



**Executive Committee Kisii County, Governor, Kisii County & County Government
of Kisii v Masosa Construction Company Limited & Transition Authority
(Civil Appeal 39 of 2016) [2020] KECA 801 (KLR) (3 April 2020) (Judgment)**

*Executive Committee Kisii County & 2 Others v Masosa
Construction Company Limited & Another [2020] eKLR*

Neutral citation: [2020] KECA 801 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPEAL 39 OF 2016
MSA MAKHANDIA, PO KIAGE & JO ODEK, JJA
APRIL 3, 2020**

BETWEEN

THE EXECUTIVE COMMITTEE KISII COUNTY 1ST APPELLANT

THE GOVERNOR, KISII COUNTY 2ND APPELLANT

THE COUNTY GOVERNMENT OF KISII 3RD APPELLANT

AND

MASOSA CONSTRUCTION COMPANY LIMITED 1ST RESPONDENT

THE TRANSITION AUTHORITY 2ND RESPONDENT

(Being an appeal from the Ruling and Order of the High Court of Kenya at Kisii, (Karanja, J.) dated and delivered on 5th April 2016 in Kisii HCC MISC. App. No. 72 of 2015)

JUDGMENT

Judgment of Makhandia, JA

1. On 7th September 2015, the 1st respondent moved the High Court by way of Chamber Summons for leave to take out contempt proceedings against the appellants for disobedience of an order of *mandamus* issued on 10th December 2014 in Kisii HCC Misc. Application No 14 of 2013 (JR). Leave was granted and the 1st respondent filed a Notice of Motion dated 7th October 2015 seeking orders that the appellants be cited and punished for contempt and or ignoring the terms of the *mandamus* order issued as aforesaid.
2. The order of *mandamus* was issued by Wakiaga, J. in the following terms:



There be and is hereby granted an order of judicial review in the nature of mandamus against the respondents herein, compelling the respondents to satisfy the decree of the court made on 23rd day of March 2010 and to pay to the applicant a sum of Kshs 8,464,699.05 only being the amount due and outstanding as ordered in Kisii HCCC Misc. App. No 10 of 2011 with cost to the applicant.

3. Upon hearing the parties on the issue of citation for contempt for disobeying the order of mandamus, the learned judge in citing the appellants for contempt expressed himself as follows:

1. It is apparent to this court that no substantial dispute arises with regard to the issuance of the material order on the 10th December 2014 vide Judicial Review Case No 14 of 2013 in Kisii Misc. App. No 14 of 2013 (JR). The respondents were dissatisfied with the judgment and decree and filed a Notice of Appeal on 9th January 2015 and a memorandum of appeal on the 6th February 2015.....

As it were, the material order of mandamus issued against the respondents remained valid and remains valid to this date....

An order of mandamus is in effect a command... Like any other court order, such a command unless withdrawn and or discharged is not for disobedience whatsoever and a party who knows or is aware of its existence cannot be permitted to in any manner disobey it.....

The question which therefore confronts this court is whether the respondents have been aware of the material order from the time of its issue on 10th December 2014 and whether they have indeed acted in disobedience of the order without justifiable cause.

With regard to the formal service of the order, the applicant's supplementary affidavit dated 15th January 2016 indicates that a duly extracted copy of the order or decree dated 14th January 2015 was served upon the County Secretary of the third respondent who allegedly also doubled up as the Chief Finance Director of the fourth respondents.....

The court must therefore find and hereby finds that the first, second and third respondents were duly served with the necessary order which was a command they were expected to heed in promoting constitutional values and principles of governance.....

The first to third respondents have no reasonable explanation for their failure to obey the order to perform a public duty bestowed upon them by law....

Accordingly, the first, second and third respondents are hereby cited for contempt of court and are given a period of seven (7) days from this date hereof to expunge the contempt and in default a warrant for the arrest of the second respondent as the Chief Executive Officer of the first and third respondents be issued for his production in court to show cause why he should not be committed to jail for contempt of court....

4. Aggrieved by the ruling of the learned judge, the appellants have filed the instant appeal citing the following grounds:

- i. The judge erred in failing to hold that proof of personal service of the orders of the court is a pre-requisite for grant of contempt orders.
- ii. The judge erred in failing to appreciate and consider that contempt only arises out of willful/neglectful or deliberate refusal to pay and not from inability to pay.



- iii. The judge erred in failing to find that the applicants cannot pay from County funds sums that have yet to be budgeted for and appropriated by the County Assembly.
 - iv. The judge erred by failing to consider the financial approval role played by the County Assembly of Kisii.
 - v. The judge erred by failing to consider the role of Controller of Budget in approving any withdrawals from the County Revenue Fund.
 - vi. The judge erred by failing to consider that the residual functions of the Transition Authority (now defunct) have by virtue of Section 12 (b) of the Intergovernmental Relations Act been taken over by the Intergovernmental Relations Technical Committee.
 - vii. The judge erred in failing to consider that the Transition Authority's uncompleted role as prescribed by Section 7 of the Transition to Devolved Government Act 2012 of auditing and verifying the assets and liabilities of the former local authorities and how they shall be apportioned between the two levels of government has been transitioned by Section 12 (b) of the Intergovernmental Relations Act.
 - viii. The judge erred in failing to consider that the County Government of Kisii is not bound to pay debts of the former local authorities until the Transition Authority (now the Intergovernmental Relations Technical Committee) has completed the process of audit, verification and apportionment of the assets and liabilities of the former local authorities.
5. At the hearing of the instant appeal, learned counsel Mr. Peter Manyonge Wanyama appeared for the appellants. Learned counsel Oguttu Mboya appeared for the respondent. Both parties had filed written submissions and list of authorities in the appeal.

Appellants' Submissions

- 6. Counsel for the appellant rehashed the background facts leading to the instant appeal. It was submitted that on 23rd March 2010, the 1st respondent obtained judgment against the then Kisii Municipal Council for Kshs 15,556,986/70. That part of the judgment was satisfied leaving a balance of Kshs 8,464,699/05. That upon promulgation of the 2010 Constitution, local authorities including the Municipal Council of Kisii ceased to exist. As a result, the 1st respondent obtained leave of the High Court at Kisii to institute Judicial Review proceedings seeking an order of mandamus against the officers of County Government of Kisii to pay the debt and in particular the balance of the decretal sum. That on 10th December 2014, the High Court issued an order of mandamus against the appellants.
- 7. That subsequent to the issuance of the mandamus, the balance of the decretal sum has not been paid to date. Accordingly, the respondents by way of Notice of Motion dated 17th November 2015 moved the High Court at Kisii to cite and punish the appellants for contempt. A ruling was delivered on 5th April 2016 citing the appellants for contempt.
- 8. In this appeal, the appellants contend that they are aggrieved by the citation for contempt because it is the mandate of the national government to take over the liabilities of the defunct local authorities; that whether the County Governments are the legal successors of the defunct local authorities is an issue to be determined in this appeal; that whether the appellants were liable to satisfy the debt owing to the 1st respondents is also an issue for consideration and determination by this Court.



9. In their written submissions, the appellants extensively cited Section 6 of the Sixth Schedule to the 2010 Constitution and urged that the liability to pay the balance of the decretal sum is on the national government and not the appellant County Government. It was submitted that County Governments are not the legal successors of the defunct local authorities and as such, the appellant, the Kisii County Government is not liable for debts of the defunct Kisii Municipal Council. It was urged that pursuant to Section 33 of the Sixth Schedule to the 2010 Constitution, County Governments are neither an office nor an institution that were established under the repealed Constitution. It was urged that the appellants are not liable to pay the decretal sum as the claim was instituted prematurely in the course of the transition period of three years provided for in Section 15 of the Sixth Schedule to the 2010 Constitution. That at the time the applications for the order of mandamus and contempt proceedings were filed, the transition period was yet to expire.
10. On the issue of contempt, the appellants conceded that they were duly served with the order of mandamus issued by the High Court. That the only question the learned judge failed to consider was whether the appellants willfully disobeyed the order of mandamus. It was urged that the appellants did not willfully disobey the order because the Transition Authority was still auditing all assets and liabilities and there was no proof that the same had been completed. That there was no mechanism developed showing that the appellants were liable to settle the debt and legally speaking, the appellants did not have any legal authority to settle the debt. That the monies claimed by the respondents have neither been budgeted for nor approved by the Kisii County Assembly and as such, the learned judge ignored that there was no appropriation of funds by the Kisii Assembly to pay the decretal sum.
11. It was submitted that the learned judge erred and only addressed himself to the issue of effective service instead of analyzing whether the appellants willfully disobeyed the court order.

Respondents' Submissions

12. In opposing the instant appeal, it was submitted that pursuant to and by dint of the provisions of Section 59 of the *Urban Areas and Cities Act*, the County Government of Kisii, now 3rd appellant, sought for and obtained leave of this Court to take up the conduct of Civil Appeal No 283 of 2011 that had hitherto been filed by the defunct Municipal Council of Kisii against the respondents herein. That on 25th February 2015, this Court granted leave to the Kisii County Government to be substituted in place of the defunct local authority. That subsequent to the substitution of the County Government of Kisii, the appeal before this Court was prosecuted and judgment in Civil Appeal No 283 of 2011 delivered on 25th November 2015. That contestation in Civil Appeal No 283 of 2011 was essentially a challenge to the judgment and decree that had been awarded in favour of the 1st respondent.
13. In this appeal, it was submitted that subsequent to delivery of the judgment in Civil Appeal No 283 of 2011, the 1st respondent became entitled to payment of the decretal sum in the original suit. That having been substituted to join the original suit, the 3rd appellant became obligated to pay the decretal sum in favour of the 1st respondent. That the appellants cannot run away from the obligations and liability to pay that which arose from the judgment of this Court in Civil Appeal No 283 of 2011. It was urged that the payment of the judgment sum by the appellants was adjudicated upon and is not subordinate to any other legal proceedings save for execution proceedings. That the import of the provisions of the Transition to the Devolved Government Act 2012 were dealt with and or disposed during the judicial review proceedings. That the appellants knew that the appropriation and or payment of the judgment sum required input of the County Assembly and Controller of Budget and it was incumbent upon the appellants to take steps and obtain the necessary approvals. That the lack of approval or otherwise does not suffice on the face of contempt proceedings.



14. The 1st respondent concluded its submissions by stating that the appellants were adjudged to pay the decretal sum vide a judgment of this Court in Civil Appeal No 283 of 2011. The appellants' insinuate on that a judgment of this Court cannot be realized without subjecting the same to other administrative processes has no basis legal or otherwise. The Transitional Authority, as the 2nd Respondent was not a party to this appeal as the Authority no longer exists in law.

Analysis and Determination

15. I have considered the grounds of appeal as well as submissions by counsel and the authorities cited. Being a first appeal, it is my duty to analyze and re-assess the evidence on record and reach my own conclusions. In *Selle v Associated Motor Boat Co.* [1968] EA 123, it was expressed:

“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (*Abdul Hameed Saif v Ali Mohamed Sholan* (1955), 22 EACA 270).”

16. The grounds of appeal urged in this matter can aptly be summarized into two. The first is whether the learned judge erred in citing the appellants for contempt. The second is whether the judge erred in finding that the appellants were liable to pay the judgment sum decreed in Kisii HCCC No 67 of 2007 and as ordered in Kisii Misc. App. No 14 of 2013 (JR) and also vide this Court's judgment in Civil Appeal No 283 of 2011.
17. On the issue of contempt, the appellants contend that the judge erred in failing to hold that proof of personal service is a pre-requisite for grant of contempt orders. That the judge erred in failing to find that contempt only arises out of willful or deliberate refusal to pay.
18. In their written submissions, the appellants urged that it was not in dispute that they were served with the order of mandamus issued by the High Court compelling them to pay the 1st respondent the balance of the decretal sum.
19. In *Justus Kariuki Mate v Martin Nyaga Wambora*, [2014] eKLR this Court acknowledged the move from the position that an order endorsed with a penal notice must be personally served on a person before contempt can be proved. Lenaola, J (as he then was) in the case of *Basil Criticos v Attorney General* [2012] eKLR perceived an additional ground for dispensation with the requirement for personal service; “...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”. Similarly, the requirement of notice of the prohibitory judgement or order would also be satisfied where a party is represented counsel who was present in court when the orders were made. Therefore, knowledge of the judgment or order by an alleged contemnor's advocate suffices for contempt proceedings. There is a presumption that when an advocate appears in court on instructions of a party, it behoves him to report back to the client all that transpired in court that has a bearing on the client's case. This presumption is in line with the *dicta* of the Canadian Supreme Court in the case of *Bhatnager v Canada, (Minister of Employment and Immigration* 1990] 2 SCR 217 where it was held that a finding of knowledge on the part of the client may be inferred from the fact that the solicitor was informed.



Similarly, in the United States case of *United States v Review* 834 F.2d 1198, 1203 (5th Cir. 1987) it was held that a defendant had adequate notice of a show cause order because his attorney was on notice. (See also Kenya Supreme Court *dicta* in [Justus Kariuki Mate & another v Martin Nyaga Wambora & another](#) [2017] eKLR).

20. In the instant matter, the admission by the appellants that they were served with the court order disposes the ground urged that the learned judge erred in failing to find that personal service was a pre-requisite for the issuance of a contempt order. Contempt proceedings are a quasi-criminal proceedings hence the need for personal service. The requirement of personal service is to ensure that the alleged contemnor is personally aware of the serious implication of the quasi-criminal proceedings. In the instant matter, the appellants having conceded that they were duly served with the court order, we are satisfied that this Court will be acting in vain in considering the issue of personal service as a ground of appeal.
21. Additional grounds of appeal urged in this matter is that the learned judge erred in failing to find that the appellants did not intentionally or deliberately refuse to pay the judgment sum. The appellants contend that they did not deliberately disobey the court order because the monies to pay the decretal sum have not been appropriated by the Kisii County Assembly; that they are not liable because the learned judge did not consider the role of Controller of Budget in approving withdrawals from the County Revenue Fund; that they are not liable because the Intergovernmental Relations Technical Committee is yet to complete its work; that they are not liable because the County Government of Kisii is not the successor to the defunct Municipal Council of Kisii; that under the Section 6 of the Sixth Schedule to the 2010 *Constitution*, the debts of the defunct Municipal Council of Kisii should be paid by the National Government.
22. I have considered these additional grounds of appeal urged by the appellants. In my considered view, the additional grounds of appeal indicate the appellants' contestation of their ability and liability to pay and satisfy the decretal sum.
23. The issue before the learned judge that gave rise to the instant appeal related to citation for contempt and not liability of the appellants to satisfy the judgment or decretal sum. The learned judge correctly stated at paragraph 10 of the impugned ruling that the matters before him did not concern the previous proceedings between the parties that led to the issuance of the order of mandamus.
24. Through the additional grounds of appeal, the appellant seeks to reopen and indirectly lodge an appeal in three different suits namely Kisii HCCC No 67 of 2007; Kisii Misc. Application No 13 of 2013 (JR) and Civil Appeal No 283 of 2011. The issue of liability of the appellants to satisfy the decretal sum has been determined in these cases. Before the learned judge and in this matter, citation for contempt was the issue and not liability or inability to pay. From the foregoing, I am satisfied that whether or not the appellants are to consult the Controller of Budget or seek approval of the Kisii County Assembly are not matters that are relevant in contempt proceedings. In contempt proceedings, the issue is whether a court order has been obeyed or not. The appellants' submissions before us seek to indirectly set aside and vary the judgment of this Court delivered in Civil Appeal No 283 of 2011. The 3rd appellant voluntarily asked to be substituted to take over the conduct of Civil Appeal No 283 of 2011. They cannot run away from binding effect of the appeal and ensuing judgment which they actively participated and prosecuted. I find that the instant appeal is an abuse of court process as it seeks to mount an indirect appeal against a judgment of this Court delivered in Civil Appeal No 283 of 2011.
25. The upshot is that this appeal has no merit and is hereby dismissed with costs.
26. As Kiage, JA is of the same view, it is so ordered.



27. This Judgment is delivered pursuant to rule 32(3) of the *Court of Appeal rules* since Odek, JA passed on before the Judgment could be delivered.

Judgment of Kiage, JA

I concur with the Judgment of my learned brother Makhandia JA, which I considered in draft, and have nothing useful to add.

DATED AND DELIVERED AT NAIROBI THIS 3RD DAY OF APRIL, 2020.

ASIKE – MAKHANDIA

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JUDGE OF APPEAL

P.O. KIAGE

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JUDGE OF APPEAL

