REPUBLIC OF KENYA

IN THE CHIEF MAGISTRATE'S COURT AT NYAMIRA

PETITION CASE NO.2 OF 2013

JUSTUS NYARIBO.....PETITIONER

-VERSUS-

CLERK TO NYAMIRA COUNTY ASSEMBLY.....RESPONDENT

R U L I N G

Before me for disposal is the petitioner's Notice of Motion dated 12th day of April 2013 in which the Petitioner/Applicant seeks for the following orders;

> (a) **That this Honourable Court be pleased to cite the Respondent herein for contempt of court order dated 22/03/2013 which was duly served upon him/her and sentence him/her under the law.**
>
> **(b) Costs of this application be provided for**.

The application is supported by grounds on the face thereof and supporting Affidavit sworn by the Petitioner Justus Nyaribo on 12th day of April 2013.

The application is opposed by the Respondent vide grounds of opposition dated 13th day of May 2013 and Replying Affidavit sworn on 14th day of May, 2013 by one Phoebe Namukuru Buchunju.

The order the disobedience whereof the applicant is seeking to cite the Respondent states as follows;

> 1. **That this application be and is hereby certified urgent and is heard ex-parte at the first instance**
>
> **2. That pending the hearing and determination of the application the respondent herein by himself and/or his agents and/or servants are hereby restrained from holding the election of speaker of Nyamira County Assembly on 22nd March and all any other time until 5th day of April, 2013 when this application shall be heard inter-parties.**

The above orders were granted ex-parte pursuant to the petitioner's Notice of Motion dated 2nd March 2013 filed under certificate of urgency dated 22nd March 2013 wherein the Petitioner/Applicant sought the following orders;

> **(a) That this application be certified as urgent and the same be heard ex-parte at the first instant.**

(b) That pending the hearing and determination of this application there be a temporary injunction restraining the Respondent herein by himself and/or his agents and/or servants and/or persons acting on his behalf from holding the election of speaker in Nyamira County Assembly on 22nd day of March 2013.

(c) That pending the hearing and determination of this suit there be a temporary injunction restraining the Respondent herein by himself and/or his agents and/or servants and/or persons acting on his behalf from holding the election of speaker in Nyamira County Assembly on 22nd day of March, 2013.

(d) Costs of this application be provided for.

The election of the speaker to Nyamira County Assembly, which the order aforesaid sought to stop was carried out on 22nd day of March, 2013. The Petitioner being aggrieved filed the present application which was canvassed on 20th day of June 2013.

Mr. Soire for the petitioner/Applicant urged that it was not in dispute that an order was made on 22/03/2013 which order had a penal notice at its foot. He argued that the order was duly served and relied on **exhibit JN2** being the Affidavit of Service sworn by one Samuel Anyoka on 5th day of April, 2013.

Mr. Soire argued that despite service of the court order the exercise that was restrained by the order was carried out as is contended in **paragraph 4** of the Affidavit in support of the present application which states that;

"That I am aware that despite the service of the said order upon the Respondent herein, the said Respondent proceeded on and carried out the exercise of election of speaker of Nyamira County"

It was Mr. Soire's argument that carrying out of the exercise was in total disregard and disobedience to court order, and that the applicant was aggrieved by the disobedience. He stated that good order and rule of law demand that a court order is obeyed.

In response to the grounds of opposition filed by the Respondent, Mr. Soire said that the Petitioner's application is merited. In response to denial of personal service by the Respondent in her Replying Affidavit, Mr. Soire argued that Affidavit of service sworn by Samuel Anyoka (emphasis mine) was clear. He said that this was a fit case to grant the orders prayed.

Mr. Bosire for the Respondent argued that in an application for contempt of court order, two (2) things must be proved;

(i) That there was a court order

(ii) That the order must be served personally upon the person who disobeyed it.

Mr. Bosire stated that it was not in dispute that there was an order in existence. He argued that the order must be specifically addressed to the person.

Picking on **paragraph 3 of Affidavit of Service** sworn by Samuel Anyoka, Mr. Bosire argued that it had not been stated who was the master of ceremony who refused to give permission of entry. He argued that swearing in was done by a judge from the High Court and a Magistrate from this honourable court, that is, Nyamira Law Courts. He then queried why the clerk to Nyamira county Assembly was being sued ***instead of the High Court –Judge and the said Magistrate. (Emphasis mine)***

While still on **paragraph 3,** Mr. Bosire queried if service was done as **paragraph 3 of Affidavit of**

Service states that the police officers locked the door and never came out.

Paragraph 3 of the said Affidavit of service states thus;

> **"That on the same dated 22nd day of March, 2013 I proceeded to Nyamira County Assembly hall where swearing in of County representatives was being conducted whereat the entrance to the said hall at 11.45a.m. I was barred by the administration police from Nyamira District Headquarters and the Kenya Police Officers from Nyamira Police Station saying that they were instructed not to allow anybody to enter into the said hall and that they were to seek permission from the master of the ceremony who declined to authorise them and instead the said officers locked the door and never came out".**

Mr. Bosire continued that **paragraph 4 of the Affidavit of Service** was in contradiction of **paragraph 3** thereof as the process server does not state where he got the sergeant at arms to whom he threw the order. That the name of sergeant at arms was not stated. He asked why the Respondent should be held liable for an order thrown at the sergeant at arms. **Paragraph 4 of the Affidavit of Service** states;

> ***"That I managed to throw in a copy of the order which I intended to serve at the time I was talking with the sergeant at arms".***

Contrary to claims of Mr. Bosire, the paragraph does not say that the process server threw the order at the sergeant at arms, but rather threw in a copy of the order while talking with sergeant at arms.

Mr. Bosire argued that in contempt applications, the applicant is required to demonstrate beyond reasonable doubt that the order was duly served. He added that it was not enough to say that the Respondent had the knowledge of the order. That service was important.

Counsel relied on the case of ***Kariuki & Others –vs- Minister for Gender, Sports, Culture & Social Services and 2 Others (2004) 1 KLR where Lenaola-Judge,*** held that in Kenyan Law, Service was higher than knowledge. This was held notwithstanding that the Advocate for the Minister was present in court when the order being the subject of contempt proceedings was given.

Mr. Bosire submitted that no service was made on the Respondent and therefore she cannot be held to be in contempt of an order she was not served with.

Mr. Bosire submitted that the Respondent stated that she had not been appointed Nyamira County Assembly Clerk at the time of the service. He then asked which clerk was purportedly served if at all there was service. That the Respondent states that she was appointed on 10/04/2013, and came to know about the order on 8/05/2013. That the Respondent was not privy to the order. He urged the court to reject and dismiss the application with costs to the Respondent.

In brief response Mr. Soire for the Applicant submitted that it was common knowledge that the person who presided over the exercise was the clerk of the Council. That the role of the High Court- Judge and the Magistrate was just to swear in and not to preside over the function.

Mr. Soire argued that the Replying Affidavit by Phoebe did not dislodge the assertion that an order was served because Phoebe was not at the scene on 22/03/2013 having been appointed on 10/04/2013. He stated that the Respondents had conveniently remained mum and silent on whoever was in office at the material time. That they were citing the person who was involved on 22/03/2013 and not Phoebe. He concluded that the application has sufficient material upon which the court can cite the Respondent for contempt.

Before I embark on the issues for determination, it is important that I straighten some issues argued by counsel. Firstly, Mr. Bosire queried why Respondent was being sued yet it is a High Court Judge and the unnamed Magistrate who did the swearing in. It should be clear that the order restrained the election of

county assembly speaker, and not the swearing in of the County Assembly Representatives and the elected speaker.

Secondly, Phoebe Namukuru Buchunju, the deponent of Replying Affidavit dated 14/05/2013, does not say that she was appointed on 10/04/2013. She states that she reported to duty on 10/04/2013. **Paragraph 2** of the said affidavit which is self-explanatory states that;

> ***"That I am the current clerk to Nyamira County Assembly the Respondent herein, having duly appointed as such reported at Nyamira County on the 10th day of April, 2013".***

Back on the issues for determination, I think the following have emerged;

- **Whether there was service of the court order.**
- **whether personal service is mandatory in contempt proceedings**

(i) **Whether there was service of the court order on the Respondent.**

Paragraph 4 of the Affidavit of Service aforesaid reveals that there was no personal service on the Respondent as the process server averred that he managed to throw a copy of the order inside while he was talking with the sergeant at arms.

(ii) Whether Personal Service is mandatory.

I would not hesitate to hold that personal service is not mandatory. Order **5, Rule 8(1) of the Civil Procedure Rules** states that;

> **"Wherever it is practicable, service shall be made on the defendant in person unless he has an agent empowered to accept service, in which case service on the agent shall be sufficient".**

The above provision takes Cognizance of the fact that personal service may not be achieved in some circumstances. In the present case, service on the Respondent was frustrated by the Kenya Police Officers from Nyamira Police Station and also the Administration Police officers from Nyamira District Headquarters who were acting on instructions of master of ceremony. However, I also find that the manner in which the process server effected the service makes it difficult for me to hold that the court order reached the respondent.

Mr. Bosire introduced the issue of knowledge of court order, and while relying on ***Kariuki & 2 Others –vs- Minister for Gender, Sports, Culture and Social Services and 2 others (2004) 1 KLR***, he argued that knowledge of the court order is not important, but personal service is important. I wish to clarify that the High Court is divided on whether personal service is higher than knowledge or vice versa. The law, according to **Lenaola-Judge,** currently puts the knowledge of a court order above personal service.

In the case of ***Hon. Basil Criticos –vs- The Hon. Attorney General & 8 Others (2012) eKLR, Judge Lenaola,*** apparently departing from his position in Kariuki's case, stated thus;

> ***"The issue of knowledge of orders as being sufficient was until recently, alien in our jurisprudence. in Kariuki and Others –vs- Minister for Gender, Sports, Culture and Social Services and 8 Others, (2004) 1KLR 588, it was held.***
>
> > ***".....but in our law, service is higher than knowledge and since the service here was frustrated.....I shall hold in accord with the existing law that there was no service."***
>
> *This was made following the decision in Wang'ombe(supra)*

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 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. Francis Atwoli in fact went further to arrogate himself the decision to determine when the strike should end despite the fact that the court order had stopped it.....His contempt was obvious and his conduct and words can attract no other finding".***

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".

See also the finding of ***Kimaru –Judge, in Justus Wanjala Kisiangani and 2 Others –vs- City Council of Nairobi and 3 Others (2008) eKLR*** where the learned judge had this to say;

> ***"I have perused the proceedings before the subordinate court. It is evident that the initial order granted by the subordinate court on 23rd February 2007 was extended from time to time till 3rd August 2007 when the respondent breached the said order by demolished the structures built on the suit property. During all this time that the interim orders were extended, the respondent's advocate was present in court. The respondents in this application cannot therefore be heard to say that they were unaware of the existence of the said order requiring them to maintain status quo. I think the respondents are labouring under misconception that since they were not served with the subsequent orders in regard to the interim orders, then they were under no obligation to obey the same. It is trite law that any part who is aware of a court order is required to obey the same".***

On the other hand, there is a school of thought that personal service is higher than knowledge. ***Judge Majanja, in Mike Maina Kamau –vs- Hon. Franklin Bett and 6 Others (2012)eKLR*** stated that;

> **" The law and practice concerning contempt of court has been settled in this country** ***(see Isaac Wanjohi and Another –vs- Rosalind Macharia Nairobi HCCC No.450 of 1995 (unreported) per Bosire-J, and Wildlife Lodges Limited –vs- County Council of Narok and Another Nairobi HCCC NO. 1248 of 2003 (unreported) per Ojwang Ag. –J). By virtue of Section 5(2) of the Judicature Act***, the law applicable is to be found in the **England Supreme Court Practice Rules. Order 52 Rule 3 (1) of the Supreme Court Practice Rules makes it mandatory for the contemnor to be served and failure to do so renders the application defective.....".**

Between the two (2) schools of thought above I am inclined to side with the first school of thought. I therefore hold that knowledge is higher than personal service.

The next question that I will deal with is whether the respondent had the knowledge of the order. **Paragraph 3 of the Affidavit of Service** states that the police officers prevented the process server from accessing the hall where the swearing in of County Assembly representatives was taking place because the police officers were not granted authority by the master of ceremony to allow the process server in. This state of affairs leaves the court in the arena of speculation as to whether word on that court order reached the Respondent. As such I am unable to hold that the Respondent had knowledge of the order. I am therefore unable to arrive at the finding that the Respondent was in contempt of the court order.

Mr. Bosire argued that contempt proceedings are criminal in nature hence proof must be beyond reasonable doubt. With due respect this is not the correct position. The ***Court of Appeal in Mutitika –vs- Baharini Farm Limited (1985) KLR229, 234*** held that;

> ***"The standard of proof in contempt proceedings must be higher than proof on balance of probabilities, almost but not exactly, beyond reasonable doubt.....The standard of proof beyond reasonable doubt ought to be left where it belongs, to wit, criminal cases. It is not safe to extent the latter standard to an offence which can be said to be quasi-criminal in nature".***

The above statement need not be overemphasized. I would have dealt with the issue as to whether this court has jurisdiction to punish the respondent for contempt, but since it is my finding that knowledge of the court order by the Respondent cannot be established, I will not venture therein.

In conclusion I wish to point out that a court order must be obeyed whether one agrees with it or not. The order must be obeyed first, thereafter a person aggrieved by it should mount proceedings to either set it aside or review it.

As per ***Hadkinson –vs- Hadkinson 2 ALL ER 1952 p.569.***

> **"It was the plain and unqualified obligations of every person against, or in respect of, whom an order was made by a court of competent jurisdiction to obey it unless and until it was discharged".**

For my earlier reason that knowledge of the court order by the Respondents has not been established, I dismiss the application. Costs be in the cause.

Dated signed and delivered at Nyamira this 2nd day of July, 2013.

.....

N. OKUMU

RESIDENT MAGISTRATE

PRESENT

- **Mr. Mutai holding brief for Mr. Bosire instructed by the firm of Bosire Gichana & Co. Advocates.**
- **N/A for the Petitioner**