



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT NAIROBI

PETITION NO. 92 OF 2018

IN THE MATTER OF AN APPLICATION UNDER ARTICLE 165 (3)(a), (b), (4)

AND

**IN THE MATTER OF THE CONTRAVENTION AND THREATENED CONTRAVENTION OF ARTICLE 2, 3, 10 (2)(a), (c),
27(1), (2), 28, 41 (1), 47, 50, 73 AND 232 OF THE CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF THE CONSTITUTION OF KENYA IN SO FAR AS THE CONSTITUTION HAS BEEN AND STANDS TO
BE VIOLATED**

AND

**IN THE MATTER OF THE CHALLENGE OF THE UNLAWFUL DISMISSAL OF THE PETITIONER FROM THE
EMPLOYMENT OF THE RESPONDENT**

AND

IN THE MATTER OF A CONSTITUTIONAL PETITION BY

HON BEATRICE KEDEVERESIA ELACHI.....PETITIONER/APPLICANT

VERSUS

NAIROBI CITY COUNTY

ASSEMBLY SERVICE BOARD.....1ST RESPONDENT/CONTEMNOR

NAIROBI CITY

COUNTY ASSEMBLY2ND RESPONDENT/CONTEMNOR

AND

NANCY MUTAI, ACTING CLERK, NAIROBI CITY COUNTY

ASSEMBLY.....INTENDED 3RD RESPONDENT/CONTEMNOR

HON. CHEGE MAURA, MCA, ACTING SPEAKER, NAIROBI CITY COUNTY

ASSEMBLY.....INTENDED 4TH RESPONDENT/CONTEMNOR

HON. WAITHERA CHEGE, MCA, NAIROBI CITY COUNTY

ASSEMBLY.....INTENDED 5TH RESPONDENT/CONTEMNOR

RULING

There are several issues for determination in this application. The first is jurisdiction. This has been raised by the Respondents and intended Respondents.

The second issue is the joinder of the 3rd, 4th and 5th Respondents. The 3rd is whether Counsel Tom Ojienda should be barred from further participation in this matter in view of the fact that he swore an affidavit on contested facts, the 4th issue is whether the application is fatally defective and the final issue, which is actually the thrust of the application, is whether the 3rd, 4th and 5th Intended Respondents are in contempt of this court's orders issued on 6th September 2018.

Vide her Notice of Motion application dated 27th September 2018, the petitioner/applicant seeks the following orders:

1. That the motion be certified urgent and heard ex parte in the first instance due to its extreme and demonstrated urgency.
2. That leave be granted to the Petitioner to have the 3rd Respondent/Contemnor, 4th Respondent/Contemnor and the 5th Respondent/Contemnor herein, enjoined to the proceedings.
3. That each of the Respondents do show cause why they should not be committed to civil jail for a period not exceeding 6 months for disobeying and having contemned the orders issued on 6th September 2018 and 7th September 2018.
4. That in default of compliance with the terms of prayer 3, the Respondents be committed to civil jail for a period not exceeding 6 months for disobeying and having contemned the orders issued on 6th September 2018 and 7th September 2018.
5. That the Respondents be personally in court on all dates appointed for the hearing of the Applicant's Application Notice (sic).
6. That the OCS Central Police Station do assist in the arrest of, and the enforcement of all orders issued upon the Respondents.
7. That the hearing and further prosecution be stayed pending further orders of this Court and the determination of the Applicant's motion.

The Application was made based on the following major grounds:

1. The cited Respondents together with the intended Respondents have declined to obey the Orders secured in the Petition issued on 6th September 2018 and re-issued on 7th September 2018, and extended thereafter.
2. The 2nd Respondent together with the intended Respondents have all violated the Order issued on 6th September 2018 and re-issued on 7th September 2018 and in particular, clause 4 of the said Order by blocking the Petitioner from accessing her chambers at the Nairobi City County Assembly offices at all material times (to date) after 7th September 2018.
3. On 25th September 2018, the cited Respondents sought to be enjoined as parties to the suit, acted (sic) in express violation of the Order issued on 6th September 2018 and re-issued on 7th September 2018 as follows:
 - i. The 1st and 2nd Respondents failed to vacate or vary the said Order as envisaged under Rule 22 of the Employment and Labour Relations Court (ELRC) Constitution Petition Rules, before purporting to elect the intended 4th Respondent as the acting speaker of the Nairobi City County Assembly.
 - ii. The intended cited persons should be enjoined to these proceedings, in furtherance of the right to a fair trial under Article 25 (c) of the Constitution of Kenya.
 - iii. Rule 5 of Legal Notice No. 117 of 2013 (Mutunga Rules) envisages such joinder of a necessary party as sought.
 - iv. The Respondents having been fully aware of the Honourable Court's Orders ought to be denied audience before the Court until they have purged their contempt.
4. The gravity of the contempt is so heavy that imposition of a custodial sentence is necessary for public protection.

On 9th November 2018 while the ruling in this application was pending delivery, a determination was made by the Constitutional and Human Rights Division of the High Court in **Kenya Human Rights Commission v Attorney General in Petition No. 87 of 2017** to the effect that sections 30 and 35 of the **Contempt of Court Act No. 46 of 2016** are inconsistent with the constitution and therefore null and void and further that the entire **Contempt of Court Act** is invalid for lack of public participation as required by **Articles 10 and 118(b) of the Constitution** and encroaches on judicial independence of the Judiciary.

The application herein having been anchored on the **Contempt of Court Act** which has now been declared invalid, has no legs to stand on. In view of the fact that the application was filed before the decision in the petition referred to above, I will not dismiss it but will terminate it so that the applicant can consider whether to file another application under the regime prior to the Contempt of Court Act No. 46 of 2016 or

move to the hearing of the main petition.

There shall be no orders for costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 30TH DAY OF NOVEMBER 2018

MAUREEN ONYANGO

JUDGE