



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT GARISSA**

**CONSTITUTION PETITION NO. 2 OF 2016**

**OMAR JIBRIL MOHAMED.....1<sup>ST</sup> PETITIONER/APPLICANT**

**OMAR JIBRIL ABDILLE ELMI.....2<sup>ND</sup> PETITIONER/APPLICANT**

**VERSUS**

**COUNTY GOVERNOR, MANDERA COUNTY.....1<sup>ST</sup> RESPONDENT**

**COUNTY SECRETARY, MANDERA COUNTY.....2<sup>ND</sup> RESPONDENT**

**THE COUNTY GOVERNMENT OF MANDERA.....3<sup>RD</sup> RESPONDENT**

**RULING**

After this court granted leave to the petitioners/applicant (applicants) on 21st July 2016 to file an application for contempt of court against the respondents, the applicants counsel Kamende and Company filed a Chamber Summons for contempt of court on the same day. This is the application for ruling today.

The Chamber Summons filed does not appear to have been signed or dated by counsel for the applicants. However no party's advocate has raised any objection to the format of the application. Thus under Article 159 (1) (d) of the Kenya Constitution 2010, I hold that the application is valid as it has not been objected to. I will thus not strike it out on a technicality.

The application was brought under Section 5 of the Judicature Act, and Section 1A, 1B and 3A as well as Section 63 of the Civil Procedure Act (cap. 21) and Order 40 Rule 3 of the Civil Procedure Rules.

The applicant seek the following orders:

- “1. That this honorable court be pleased to order the attachment of the respondents property, jointly and severally for disobedience of the order given on 6th June 2016.
2. That this court be pleased to order that Captain Ali Ibrahim Roba and Okash Abdullahi Adan, the 1st and 2nd respondent respectively on their own behalf and on behalf of the 3rd respondent duly served with a court order herein be imprisoned for 6 months or any other period for disobeying the order given on 6th June 2016.
3. That this Honourable court be pleased to grant any other orders that it may deem fit and proper to grant in the circumstances.
4. That in any event, the costs hereof be awarded to the petitioners/applicants.

The application is based on grounds on the face of the Chamber Summons, and a supporting affidavit sworn by Omar Jibril Mohammed the 1<sup>st</sup> applicant on 21st July 2016 annexing several documents.

In their response, the respondents filed a replying affidavit sworn on 10th August 2016 by Okash Abdullahi Adan the County Secretary of Mandera County the 2nd respondent.

By consent of the parties counsel, the application proceeded by way of filing written submissions. The petitioners' written submissions were filed on 6th March 2017, while the respondents submissions were filed on 10<sup>th</sup> April 2017. Several authorities were cited on both sides.

I have perused and considered both sets of submissions.

This is an application for committal of the respondents for contempt of court orders. It is grounded on section 5 of the Judicature Act which states as follows:-

***“5 (1) The High Court and the Court of Appeal shall have the same power to punish, for contempt of court as is for the time being possessed by the High Court of Justice in England, and that power shall extend to upholding the authority and dignity of subordinate courts.***

***2. An order of the High Court made by way of punishment for contempt of court shall be appealable as if it were a conviction and sentence made in the exercise of the ordinary original criminal jurisdiction of the High Court.”***

The first issue relates to the clarity of the order that was said to have been served and disobeyed by the 1st and 2nd respondents. The order in issue is the order made by this court on 6th June 2016. What was extracted by counsel for the applicants through the registry is as follows:-

***“4. That the interim orders are extended until the hearing and determination of the petition. In addition construction work by the respondent will stop until the hearing and determination of the petition herein. “***

When the order of the court was made on the 6th of June 2016, Ms. Kamende was present in court for the petitioner, and Mr. Muthoka was present for the respondents.

The actual relevant order of the court is as follows:-

***4. “The interim orders are extended until the hearing and determination of the petition. In addition, construction work by the respondent in the disputed area will stop until the hearing and determination of the petition herein.”***

It is obvious that the order extracted by the petitioners counsel excluded the works **“in the disputed area”**. From the order extracted, it would look as if construction work was stopped in the whole of Mandera County which was not the case. The parties counsel were all present in court, and so where a counsel for a party deliberately or by default extracts an order without getting the concurrence of the other, which does not reflect what all counsel heard from the court during session as in the present case, in my view an advocate, in order to protect the rule of law is entitled to advise his client to challenge that order before complying with it. That is what professionalism, the rule of law, and integrity, and accountability as envisaged under the Constitution of Kenya 2010 Article 10 (2) (c) would demand.

In other words, the extracted order herein was worded in a way that was not comprehensible and not capable of being complied with.

The next issue is whether the order was served. One has to remember that contempt proceedings are in the nature of criminal proceedings and thus there is generally a strict requirement for service of the court order. In the case of ***INTERNATIONAL LTD VS. JOSEPH MAUNGE (2013) eKLR*** – It was held that in certain circumstances the requirement for personal service may not be necessary.

The affidavit of service herein states that on 27th May 2016 a petition was served at the Mandera County offices. Another affidavit of service dated 13th June 2016 sworn by Noel Musyimi Muniyithia states that on 7th June an order of the court dated 25th May 2016 was served at Mandera County offices, and that on 9th June 2016 the same order was served in the offices of Yunis Advocates, Standard Building, Standard Street, Nairobi.

There is no indication whatsoever that the order of 6th June 2016 was served on either the County Government of Mandera or on the advocates for the respondents.

That being the case I find that the order of 6th June 2016 was not served on any of the respondents.

In the present case therefore, it was the good faith and honesty of the counsel on both parties who were present in court to advise their clients on the actual order made by the court. The court order not having been served on the respondents, it cannot be said that they were aware of it, nor that they were and in contempt of court unless this court delves into details of the advice which the advocates herein communicated to their clients following the issuance of the court orders, which has not been canvassed in court herein. On that account also the application for contempt will fail, as I find that it cannot be said that the respondents were aware of the orders of the court. The lawyers knew though there is no request herein to commit them or any of them for contempt.

The standard of proof required in application for contempt of court is not the civil cases standards of proof on the balance of probabilities. It is a higher standard of proof beyond reasonable doubt. Even assuming that the order as extracted was a correct reflection of the order issued by the court, and that it was served, there is no evidence placed before this court to show that the order from the court was disobeyed. The orders issued by this court were very specific.

On the 25th May 2016 the court made following order ***“That in the interim, a conservatory order be and is hereby granted restraining and or prohibiting the respondents jointly and severally, their agents, or any person acting under their behest from further receiving the bids and or proceeding to open the bids and or tenders on the 31st May 2016 and or thereafter and or approving the bidders/agents or making a decision by naming, publishing or appointing of such or otherwise whatsoever giving effect to the bidding and or tendering process, as contained in the open tender advertisement in the Standard newspaper of 15th May 2016 for the listed projects pending the interpartes herein of this application on 6th June 2016.”***

The petitioners have not stated that any of the elements of the above orders were violated by the County Governor, County Secretary and the County Government of Mandera, when and how.

In addition to the above order, on 6th June 2016, the court issued an order in the following terms.

***“In addition, construction work by the respondent in the disputed area will stop until the hearing and determination of the petition herein.”***

Again, this court has not been told by the petitioners that in the disputed area construction went on and from when to when. The fact that the Governor (1<sup>st</sup> Respondent) commissioned houses for IDPs after the restraining orders were issued by the court was not contemptuous or a disobedience of the court order, as the court did not prohibit commissioning of works. It only prohibited carrying out additional work.

The petitioner should have come to court and stated through evidence that on such and such a date the respondents carried out construction work in the disputed area, after the court orders were known to them. They have not provided that evidence. The petitioners have thus not discharged their burden of proof for the grant of the contempt orders sought.

To conclude, I find that the application herein lacks merit. I dismiss the application of the petitioners for contempt against the respondents herein. I award the costs of the application to the respondents against the petitioners, jointly and severally.

**Dated and delivered at Garissa this 9<sup>th</sup> day of May 2017**

**GEORGE DULU**

**JUDGE**