



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISC. APPLICATION NO. 3 OF 2013

**THE REGISTERED TRUSTEES OF BAPTIST CONVENTION OF
KENYA**

T/A KIEMBENI BAPTIST CHURCH PRIMARY SCHOOL. APPLICANTS

VERSUS

THE MINISTRY OF EDUCATION SCIENCE AND TECHNOLOGY...1ST RESPONDENT

THE MUNICIPAL COUNCIL OF MOMBASA.....2ND RESPONDENT

RULING

1. This is a partial ruling on an application for committal for contempt of court. By Notice of Motion dated 3rd April 2013 filed upon leave therefor granted by the Court on the 13th February 2013, the applicant sought the committal for contempt of court of two alleged contemnors as follows:

- 1. That Onesmus Mwatsuma Head teacher, Kiembeni Baptist Church Primary School and Tubman Otieno, Town Clerk Municipal Council of Mombasa be punished for contempt of Court Orders made on the 13th June, 2012;**
- 2. That cost of this application and other costs be in the cause.**

To be sure, the orders of the Court were made on the 29th December 2011 and formally extracted on the 13th June 2012.

2. It is alleged that the two have in disobedience of the court failed to implement the judgment of the Court delivered on the 29th December 2011 in the Mombasa High Court Petition No. 3 of 2006 between the same parties, whose specific orders are set out in the extracted formal order issued on 13th June, 2012 as follows:

- 1. A declaration that the operations of the Kiembeni Baptist Church Primary School by the Respondents without consent of the Petitioners is a violation of the Petitioners' right to property in the parcel of land Plot O. 811/II/MN (Old Plot NO. 169/II/MN Kiembeni-Bamburi).*
- 2. A declaration that the Kiembeni Baptist Church Primary School belongs to the Petitioners who have the sole right of operation save where the Petitioners may in accordance with the law seek the Respondents' assistance, at the Petitioners' sole discretion.*
- 3. An order of mandamus is issued to compel the 1st Respondent to cause the registration of the*

Kiembeni Baptist Church Primary School, Bamburi Mombasa as a Private School in accordance with Section 15 of the Education Act.

4. *All the children/pupils enrolled with the school at various classes from nursery to standard eight for the year 2012 to proceed with their studies until completion on the basis of the public school status.*
5. *The Petitioners will commence enrollment of pupils for the academic year 2013 and the school will revert to full private status upon completion of studies for the pupils enrolled under the public school system as at academic year 2012.*
6. *The 2nd Respondent will pay the Petitioners' costs and the 1st Respondent will bear its own costs.*

3. From the supporting affidavit, replying affidavit filed for the Respondents and submissions in the matter, it is clear to me that the default in the implementation of the order contained in the judgment of 29th December 2011 is the function of the failure, of interplay, between the 1st defendant Ministry and the second defendant local authority and their successors in facilitating the conversion and registration of the *Kiembeni Baptist Church Primary School, Bamburi, Mombasa* as a private school under the Education Act in force at the time of the Judgment and the subsequent Basic Education Act, 2013.

4. It is also apparent that in punishing the two alleged contemnors without further directions as to the specific implementation of the court orders will leave the matters at the same place they were at the beginning of the application for contempt of court. The result is that the orders of the court will have for three straight years been flagrantly disobeyed, with impugnty.

5. As the Court of Appeal has held in **The Defence Forces Council & 6 Others v. Gabriel Kirigha Chawana and 26 Ors.**, (Mombasa) C.A.C.A. No. 9 of 2014, the Court deplores disobedience of the court orders especially by government officers who should be at the forefront of respecting the rule of law principle embodied in the orders. The court said:

*“Before we rest this matter, one other issue deserves mention. The respondents invited us to find that the applicants had no right of audience before us as they had failed to comply with the High Court order. We were also told of the difficulties encountered by the respondents in their bid to serve the orders on the applicants. **Needless to state, the hallmark of a civilized society and which adheres to the rule of law is respect for the Judicial Process and the attendant results. The results may be onerous, oppressive, imperfect, may even elicit disagreement and or disenchantment by the parties or any one of them. However as long as the orders and decrees arising therefrom have not been reviewed, lifted, vacated and /or set aside, it is the bounden duty of the parties to respect the same and act accordingly.** In the circumstances of this case, it is clear that the respondents were granted bail. The applicants were not happy with the result and accordingly embarked on a mission to frustrate the execution of the order thereof. This they did by making it impossible and impractical for the orders to be served personally on them for compliance. We have no doubt at all that the applicants were aware of the order for it was made in the presence of their counsel. A party is deemed to have knowledge of the order in those circumstances. The applicants ought therefore to have complied with the order. They chose wilfully not to do so.*

*We would have been disinclined to give them audience on that account or score alone. However, considering the personal liability that attaches to such disobedience and the need for personal service, we opted nonetheless to hear the applicants. **We wish however to put on record that the conduct of the applicants has been anything but discourteous and arrogant which this Court frowns upon, more so, coming from members of the disciplined forces. They should know better, the consequences of disobeying lawful court orders.**”*

6. The court cannot suffer such contempt of its orders without immediate remedial measures for purposes of protecting the Rule of Law which demands respect for its judicial authority and for the court to foster public confidence in the system of justice through the court. For as long as the court orders remain unimplemented the very system of our courts as guardians of law and justice

will be ridiculed as irrelevant in dealing with the social problem the orders sought to resolve. In particular, the orders the subject of the contempt application herein relate to the delicate matter of administration of a basic education institution with the danger of affecting the quality of foundational preparation of the school pupils.

7. The law of contempt permits the court to make, in addition to, or instead of, any punishment for contempt of court, specific orders to be enforced by a person towards the implementation of its orders which are the subject of the contempt application. See **Halsburys Laws of England**, 4th Ed Vol. 9 pp. 62-63, para. 104:

104. Other remedies.

The court may, in its own discretion, grant an injunction, in lieu of committal or sequestration, to restrain the commission or repetition of a civil contempt. The court may in lieu of any other penalty require the contemnor to pay the costs of the motion on a common fund basis. In a doubtful case, the court may, instead of proceeding for contempt, grant an order requiring the defendant to state whether he has complied with an undertaking. If an order of mandamus, a mandatory order, injunction or judgment or order for the specific performance of a contract is not complied with, the court may, besides or instead of proceeding for contempt, direct the act to be done by some person appointed for that purpose.

8. Accordingly, before making any orders as to liability for and the punishment for contempt of the named alleged contemnors, the Head-teacher at the school and the Town Clerk of the Mombasa Municipal Council, and in determining what additional action need be taken by what person, I consider that it is important to hear the Cabinet Secretary in charge of the Ministry of Education and the County Secretary of Mombasa County as the successor of the 2nd defendant to explain their default in implementing the orders of the court and to show cause why they should not themselves be held in contempt as the the administrative superintendents of their respective organs of the State.
9. For that purpose, the Court issues summons to the Cabinet Secretary, Ministry of Education and the County Secretary of the Mombasa County to attend court within ten (10) days on the **15th December 2014 at 10.00am**. The court will upon hearing the two persons summoned by the Court render its final decision on the application for contempt and any further orders for the implementation of the Judgment of the court based on the pleadings, affidavits on record and any further submissions that the counsel for the parties may, in view of the representations by the summoned persons, be minded to adduce.
10. The summons will be served by the court bailiff on the office of the Attorney General on behalf of the Cabinet Secretary, Ministry of Education Science and Technology, in terms of Order 5 rule 9 of the Civil Procedure Rules and personally on the County Secretary, Mombasa County with the return date of **15th December 2014**.

Dated, Signed and Delivered on the 4th December 2014.

EDWARD M. MURIITHI

JUDGE

In the presence of: -

Mr. Chawada for the Petitioners

Mr. Ngari for the 1st Respondents

No appearance for 2nd Respondent

Mr. Murimi - Court Assistant