



Benjamin & another v Kihika, Governor Nakuru County Government & 3 others; Kuria & 8 others (Interested Parties) (Petition E013 & E014 of 2022 (Consolidated)) [2023] KEELRC 747 (KLR) (21 March 2023) (Ruling)

Neutral citation: [2023] KEELRC 747 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

PETITION E013 & E014 OF 2022 (CONSOLIDATED)

HS WASILWA, J

MARCH 21, 2023

IN THE MATTER OF SKEWED NOMINATIONS/APPOINTMENT OF COUNTY EXECUTIVE COMMITTEE MEMBERS-2022, NAKURU COUNTY GOVERNMENT

AND

IN THE MATTER OF SECTION 35 & 36 OF COUNTY GOVERNMENT ACT, NO 17 OF 2012

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF ARTICLE 3, 10, 27, 73, 75 AND 232 OF THE CONSTITUTION (2010)

AND

IN THE MATTER OF ARTICLES 1, 2, 3, 10, 23, 27, 28, 41, 73, 75, 159, 162, 179, 232, 258 AND 259 OF THE CONSTITUTION OF KENYA (2010)

AND

IN THE MATTER OF RIGHT TO INCLUSIVITY, NON-ETHNIC MARGINALIZATION AND NON-DISCRIMINATION

BETWEEN

DR MAGARE GIKENYI J BENJAMIN 1ST PETITIONER

DANIEL KINGETICH BETT ALIAS SELEMBU 2ND PETITIONER

AND

HON SUSAN WAKARURA KIHICA, GOVERNOR NAKURU COUNTY GOVERNMENT 1ST RESPONDENT

COUNTY GOVERNMENT OF NAKURU 2ND RESPONDENT

COUNTY ASSEMBLY, NAKURU COUNTY GOVERNMENT 3RD RESPONDENT



**HON COUNTY ATTORNEY, NAKURU COUNTY GOVERNMENT. 4TH
RESPONDENT**

AND

HON STEPHEN MUIRURI KURIA INTERESTED PARTY
HON. JOHN KARANJA KIHAGI INTERESTED PARTY
HON ZIPPORAH WAMBUI INTERESTED PARTY
LEONARD KIPKOECH BOR INTERESTED PARTY
ROSELYN WANJIRU MUNGAI INTERESTED PARTY
JOSEPHINE ATIENO ACHIENG INTERESTED PARTY
HON NELSON TANUI MAARA INTERESTED PARTY
STEPHEN IRIBE NJOGU INTERESTED PARTY
ENG MICHAEL KAMAU KARANJA INTERESTED PARTY

RULING

1. Before this Court for determination is the 2nd Petitioner Applicant's Notice of motion dated 13th December, 2022, filed under certificate of urgency on the 14th December, 2022 and brought pursuant to Section 1A and 3 of the *Employment and Labour Relations Court Act*, Order 40 Rule 3 of the *Civil Procedure Rules*, Section 1A, 1B and 3 of the *Civil Procedure Act* and Article 159 of the *Constitution* of Kenya, seeking for the following Orders; -
 1. Spent.
 2. That the press release or any other document issued by the 1st Respondent on 10th December, 2022, requesting for approval hearing of the 1st -9th Interested parties to be appointed to the position CECM-Nakuru County, be and is hereby stayed pending the hearing and application of this Contempt proceedings inter-parties.
 3. That Notice to show cause be issued to the 1st Respondent herein. Hon Susan Wakarura Kihika, Governor Nakuru County Government, and she be cited and punished for deliberately and blatantly disobeying the orders of the Court issued vide a judgement of the Court issued on the 5th December, 2022.
 4. That the Honourable Court be pleased to grant any or further orders of the Court geared towards protecting the dignity and authority of this Honourable Court deemed expedient in the circumstances.
 5. That costs of this Application be provided for.
2. The application is supported by the grounds on the face of the Application and the supporting affidavit of Daniel Kipngetich Arap Bett alias Selembu, the 2nd Petitioner/Applicant herein and based on the following grounds;



- a. That the Petitioners had filed separate petitions on the 18th October, 2020 and the 25th October, 2022 respectively which were consolidated into this petition and upon hearing, the Court found merit in their case and allowed the prayers as prayed on the 5th December, 2022.
 - b. That the judgment in this matter was read by the Court in presence of the 1st Respondents lawyers together with the County Attorney, as such that the Respondents were aware of the verdict by the Court.
 - c. The Petitioner stated that on 8th December, 2022, they received a notice of Appeal which notice demonstrated further that the Respondent were aware of the orders the Court had made.
 - d. On 10th December, 2022, the 1st Respondent, in blatant disregard of the Orders of the Court, notified the public and nominees of the vetting exercise to be conducted on 15th December, 2022 but for the same nominees that the Court had directed her not to nominate save for one nominee who was changed. These nominees are the interested parties. The said nominees were vetted within a short time and by noon, they were sworn into office and assumed their duties as CECs.
 - e. It is stated that the list of CECs has 6 members, together with the Governor, County secretary all adding up to Eight out of Twelve members sitting in the Cabinet, who come from the same tribe. It is averred that these acts by the 1st Respondent is in violation of the Constitution, the County Government Act and against the spirit of the orders issued by this Court on 5th December, 2022.
 - f. That unless the list is stopped, the substratum of this application will be lost and therefore prayed for the list to be stayed until this application is heard and determined.
 - g. The applicant stated that the Respondent have devised means to have the said nominees vetted despite the Orders of the Court saying otherwise. On that basis, the Applicant sought to have the 1st Respondent held in contempt of Court Orders.
3. The 2nd Respondent filed grounds of Opposition through the County Attorney Chamber that came out as follows; -
- a. That the said applications are misconceived and bad in and ought to be struck out with costs.
 - b. That the County Executive Committees is provided for under Article 179 of the Constitution of Kenya, 2010 which provides *inter alia*: 179 (1) The executive authority of the county is vested in, and exercised by, a county executive committee.
 - c. The county executive committee consists of-
 - i. The county governor and the deputy county governor; and
 - ii. Members appointed by the County Governor, with the approval of the assembly, from among persons who are not members of the assembly.
 - d. That neither the provisions of the constitution nor the County Government Act require the Governor of the 2nd Respondent to advertise for positions of County Executive Committees Members.
 - e. That the governor of the 2nd Respondent has the discretion to nominate names without necessarily advertising.



- f. That it is clear that the Petitioner has misapprehended the law and the implication of the judgment of this Hon. Court.
 - g. That this Honourable Court did not debar the 1st Respondent from nominating the interested parties nor did it make a finding that the interested parties are not qualified to be appointed.
 - h. That in compliance to the Court decision the the Governor of the 2nd Respondent dropped one name to accommodate other interests as directed by the Court.
 - i. That the applicants have come to Court with clean hands. In *John Njue Nyaga V Nicholas Njiru Nyaga & Another* [2013] eKLR the Court of Appeal sitting in Nyeri observed as follows “ it is our considered view that one who comes to equity must come with clean hands and equity frowns upon underhand dealings” the Applicant has not done so and is underserving of the orders he seeks.”
 - j. That the litigation must come to an end.
4. The 1st Respondent also filed grounds of opposition which are as follows;
- a. The instant Notice of Motion Applications by the Petitioners/applicants both dated 13th December, 2022 is, pre-mature, misconceived, incompetent and & otherwise legally untenable, as the new list of names published by the 1st Respondent is not an exact replica to that addressed in the judgment dated and delivered on 1st December 2022, and was done in line with the statutory and constitutional provisions in place in terms of ethnic gender “cultural diversity and marginalized applicants considerations, and essentially a differently constituted list;
 - b. That the revised list substituting one person from the initial list now means that the new list meets the constitutional and statutory threshold.
 - c. That the judgment did not require a complete overhaul of the nominated persons by a repeat process of recruitment, but for the 1st Respondent to pay regard to the law and the constitution to achieve a list that meets inclusivity and reflects the diversity of the people, which has been achieved by the new list.
 - d. That the matters raised are weighty and cannot be addressed in an application for contempt as they are such that evidence needs to be tabled and analyzed that cannot be done in an application such as the instant application dated 13th December, 2022.
 - e. That the names published by the 2nd Respondent are compliant to the parameters set out in the judgment, and the second list is compliant to the legal requirements in place reflecting the diversity of the great people of Nakuru County.
 - f. That the issue as raised in the consolidated petitions was ethnic balance and the 1st Respondent rectified the anomaly by making changes to the list to achieve such balance, and the application is thus raising an entirely new cause of action given the revised publication.
 - g. That the applications fail to meet the legal threshold as the applicant is required to set out clearly the ground on which the committal application is made, identify separately and numerically each alleged act of contempt and be supported by affidavit(s) containing all the evidence relied upon, which has not been done.
 - h. That the instant application does not therefore disclose any reasonable cause of action and constitutes and or amounts to an abuse of the due process of Court.



5. In addition to the grounds of opposition, the Respondents filed a replying affidavit deposed upon by Dr. Samuel Mwangi Mwaura, the Acting County Secretary of the 2nd Respondent and based on the following grounds; -
- a. That once the Governor was elected into office, she began the process of forming a County Executives Committees in accordance with Article 179(2)(d) of the Constitution as read with Section 30(2)(d) of the County Government Act.
 - b. To form her cabinet, the Governor formed a select committee to guide in the recruitment process of advertising, conducting interviews and recommending names for the most qualified individuals for nomination.
 - c. Consequently, the select committee in line with sections 35 and 36 of the County Government Act, advertised in the daily nation the names of the proposed CEC members pending the vetting by the County Assembly.
 - d. That the purpose of the said advertisement was to inform the public of the outcome of the said interviews and list the proposed members that have emergence at the top.
 - e. He stated that this Court dealt with the issue of the list not reflecting the cultural diversity of the People of Nakuru County; which Court pronounced itself on on the 5th December, 2022.
 - f. That the Court while quashing the list of the nominees, gave the Respondents lee way to initiate proper/ legal process of filling the County Executive Committee members by strictly adhering to the dictates of the Constitution. Further that the nomination that were quashed was the one made on the 13th October, 2022.
 - g. That the current list that was prepared by the Respondent factored in the recommendation of the Court with regard to cultural diversity, inclusivity while balancing with meritocracy and ability to deliver. That it is the balancing of these competing interest that led to the population of the list publicized on the 8th December, 2022 which members were subjected to vetting.
 - h. That the issue of nomination of CECs was settled in the case of Peter Kyalo V Alfred Mutua, Governor Machakos County & 6 others [2018] eklr .
 - i. That the Applicant has failed to appear before the select committee to register their concerns with regard to the nominees, neither have they challenged their suitability in terms of qualification for appointment.
 - j. It is contended that the appointment of the current nominees had not been challenged in any Court of law to warrant the contempt application filed herein.
 - k. That the applicant has not demonstrated willful and wrongful disobedience of the Court Orders to warrant the orders being sought herein.
 - l. That the Applicants are on a mission to ensure the 1st Respondent does not undertake her constitutional mandate as the Governor of the 2nd Respondent and is now hell-bent to ensure that the operations of the 2nd Respondent are brought to stand still.
 - m. In conclusion, the affiant stated that the application for contempt is misconceived, frivolous and vexatious because it seeks to challenge fresh nomination process without filling a fresh suit. They thus prayed for the application to be dismissed with costs.
6. The application was canvassed by written submissions.



Applicant's Submissions.

7. The applicant submitted that the actions by the Respondent of nominating, vetting and appointing CECs from one ethnic group, when the Court had given clear directions on how the said nominations should be done in the judgement of 5th December, 2022, is in total breach of the Court Orders and the 1st Respondent should be held in contempt of the Court Orders. He urged this Court to direct the 1st Respondent to purge the contempt and comply with the Court Orders failure to which she be committee to civil jail. In this he relied on the case of *Sheila Cassatt Issenberg & another v Antony Machatha Kinyanjui* [2021] eKLR where the Court cite the case of *Econet Wireless Kenya Ltd v Minister for Information & Communication of Kenya & another* [2005] KLR 828, Ibrahim, J. (as he then was), underscored the importance of obeying Court orders, stating:

“It is essential for the maintenance of the rule of law and order that the authority and the dignity of our Courts are upheld at all times. The Court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors. It is the plain and unqualified obligation of every person against whom an order is made by Court of competent jurisdiction, to obey it unless and until the order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by the order believes it to be irregular or void. (emphasis)
8. They also cited the case of *T. N. Gadavarman Thiru Mulpad v Ashok Khot And Anor* [2006] 5 SCC, the Supreme Court of India also emphasized on the dangers of disobeying Court orders, thus:

“Disobedience of this Court's order strikes at the very root of the rule of law on which the judicial system rests. The rule of law is the foundation of a democratic society. Judiciary is the guardian of the rule of law. Hence, it is not only the third pillar but also the central pillar of the democratic State. If the judiciary is to perform its duties and functions effectively and remain true to the spirit with which they are sacredly entrusted to it, the dignity and authority of the Courts have to be respected and protected at all costs. Otherwise, the very corner stone of our constitutional scheme will give way and with it will disappear the rule of law and the civilized life in the society. That is why it is imperative and invariable that Court's orders are to be followed and complied with.”
9. The applicant submitted that the Court had quashed the Respondent's nominees list of 13th October, 2022 and also on 15th December, 2022, directions were given by the Court for the status quo to be maintained. However, in total breach of the said Orders and directions, the Respondent went ahead with the vetting exercise and nominated the said CECs and appointed them to office.
10. The Applicant submitted that the case of *Sheila Cassatt Issenberg* (*Supra*) and the case of *Samuel M N Mweru and others V National Land Commission & 2 others* [2020] eKLR, listed the conditions that must be met by an applicant when citing another party for contempt, which condition are; terms of Orders, Knowledge of terms by the Respondents and failure by the Respondents to comply with the terms of the order.
11. On that basis, it was submitted that the Judgment of the Court of 5th December, 2022 was read in presence of the advocates for the Respondents as such the Respondent were aware of the said Orders. Moreover, that a copy of the said judgment was emailed to the Respondents. These means that the advocates and in effect the Respondents were aware of the terms of the orders and its effects thereof that cause them to even appeal against the said judgment, affirming knowledge of the terms of the said



Orders. Thirdly, that the Respondent despite having knowledge of the Orders acted in breach of the same by appointing new CECs, which failed to adhere to the dictates of the Constitution and direction of the Court of 5th December, 2022.

12. The applicant maintained that the orders that were issued by the Court have to be obeyed by all person including the 1st Respondent. In this they relied in the case of Sheila Cassatt Issenberg(*Supra*) where the Court relied in the Indian Supreme Court again stated in *Re: Vinay Chandra Mishra* [(1995) 2 SCC584], that:

“The judiciary has a special and additional duty to perform, viz, to oversee that all individuals and institutions including the executive and the legislature act within the framework of not only the law but also the fundamental law of the land. This duty is apart from the function of adjudicating the disputes between the parties which is essential to peaceful and orderly development of the society. Dignity and authority of the Court has to be respected and protected at all costs.”

13. In order to reemphasize the need by parties to obey Court Orders, the Applicant cited a plethora of cases including the case of Econnet wireless Kenya Limited V Minister for Information and Communication of Kenya & Another [2005] 1 KLR 828 and the case of A.B & Another V R. B., Civil Application number 4 of 2016[2016] eklr.
14. The Applicant also submitted that the Respondents have acted in bad faith and in abuse of Court process when they, at one hand, sought for stay of execution and proceedings of the Court and before they are granted, they proceed with nomination, vetting and swearing of the CECs reducing the judgment and the proceedings before Court to mere academic exercise. In this he relied on the case of Satma Bhama Gandhi V Director of Public Prosecution & 3 others [2018] eklr and the case of Bellevue Development Company Limited V Francis Gikonyo & 3 others [2020] eklr.
15. In conclusion, the Applicant urged this Court to allow the applications with costs to them.

Respondents' Submissions.

16. The Respondents submitted that the applicant is seeking to challenge the nomination process carried out from 8th December, 2022 in a suit that was concluded on 5th December, 2022. It was argued that this Court in its Orders gave the Respondent a go ahead to initiate a proper process of filling the County Executive Committee Members of the Nakuru County Government positions as contemplated under the Constitution. Consequently, that the Respondents began that process by publishing the circulated list on the 8th December, 2022, of the names of the nominees that was substantially different from the list because Dr. Samuel Mwangi Mwaura was dropped in favour of Ms. Jacqueline Mong'ina Osoro to give cultural diversity as directed by the Court and in compliance with the direction of the Court.
17. It was submitted that the Applicants had their opportunity to submit their views to the county Assembly and challenge the appointment of any of the said nominees in accordance with the County Government Act and the Constitution instead of filing the current application, which in the Respondents' view is frivolous. In this they relied on the case of Japheth Ododa Origa V Vice chancellor University of Nairobi & 2 others [2018] eklr where the Court agreed with with the observation by Lord Diplock in the case of *Harrikissoon V Attorney General of Trinidad and Tobago* [1980]AC 265



where he decried the tendency of people rushing to institute constitutional petitions alleging violation of fundamental freedoms where there was none, stating;

“The notion that wherever there is a failure by an organ of government or a public officer to comply with the law this necessarily entails the contravention of some human rights or fundamental freedoms guaranteed for individuals by...the constitution is fallacious. The right to apply to the High Court... for redress when any human right or fundamental freedom is or is likely to be contravened, is an important safeguard of those rights and freedoms; but its value will be diminished if it is allowed to be misused as a general substitute for the normal procedures for invoking judicial control of administrative action... the mere allegation that a human right of the applicant has been or is likely to be contravened is not itself sufficient to entitle the applicant to invoke the jurisdiction of the Court...if it is apparent that the allegation is frivolous, vexatious or abuse of the process of Court as being made solely for the purpose of avoiding the necessity of applying the normal way for appropriate judicial remedy for unlawful administrative action which involves no contravention of any human right or fundamental freedom.”

18. Accordingly, that the process that the applicant seeks to challenge is done and dusted and in any case that the Applicant had an opportunity to challenge the fresh nominations when they were gazetted in accordance to the *County Government Act*, instead of filling this Contempt application. To emphasize on this argument, the Respondent cited the case of *KKB v SCM & 5 others* (Constitutional Petition 014 of 2020) [2022] KEHC 289 (KLR) (22 April 2022) where the Court held that;-

“Courts will not normally consider a constitutional question unless the existence of a remedy depends upon it; if a remedy is available to an applicant under some other legislative provision or on some other basis, whether legal or factual, a Court will usually decline to determine whether there has been, in addition, a breach of the Declaration of Rights...”

19. They also cited the supreme Court decision of *Justus Kariuki Mate & Another V Martin Nyaga Wambora and another* [2017] eKLR where the Court held that;-

“This Court will not question each and every procedural infraction that may occur in either of the Houses of Parliament. The Court cannot supervise the workings of Parliament. The institutional comity between the three arms of government must not be endangered by the unwarranted intrusions into the workings of one arm by another”

20. From the foregoing, it was submitted that the Applicant has raised a new cause of action disguised in a contempt of Court Application which should not be allowed to stand.

21. On whether the nomination process of 8th December, 2022 was in compliance with the Judgement of this Court of 5th December, 2022, the Respondents submitted that the new list of nominees factored in the sentiments of this Court and dropped one of the applicant in favour of another to incorporate more tribes as directed by this Court as such the subsequent process of nomination and the entire process was sound and done in accordance with the law. In any case that there are no hard and fast rules on the manner, timelines and nature of nominations as long as they are done in accordance with the law. To support this position, they relied on the case of *Peter Kyalo V Alfred Mutua, Governor Machakos County & 6 others*[2018] eKLR where the G.V Odunga J(As he then was) held that;-

“In this case similarly there is no requirement that the Governor should advertise the positions for nomination for the member of the County Executive Committee. As defined



by Black's Law Dictionary, the word nomination merely denotes a suggestion which is not binding. In my view the process of nominating people for appointment as contemplated under Article 179 of the Constitution as read with section 35 of the [County Governments Act](#), amount to mere recommendation. As stated in Black's Henry Campbell, 1968. Black's Law Dictionary, Definition of the Terms and Phrases of American and English Jurisprudence, Ancient and Modern, (4th ed) West Publishing Co., St Paul, MINN. the words 'recommend' means "to advise or counsel" as opposed to 'direct' which means "to point to; guide; order; command; instruct...". It therefore follows that the Governor cannot exercise the power of appointment of the members of the County Executive Committee without the approval of the Members of the County Assembly. In this case there is no doubt that the County Assembly in approving the said nominees is required to conduct public participation process before arriving at its decision. In my view the appointment of the County Executive Committee members being a process, it cannot be that every stage of that process must be subjected to public participation."

22. Accordingly, that the issue of public participation in the appointment of CECs is representative in nature, that is undertaken by the County Assembly members in the vetting process. Thus the process of nomination done by the 1st Respondent was proper in the circumstances and no fault has been raised by the Applicants.
23. On whether the actions of the 1st Respondent fulfil the threshold for civil contempt, the Respondent submitted that the operating Act for contempt of Court is the [Judicature Act](#) and that recently the rules of the supreme Court of England had been replaced with [Civil procedure \(Amendment\) No. 2, Rules 2012](#) which at Part 81 replaced Order 52 in its entirety. Part 81 provides for application and proceedings in relation to Contempt of Court and part 81. 4 relates to committal for breach of judgement, order or undertaking to do or abstain from doing an Act. For a party to institute such contempt proceedings under this part, they are to file "Application notice" instead of the usual notice of Motion, setting out the full grounds in which the application is made, then identify separately and numerically each alleged act of contempt which are to be supported by an affidavit. On that note it was submitted that the current application has failed to identify any alleged act of contempt and thus the application ought to be dismissed. In this they relied on the case of [Samuel M N Mweru & others V National Land Commission & 2 others](#) [2020] eKLR where the Court held that:-

"The test for when disobedience of a civil order constitutes contempt has come to be stated as whether the breach was committed 'deliberately and mala fide.' A deliberate disregard is not enough, since the non-complier may genuinely, albeit mistakenly, believe he/she is entitled to act in the way claimed to constitute the contempt. In such a case good faith avoids the infraction. Even a refusal to comply that is objectively unreasonable may be bona fide (though unreasonableness could evidence lack of good faith. These requirements – that is the refusal to obey should be both wilful and mala fides, and that unreasonable non-compliance, provided it is bona fide, does not constitute contempt – accord with the broader definition of the crime, of which non-compliance with civil orders is a manifestation. They show that the offence is committed not by mere disregard of a Court order, but by the deliberate and intentional violation of the Court's dignity, repute or authority that this evinces. Honest belief that non-compliance is justified or proper is incompatible with that intent."

24. The Respondent submitted that, the three conditions that need to be met for one to be held in contempt of Court were not demonstrated by the Applicant because, there was no Orders that barred



the nomination of the CECs and the entire process undertaken from 8th December, 2022. Secondly, that since there was no order barring the Respondent, there was nothing that the Respondent disobeyed to warrant the contempt of Court application that is before this Court. In this, they relied on the case of *Samuel M N Mweru & others V National Land Commission & 2 others*(*Supra*), where the Court held that:-

“On the face of our transformative constitution with an expanded Bill of Rights, a pertinent question warrants consideration. Do constitutional values permit a person to be put in prison to enforce compliance with a civil order when the requisites are established only preponderantly, and not conclusively? In my view, a high standard of proof applies whenever committal to prison for contempt is sought because contempt of Court is quasi-criminal in nature.”

25. Accordingly that since the orders of the Court relate to the nomination undertaken on 13th October, 2022 and considering the direction of the Court that gave the Respondent go ahead to nominate in accordance with law, the actions of the Respondent in nominating the current CECs cannot amount to contempt of Court because the list in question is different and thus the 1st Respondent has not breached any order of the Court in relation to these proceedings to warrant any purging. In this they relied on the case of *Gatharia K Mutikika V Babarini Farm Limited* [1985] eKLR.
26. In conclusion, the Respondent submitted that the application was filed to merely embarrass them because all actions that were undertaken after the judgement of 5th December, 2022 was in compliance with the said directives. They thus prayed for the application to be dismissed for lacking merit with costs to them.
27. I have examined the averments and submissions of the parties herein. *Vide* this Court’s judgment of 5/12/2022, this Court quashed the nomination of interested parties as CEC Members of the 2nd Respondent and ordered fresh nominations. The applicants herein have submitted that the Respondents in total disregard of the Court orders made another list by just adding 1 person and proceeded to swear in interested persons as CECs members after reversing time lines for vetting an indication of bad faith.
28. The applicant contends that the action of the Respondent was geared at defeating this Court orders and so they should be punished for contempt.
29. The Respondents contend that the Respondent acted as per the Court order and reintroduced a new list which was substantially different and so she was not in contempt of this Court orders.
30. In determining whether the 1st Respondent should be cited for contempt or not I will apply the 4 thronged test on issues of contempt as laid down in *Samuel Mweru & others Vs National Land Commission and 2 others* (2020) eKLR cited by the Respondents where the learned judge held as follows:-

“the test for when disobedience of a civil order constitutes contempt has come to be stated as whether the breach was committed deliberately and malafide. A deliberate disregard is not enough, since the non-complier may genuinely, albeit mistakenly, believe he/she is entitled to act in the way claimed to constitute the contempt. In such a case good faith avoids the infraction. Even a refusal to comply that is objectively unreasonable may be bona fide (though unreasonableness could evidence lack of good faith)”.



31. The Respondents further submitted on the elements of contempt from Contempt in Modern New Zealand whereas it is stated as follows;-

“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 orders.
- c. The defendant has acted in breach of the terms of the order and
- d. The defendants conduct was deliberate”.

32. In following this guideline, the order of the Court complained of emanated from the Court’s judgment and order of 5th December 2023 and further on 15th December 2022. In the judgment of the Court, I ordered as follows;-

- “a)
- b) An order of judicial review by way of mandamus, compelling the Respondent herein to initiate a proper/legal process of finding the County Executive Committee members of Nakuru County Government positions as contemplated in the constitution, the county government Act No. 17 of 2012 of all enabling provision of the constitution and the law.
- c)
- d) A declaration that the skewed nominations/appointments/action of the 1st Respondent (Governor of Nakuru County Government H. E. Susan Wakarura Kihika) on or about 13th October 2022 of purported nomination/appointments of interested parties or/and any other person or County Executive Committee members of Nakuru County Government without constitutional and statutory provision in contrary to article 1, 2, 3, 27, 10, 73, 75 and 23 of the constitution”.
- e) An order of Judicial Review by way of Mandamus to the 1st Respondent to perform her duties according to the laws and the constitution and protect, defend this constitution as per the oath of office she took”.

33. The implication of the above orders was that a fresh nomination selection process had to be initiated.

34. So how did the 1st Respondent act after this order?

35. On 8/12/2022 Dr. Samuel Mwanza the Ag County Secretary and Head of Public Service issued the following process release (MG 3).

“Press Release

Proposed County Executive Committee Members



Pursuant to the provisions of the *Constitution* of Kenya (2010), article 179(2)(b); the Governor of the County Government of Nakuru has appointed and forwarded the following individuals to the Nakuru County Assembly for approval as Members of the County Executive Committee.

	NAME	DEPARTMENT
1	Dr. Nelson Tanui Maara	Water, Environment, Climate Change & Energy
2	Jacqueline Mong'ina Osoro	Health Services
3	Hon. Stephen Kuria Muiruri	Trade, Culture and Tourism
4	Hon. John Kihagi	Lands, Physical Planning, Housing & Urban Development
5	Leonard Kipkoech Bor	Agriculture, Fisheries and Cooperatives
6	Roselyn Wanjira Mungai	Public Service Management, training & Devolution
7	Josephine Atieno Achieng'	Sports, Gender & Social Services
8	Hon. Zipporah Ngugi	Education, Youth & ICT
9	Stephen Iribe Njogu	Finance & Economic Planning
10	Eng. Michael Kamau Karanja	Infrastructure

36. Later on a notice was placed on the daily papers (MG 4) indicating that approval hearing – notice to nominees and members of the public that the names of the nominees had been handed over to the Nakuru County Assembly for approval hearing (vetting) on dates indicated and times allocated on 15/12/2022.
37. A look at the impugned nomination list of 13/10/2022 and the one of 8/12/2022 show that the list remained substantially the same save for the removal of the name of Dr. Samuel Mwangi Mwaura as CEC for health and insertion of the name of Jacqueline Mongina Osoro in his place.



38. The question for this Court to answer then is whether the ‘new’ process complied with the decision of the Court as per the judgment of 5/12/2022.
39. As per the judgment of the Court, the Court gave an order of JR by way of Mandamus compelling the Respondents herein to initiate a proper and legal process of finding the County Executive Committee members of Nakuru County Government position as contemplated in the constitution, the County Government Act and all enabling provisions of the constitution and the law.
40. Let me now consider the process envisioned in the law in appointment of CEC members. The process envisioned in appointment of CECs is provided for under Section 35 of the *County Government Act* which states as follows;

“ 35.

- (1) The governor shall, when nominating members of the executive committee—
 - (a) ensure that to the fullest extent possible, the composition of the executive committee reflects the community and cultural diversity of the county; and (b) take into account the principles of affirmative action as provided for in the Constitution.
- (2) The county assembly shall not approve nominations for appointment to the executive committee that do not take into account-
 - (a) not more than two thirds of either gender;
 - (b) representation of the minorities, marginalized groups and communities; and
 - (c) community and cultural diversity within the county.
- (3) A person may be appointed as a member of the county executive committee if that person—
 - (a) is a Kenyan citizen;
 - (b) is a holder of at least a first degree from a university recognised in Kenya;
 - (c) satisfies the requirements of Chapter Six of the Constitution; and
 - (d) has knowledge, experience and a distinguished career of not less than five years in the field relevant to the portfolio of the department to which the person is being appointed.
- (4) A member of the county executive committee shall not hold any other State or public office”.



41. Article 179 of the constitution on the other hand provides as follows;-

“179.

- (1) The executive authority of the county is vested in, and exercised by, a county executive committee.
- (2) The county executive committee consists of—
 - (a) the county governor and the deputy county governor; and
 - (b) members appointed by the county governor, with the approval of the assembly, from among persons who are not members of the assembly.
- (3) The number of members appointed under clause (2)(b) shall not exceed—
 - (a) one-third of the number of members of the county assembly, if the assembly has less than thirty members; or
 - (b) ten, if the assembly has thirty or more members.
- (4) The county governor and the deputy county governor are the chief executive and deputy chief executive of the county, respectively.
- (5) When the county governor is absent, the deputy county governor shall act as the county governor.
- (6) Members of a county executive committee are accountable to the county governor for the performance of their functions and exercise of their powers.
- (7) If a vacancy arises in the office of the county governor, the members of the county executive committee appointed under clause (2)(b) cease to hold office.

42. The law and the constitution therefore, envisages that the governor has the sole authority and power to nominate the County Executive Committee members.

43. The parameters for consideration for appointment of such CEC members is also set out in the law and these includes adherence to the two thirds majority rule, representation of the minorities, marginalized groups and communities, community and cultural diversity of the county, academic qualifications, fulfilment of requirements of chapter 6 of the constitution amongst others.

44. The process of nomination by the governor is however not explained. In the judgment of 5/12/2022, this Court indicated that the appointments of the interested parties previously made was skewed as they infringed on provision of Article 1, 2, 3, 27, 10, 73, 75 and 232 of the constitution and were also discriminatory contrary to Article 27 & 28 of the constitution.

45. In paragraph 125 of the judgment, I indicated that, “the appointment..... was skewed and does not reflect the ethnic diversity of the county”.

46. Indeed the process did not also consider the marginalized as the case should be. The same should not be allowed to proceed.

47. In the initial process which was impugned by the judgment of the 5/12/2022 the Court indicated at paragraph 119 that a press statement had been released where the 1st Respondent indicated that the county had ran an advert calling for qualified applicants to apply for the position of CEC members. Following the advert, they had received 478 applications from qualified Kenyans.



48. The select committee tasked with short listing and carrying out the interviews then embarked on getting the most suitable candidates who would be part of the team that would be part of the cabinet and help her fulfil her promises to the people of Nakuru. She then proceeded to indicate that she had since received the names and listed them accordingly. This is the list that was to be sent to the County Assembly for vetting.
49. When this Court then made orders that the Respondent initiates a proper/legal process of finding the CEC members of the Respondent, then the implication was that fresh advertisements calling for the nomination was to be initiated followed with selection process of the applicants and then submission of the list to the 1st Respondent for nomination.
50. This was never done. Instead the 1st Respondent as indicated above just picked her former list and inserted one other name and removing another and presented it to the County Assembly for vetting. In my view this was in breach of this Court's orders and judgment of 5/12/2022 which were clear and unambiguous.
51. On whether the Respondent had knowledge of proper notice of the terms of the order, it is clear that when the judgment of the Court was delivered on 5/12/2023, the counsels present were Munene for Respondents assisted with Ngunjiri, Chege for 1st to 3rd Respondents, Mwangi for 1st to 10th interested parties, Biko for 11th to 13th interested parties, Magere for the Petitioner and Nyamwange for 4th Respondent and office of the County Attorney.
52. It is clear that the Respondents were present represented by their counsel on record and therefore the Respondent had knowledge of the judgement and order of the Court. With this knowledge the 1st Respondent proceeded to file an application at the Court of Appeal in COAPPL/E 097/2022 seeking to stay execution of this Court's judgment. This was an indication that the Respondent had knowledge of the judgment herein.
53. On whether the 1st Respondent deliberately failed to comply with the judgment/decree, I have already demonstrated above what the judgment or order indicated. I have analyzed the fact that the orders of the Court were clear and unequivocal.
54. The action of the 1st Respondent herein after the judgement have been elaborated upon. It is therefore my finding that indeed the 1st Respondent acted in breach of the Court's judgment and deliberately disregarded the said judgment/decree.
55. Is the action of the 1st Respondent punishable? I have demonstrated that indeed the 1st Respondent acted deliberately in breach of the Court's order and judgement.
56. Having had the knowledge of the Court order which was clear and unambiguous, I therefore find the 1st Respondent's action contemptuous and therefore punishable.
57. In order to preserve the integrity of this Court, this Court reiterates its orders in the Judgment of 5/12/2022.
58. These are the orders of this Court.

RULING DELIVERED VIRTUALLY THIS 21ST DAY OF MARCH, 2023. HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:-



Dr. Magare the 1st Petitioner – present

Kemboi for 2nd Petitioner – present

Okere holding brief for Prof. Ojienda S.C. for for 1st, 2nd & 4th Respondents – present

Court Assistant – Fred

