



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT KISII

MISC. APP. NO. 6 OF 2017

IN THE MATTER OF CONTEMPT OF COURT ACT, NO. 46 OF 2016

AND

IN THE MATTER OF SECTION 148(2) OF THE PUBLIC FINANCE MANAGEMENT ACT (NO. 18 OF 2012)

AND

IN THE MATTER OF ISSUANCE OF SHOW CAUSE NOTICE BY THE COURT UNDER SECTION 30(1) OF THE CONTEMPT OF COURT ACT (NO. 46 OF 2016)

AND

IN THE MATTER OF ARTICLE 179 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF CONTEMPT OF COURT BY COUNTY GOVERNMENT OF KISII

BETWEEN

DR. J.A.S KUMENDA.....1ST APPLICANT

FLORENCE W. GATUNE.....2ND APPLICANT

AND

THE GOVERNOR (COUNTY GOVERNMENT OF KISII).....1ST RESPONDENT

THE EXECUTIVE COMMITTEE MEMBER (FINANCE).....2ND RESPONDENT

**THE EXECUTIVE COMMITTEE MEMBER (LANDS, HOUSING, PHYSICAL
PLANNING & URBAN DEVELOPMENT).....3RD RESPONDENT**

THE EXECUTIVE COMMITTEE MEMBER (ENERGY, WATER,

ENVIRONMENT & NATURAL RESOURCES).....4TH RESPONDENT

THE EXECUTIVE COMMITTEE MEMBER

(HEALTH SERVICES).....5TH RESPONDENT

THE COUNTY GOVERNMENT OF KISII.....6TH RESPONDENT

RULING

1. This court on 13th July 2018 made an order that contempt of court proceedings be commenced against the respondents herein. The court directed that the Deputy Registrar of the court do issue to the respondents a notice to attend court on 25th September 2018 to show cause, if any, why they should not be held to be in contempt of court.

2. On the date scheduled for the hearing of the notice to show cause, the respondents filed a notice of motion application seeking a stay of any proceedings and/or any orders issued by the court on 13th July 2018 and/or any proceedings by way of notice to show cause pending the hearing and determination of the intended appeal against the orders issued by the court on 13th July 2018. The application was expressed to be brought under Sections 1A, 1B and 3A of the Civil Procedure Act, Order 42 Rule 6 of the Civil Procedure Rules and Section 33 (a) (2) of the Contempt of Court Act. The application inter alia sought the following orders:-

1. That pending the hearing of this application inter partes there be a stay of execution of any proceedings and/or the judgment/orders Notice to Show Cause issued before the Kisii Environment and Land Court by Hon. J. M. Mutungi and the orders issued dated and delivered on the 13th July 2018 in Misc. Application No. 6 of 2017 and/or any proceedings of Notice to Show Cause and all other consequential orders made thereto.

2. That pending the hearing and determination of the intended appeal there be a stay of execution of the judgment/orders issued before Kisii Environment and Land Court by Hon. J. M. Mutungi dated and delivered on the 13th day of July 2018 in Misc. Application No. 6 of 2017 and/or any proceedings of Notice to Show Cause before the Honourable court and all other consequential orders made thereto.

3. The application was premised on the grounds set out on the body of the application and the affidavit sworn in support by one, John Billy Momanyi, the Executive Committee Member – Finance and the 3rd Respondent herein. The respondents state that they were aggrieved by the judgment/order given by the court on 13th July 2018 requiring the respondents to show cause in regard to Contempt of Court proceedings. The respondents have filed and served a Notice of Appeal and further aver that the issue of ownership of the subject property remains in dispute and in that regard make reference to Gazette Notice Number 6862 Vol. CXIX-No. 97 dated 17th July 2017 by the National Land Commission annulling the title to the subject property which has provoked High Court Misc. Civil Application No. 3 of 2017 (JR) which will finally adjudicate on the ownership of the suit property. The respondent's assert that the issue of ownership of the property ought to be dealt with first before the issue of contempt and urge that there exists sufficient cause to order stay of execution and of the proceedings as the respondents/applicants could suffer substantial loss if stay of the proceedings is not granted.

4. The applicants/respondents filed a replying affidavit dated 14th October 2018 sworn by Dr. J. A. S Kumenda in opposition to the respondents' application for stay of proceedings/execution. The applicants inter alia contended the respondents' application is incompetent and bad in law. The applicants stated that the ruling of the court delivered on 13th July 2018 dismissed a preliminary objection by the respondents and was thus a negative order incapable of being executed. The applicants contended that the firm of Swanya & Swanya & Co. Advocates who filed the application were not properly on record for the respondents and hence the application was incompetent. Further, the applicants averred that there was no automatic right of appeal against the ruling/order of 13th July 2018 and to the extent that no leave to appeal was sought and obtained no valid appeal can lie to the Court of Appeal.

5. The applicants further aver that the pendency of Kisii ELC Misc. Civil Application No. 3 of 2017 (JR) where the applicants seek to quash the decision of the National Land Commission has no bearing to these proceedings and the respondents cannot invoke the Judicial Review proceedings to cover for their disobedience of the orders of this court. The applicants contention is that the respondents are in disobedience of the court order and persist in such disobedience and are therefore liable to be cited for contempt of court. The applicants aver that the respondents' instant application is devoid of any merit and prays for its dismissal.

6. The respondents' application for stay of proceedings dated 24th September 2018 was canvassed by way of written submissions. The applicants have challenged the competency of the respondents application for stay of the contempt proceedings pending the hearing and determination of the appeal on the basis firstly, that the application was filed by a stranger as the firm of Swanya & Swanya & Co. Advocates were not properly on record for the respondents; and secondly, that the respondents had no right to appeal as they had not obtained leave to do so.

7. On the question whether or not the firm of Swanya & Swanya and Co. Advocates are properly on record for the respondents, the court observes that the said firm on 25th September 2018 filed a "**Notice to act together with Kennedy & Chweya Onsembe Advocates**" dated 24th September 2018. The notice was to the effect that the 1st to 6th respondents had appointed the said firm to act for them together with Kennedy Chwenya Onsembe Advocate. The law does not place a limitation on the number of advocates who may be appointed to represent a party and neither does the law bar the appointment of an additional advocate by a party to represent him after he had appointed an earlier advocate. In my view, what is important is that a notice of the appointment of the additional advocate is given to the other parties and to the court. This is underpinned by the constitutional requirement for unrestricted access to justice and a fair hearing under Article 48 and 50(1) of the Constitution. In the furtherance of the principles of access to justice and ensurance of a fair trial parties have a right to be represented by advocates of their choice. In that regard, a party may appoint any number of advocates it wishes to represent them except that the costs of more than one advocate for a party can only be certified by the court having regard to the nature of the case.

8. In the instant matter, I do not consider that the appointment of the firm of Swanya and Swanya & Co. Advocates offends the provisions of Order 9(1) of the Civil Procedure Rules which provides thus:-

9(1) Any application to or appearance or act in any court required or authorized by the law to be made or done by a party in such court may, except where otherwise expressly provided by any law for the time being in force, be made or done by the party in person, or by his recognized agent, or by an advocate duly appointed to act on his behalf.

9. The notice filed by the firm of Swanya and Swanya & Co. Advocates notified the court and the other advocates on record that they had

been appointed to act together with Kennedy Chweya Onsembe advocate for the respondents and that henceforth all correspondence were to be addressed to them. Notably, Kennedy Chweya Onsembe advocate, is an attorney of the County Government and as the respondents are all officers of the County Government, it made sense to have an external counsel as part of their defence team. With the filing of the notice, the firm of Swanya and Swanya & Company advocates virtually took over the conduct of the brief from Kennedy Chweya advocate without necessarily replacing him. He was effectively relegated to supporting counsel as service of process was henceforth to be to the new law firm. I find no inconsistency in the appointment and I hold that the appointment does not contravene any law as a party can be represented by more than one advocate and constructively by more than one law firm in the same matter. The essence of having a duly appointed advocate on record is so that the court and the other parties in the suit know who represents a party and who is to be served with process. In the instant case the firm of Swanya & Swanya and Co. Advocates upon filing the notice of appointment signified that they were henceforth to be served with process on behalf of the respondents which would include any pleadings.

10. In the premises, I hold the firm of Swanya & Swanya and Company Advocates is properly on record for the respondents and the application filed by the law firm on behalf of the respondents is therefore competent.

11. The respondents application for stay pending the hearing and determination of appeal is further challenged by the applicants on the basis that the respondents did not obtain leave to lodge an appeal following the dismissal by the court of the preliminary objection they had raised on 13th July 2018. The applicants have argued that the respondents did not have an automatic right of appeal against the ruling of the court as the same did not fall under the orders that were appealable as of right and rely on Section 75 of the Civil Procedure Act and Order 43 Rules 2 and 3 of the Civil Procedure Rules. Order 43 Rule 1 sets out the various orders and rules of the Civil Procedure Rules in regard to which appeals would lie as of rights. The preliminary objection taken by the respondents was not founded on any of the orders and/or rules in regard to which any ruling, decision or order made thereunder would be appealable as of right.

12. Section 75(1) of the Civil Procedure Act provides for the orders against which an appeal would lie as of right and/or with the leave of the court. It provides thus:-

75(1) An appeal shall lie as of right from the following orders and shall also lie from any other order with the leave of the court to which an appeal would lie if leave were granted –

- (a) An order superseding an arbitration where the award has not been completed within the period allowed by the court;**
- (b) An order on an award stated in the form of a special case;**
- (c) An order modifying or correcting an award;**
- (d) An order staying or refusing to stay a suit where there is an agreement to refer to arbitration;**
- (e) An order filing or refusing to file an award in an arbitration without the intervention of the court;**
- (f) An order under Section 64;**
- (g) An order under any provisions of this Act imposing a fine or directing the arrest or detention in prison of any person except where the arrest or detention is in execution of a decree;**
- (h) Any order made under rules from which an appeal is expressly allowed by the rules.**

13. Order 43 Rule (1) of the Civil Procedure Rules sets out the orders and rules in respect of which appeals would lie as of right. Under Order 43(2) it is provided that an appeal shall lie with the leave of the court from any other order made under the Rules. This means that unless the order sought to be appealed against falls under the orders which are appealable as of right under Order 43(1) leave to appeal must be obtained before such an appeal can be preferred. The procedure for obtaining leave is provided under Order 43(3) which states as follows:-

(3) An application for leave to appeal under Section 75 of the Act shall in the first instance be made to the court making the order sought to be appealed from, either orally at the time when the order is made or within fourteen days from the date of such order.

14. In the present matter the ruling/order sought to be appealed against arose from a preliminary objection raised by the respondents/applicants that the court dismissed. The dismissal of a preliminary objection does not constitute an order falling under Section 75(1) of the Act against which an appeal would lie as of right and neither would it fall under the Orders under which an appeal would lie as of right under Order 43(1) of the Civil Procedure Rules. That meant the respondents could only appeal against this court's ruling/order of 13th July 2018 dismissing their preliminary objection if they sought and obtained leave to appeal from the court. The respondents did not obtain any leave to appeal against the ruling/order.

15. The respondents have argued that the preliminary objection was on points of law and was majorly anchored on whether the respondents were the competent parties to be cited for contempt and on that account they submitted the appeal would properly be one arising from Order 43 Rule 1(a) relating to parties to suits and would therefore invite an appeal as of right under the provisions of Section 75(1) (h) of the Civil Procedure Act. With respect, I disagree. Section 75(1) of the Civil Procedure Act and Order 43(1) of the Civil Procedure Rules are clear as to which orders are appealable as of right and which orders require the leave of the court for an appeal to lie. In this matter, it is my view that the respondents did not have an automatic right of appeal against the Order of 13th July 2018 to the Court of Appeal and therefore no

competent appeal could be lodged in the Court of Appeal without first seeking and obtaining leave to lodge an appeal from this court in the first instance.

16. Having come to the conclusion that the respondents required the leave of this court to lodge the appeal in the Court of Appeal, which they did not obtain, it follows that any appeal the respondents would have preferred would be incompetent for want of leave. This court has the jurisdiction to determine whether an appeal from its order of 13th July 2018 is such as would have required the leave of the court. The court has determined that leave to appeal was necessary and was not obtained. Consequently, the appeal lodged by the respondents in the Court of Appeal is a nullity and cannot form a basis for this court to be urged to stay its proceedings and/or execution of any orders it may have made. The respondents' instant application to stay the execution of this court's orders given on 13th July 2018 and/or the proceedings of this court pending the hearing and determination of the intended appeal invariably must fail.

17. The respondents' application is predicated on there being a competent appeal and I have held the appeal would be incompetent as the leave of this court, which was pre-requisite, was not obtained to file the appeal and that was a fatal omission. I will therefore not consider the merits or otherwise of the application save to observe that most of the grounds advanced in support of the application are grounds the respondents can and would be entitled to advance on the hearing of the Notice to Show Cause. The court has not as yet found the respondents to be in contempt. The respondents have the window through the Notice to Show Cause to demonstrate that they have either complied with the court order that they are alleged to have disobeyed and/or to show cause why contempt proceedings should not be commenced against them. The court is yet to hear and determine the Notice to Show Cause.

18. I accordingly dismiss the respondents' application dated 24th September 2018 with costs to the applicants. The respondents are directed to attend the court on the 14th March 2019 to show cause, if any, why they should not be held to be in contempt of court and/or why contempt proceedings should not be commenced against them.

19. It is so ordered.

RULING DATED, SIGNED and DELIVERED at KISII this 20TH DAY of DECEMBER 2018.

J. M. MUTUNGI

JUDGE

In the presence of:

Mr. O. M. Otieno for the 1st and 2nd applicants

Mr. Onsembe for the 1st to 6th respondents

Ruth court assistant

J. M. MUTUNGI

JUDGE