



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**PETITION NO. 17 OF 2016**

**DORIS C. OMBARA ..... PETITIONER**

*VERSUS*

**COUNTRY GOVERNMENT OF KISUMU.....1<sup>ST</sup> RESPONDENT**

**GOVERNOR, KISUMU COUNTY .....2<sup>ND</sup> RESPONDENT**

**COUNTY SECRETARY, KISUMU COUNTY.....3<sup>RD</sup> RESPONDENT**

**SECRETARY, COUNTY PUBLIC**

**SERVICE BOARD .....4<sup>TH</sup> RESPONDENT**

Okwe Achiado for petitioner/applicant

Prof. Amondi for the respondents

**RULING**

1. By a notice of motion application dated 13<sup>th</sup> May 2016 the petitioner/applicant seeks the following orders:

1) That this Honourable court be pleased to order Hon. Jack Raguma, the Governor/Chief Executive of Kisumu County, the 2<sup>nd</sup> respondent herein and Mr. Humphrey Nakitari, the County Secretary, Kisumu County, the 3<sup>rd</sup> respondent be both committed to civil jail for contempt for disobedience of the orders issued on 8<sup>th</sup> day of April, 2016 by Hon. Justice Mathews Nderi Nduma, sitting in the Employment and Labour Relations Court of Kenya at Nairobi, in Constitutional Petition No. 39 of 2016.

2) that Hon. Jack Raguma, the Governor/Chief Executive of Kisumu county and Mr. Humphrey Nakitari, the County Secretary, Kisumu County do pay costs of this application personally.

2. The application is supported on grounds set out on the face of the application as follows;

3. That the Honourable court granted the applicant orders on the 8<sup>th</sup> day of April, 2016 that were meant to stay the letter of deployment dated 24<sup>th</sup> day of March, 2016, prohibiting the transfer, deployment, and or

designation of the applicant/petitioner from her position as the City manager; prohibiting any unlawful deductions on her salary and refunding the amount so far deducted by the 1<sup>st</sup> respondent acting on the direction of the 3<sup>rd</sup> respondent and prohibited advertisement, interviewing, recruiting and in any manner replacing the applicant/petitioner from her position as City Manager which order the 2<sup>nd</sup> and 3<sup>rd</sup> respondents have flagrantly disobeyed without any due care as to the consequences of their action.

4. That I am further aware that the said cited parties despite having been served with the said court order which had a penal notice at its foot and having the knowledge of the order of this Honourable court made on 8<sup>th</sup> day of April, 2016 and in spite of numerous prior and subsequent demands and reminders from the applicant/petitioner, have neglected, failed, and/or refused to comply and persist in such refusal to allow the applicant to resume her position as City manager and to stop the unlawful deductions and pay her, her full salary.

5. That failure to carry out the order as directed by the court was in total disregard and disobedience to court order and that the applicant is aggrieved by the disobedience.

6. That good order and the rule of law demand that a court order is obeyed.

7. The 1<sup>st</sup> and 2<sup>nd</sup> respondents have flagrantly, deliberately and contemptuously breached or disobeyed this court's order granted on 8<sup>th</sup> day of April 2016.

8. That the above actions of the respondents are offences against the administration of justice as the said actions impede and obstruct the course of justice.

9. The contempt proceedings are necessary in order to maintain the dignity of this court and the proper administration of the law.

10. The culture of disobeying court orders and decision has reached very high levels in Kenya and the courts must now exercise their constitutional authority of punishing people for contempt of court irrespective of their positions or station in life.

11. The blatant refusal by the 1<sup>st</sup> and 2<sup>nd</sup> respondents to obey a valid court order is in contempt of court.

12. In the circumstances, the court to compel and direct the 2<sup>nd</sup> and 3<sup>rd</sup> respondents herein to allow the applicant to resume her position as the City Manager and to stop any further unlawful deductions on her salary and reimburse any deductions so far made.

13. The application is further supported by affidavit of petitioner sworn on 13<sup>th</sup> May 2016.

## **Response**

14. The application is opposed vide the affidavit of Amos William Omollo sworn on 22<sup>nd</sup> June 2016 in which she deposes as follows:

15. That this court on the 07/04/2016 granted interim conservatory orders ex-parte which in the material part constituted the re-instatement of the petitioner into her former position of City Manager – Kisumu by staying the letter of deployment dated 24/03/2016 by the 3<sup>rd</sup> respondent.

16. Further that the letter of deployment was signed by the petitioner's appointing authority (the Governor acting through the County Secretary) as did her letter of appointment dated 28/08/2015. (Extracts of the letter of deployment and letter of employment are in pages 7 and 5 respectively of the petitioners list of annexures).

17. That as per the terms of the petitioner's appointment, she was to report and was therefore answerable

to the office of the County Secretary which generally oversees the entire executive structure as the Head of the County Public Service and with authority to deploy County public officers from one department to another pursuant to sections 44(1) and 72(2) of the County Government Act 2012 respectively so as to ensure the successful implementation of the County Government's policies. (Extracts of the letter by the Kisumu County Public Service Board dated 12/08/2015 are in page 4 of the petitioners list of annexures).

18. Further that the petitioner is a County public officer who was appointed by the Governor in exercise of his powers under section 31 (c) of the County Government Act to head the decentralized unit under the Urban Areas and Cities Act 2011 and with the overall objective of delivering services to the people of Kisumu County.

19. That the Governor is the Chief Executive of the county pursuant to Article 179(4) of the Constitution and is responsible for the management and coordination of the functions of the county administration and its departments through the County Executive which he chairs pursuant to Article 183(c) and for which roles he was specifically subjected to and elected by the people of Kisumu County through a popular vote and to them he alone shall be so accountable through the electoral cycle of a democratic election.

20. That it is in exercising the aforementioned responsibilities and to safeguard the success of the Kisumu Integrated Strategic Urban Development plan (ISUD) that in recognition of the petitioner's competence and knowledge over the project that she was deployed to the transformative flagship project as the Task Team Leader of the Lake Front Development and Urban Renewal, a project that is a partnership between the County Government of Kisumu, the City Authority, the Kenya Railways Corporation and the United Nations – Habitat and with the capacity to significantly and permanently alter and boost the hospitality and tourism sector and therefore the economic well being of Kisumu County. (Extracts of the same are captured in pages 23 – 41 of the petitioners annexures).

21. The deployment was done in good faith and out of recognition of the need to ensure service delivery and transformation of Kisumu County and it is for the same reason that the petitioner is still on the payroll at Job Group 'S' hence still of the same rank and is expected to handle a much higher annual financial portfolio of about Kshs.1 Billion and in a much more high profile position so that in essence she has not been lowered in rank, position, pay or any status to constitute a demotion.

22. That the understanding of the petitioner's deployment is that she would still be in a position to come back to the position of City Manager once she has fully completed this project which is critical and at the heart of the County Executive and the people of Kisumu County who are keen to see their untapped core resource of proximity to the lake being fully exploited.

23. That it is unfortunate that the petitioner failed to disclose these material facts when she rushed to court ex parte and secured the interim conservatory orders in terms of reinstatement with the net result that the court's order have resulted into chaos in the running of the City Manager's office.

24. That the averments in paragraphs 9 and 10 of the affidavit reflect actions done by the office of the Governor in exercise of his powers for execution of duty of office of Governor pursuant to section 31 (d) of the County Government Act 2012 and a rebuttal of the same by the petitioner amplified by her averments as reflected from paragraph 17 to 44 of her affidavit reflect a deplorable relationship between herself and her fellow staff, the County Secretary as well as the Governor to whom she is ordinarily expected to report and consult with widely which is a clear demonstration of bad blood and working relationship between the appointing authority and the employee.

25. That the cornerstone of an employment relationship are the core values of mutual trust and confidence and yet the implementation of the court's order in view of the bad blood manifested is bound to be viewed as insubordination and may not be practical as envisaged under section 49 (3) of the Employment Act.

26. It is in the public interest that the orders herein are discharged for the smooth running of City Authority and in any case if the petition were to ultimately succeed the petitioner can still be adequately compensated by way of damages.

27. The intervention sought by the petitioner and the ex parte order granted by the court has resulted in unjust limitation of the Governor's and the Chief Secretary's managerial prerogative contrary to the principle of non justiciability of political decision left to the Governor's discretion by virtue of the principle of Separation of Powers when dealing with matters entrusted to the executive branch as political questions as held in **Marbury-Madison case. 5 U.S./37 [1803]**

28. That the non justiciability of this cause as held in **BARKER-V-CARR, 369 US.549 (1946)** arises out of the clear presence of a textually demonstrable constitutional commitment of the issue to a coordinate political department (the office of the Governor), the impossibility of a court's undertaking independent resolution without expressing lack of the respect due to co-ordinate branches of government, an unusual need for unquestioning adherence to a political decision already made or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

### **Determination**

29. The issues for determination are as follows;

(i) Whether the Hon. Governor Mr. Jack Raguma is in contempt of court order issued on 8<sup>th</sup> day of April 2016.

(ii) What remedies are available to the petitioner.

### **Issue (i)**

30. From the affidavit of Amos William Omollo, the County Attorney at the County Government of Kisumu, the following facts are not in dispute;

31. The County Government of Kisumu, the County Governor and County Secretary Kisumu County are aware of the order of the court issued on 8<sup>th</sup> April 2016 requiring that the respondents re-instate the petitioner to her former position of CITY MANAGER – Kisumu by staying the letter of deployment dated 24<sup>th</sup> March 2016 by the 3<sup>rd</sup> respondent, County Secretary, Kisumu County.

32. The County Governor and the County Secretary, made a conscious decision not to implement the order of the court issued on 8<sup>th</sup> April 2016 and instead of purging their disregard and contempt of the order seek to justify their action in the extensive deposition filed before court.

33. In the case of **African Management Communication International Limited - Vs – Joseph Mathenge Mugo and another [2013] eKLR Civil Case No. 242 of 2013**, the county cites the **Black's law Dictionary (Ninth Edition)** which defines contempt of court as;

*“Conduct that defies the authority or dignity of a court. Because such conduct interferes with the administration of justice, it is punishable usually by fine or imprisonment.”*

34. In the **Teachers Service Commission -Vs – Kenya National Union of Teachers and 2 others [2013] eKLR Ndolo J.** observed that;

*“The reason why courts will punish for contempt of court then is to safeguard the rule of law which is fundamental in the administration of justice. It has nothing to do with the integrity of the judiciary or the court or even the personal ego of the presiding Judge. Neither is it about placating the applicant who moves the court by taking out contempt proceedings. It is about preserving and safeguarding the rule of law.”*

35. Furthermore, section 20 (7) of the Employment and Labour Relations Court Act, cap 234 B of 2014 provides;

“(17) A person who –

(a) without reasonable cause fails to comply with an order duly given under subsection (4)

(b) .....

*commits an offence and shall, on conviction, be liable to a fine not exceeding one million shillings or to imprisonment for a term not exceeding two years or both.”*

36. It is the court’s finding that the erstwhile Governor of Kisumu County, Hon. Jack Raguma and the County Secretary of Kisumu County, Mr Humphrey Nakitari are guilty of willful defiance of the order of the court issued on 8<sup>th</sup> day of April 2016 by Hon. Justice Mathews Nderi Nduma.

**37. Accordingly, the court finds the two officers guilty of contempt of court and sentences each one of them to six months imprisonment (suspended) for a period of one month to allow the County Secretary of Kisumu County to purge the contempt and in addition each to pay personally, a fine of Ksh.350,000.**

**38. The respondents to pay the costs of this application.**

**Dated, signed and delivered at Nairobi this 25<sup>th</sup> day of August, 2017.**

**MATHEWS NDERI NDUMA**

**PRINCIPAL JUDGE**