



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**  
**PETITION NO.466 OF 2006**

**BETWEEN**

**CHARLES LEKUYEN NABORI ..... 1<sup>ST</sup> PETITIONER**  
**JOEL OLE SAAYA ..... 2<sup>ND</sup> PETITIONER**  
**CLEMENT NASHURU ..... 3<sup>RD</sup> PETITIONER**  
**WESLEY KAKIMON ..... 4<sup>TH</sup> PETITIONER**  
**EDWARD TAMAR ..... 5<sup>TH</sup> PETITIONER**

**NGAMIA RANGAL LEMEIGURAN ..... 6<sup>TH</sup>**  
**PETITIONER**

**SHAOLIN LERICHE MEIGURAN ..... 7<sup>TH</sup>**  
**PETITIONER**

**SAMSON LEREYA KAKIMON ..... 8<sup>TH</sup>**  
**PETITIONER**

**SAMANTIITA SAMARIA LENGIYAA ..... 9<sup>TH</sup>**  
**PETITIONER**

**STANLEY LETEREWUA ..... 10<sup>TH</sup>**  
**PETITIONER**

**AND**

**THE HONOURABLE ATTORNEY GENERAL ..... 1<sup>ST</sup>**  
**RESPONDENT**

**THE CABINET SECRETARY FOR WATER AND NATURAL RESOURCES..... 2<sup>ND</sup>**  
**RESPONDENT**

**NATIONAL ENVIRONMENTAL MANAGEMENT AUTHORITY ..... 3<sup>RD</sup>**

## RESPONDENT

THE COUNTY COUNCIL OF BARINGO..... 4<sup>TH</sup>  
RESPONDENT

### RULING

#### Introduction

1. The facts that have precipitated this Ruling are fairly straight forward. The Petitioners, who are the Applicants herein, are residents of Baringo County and they filed the present Constitutional Petition aggrieved by the decision of the Kenyan Government to introduce a weed, the *Prosopis Juliflora*, which was planted in various places within the aforementioned Baringo County. They challenged the decision on various grounds but their main contention was that the weed has had adverse effects on the environment and their socio-economic well-being and that it further resulted in a threat to and violation of their right to life among others. The Court ruled in favour of the Petitioners and granted various orders, as shall be discussed later.
2. The Petitioners are however aggrieved by the fact that the orders that were granted have not been enforced until. They have therefore sought to have the Respondents cited for contempt of Court and have filed the Chamber Summons Application dated 4<sup>th</sup> February, 2014 together with an Affidavit in support sworn on 25<sup>th</sup> February, 2014 by the 7<sup>th</sup> Petitioner/Applicant, Shaolin Leriche Meiguran, on their behalf, the subject of this Ruling, in which they seek the following orders:
  - i. ...
  - ii. ***That a Notice to Show Cause be issued to the Principal Secretary Ministry of Natural Resources, Mr. Richard Leresian Lesiyampe, and the Director of the National Environmental and Management Authority, Prof. Geoffrey Wahungu, to appear personally in Court and show cause why the orders issued on 27<sup>th</sup> February, 2008, have not been acted upon since or be committed to civil jail.***
  - iii. ***That an order do and is hereby issued to compel the Attorney General, the Cabinet Secretary for Environment, Water and Natural Resources and the Director of the National Environment and Management Authority to comply and enforce the Court orders issued on 27<sup>th</sup> February, 2008 and more specifically order (f).***

#### The Applicants' Case

3. The Applicants case is that this Court issued orders on 27<sup>th</sup> February, 2008 as follows:

***“It is hereby ordered:***

- a. ***That a right to a clean and healthy environment free from pollution of any kind that is detrimental to human health, wealth and/or socio-economic well-being and ultimately the human life is a fundamental right to life as enshrined in Section 70 of the Constitution of Kenya.***
- b. ***That the right to a clean and healthy environment is fundamental attribute of people and the aggregation to the environment occasioned by the weed *Prosopis Juliflora* amounts to a breach of this right which this Honourable Court is empowered to address and remedy accordingly.***
- c. ***That the introduction of the weed *Prosopis Juliflora* has caused and continues to cause more harm than good to the environment and its harmful effects and damages far surpass any reasonable and beneficial use that it could be put to and it thus ought to be eradicated and/or managed with expediency.***

- d. ***That the Petitioners' right to life as set out in (a) is compromised by the introduction of the weed Prosopis Juliflora to warrant the intervention by a constitutional Court.***
  - e. ***That the failure by the Ministry for Environment and Natural Resources to take affirmative steps towards eradication of the weed/plant Prosopis Juliflora amounts to breach of the right to own property.***
  - f. ***That a Commission comprising of technical and local experts be appointed by the Government under terms and reference to be set out by this Honourable Court inter alia:***
    - i. ***Assess and quantify the loss visited upon the environment and to the residents of Baringo District by the weed Prosopis Juliflora.***
    - ii. ***Assess and quantify the loss resulting from the introduction and non-action by the Government.***
    - iii. ***Assess injury to persons and commensurate and make a finding and report to Court its assessment and findings.***
    - iv. ***Assess and ascertain the injuries occasioned to individuals resident in the areas affected by the weed Prosopis Juliflora and recommend commensurate compensation thereto.***
    - v. ***Complete its task within sixty (60) days of appointment.***
  - g. ***That 1<sup>st</sup> to 2<sup>nd</sup> Respondents to implement the Public Complaints Commission recommendations with respect to the complaint on Prosopis Juliflora in PMCC No. 67 of 2005 between Community Museum of Kenya and Kenya Forestry Research Institute and Food Agricultural Organization.***
  - h. ***That the costs to the Petitioners by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.***
  - i. ***That the Ministry of Environment produces a policy working paper on the management and eradication of the plant and present the said paper within sixty (60) days for debate and interpretation."***
4. No appeal was ever lodged against the above decision and all the Parties were ably represented by their respective Counsel. It is therefore the Applicants' case that they have effected service on all the Respondents but to date, no effort has been made to act on the same and no explanation has been offered as to why there has been procrastination on the matter.
  5. They contended that, through their advocates, they have also made several demands for compliance of the orders by the Respondents but all in vain. Additionally, it was the Applicants' assertion that entire villages in Ng'ambo Location, Salabani Location, Loropili, Sintaan and LIng'arua, have been vacated by thousands of villagers due to the invasion of the aforesaid weed. Further, that as a direct result of the invasion, several permanent structures such as Ng'ambo Shopping Centre, Ng'ambo Primary School and Ng'ambo A.I.C church, as well as Salabani Primary School and Shopping Centre have been vacated and abandoned by their inhabitants.
  6. It was their further assertion that the proliferation of the weed has led to the death of thousands of animals leading to further heavy losses on the entire community and the same has resulted in untold suffering and immense loss of property amounting to millions of shillings belonging to the Ilchamus people. That they are therefore suffering and continue to suffer from the physical and biological menace posed by the Prosopis plant.
  7. The Applicants have also argued that the Director of the National Environmental Management Authority and the Principal Secretary, Ministry of Environment and Natural Resources have

specifically failed to act in regard to the Court order that had been issued whose effect was that a Commission of Inquiry ought to be formed and a report issued within 60 days of the delivery of the Judgment. In that regard, they contended that it is necessary for summons to be issued as prayed in the interests of justice. Further, that this Court is clothed with immense powers and competent jurisdiction to issue the orders sought herein and that in any event, this Application does not in any way prejudice the Respondents.

8. Furthermore, according to the Applicants, the Respondents' conduct has forced them to file the present Application in order to realize the fruits of their Judgment and unless the Court grants the orders sought herein, there is a likelihood that they and the entire Ilchamus Community would be rendered extinct. In that regard, they argued further that it is only the Kenyan Government and other subsidiary bodies like the 3<sup>rd</sup> Respondent which have the powers and mechanism to arrest the environmental problems raised in the Petition herein.
9. In their Written Submissions dated 26<sup>th</sup> June, 2014, it was the Applicants' submission that Court orders are neither issued in vain nor are they optional and that the failure and refusal by the Respondents to obey the said orders is contemptuous considering that they were well aware of them. In that regard, while citing **Section 5 (1) of the Judicature Act** and the decision **In the Matter of an Application by Gurbaksh and Sons Limited, Misc. Civil Case No. 50 of 1983**, they argued that knowledge of Court orders plays a crucial role in committal proceedings and in the present case, neither the Respondents nor their advocates on record have in any way disputed service of the Court orders in question.
10. Further, they expressed the view that where a party clearly acts and shows that he has knowledge of a Court order, the strict requirements that personal service must be proved is rendered unnecessary as was held in **Basil Criticos vs Attorney General and Others, [2012] eKLR, Kenya Tea Growers Association vs Francis Atwoli and Others, Petition No. 64 of 2010 and Ibrahim Haji Issak vs Kenya Meat Commission and Another, [2013] eKLR.**
11. The Applicants finally relied on the holding of the Court in **Mutitika vs Baharini Farm Limited (1985) KLR 227** for the proposition that the standard of proof in contempt proceedings must be higher than proof on the balance of probabilities and almost but not exactly, beyond reasonable doubt. That therefore, in their view, their Application clearly demonstrates a more than sufficient case for committal of the Respondents and their Application therefore ought to be allowed.

#### **The 1<sup>st</sup> -3<sup>rd</sup> Respondents' Case**

12. In response to the Application, the 1<sup>st</sup> -3<sup>rd</sup> Respondents filed Grounds of Opposition dated 10<sup>th</sup> July, 2014 and Written Submissions dated 14<sup>th</sup> April, 2016.
13. In the said Grounds of Opposition they asserted that the Application is unmeritorious and unsustainable in so far as it alleges non-compliance of the Court orders aforesaid, and is misconceived in requiring the personal attendance in Court of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, whereas there are no specific orders directed at them individually requiring them to perform specific duties.
14. While relying on the decision in **Mutitika vs Baharini Farm Limited (supra)** and **Africa Management Communication International Limited vs Joseph Mathenge Mugo and Another [2013] eKLR**, it was the Attorney General's submission on behalf of the above Respondents that the Applicants have failed to meet the threshold for contempt proceedings. That, as an alleged contemnor stands to lose his right to liberty, knowledge must be proved beyond reasonable doubt by an Applicant and that knowledge of the Court orders has not been proved beyond reasonable doubt in the instant case as the said orders were directed at the Ministry of Environment and Natural Resources and not specifically to the Principal Secretary in that Ministry.

15. The Attorney General in that regard relied on the holding in **Payless Car Hire vs Imperial Bank, Civil Case No. 33 of 2011**, where it was stated that where orders are directed at institutions/organisations rather than individuals, an Applicant must prove beyond reasonable doubt that a director/member of that organization personally had knowledge of the order. Accordingly, that in the present case, so argued the Attorney General, the Applicants have failed to establish beyond reasonable doubt that their letters to the Ministry aforesaid were received, and if they were, that the same were received personally by the Principal Secretary named in the Application herein.
16. The foregoing notwithstanding, it was the Attorney General's other submission that there is a difficulty in complying with the orders in issue because the Judges made a specific order requiring that a Commission of technical and local experts be formed and the fact that the said Commission is not in existence cannot in any way be attributed to the 2<sup>nd</sup> Respondent, by operation of the law. In that regard, it was his argument that the power to appoint a Commission in the nature of what is envisioned by the Court orders are only exercisable by the President pursuant to **Section 3** of the **Commissions of Inquiry Act**, and as such, the 2<sup>nd</sup> Respondent cannot be said to be in contravention of the orders.
17. Additionally, the Attorney General submitted that the order requiring the Ministry to produce a policy working paper on the management and eradication of the plant is unenforceable. That in any event, the Principal Secretary is not singularly responsible for making policies and he can therefore not be reasonably, held singularly and personally, liable for failure to perform collective duties of an institution.
18. Accordingly, that having been aggrieved by, and intent on appealing the Judgment, the 2<sup>nd</sup> Respondent's appeal has been frustrated by matters beyond his control after he filed a Notice of Appeal on 24<sup>th</sup> December, 2007 and through numerous letters to the Deputy Registrar of the High Court, requesting for typed proceedings and certified copies of the Judgment but the said letters went unattended. As a result therefore, in the Attorney General's view, it would be grossly unfair to hold the 2<sup>nd</sup> Respondent liable for the state of affairs ensuing in light of the efforts they have made in the matter.
19. Finally, the Attorney General noted that the name of the person cited for contempt is Richard Leresian Lesiyampe, who is neither the Principal Secretary nor an officer at the relevant Ministry and he cannot therefore be held accountable for enforcing orders outside his mandate.
20. For the above stated reasons, the Respondents urged the Court to dismiss the Application with costs.

### **Determination**

21. Looking at the Prayers in the present Application and submissions made, they are in two forms:
- i. If a notice to show cause should be issued for the named officials to explain why the orders issued on 27<sup>th</sup> February 2008 have not been implemented and in the alternative;
  - ii. The named persons be cited for contempt.
22. None of the Parties addressed (i) above and it is as if only (ii) requires resolution. In that regard, the question of a notice to show cause would have been a simple matter and I would have issued the same for the right person to come and explain why the orders issued in the Judgment herein were not complied with. I will however shelve the matter, address the issue of contempt of Court first and determine if a notice to show cause prior to any sanction ought to be issued.
23. In that regard, the law on contempt has been well addressed previously by Courts both in this and other jurisdiction and in Kenya and **Section 5(1)** of the **Judicature Act** states as follows:

*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.*

24. On the principles applicable before any person can be cited for contempt, this Court in the **Basil Criticos Case (supra)** reiterated that:

*“[17] The question I must answer is whether the procedure of instituting and prosecuting a contempt of court application has been adhered to by the Petitioner. Over the years, the courts have been very strict in entertaining an application for civil contempt of court. Such an application can only be allowed if the particular order of court has been served on that person and the copy of that order must be endorsed with a notice informing the person whom the copy is served that if he disobeys the Order, he is liable to the process of execution to compel him to obey the order.” (Emphasis added)*

25. On the question of knowledge of the Court orders and personal service of the said orders, this Court cited with approval the decision in **Kenya Tea Growers Association vs Francis Atwoli and Others, Petition No. 64 of 2010** and stated further that:

*“[20] ... However the law has changed and as it stands today knowledge supersedes personal service and for good reason. This has recently been held in Kenya Tea Growers Association vs Francis Atwoli & 5 Others, Petition No.64 of 2010 where I opined as follows;*

*“In the case before me, I am more than satisfied that even at the higher level of beyond reasonable doubt, when an individual has been served with and/or has knowledge of a court order but not only ignores it but in fact incites others to do the same, the threshold for contempt has been met...*

*The point above is that where a party clearly acts and shows that he had knowledge of a Court order, the strict requirement that personal service must be proved is rendered unnecessary. That should be the correct legal position and I subscribe to it.” (Emphasis added)*

26. I still subscribe to the same school of thought and I do not see any reason to depart from the holdings in the said decisions and as I understand it, contempt proceedings are akin to criminal proceedings and as such the burden of proof is beyond reasonable doubt and that the Court orders in question must have either been served upon an alleged contemnor or that he or she otherwise had knowledge of the said Court orders.

27. In the present case, the Respondents have opposed the present Application on three main grounds namely, that the said orders were not directed specifically at the 2<sup>nd</sup> Respondent; the orders are unenforceable; and that they were aggrieved by the decision and their intentions to lodge an appeal against the same have been frustrated by events beyond their control.

28. Elsewhere above I reproduced the orders issued and the next question is, to whom were the orders directed? A plain reading would indicate that Orders (a), (b), (c), and (d) are merely declaratory orders in regard to the Applicants’ rights among others, while Orders (e) and (i) were specifically directed to the Ministry of Environment, (f) is directed to the Kenyan Government, while (g) and (h) were directed to both the Attorney General and the Minister for Environment and Natural Resources. No specific person at the said Ministry was directed to comply thereof.

29. If that be the case, in the present Application, the alleged contemnor is stated as being, one Mr. Richard Leresian Leriyampe in his capacity as Principal Secretary, Ministry of Environment and Natural Resources. **Article 155 (2) of the Constitution** provides that “Each State Department

shall be under the administration of a Principal Secretary”. Assuming that the said Mr. Richard Leresian Leriyanpe is the Principal Secretary in the said Ministry (actually he was but has since been re-deployed to the Ministry of Agriculture by the President under **Article 155 (4) of the Constitution**), where is the evidence that at a personal level he had knowledge of the orders in question and more fundamentally, that he was the officer to act on the said orders. Orders Nos. (e) and (i) were indeed directed at the Ministry of Environment but under **Article 153 (2) and 4 (b) of the Constitution**, it is a Cabinet Secretary that is responsible and accountable to the President “for the exercise of their powers and performance of their functions” and is the one to provide Parliament with full and regular reports of the Ministry under his control. Why then would a former Principal Secretary in the relevant Ministry be cited for contempt in the circumstances?

30. Order (f) was also specifically directed at the Ministry to provide “a policy working paper on the management and eradication of the plant and present the said paper within sixty (60) days for debate and interpretation”. Policy, as I understand it, is a matter for the Cabinet Secretary and by extension the Cabinet as appointed under **Article 152 of the Constitution**. The implementer of Cabinet decisions and those of Cabinet Secretaries are Principal Secretaries. Why then would a Principal Secretary be punished for alleged failure to formulate a policy which is not within his constitutional mandate?

31. Further to the above and on the enforceability of the said orders, Order (f) was to the effect that the Government should form a Commission to undertake the tasks specified therein within 60 days. The formation of such a Commission could be made pursuant to that Court order and the law as existing. As submitted by the Respondents, Commissions of Inquiry are within the mandate of the President by dint of **Section 3 of the Commission of Inquiry Act**. The said Act was enacted as an *Act of parliament to provide for the appointment of Commissioners to inquire into and report on matters of a public nature referred to them by the President, to prescribe their powers, privileges and duties, and to provide for other matters relating thereto*. **Section 3** thereof stipulates inter alia thus:

1. *The President, whenever he considers it advisable so to do, may issue a commission under this Act appointing a commissioner or commissioners and authorizing him or them, or any specified quorum of them, to inquire into the conduct of any public officer or the conduct or management of any public body, or into any matter into which an inquiry would, in the opinion of the President, be in the public interest.*
2. *Every commission shall specify the matter to be inquired into, and shall direct where and when the inquiry shall be made and the report thereof rendered, and, where more commissioners than one are appointed, the commission may designate one such commissioner to be chairman, and, if the President so thinks fit, another such commissioner to be deputy chairman, of the commissioners.*
3. ...

32. In that context, the order in issue was also directed at “the Government” and even if a Commission could be lawfully constituted outside the framework of the **Commissions of Inquiry Act**, why would a Principal Secretary called Mr. Richard Leresian Lesiyampe be punished for failure to set up such a Commission? It must be reiterated that contempt is a serious matter and no person ought to be punished under it unless it can be shown that the charges are specific to his act of omission or commission- See **Coward vs Stapleton (1953) 90 C.L.R 573 at 570-80**. In the specific circumstances before me, I am therefore unable to find that the alternative part of Prayer (ii) of the Application before me can be granted.

33. Turning to Prayer (iii) of the Application, what is sought is an order to compel the Attorney General and the Cabinet Secretary, Ministry of Environment and Natural Resources to comply and enforce the Court orders aforesaid. In that regard and from what I have stated above, it seems to me that whereas contempt of Court may not properly attach to the Principal Secretary of the

relevant Ministry, under **Article 156 (4) (b)** of the **Constitution**, the Attorney General is mandated to represent “the national government in Court in any other legal proceedings to which the national government is a party...” One such proceeding is the present one and where there are specific orders directed at the Government, then it is upon the Attorney General to explain why since 2007, no action has been taken in compliance with the Court orders and the Applicants are properly entitled to seek him to be compelled to explain such non-compliance.

34. Returning to Prayer (i) of the Application before me, it seems to me that any notice to show cause can be properly directed at the Attorney General and the Cabinet Secretary who may however, in the order of things delegate the matter to their juniors including the Solicitor-General and the Principal Secretary of the relevant Ministry.

35. I have in making the above finding deliberately refused to draw the Director of the National Environment and Management Authority into these proceedings as none of the orders in issue were ever directed at that office or its officials.

36. The 2<sup>nd</sup> Respondent cannot in the circumstances be held singularly and personally liable for the failure on the part of the Ministry to formulate the said working policy on the management and eradication of the *Prosopis Juliflora* weed and to present the same for debate and interpretation.

37. One last issue needs to be addressed; whereas the Respondents have alleged that their intentions to appeal the decision have been frustrated and hence it would be unfair to hold them in contempt, they have not in any way adduced evidence to demonstrate that they at any time sought for orders of stay against the enforcement of the said orders. That fact notwithstanding, I am inclined to hold that the Applicants herein have not made out a case for contempt against the Respondents based on my reasoning as stated herein above.

### **Conclusion**

38. The Applicants, in their Application have sought three key remedies pertaining to the orders that had been granted by the Court. The main order is that the Attorney General, the Minister for Environment and Natural Resources and the Director of the National Environmental and Management Authority be compelled to comply with the said orders and in particular prayer (f) whose effect is to have a Commission of Inquiry formed to address the issues stated therein. In that regard, I am alive to the Applicant’s constitutional rights to life and their right under **Article 42** of the **Constitution** which states inter alia:

***Every person has the right to a clean and healthy environment, which includes the right-***

- a. ***To have the environment protected for the benefit of present and future generations through legislative and other measures, particularly those contemplated in Article 69; and***
- b. ***To have obligations relating to the environment fulfilled under Article 70.***

39. In that context, **Article 70** of the **Constitution** provides that:

1. ***If a person alleges that a right to a clean and healthy environment recognized and protected under Article 42 has been, is being or is likely to be denied, violated, infringed or threatened, the person may apply to a court for redress in addition to any other legal remedies that are available in respect to the same matter.***
2. ***On application under clause (1), the court may make any order, or give any direction, it considers appropriate-***
  - a. ***To prevent, stop or discontinue any act or omission that is harmful to the environment;***

- b. *To compel any public officer to take measures to prevent or discontinue any act or omission that is harmful to the environment; or*
- c. *To provide compensation for any victim of a violation of the right to a clean and healthy environment.*

3. ...

40. While keeping in mind the foregoing, and the fact that this Court has already found that the Applicants right to life has been compromised by the introduction of the *Prosopis Juliflora* and that the said weed has caused and continues to cause more harm than good to the environment, this Court cannot shut its eyes to the continuing injustice occasioned to the Applicants as a result of the failure by the Government to comply with the aforesaid orders. In exercise of the powers conferred to this Court by **Article 23 (3)** of the **Constitution** therefore, it would be an appropriate remedy to summon the Attorney General or his representative and the Cabinet Secretary, Ministry of Environment and Natural Resources to appear before this Court to show cause why the orders in question have not been acted upon.

#### **Disposition**

41. For the above stated reasons, I am not satisfied that the Applicants have made out a case for contempt against the Respondents and the Chamber Summons Application dated 30<sup>th</sup> September, 2004 to that extent only is dismissed.

42. I however hereby direct the Deputy Registrar of this Court to issue a Notice to show Cause to the Attorney General (or his representative) and the Cabinet Secretary, Ministry of Environment and Natural Resources (or his representative) to appear before this Court on a date to be indicated on the said Notice to explain non-compliance with orders issued on 27<sup>th</sup> February, 2008 pursuant to the Judgment delivered on 11<sup>th</sup> December, 2007.

43. Let each Party bear their own costs of this Application.

44. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 15<sup>TH</sup> DAY OF JULY, 2016**

**ISAAC LENAOLA**

**JUDGE**

#### **In the presence of:**

Muriuki – court clerk

Mr. Otieno holding for Mr. Gitonga for 3<sup>rd</sup> Respondent

No appearance for Applicant

Mr. Ogosso holding brief for Mr. Kamunya for 1<sup>st</sup> and 2<sup>nd</sup> Respondent

**Order**

Ruling duly delivered.

**ISAAC LENAOLA**

**JUDGE**

**Further Order**

Mention on 19/8/2016 for compliance.

**ISAAC LENAOLA**

**JUDGE**