



**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 KINGOR.....2ND RESPONDENT/2ND CONTEMNOR**

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

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

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

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

**AND**

**ELIZABETH WANJIKU MUTHUI.....3RD CONTEMNOR**

**JOHN DUBE KAMURIA.....4TH CONTEMNOR**

**BENSON LEARMORIJO.....5TH CONTEMNOR**

**CONSOLIDATED WITH**

**CONSTITUTIONAL PETITION NO. E01 OF 2021**

**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**

1. The applicant filed a Notice of Motion dated 27th July 2021 under certificate of urgency seeking for orders interlia;

a) THAT this honorable court be pleased to issue an order directed towards ZACHARY MWANGI NJERU, EDINALD WAMBUGU KINGORI, ELIZABETH WANJIKU MUTHUI, 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 avail and/or produce and handover to the Acting Clerk of the County Assembly of Nyandarua Gideon Mukiri Muchiri, the Keys to all the gates and doors leading to the County Assembly of Nyandarua building and chambers unconditionally and in any event within 24 hours from the date of this orders pending the hearing and determination of this application inter parties.

b) THAT in the event of failure to comply with order (2) above, an order to issue 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 this Application inter parties.

c) 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, BENSON LEPARMORIJO and ZACHARY MWANGI KIMANI respectively directing them to appear in court in person and show cause why they should not be punished for contempt of court for failure to comply with the orders of this court issued on the 22nd July 2021.

d) THAT the 1st, 2nd, 3rd, 4th and 5th Contemnors herein, being ZACHARY MWANGI NJERU, EDINALD WAMBUGU KINGORI, ELIZABETH WANJIKU MUTHUI JOHN DUBE KAMURIA, BENSON LEPARMORIJO and ZACHARY MWANGI KIMANI be sentenced to six (6) months imprisonment or any such period that the court may deem fit for failure to comply with court orders issued by this court on the 22 July 2021.

e) THAT this honorable court be pleased to issue an order directed towards ZACHARY MWANGI NJERU, EDINALD WAMBUGU KINGORI, ELIZABETH WANJIKU MUTHUI, the County Police Commander, Nyandarua County, County Administration Police Commander (Critical Infrastructure Police Unit - C.L.P.U), Nyandarua County and the County Commissioner Nyandarua County compelling them, jointly and individually, to avail and/or produce and handover to the Acting Clerk of the County Assembly of Nyandarua Gideon Mukiri Muchiri, the Keys to all the gates and doors leading to the County Assembly of Nyandarua building and chambers unconditionally and in any event within 24 hours from the date of this orders pending the hearing and determination of the Petition.

f) The costs of this Application be borne by the Respondents.

2. The application is premised on the grounds on the face of the record and the supporting affidavit of James Wahome Ndegwa. In his supporting affidavit the applicant averred that he served upon all the contemnors the orders of this court of **22nd July 2021**, he also wrote all the contemnors a letter dated 22nd July 2021 informing them that he would appear at the Assembly on Monday 26th July 2021 together with Assembly clerk and the 1st contemnor was expected to comply with the court's orders. However, when the applicant sought to access the Assembly on 26th July 2021, they were met by a large contingent of police who were manning the County Assembly compound. They only allowed the applicant access to the Compound but denied him access to County Assembly's building and chambers.

3. It was averred that none of the contemnors appeared at the Assembly and none of the items ordered to be released to the applicant and Clerk of the County Assembly were handed over as directed. The contemnors who are aware of the orders and the ruling of this court of 22nd July 2021 are intent at making comedy of the Court orders thereby greatly eroding public trust, confidence and faith in the judicial system.

4. It was averred that it is only a custodial punishment that can deter the continued contemptuous actions of the contemnors and return public trust, confidence and faith in the judicial system. This Court has already found the contemnors guilty of contempt of court orders of **29th April 2021**, given them a chance to purge the contempt but in vain and it is only reasonable, fair and just that a deterrence punishment be meted out on them. Unless the contemnors are punished as aforesaid, they will continue putting the integrity and honour of this honourable court into public ridicule and vilification.

5. It was averred that the orders sought are necessary for purposes of protecting the rights of the Applicant and to maintain, enhance, and promote the dignity of this honourable court and the rule of law. He prayed that the prayers herein be granted.

6. The 3rd contemnor filed a replied affidavit and stated that the Nyandarua County Assembly has remained open and accessible to all members of the staff. That she wrote a letter to the Deputy Registrar and informed her that the County Assembly was in recess and that sittings would resume after recess, that the official vehicle of the speaker had been remitted for mechanical repairs and as such could not be handed over to the petitioner herein prior to the said mechanical defects being rectified. It was averred that in light of the foresaid there has been no willful disobedience of Court orders.

7. The deponent averred that this application has been brought in bad faith in a bid to delay the just conclusion of this matter noting that the petitioner is the benefactor of orders issued by this court of 29th day of April 2021 which orders lapse upon the final determination of the instant dispute. It was further averred that the reliefs sought herein are resjudicata since they had been dealt with in the application dated the 6th May 2021. This court therefore lacks jurisdiction to grant the reliefs sought.

8. It was averred that the issue regarding the position of the Acting clerk of the County Assembly of Nyandarua is pending before the Employment Court at Nakuru, hence lacks jurisdiction to make definitive orders touching on the position of the Acting Clerk of the County Assembly. In any event this court being a court of law cannot be perceived to be entertaining illegalities such as those prayed for by the petitioner which include but not limited to allowing him to use the necessary force to break into the County Assembly. The application is thus an abuse of the court process and should be struck out with costs to the 3rd contemnor. The 1st contemnor reiterated the sentiments of

the 3rd contemnor in its replying affidavit.

9. The acting secretary to the 2nd interested party also filed a replying affidavit and averred that the petitioner having been impeached by a majority cannot attain the requisite quorum to conduct the business of the Assembly. The courts must be in consonance with the reality on the ground and avoid issuing orders without taking into account the complexities witnessed at the County Assembly. It was further averred that while appreciating that court orders must be obeyed; the petitioner should remember that there is no personal property in a public office. He requested the court to dismiss the application for being an abuse of the court process.

The acting clerk Gideon Mukiri Muchiri swore a replying affidavit on behalf of the 3rd Respondent. He supported the petitioner's application and averred that the 1st respondent's application dated 23rd July 2021 should be dismissed and be jailed for six (6) months. He averred that the contemnors should not be given audience unless they comply with the orders of this court.

10. The 4th contemnor in his replying affidavit stated that the court did not direct him to be present at the mace handing ceremony. That the gates to the assembly are open as they have always been and the applicant and all members of staff have gotten access and are free to enter and leave the County Assembly precincts at their will. He averred that he is not in possession of the keys, the mace and/or the motor vehicle and neither did this court direct him to hand over the same.

11. The 4th contemnor further averred that they are in charge of the security of the County Assembly Premises and their only responsibility is securing the building from invaders and anything that happen in the assembly is beyond their mandate. He prayed that the application be dismissed with costs for failure to establish a proper case against the 4th contemnor.

12. The 5th contemnor in his replying affidavit averred that his duties are only limited to the roles enshrined under the National Government Coordination Act and the Executive Order No.1 of 2018 and handing over of the mace is not one of them. He stated that this court did not order him to preside over the handing over of the mace and that is subject to the directions and instructions of his superior the Regional Commissioner Central Region and not the Hon. Speaker of the Assembly.

13. He further averred that he is a respecter of the rule of law and has not disobeyed any court orders. He averred he is not in possession of the assembly gate keys and he does not control who gets in and out hence the orders sought against him are unfounded. He also stated that he does not command any police officers as they are under the office of the Inspector General which is an independent institution. He stated that the applicant has not proved his case against him to the required standard of proof hence the application should be dismissed with orders as to costs.

14. The 6th contemnor also filed a replying affidavit in opposition of the application and stated that he was not served with the orders of the Court issued on 22nd July 2021. He also averred that he has no authority over the speaker's official motor vehicle, the county assembly's mace or the key hence he cannot handover that which he doesn't possess.

15. The court directed that the matter be disposed by way of written submissions which the parties have complied and the same can be summarized as hereunder.

#### **Petitioner/ Applicant's submissions**

16. The petitioner submitted that the contemnors have continued to disobey this court's orders of 29th April 2021 and 22nd July 2021. Although it has been alleged that the assembly remains open and accessible to all members of staff, no evidence has been exhibited to contradict the evidence by the petitioner showing locked doors and heavy presence of police officers to ensure that there is no forced entry.

17. The 1st respondent continues to perform the functions of the petitioner and to occupy his physical office. The precincts of the assembly have remained closed to date and that is why the 1st respondent gained access to the County Assembly at wee hours of the morning, locked himself with others and presided over a sitting of the Assembly scheduled for 3/8/2021. The petitioner has fought to retain his position since December 2020 and it cannot be true that he is refusing to perform his duties and to enter the assembly after he has succeeded in his quest.

18. It was submitted that the contemnors have no intentions or at all of obeying the Court orders and as clearly stated in the orders of 22nd July 2021, they should face further precipitate sanction of the Court by imprisonment for 6 months without a fine as this is the only way the orders can be obeyed. The petitioner placed reliance in the case of **Miguna Miguna v Fred Matiangi (2018) eKLR** and urged the court to find that it's orders are still being disobeyed and the contempt is continuance and to direct that the keys to the assembly be handed over to the petitioner or the Ag Clerk Gideon Mukiri or they be deposited with the OCS Olkalou Police Station for collection by the petitioner as it is evident that the contemnors have no intentions of personally engaging with the petitioner and the Acting clerk. The petitioner prays that his application dated 27/7 2021 be allowed with costs.

19. The petitioner further submitted that the 1st respondent's application is a waste of judicial time and meant to divert the court's attention from the serious acts of contempt by the contemnors. He placed reliance in the case of **Econet Wireless Kenya Ltd v Minister for info.Comm of Kenya & Ano. (2005) eKLR** where the court held that;

***“the court is obliged to hear the application for committal first before any other matter. This is a general rule which must be applied strictly”.***

20. The petitioner disputed the fact that the motor vehicle is at the garage. The name of the garage has not been disclosed and the only document confirming the position is authored by the 3rd contemnor. The petitioner confirmed having met with the Motor Vehicle on the 22nd July 2021 at Soko Mjinga area along Naivasha/Nairobi Highway and that its usual driver switched off his known telephone contact on the 22/7/2021 after the court's orders were issued. The petitioner submitted that the court did not order that the vehicle has to be in good mechanical condition for it to be handed over. This is just a deliberate attempt to disobey court orders on lame excuses and this has to be

brought to a stop.

### **The Attorney General's written submissions on behalf of the 4th, 5th, and 6th Contemnors.**

21. The AG submitted that the 4th, 5th and 6th contemnors did not breach any of the orders issued by this court on the 22nd day of July 2021 thus the application is unmerited. The AG placed reliance in the case of **Carey v Laiken 2015 SCC 17** which expounded elements of civil contempt of court which must be established and submitted that the orders of the court of 22/7/2021 were clear.

22. It was submitted that the contemnors were required to open the gates to the County Assembly which they did. The role of the 3rd contemnor is only to secure the security of the premises, it does not include opening and closing the chamber or admitting people to the chamber of the County Assembly premises. It was submitted that the orders were to the effect that the 3rd, 4th and 5th contemnors should ensure that the gates remain open, there was no mention of the chamber in the said order. Thus, the applicant has not demonstrated any reason why the 3rd, 4th and 5th respondents should be punished.

23. It was submitted that the applicant has not proved its case to the required standard of proof. There was no disobedience of the court order. Further the AG placed reliance in the case of **Samuel M.N Mweru & others v National Land Commission & 2 others 202 eKLR** and submitted that this application has failed to satisfy the other essential elements of the contempt of court threshold as stipulated in the said case. This is because the applicant has failed to demonstrate that the terms of the order were clear and unambiguous and binding on the contemnors and that their conduct was deliberate.

24. It was submitted that the 3rd contemnor is not in possession of the keys to the County Assembly neither is he in possession to the keys to the County Assembly gates. The allegation that he has refused to surrender the keys is a non-starter. Further, the court did not direct the 3rd respondent to surrender any key or to whom a key should be surrendered to. It was also submitted that the court did not make orders as to the issue of handing over the mace and the speaker's office car neither did it direct the 3rd, 4th, 5th to be physically present at the handing over ceremony.

25. It was submitted that the 4th and 5th contemnors do not work at the County Assembly premises, the gates were opened and the speaker and anyone else who wanted to access the assembly accessed it on 26th July 2021 and other days. The 3rd, 4th and 5th contemnors are offices created by law, the persons who can direct and give them orders as far as their responsibilities are concerned are stated by law. The speaker of Nyandarua County Assembly is not among those persons. Handing over a mace is a political function and the 3rd, 4th and 5th respondents are prohibited from participating in it. Thus, the application has no merit as against the 3rd, 4th and 5th respondents. The prayers sought should therefore be dismissed with costs.

### **3rd respondent's submissions**

26. The 3rd respondent submitted that the 1st respondent and his fellow contemnors are taking the Honorable court for granted. All the orders from this court have never been respected and implemented by the contemnors, until the contemnors comply with the orders of the court, none should be given audience. It was submitted that the contemnors cannot disobey a lawful Court Order unless and until the same is set aside, varied or reviewed. The contemnors can only be compelled to obey the orders of the court by committing them to civil jail.

### **Issues for determination**

27. I have looked at the petitioner's application, the replying affidavits, parties' submissions and the only issue for determination is **whether the contemnors should be punished for contempt of court for failure to comply with the orders of this court issued on the 22nd July 2021.**

28. The contemnors have been in intentional and continuous contempt of all this court's orders and despite them being in contempt they are not even perturbed and they are still approaching this court for more orders and they are doing so with unclean hands.

29. 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."***

30. The petitioner submitted that all the Contemnors were served with this court's Orders of 22nd July 2021. The 6th contemnor contended that he had not been served with the orders of this court, however there is an affidavit of service on record which proves that service was indeed done.

31. In the case of **Basil Criticos v Attorney General & 8 Others [2012] eKLR** wherein Lenaola J ( as he then was ). Held that where a party clearly acts and shows that he had knowledge of a Court Order, the strict requirement that personal service must be proved is rendered unnecessary. It is therefore correct for this court to hold that all the parties had knowledge of the orders of this court of 22nd July 2021 but brazenly failed to obey them.

32. Despite service of the court orders upon the contemnors, the petitioner has asserted that the contemnors only opened the gates to the County assembly but the doors to the Assembly chambers remained locked, the official Motor vehicle and the mace were never handed over as directed by this court. The orders of this court were unequivocal and unambiguous, they were valid but the contemnors blatantly elected to disobey them.

33. The contemnors have contended that the official motor vehicle had been taken to garage, there is no evidence on record to prove that the said motor vehicle had a mechanical problem. In any case if it had any mechanical problem, the same would have been handed over to the speaker with information that the motor vehicle had an issue so that the speaker can take care of the same once he is in possession.

34. The Supreme Court of India decision in the case of **T. N. Cadavarman Thiromulpad [(2006) 5SCC 1]** held: -

***“Disobedience of orders of the court strikes at the very root of rule of law on which the judicial system rests. The rule of law is the foundation of a democratic society. Judiciary is the guardian of the rule of law. If the Judiciary is to perform its duties and functions effectively and remain true to the spirit with which they are sacredly entrusted, the dignity and authority of the courts have to be respected and protected at all costs”***

35. Similarly, In the case of **Miguna Miguna v Fred Matiang’i, Cabinet Secretary Ministry of Interior and Co-ordination of National Government & 8 others [2018] eKLR** the court held;

***36. “Contempt of court is no doubt an affront to judicial authority and therefore is not a remedy chosen by a party but is invoked to uphold the dignity of the court. The Court found that the Respondents herein have no doubt conducted themselves in a most despicable manner not expected in this constitutional era. I reiterate what I said in the earlier ruling that those who disobey Court orders risk being declared by the Court to have breached Article 10 of the Constitution which prescribes national values and principles of governance with the attendant consequences among other appropriate sanctions.***

***In deciding what sanction to mete this Court must reflect on the need to maintain the rule of law and to ensure that the authority and the dignity of our Courts are upheld at all times and to stamp the Court’s authority and uphold the values and principles of governance enshrined in Article 10 of the Constitution. In this case the 1st to 3rd Respondents have not adhered to the oath of office which they took to inter alia protect the Constitution of this country including the national values and principles of governance. To the contrary the manner in they have conducted themselves in these proceedings does not inspire confidence at all.”***

37. It has been clearly shown that the contemnors have no respect for the rule of law and will not comply with the orders of this Court. This Court, like any other Court of law, ought not to make orders in vain. In view of the foregoing reasons, I am satisfied that the contemnors are in contempt of court orders and that the contempt is continuous.

38. The 4<sup>th</sup> 5<sup>th</sup> and 6<sup>th</sup> contemnors seems to suggest in their defence that they did not know the extent of compliance with the courts orders. That they do not control the keys to the assembly and the mace is not in their custody. This court does not buy the same but shall nevertheless grant them another chance. As much as they averred that they do not obtain their orders elsewhere except their bosses it ought to be emphasized that this court has the constitutional mandate to protect the rule of law and to ensure all and sundry obey the same.

39. In the recent South African case of **Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud In The Public Sector Including Organs Of State v Jacob Gedleyihlekisa Zuma & others** the court demonstrated how its orders must be obeyed when it held that;

***“Quantifying Mr Zuma’s egregious conduct is an impossible task. So, I am compelled to ask the question: what will it take for the punishment imposed on Mr Zuma to vindicate this Court’s authority and the rule of law? In other words, the focus must be on what kind of sentence will demonstrate that orders made by a court must be obeyed and, to Mr Zuma, that his contempt and contumacy is rebukeable in the strongest sense. With this in mind then, I order an unsuspended sentence of imprisonment of 15 months. I do so in the knowledge that this cannot properly capture the damage that Mr Zuma has done to the dignity and integrity of the judicial system of a democratic and constitutional nation. He owes this sentence in respect of violating not only this Court, nor even just the sanctity of the Judiciary, but to the nation he once promised to lead and to the Constitution he once vowed to uphold”.***

40. For the foregoing reasons and to ensure that there is law and order this court hereby orders as follows.

**a) Zachary Mwangi Njeru, Edinald Wambugu Kingori and Elizabeth Wanjiku Muthui jointly and severally are hereby found in contempt of the court orders dated 22<sup>nd</sup> July 2021 and are each penalized and ordered to pay kshs. 200,000 personally within 7 days from the date herein and in default to serve two (2) months imprisonment.**

**b) the above 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> contemnors should comply with the orders of this court dated 22<sup>nd</sup> July 2021 immediately and not less than 48 hours from the date herein by handing over the mace and the motor vehicle as directed as well as allowing the applicant free and unhindered access to the assembly and the attendant offices.**

**c) The 4<sup>th</sup> and, 5<sup>th</sup> contemnors should ensure compliance of the above orders by offering adequate security during the above exercise.**

**d) The applicant shall have the costs of this application.**

**DATED SIGNED AND DELIVERED AT NAKURU VIA VIDEO LINK THIS 4TH DAY OF OCTOBER 2021.**

**H K CHEMITEI**

**JUDGE.**