



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

PETITION NO. 7 OF 2019

ISMAEL NOO ONYANGO.....PETITIONER/DECREE HOLDER

VERSUS

THE GOVERNOR, COUNTY GOVERNMENT OF SIAYA....1ST RESPONDENT/JUDGMENT DEBTOR

THE COUNTY GOVERNMENT OF SIAYA.....2ND RESPONDENT/ JUDGMENT DEBTOR

RULING

1. This ruling relates to a Notice of Motion application dated 26th November, 2020, expressed to be brought pursuant Rule 3(8) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013.
2. The Petitioner seek the following orders:
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 2. That this Honourable Court be pleased to order for attachment of and sequestration of the personal property of including moveable assets and bank accounts of H.E Honourable Cornel Rasanga Amoth, the Governor, County of Siaya and Ambassador Philip Okanda Owade, the Siaya County Attorney .
 3. That the Contemnors do purge the contempt of court by reinstating the applicant as the legally elected and/or appointed member of Siaya County Assembly for the full statutory term of six years before they can be granted audience by the Honourable court
 4. The costs of this application be granted to the Applicant.
3. The application is supported by grounds on the face thereof and an Affidavit dated 26th November, 2020, sworn by Ismael Noo Onyango, the applicant herein.
4. The application is premised on a judgment and decree issued by the court on 8th July, 2020, where the court decreed that the Applicant's term of office is six years. The Applicant avers that per the said decree, he was to serve in office as a member of the County Public Service Board for the statutory six year period but has been kept out of office until his term lapsed.
5. The Applicant states that the decree subject of this ruling was served on the Respondents on the 15th July, 2020 by a licensed process server and that the return of service in respect of the decree is part of the record of this court.
6. It is the Applicant's assertion that the willful and deliberate refusal to comply with the decree despite the Respondents being aware of its existence amount to a gross act of contempt of court.
7. The application is opposed by the Respondents' Replying Affidavit sworn by one Joseph Ogutu, the County Secretary of the 2nd Respondent.
8. The Respondents' oppose the application on the premise that the Siaya County Public Service Board is presently fully constituted and to reinstate the Applicant, would lead to infringement of the law.
9. The Respondents further state that the only feasible option is for the Applicant to be fully compensated for the period he has not served

and that they have had conversations with the Applicant towards this end.

10. The Respondents further submit that they have taken measures to execute the decree and orders of the court and that it is mischievous of the Applicant to seek to cite them for contempt when he is fully aware that the County Government is in the process of compensating him.

11. The Respondents' further case is that the Applicant's term lapsed on 27th March, 2020 by effluxion of time and that new office holders have since been recruited. They state that they are willing to compensate the Applicant for the unserved term.

12. The Applicant filed a further Affidavit in response to the Respondents' Reply, where he avers that the Respondents have not made any effort to abide by the decree and orders of the court, as no compensation has been paid to him as ordered in the decree. The Applicant further states that the Respondents consciously delayed to comply with the orders of the court so as to take advantage of the lapse of time to prevent him from serving in his position.

13. The Applicant's further case, is that the Respondents not having taken measures to comply with the court orders, their allegations are scandalous, frivolous and vexatious. He avers that the allegations of communication with him in regard to the decree subject herein are false, as they have neither communicated to him nor his Advocates.

14. The Claimant filed submissions and have been dully considered. The Respondents filed their submissions late and were not considered.

Determination

15. I have considered the application, the grounds thereof, the reply from the Respondents and the Applicant's submissions. The issue for consideration is whether the Respondents are in contempt of court.

16. The Application was brought under Rule 3(8) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and, 2013. The Rule states as follows: -

“Nothing in these rules shall limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court.”

17. There is currently no law governing contempt of court, the 2016 Contempt of court Act No. 46, having been declared unconstitutional and it is no wonder that the Applicant herein based his application on the general provision of the Constitution Practice and Procedure rules.

18. The order sought is for the attachment and sequestration of the personal property of including moveable assets and bank accounts of H.E Honourable Cornel Rasanga Amoth, the Governor, County of Siaya and Ambassador Philip Okanda Owade, the Siaya County Attorney.

19. The Governor, County Government of Siaya is a party to this suit while the 2nd Respondent in the suit, is the County Government of Siaya. The reason the Applicant sought to cite the County Attorney for contempt has not been explained. I say so because, a County Attorney is only legal advisor of the county government and does not wield executive power to be required to personally comply with court decrees/orders on behalf of the county government.

20. The elements of civil contempt as correctly submitted by Counsel for the Applicant, were clearly stipulated in the case of *Modern New Zealand*, and locally cited in the case of *North Tetu Farmers Limited v Joseph Nderitu Wanjohi (2016) eKLR* in the following words: -

“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 which is higher than civil cases) thus:

(a) The terms of the order (or injunction or undertaking) were clear and unambiguous and were binding on the defendant;

(b) The defendant had knowledge of or proper notice of the terms of the order;

(c) The defendant has acted in breach of the order; and

(d) The defendant's conduct was deliberate.”

21. The decree subject of this ruling reads as follows: -

“Accordingly, the petition succeeds and court makes the following orders:

(a) The appointment of the Petitioner as member Siaya County Public Service Board is declared to be a six (6) year fixed term by operation of law (Section 58(4)(a) of the County Government Act, No. 17, 2012)

(b) The Petitioner shall serve in office as member of the board for the full statutory term of six years.

(c) The Respondents are directed to pay the Petitioner full remuneration and gratuity in respect of the full six (6) year term the Petitioner is mandated to serve.”

22. The Respondents' case is that by the time the court issued the decree subject of this application, the Applicant's term had already expired by operation of law/effluxion of time. They further submitted that the position that the Applicant held and seeks to be reinstated to, has since been filled and is therefore not available.

23. The Applicant on his part states that the delay in reinstating him was deliberate so as to invoke the ground that his term had expired as reason not to reinstate him to his position.

24. My interpretation of the decree subject of this ruling, is that the order that called for compliance is "(c) ***The Respondents are directed to pay the Petitioner full remuneration and gratuity in respect of the full six (6) year term the Petitioner is mandated to serve.***"

25. The court in my view, did not make an order for reinstatement. Where one is reinstated, they would as a guarantee be paid remuneration and at the end of their contract, gratuity. That the court ordered compensation for the six-year term, goes to confirm that it did not intend that the Applicant be reinstated, as that would amount to an unjust enrichment.

26. The declarations in paragraphs (a) and (b) of the decree, are reasons as to why order (c) was made. Moreover, by the time the judgment and decree subject herein was issued, the Applicant's six-year term had come to the end by operation of law and as the Respondents submitted, the only viable remedy was compensation.

27. Having said this, does this then mean that the Respondents are free of contempt? The decree states that the Applicant be compensated through payment of remuneration and gratuity for the full six-year term.

28. The Respondents herein have not disputed service of the decree and orders of the court. The issue then becomes whether the case meets the elements set out in ***Modern New Zealand (supra)***. The first element being, whether the terms of the decree were clear and unambiguous and were binding on the Respondents.

29. The Applicant from my reading of the application, was more interested in being reinstated than the compensation and this seem in my opinion, to be what he pursued. The Respondents have told this court that they are in the process of compensating the Applicant, but the Applicant denies this being the case.

30. In my assessment, the terms of the decree subject of this application were ambiguous and thus difficult to comply.

31. For this reason, I find the application without merit and is dismissed.

32. To enable compliance with the Orders subject of this ruling, I further order that the Respondents comply with the decree of the court within 30 days from the date of this ruling, by paying the Applicant both remuneration and gratuity for the unserved period of his six-year term, that he should have served as directed by the trial court.

33. I make no orders as to costs.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 3RD DAY OF FEBRUARY, 2022.

CHRISTINE N. BAARI

JUDGE

Appearance:

Ms. Awuda present for the Petitioner/Applicant

Mr. W. Otieno present for the Respondents

Ms. Christine -C/A