



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

MISC. CIVIL APPLICATION NO. 216 OF 2014 (JR)

MUNGAI KIVUTI & CO ADVOCATES.....DECREE HOLDER/RESPONDENT

VERSUS

EMBU CONTY GOVERNMENT.....JUDGMENT DEBTOR/RESPONDENT

AND

MUGAMBI RUTERE

T/A GIANT AUCTIONEERS.....INTERESTED PARTY/APPLICANT

RULING

1. The applicants in their application dated 7/04/2016 cites the respondents for contempt of court of orders granted by the court on 18/11/2014. The application seeks the following orders:-

(a) *An order for committal be made against Julius Thiriku – Director of Trade Embu County Government and Martin Nyaga Wambora – Governor Embu County Government officers of the Respondent herein to prison for such period as this Honourable Court may deem fit and just in that the said Julius Thiriku – (Director of Trade Embu County Government) have disobeyed orders made herein by this Honourable Court on 18th November, 2014.*

(b) *An order that costs of these contempt proceedings be borne by the said Julius Thiriku - Director of Trade Embu County Government and Martin Nyaga Wambora – Governor Embu County Government officers of the Respondent herein.*

(c) *This court do order that A/C No. 01141408230700 Co-operative Bank Embu Branch be frozen pending determination of this case.*

2. The application is supported by the affidavit of John Ireri based on several grounds among them:-

That the applicants sought orders against the respondent the County Government of Embu to file judicial review proceedings seeking to quash notices issued by the County Executive Director for Trade & Tourism direct Bar Owners to renew their licence and to pay fees for licences and disband all committees.

3. The orders for leave to operate as stay of the notices, levying of fees and for filing the JR proceedings were issued against the respondent on 18/11/2014.

4. It is deponed that the subsequent to the issuance of the order which was duly served, the respondent has continued to arrest and charge in court the members of the Embu County Dealers Association for not having licences which was stayed by the orders of his court. The said order was served on the respondent with a penal notice spelling out the consequences of disobedience.

5. The applicant states that they served the order containing a penal notice on the respondent's advocate Messrs Mungai Kivuti & Co. The parties thereafter entered into negotiations for settlement out of court of the substantive motion dated 5/12/2014 and which was duly served on the respondent's counsel. The respondent went ahead to file a consent made by the parties but before the applicant's affixed their signatures.

6. The consent was to the effect that the Embu County Alcoholic Act (Amendment) Bill 2015 be debated within 60 days. Thereafter, the applicant has continued to breach the order of the court staying the notices by arresting its members and charging them in various courts including Siakago Magistrates Court.

7. A bank account No. 01141408230700 Co-operative Bank of Kenya has been opened and members of the applicant association directed to deposit licence fees and levies. The applicant states that the opening of this account is a breach of the orders for stay and should be freezed.

8. The 2nd respondents in the replying affidavit sworn by Josiah Thiriku opposes the application. I note that the deponent has not stated his designation in the Embu County Government, if at all and has not indicated that he has authority from the 2nd respondent to swear the affidavit on his behalf.

9. The deponent states that on 24/03/2016 the County Legal Office was served with a notice of intention to commence contempt proceedings which states:-

That it has come to the applicant's notice that you have already opened a bank account with a view of collecting liquor licenses fee which is illegal and amounts to blatant contempt of the court.

10. It was not indicated in the notice that the respondents were in breach of the court order issued on 18/11/2014. It is contended that the order in question did not restrict the respondent in any way to opening a bank account thus rendering the contempt proceedings baseless and without sound legal basis.

11. It is further argued that the respondents do not possess any prosecutorial powers and cannot be said to have arrested and prosecuted the members of the applicants association.

12. It was further contended that the applicants have not availed the list of its members in order to establish that the licensee one Edward Mugendi Muthoni T/A Oxic Bar & Restaurateur is a member of the applicant's association. The respondent also questions the privity of proceedings as regards the respondent's Martin Nyaga Wambora, the Governor and the said Edward Muthoni who were not parties to the proceedings resulting in the order made on 18/11/2014. The citation of the 2nd respondent is alleged to be in bad faith and orchestrated by malice.

13. The applicant also stated that the date of the alleged contempt is alleged to have been 23/03/2013 before the said order was issued.

14. Both parties argued this application by way of written submissions which were filed by Anne Thungu & Co. Advocates for the applicants and Ndegwa and Ndegwa associates for the respondent. The submissions basically explain the grounds supporting and opposing the application.

15. The rule of law requires that the orders of the court be respected and must be dealt with firmly so that the authority of the court is not brought into disrepute. Of significant to note is that no leave is required from the court for filing contempt proceedings where the proceedings relate to disobedience of a court order.

16. It is a legal requirement that a copy of the order must be served personally on the person who is required to act or to abstain from doing a certain act. The order must be accompanied with a notice informing the person that he is liable to the execution process. Once the applicant has satisfied the legal requirement as to personal service of the order was intentionally and willfully disobeyed.

17. The burden of proof in contempt is beyond reasonable doubt as it was held in the case of **MARY WAMAITHA MUKAMI VS PHILIS NDUTA NGUGI Civil Application No. Nairobi 62 of 1988**. The proceedings of contempt are akin to a criminal offence leading to penal consequences, that is, committal to civil jail where a person loses personal liberty.

18. As regard service, the applicant states in paragraph 5 of the supporting affidavit that the order made by the court on 18/11/2014 “was served on the County Government of Embu with an endorsed notice of penal consequence which they duly received”. The order annexed to the application reads:-

It is hereby ordered:-

(i) *That the applicants John Ireri, Doris Wairimu and Peter Njagi Munya being Chairman, Treasurer, Secretary and Treasurer of Embu County Liquor Dealers Association are hereby granted leave to apply for prerogative orders of mandamus to compel the Respondent to establish a Directorate of Alcoholic Drinks Control.*

(ii) *That the applicants John Ireri, Doris Wairimu and Peter Njagi Munya being Chairman, Treasurer, Secretary and Treasurer of Embu County Liquor Dealers Association are hereby granted leave to apply for prerogative orders of Certiorari to remove into the High Court and quash the notices issues by the County Executive for Trade and Tourism dated 9th October 2014 and 10th November 2014 directing liquor dealers/bar owners to renew their licences and pay fees for licenses and all committees and notices be suspended and disbanded.*

(iii) *That the grant of the orders for leave is hereby granted to operate as a stay of the notice dated 9th October and 10th November 2014, levying of fees and operations of sub-committees until hearing and determination of the substantive Application Orders of Certiorari.*

(iv) *That the substantive motion to be filed within 21 days.*

19. The applicant states in paragraph 14 of the affidavit:-

That on 24th March 2016, we served the respondent with a notice that they were breaching the court orders but they chose to continue collecting and charging levies and directing people to deposit in their Account in contravention of the court orders.

20. Of importance is the order was worded in plural “they’ showing that it was not addressed to any particular officer or person.

21. The annexed order has an official stamp affixed on top of the page that reads:-

Office of the County Secretary, P.O. Box 36-60100, Embu”

The notice of intention to commence these proceedings was addressed to the Honourable County Secretary and it read in part:-

That it has come to our notice that you have already opened a Bank Account with a view of collecting Liquor Licenses fees which is illegal and amounts to blatant contempt of Court.

22. From the above, I make some observations. Firstly that the person served with the order and the notice was not named or identified. It is not enough to serve an order to a certain office or institution due

to the very nature of contempt proceedings which are personal. The affidavit of service of the order or of the notice were not annexed to the application.

23. In the case of ***REPUBLIC VS THE PERMANENT SECRETARY MINISTRY OF LANDS AND HOUSING & ANOTHER EX PARTE LINA JEPKEMOI & OTHERS Eldoret High Court MA No. 128 of 2005***, Ibrahim, J. it was held that the service was flawed where the applicant had served the office of the District Commissioner without naming the person upon whom the service was effected. The earlier order had been served on the Executive Officer in the former District Commissioner's office. The court further held that the identity and the person of the alleged contemnor must be disclosed.

24. It follows that it is not sufficient service on the institution or office of the County Government of Embu if the alleged cotemnor is not identified. Even where a party is represented by an advocate, personal service must be effected on the person required to do or abstain from doing the act complained of.

25. The respondent in these proceedings is the County Government of Embu. The replying affidavit to these proceedings were sworn by the County Chief Officer for trade. The respondent argued that the applicant acted in bad faith to cite the Governor Martin Nyaga Wambora for contempt. From the proceedings, it is evident that the governor has never taken part in these proceedings. The fact that he is the Governor does not justify citing him for contempt. I note that there is no evidence that he has ever been served with the order in question.

26. In the County Government, there are officers designated to head or to hold certain portfolios and are assigned certain functions or dockets and these are the right people to be served with orders related to their respective functions.

27. I agree with the respondent that the applicant was wrong to cite the governor with contempt while he has never been personally served with the order as required by the law.

28. It was contended that the order was ambiguous in that it involved the respondent's opening of the bank account. It is noted that the order issued on 18/11/2014 was comprehensive and properly understood by both parties.

29. The respondent is complaining about the notice served on the office relating to the opening of the bank account. If opening of the bank account and charging levies violates the order of the court, then the applicant is entitled to complain provided that it can be proved that there exists a connection to the alleged violation.

30. It was contended that the applicant could not establish that the person licenced namely Edward Muriithi Muthoni was a member of the applicants association at the time the orders were issued. For the applicant to establish this allegation, the list of membership requires to be availed. It is noted that no such list was annexed to the application. The said Edward Muriithi Mutthoni could as well be a stranger to these proceedings. There was no affidavit sworn by him to confirm who he was and what happened to him in relation to these proceedings.

31. It is not necessary as argued by the respondent that he be possessed of powers to arrest and prosecute. The police and the Director of Prosecution have these powers under the law. However, if there is an order of stay regarding certain individuals, the respondent in consultation with the relevant public bodies has a duty to ensure that the orders of the court are obeyed. Indeed, it has the mechanism to ensure compliance. If the list of membership is necessary for the performance of such duty, then it is incumbent upon the respondent to call for the list through the right forum.

32. I reach a conclusion that the alleged contemnors in these contempt proceedings have not been identified and that personal service was not effected as required by the law. The applicant has a duty to ensure that all the legal and procedural requirements are satisfied before citing the respondent for contempt. As I have already said, the applicants cited wrong parties in these proceedings.

33. I find no merit in this application and it is hereby dismissed with costs to the respondent.

DATED, DELIVERED AND SIGNED THIS 6TH DAY OF MARCH, 2017.

F. MUCHEMI

JUDGE

In the presence of:-

Ms. Thungu for the exparte applicant