



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

PETITION NO. 44 OF 2017

(Before Hon. Justice Mathews N. Nduma)

VINCENT ENDEKWA MAHASI.....1ST PETITIONER/APPLICANT

JULIUS MASIVA OBUGA.....2ND PETITIONER/APPLICANT

VERSUS

FRANCIS ANGUEYAH OMINDE.....1ST RESPONDENT

VIHIGA COUNTY ASSEMBLY.....2ND RESPONDENT

RULING

1. The applicant seeks the arrest and commitment to prison for contempt of court of The Speaker of Vihiga County Assembly Hon. Hasna Mudeizi. The Assembly clerk, Mr. Ambaka Kihinge and Governor of Vihiga County Hon. Wilberforce Ottichilo.
2. The application is based on grounds set out on the notice of motion as follows:-
 - i) The court issued an order with a penal notice directed at the 2nd and 3rd Respondents on 17th November, 2017.
 - ii) The court order was served on the 2nd and 3rd Respondents who have willfully defied the same, in proceeding to vet for appointment, and actually appointed the 1st Respondent as the County Secretary of Vihiga County.
3. That the 2nd and 3rd Respondents are in willful contempt of court orders and they be found guilty and sentenced accordingly to protect the rule of law and the dignity of the court.
4. The application is buttressed by supporting affidavit of Julius Masiva Obuga, who states that on 15th November, 2017 he moved the court for orders of stay and in the alternative stopping the Gazettement of the nominated County Secretary that had been vetted by the adhoc committee of the County Assembly and confirmed by the Vihiga county Assembly.
5. That the Court issued an order on 17th November, 2017 staying the gazettelement and swearing of the 1st Respondent by the 2nd Respondent pending hearing and determination of the application. The 3rd Respondent was not yet a party to the proceedings at the time. The orders were to be served forthwith and by close of the day on 20th November, 2017.
6. The process server, one Wycliffe Okutoyi Omukuba, has filed an affidavit of service marked 'JMOD' in which he states that he served the court order on a domestic worker of the 1st Respondent on 20th November, 2017 at 8.03 am but, the said worker by the name Meshack refused to sign the court process in acknowledgment of receipt.
7. The said process server has filed a further affidavit of service sworn on 22nd November, 2017 in which he states that he served 'two' ladies well known to him at the office of the County Assembly of Vihiga with the court order on a date he does not state in the Affidavit of Service at 3.30 pm. No copies acknowledging receipt by the County Assembly are annexed to the application.
8. The deponent of the supporting affidavit, Mr. Julius Masiva Obuga, does not in any of the paragraphs state on which date, the 1st and 2nd Respondents were served with the court order.
9. There is no deposition that the 3rd Respondent the Governor of Vihiga was served with the court order, except to say in paragraph 6 of the

supporting affidavit, that the governor was aware that the court had issued a court order staying the gazettelement of the 1st Respondent.

10. It is further deposed that, mere knowledge of court order is sufficient to found contempt proceedings, and the court should find the speaker and the clerk, County Assembly and the Governor, guilty of contempt of court and sentence them as prayed.

Response

11. The application is opposed vide grounds of opposition filed by advocates for the 1st Respondent on 11th December, 2017 as follows:-

i) THAT the application violates the mandatory requirements of section 30 of the contempt of Court Act.

ii) THAT the order issued on 17th November 2017 does (did) not in any way restrain the Governor Vihiga County from appointing and gazetting the 1st Respondent as County Secretary Vihiga County.

iii) THAT the said Order is expressly directed to the 2nd Respondent and/or its agents and not the Governor Vihiga County.

iv) THAT in any event the Gazettelement was done on 19th November, 2017 and the Governor Vihiga County was allegedly served on 21st November, 2017.

v) THAT there is no affidavit of service showing that the Governor Vihiga County was served in person.

vi) THAT the Governor Vihiga County, not being party to the petition herein, cannot be bound by the order which is *in persona*.

12. The gravamen of the opposition is that the applicant is in violation of section 30(1) of the contempt of Court Act, 2016, which provides –

“where a state of organ, government department, ministry or corporation is guilty of court in respect of any undertaking given to a court by the state organ, government department, ministry or corporation, the court shall serve a notice of not less than thirty days on the accounting officer, requiring the accounting officer to show cause why contempt of court proceedings should not be commenced against the accounting officer.”

13. Subsections (2) and (3) thereof provide that no contempt of court proceedings should commence against an accounting officer unless the notice under subsection (1) has been served on the accounting officer and the Attorney General.

14. It is the court’s considered opinion and finding that this section applies only to state organs and not to organs of County Governments and this objection is misplaced. If it was the intention of the legislature to include, County organs, and their accounting officers under this section, nothing would have been easier than to state so expressly.

15. In his Replying Affidavit, the clerk to the County Assembly, Mr. Ambaka Kihinga acknowledges that the Assembly was served with the order dated 17th November, 2017. That the report on vetting of the 1st Respondent was tabled before the Assembly on 15th November, 2017 and same was adopted on the same date and forwarded to the Governor for further action. The Assembly became functus officio as soon as it forwarded the matter to the Governor. Attached to the clerk’s affidavit is the communication to the Governor communicating approval for nominee to the position of County Secretary dated 15th November, 2017. It was now left for the Governor to appoint the Secretary and cause the appointment to be gazetted.

16. The Speaker to the Assembly in his Affidavit filed on 13th December, 2017 confirms the position by the clerk to the Assembly.

Determination

17. The issues for determination are:-

(i) Whether the Vihiga County Assembly and the Governor Vihiga County Government are in willful defiance of the order of the court issued on 17th November, 2017.

(ii) If the answer to (i) above is in the alternative, what are the appropriate remedies to be meted out by the court.

Issue 1

18. From the facts before the court, the speaker and the clerk of the County Assembly, did not contravene the order of the court issued on 17th November, 2017 having let the Assembly to debate and approve the appointment of the 1st Respondent on 15th November, 2017. Clearly the horse had bolted by the time the petitioner, rushed to court for orders granted on 17th November, 2017.

19. As at the time, the governor was not a party to the suit and there is no evidence before court that the governor or his office was served with the court order before appointing the 1st Respondent on 19th November, 2017 when Gazettelement was done.

20. The County Assembly does not gazette or swear in a newly appointed County Secretary and therefore only the office of the Governor is responsible in that regard.

Burden and Standard of Proof

21. In **Board of Governors Moi High School Kabarak Vs Malcolm Bell & Another, Supreme Court Petition No. 6 & 7 of 2013**, the Supreme Court held that the power to punish for contempt is a power for the court to safeguard itself against contemptuous or disruptive intrusion from elsewhere. The court stated:-

“without that power, protection of citizens’ rights and freedoms would be virtually impossible, courts of law would be reduced to futile institutions spewing forth orders in vain.”

22. The Court of appeal in the case of **Shimmers Plaza Limited Vs NBK (2015) Eklr** held –

“... the law has changed and as it stands today knowledge supersedes 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.”

23. However, the Court of Appeal affirmed the position in **Justus Kariuki Mate & Another Vs. Martin Nyaga Wambora & another CA 24, 2014**, in which the court stated –

“It is important however, that the court satisfies itself beyond any shadow of a doubt that the person alleged to be in contempt committed the act complained of with full knowledge or notice of the existence of the order of the court forbidding it. The threshold is quite high as it involves possible deprivation of a person’s liberty.”

24. In the present case, the clerk and the speaker were not parties to the suit at the time the order was given. Secondly, no impugned action was taken by the Vihiga county Assembly after the issuance and service of the order.

25. The applicant has not proved at all that the Vihiga County Assembly ignored, disregarded or disobeyed willfully or in any manner the order of the court and the application to hold the Vihiga county Assembly, its speaker or its clerk in contempt of court has no basis and the same is dismissed.

26. With regard to the governor Vihiga County, it is evident that, he appointed and caused to be gazetted the appointment of the 1st Respondent on 19th November 2017, after the order of the court was issued on 17th November, 2015 and allegedly served on the Governor Vihiga on 20th November, 2017 and on the Legal Officer of the County on 21st November, 2017.

27. It is alleged that the Governor was aware of the order of the court when he made the appointment.

28. The applicant relies on the decision of **Romer L. J in Hadkinson Vs Hadkinson(1952)** 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. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or even void.”

29. Further Lord Donaldson MR said in **Johnson Vs Walton (1990) 1 FLR 350** at 352 stated:-

“It cannot be too clearly stated that, when an injunctive order is made or when an undertaking is given, it operates until it is revoked on appeal or by the court itself and it has to be obeyed whether or not it should have been granted in the first place.”

30. Be that as it may, and on the facts before court even without a replying affidavit by the Governor who was not a party to these proceedings earlier, the applicants have failed to prove beyond reasonable doubt that the Governor who was served with the court order on 20th November 2017, had knowledge of the court order when he appointed the 1st Respondent and caused the appointment to be gazetted on 19th November, 2017.

31. Accordingly, the application is dismissed with costs against the Petitioners/Applicants.

Ruling Dated, Signed and delivered this 12th day of April, 2018

MATHEWS N. NDUMA

Judge

Appearances

Osabwa Sandys & Co. Advocates for the Petitioners

Osores & Co. Advocates for the 1st & 2nd Respondents

Chrispo – Court Clerk