicature Act as the law under which to punish for contempt of court. The said section provides as follows:

“(1). The High Court and the Court of Appeal shall have the same power 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.”

41. A court order is binding on the party against whom it is addressed and until it is set aside it remains valid and is to be complied with. It is the duty of the court not to condone deliberate disobedience of its orders nor waiver from its responsibility to deal decisively and firmly with contemnors. The court does not, and ought not to be seen to make orders in vain. Otherwise, the court would be exposed to ridicule, and no agency of the constitutional order would then be left in place to serve as a guarantee for legality, and for the rights of all people.

42. In the case of **Samuel M. N. Mweru & Others v National Land Commission & 2 others [2020] eKLR**, the court stated that **“It is an established principle of law that in order to succeed in civil contempt proceedings, the applicant has to prove (i) the terms of the order, (ii) Knowledge of these terms by the Respondent, (iii). Failure by the Respondent to comply with the terms of the order. Upon proof of these requirements the presence of willfulness and bad faith on the part of the Respondent would normally be inferred, but the Respondent could rebut this inference by contrary proof on a balance of probabilities. Perhaps the most comprehensive of the elements of civil contempt was stated by the learned authors of the book Contempt in Modern New Zealand who succinctly stated: - “There are essentially four elements that must be proved to make the case for civil contempt. The applicant must prove to the required standard (in civil contempt cases which is higher than civil cases) that: -**

- (a) the terms of the order (or injunction or undertaking) were clear and unambiguous and were binding on the defendant;**
- (b) the defendant had knowledge of or proper notice of the terms of the order;**
- (c) the defendant has acted in breach of the terms of the order; and**
- (d) the defendant's conduct was deliberate.”**

43. I have looked at the application, the supporting affidavits, the replying affidavits and the submissions filed in this suit and I can confidently say that the respondents/contemnors were aware of the orders of the court of 29th April 2021 since they have acknowledged the same in their replying affidavit dated 17th May 2021. They were also aware that the net effect of the orders of the court of 29th April 2021 was to reinstate the Petitioner/applicant into office pending the hearing and determination of the petitioner’s application. Therefore, it will be proper for the court to state that the orders were clear and unambiguous and binding on the respondents/ contemnors.

44. The applicant contends that the contemnors despite being aware of the orders of the court have blatantly ignored the same and have deliberately breached the said orders by blocking the speaker of the assembly/ applicant herein from accessing the assembly and carry out his lawful duties. The orders of the court were to secure the rights of the speaker who had been unlawfully impeached from being harassed by the respondents until the lawful process of impeachment is followed. However, the speaker/applicant was never even allowed to step at the assembly premises and carry out his duties as per the orders of this court.

45. The 1st contemnor has unlawfully continued to hold himself as the speaker, he convenes and presides over sittings of the County Assembly without the speaker/ applicant’s permission and/or approval and has continued to carry out the functions of the assembly even after the speaker/ applicant was restored to his position by this court’s orders of 29th April 2021 contrary to the law. The contemnors have not disputed the fact that they have willfully disregarded this courts orders of 29th April 2021. The 1st contemnor has even agreed to the existence of a video that was recorded by them vowing that they will never allow the applicant to resume his duties.

46. The applicant has also proved to the required standard that the 1st contemnor in collusion with the 2nd, 3rd, 4th and 5th contemnors willingly decided to disobey the clear court orders of 29th April 2021 and have now purported to impeach the speaker/applicant for a second time.

47. The court’s orders of 29th April 2021 would mean that the applicant would have access to his office, he would be in the payroll, he would be given back his official vehicle, and he would be handed over the mace which is a symbol of authority and finally he would be allowed to carry out his functions as the speaker of the assembly until the time when he would be lawfully removed as the speaker of the County Assembly. However, all this have been ignored by the 1st contemnor who is working in cahoots with the 2nd, 3rd, 4th and 5th contemnors. This therefore shows blatant disregard of the court orders of 29th April 2021 hence warranting the contemnors to be punished for contempt.

48. The court shall shortly make appropriate orders after dealing with the second application.

48. Turning to the application dated 30th April 2021, the 1st respondent in the said application wants this court to issue a 30 days stay of execution of this courts orders of 29th April pending the hearing and determination of this application. It is not clear which application the 1st respondent is alluding to.

49. Be it as it may, assuming that the 1st respondent/applicant's application was for stay of execution pending appeal, then the applicant must meet the threshold for grant of stay of execution pending appeal.

50. Grant of stay of execution pending appeal is provided for under Order 42 Rule 6 of the Civil Procedure Rules, the relevant part of which states as follows:

“(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of in so far as the court appealed from may order but, the Court Appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

(2) No order for stay of execution shall be made under sub rule (1) unless—

(a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and

(b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.

51. An applicant for stay of execution of a decree or order pending appeal is obliged to satisfy the conditions set out in Order 42 Rule 6(2), aforementioned: namely (a) that substantial loss may result to the applicant unless the order is made, (b) that the application has been made without unreasonable delay, and (c) that such security as the court orders for the due performance of such decree or order as may ultimately be binding on the applicant has been given. See **Antoine Ndiaye vs. African Virtual University [2015] eKLR**.

52. The applicant has not demonstrated to this court the kind of loss that he will suffer should this court not grant his prayer of stay of execution pending appeal. In any case the 1st respondent/ applicant is an elected member of Assembly for Nyakio Ward and would remain to be an MCA even if his application for stay of execution is not granted. The applicant is also the deputy speaker and his functions are well spelt out under article 178(b) of the Constitution hence the orders of 29th April 2021 would not affect him in any manner whatsoever. Actually, it is the speaker/ respondent who would continue to suffer loss since the applicant has refused to let go his lawful sit as ordered by this court on 29th April 2021.

53. On whether the application was made without unreasonable delay, the orders of the court were made on the 29th of April and this application was filed on 30th April 2021 hence there was no delay.

54. With regard to security for costs, the court in **Absalom Dova vs. Tarbo Transporters [2013] eKLR**, stated:

“The discretionary relief of stay of execution pending appeal is designed on the basis that no one would be worse off by virtue of an order of the court; as such order does not introduce any disadvantage, but administers the justice that the case deserves. This is in recognition that both parties have rights; the Appellant to his appeal which includes the prospects that the appeal will not be rendered nugatory; and the decree holder to the decree which includes full benefits under the decree. The court in balancing the two competing rights focuses on their reconciliation...”

55. The applicant has not offered any security to safeguard the rights of the respondent since the respondent is likely to lose his sit should the appeal succeed. In any event, the applicant has refused to obey the orders of this court that he is seeking to stay, hence he has come to this court with unclean hands and thus should not be allowed any audience.

CONCLUSION

56. In view of the findings that the contemnors are in breach of the orders of this court dated 29th April 2021, this court allows the application dated 6th May 2021 and makes the following orders;

(a) The County Police Commander Nyandarua County, the County Administrative Police Commander (Critical Infrastructure Unit (CIPU) Nyandarua County, and the County Commissioner Nyandarua County jointly and severally do ensure that the Nyandarua County Assembly gates are opened forthwith and unconditionally and that the County Assembly precincts remain accessible to the applicant herein and the County Assembly members of staff to allow for normal business of the assembly to resume and or continue pending the hearing and determination of the petition herein.

(b) The 1st respondent herein or his agents and or servants do as a matter of priority and within 48 hours from the date herein hand over the mace for Nyandarua County Assembly, and the Nyandarua County Assembly speakers official car registration number 18CG 093A Toyota Prado -VXL to the applicant and or the Acting Clerk Nyandarua County Assembly Gideon Mukiri Muchiri unconditionally.

(c) The 1st, 2nd, 3rd, 4th and 5th contemnors, namely ZACHARY MWANGI NJERU, EDINALD WAMBUGU KINGORI, ELIZABETH WANJIKU MUTHUL, JOHN DUBE KAMURIA AND BENSON LEPARMORIJO are hereby found to be in contempt of the orders issued on the 29th April 2021 and are hereby warned not to disobey the same again and in default

they shall face further precipitate sanctions by this court in their individual capacities.

(d) The application dated 30th April 2021 is hereby dismissed.

(e) The applicant shall have the costs of both applications.

Dated signed and delivered at Nakuru via video link this 22nd day of July 2021.

H. K. CHEMITEI

JUDGE