IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MARAGA, MUSINGA & GATEMBU, JJ.A)

CIVIL APPEAL NO. 77 OF 2014

BETWEEN

SPEAKER, KAKAMEGA COUNTY ASSEMBLY.....APPELLANT

AND

CLEOPHAS WAKHUNGU MALALA.....1ST RESPONDENT

CLERK, KAKAMEGA COUNTY ASSEMBLY.....2ND RESPONDENT

KAKAMEGA COUNTY ASSEMBLY.....3RD RESPONDENT

(Being an appeal from the Ruling of the High Court at Kakamega (Chitembwe, J.) delivered on 17th October, 2014

in

Constitutional Petition No.13 of 2014)

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JUDGMENT OF THE COURT

1. Apprehensive that Kakamega County Assembly, the 3rd respondent, was going to unlawfully impeach him, on 1st July 2014, Cleophas Wakhungu Malala, the 1st respondent, filed a petition in the High Court at Kakamega and sought, inter alia, an injunction to restrain the intended impeachment and a conservatory order retaining him in office as acting Speaker of Kakamega County Assembly.

2. Contemporaneous with the filing of the petition, the 1st respondent also filed a notice of motion in which he sought, on an interim basis, a similar injunction. After hearing the application, in his ruling dated 1st July 2014, Chitembwe, J. issued orders restraining the appellant and the 2nd and 3rd respondents (the respondents) from entertaining, debating or voting on the impeachment motion or taking any action to replace the 1st respondent.

3. It is alleged that contrary to those orders, on 2nd July 2014, the respondents went ahead to debate and

remove the 1st respondent. On 7th July 2014, the 1st respondent applied to cite the appellant and the 3rd respondent for contempt of court. After hearing that application, in his ruling dated 17th October 2014, the learned Judge found the appellant guilty of contempt of court and fined him Kes.200,000/=. This appeal is against that decision.

4. In his memorandum of appeal, the appellant has raised three points: privilege arising from the doctrine of separation of powers; lapse of the order alleged to have been flouted; and lack of service or knowledge of the order. On the first issue of separation of powers, Prof. Ojienda teaming up with Mr. Fwaya for the appellant, submitted that under the doctrine of separation of powers as enshrined in Articles 159, 174 and 175 of the Constitution, no arm of government has authority to interfere with the functions or operations of another. Although under Article 165 of the Constitution the High Court has supervisory jurisdiction over the other arms, counsel cited this Court's decision in **Mumo Matemu v. Trusted Society of Human Rights Alliance, [2013] eKLR** and contended that jurisdiction does not extend to interfering with ongoing processes before the other organs. They said the court should defer to the other arms and only challenge the constitutionality of their final decisions.

5. In this case, counsel argued, the appellant's acts alleged to have been in contempt of court were acts in execution of the mandate of his office as Speaker of the Kakamega County Assembly and as such were part of the proceedings of that Assembly which, under Articles 177(1)(d) and 196(3) of the Constitution as read with Section 17 of the County Governments Act, 2012 and Sections 12 and 29 of the National Assembly (Privileges and Immunities) Act, Chapter 6 of the Laws of Kenya, are absolutely privileged. In the circumstances, they argued that the High Court had no jurisdiction to entertain the injunction application in the first place.

6. On the second issue, counsel argued that the injunction order of 1st July 2014 lapsed at 11.30 am on 2nd July 2014. And as the learned Judge, having found in Paragraph 20 of his ruling that it had been overtaken by events and vacated it, he erred in relying on it to find the appellant guilty of court contempt.

7. On the third issue, counsel for the appellant argued that in contempt of court matters, save where there is proof of knowledge of the disobeyed order, as **Orders 5** and **48** of the Civil Procedure Rules require, service upon the contemnor of the order allegedly disobeyed must be personal. They cited to us the English cases of **In Re Bramblevale Ltd [1969] 3 All ER 1062** and **Witham v. Holloway [1995] 183 CLR 525** and argued that contempt of court cases are of a criminal character. As such, proof of knowledge or service of the order alleged to have been disobeyed has to be beyond reasonable doubt.

8. In this case, counsel argued, there was no personal service. The court order allegedly disobeyed was served upon the appellant's secretary and there was no proof of the appellant's knowledge of it. They therefore submitted that the learned Judge erred in relying on the unconfirmed and unofficial minutes of the proceedings before the House Business Committee, which allegedly proved the appellant's knowledge of the order. At any rate, counsel concluded, no leave was obtained to commence contempt proceedings as the court had directed. On those submissions, counsel urged us to allow this appeal with costs.

9. In response, Mr. Maseke, learned counsel for the 1st respondent, submitted that although the 1st respondent did not seek leave to commence contempt proceedings, as no objection was taken on the competence of the contempt application, the learned Judge was right in holding that by the conduct of the parties, the question of leave was resolved by consent. At any rate, no leave was required. Counsel further argued that although the debate on the 1st respondent's impeachment had been concluded, the voting on the motion was on 2nd July 2014, as is clear from the minutes of the House Business Committee with full knowledge of the court order.

10. On service of the order, Mr. Maseke submitted that he served the order upon the appellant's secretary who informed him she had the appellant's authority to accept service on his behalf. At that time the appellant was in his office. The following day, before the Assembly voted on the motion, the appellant went to court in the morning and sought an adjournment after which he went back and at 10.00 am he guided the House to vote on the motion in violation of the court order. Counsel dismissed the contention

that the Hansard proceedings of the 3rd respondent were not authentic, arguing that there is no provision that it is only the Speaker who can sign the minutes of the House proceedings. At any rate the signature on those minutes has not been shown to be a forgery. In the circumstances, counsel urged us to dismiss this application with costs.

11. We have considered the grounds of appeal, the rival submissions by counsel for the parties and the authorities cited to us. In our view, three issues arise for our determination in this appeal. They are whether the application to cite the appellant for contempt of court was competent; whether the High Court had jurisdiction to entertain that application; and whether the appellant was guilty of contempt of court as the learned trial Judge found.

12. Though the competence of the contempt application is not one of the grounds of appeal, Prof. Ojienda, learned counsel for the appellant, submitted that as no leave of court was sought or obtained as the court had directed, the contempt application was incompetent. In response, Mr. Maseke, learned counsel for the 1st respondent, argued that although the issue of the competence of the contempt application was not raised, leave was at any rate not required as the flouted order was one of injunction which does not require leave of the court to enforce by contempt proceedings.

13. The court's jurisdiction to punish for contempt of court is anchored on Section 5 of the Judicature Act which states that;

> **"5.(1) The High Court and the Court of Appeal shall have the same power to punish for contempt of court as is <u>for the time being</u> possessed by the High Court of Justice in England, and that power shall extend to upholding the authority and dignity of subordinate courts."** [Emphasis supplied].

14. In both **Mate & Another v. Wambora & Another, [2014] eKLR** and **Christine Wangari Gachege v. Elizabeth Wanjiru Evans & 11 Others, [2014] eKLR** it was held that the phrase "for the time being" means that the Kenyan courts should always endeavor to ascertain the law in England at the time the application is made or at the time of trial of the application. The current law in England as this Court further held in the case of **Shimmers Plaza Ltd v. National Bank of Kenya Ltd [2015] eKLR** is the **Civil Procedure (Amendment No. 2) Rules 2012** Part 81 of which replaced Order 52 of the Rules of the Supreme Court of England. Under those provisions, leave of court is no longer required to commence proceeding for contempt of court in the case of a judgment or order requiring a person not to do an act. See **Christine Wangari Gachege v. Elizabeth Wanjiru Evans & 11 Others, [2014] eKLR**. It follows that no leave of court was required to commence the contempt proceedings giving rise to this appeal. The contempt application was therefore competent.

15. The second issue is whether the High Court had jurisdiction to entertain the contempt application. We agree with counsel for the appellant that under the doctrine of separation of powers, the courts must defer to the independence of other arms of government. As this Court stated in the said case of **Mumo Matemu v. Trusted Society of Human Rights Alliance, [Supra] eKLR**, *"the doctrine of separation of powers is a feature of our constitutional design"* which requires the courts to *"show deference to the independence of the legislature as an important institution in the maintenance of our constitutional democracy as well as accord the executive sufficient latitude to implement legislative intent."* However, as this Court added in **County Assembly of Kisumu & 2 Others v. Kisumu County Assembly Service Board & 6 Others, CA Nos. 17 & 18 of 2015 (Consolidated)**, the same Constitution has under **Article 165(6)**

granted the High Court "supervisory jurisdiction over subordinate courts and over any person, body or authority exercising judicial or quasi judicial function" to restrain actions in contravention of the Constitution. In that case, this Court added that impeachment of a Speaker of either the National or any County Assembly is a quasi-judicial function which is subject to the supervisory jurisdiction of the court and that it is therefore "no derogation from the doctrine of separation of powers to subject the County Legislative Assemblies (and even the National Assembly) to the supervisory jurisdiction of the court if, in the exercise of their quasi-judicial functions, they violate the Constitution."

16. We are reinforced in this view by the South African Constitutional Court's succinct statement in **Speaker of National Assembly v. De Lile MP & Another, 297/98 (1999) (ZASCA 50),** that in a constitutional democracy, it is the Constitution which

> **"is supreme-not Parliament. It [the Constitution] is the ultimate source of all lawful authority in the country. No Parliament however bona fide or eminent its membership, no President, however formidable be his reputation or scholarship and no official, however efficient or well meaning, can make any law or perform any act which is not sanctioned by the Constitution. Section 2 of the Constitution expressly provides that the law or conduct inconsistent with the Constitution is invalid…. It follows that any citizen adversely affected by any decree, order or action of any official or body, which is not properly authorized by the Constitution is entitled to the protection of the Courts. No**
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> **Parliament, no official and no institution is immune from judicial scrutiny in such circumstances."**

In this case, the High Court granted the said injunction on the basis of the 1st respondent's claim that the proceedings for his impeachment were in flagrant breach of the Constitution in, *inter alia*, denying him an opportunity to respond to the charges brought against him. Until set aside, the appellant and the other respondents in that petition had no option but to obey that order. We therefore find that the court had jurisdiction to entertain the petition and issue the order of injunction as it did.

17. The last issue is whether or not the appellant was properly adjudicated guilty of contempt of court. Counsel for the appellant quite correctly submitted that contempt proceedings are criminal in nature. As such, to find an alleged contemnor guilty, proof beyond reasonable doubt is required that he was personally served with the order. Thesiger, L.J. succinctly stated the law on this point in the old English case of **Ex parte Langley (1879) 13 Ch D. 110 (CA)**, at p. 119:

> **"…in a matter of this kind, bearing in mind that the liberty of the subject is to be affected, I think that those who assert that [the person charged had notice of the order alleged to have been disobeyed] … ought to prove it beyond reasonable doubt."**

18. It is, however, settled law that knowledge of the judgment or order alleged to have been disobeyed suffices to found a conviction for its disobedience. See **Hadkinson – Vs – Hadkinson (1952) 2 ALLER 567**. In this case, though the court's order of 1st July 2014, the disobedience of which the appellant was charged with, was admittedly served on his secretary, by his own admission, the appellant was later given a copy of the same and therefore had knowledge of it and its clear terms. This comes out even more clearly from the record of the 3rd respondent's impeachment proceedings.

19. Debate on the impeachment motion commenced on 24th June 2014 but was adjourned. As stated, before the Kakamega County Assembly voted on it, on 1st July 2014 the 1st respondent obtained an injunction restraining the Assembly, its Speaker and/or Clerk from "entertaining, presenting, moving, debating and/or voting on the motion dated 24th day of June 2014 …" pending the inter parte hearing of that application "on 2nd day of July 2014 at 11.30 am." In the Assembly's Hansard Report of 2nd July 2014, a copy of which was annexed to the 1st respondent's affidavit sworn on 7th July 2014 in support of the contempt application, the appellant is recorded as having informed the Kakamega County Assembly at around 10.00 am on 2nd July 2014 that though;

> **"…there are orders restraining us from debating and also voting on … [the impeachment motion], … [t]o me it does no harm to put it on the order paper but I have asked the lawyer to write to us an opinion on the way forward because the orders were served yesterday and it is directing that that should (sic) not happen and the case was put for today …. So the Speaker will appear there [court] at 11.30 am to just confirm what is happening."**

20. We reject the contention by the appellant's counsel that the Hansard Report was not authentic simply

because it was not signed by the Speaker, who in this case happens to be the appellant. The applicant did not dispute the contents of the report or in any way allege that it was a forgery. We have not been shown any rule that a County Assembly's Hansard report can only be authenticated by the Speaker. In the circumstances, we are satisfied that the above admission by the appellant was clear proof beyond reasonable doubt that, though not personally served, the appellant had knowledge of the order and its terms. Despite that, he went ahead and guided the Assembly in voting on the impeachment motion. We therefore find no merit in this appeal and we hereby accordingly dismiss it with costs.

Dated and delivered at Kisumu this 12th day of February, 2016.

D.K. MARAGA

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JUDGE OF APPEAL

D.K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR