



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA AT NYERI

CASE NO. 149 OF 2014

PATRICK MBUVI MUENDO.....CLAIMANT

VERSUS

TANATHI WATER SERVICE BOARD.....1ST RESPONDENT

MWALA WATER & SANITATION CO. LTD.....2ND RESPONDENT

RULING

1. The application before me is the notice of motion application dated 3rd May 2018 seeking for orders against the alleged contemnors the Chairman Shadrack Muya and the Managing Director Moses Mutunga Nzuki for disobeying and disregarding court orders. During the pendency of the Ruling the High Court declared the Contempt of Court Act unconstitutional thus throwing the present application in a tailspin. What is the effective date of this declaration by Mwita J.?

2. In a paper titled the *Effective Date of Declaration of Unconstitutionality of Statute, Doctrine of Eclipse, Spoil System And Acquiring Rights From An Unconstitutional Provision* presented at the Annual Judges Colloquium held at Mombasa, Kenya between 20th August and 25th August 2018 by the then Director of the Judiciary Training Institute (JTI), Hon. Justice (Prof.) Otieno-Odek, Judge of Appeal, the learned Judge of Appeal had this to say on the question of the effective date of declaration of unconstitutionality of a statute:-

The legal and jurisprudential question the subject of this inquiry is the effective date of the declaration of unconstitutionality. From which date is the Act or provision unconstitutional? A judgment is effective from the date of its pronouncement. Is the pronouncement date the effective date of unconstitutionality of an Act or statutory provision declared to be unconstitutional? What is the legal effect on the parties and third parties of the declaration of an Act or provision to be unconstitutional?

There are various possible effective dates and scenarios. These are:

(i) The date of pronouncement of the judgment.

(ii) The date when the Act or impugned statutory provision was gazetted or came into force. In this context, the declaration of unconstitutionality is retroactive.

(iii) A date in future and temporary suspension of declaration of invalidity by the Court.

(iv) A date in future when Parliament decides to repeal the law. In this context, the law remains in the law books but it is a dead letter law until the legislature repeals or abrogates the impugned law.

Other pertinent questions include: is the law declared unconstitutional enforceable? What if other courts or tribunals are not aware of the decision declaring an Act or provision to be unconstitutional? What about pre-2010 laws inconsistent with the 2010 Constitution, are they invalid? Case law abound that support any of the above scenarios.

3. The High Court held as follows in **Kenya Human Rights Commission v Attorney General & another [2018] eKLR**:-

1. A declaration is hereby issued that Sections 30, and 35 of the impugned contempt of court Act No 46 of 2010 are inconsistent with the constitution and are therefore null void.

2. A declaration is hereby issued that the entire contempt of court Act No 46 of 2016 is invalid for lack of public participation as required by Articles 10 and 118(b) of the constitution and encroaches on the independence of the Judiciary

4. The determination therefore removed the Contempt of Court Act from our statute books in line with the reasoning in the doctrine of eclipse, the statute the Claimant/Applicant relied on is no longer tenable as a basis for the attack on the alleged contemnors. I will therefore order the striking out of the motion but with no order as to costs as no basis now exists for the grant of the relief sought.

It is so ordered.

Dated and delivered at Nyeri this 20th day of November 2018

Nzioki wa Makau

JUDGE