



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KISII**  
**MISC. CIVIL APPLICATION NO. 72 OF 2015**

**MASOSA CONSTRUCTION COMPANY LTD ..... APPLICANT**

**VERSUS**

**THE EXECUTIVE COMMITTEE, KISII COUNTY**

**THE GOVERNOR, KISII COUNTY**

**THE COUNTY GOVERNMENT OF KISII ..... RESPONDENTS**

**THE TRANSITIONAL AUTHORITY**

**RULING**

1. By a chamber summons dated 7<sup>th</sup> September 2015, the applicant, **Masosa Construction Company Ltd**, moved this court for leave to take out contempt proceedings against all the four respondents viz:- The Executive Committee, Kisii County, The Governor, Kisii County, the County Government of Kisii and the Transitional Authority, on the basic ground that they have disobeyed and/or disregarded a lawful order of “mandamus” issued by the court on the **10<sup>th</sup> December 2014**, in **Kisii High Court Misc. Application No. 14 of 2013 (J.R)**.

The application was made “ex parte” the respondents and was effectively granted on the 2<sup>nd</sup> October 2015.

2. Pursuant to such leave, the applicant filed the present application vide a Notice of Motion dated 7<sup>th</sup> October 2015, seeking basic orders that the respondents be cited and punished for contempt of court by breaching, disregarding and/or ignoring the terms of the court order issued on 10<sup>th</sup> December 2014 in Kisii High Court Misc. Application No. 14 of 2013 (J.R), and that the non-corporate respondents be committed to jail for a period not exceeding six (6) months.

Alternatively, the applicant seeks an order of sequestration to attach the respondents’ property and have them sold to defray the damages occasioned by the breach and/or disobedience of the said court order.

3. The grounds in support of the application are contained in the body of the Notice of Motion.

The first, second and third respondents filed their grounds of opposition dated 2<sup>nd</sup> December 2015. The fourth respondent did not file any grounds of opposition.

The application proceeded by way of written submissions and in that regard the applicant’s submissions were filed on its behalf on 5<sup>th</sup> February 2016, by the firm of **Oguttu Mboya & Co. Advocates**.

The first, second and third respondents filed their submissions on the 7<sup>th</sup> March 2015 and supplementary submissions on the 21<sup>st</sup> March through the learned counsel, **Mr. Kennedy Chweya Onsembe**.

The fourth respondent filed its submissions on 15<sup>th</sup> March 2015, through the learned Senior Principal Litigation Counsel, **Mr. M.O. Eredi**.

Counsels representing the parties were given an opportunity to orally highlight the written submissions.

4. Due consideration having been given to the rival submissions in the light of the grounds for and against the application, it is apparent to this court that no substantial dispute arises with regard to the issuance of the material court order on the **10<sup>th</sup> December 2014** vide Judicial Review Case No. 14 of 2013 or Kisii High Court Misc Application No. 14 of 2013 (J.R), where the applicant had sought judicial review orders of mandamus to compel the respondents to satisfy and/or settle a decree issued in **Kisii High Court Civil Case No. 67 of 2007**, on the 23<sup>rd</sup> March 2010 for the sum of **Ksh. 8,464, 699/05** in favour of the applicant.

The applicant also sought a time frame within which the payment and/or settlement of the amount would be effected.

5. The application was heard on the 11<sup>th</sup> November 2014, in the absence of the respondents who failed to appear in court or even file their written submissions.

The court rendered its judgment on 10<sup>th</sup> December 2014, in favour of the applicant. Thus, an order of mandamus was issued against all the respondents to satisfy the decree of the court and pay to the applicant the sum of Ksh. 8,464,699/05, being the amount due and outstanding as ordered in **Kisii Misc. Application No. 10 of 2011**.

A decree to that effect was extracted and issued on the 14<sup>th</sup> January 2015 and not as indicated thereon on 14<sup>th</sup> January 2014. The respondents were dissatisfied with the judgement and decree and filed a Notice of Appeal on 9<sup>th</sup> January 2015 and a memorandum of appeal on the 6<sup>th</sup> February 2015.

It is uncertain as to whether the appeal was prosecuted or is still pending. What is however, certain is that there is no stay order from the Court of Appeal or even an order quashing the judgement and decree of the 10<sup>th</sup> December 2014.

6. As it were, the material order of mandamus issued against the respondents remained valid and remains valid to this date.

In **Halsbury's Laws of England 4<sup>th</sup> Ed. Vol. 1 Pg 111**, the order of mandamus is described in the following terms:-

*“The Order of Mandamus is of a most extensive remedial nature and is in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty”.*

And in the case of **Kenya National Examinations Council Vs. The Republic “ex parte” Geoffrey Gathenji and Others (1997) e KLR**, the Court of Appeal stated that an order of mandamus will compel the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed.

7. An order of mandamus is in effect a **command** to a public official or body to perform that which is lawfully expected of him or it in the normal course of public duty.

Like any other court order, such a command unless withdrawn and/or discharged is not for disobedience whatsoever and a party who knows or is aware of its existence cannot be permitted in any manner disobey it, whether he believes it to be null and void or irregular (**See, Hadkinson Vs. Hadkinson (1952) ALL ER 567.**)

A court order is not meant to be made in vain. All public officers and public offices should never be allowed to stand in the way of a citizen merely realizing the fruits of his judgement or decree.

In such circumstances, the court would lean mostly towards enforcement of accrued rights as the cardinal duty of the court is to do justice without unreasonable delay and as a matter of course, to guarantee the protection of an applicant's right of access of justice under Article 48 of the Constitution (**See, Republic .Vs. Town Clerk of Webuye County Council & Another HCCC No. 448 of 2006 (Nbi).**)

**8.** As was held by the High Court in **Republic Vs. The Attorney General & Another ex parte James Alfred Kosoro JR Misc App No. 44 of 2012 (Nbi).**

*“An applicant in seeking an order of mandamus is not seeking relief against the Government but to compel a Government Official to do what the Government through Parliament has directed him to do. The relief sought is not “execution or attachment or process in the nature thereof”. It is not sought to make any person “individually liable for any order for any payment” but merely to oblige a Government officer to pay, all of the funds provided by Parliament, a debt held to be due by the High Court in accordance with a duty cast upon him by Parliament. In mandamus cases it is recognized that when statutory duty is cast upon a public officer in his official capacity and the duty is owned not to the State but to the public any person having a sufficient legal interest in the performance of the duty may apply to the courts for an order of mandamus to enforce it.”*

**9.** It is very clear that a public officer is not expected to abdicate from performance of his official duty after the issuance of an order of mandamus. If he fails or declines or neglects to perform such duty, such action would amount to contempt of court and any contempt proceedings following thereafter would solely and most importantly be geared towards upholding the rule of law as well as the dignity and authority of the court (See, **S.5(1) of the Judicature Act**).

The present application pre-supposes that the respondents are in disobedience of an order of mandamus issued against them by this court and should therefore be cited for contempt and be punished accordingly.

The question which therefore confronts this court is whether the respondents have been aware of the material order from the time of its issue on the **10<sup>th</sup> December 2014**, and whether they have indeed acted in disobedience of the order without justifiable cause.

**10.** It must be stated herein for purposes of clarity or avoidance of doubt that we are not herein concerned with the previous proceedings between the applicant and the respondent or any other party which eventually led to the application for an order of mandamus by the applicant.

The relevant proceedings for the purposes of the present application are those conducted in this court's Judicial Review Application No. 14 of 2013, which gave rise to the material order of mandamus.

Before delving into the points for determination in this application it is necessary to understand the scope and efficacy of an order of mandamus as stated in the 4<sup>th</sup> Edition of Halsbury's Laws of England Vol 1 Pg 111 paragraphs 89 and 90.

**11.** Thus, an order of mandamus is intended to remedy the defects of justice and will accordingly issue to the end that justice may be done in all cases where there is a specific legal right and no specific legal remedy for enforcing that right. It may also issue in cases where although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual.

The order must command no more than the party against whom the application is made is legally bound

to perform. Where a general duty is imposed, a mandamus cannot require it to be done at once. Where a statute, which imposes a duty leaves discretion as to the mode of performing the duty in the hands of the party to whom the obligation is laid, a mandamus cannot command the duty in question to be carried out in a specific way.

12. All the foregoing factors are relevant in determining the present application but although the subject order of mandamus was issued against all the four (4) respondents, it is apparent that the duty or obligation to pay or settle the accrued debt could only have been performed by the County Government of Kisii (3<sup>rd</sup> Respondent) directly or indirectly through the Transitional Authority (4<sup>th</sup> Respondent).

The inclusion of the Executive Committee, Kisii County (1<sup>st</sup> Respondent) and the Governor, Kisii County (2<sup>nd</sup> Respondent) may not have been well informed if not misconceived for reasons that a County Government consists of a County Assembly and a County Executive (See, **Article 176 (1) of the Constitution**).

And, a County Executive Committee which exercises executive authority of a county is comprised of the County Governor, the deputy County Governor and other members appointed by the County Governor with the approval of the County Assembly (See, **Article 179 of the Constitution**).

13. The Governor is ultimately the chief executive of a County Government. He thus controls the County Executive Committee and when we talk of a County Government we actually mean the County Executive Committee and the County Assembly. It was therefore unnecessary to include the first and second respondents in the application for mandamus and this application and if they had to be included either separately or jointly, then the third respondent ought to have been excluded.

In any event, the contract which gave rise to these and other proceedings was between the applicant and the former Municipal Council of Kisii whose functions and/or undertakings were lawfully taken over by the third respondent whose Chief Executive Officer is the second respondent.

14. Be that as it may, and turning now to the crucial issues for determination, there appears to be no substantial dispute from the respondents and in particular the first to the third respondents that they were very much aware of the issuance of the order of mandamus on the 10<sup>th</sup> December 2014. The relevant judgement of the court was read in the presence of their legal counsel, **Miss Nyaega**, on that date even though they failed to attend the proceedings leading to the judgement. Those proceedings were conducted on the 11<sup>th</sup> November 2014 in their absence after they failed to appear without any reason and/or without filing their written submissions.

The fourth respondent appears not to have been included to participate in those proceedings in whatever manner. It cannot be said that the fourth respondent was aware of the order of mandamus prior to the formal service of the same unlike the first to third respondents.

The reading of the relevant judgement by the court on 10<sup>th</sup> December 2014, in the presence of counsel to the first, second and third respondents was sufficient communication of the order to them (see, **Gathimu Farmers Co. Vs. Geoffrey Kagiri Kamari & Others (2005) e KLR**).

15. With regard to the formal services of the order, the applicant's supplementary affidavit dated 15<sup>th</sup> January 2016, indicates that a duly extracted copy of the order or decree dated 14<sup>th</sup> January 2015, was served upon the County Secretary of the third respondent who allegedly also doubled up as the Chief Finance Director of the fourth respondent.

The process-server, **David Okumu Ojill**, in his affidavit of service dated 19<sup>th</sup> February 2015, indicated that a copy of the decree was handed to him to effect service upon the first, second and third respondents. In that regard, he proceeded to the offices of the third respondent on **17<sup>th</sup> February 2015**, and effected service upon the third respondent's county secretary by name **Johnstone Ndege**, who accepted service by

affixing the official stamp of the third respondent on the copy.

**16.** A perusal of the decree by this court confirms that its terms were precise and unambiguous complete with a penal notice. It was on the basis of the decree that the first to the third respondents filed a memorandum of appeal on 6<sup>th</sup> February 2015. Their notice of appeal had been filed much earlier on 9<sup>th</sup> January 2015. They cannot now be heard to say that the decree or order was never served upon them. They have not at all disowned their county secretary who accepted service on their behalf and who indeed had the necessary authority to accept the service on their behalf. Their attempts to discredit the process server were futile.

This court must therefore find and hereby finds that the first, second and third respondents were duly served with the necessary order which was a command they were expected to heed in promoting constitutional values and principles of governance such as the Rule of Law beside upholding the dignity and authority of the court.

**17.** But, with regard to the fourth respondent, this court is not satisfied that proper service of the subject order was effected upon itself through an authorized officer.

The relevant affidavit of service did not refer to the fourth respondent nor its appointed or authorized officer for purposes of service.

Suffice to hold that the fourth respondent was not aware of the material order and even the proceedings in which it was issued. It would be foolhardy to expect it to obey an order which it was not aware of by direct communication or formal service from the applicant.

A person cannot be said to impede the cause of justice and be punished for disobedience of a court order which has not in any manner been brought to his attention.

The present application in so far as it relates to the fourth respondent is devoid of merit and unsustainable.

**18.** As to whether the first, second and third respondents ought to be cited for contempt of court and be punished accordingly, the applicant was required to satisfy that not only were the first to the third respondents served with the necessary order but that they also deliberately disobeyed it.

It was the applicant's contention that the said respondents had an unqualified duty and obligation to comply with the terms of the order but they failed to do so despite being served and made aware thereof.

In essence, the applicant implies that the order was to be complied with no sooner had it been served upon the first to the third respondents on the 17<sup>th</sup> February 2015.

This court would accept the contention and implication for reasons that no time frame for the payment of the debt was provided in the terms of the order meaning that the order was to take effect immediately after service.

So, even if the affected respondents were given a reasonable time within which to settle the debt the indications pointing towards them showed a reluctance or neglect in undertaking that responsibility imposed by law considering that this application was filed on 8<sup>th</sup> October 2015 whereas the material court order was made on 10<sup>th</sup> December 2014 and formally served on 17<sup>th</sup> February 2015.

**19.** The first, second and third respondents had a reasonable period of about nine (9) months from the 17<sup>th</sup> February 2015 to the 8<sup>th</sup> October 2015 to heed the command to pay the outstanding debt to the applicant yet they did not.

Their inaction, lethargy and neglect in that regard was no more than a deliberate disregard and/or disobedience of a valid order of mandamus as well as a gross violation of constitutional values and

principles to which they are bound as state organs and/or state or public officers and in particular the Rule of Law (see **Article 10 of the Constitution**).

Needless to say that the inaction grossly undermined the dignity and authority of this Court.

The first to the third respondents have no reasonable explanation for their failure to obey the court order to perform a public duty bestowed upon them by law. They could not cling to the fourth respondent and attempt to transfer to it their responsibility of discharging the debt owed to the applicant by themselves. They have persistently disobeyed the order of mandamus issued against them and should now prepare for the legal consequences.

**20.** Accordingly, the first, second and third respondents are hereby cited for contempt of court and are given a period of seven (7) days from this date hereof to expunge the contempt and in default a warrant for the arrest of the second respondent as the chief executive officer of the first and third respondents be issued for his production in court to show cause why he should not be committed to jail for contempt of court.

With regard to the fourth respondent, the application be dismissed with costs.

Ordered accordingly.

**J.R. KARANJA**

**JUDGE**

**[Read and signed this 5<sup>th</sup> day of April 2016]**