



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT KISII

MISC. APP. NO. 6 OF 2017

IN THE MATTER OF CONTEMPT OF COURT ACT, NO. 46 OF 2016

AND

IN THE MATTER OF SECTION 148(2) OF THE PUBLIC FINANCE MANAGEMENT ACT (NO. 18 OF 2012)

AND

IN THE MATTER OF ISSUANCE OF SHOW CAUSE NOTICE BY THE COURT UNDER SECTION 30(1) OF THE CONTEMPT OF COURT ACT (NO. 46 OF 2016)

AND

IN THE MATTER OF ARTICLE 179 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF CONTEMPT OF COURT BY COUNTY GOVERNMENT OF KISII

BETWEEN

DR. J.A.S KUMENDA1ST APPLICANT

FLORENCE W. GATUNE..... 2ND APPLICANT

AND

THE GOVERNOR (COUNTY GOVERNMENT OF KISII)1ST RESPONDENT

THE EXECUTIVE COMMITTEE MEMBER (FINANCE)2ND RESPONDENT

**THE EXECUTIVE COMMITTEE MEMBER (LANDS, HOUSING ,
PHYSICAL PLANNING & URBAN DEVELOPMENT).....3RD RESPONDENT**

**THE EXECUTIVE COMMITTEE MEMBER (ENERGY, WATER,
ENVIRONMENT & NATURAL RESOURCES).....4TH RESPONDENT**

**THE EXECUTIVE COMMITTEE MEMBER
(HEALTH SERVICES).....5TH RESPONDENT**

THE COUNTY GOVERNMENT OF KISII6TH RESPONDENT

RULING

1. The applicants in the instant application were the ex parte applicants in Kisii ELC Misc. Civil Application No. 3 of 2013 (JR) where the court issued orders of certiorari and prohibition quashing the decision of Kisii Municipal Council (now Kisii County government) barring them (applicants) from continuing effecting developments of land parcel number **Kisii Municipality/Block III/301**. The County Government was also prohibited from using the said property as a garbage dumping site. The decision of the court in the Judicial Review matter was duly conveyed to the respondents herein leading them to enter into a consent order with the applicants dated 13th December 2016 whereby the County Government agreed to fully relocate the garbage dump site from the applicants land parcel **Kisii Municipality/Block III/301** by 31st December 2016. The respondents did not abide with the judgment of the court in the judicial review application and neither did they comply with the terms of the order entered by consent which has now precipitated these proceedings.

2. In the present application brought under Sections 4(1), 5(b) and 30(1) and (2) of the Contempt of Court Act No. 46 of 2016 and Section 148 (2) of the Public Finance Act No. 18 of 2012 and Article 179 of the Constitution and Sections 1A, 1B and 3A of the Civil Procedure Act the applicants seek inter alia an order that:

“The Honourable Court be pleased to direct the Deputy Registrar to serve Notice to show Cause upon the 1st – 5th respondents of not less than 30 days, requiring personal attendance before the court on such a date as the court shall deem fit and expedient, requiring the 1st – 5th respondents to show cause why contempt of court proceedings should not be commenced against the same as stipulated under Section 30(1) and (2) of the Contempt of Court Act (No. 46 of 2016).”

3. The application is supported on the grounds set out on the face of the application and the affidavit sworn in support by Dr. J. S Kumenda the 1st applicant herein. The applicant’s contention is that the respondents have deliberately and willfully and with impunity disobeyed a lawful court order made on 13th December 2016 and issued on the 17th January 2017 in contravention of Section 4 of the Contempt of Court Act No. 46 of 2016. The applicant avers that the order was served and the respondents were well aware and had knowledge of the court order yet they defiantly disobeyed the same with impunity and continue to engage in acts of breaches and disobedience of the court and are therefore contemptuous of the court. The applicant contends that the 1st - 5th respondents are administrators of the 6th respondent and that in accordance with Section 148 (2) of the Public Finance Management Act (Act No. 18 of 2012) are deemed accounting officers or administrators who under Section 30(1) and (2) of the Contempt of Court Act would require to be served with a Notice to Show Cause why contempt proceedings should not be commenced against them.

4. Mr. Kennedy Chweya Onsembe filed a Notice of Appointment of advocate on 26th May 2017 for all the respondents and on 16th October 2017 filed a Notice of Preliminary Objection dated 15th October 2017 against the applicants ex parte Notice of Motion dated 11th May 2017 and the Notice to Show Cause dated 18th July 2017. He set out the following grounds in support of the preliminary objection.

1. The 1st, 2nd, 3rd, 4th and 5th respondents cited for contempt are not the accounting officers of the 6th respondent within the meaning of Section 30(1) of the Contempt of Court Act, 2016.

2. The 1st, 2nd, 3rd, 4th and 5th respondents cited for contempt are not accounting officers within the meaning of the Public Finance Management Act, No. 18 of 2012 and the Regulations made thereunder.

3. The action is time barred under section 34 of the Contempt of Court Act as it was brought to court after six (6) months from the date on which the Contempt of Court is alleged to have been committed.

4. The proceedings herein are not in compliance with Section 34 of the Contempt of Court Act 2016 as and takes away the respondents right under Article 47 and 50 of the Constitution.

5. The 1st, 2nd, 3rd, 4th and 5th respondents were not party to Misc. Application No. 3 of 2013 (JR) and so cannot be made party to the current proceedings.

6. The notice to show cause dated 18th July 2017 is bad in law and not in tandem with the order sought and granted on the application dated 11th May 2017.

7. The applicants be disallowed to use correspondences on a “without prejudice” basis and the same be expunged from the court records being annexures/exhibits JSK 2 (a), (b), (c), (d), (e), (f), (g), (h).

5. The court on 29th May 2017 after reviewing the applicant’s ex parte Notice of Motion dated 10th May 2017 authorized the service upon the respondents of Notices to Show Cause under Section 30(1) of the Contempt of Court Act and fixed the hearing of the Notice to Show Cause on 12th July 2017. As there was no record of service of the Notice to Show Cause on the respondents, the court adjourned the same for hearing on 19th October 2017 when Onsembe advocate appeared and stated he had filed a preliminary objection and sought directions on its disposal.

6. As the preliminary objection challenged the competency of the applicants’ application, the court directed the preliminary objection be disposed of first. The parties were directed to canvass the preliminary objection by way of written submissions. Mr. Onsembe advocate filed his submissions on 20th December 2017 while the applicants’ submissions in response thereof were filed on 5th February 2018.

7. Mr. Onsembe advocate in his filed submissions contended that the 1st to 5th respondents were not accounting officers of the 6th respondent as contemplated under Section 30(1) of the Contempt of Court Act, 2016 so as to be liable for contempt. He submitted the 1st to 5th respondents were the Governor and the Executive Committee Members respectively and their duties and functions are specifically set out under Section 30 of the County Government Act, 2012. The Governor, he further submitted, is not designated as an accounting officer either

under the County Government Act or the Constitution and thus he could not be properly cited for Contempt of Court. Mr. Onsembe further submitted, the Public Finance Management Act, 2012 provides under Section 148 how the accounting officers of a County Government are designated and does not constitute the respondents as accounting officers.

8. Mr. Onsembe further contended the Notice to Show Cause dated 18th July 2017 was not issued in compliance with the provisions of the Contempt of Court Act, 2016. He asserted the Notice did not specify the order that was disobeyed and further averred that as the decision giving rise to the contempt proceedings was made on 3rd June 2016, these proceedings are barred by limitation as the same were commenced after the expiry of 6 months which was in contravention of Section 34 of the Contempt of Court Act, 2016.

9. On behalf of the respondents, Mr. Onsembe further argued the respondents were not party to the suit where the order alleged to have been disobeyed was made and they therefore cannot be charged with contempt when they were not party in the relevant suit. Lastly, Mr. Onsembe asserted that the applicants are relying on correspondences exchanged on a “**without prejudice**” basis to lay the claim for contempt and the applicants ought to be prevented from using the correspondences against the respondents.

10. Mr. O. M. Otieno filed the applicants response submissions dated 2nd February 2018 on 5th February 2018. The applicants submit that Judgment/ Decree issued in the Judicial Review Application (Kisii JR Misc. App. No. 3 of 2013) on 3rd June 2016 prohibited the respondents from carrying on certain offending acts of nuisance and trespass on the ex parte applicant’s land as per paragraphs 2, 3 and 4 of the decree/order. The applicants aver that following the judgment the respondents and the applicants engaged in negotiations in regard as to how best to give effect to the judgment/decrees culminating with mutual consent/agreement of the parties which the court adopted and was issued as an order of the court on 13th December 2016 as per annexure “**JSK4**”. The applicants submit that the court order which is the subject of these contempt proceedings is the consent court order which required the 6th Respondent to move out and relocate its dumping activities from the locality and environ of the applicants land parcel number **Kisii Municipality/Block III/301** and to cease to dump waste within the precincts of the applicants parcel of land by the close of business on the 31st December 2016.

11. On the grounds taken in support of the preliminary objection, the applicant submits that as the Kisii County Government is in the nature of a state organ or corporate entity that cannot be served directly, under Section 30(1) of the Contempt of Court Act, any notice required to be served under that Section would require to be served on its accounting officer(s). The applicant submits that as the County Executive Committee member for Finance of the 6th Respondent has not designated accounting officers as envisaged under Section 148(1) of the Public Finance Management Act, the 1st to 5th Respondents by virtue of Section 148(2) of the Act, being the administrators and executive officers charged with the administration of the County and being responsible for making of the key decisions of the County are such persons as Section 30(1) of the Contempt of Court Act 2016 deems accountable for any contemptuous acts committed in furtherance of their directions, instructions and/or orders.

12. In support of their submission that the 1st - 5th respondents are accountable for the contemptuous acts, the applicants place reliance on Article 179 of the Constitution which makes provision for County executive committees:-

179 (1) The executive authority of the County is vested in, and, exercised by, a County Executive Committee.

(2) The County Executive Committee consists of-

(a) The County Governor and the Deputy County Governor;

(b) Members appointed by the County Governor, with the approval of the assembly, from among persons who are not members of the assembly.

(3)

(4) The County Governor and the Deputy County Governor are the Chief Executive and Deputy Chief Executive of the County respectively.

(5) When the County Governor is absent, the Deputy County Governor shall act as the County Governor.

(6) Members of a County Executive Committee are accountable to the County Governor for the performance of their functions and exercise of their powers.

13. To buttress their submissions the applicants further relied on the case of **Republic -vs- County Chief Officer, Finance and Economic Planning, Nairobi City County, Ex parte Stanley Muturi [2017]eKLR** where the respondent objected to contempt proceedings being initiated against him arguing that the notice ought to have been directed to the County Executive Committee member in charge of finance who bore the responsibility of management and control of Public Finance under the provisions of the Public Finance Management Act, Cap 412C of the Laws of Kenya. In the case even though Odunga J. accepted that it was indeed the County Executive in Charge of Finance who was under obligation to pay funds, he took the view that the misjoinder could not be fatal and relying on Article 159 (2) (d) he was of the view that substantive justice ought not to be sacrificed at the altar of procedural technicalities. He observed thus:-

23. It is therefore my view that whereas misjoinder or non-joinder may lead to denial of costs in the event that the party in default succeeds in the application or even being penalized in costs, that blunder is not incurably defective and ought not on its own be the basis upon which an otherwise competent application is to be dismissed where the substance of the reliefs sought can still be realized notwithstanding the irregularity.

24. Article 159 (2) (d) of the Constitution enjoins this court to administer justice without undue regard to technicalities of procedure, as long as the rules of natural justice are adhered to. At the end of the day the entity which is bound to settle the decree is the County Government and not the said officer in his personal capability. Misjoinder of parties in County Governments was also considered in Council of Governors & Others -vs- The Senate: Petition No. 413 of 2014 where it was held that:

“...the role of the Governor under Section 30(3) (f) of the County Government Act is critical in fiscal management at the County Level. He is the Chief Executive Officer and the buck stops with him in the management of County resources. It is critical that such a provision exists so as to ensure the responsibility of public resources which would ultimately enhance national values as provided for under Article 10 of the Constitution as well as the spirit and tenor of Constitution.”

It was thus Odunga, J’s view that the Governor as the County’s Chief Executive cannot escape responsibility for the acts of the officers who he supervises.

14. Section 30(1) and (2) of the Contempt of Court Act, 2016 provides as follows:-

30(1) Where a state organ, government department, ministry or corporation is guilty of contempt of court in respect of any undertaking given to a court by the state organ, government department, ministry or corporation, the court shall serve a notice of not less than thirty days on the accounting officer, requiring the accounting officer to show cause why contempt of court proceedings should not be commenced against the officer.

(2) No contempt of court proceedings shall be commenced against the accounting officer of a state organ, government department, ministry or corporation, unless the court has issued a notice of not less than thirty days to the accounting officer to show cause why contempt of court proceedings should not be commenced against the accounting officer.

15. The term **“accounting officer”** is not defined under the Contempt of Court Act and the court therefore has to resort to the Constitution and any other provisions of the law to determine who an accounting officer in the context of the instant application would be. The respondents preliminary objection is predicated on the argument that accounting officers of the County Government are designated by County Executive Committee Member of Finance under section 148(1) of the Public Finance Management Act and according to the respondents those are the persons envisioned under Section 30(1) and (2) of the Contempt of Court Act as accounting officers and therefore answerable for any contemptuous acts. I do not agree with that argument and this is why.

16. The objectives of the Public Finance Management Act is broadly stated in the preamble to the Act thus:-

“An Act of Parliament to provide for the effective management of Public Finances by the National and County governments; the oversight responsibility of Parliament and County Assemblies; the different responsibilities of Government and other bodies, and for connected purposes.”

17. As the title of the Act suggests and the objective fortifies the Public Finance Management Act is intended to provide mechanisms to ensure prudent and effective management of public funds and to provide oversight mechanisms to ensure there was prudent and transparent utilization of public resources by both the National and County governments. Section 148(1) and (2) of the Public Finance Management Act provides as follows:-

(1) A County Executive Committee Member for finance shall except as otherwise provided by law, in writing designate accounting officers to be responsible for managing the finances of the County Government entities as is specified in the designation. [emphasis mine]

(2) Except as otherwise stated in other legislation, the person responsible for the administration of a County Government entity, shall be the accounting officer responsible for managing the finances of that entity.

18. In my view, the accounting officer envisioned under Section 148 as above is one responsible for management of the finances of the County and cannot be extended to include the officers responsible for administration and executing the decisions and/or directions of the executive. I do not therefore agree that the accounting officer designated by the County Executive Committee member for finance under Section 148 (1) of the Public Finance Management Act has to be and is the only person who would be liable for contempt under Sections 30(1) and (2) of the Contempt of Court Act, 2016. The accounting officer designated under Section 148 of the Public Finance Management Act, responsibilities are limited to management of the finances of the County and that is what he would be held responsible for. It would be ridiculous for such an accounting officer to be held responsible for the direct acts of executive in the course of carrying out their administrative functions not at all related to public finances.

19. Under Section 36(1)(a) of the County Government Act 2012 the functions of the executive committee include:-

(a) Supervise the administration and delivery of services in the County and all decentralized units and agencies of the County.

The County Executive Committee therefore in terms of Article 179(1) and (6) of the Constitution and Section 36(a) of the County Government Act have a collective and joint responsibility and authority in the management of the County affairs and would thus be accountable and answerable for any acts of omission and commission attributable to the County Government which may be contemptuous of a valid court order. The persons named as the respondents are members of the Executive Committee of the 6th respondent and by virtue of the offices they hold and their respective responsibilities and functions are proper parties against whom contempt proceedings under Section

30(1) and (2) of the Contempt of Court Act, 2016 may be initiated.

20. Having found that the respondents are properly cited for contempt of court, I have no hesitation in finding that the relevant court order as relates to the alleged contemptuous acts complained of by the applicant is the court order granted by consent of the parties on 13th December 2016 and that the contempt proceedings were therefore not initiated out of time having been commenced on 15th May 2017 when the Notice of Motion was filed in court.

21. The other grounds canvassed in the preliminary objection go to the merits of the application and are such as would be canvassed when determining whether or not the contempt proceedings were properly commenced against the respondents. The respondents upon appearance will have the opportunity to show cause, if any, why they should not be held to be in contempt by either demonstrating that the contempt if it was there has been purged and/or by showing there never was any contempt as alleged. By the court issuing the Notice to Show Cause, the court is adhering to the rules of natural justice to afford the respondents the chance of being heard on the allegations leveled against them. I hereby direct and order that the Deputy Registrar of this court do issue to the respondents a notice to attend court on 25th September 2018 to show cause, if any, why they should not be held to be in contempt of court and/or why contempt of court proceedings should not be commenced against them.

22. In the premises, I find no merit in the preliminary objection and I dismiss the same. The costs of the preliminary objection are awarded to the applicants.

23. Orders accordingly.

RULING DATED, SIGNED and DELIVERED at KISII this 13TH DAY of JULY 2018.

J. M. MUTUNGI

JUDGE

In the presence of:

Mr. Moracha for Otieno for the 1st and 2nd applicants

Mr. Onsembe for the 1st to 6th respondents

Ruth court assistant

J. M. MUTUNGI

JUDGE