



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 409 OF 2019

IN THE MATTER OF A CONSTITUTIONAL PETITION UNDER ARTICLES 22 AND 258 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF THE BILL OF RIGHTS UNDER ARTICLES 19, 20, 21, 22, AND 23 OF THE CONSTITUTION OF KENYA 2010

AND IN THE MATTER OF THE CONTRAVENTION OF ARTICLES 2(2), 10, 26, 27, 40, 43, 46, 73, 75, 178(2), 194 AND 201 OF THE CONSTITUTION OF KENYA 2010

BETWEEN

JOY FURAHA MRANJA.....PETITIONER

-VERSUS-

BEATRICE KEDEVERESIA ELACHI1ST RESPONDENT/APPLICANT

NAIROBI CITY COUNTY ASEMBLY.....2ND RESPONDENT

NAIROBI CITY COUNTY SERVICE BOARD.....3RD RESPONDENT

THE ACTING SPEAKER, NAIROBI CITY COUNTY ASSEMBLY.....4TH RESPONDENT

THE CLEARK OF THE NAIROBI CITY COUNTY.....5TH RESPONDENT

RULING

1. Before me are three applications which this Court directed that they be heard together being as follows:

- i. Notice of Motion dated 29th October 2019.**
- ii. Notice of Motion dated 30th October 2019**
- iii. Notice of Motion dated 13th November 2019.**

2. On 18th November 2019 upon hearing the Counsel for and upon perusal of the three applications the Court directed the three applications be heard and determined together with their respective submissions within 7 days from the date of service of the responses which were to be filed within 14 days from the mention date being 18/11/2019.

3. I propose in this ruling to be dealing with each application on its own and shall treat the application as applications (a) (b) and (c) as indicated herein above.

A. NOTICE OF MOTION DATED 29TH OCTOBER 2019.

4. The Notice of Motion herein above is brought pursuant to **Rule 25 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013**, Section 1, 1A, 3, 3A, 34 and 63(e) of the Civil Procedure Rules and the Inherent Power of the Court.

5. The 1st Respondent/ Applicant Beatrice Kedeveresa Elachi seeks the following orders:-

1. That the motion be certified as urgent, owing to the urgency, and service thereof on the Respondents be dispensed with in the first instance.

2. That pending the hearing and determination of this application, the execution of any aspect of the "Consent order" herein purportedly dated 25th October 2019, be stayed.

3. That the "Consent Order" herein issued on 25th October 2019 be vacated and entirely set aside.

4. That the purported representation in these proceedings of the 1st Respondent by Musyoki, Mogaka & Co. Advocates be nullified, and any and all process lodged on behalf of the 1st Respondent by the said Musyoki, Mogaka & Co. Advocates together with the purported Notice of Appointment dated 23rd October 2019 be struck out, and expunged from the Court record.

5. THAT the 1st Respondent's advocate on record in this suit be recorded as M/S HARRISON KINYANJUI & CO. ADVOCATES.

6. These proceedings be struck out for want of jurisdiction.

7. Directions do issue on the further conduct of these proceedings.

8. The costs of this motion be to the 1st Respondent/Applicant in any event

6. The Notice of Motion is based on the ground on the face of the application being nos (a) – (y) and further supported by supporting affidavit by Hon. Beatrice Kedeveresa Elachi sworn on 29th October 2019.

7. The Petitioner herein filed a Replying Affidavit sworn on 26/11/2019 just 4 days to filing of the application dated 29th October 2019 referring to some issues raised by the 1st Respondent / Applicant namely:

i. That she did not instruct the firm of Musyoki Mogaka & Company Advocates and/or Mogaka Advocate to enter into any consent in this matter:

ii. That she was never served with the pleadings in this Petition and the Application thereof:

iii. That the consent order was obtained fraudulently and through collusion between me and the firm of Musyoki Mogaka & Company Advocates;

iv. That this Court lacks jurisdiction to entertain the petition as the same should be heard by the Employment and Labour Relations Court.

8. The Petitioner allege that her Advocate informed her the Respondents were served with all the pleadings on 15/10/2016. That on 23rd October 2019 her advocates received Notice of Appointment from the firm of M/s Musyoki Mogaka & Co. Advocates purporting to be acting for the Respondents.

9. The Petitioner in her replying Affidavit has not stated that the Respondents directly or otherwise instructed the firm of M/s Musyoki Mogaka & Co. Advocates.

10. The firm of M/s Musyoki & Mogaka & Co. Advocates did not file a Replying Affidavit to the 1st Respondent's / Applicants application controverting the allegations thereto.

BRIEF FACTS OF THE CASE.

11. On the 6th day of September 2018, the members of the Nairobi City County Assembly impeached the 1st Respondent. On the same day she was impeached, the 1st Respondent moved to the Employment and Labour Relations Court at Nairobi in **Beatrice Kedeveresa Elachi v Nairobi City County Assembly Service Board & another Petition No. 92 of 2018 [2018] eKLR** and got temporary conservatory orders preventing her from vacating her office.

12. It is urged that she as the said Speaker has only visited the precincts of her office twice since she was temporarily reinstated by the

Employment and Labour Relations Court after her impeachment on the 6th day of September, 2019. The said visit however, have been characterized by chaos, pandemonium and disruptions which have been quite harmful to the realization of the fundamental rights under the constitution. It is noteworthy that the said speaker only went to the precincts of her office on the 10th day of September, 2018, shortly after she had been impeached and subsequently reinstated by the Court and on the 9th day of October, 2019, which is a more recent event still fresh in the mind of all and sundry. Both the visits have had the following similarities:

- i. There has been bitter altercation pitting the members of the county assembly who are supporting the 1st Respondent and the majority who still hold fast the position that the said 1st Respondent cannot serve as the speaker of Nairobi City County Assembly;
- ii. There has been untamed disruption of businesses in areas around the City Hall not only inevitably leading to violation of consumer rights as people who intend to shop in areas around the City Hall cannot do so, but also to violation of the rights of entrepreneurs who do business around the City Hall to sell their merchandise;
- iii. The going of the said speaker to the City Hall has been a serious violation of the right to health. The chaos and disruptions that welcome her every time she makes a debut to the City Hall after the impeachment has led to the maiming, dismemberment and grievous injuries upon the lives and health of innocent citizens struggling to eke a living in the ever demanding city of Nairobi. A number of people are in hospital beds nursing serious injuries not only from anti-riot police butts and bullet, but also from barbed wires and metal bars which gore them as they try to escape the sometimes known brutality of our security agencies.

ANALYSIS AND DETERMINATION

13. I have considered the application and the pleadings in support and in opposition as well as rival submissions and from the above the following issues do arise for consideration: -

- i. Who bears the burden of proof in such crisis and what is the standard of proof thereof?**
- ii. Was there any fraud or collusion?**
- iii. Did the 1st Respondent instruct Musyoki Mogaka & Co. Advocates?**
- iv. Was the 1st Respondent properly served?**
- v. Whether this Court has jurisdiction to deal with this matter?**

1. WHO BEARS THE BURDEN OF PROOF IN SUCH CRISIS AND WHAT IS THE STANDARD OF PROOF THEREOF?

14. In the instant Petition the 1st Respondent / Applicant alleges in her supporting affidavit that she did not give any instructions to M/s Musyoki Mogaka & Company Advocates to come on record for her and do prosecute the case on her behalf. It is further her contention that the consent order dated 23rd October 2019 was signed without her authority and instruction. It is on these basis she urges that the same should be expunged from the record. I find that no doubt this is a serious allegation and that should not be taken lightly by any Counsel said to have acted as such. The burden to prove the veracity of such an allegation squarely rests within 1st Respondent / Applicant. On the other hand the standard of proof is above balance of probability and below reasonable doubt. I find that it is not merely enough to allege in her affidavit that she never gave the instruction but she is obligated to bring to court some other material evidence from which a reference can be drawn.

15. In the case of *SM4V ZMS & 3 Others Civil Appeal No. 205 of 2014 [2017] eKLR* the Court of Appeal faced with an almost similar scenario held as follows:

The factors touted for impeaching the consent in this matter were fraud and collusion. It is also alleged that counsel had no authority to enter into the consent. The onus of proving those assertions to the required standard was on the appellant. They are serious imputations bordering on crime and therefore the burden of proof is of necessity slightly higher than on a balance of probability but perhaps not beyond reasonable doubt. An allegation made against an advocate of the High Court that he was involved in fraud or colluded with another advocate or person to subvert the cause of justice in a matter pending in Court is certainly one of utmost gravity. It destroys the advocate's honour and respect. It can undo his entire legal practice and attract censure from his professional body. It cannot merely be flashed or mentioned only to be believed. There must be cogent and truthful evidence of such charges.

16. From the 1st Respondent / Applicant affidavit it is deponed that her Advocate M/s Harrison Kinyanjui upon perusal of the Court file he established that there was Notice of Appointment of Advocate for all Respondents thereof filed by M/s Musyoki Mogka & Co. Advocates (annexture BE 3) with a "letter of consent". The 1st Respondent aver she was shocked as no authority (oral or written) ever emanated from her in these proceedings or indeed any other matter to Musyoki Mogaka & Co. Advocates to defend her in the same or otherwise participate in any aspect herein on behalf of the 1st Respondent. It is further asserted on oath that No meeting or communication of whatever kind has ever passed between her and M/s Musyoki Mogaka & Co. Advocates permitting such purported representation by the aforesaid Advocates in this or any other suit.

17. The 1st Respondent urge that no such Advocate - client relationship has ever subsisted between herself and the said Musyoki Mogaka & Co. Advocates nor did she appoint the advocate to enter into any consent in these proceedings or any other proceedings on her behalf. It is

averred that the advocate acted without instructions and did so on their own motion without even consulting her at all at any stage until she noted from the misguided order dated 25th October 2019 brought to her attention on 29th October 2019. She averred she was never served with any process by the Petitioner and further urged no affidavit of service was filed on her service. She further depones no single correspondence has emanated from M/s Musyoki Mogaka & Co. Advocates to her expressing the status of the proceedings.

18. The 1st Respondent contend that the purported “Consent Order” as purportedly executed between the parties was never lawfully or factually entered into by herself as purported by the self-appointed advocate who never had her instruction or appointment and bearing in mind she was never served with the pleadings hence she terms the “Consent Order” as null and void.

19. The 1st Respondent aver that there was no legal basis upon which the advocates could have acted to compromise the suit as purported. Its her further contention at no time had she sought to compromise these proceedings as alleged in the purported “Consent Order”. It is contended the procedure adopted to “file” the purported “Consent” and the extraction clearly was unprocedural and smacks of a calculated conspiracy to defeat justice.

20. The 1st Respondent/Applicant contend that the Petitioner has no valid constitutional claim as against her and it is totally wrong to have invited the Constitutional Division jurisdiction when this matter dealt with her employment with the Nairobi City County Assembly Service Board hence the matter ought to have been before the Employment and Labour Relations Court and by operation of the constitution.

21. The 1st Respondent aver the Petition is lodged with malice, afterthought as the advocates appearing colluded to secure the “consent order” now impugned ; which the 1st Respondent terms as naked abuse of the Court process that tarnishes the image and constitutional place of the judiciary, which clearly calls for urgent interventions.

22. The court record as submitted by the 1st Respondent reveal that she was never personally served but is alleged service was affected upon Receiving Clerk on behalf of the 1st Respondent, and whose name is not disclosed.

23. The firm of M/s Musyoki Mogaka & Co. Advocates were served with the 1st Respondent’s application which raises serious issues, such as acting without instructions and entering into a consent without authority. This court gave the said firm an opportunity to appear and /or file response but have todate declined so to do for no apparent reason. The counsel who recorded the consent was directed by the Court to summon the 1st Respondent before recording the consent and asked to inform the 1st Respondent, of the consent and asked to inform her to avail herself to record the consent but he insisted he had full instructions to file the consent. I find the failures to file response, failure to file retainership or any instructions note is not without reasons. The inference that can be drawn is clear that the Counsel acted without instructions to the detriment of the 1st Respondent / Applicant who had not instructed the firm of Advocates and who was not aware of the matter.

24. From the contents of the affidavit by the 1st Respondent I find sufficient evidence to show that the 1st Respondent never retained or instructed the firm of M/s Musyoki Mogaka & Co. Advocates to represent her or act for her or enter into any consent as the said firm stated in this matter. The said firm of Advocates acted on their own volition as they were never appointed or instructed to represent the 1st Respondent in this matter. There is no single document on record presented by any party in this matter showing that 1st Respondent had indeed appointed the firm of Advocates of M/s Musyoki Mogaka & Co. Advocates to represent the 1st Respondent. I find the 1st Respondent has adduced sufficient evidence to impeach credibility of the document filed by the firm of M/s Musyoki Mogaka & Company Advocates.

ii. WAS THERE ANY FRAUD OR COLLUSION?

25. It is urged by the Petitioner that there is nothing adduced by the 1st Respondent to support her case and in the supporting Affidavit it is averred there is nothing to show fault on the part of the Petitioner. It is urged that in any case the law demands that where there is a claim of fraud, the particulars thereof must be set out in the case. It is urged the particulars of fraud are not set out to enable the court to evaluate who is to blame. It is urged there is no evidence of collusion involving the Petitioner or her advocates on record.

26. The 1st Respondent contention is that M/s Musyoki Mogaka & Co. Advocates in purporting to represent the 1st Respondent did so at their own motive without ever clearing with the 1st Respondent at all at any one stage. The Petitioner on the other hand did not serve the 1st Respondent with the Petition and it is averred that no affidavit of service was filed by any licensed process server. That the consent order was entered into without knowledge of the 1st Respondent. It is further averred that the consent order was in total disregard of the accepted and laid down practice and procedure that such as where a “Consent” is to be recorded it must of necessity involve parties for confirmation formally and reading whatever terms of consent are purportedly entered into and for parties respective advocates to append their respective signatures thereto to the court file.

27. In the instant Petition the Petitioner’s Advocate and the firm of M/s Musyoki Mogaka & Company Advocates have not shown that the consent order obtained was in accordance with public policy. Further M/s Musyoki Mogaka & Co. Advocates have not countered the 1st Respondents averments in her affidavit and more specifically that the consent order was unlawful for want of instruction. Secondly, the Petitioner has not demonstrated service of the pleadings upon the 1st Respondent. I therefore find the consent order was not lawfully obtained for the reasons disclosed herein above.

iii. DID THE 1ST RESPONDENT INSTRUCT MUSYOKI MOGAKA & CO. ADVOCATES?

28. The 1st Respondent contention is that at no time did she ever instruct M/s Musyoki Mogaka & Company Advocates to act for her in these proceedings, though the said firm did file notice of appointment of Advocates in this matter.

29. When the 1st Applicant raised the issue of having not instructed the Advocates and having the application served, no response and no submissions was filed controverting the averments in her affidavit. Nor did M/s Musyoki Mogaka & Co. Advocates bother to file any documents to controvert the 1st Respondents averments.

30. Having considered the 1st Respondent's application which is unopposed by the said firm of Advocates, I find no evidence of the said firm having been instructed to act for the 1st Respondent as her advocates or as agent of the 1st Respondent but it acted on its own volition in filing a Notice of Appointment of Advocate. When a dispute arises in case where an advocate is alleging to have been instructed, the advocate is required to file an Instruction Note or retainership agreement or any documentation duly executed by the purported instructing client showing she / he gave instructions. From the evidence on record I find that the 1st Respondent has demonstrated that she had never instructed the firm of M/s Musyoki Mogaka & Co. Advocates to act for her.

iv. WAS THE 1ST RESPONDENT PROPERLY SERVED?

31. The Petitioner contention is that the 1st Respondent was duly served. The Petitioner rely on his Replying Affidavit dated 26th November 2019, and in particular annexure "SA 2A" Affidavits of Service by Dickson Kariuki sworn on 22/10/2019. Its relevant paragraph is paragraph 7.

32. The 1st Respondent has denied ever having been served with the pleadings in this matter. According to Dickson Kariuki, a certified Court Process Server he stated:-

"That at the same time I proceed to the office of the applicant at Nairobi City County Assembly and still served the same pleadings on their receiving Clerk who also acknowledged service on behalf of the 1st Respondent by appending his signature, time and their stamp on my return copy."

33. *Order 5 Rule 8 of the Civil Procedure Rules* sets out what a proper affidavit of service should contain. It is provided as follows:-

"Wherever it is practicable service shall be made on the defendant in person unless he has an agent empowered to accept service in which case service on the agent shall be sufficient."

34. In the Affidavit of service by Dickson Kariuki dated 22/10/2019, he has not stated the date of service, the actual place of service or where the office of the speaker is situated at Nairobi City County, the name of the receiving clerk, how he identified himself as regards his relationship to the Appellant or whether he had known him before and whether he had authority to receive summons on behalf of the 1st Respondent, or who identified him to him. The time of service is not indicated nor is there pleading attached to the affidavit. Service annexure "SA 2A" is not duly stamped with official stamp as alleged by Dickson Kariuki.

35. In view of the glaring deficiencies in the Affidavit of service of Dickson Kariuki of 22/10/2019 I find that the Petitioner has failed to demonstrate proper service or any service at all upon, the 1st Respondent. I accordingly find that the 1st Respondent was not duly served with the pleadings as purported by the Process Server. Furthermore it should be noted the 1st Respondent has been sued as an individual and not as a Speaker or representative of Nairobi City County Assembly and that called for personal service and not otherwise.

v. WHETHER THIS COURT HAS JURISDICTION TO DEAL WITH THIS MATTER?

36. It is an issue for consideration in this matter whether this court has jurisdiction to hear and determine this matter. It remains a good law that jurisdiction is everything and without it the court must down its tools (see *Owners of Motor Vessel Lillian "S" v Caltex Oil (Kenya) Limited*).

37. The Petitioner in the Petition under prayers (a) to (e) prays for the following reliefs: -

i. A declaration be and is hereby issued that the 4th Respondent is at fault for failing to declare the seat of the Speaker of Nairobi County Assembly vacant in line with Article 194(1) (b) of the Constitution of Kenya;

ii. An order of permanent injunction be and is hereby issued against the 1st Respondent, restraining her either by herself or through proxies from going, interfering, or in any manner being involved in the affairs of the Nairobi City County Assembly until this Petition is heard and determined;

iii. An order of permanent injunction be and is hereby issued against the 3rd and the 4th Respondents, whoever is relevant, prohibiting them from making payments to 1st Respondent that would be over and above what she genuinely worked for and that the computation of the said payment be presented in Court;

iv. And order be issued by the Honourable Court directing that the current Acting speaker elected pursuant to Article 178(2)(b) of the Constitution to continue presiding over the business of Nairobi City County Assembly until the Petition field herewith is heard and determined;

v. The cost of this Petition be provided.

38. From the issues raised in the Petition as captured herein above, they effect or relate to 1st Respondent's employment and are purely not constitutional issues but they are matters related for ELRC Court.

39. Article 162 (2) and (3) of the Constitution provides:-

“ 162. System of courts -

(2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—

(a) employment and labour relations; and

(b) the environment and the use and occupation of, and title to, land

(3) Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2).”

40. The Parliament established Employment Labour Relations Court Act which deals with matters of employment and Labour Relations. The present Petition as filed is dealing with a matter of Employment and Labour Relations. Indeed from perusal of the Petitioner's claim, it is clear that the claim indicate that it relates to 1st Respondent's Employment with the Nairobi City county Assembly service Board hence the proper forum is ELRC and not Constitutional Division. The 1st Respondent has attached a ruling in a matter before ELRC being *ELR Petition No. 194 of 2019* relating to her discharge of her duties as a Speaker of the Nairobi City County Assembly and indeed the employment and Labour Relations Court has assumed jurisdiction. The same matter is similar to the present Petition.

41. In view of the above I am satisfied that this court lacks jurisdiction to hear and determine this Petition as it is a matter for the Employment and Labour Relations Court.

42. To the extent of my findings, I find that 1st Respondent's Notice of Motion dated 29th October 2019 is meritorious and the same ought to be allowed.

B. NOTICE OF MOTION DATED 30TH OCTOBER 2019

43. The Notice of Motion by the Petitioner herein is brought pursuant to *Section 5(1) of the Judicature Act (Cap 8) Laws of Kenya, Order 52 Rule 2(2) of the Rules of the Supreme Court of England 1965, Section 3A of the Civil Procedure Act (Cap 21) Laws of Kenya* and all other Enabling Provisions of the Law seeking the following orders:

i. THAT this Honourable Court be pleased to order that the 1st Respondent herein be and is hereby committed to Civil jail for contempt for such a period as this Honourable Court may deem fit and just for disobedience of the order of this Court issued on the 25th day of October, 2019 by Hon. Mr. Justice J. Makau sitting in the High Court of Kenya at Nairobi in the constitutional Petition Number 409 of 2019;

ii. THAT the 1st Respondent be and is hereby condemned to pay the cost of this application.

44. The application is based on the following grounds on the face of the application being (a) – (j) and further on the supporting affidavit by Joy Furaha Muranja sworn on 30th October 2019.

45. The 1st Respondent is opposed to the application and in doing so filed Notice of Preliminary Objection setting out the following grounds:-

1. The Application is fatally defective as it offends the demands of Section 5(1) of the Judicature Act to lodge an Application Notice, not a Notice of Motion, which procedure is underscored in the Court of appeal holding in CHRISINE WANGARI GACHEGE vs. Elizabeth wanjiru Evans & 11 Others [2014] eKLR.

2. Notwithstanding Objection No.1 above, the mandatory prescription of Part 81 of the English Civil Procedure Rules to serve the application on the Crown Office (equivalent of our Hon. Attorney general) and enjoin him in the proceedings has not been met.

3. The demands of personal service on the 1st Respondent of

i. The order alleged to be contemned;

ii. The application itself for “contempt of court” have not been met.

4. There is no Affidavit of Service of a Licensed Process Server in proof of compliance with Rule 81.1(1) of the English Civil Procedure Rules evidencing personal service of the Order allegedly contemned on the 1st Respondent.

5. No leave of the Court was sought by the Petitioner in accordance with Rule 81.1(1) of the English Civil Procedure Rules

waiving such personal service of the Motion and order allegedly contemned on the 1st Respondent.

46. From the 1st Respondent's preliminary objection the following issues arise for consideration.

i. Whether the Applicant /Petitioner followed the Rules of Procedure in filing the application for contempt?

ii. Whether the 1st Respondent was properly served with order of this Honourable Court dated 25th October 2019 and whether the order was brought to her attention.

iii. Whether the 1st Respondent disregarded the order dated 25th October 2019.

iv. What order should the court make?

i. WHETHER THE APPLICANT /PETITIONER FOLLOWED THE RULES OF PROCEDURE IN FILING THE APPLICATION FOR CONTEMPT?

47. The 1st Respondent urge that the application is fatally defective as it offends Section 5(1) of the Judicature Act by failing to lodge an Application Notice but not a Notice of Motion, which procedure is underscored in the Court of Appeal holding in Christine Wangari Gachaga V Elizabeth Wanjiru Evans & 11 others [2014] eKLR.

It is further urged that notwithstanding the above objection, the mandatory prescription of Part 81 of the English Civil Procedure Rules to serve the application on the Crown office (equivalent of our Attorney General) and enjoin him in the proceedings has to be complied with and has however not been met.

48. The preliminary objection is brought on the backyard of the following 3 key issues namely: -

i. The fact that the contempt of Courts Act was declared unconstitutional.

ii. The fact that the law of contempt reverted back to the application of common law.

iii. The fact that certain aspects of contempt of court are dealt with under the Civil Procedure Act and Civil Procedure Rules.

49. In the *Kenya Human Rights Commission v. Attorney General & another Constitutional Petition No. 87 of 2017 [2018] eKLR* Hon. Justice E. C. Mwita declared the contempt of Courts Act unconstitutional. This clearly means accordingly proceedings on contempt of Court reverted to the regime of Law that was in operation before the enactment of the said Contempt of Courts Act, thus, the common law approach and the statutory approach for those instances where the statutory law provided guidance. One such statutory approach is provided for under Section 63 (c) of the Civil Procedure Act and Order 40 Rule (3) of the Civil Procedure Rules.

“Section 63 (c) of the Court Procedure Act – provides :- “In order to prevent the ends of justice from being defeated, the court may, if it is so prescribed—

(c) grant a temporary injunction and in case of disobedience commit the person guilty thereof to prison and order that his property be attached and sold”

“ [Order 40, rule 3 of the Civil Procedure Rules provides: - “3. (1) In cases of disobedience, or of breach of any such terms, the court granting an injunction may order the property of the person guilty of such disobedience or breach to be attached, and may also order such person to be detained in prison for a term not exceeding six months unless in the meantime the court directs his release.”

50. The above-mentioned provisions are specific as opposed to *Section 5 of the judicature Act* which is a general provision for dealing with contempt of court.

51. It is clear from the provision of Civil Procedure Act and Civil Procedure Rules that in case of injunction the court should punish for contempt in respect of disobedience of its orders pursuant to *Section 63(c) of the Civil Procedure Act* and *Order 40 Rule 3(a) of the Procedure Rules* and not in accordance with *Section 5 of the Judicature Act* and *Order 52 Rule 2(2) of the Rules of the Supreme Court of England 1965*. This was indeed the position taken in the case of *African Management Communication International Limited Vs Joseph Mathenge Mugo & another Civil CA No. 242 of 2013 [2013] eKLR*.

52. In the instant Petition, the order alleged to have been disregarded was issued by this Court. It was an injunctive order. The relevant law as regards the contempt herein, I find is under *Section 63(c) of the Civil Procedure Act* and *Order 40 Rule 3(1) of the Civil Procedure Rules* and not the provisions outlined by the 1st Respondent under grounds nos 1 and 2 of her preliminary objections. I find the borrowing by the Counsel on Common Law regarding this matter not relevant at all. Part 81 of the English Civil Procedure Rules does not apply here. Similarly, the 1st Respondent is an employee in the Nairobi City County Assembly and therefore the services of the Attorney General in a matter as this one are not available to the 1st Respondent.

53. The decision relied upon by the 1st Respondent in support of ground no. 9 of her objection in reference to the case of *Christine Wangari*

Gachege V Elizabeth Wanjiru Evans & 11 Others Civil Application No.233 of 2007 [2014] eKLR is clearly distinguishable as the impugned orders thereon were not injunctive orders as is the case in this instant Petition and which is subject to punishment by the court under provisions of Civil Procedure Act and Civil Procedure Rules. I find the present application is proper as drawn and filed.

ii. WHETHER THE 1ST RESPONDENT WAS PROPERLY SERVED WITH ORDER OF THIS HONOURABLE COURT DATED 25TH OCTOBER 2019 AND WHETHER THE ORDER WAS BROUGHT TO HER ATTENTION.

54. The Petitioner as regard service of the Courts order rely on Affidavit of Service by Dickson Kariuki sworn on 28th October 2019. It is stated under paragraphs 4 and 5 the consent order was served upon M/s Musyoki Mogaka & Company Advocates on 25th October 2019 who accepted service and acknowledged receipt by signing and appending their official stamp.

55. The 1st Respondent denies service. The Petitioner have contended that the service was upon M/s Musyoki Mogaka & Co. Advocates. There is no evidence of personal service on the 1st Respondent with the alleged court order, the contemnor nor personal service of the application itself for "contempt of Court". Further no evidence has been tendered demonstrating the 1st Respondent had personal knowledge of the Court's order or the advocates had communicated to the 1st Respondent.

56. Further to the above the Advocates served were acting on their own volition as the 1st Respondent had not instructed them. They cannot therefore be taken as agents of the 1st Respondent. In an application for contempt personal service of the order alleged to have been disobeyed is important and in absence of service the court would find it hard to punish a party unless it is proved there was personal service or knowledge of the order. This has not been proved. I find the 1st Respondent was not served with the court's order nor did she have knowledge of the order.

iii. WHETHER THE 1ST RESPONDENT DISREGARDED THE ORDER DATED 25TH OCTOBER 2019.

57. The Petitioner have not proved service of the Court's Order nor has it been demonstrated the 1st Respondent had knowledge of the Court's Order and disregarded the same. In view of this I find that 1st Respondent could not disregard the order of 25th October 2019 having no knowledge of the same and not having been served.

vi. WHAT ORDER SHOULD THE COURT MAKE?

58. Having considered the Preliminary Objection and rival arguments I find the preliminary objections to be meritorious, as discussed under Notice of Motion dated 29th October 2019, I find the consent Order dated 25th November 2019 was not properly obtained, as the Counsel purported to represent the 1st Respondent was not duly appointed and instructed by the 1st Respondent but acted on his own volition. I find the consent order was not duly served to an authorized agent of the 1st Respondent but a firm of Advocates M/s Musyoki Mogaka & Co. Advocates who were not duly instructed by the 1st Respondent. The 1st Respondent was not notified of the same even though it was served upon Advocates who were not duly instructed by 1st Respondent. I find that the 1st Respondent is not a valid contemnor in this matter.

C. NOTICE OF MOTION DATED 13TH NOVEMBER 2019.

59. The firm of M/s Musyoki Mogaka and Company Advocates through a Notice of Motion dated 13th November 2019 prays for the following orders:-

i. THAT this Honourable Court be pleased to grant leave to the Respondents Advocates, namely Messrs Musyoki Mogaka and Co. Advocates, to cease acting in the matter.

ii. THAT the Honourable Court be pleased to issue such orders as ay be fair and just to secure the parties Rights to a fair and just trial.

iii. THAT costs be in the cause.

60. The application is based on the following grounds on the face of the sober.

i. THAT the Applicant did receive formal instructions to act in the matter which instructions were dated 22nd October, 2019.

ii. THAT the Respondent Advocate Applicant has received no further instructions on how to engage in the matter since that date.

iii. THAT the Respondents Advocate Applicant did write a letter to the Respondents dated and served 31st October, 2019, communicating their wish to cease acting in the said matter.

iv. THAT since issuing the said letter, the Respondents have not made any further overtures, nor has a Notice of Change of Advocates been served upon the Respondents Advocate.

v. THAT in the circumstances, the Applicant herein having received no further instructions cannot continue to act on behalf of the Respondents in this matter and wishes to be taken off the record.

vi. THAT any further representation by the Applicant on behalf of the Respondents herein would prejudice the Respondents' case going forward.

61. The application is supported by the Applicant's affidavit deposed upon by Mr. Stephen Musyoki Mogaka. The Advocate aver that instructions were given to act for the Respondents through a letter dated 22/10/2019, issued by the 5th Respondent (SMM1). That therefore no instructions were given directly by the 1st Respondent. That through a letter dated 31st October 2019 to the 5th Respondent the firm of the Advocates intimidated of their intention to cease acting no response was made back to the firm of Advocates.

62. The firm of M/s Musyoki Mogaka & Co. Advocates filed Notice of Appointment of Advocates on 23rd October 2019 to act for all the Respondents on the strength of a letter by 5th Respondent dated 22nd October 2019. There is no evidence that the 1st Respondent who denies having authorized the firm of Advocates to represent her was aware of the instructions by the 5th Respondent nor is there any evidence that she made such authorization. In view of this I am satisfied there is no evidence that the 1st Respondent acquiesced to the instructions by the 5th Respondent to the firm of Musyoki Mogaka & Co. Advocates.

63. It is from the 1st Respondent's contention that she appointed M/s Harrison Kinyanjui & Co. Advocates to represent her in this matter and who on 29th October 2019 filed Notice of Appointment of Advocates to represent the 1st Respondent.

64. In view of the aforesaid I find that M/s Musyoki Mogaka & Co. Advocates had no instructions from the 1st Respondent to act for her and did act without her authorization. The notice of Appointment filed to represent the Respondents is general as it should have indicated either acting for 1st, 2nd, 3rd, 4th and 5th Respondents but not Respondents when all respondents had not written to instruct them. I therefore find and hold that 1st Respondent was not amongst the Respondents the advocates were acting for.

65. I find that the other Respondents did not raise any objection to the application by M/s Musyoki Mogaka & Co. Advocates from ceasing to act for them. I find that the application ought to be allowed as against the 2nd, 3rd, 4th and 5th Respondents.

66. The upshot is that the Application dated 29th October 2019 succeeds Application dated 30th October 2019 fails and application dated 13th November 2019 partly succeeds.

67. I proceed to make the following orders:-

a. Notice of Motion dated 29th October 2019 is allowed in the following terms:-

i. The "Consent Order" herein issued on 25th October 2019 be and is hereby vacated and entirely set aside.

ii. The purported representation in these proceedings of the 1st Respondent by M/s Musyoki Mogaka & Co. Advocates be and is hereby nullified, and any and all processes lodged on behalf of the 1st Respondent by the said M/s Musyoki, Mogaka & Co. Advocates together with the present Notice of Appointment dated 23rd October 2019 be and is hereby struck out and expunged from the Court record.

iii. That the 1st Respondent Advocates on record in this suit be and is hereby recorded as M/s Harrison Kinyanjui & Co. Advocates.

iv. These proceedings are struck out for want of jurisdiction.

v. The costs of this motion is awarded to the 1st Respondent.

b. Notice of Motion dated 30th November 2019 is without merits and the same is dismissed with costs to the 1st Respondent.

c. Notice of Motion dated 13th November 2019 is allowed but as the 1st Respondent had not instructed M/s Musyoki Mogaka & Co. Advocates is awarded costs to the application.

Dated, Signed and Delivered at Nairobi on this 21st day of May, 2020.

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J. A. MAKAU

JUDGE