



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
HIGH COURT AT NAIROBI(MILIMANI LAW COURTS)
MISCELLANEOUS APPLICATION NO. 558 OF 2009
IN THE MATTER OF LOCAL GOVERNMENT ACT CAP 265 LAWS OF
KENYA
AND
IN THE MATTER OF THE NOMINATION OF COUNCILORS
MICHAEL NJOROGE MWAURAAPPLICANT
VERSUS
MINISTER OF LOCAL GOVERNMENTRESPONDENT
PETER NJOROGE MUNYIRAINTERESTED PARTY

RULING

This ruling is an answer to Michael Njoroge Mwaura's Notice of Motion dated 6th October, 2011 and filed in court on the same date. The application is brought under the Inherent Jurisdiction of the Court. In the application Michael Njoroge Mwaura who is the ex-parte applicant in the proceedings seeks orders as follows:-

- 1. THAT Hon. Musalia Mudavadi, the Minister for Local Government and Prof. Karega Mutahi, Permanent Secretary, Ministry of Local Government be cited for contempt of court for having disobeyed the order of the Court delivered on 13th May, 2011 in the presence of both parties.**
- 2. THAT the said Hon. Musalia Mudavadi and Prof Karega Mutahi be compelled to abide by the orders issued on 30th May, 2011 within such time as the court may deem fit.**
- 3. THAT the Respondent be directed to pay the costs of this application.**

The respondent in respect of this application is the Minister for Local Government who is the respondent in the main application. In the main application Peter Njoroge Munyira was named as an interested party but he has not been involved in this application.

The application is supported by grounds on its face and a supporting affidavit sworn by the applicant on 6th October, 2011. The grounds in support of the application are:-

(i) That the Minister for Local Government was issued with an order of Certiorari quashing Gazette Notice Number 8217 of 2009.

(ii) That the Minister for Local Government was issued with an order of Certiorari quashing Gazette Notice No. 8218 of 2009.

(iii) That the Minister for Local government was issued with an order prohibiting the Respondent from revoking the nomination of the Applicant as a nominated Councillor of the Municipal Council of Kiambu.

(iv) That the Minister, its agents or servants has despite the Court order refused to quash Gazette Notice Number 8217 of 2009 and Gazette Notice Number 8218 of 2009 and refused to cancel the revocation of the applicant's nomination as Councillor of the Municipal Council of Kiambu and such order and decree was served upon the Permanent Secretary for Local Government on 31st May, 2011.

(v) That it is desired to protect the sanctity of Court Orders violated by the Respondent generally and the cited individuals.

The application was opposed through a replying affidavit sworn on 15th December, 2011 by Wycliffe Musalia Mudavadi the Deputy Prime Minister and Minister for Local Government. In the said affidavit the respondent restates what is found in the preliminary objection dated 23rd January, 2012. I will reproduce the grounds of preliminary objection in due course but I find it necessary to first reproduce paragraphs 8, 9 and 10 of the respondent's replying affidavit which states as follows:-

"8. THAT in response to paragraph 6 of the supporting affidavit, I am advised by the State Counsel on record which advice I verily belief to be true that I have no powers to nominate councilors but only acted on a letter dated 23rd July, 2007 from the Chairman Interim Independent Electoral Commission which letter I acted upon as per the powers bestowed upon my office under Section 40 of the Local Government Act Cap 265. Annexed and marked "WMM1" is a copy of the said letter.

9. THAT my powers which are bestowed upon my office under Section 26(b) and 39(c) of the Local Government Act, Cap 265 Laws of Kenya is to Gazette the names which have been forwarded to my office by Interim Independent Election Commission.

10. THAT I have been advised by the State Counsel on record which advise I verily belief to be true that the interested party could have brought the political party which nominated him on board if at all he wanted to be reinstated to the said position."

I will in the course of this judgement revert to the three paragraphs of the respondent's replying affidavit reproduced above. The respondent's grounds of preliminary objection are:-

1. THAT the applicant's application against the Respondent is fatally defective and bad in law.

2. THAT the parties cited for contempt are not parties in the application.

3. THAT the Court order was not addressed to the persons cited in contempt herein.

4. THAT the service of the pleadings, orders and notice was done contrary to the provisions of the law and the same is void.

5. THAT the Respondent cannot enforce what is not capable of legal enforcement.

6. THAT the Respondent is not in contempt of any Court order as the order as was granted was for certiorari and prohibition and it does not require any action by the Respondent.

When the application came for hearing before me Mr. Mogeni for the applicant submitted that the respondent has acted in disobedience of the decision of Musinga, J delivered 13th May, 2011. He therefore asked the court to ensure that the said court order was obeyed by the respondent. He urged the court not to sacrifice his client's application at the altar of technicalities.

Mr. Siro for the respondent argued that whatever they have raised in the preliminary objection are matters of procedure and they cannot be treated as technicalities. He submitted that the Notice of Motion was fatally defective. He argued that Musalia Mudavadi and Professor Karega Mutahi who are named in the application are not parties to this application. Mr. Siro also argued that this application did not comply with the procedures pertaining to contempt of court proceedings. He also queried the validity of the service of the application. On another line of argument Mr. Siro submitted that the ruling of Musinga, J which is alleged to have been disobeyed was not served upon them. He argued that the judgment of Musinga, J did not compel the respondents to act and they cannot be said to have disobeyed any order.

For purposes of record it should be noted that I directed the advocates to argue the notice of motion and preliminary objection at the same time. This ruling will therefore answer the issues raised by both the notice of motion and the preliminary objection.

Looking at the notice of motion, it is clear that it carries two distinct prayers. The first prayer asks the court to cite Hon. Musalia Mudavadi and Professor Karega Mutahi for contempt for disobeying this court's order delivered on 13th May, 2011. The second prayer asks the court to compel Hon. Musalia Mudavadi and Professor Karega Mutahi to abide by the orders issued by this court on 30th May, 2011. It should be noted that there were no orders issued on 30th May, 2011 and it is safe to assume that the applicant is referring to the ruling of 13th May, 2011.

I will start by looking at the issue of contempt of court. On this issue two questions have to be answered namely:-

(a) Did the respondent disobey this court's order dated 13th May, 2011? and

(b) Is the application to cite the respondent for contempt properly before this court?

I have looked at the submissions placed before this court by the advocates for the parties. Looking at the court file it is clear that the respondent in the main notice of motion is the Minister for Local Government. At the time the main notice of motion was filed and at the time the notice of motion which is the subject of this ruling was filed, the Minister for Local Government was Hon. Musalia Mudavadi. The applicant cannot therefore be faulted for putting the name of the Minister for Local Government in the application.

Looking at the court file it is clear that there is no other respondent. I do not understand why the applicant decided to include Professor Karega Mutahi who is the Permanent Secretary in the Ministry for Local Government in the application. In my view Professor Karega Mutahi is a stranger to these proceedings. His inclusion was therefore wrong and unwarranted. No orders can be issued against him. Professor Karega Mutahi cannot therefore be said to have disobeyed any court order.

Did the Minister disobey any court order? I have gone through the ruling delivered by Musinga, J on 13th May, 2011. According to my understanding, that ruling quashed Gazette Notice No. 8217/2009 which had cancelled the appointment of Michael Njoroge Mwaura (the applicant) as a nominated councillor. The ruling also quashed Gazette Notice No. 8218 of 2009 which had nominated Peter Njoroge Munyira (the interested party) to replace Michael Njoroge Mwaura (the applicant). The ruling also reveals that the applicant's name was forwarded by his political party to the defunct Electoral Commission of Kenya in 2008. He was then nominated a councillor to the Municipal Council of Kiambu. On 22nd June, 2009 the applicant was re-nominated a councillor to the said Municipal Council of Kiambu. That means after Gazette Notice No. 8217/2009 was quashed, the notice that remained in force was Gazette Notice No. 6373 dated 18th June, 2008. The respondent therefore needed not to have put in another notice in the

Gazette nominating the applicant because Gazette Notice No. 6373 had come back into full force after the court quashed Gazette Notice No. 8217. The respondent is therefore correct when he says he needed not to have taken any further action. By virtue of the same reasoning it follows that the interested party is no longer a nominated councillor since his nomination was thrown out when this court quashed Gazette Notice No. 8218 which nominated him.

Earlier on in this ruling I did reproduce paragraphs 8, 9 and 10 of the respondent's replying affidavit. I did so because I felt the respondent was asking me to relook at the decision of Musinga, J. Let it be known to the respondent that this court has no powers to reopen the ruling of 13th May, 2011. From the papers filed in court it is clear that neither the respondent nor the interested party appealed against this court's decision. They will therefore have to live with the consequences of that ruling.

As already stated it is clear that the respondent cannot be said to have disobeyed this court's ruling of 13th May, 2011. Having reached this conclusion I no longer find it necessary to consider whether the application to cite the respondent for contempt is procedurally compliant.

Having concluded that the respondent did not disobey the court order, I would wish to consider what would have happened had the respondent been found guilty of contempt of court. There is the known risk of imprisonment. In my view, however, there is another latent but potent outcome which can result in the destruction of the career of a politician like the respondent before me. In passing the Constitution Kenyans put into force a strong regime of laws. It however seems that the majority of Kenyans have not internalized the salient features of the Constitution. Apart from Chapter Six which takes care of Leadership and Integrity, Article 10 provides for national values and principles of governance. These national values and principles of governance have to be taken into account whenever a state organ, state officer or public officer enacts, applies or interprets any law. Among the national values and principles of governance are the rule of law and integrity. Supposing a politician is found guilty of contempt of court, and the contempt is not purged before an election, can the Independent Electoral and Boundaries Commission deny such a politician clearance on the ground that he has not adhered to the national values and principles of good governance? I do not have to answer this question because it was not an issue in this case but I believe that sooner rather than later the question will have to be answered. As for public employees I think disobedience of court orders can be cited as failure to adhere to the rule of law. In my view, it is no longer fashionable to disobey court orders.

I will then move to the applicant's request to this court to compel the respondent to abide by this court's ruling of 13th May, 2011. This is not about compelling the respondent as such. It is only about setting the record straight. This court has inherent jurisdiction to ensure that the orders it gives are complied with. What I will therefore do is to put in place measures which will ensure that the applicant enjoys the fruits of the ruling of 13th May, 2011.

As such, I issue orders as follows:-

1. The applicant to forthwith resume his duties as a nominated councillor at the Municipal Council of Kiambu;
2. The respondent to direct the relevant officers in his Ministry to process all the applicant's unpaid dues within 30 days from the date of this order;
3. The Permanent Secretary in the Ministry for Local Government and the Clerk to the Municipal Council of Kiambu are directed to assist in the execution of this order;
4. The Attorney General to inform the two officers mentioned in number 3 above and the respondent about this order but the applicant is at liberty to serve the order on the above mentioned persons;
5. If this order will not have been complied with by the next mention date, the Minister for Local Government Hon. Musalia Mudavadi to appear in court in person and show cause why he should not be

punished for failing to comply with this order.

6. This matter to be mentioned on 23rd April, 2012 to confirm compliance and for further directions, if need be.

7. There is no order as to costs.

Dated and signed at Nairobi this 1st day of March, 2012 .

W.K.KORIR
JUDGE