



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

MISCELLANOUS JUDICIAL REVIEW APPLICATION NO. 121 OF 2013

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW UNDER ORDER 53 OF
THE CIVIL PROCEDURE RULES**

AND

**IN THE MATTER OF THE CONSTITUTION OF KENYA ARTICLES 47 AND 50 AS TO FAIR
ADMINISTRATIVE ACTION**

AND

IN THE MATTER OF THE PUBLIC FINANCE MANAGEMENT ACT

AND

IN THE MATTER OF THE COUNTY GOVERNMENTS ACT 2012

AND

**IN THE MATTER OF SUSPENSION OF THE APPLICANT BY THE GOVERNOR MAKUENI
COUNTY**

VIS -AVIS THE MAKUENI COUNTY ASSEMBLY

BETWEEN

REPUBLIC.....APPLICANT

AND

- 1. THE GOVERNOR MAKUENI COUNTY**
- 2. THE INTERIM COUNTY SECRETARY,**

MAKUENI COUNTY GOVERNMENT

3. THE MAKUENI COUNTY EXECUTIVE.....RESPONDENTS

AND

DAVID MUIMI KAKONZI.EX-PARTE APPLICANT

RULING

The Application

The Applicant in his application by way of a Chamber Summons dated 13th August, 2013 and filed on the same day, sought orders that he be issued with leave for an order to commit the Respondents to prison for such period as this Court may deem fit and just. The application is premised on grounds that on the 27th June, 2013, B. T. Jaden J. granted the Applicant leave to apply for certiorari, and which leave was to operate as stay to the implementation of decision of the Governor of Makueni County made vide the letter dated 29.5.2013 seeking to suspend the Applicant from office. Further, that a copy of the order and the penal Notice were served upon the Respondents on 1st July, 2013, but the Respondents went ahead and disobeyed the court order and suspended the Applicant from office in contempt of Court.

The Applicant in his supporting affidavit sworn on 13th August 2013 and further affidavit filed in Court on 23rd May 2016 averred that the Respondents despite having been served with the Court order have refused him to perform his duties and have refused to pay his salaries. He contended that the Respondent has admitted that he was served with the said orders of the court, and furthermore filed an application seeking that the said orders be vacated, in which the deponent in the supporting affidavit thereto stated that they were aware of the court orders. The Applicant annexed a copy of the orders of court dated 27th June, 2013, affidavit of service and of the application dated 18.11.2013 and supporting affidavit.

The Applicant claimed that he is an employee of the Makueni County Government and that he was seconded to the County Assembly to assist in establishing structures, but was not transferred from the County Government. However, that when the news of suspension letter reached the Interim Clerk of the County Assembly, he was barred from accessing the premises and told to wait until the Governor reinstated him and that upto date the Governor has never reinstated him or paid him.

The Applicant's counsel, B. M Mung'ata & Company Advocates filed submissions dated 14th December 2016 on the application, wherein it was urged that it is evident that the Respondents were well aware of the court orders issued on 27th June, 2013, and they blatantly chose to disobey the same. Further, that the argument by the Respondents that they could not abide the court order is unfounded and also unmerited, and that in any event, if at all the Respondent were convinced that indeed the orders issued staying the suspension of the Applicant were unenforceable or void for lack of jurisdiction by the trial Court, they should have filed an application to vacate the said order but not ignored the said Orders.

Reliance was placed on the decision in **Hadkinson -vs- Hadkinson, (1952) ALLER 567** where it was held that a party, who knows of an order whether null or valid, regular or irregular, cannot be permitted to disobey it. The Applicant also cited various other judicial decisions in support of this position including **Ibrahim Haji Issak v Kenya Meat Commission & Another [2013] eKLR.**

The Response

The Respondents filed a replying affidavit and supplementary affidavit opposing the Applicant's application, which were both sworn by Kivutha Kibwana, the Governor of Makueni County on 9th May 2016 and 24th January 2017. Nyamu & Nyamu Company Advocates, the Respondents' counsel, also filed written submissions on 13th February 2017. The Respondent denied disobeying any court orders, and gave a history of the Applicant's deployment to the Makueni County Government.

He averred that when he took office, the Applicant herein served in the County Government as a Senior Internal Auditor, and that sometimes between April and May, 2013, it emerged that Kenya Shillings One Hundred and Thirty Two Million (K.sh 132,000,000/=) received from the Local Authority Trust Fund (LATF) was spent on projects other than those designated. The Respondent averred that he then decided to send the Applicant on suspension as investigations on the acts of all those involved were being carried out, by way of a suspension letter dated 29th May, 2013. That the Applicant thereafter made an application dated 17th June, 2013 seeking leave to institute judicial review proceedings, which leave was granted and the same was to operate as a stay of the Respondent's decision to suspend the Applicant from employment.

According to the Respondents, on the same day, being 29th May 2013, the Applicant reported to the County Assembly where he had been deployed by the Transition Authority, and he annexed a letter from Interim Clerk of the County Assembly of Makueni dated 3rd June 2013 to this effect. Therefore, that since the Respondents have no control over anybody deployed to serve under the County Assembly Service Board, they could not obstruct them from rendering services thereat, save that they were obliged to notify the relevant steps taken whilst the Applicant was serving under the County Executive. Further, that it was only either the Transition Authority or the Interim Clerk or Speaker of the County Assembly who would decide whether the Applicant would take position as deployed.

The Respondents submitted that despite the Court orders issued by B. T. Jaden J. on the 27th June, 2013 the Respondent has not disobeyed any orders since the same could not be implemented by the Governor of Makueni County, as the Applicant was deployed to Makueni County Assembly by the Interim Clerk to the County Assembly on the 3rd June, 2013. Further, that section 12 of the County Governments Act, 2012 provides for the county assembly service board.

It was further submitted that the County Assembly, where the Applicant was deployed to work, and the County Executive are two separate entities, and the County Executive is headed by the County Governor whose functions, responsibilities and powers are provided for under section 30 and 31 of the County Governments Act, 2012. Reliance was placed in this regard on the case of **Council of Governors & 3 others -versus- Senate & 53 others (2015) eKLR.**

Therefore, that in light of the principles of separation of powers, the order of stay by B. T. Jaden J. of 27th June, 2013 ought to have been served to the County Assembly of Makueni which is headed by the Speaker, since the County Assembly is a separate body from the County Executive. In addition, that the Governor of Makueni County who is the head of the County Executive could not perform duties of the County Assembly since this would be a breach of the principle of separation of powers, and he had no powers to direct and/or control the Applicant's employment.

To illustrate that they did not willfully defy court orders, the Respondents submitted that they filed an application dated 18th November, 2013 seeking for the following orders:-

- a) That the matter be certified as urgent and the same be heard on priority basis.
- b) That the Honorable Court be pleased to vacate Orders for stay issued on 27th June, 2013.
- c) That the orders for leave to institute judicial review proceedings made on the 27th June, 2013 be vacated and in the alternative any application filed pursuant to leave so granted be dismissed with costs to the Respondent.
- d) That cost of the application be provided for.

The Respondents averred that they properly moved this Court to set aside the orders granted on the 27th June 2013, since the Governor Makueni County would be interfering with investigations of misappropriation of funds. Further, that they notified the Court of its inability to carry out the orders and this amounts to reasonable excuse for their inability to obey Court orders. The decisions in **In Re Edward Mutinda Ndeti & 15 others, (2015) eKLR** to the effect that a party ought to move the Court

to discharge or vary orders it finds oppressive was cited in this respect.

The Issues and Determination

The substantive law that applied at the time of the alleged contempt by the Respondents and filing of the Applicant's application was the English law on committal for contempt of court, by virtue of section 5(1) of the Judicature Act which section provided that:

“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.”

The said section of the Judicature Act has since been repealed by the Contempt of Court Act No 46 of 2016 which came into force on 13th January 2017.

The applicable English Law in this respect was Part 81 of the English Civil Procedure Rules of 1998 as variously amended, which part repealed in most part the Rules of the Supreme Court that previously applied, including Order 52 and parts of Order 45 of the Rules of the Supreme Court. The law required the personal service of court orders for contempt of Court to apply. Rule 81.8 of the English Civil Procedure Rules provides that unless the court dispenses with service, a judgment or order may not be enforced by way of an order for committal unless a copy of it has been served on the person required to do or not do the act in question. Rule 81.6 of the English Civil Procedure Rules specifically provides that the method of service shall be personal service, which is effected by leaving the order with the person to be served.

Rule 81.9 (1) of the English Civil Procedure Rules of 1998 is also clear that a judgment or order to do or not do an act may not be enforced unless there is a prominently displayed a warning to the person that disobedience to the order would be a contempt of court punishable by imprisonment, a fine or sequestration of assets. Under sub-rule (2) of the said Rule, it is only in the case of an undertaking to do or not to do an act which is contained in a judgment or order where the notice of penal consequences may be dispensed with.

This Court notes that Kenyan courts have also held that personal service of orders and a penal notice is a requirement in contempt of court proceedings, and reference is made to the Court of Appeal decisions in **Nyamogo & Another v Kenya Posts and Telecommunications Corporation, (1994) KLR 1**, and **Ochino & Another v Okombo & 4 others (1989) KLR 165** in this respect. It must be pointed out at the outset that there must be strict compliance with the law when punishing for contempt of court as the proceedings are quasi criminal and punitive in nature, with a penalty being provided for the offence of imprisonment and/or payment of a fine.

There are thus three issues before the court for determination arising from the pleadings and submissions highlighted in the foregoing. The first is whether there was personal service of the orders issued by the court on 27th June, 2013 and a notice of penal consequences on the Respondents. Secondly, if there was such service, whether the Respondents are culpable for contempt of court. The last issue is if the Respondents are found culpable, what penalty ought to be granted by this Court.

The Applicant claimed that he served the Respondents with the said orders and attached an affidavit of service sworn on 3rd July 2013 by Jacob Muthenya, a court process server, attesting to service on the secretary of the 1st Respondent, and the 2nd Respondent on 1st July 2013. However, I noted certain discrepancies as regards the said affidavit of service. Firstly, it does not bear a stamp to show that it was filed in court, and secondly there was no copy of the order and penal notice bearing the acknowledgment of service as alleged in the affidavit attached. It is also notable that the service on the 1st Respondent was not personally effected.

The Applicant has also argued that the Respondents were aware of the court orders as shown by their

application by a Notice of Motion dated 18th November 2013 filed on the same date, seeking to vary the orders of 27th June 2013. The applicable English law did provide that the court can dispense with the personal service of an order under Rule 81.8 (1) of the English Civil Procedure Rules, if it is satisfied that the person has had notice of it either by being present when the order was given or made; or by being notified of its terms by telephone, email or otherwise.

It has also been held in several judicial decisions that if personal awareness of the court orders by the alleged contemnors is demonstrated, they will be found culpable of contempt even though they had not been personally served with the penal notice. See in this regard the decisions in **Kenya Tea Growers Association vs Francis Atwoli & Others**, **Nairobi High Court Constitutional Petition No 64 of 2010**, **Husson v Husson**, (1962) 3 All E.R. 1056, **Ronson Products Ltd v Ronson Furniture Ltd** (1966) RPC 497, and **Davy International Ltd vs Tazzyman** (1997) 1 WLR 1256 .

For this court to dispense with personal service of the orders issued on 27th June 2013 and to find that the Respondents were aware of the court's order, the Applicant must show that the Respondents were personally aware of the court order through some other means other than personal service. He in this respect relies on the application filed by the Respondents on 18th November 2013 to set aside the said orders. His application for committal was however filed on 13th August 2013. There is thus the possibility that the Respondents may not have been aware of the orders until 18th November 2013 as there is no other evidence brought of their awareness, and given that the orders of 27th June 2013 were granted to the Applicant *ex parte*.

Even if this Court were to find that the Respondents were aware of the orders, this Court also notes that the Applicant did not provide any evidence of their alleged disobedience of the orders. He claims that he remains suspended without pay. The Respondents in this respect brought evidence of a letter from Interim Clerk of the County Assembly of Makueni dated 3rd June 2013 to show that the Applicant was no longer in their employment from 3rd June 2013, and was in the employment of the Count Assembly.

In addition the Applicants did not bring any evidence of the communication he alleged that he got from the Interim Clerk of the County Assembly of Makueni that he could not be deployed until his suspension by the Governor of Makueni County was lifted, or of correspondence to the Respondents on his reinstatement. The applicable law as stated in **Mwangi H.C. Wangonde vs Nairobi City Commission**, **Nairobi Civil Appeal No. 95 of 1998** is that the threshold of proof required in contempt of Court is higher than that in normal civil cases, and one can only be committed to civil jail or otherwise penalized on the basis of evidence that leaves no doubt as to the contemnor's culpability. r I cannot in the circumstances therefore find the Respondents culpable of willfully disobeying the orders given by Jaden J. on 27th June 2017.

The prayers sought in the Applicant's Chamber Summons dated 13th August, 2013 are accordingly declined for the foregoing reasons, with no order as to costs.

Orders accordingly.

Dated, signed and delivered in open court at Machakos this 3rd day of May 2017.

P. NYAMWEYA

JUDGE