



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT ELDORET**

**PETITION NO. 1 OF 2018**

**IN THE MATTER OF ARTICLES 1, 2, 10,22,28,40,43,47,55,57 AND 186 OF THE CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF THE FOURTH SCHEDULE PART 2 (7) (a), (b), (c) AND (d) OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF RULE 4 OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013**

**AND**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS UNDER ARTICLE 28,40,43,47,55 AND 57 OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF THE REGULATION OF HAWKING ZONES, HAWKING ACTIVITIES, SMALL SCALE TRADE, LICENSING EXCLUDING PROFESSIONAL LICENSING, FAIR TRADE PRACTICES AND COOPERATIVE SOCIETIES IN UASIN GISHU COUNTY**

**BETWEEN**

**ELDO HAWKERS SAVING AND CREDIT**

**COOPERATIVE SOCIETY LIMITED.....PETITIONER**

**AND**

**THE UASIN GISHU COUNTY GOVERNMENT.....RESPONDENT**

**RULING**

This ruling is in respect of an application dated 25<sup>th</sup> January 2018 brought by way of notice of motion by the petitioner/applicant for orders:

1. Spent

2. That pending the hearing and determination of this application and thereafter the hearing and determination of the petition the respondent and its officers herein be compelled to return all the metallic stands or the petitioner’s members which it had confiscated, the petitioner’s members do proceed to occupy and continue to carry out their trade in the same hawking zones as they did prior to removal by the respondent devoid of harassment or interruption and the respondent do continue to collect from the petitioner Kshs. 100/ from the petitioner’s members, and the Administration Police Commandant Uasin Gishu County and or any officer Commanding Police Division Eldoret Central do assist in implementing the order.

3. That **Peter Leley** the County Secretary of the respondent, **Paul Rutto** the County Security Advisor of the respondent, **Silas Kering Leting** the Director of Licensing and Compliance and Antony Alwanyi the County Chief Enforcement Officer of the respondent herein be summoned to show cause as to why they should not be committed to civil jail for a term not exceeding six months for contempt of court having deliberately, wilfully and persistently acted in defiant disobedience of the orders this

Honourable court made on 18<sup>th</sup> January 2018 and in the absence of any shown cause to the satisfaction of the court and law the respondent be fined and each of the officers named herein be each fined Kshs. 200, 000/ in addition to the incarceration in jail in accordance with section 28 of the Contempt of Court Act No. 46 of 2016.

4. That the costs of this application be paid by the respondent and the contemnors.

During the hearing of this application the persons mentioned in this case as the contemnors were present in court apart from one Peter Leley who had been appointed as CEO of Intergovernmental Technical Committee. There was a letter that was produced in court indicating the same and he was not able to make it to court.

#### **Petitioner's Submissions**

Mr. Kagunza for the applicant relied on the grounds on the face of the application and the supporting affidavit sworn by the applicant together with the annexures. He submitted that the court issued an order dated 18/1/18 which was clear and specific restraining the respondent from evicting the petitioners or interfering with their economic activities.

Counsel further submitted that the order was duly served and proof of service was filed vide an affidavit of service in court. That a process server was cross examined in court on 1/2/18 when the contemnors were present in court. He stated that this is clear evidence that the contemnors were aware of the court order, that they were duly served but decided to flagrantly disobey the court order.

Mr. Kagunza also submitted that there were photographs marked as annexure C showing the security Advisor forcefully ejecting the applicants from the designated hawking zones on 19/1/18. He stated further that the Director of Compliance is also not allowing the applicants to pay Kshs. 100 daily. Counsel further submitted that the contemnors are undermining the administration of justice by the court which ultimately undermines the dignity and authority of the court.

Counsel therefore urged the court to find that the contemnors are in contempt of court and that they should not be given a right of audience as they have not purged the contempt.

#### **Respondent's Submissions**

Miss Chesio Counsel for the respondents opposed the application and relied on the replying affidavits of the respondents. Counsel also relied on the authorities dated 12/3/18. She submitted that in an application for contempt an applicant must demonstrate that there was proper service. It was her submission that paragraph 4 of the affidavit of the process server one Tobias Nyaberi confirms that the order was served on the County Attorney and not the contemnors before this Honourable court. Counsel stated that this contradicted paragraph 4 (d) of the applicant's supporting affidavit which avers that the orders were served on the contemnors and that the contemnors tore the orders into pieces. Miss Chesio further submitted that the issue of service on the contemnors has not been proved by the applicants.

Counsel also stated that it must be proved that the contemnors had personal knowledge and the existence of the orders. That the glaring contradictions on the issue of service confirms that the contemnors were not aware of the orders. Counsel further submitted that the cross examination of process server was on the service of the application and not the orders.

It was Counsel's submission that the applicant must demonstrate that the contemnors deliberately or knowingly, blatantly and wilfully disobeyed the orders as this goes to the omission/commission alleged against the contemnors. That the annexures are similar to the ones in petition No.4 of 2018 annexure 2 photographs.

Miss Chesio cited section 78 of the Evidence Act which provides that the person who took the photographs should accompany them with a certificate. That no such certificate was supplied to help the court to discern whether the photographs were similar to the ones in petition No. 4 of 2018.

Counsel cited section 44 (3) a to d of the County Government Act which provides for the job description of a County Secretary and pursuant to his statutory functions he was in no way in a position to disobey these orders as they affected a different department. Further that no evidence was supplied to confirm that the County Askaris had declined to receive money from any member of the public as no letter was attached to demonstrate the same.

Miss Chesio submitted that the allegations of assault have not been substantiated and Mr. Ruto a Security Advisor has been dragged into this case. She also stated that the applicant was under a duty to ensure that the orders applied for and issued were clear and unambiguous. She cited the part that mentioned designated hawking zones but annexure No. "d" a letter dated 18/1/18 which approved designated hawking zones indicated that they were temporary and were valid for a period of 3 months in 2016. Further that the designated areas are the market in Eldoret and that the applicant wants the court to infer that the designated areas are streets and outside business premises.

Counsel therefore urged the court to dismiss the application with costs to the respondents as the contemnors are in full compliance with the court orders. In response Counsel for the applicant reiterated his earlier submissions and submitted that the contemnors have not yet purged the contempt. He urged the court to allow the application.

#### **Analysis and determination**

The application before me is for committal of the respondent's officers named in the application to civil jail for contempt. This application arose from orders that were granted by this court against the respondents on 18/1/18. The applicant argued the application and stated that the contemnors had disobeyed the court orders and that they were duly served with the order but blatantly chose to disobey. Both Counsel for the

applicant and the respondents argued the application as enumerated above.

According to the book on Contempt in Modern New Zealand, in an application for contempt of court, there are essentially four elements that must be proved to make the case for civil contempt. The applicant must prove to the required standard (in civil contempt cases which is higher than civil cases) 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.

The applicant must adhere to the requirements above and establish that the contemnor was personally served or had knowledge of the alleged order. The reason why personal service is important is because of the nature of the punishment which involves the curtailment of the freedom of an individual and the fact that it is quasi criminal in nature. The standard of proof in contempt proceedings is also much higher than in civil cases.

On the first issue whether the terms of the order were clear and unambiguous and were binding on the defendant; Counsel for the respondent submitted that the terms of the order did not meet this requirement as the designated areas or hawking zones were not specific or clear. The question is, what are these designated hawking zones? Are they the designated hawking zones in the whole of Uasin Gishu County or are they specific zones within Eldoret Town. Are these areas meant to be the market or the streets in Eldoret Town?

The applicant should have specifically named the said designated hawking zones which they wanted to be part of the order. The order therefore was ambiguous and not clear. Even though the affidavit stated that there was a designated zone for hawking the order did not incorporate this.

On the second issue as to whether the defendant had knowledge of or proper notice of the terms of the order; it was submitted that the defendant was served with the order but when the process server was cross examined in court he admitted that he served the County Attorney with the order and the suit papers. The contemnors filed affidavits deponing that they were never personally served with the orders as required by law and procedure of contempt of court proceedings. Were the contemnors aware of the orders? If not then were they capable of disobeying an order they are not aware of? If the same is in the affirmative and that they wilfully disobeyed the court order then they are liable to be committed to civil jail.

In the case of *GATHARIA K. MUTITIKA & 2 OTHERS -VS- BAHARINI FARM LTD* it was held that:

*“it is quite clear on the authorities that anyone who, knowing of an injunction, or an order of stay, willfully does something, or causes others to do something, to break the injunction or interfere with the stay, is liable to be committed for contempt... The reason is that by doing so he (or she) has conducted himself (or herself) so as to obstruct the course of justice and so has attempted to set the order of the court at naught”*

The process server having admitted on cross examination that he served the county Attorney and not the officers named in the contempt proceedings. In order to succeed in a contempt of court proceedings, the applicant must prove that the contemnor must have been served personally. It should also be noted that knowledge of the order supersedes personal service as was held in *NAIROBI MISC.CIVIL APPLICATION NO. 316 OF 2010 BASIL CRITICOS -VS- ATTONEY GENERAL & 4 others* where Lenaola J (as he then was) stated

*that the law has changed and so as it stands today, knowledge supersedes personal service and for good reason. ....where a party clearly acts and shows that he has knowledge of a court order, the strict requirement that personal service must be proved is rendered unnecessary”*

If the applicant can prove that the contemnors even though not personally served were aware of the order then the court would consider punishing the parties for contempt. The applicant has neither discharged this requirement that the contemnors were personally served with the order nor had knowledge.

On the third and fourth issues on whether the contemnors acted in breach of the terms of the order and whether their conduct was deliberate, from the onset as stated above the order was not clear and having found that the contemnors were not served personally, the court would not come to the conclusion that the contemnors acted in breach of the terms of the order. Having looked at the functions of the County Secretary as provided for in law, he would be acting ultra vires if he dealt with issues involving security and enforcement of law and order.

Finally it is trite law that the standard of proof in contempt proceedings is higher than proof on a balance of probabilities and almost but not beyond reasonable doubt as was held in the Court of Appeal held in the case of *Mutitika Vs Baharini Farm Limited [1985] KLR 229, 234* that:

*“In our view, the standard of proof in contempt proceedings must be higher than proof on the 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, in criminal cases. It is not safe to extend it to an offence which can be said to be quasi-criminal in nature.”*

The court should therefore exercise restraint when dealing with cases of contempt where the standard of proof has not met the threshold. Parties should also be aware that orders of the court are not issued in vain and must be obeyed whether they agree with the terms of the order or not. There are avenues put in place to ventilate parties' displeasure with the terms and conditions of an order.

Having said that I find that the application does not meet the threshold for grant of the orders sought and is therefore dismissed with no orders as to costs.

**Dated and delivered at Eldoret this 9<sup>th</sup> day of October, 2018.**

**M.A ODENY**

**JUDGE**

Ruling read in open court in the presence of Mr. Mogambi for the applicant and Mr. Kamau holding brief for Miss Chesio for the Respondent.

Mr. Koech: Court Assistant.