



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISCELLANEOUS CIVIL APPLICATION NO. 40 OF 2000

REPUBLIC

VERSUS

THE HON. ATTORNEY GENERAL 1ST RESPONDENT

THE MINISTER FOR LANDS & SETTLEMENT 2ND RESPONDENT

COMMISSIONER FOR LANDS 3RD RESPONDENT

MINISTER FOR INTERNAL SECURITY 4TH RESPONDENT

MINISTER FOR ENVIRONMENT &

NATURAL RESOURCES 5TH RESPONDENT

THE COMMISSIONER OF POLICE 6TH RESPONDENT

MINISTER FOR LOCAL GOVERNMENT 7TH RESPONDENT

MUNICIPAL COUNCIL OF MOMBASA 8TH RESPONDENT

AND

HON. SULEIMAN SHAKOMBO 1ST INTERESTED PARTY

MAWENI DEVELOPMENT COMMITTEE 2ND INTERESTED PARTY

EXPARTE

EVANSON JIDRAPH KAMAU 1ST APPLICANT

BERTHA WANJIRU KAMAU 2ND APPLICANT

VERSUS

MINISTER FOR LANDS & SETTLEMENT & OTHERS..... RESPONDENTS

RULING

1. By Notice of Motion dated 30th May 2013, the applicant seeks, principally, orders as follows:

- a. That this honourable court be pleased to grant leave to the applicant to serve the Inspector General of Police, David Kimaiyo, with the order made herein on 8th November 2001, for enforcement.
- b. That leave be granted to the ex parte applicant to serve the said order upon Mr. David Kimaiyo, the Inspector General of Police, by advertising in the Daily Nation [Newspaper].
- c. That leave be granted to the ex parte applicant to serve the said order upon His Excellency the President, the Cabinet Secretaries in charge of Land and Internal Security and the Hon Attorney General by advertising it in the Daily Nation.
0. The first limb of the application is made necessary by the change under the Constitution of Kenya 2010 establishing the office of the Inspector General of Police as the head of police replacing the former office of the Commissioner of Police.
0. The application for service through the Daily Nation Newspaper in the circumstances of this case is governed by rule 9 of Order 5 of the Civil Procedure Rules in the following terms:

9. (1) *The provisions of this Order shall have effect subject to section 13 of the Government Proceedings Act, which provides for the service of documents on the Government for the purpose of or in connection with civil proceedings by or against the Government.*

(2) *Service of a document in accordance with the said section 13 shall be effected—*

(a) by leaving the document within the prescribed hours at the office of the Attorney-General, or of any agent whom he has nominated for the purpose, but in either case with a person belonging to the office where the document is left; or

(b) by posting it in a prepaid registered envelope addressed to the Attorney-General or any such agent as aforesaid, and where service under this rule is made by post the time at which the document so posted would be delivered in the ordinary course of post shall be considered as the time of service thereof.

(3) *All documents to be served on the Government for the purpose of or in connection with any civil proceedings shall be treated for the purposes of these Rules as documents in respect of which personal service is not requisite.*

(4) *In this rule, “document” includes writs, notices, pleadings, **orders**, summonses, warrants and other documents, proceedings and written communications.*

2. On the request for service upon the President and the Cabinet Secretaries, Counsel for the applicant, Mr Gacheru, cited Article 3, 10 and 260 of the Constitution emphasizing the duty of every individual and state officers to protect the constitution and its national values and principles. He submitted that the joinder of the president and the cabinet secretary will activate lines of political responsibility so that “if the inspector General disobeys the order, the officials as superiors can take responsibility and take action against the Inspector General for failing to protect the constitution.” Counsel therefore urged that the order of the court be served upon the state officers as a means of activating political accountability for the compliance with the court order. He relied on the South African decision in *Somyani v. Member of the Executive Council for Welfare, Eastern Cape*, cited in an Article by Clive Plasket entitled **Enforcing Judgments Against the State** in the journal **Speculum Juris** 2003 at p. 1, where the learned author writes of the decision,

“Froneman, J issued an order that the State Attorney was to ensure that a copy of the judgment and order would be served personally on the premier of the Province and his senior legal adviser, the legal adviser in the office of President and the respondents; that the State Attorney was to file an affidavit

confirming service; and that the matter would be postponed to a day on which the respondents were to explain why they did not appear when the matter was called and how they intended to complying with the order in respect of which they were in default, and to determine why a warrant for the arrest of the Permanent Secretary of the department should not issued for the purposes of bringing him before the court to show cause why he should not be found guilty of contempt of court. This order appears to have been aimed in two directions: on the one hand, it appears to have been intended to activate lines of political accountability by requiring service on the Premier and the President's office; secondly, it retained in the hands of the court the important function of enforcing its orders through committal for contempt if needed, thus activating lines of accountability to the court itself.”

3. Counsel for the Attorney General, Mr. Eredi, while agreeing that the order may be served upon the new head of the Police, the Inspector General of Police in place of the defunct Commissioner of Police objected to the service upon the President and Cabinet Secretaries because of the immunity of the president to civil and criminal proceedings under Article 143 of the Constitution and further submitted that:

“[The] invocation of the political responsibility and activating the lines of political accountability is premature because the order has not been served yet. In Kenya law, counsel cannot be asked to serve orders. There are persons authorised to effect service of court orders. There are court bailiffs who can also be employed to serve. We cannot borrow from South Africa when we have own constitution and civil procedure. It should follow the law as it is. It is premature to bring in the president and the cabinet secretaries. The order to be served is not against the officers. If the person does not enforce the order, the court can enforce and punish for contempt.”

4. I agree with the reasoning of Froneman, J in **Somyani** case, although the South African Constitution has an express in the provision under Article 165 (5) of the Constitution of the principle that **“An order or decision by a court binds all persons to whom and organs of State to which it applies”**. In Kenya, some construction of the relevant provisions is necessary.

5. I consider that since the Constitution of Kenya 2010 binds all persons, state officers and organs to observe the national values and principles of the Constitution under Article 10, they are obliged to observe the principle of the rule law which is one of the national values and principles of the Constitution. Article 10 is in the following terms:

“10. (1) The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them—

- (a) applies or interprets this Constitution;
- (b) enacts, applies or interprets any law; or
- (c) makes or implements public policy decisions.

(2) The national values and principles of governance include—

- (a) patriotism, national unity, sharing and devolution of power, **the rule of law**, democracy and participation of the people;
- (b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised;
- (c) good governance, integrity, transparency and accountability; and
- (d) sustainable development.”

6. There can be no doubt that the obedience of court orders is a cardinal principle of the rule of law and

administration of justice, an order standing good for purposes of enforcement until it is perfected on appeal or review. No matter how judicious an order of the court is, if it is not complied with or implemented, the same remains a worthless paper directive with no practical effect in resolution of the dispute adjudicated by the court.

7. There have been many cases recently [and I have presided over some of these] where the state officers or government employees claim to be unable to receive court orders, even when they are respondents, or to comply with court orders, until they are instructed so to do by their senior officers in the government departments and ministries. In this way, well-meant orders of the court aimed at resolving the dispute between the parties have been defeated for want of implementation. In this regard, where the senior officers and state organs are not direct parties to the suit in which the order has been made, they may nevertheless be served with the order as a means of notifying them of the existence of the order and so that they may, pursuant to the principle of the rule of law, direct their junior officers who look upon them for instructions in the face of court orders to promptly comply with the orders, and so that they can check any disobedience by these junior officers and supervise proper execution of the order in exercise of their Article 3 duties. That is what I understand to be the political accountability for the implementation of the court orders. It does not mean that the person to whom the respondent is politically accountable thus becomes liable for punishment for contempt of court. The court process for committal for contempt of court or accountability to the court remains against the persons bound by the order only, the respondents.

8. The immunity under Article 143 of the Constitution relates to criminal and civil proceedings, and I consider that constitutional litigation is a special jurisdiction outside the two branches of litigation. Indeed, the jurisdiction of the court with respect to constitutional litigation under Article 165 (3) (b) and (d) is clearly different from criminal and civil jurisdictions under Article 165 (3) (a) of the Constitution. However, in invoking political responsibility and activating the lines of political accountability in this case, I consider that the cabinet secretaries as the chief executives of the respective line ministries are up to the task of seeing to the compliance with, or giving effect to, the court order without direction from the President of the Republic. No cause has yet been demonstrated of activating the highest executive authority of the Republic.

9. Accordingly, I allow the application dated 30th May 2013 in terms as follows:

1. The court order of 8th November, 2001 may be served upon the Inspector General of Police as the current holder of the office of the head of police.
2. The Cabinet Secretaries for Lands and Internal Security will be served with the order of the court for formal information to enable them to direct, check and supervise the compliance with the court order and or take further or other action toward the resolution of the dispute the subject of these proceedings.
3. The service of the court orders herein will be effected, in accordance with Order 5 Rule 9 of the Civil Procedure Rules, 2010 through the office of the Hon. Attorney General.
0. The costs of the application will be costs in the cause.

Dated and delivered this 14th day of July, 2014.

EDWARD M. MURIITHI

JUDGE

In the presence: -

Mr. Gacheru for the Ex-parte Applicant

Mr. Eredi for the Respondent's

Ms Linda - Court Assistant