



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MACHAKOS

ELC. PETITION NO. 6 OF 2017

REV. HANNINGTON KYENGO MUNYAO.....1ST PETITIONER/RESPONDENT
JOEL MUTUKU MBITHI.....2ND PETITIONER/RESPONDENT
MARGARET KANINI KISILA.....3RD PETITIONER/RESPONDENT
DAVID MUEMA NGINDA.....4TH PETITIONER/RESPONDENT
STEPHEN MUTHWII KITONGA.....5TH PETITIONER/RESPONDENT
JIMMY NTHENGE MWAKA.....6TH PETITIONER/RESPONDENT
SAMUEL WAMBUA KITUNA.....7TH PETITIONER/RESPONDENT
AGNES SYOKAU MULWA.....8TH PETITIONER/RESPONDENT
(all petitioning on their behalf and on behalf of 206 others as members of Africa Inland Church Muisuni)

VERSUS

BENARD NGUYO.....1ST RESPONDENT/APPLICANT
JAPHETH ITUMO.....2ND RESPONDENT/APPLICANT
JACOB MUSILA.....3RD RESPONDENT/APPLICANT
SHADRACK MUTHAMA.....4TH RESPONDENT/APPLICANT
PHILIP NGATA MUIA.....5TH RESPONDENT/APPLICANT
JACKSON KAINDE.....6TH RESPONDENT/APPLICANT
GEORGE MUTUNE.....7TH RESPONDENT/APPLICANT
JONATHAN MUTETI.....8TH RESPONDENT/APPLICANT
SILVANUS NZIOKA.....9TH RESPONDENT/APPLICANT
JOSEPH KIMANI KARIUKI.....10TH RESPONDENT/APPLICANT

RULING

1. The Ruling relates to the Application dated 30th September, 2020 in which the Applicants, who are the Respondents in the Petition, are

seeking for the following orders:

a) Spent.

b) *That this Honorable Court be pleased to issue a Notice to Show cause why contempt of court proceedings should not be commenced against the following: Rev. Hannington Kyengo Munyao, Joel Mutuku Mbithi, Margaret Kanini Kisila, David Muema Nginda, Stephen Muthwii Kitonga, Jimmy Nthenge Mwaka, Samuel Wambua Kituna and Agnes Syokau Mulwa for contempt due to their continued disobedience of this Honourable Court's orders given by Hon. Mr. Justice O. A. Angote on the 26th day of October 2018.*

c) *That this Honorable Court be pleased to cite Rev. Hannington Kyengo Munyao, Joel Mutuku Mbithi, Margaret Kanini Kisila, David Muema Nginda, Stephen Muthwii Kitonga, Jimmy Nthenge Mwaka, Samuel Wambua Kituna and Agnes Syokau Mulwa for contempt due to their continued disobedience of this Honourable Court's orders given by Hon. Mr. Justice O. A. Angote on the 26th day of October 2018 and commit them to Jail for a period of not more than six (6) Months.*

d) *That this Honorable Court be pleased to direct the Officer Commanding Station, Kangundo Police Station to ensure compliance of this Court's orders issued on 26th day of October 2018.*

e) *That the Costs of this Application be provided for.*

2. The Application is supported by the Affidavit of an unknown person. Although the Affidavit states that it is sworn by Rev. Japheth Itumo, the 2nd Respondent/Applicant, the same was purportedly signed/sworn by Bernard Nguyo, the 1st Respondent/Applicant.

3. In the said Affidavit, it was deponed that on 26th October 2018, this Court issued an order to the effect that *in addition to the orders of this court of 23rd November 2017, the Petitioners are hereby restrained from taking over or interfering with the running and management of AIC Kangundo Children's Home located on parcel numbers Kangundo/Muisuni/945 and Kangundo/Muisuni/1009 pending the hearing and determination of the Petition.* It was deponed that the Petitioners filed an Application dated 23rd November 2018 for stay of the orders which Application was granted pending the hearing and determination of the Application.

4. It is the Respondents'/Applicants' case that on 25th July 2019, the Petitioners withdrew their Application and as a result the orders of stay issued on 23rd November 2018 automatically lapsed; that the orders that remain in force were those issued on 26th October 2018 and that the order of 26th October 2018 was extracted and served on the Petitioners and/or their advocates.

5. It was deponed that in breach of the order of the court, the Respondents/Applicants continued to interfere with the running and management of AIC Kangundo Children's Home and that despite several requests to the Petitioners to obey the orders of the court, they have acted in disobedience of the orders of the court, which actions are adversely affecting the operations of the Children's Home.

6. In response, the 1st Petitioner deponed that the Respondents have not shown in which way the Petitioners have disobeyed the orders of the court; that the order the Respondent is alluding to was stayed by this court and that at no given time have the Respondents/Applicant been in the management of the Children's Home.

7. The 1st Petitioner lastly deponed that the Respondents have not been to the Children's Home for the past four years and that the Respondents' intention is to scuttle the hearing of the Petition,

8. The Application was canvassed vide written submissions. Counsel for the Applicant submitted that the Respondents had knowledge of the Order issued on 26th October, 2018 and that the Petitioners continued to interfere with the running and management of AIC Kangundo Children's Home contrary to the order of the court.

9. Counsel submitted that the Petitioners should be found to be in contempt of the order of 26th October, 2018. Counsel cited the case of *Africa Management Communication International Limited Vs. Joseph Mathenge Mugo & another*, Civil Case No. 242 of 2013, where Mabeya, J. noted as follows:

"22. The standard of proof in matters of contempt of court is well settled. It must be higher than proof on a balance of probabilities, almost but not exactly beyond reasonable doubt. See the case of Mutitika vs. Baharini Farm Limited [1985] KLR 229. This is because the charge of contempt of court is akin to a criminal offence. A party may lose his liberty. In this case I have found that the Defendants have not denied that they have continued to market and organize the "2nd Human Resources Symposium" using brochures and branded items that bear a close similarity to those of the Plaintiff. This is in utter breach of the Order of 13th June, 2013. Their main contention is that the Order was irregular, given the issues raised as to ownership of the intellectual property of the event and the Plaintiff's locus standi. That argument may probably be credible. But the application to establish the legal rights of the parties on a prima facie basis is still pending. The same is yet to be determined. What is at hand is an allegation that an order issued by this court was not complied with. The explanation given by the Defendants for non-compliance thereof is that they think that the same was irregular as the Plaintiff was undeserving of the same. In my view, this is a strange argument. To answer the Defendants, I will reiterate the sentiments of Romer LJ in Hadkinson -v- Hadkinson (1952) P 285 at 288 that: -

"It is plain and unqualified obligation of every person against or in respect of whom an order is made by a court of competent jurisdiction to obey it unless and until that order is discharged. The uncompromising nature of this obligation is

shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or even void” (Emphasis added)

Further, Lord Donaldson MR said in *Johnson –v- Walton (1990) 1 FLR350 at 352* stated: -

“It cannot be too clearly stated that, when an injunctive order is made or when an undertaking is given, it operates until it is revoked on appeal or by the court itself, and it has to be obeyed whether or not it should have been granted in the first place.” (Emphasis mine)

23. To my mind therefore, a party must comply with an order whatever he thinks of such an order. What is important is that such a party has knowledge of the terms of the order. To my mind, if the Defendants were unsatisfied with the Order of 13th June, 2013, they should have attempted to get rid of the same through the proper course that is, either by setting it aside or through appeal. So long as the injunctive order exist, the Defendants are bound to obey the same to the letter.”

10. It was counsel’s submission that the withdrawal of the Petitioner’s Application dated 23rd November 2018 meant that the interim orders automatically stood discharged; that the parties reverted to the status quo in place prior to the grant of the said stay orders and that the Petitioners/Respondents cannot use the said orders which are no longer in existence as a shield against the orders sought in the present Application.

11. It was submitted that the dispute herein is over the control of the AIC Muisuni Church and its properties, including the Kangundo Children’s Home; that the Petitioners have disowned the Africa Inland Church – Kenya and have openly associated themselves with persons who tried to unlawfully take over the national leadership of the AIC and that their claim was rejected by this Court in *Petition 395 of 2012 (Nairobi): Bishop Silas Yego & others v Minister of State for Provincial Administration and Internal Security & 8 others*.

12. In response, counsel for the Petitioners/Respondents submitted that for an Application of this nature to succeed, it ought to be proven that the Respondents were personally served with the order and that the Respondents had wilfully disobeyed the court orders.

13. While relying on the case of *Duncan Manuel Murigi v Kenya Railways Corporation (2008) eKLR*, it was submitted by counsel that it had not been established that the order was served on the Respondents and that in any event, the Applicants had not demonstrated that there was disobedience of the court orders.

14. Contempt of court consists of conduct which interferes with the administration of justice or impedes or perverts the course of justice. Civil contempt consists of a failure to comply with a Judgment or Order of a court or breach of an undertaking given to the court. (See *Osborne’s Concise Law Dictionary, P. 102*).

15. In the case of *Sam Nyamweya & Others v Kenya Premier League Ltd and Others [2015] eKLR* Justice Aburili J stated that:

“contempt of court is constituted by conduct that denotes wilful defiance of or disrespect towards the court or that wilfully challenges or affronts the authority of the court or the supremacy of the law, whether in civil or criminal proceedings.”

16. *Halsbury’s Law of England, Vol.9(1) 4th Edition* states as follows:

“Contempt of Court can be classified as either criminal contempt, consisting of words or acts which impede or interfere with the administration of justice or which creates substantial risk that the course of justice will be seriously impeded or prejudiced, or contempt in procedure, otherwise known as civil contempt consisting of disobedience to Judgment, Orders or other process of Court and involving in private injury.”

17. In the instant Application, the court ought to satisfy itself that the Applicants have proved the elements of civil contempt as were laid down in *Contempt in Modern New Zealand* which were cited in *North Tetu Farmers Co. Ltd v Joseph Nderitu Wanjohi [2016] eKLR* as follows:

“There are essentially four elements that must be proved to make the case for civil contempt. The applicant must prove to the required standard that:-

(a) the terms of the order (or injunction or undertaking) were clear and unambiguous and were binding on the defendant;

(b) the defendant had knowledge of or proper notice of the terms of the order;

(c) the defendant has acted in breach of the terms of the order; and

(d) the defendant's conduct was deliberate.”

18. The record shows that on 26th October, 2018, this court issued an order in the following terms:

a) THAT in addition to the orders of this court of 23rd November, 2017, the Petitioners are hereby restrained from taking over or

interfering with the running and management of AIC Kangundo Children's home located on parcel numbers Kangundo/Muisuni/945 and Kangundo/Muisuni/1009 pending the hearing and determination of the Petition.

19. After the Ruling of 26th October, 2018, The Petitioners filed an Application dated 16th November, 2018 in which they sought to stay the orders of 26th October, 2018. The record shows that this court stayed the said order on 23rd November, 2018 until 23rd January, 2019. However, that Application has never been heard to date.

20. Although the orders of 26th October, 2018 were stayed until 23rd January, 2019, the said orders of stay were never extended. The orders of stay therefore lapsed by effluxion of time.

21. Indeed, having sought to stay the orders of 26th October, 2018, it means the Petitioners were aware of the same. In fact, the record shows that the Petitioners' advocate was present when the court issued the orders of 26th October, 2018.

22. It is now settled that a litigant need not be personally served with an order of the court before contempt proceedings can be commenced. In the case of *Shimmers Plaza Limited vs. National Bank of Kenya Limited (2015) eKLR, Civil Appeal No. 33 of 2012* the Court of Appeal stated as follows:

“On the other hand however, this Court has slowly and gradually moved from the position that service of the order along with the penal notice must be personally served on a person before contempt can be proved. This is in line with the dispensations covered under 81.8 (1) (supra).

Kenya's growing jurisprudence right from the High court has reiterated that knowledge of a court order suffices to prove service and dispense with personal service for the purposes of contempt proceedings.”

23. Where a party's advocate is aware of an order of the court, it is presumed that he passes such information to his client. In the *Shimmers Plaza case(supra)*, the Court of Appeal held as follows:

“Would the knowledge of the judgment or order by the advocate of the alleged contemnor suffice for contempt proceedings” We hold the view that it does. This is more so in a case such as this one where the advocate was in Court representing the alleged contemnor and the orders were made in his presence. There is an assumption which is not unfounded, and which in our view is irrefutable to the effect that when an advocate appears in court on instructions of a party, then it behoves him/her to report back to the client all that transpired in court that has a bearing on the client's case.

24. The Petitioners in this matter, having been represented in court on 26th October, 2018 when the court delivered its Ruling were aware of the order of the court.

25. The last issue I will address is whether indeed the Petitioners disobeyed the orders of 26th October, 2018.

26. Although the Applicants have stated that they have asked the Petitioners on numerous occasions to vacate the Children's Home without success, they have not annexed any evidence to that effect.

27. Indeed, considering that the Petitioners were restrained from *“taking over or interfering with the running and management of AIC Kangundo Children's Home”* located on the suit property, there is no evidence before me to show that the Applicants were running the said Home and that the Petitioners have taken over from them.

28. In the absence of evidence to show that the Petitioners have taken over or interfered with the running of the Children's Home, it is my finding that the Applicants have not proven on the required standard that the Petitioners have disobeyed the order of 26th October, 2018.

29. For the reasons I have given above, I dismiss the Application dated 30th September, 2019 with costs.

DATED, SIGNED AND DELIVERED IN MACHAKOS THIS 23RD DAY OF OCTOBER, 2020.

O. A. ANGOTE

JUDGE