



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NAIROBI

CAUSE NO. 108 OF 2020

BERNARD BARASA SUNGUTI.....CLAIMANT

VERSUS

NAIROBI CITY COUNTY,

CHIEF OFFICER URBAN PLANNING.....1ST RESPONDENT

NAIROBI CITY COUNTY,

CHIEF OFFICER INFORMATION

COMMUNICATION TECHNOLOGY (ICT).....2ND RESPONDENT

NAIROBI CITY COUNTY GOVERNMENT.....3RD RESPONDENT

RULING

1. The Claimant/Applicant filed a Notice of Motion Application dated 22nd September 2021 seeking Contempt of Court orders against the Respondents' Dr. Jairus Musumba, Mr. Peter Mukenya and Mr. Dominic Mutegi. The Application is based on the grounds that the matter herein was fully heard and Judgment delivered in favour of the Claimant on 17th March 2021 but the Claimant has never enjoyed the fruits of the judgment as the Respondents continue frustrating him in disobedience of the said Court's orders. The Claimant asserts that this continued disobedience by the Respondents/Contemnors is of high impunity and hurts the dignity of the Honourable Court despite being served with this Court's decree dated 3rd August 2021, internal memo dated 15th June 2021 and an order dated 19th March 2021. The Applicant asserts that the dignity of this Honourable Court must be maintained. In the Supporting affidavit, the Claimant/Applicant depones that the 1st Respondent has denied him access to his office against the order of the Court and he is unable to perform duties and that the 1st Respondent has also refused to distribute to him Development Plans applications for vetting. That the 2nd Respondent has refused to open for him an online account and facilitate him with building plans to discharge his duties as ordered by Court but continues opening the accounts for other junior staff. He asserts that he is bound to suffer irreparable loss and damage due to the Respondents' actions which are geared to punish me for nothing whereas the Respondents will not suffer any prejudice should the Honourable Court issue the orders sought herein.

2. In opposing the application, the Respondents filed their Grounds of Opposition dated 8th October 2021 asserting that the functions of the Nairobi City County have since been transferred to the Nairobi Metropolitan Services (NMS) by Deed of Transfer of Functions pursuant to Article 187 of the Constitution as read with Section 26 of the Intergovernmental Relations Act, 2012 and that the authority over the concerned sectors was transferred to NMS as published in the Kenya Gazette Notice No 1609 dated 25th February 2020. That therefore Nairobi City County has no control of Staff and functions for the transferred sectors and any attempts by the Applicant to enforce orders made to NMS and/or perform functions transferred to the NMS would be *ultra vires*. That Nairobi City County is legally incapable and incapacitated to effect the judgment of this Court since they have no mandate under the Deed of Transfer of Functions and contempt of court orders cannot thus be issued against the Respondents. Further, that since the NMS is domiciled under the Office of the President it is the Attorney General who can be sued on behalf of the Office of the President. The Respondents deny that the Applicant is entitled to any of the reliefs sought and pray the Application be dismissed with costs.

3. The Claimant/Applicant filed a Supplementary Affidavit dated 12th October 2021 averring that contempt of court is basically factual on whether there is compliance or non-compliance with court orders. That the issues raised in the objection were raised in the main Claim and considered by the Court in reaching its final findings that this was a work environment and facilitation issue purely done by the Nairobi City County Government. He further avers that the Respondents have not preferred any appeal and/or review if indeed they were aggrieved by this Court's judgment and that their conduct is despite the fact that they have been advised by the County's Acting County Solicitor to

comply with the court's decision to avoid adverse orders being issued against the County.

4. Claimant/Applicant's Submissions

The Claimant/Applicant submits that the law that governs contempt of court proceedings in Kenya is the English law applicable in England at the time the alleged contempt is committed. That Section 5 of the Judicature Act imposes a duty on the High Court, the Court of Appeal and law practitioners to ascertain the applicable law of contempt in the High Court of Justice in England, at the time the application is brought. That Courts are entrusted with the extraordinary power of punishing those who indulge in acts which tend to undermine their authority and bring them in disrepute and disrespect. That to prove that the Respondents are in contempt of court, he is required to prove the terms of the order; knowledge of the terms by the Respondents; and failure by the Respondent to comply with the terms of the order. That to this end, there is a detailed affidavit of service by one Diffinah Moithaga outlining how the Respondents were served and how they criticized the Ksh. 100,000/- awarded as costs stating that the Court should have instead awarded One Million shillings. That the Orders of this Court have not been obeyed at all and this Court should therefore firmly deal with the proved contemnors. It is the Claimant's submission that it is the plain and unqualified obligation of every person against, or in respect of whom, an order is made by a court of competent jurisdiction, to obey it unless and until that order is discharged. That the uncompromising nature of this obligation is shown by the fact that it extends to cases where the person affected by an order believes it to be irregular or void. That the Court ought not be seen to be making orders in vain lest it be exposed to ridicule and with no agency of the constitutional order then left in place to serve as a guarantee for legality, and for the rights of all people.

5. Respondents' Submissions

The Respondents submits that pursuant to Article 3 of the Deed of Transfer dated 25th February 2020, the Nairobi City County Government unequivocally transferred the following functions to the National Government:

- i. County Health Services;
- ii. County Transport Services;
- iii. County Planning and Development Services; and
- iv. County Public Work, Utilities and Ancillary Services.

6. They submit that Article 5 the Deed of Transfer further outlined how financing the delivery of the transferred functions would be done. It is the Respondents' submission that they have not appealed against the decision of the Court which is an indication that they were willing to abide by the said decision. They agree it is a crime to unlawfully and intentionally disobey court orders and which is trite law and submit that the rules of natural justice demand that there cannot be a conviction without trial. That the rule of assumption of innocence till proven otherwise is also firmly entrenched in our Courts and practice. They rely on the case of **Samuel M. N. Mweru & Others v National Land Commission & 2 Others [2020] eKLR** where the Court addressed that the two tests are whether the breach was committed 'deliberately and *mala fide*' and further explained that 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. That it is upon assertion that they submit that the Respondents' failure to enforce the Orders of this Court was not deliberate but a result of conformity to the changes effected by the transfer of functions from the Respondent County Government to the National Government. That intention to disobey a court order is a key element in prosecuting contempt charges against alleged contemnor and no evidence has been tabled by the Applicant to demonstrate that the Respondents had no intention of enforcing the orders of this Honourable Court. That the balance of convenience in this case thus lies towards the Respondents as the Applicant has failed to demonstrate the tests for contempt which are a pre-requisite to granting the orders sought. The Respondents also submit that they are misjoinders in this matter since they have no *locus standi* to answer to charges of contempt of Court orders which they do not have capacity to execute.

7. If one ever needed to have reason to understand why the services of the Nairobi City County Government were transferred to the National Government under a deed of transfer to the Nairobi Metropolitan Services, one need to only look at this case and the arguments advanced by the alleged contemnors. They hold the offices that would execute the decree of this Court but assert that having had a transfer of authority to NMS the Claimant ought to have sued the Attorney General. As the Respondents have failed to comply with the Court orders and decree of the Court issued on 19th March 2021 arising from the judgment of the Court on 17th March 2021, the alleged contemnors are all found guilty of the offence of wilful disobedience of court orders. Just because they assert they have intention to comply and that is why they never appealed the decision is no salve. They are accordingly fined a sum of Kshs. 500,000/- to be paid within the next 7 days failing which they shall be arrested and confined for a period of one month from the 27th December 2021. The Claimant shall have the costs of the application as well.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF DECEMBER 2021

Nzioki wa Makau

JUDGE