



REPUBLIC OF KENYA
EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

PETITION NO. 46 OF 2015

(Before Hon. Lady Justice Hellen S. Wasilwa on 23rd February, 2016)

IDRIS ADEN MUKHTAR 1ST PETITIONER

MUKHTAR BULALE..... 2ND PETITIONER

SALAH YAKUB FARAH..... 3RD PETITIONER

VERSUS

THE COUNTY GOVERNMENT OF GARISSA.....1ST RESPONDENT

THE GOVERNOR –GARISSA COUNTY2ND RESPONDENT

RULING

1. There are two applications before court and the first one is dated 31.7.2015 where the Applicant seeks the following Orders:
 1. *The Application herein be certified urgent and heard exparte in the first instance for purposes of prayers 2,3 and 4.*
 2. *Any and all directions given by the 2nd Respondent herein to restructure the Ministries contrary to the Ruling of the Court after the delivery of the Ruling by Lady Justice Hellen Wasilwa be stayed pending the hearing of the Appeal.*
 3. *There be a re-instatement of the vacated interim Orders as granted by Hon. Justice Nzioki wa Makau in Constitutional Petition No. 46 of 2015 on 27th May, 2015, pending an Appeal by the Applicants herein under Order 40 of the Civil Procedure Rules.*
 4. *The 2nd Respondent, the Governor of Garissa Nathif Jama Adam be summoned to Court to show cause why he should not be cited for contempt and committed to prison for such period and time as this Honourable Court may deem fit and just in that the said 2nd Respondent has disobeyed the Order made herein by Lady Justice Helen Wasilwa on 27th July, 2015, interalia:-*
 - a. *Compelling the Respondents to preserve the positions previously held by the Applicants however, the Respondents are precluded from substantively filling the said positions pending the hearing and determination of this Petition which in any case should be handled on priority*

basis given the nature of Orders sought in the final analysis.

5. *The Respondent be cited for contempt and Orders of committal and sequestration of property be issued as deemed appropriate by this Honourable Court.*
6. *No further action be taken by the Respondents herein regarding the matters in issue pending the determination of the Appeal.*
7. *The costs of this application be provided for.*
2. The Application is supported by the grounds on the face of the Application to wit:
 1. *The Ruling on the Applicant's Application dated 27th May, 2015, and the Respondents' Application dated 3rd June, 2015, was delivered on 27th July, 2015, in favour of the Respondents herein, the Appellant being aggrieved by the said Ruling has preferred an Appeal against the whole Ruling.*
 2. *The Applicants are aggrieved by the said Ruling to the extent that it vacated the Interim Orders and contend that they have an arguable appeal that raises serious triable issues thus the need to allow the determination of the Appeal on its merits and that the execution herein will render the Appeal nugatory.*
 3. *The Applicant herein stands to suffer irreparable loss and harm if the Orders sought herein are not granted. Further, service delivery to the Citizens of Garissa County would be greatly prejudiced. However, prejudices whatsoever shall be visited upon the Respondents if the Orders sought herein are granted save that the correct position of the law and dispensation of justice shall be done once and for all.*
 4. *The Honourable Court on the 27th July, 2015, issued an Order directing the Respondents to preserve the positions previously held by the Applicants. However, the Respondents are precluded from substantively filling the said positions pending the hearing and determination of this petition which in any case should be handled on priority basis given the nature of Orders sought in the final analysis.*
 5. *The Order was made in the presence of the Advocate for the Respondents and as such the Respondents are fully aware of the said Order.*
 6. *The 2nd Respondent, in an attempt to steal a march on the Honourable Court, totally ignored the said Orders by restructuring the said Ministries within an hour of the Court Ruling and dismantled the Ministry of the 1st Petitioner herein and merged it with various ministries and further merged the Ministries of the 2nd and 3rd Petitioners to form one Ministry.*
 7. *The 2nd Respondent is in defiance of these Orders and continues in such disobedience to the detriment of the Applicants.*
 8. *The terms of the Court Order were clear and unambiguous.*
 9. *The 2nd Respondent's despise towards the Honourable Court and his flagrant disregard for Court Orders in light of this ongoing litigation has been deliberate, contemptuous and high-handed, calculated to bring into disrepute and interfere with the due administration of justice.*
 10. *The Respondent's conduct undermined the authority and dignity of the Honourable Court and must be dealt with firmly so that the Court's authority is not brought in to disrepute.*
 11. *The Applicant has no other way of enforcing this Order.*

3. The Application is supported by an affidavit sworn by the 1st Petitioner with the authority of the co-petitioners.
4. The Respondents have opposed the Application by filing grounds of opposition where they state as follows:
 1. *That prayer No. 3 of the Petitioners'/Applicants' Chamber Summons Application invites the Honourable Court to sit on appeal on a matter it has already pronounced itself on.*
 2. *That prayers 4 and 5 of the Petitioners'/Applicants' Chamber Summons Application should not be granted as there was no personal service of the Court Order and/or an application for committal of the 2nd Respondent. Similarly, the Petitioners/Applicants have not demonstrated that the 2nd Respondent had knowledge of the existence of the Order.*
 3. *That the Petitioners/Applicants have not annexed a draft Memorandum of Appeal so as to enable this Honourable Court assess the probability of success of the Petitioners'/Applicants' intended Appeal neither have they enumerated their intended grounds of appeal on their Chamber Summons Application or supporting affidavit.*
 4. *That the Petitioners/Applicants have not established sufficient cause. They have not satisfied that substantial loss would ensue from refusal to grant stay and the Petitioners have not deposited security for costs neither have they indicated they are ready to deposit security for costs.*
5. The 2nd Application by the Respondents is dated 25.08.2015 and seeks the following Orders:
 1. *That the instant Application be certified as urgent and leave be granted for the same to heard ex parte during the High Court's vacation.*
 2. *That the Honourable Court be pleased to stay and/or vacate discharge the Orders granted on 31.07. 2015 and subsequently extended on 14.08.2015.*
 3. *An Order of this Honourable Court expressly providing that the Petitioners/Respondents are no longer County Executive Committee members of the 1st Respondent and be restrained from occupying, storming, entering and/or breaking into the Garissa County offices.*
 4. *That pending the hearing and determination of this Application, the petitioners/Respondents be restrained by way of an injunction from assuming their offices as county executive committee members of Garissa County.*
 5. *That pending the hearing and determination of this Application, the Petitioners/Respondents be compelled to return to the 1st Respondent any of the 1st Respondent's property that is in the Petitioners'/Respondents' possession.*
 6. *That pending the hearing and determination of this Petition, the Petitioners/Respondents be restrained by way of an injunction from assuming their offices as county executive committee members of Garissa County.*
 7. *That pending the hearing and determination of this Petition, the Petitioners/Respondents be compelled to return to the 1st Respondent any of the 1st Respondent's property that is in the Petitioner's/Respondent's possession.*
 8. *Costs of this Application and the interest thereon.*
6. *Any other and further relief that this Honourable Court may deem fit and just to grant in the circumstances.*

6. The Application is supported by the grounds that:

1. ***That due to the avalanche of Orders issued by the Honourable Court, the County Government of Garissa is in chaos and in paralysis. Mayhem is the order of the day at the County offices.***

2. ***That by a ruling delivered by Lady Justice Hellen S. Wasilwa on 27.07.2015, she expressly ruled that:***

“The upshot of this decree is that the Court vacates the interim Orders granted reinstating the Applicants in the positions previously held before their dismissal as Garissa County Executive Committee Members.”

3. ***Despite the above mentioned Order being in force, the Petitioners/Respondents in blatant disregard of the said Order have been purporting to be lawfully in office. This is as a result of the confusing Orders that have paralyzed operations of the County government.***

4. ***The Petitioners/Respondents have broken into the offices of the 1st Respondent and caused havoc and mayhem.***

5. ***There is an urgent need for this Honourable Court to issue an express Order stating that the Petitioners/Respondents are no longer in office and staying the confusing Orders it has granted.***

6. ***The 2nd Respondent is unable to hold cabinet meetings and run the business affairs of the County Government amid the Petitioners/Respondents claiming to be lawfully in office.***

7. ***If the Orders sought herein are not granted there is an imminent risk and grave danger that the Petitioners/Respondent will continue to use the 1st Respondent’s resources to the detriment of the people of Garissa County.***

8. ***It is in the best interest of justice that the Orders sought herein are granted as prayed for.***

7. The Respondent’s Application is opposed by a Replying Affidavit sworn by the 1st Petitioner.

8. At the hearing of the Applications, Counsels for the parties agreed to argue both Applications contemporaneously.

9. The Petitioners set out four issues for determination namely:

a. ***Whether the Court ought to cite the 2nd Respondent for contempt of court.***

b. ***Whether the Court ought to grant injunction pending appeal.***

c. ***Whether the Court became functus officio.***

d. ***Costs.***

10. The Petitioners submit that when the Court delivered its Ruling the Advocate for the Respondents was present in Court and must have notified the Respondents of the Orders, and thus it does not matter whether or not the Respondents saw a copy of the Order or not. The 2nd Respondent being aware of the Order totally disregarded it and went ahead to restructure the Ministries. The Petitioners rely on Lord Denning’s decision in **Morris Vs. The Crown (1970) 1 ALL ER 1079** which talks about contempt in the face of the Court.

11. The Petitioners also rely on Section 5 of Judicature Act Cap 8 of the laws of Kenya and Order 40(3) of the Civil Procedure Rules. They further state that it is clear that an Order was issued by the Court restraining the Respondent from restructuring the Ministries pending hearing and

- determination of the Petition. The Respondents were aware of the said Orders and the 2nd Respondent indeed disobeyed the Orders.
12. On the issue of whether an injunction ought to be granted pending the appeal, the Petitioners state that the County Executive Committee are the most qualified for the positions that they held in the Committee. They allege that their malicious dismissal hinders service delivery to the People of Garissa County as they have held the said positions since inception of the County Governments and have delivered service uncompromisingly.
 13. The Petitioners urge that it was the interim Orders that were granted by Hon. Justice Nzioki Wa Makau was the only safety net that the Petitioners had on preserving the substratum of the subject matter while maintaining the optimum service delivery to the People of Garissa. Vacating the said orders therefore means that in the period the Petition is decided, the Respondent can alter the substratum of the Petition and render the prayers sought nugatory in the event the Petition is successful.
 14. The Petitioners aver that the requirement for a draft memorandum of appeal in an application for stay before the trial Court is not necessary. An arguable appeal is only necessary in an application in the appellate Court as stipulated under Rule 5 (2) (b) of the Court of Appeal Rules. The Petitioners cite the case of **Ngucie Vs Kazeha Ngala (2012) eKLR** in support of this assertion.
 15. The Petitioners state that the Court has jurisdiction to grant an Order for injunction pending Appeal even in instances where the Application for interlocutory injunction had been heard on merit and dismissed. They cite the case of **Jimmieson Mkumbo Mbogho t/a Ziotech Motors Vs Barclays Bank Limited (2014) eKLR**. They further state that substantial loss will result if the orders sought are not granted.
 16. On the issue of whether the Court is *functus officio*, the Petitioners submit that this assertion by the Respondents is misguided as the Court only becomes so after it has pronounced itself in judgment regarding the facts in issue. In the instant case there is no judgment but a Ruling only and as such it is not *functus officio*.
 17. The Petitioners pray for costs for both applications.
 18. The Respondents in response to the Petitioners' submissions state that the Petitioners have not come to Court with clean hands. The Petitioners allegedly refused to obey Court Orders and proceeded to another Court to seek Orders that this Court has rejected. This is an abuse of Court process in the Respondents' view.
 19. The Respondents state that the Prayer No. 2 of the Petitioners' application seeks for a fresh injunctive relief and is not an issue being appealed from.
 20. Prayer No. 3 is in the Respondents' opinion untenable as the Court does not have power to reinstate interim Orders that were discharged after inter partes hearing. The Court however has power to grant the prayers sought in exceptional circumstances.
 21. The Respondents further state that there has not been any disobedience of Court Orders set out in paragraph 48 of the Ruling. The Respondents state that temporary limited reshuffle of the cabinet was not stayed and choice of words needs to be appreciated as the Court was cognizant of the fact that the County Government should not be paralyzed.
 22. The Respondents aver that they are not in contempt of Court since there is no substantive appointment into the Ministries. The Respondents state that the threshold for contempt is very high, it is quasi criminal and the Court must have strong evidence that a party has disobeyed the Order.

23. The Petitioners in response to the submissions by the Respondents state that they should not be blamed if the matter was taken before another Court. The Petitioners also allege that the Respondent issued a signed circular showing names of the executive committee and it does not use the words temporary or interim; it is a substantive reshuffle.

24. I have considered the submissions of both parties and I narrow down issues for determination as follows:

1. **Whether this Court is *functus officio* in awarding orders sought herein.**
2. **Whether the Application has established a *prima facie* case with a probability of success to warrant issuance of order of stay pending appeal.**
3. **Whether the Respondents are guilty of contempt of Court in relation to this Court's orders dated 21.7.2015.**
4. **What other orders this Court can grant in the circumstances.**

25. On 1st issue, the Respondents had submitted that this Court is already *functus officio* and could not be expected to revisit the application and grant orders sought by the Petitioner.

26. The Respondents submitted that the law does not empower a Court to grant reinstatement of Interim Orders that were discharged after interpartes hearing. That such orders can only be granted in exceptional circumstances but that the dynamic of this case militate against the granting of the orders sought.

27. If this Court is *functus officio*, it implies that it cannot entertain the applications in Court.

28. However, it is this Court's position that it is not *functus officio* as it is still dealing with Interim applications and had only made a ruling. The main Petition is still undisposed of and as such, this Court can still grant fresh orders and/or review or vacate orders in force depending on the application before it.

29. I now turn to the 2nd issue. The Applicants want this Court to order for stay pending an appeal they aver they intend to file having filed their Notice of Appeal on 31.7.2015. They submitted that the stay will safeguard the status quo and preserve the substratum of this case.

30. They cited **Erinford Properties Limited vs. Cheshire County Council ALL ELR (1974) VOL 2** where Megarry J. of the Chancery Division noted that:

“there is no inconsistency in granting such an injunction after dismissing the motion, for the purpose of the order is to prevent the Court of Appeal's decision from being rendered nugatory should that Court reverse the judge's decision”.

31. Order 42 Rule 6 (1) & (2) of the Civil Procedure Rules provides that:

“6.(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

(2) No order for stay of execution shall be made under subrule (1) unless:

- a. **the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and**
- b. **such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.**

32. For an order of stay to be granted the above conditions must be satisfied. The Applicants have submitted that they stand to suffer substantial loss should the orders sought not be granted. They also aver that they have made this application promptly without unreasonable delay.

33. They have cited Joseph Kingsley Karuri Maina vs. Housing Finance Company of Kenya & Another (2015) eKLR and Fredrick Wamburi Chege vs. James Karume Wanjema & 2 others Nairobi C.A Civil Appeal No. 338/2004(2005) eKLR where the Court of appeal held that:

“The purpose of an injunction pending appeal is to preserve the status quo pending appeal. Although the jurisdiction of the Court is discretionary, it would however, be wrong to grant an injunction pending appeal where the intended appeal is frivolous or where the refusal of an order of injunction would not render the intended appeal nugatory or where the order of injunction could inflict greater hardship than it would avoid”.

34. The Respondents opposed this order being granted and they submitted that the Applicants should not be granted as they have not come to this Court with clean hands in that they had previously disobeyed this Court’s order. They also submitted that on a balance of probabilities, greater harm will be occasioned to the Respondents if the stay is granted.

35. A relook of the order this Court gave shows that the Court directed that the order to reinstate the Applicants to their previous positions be denied as they are orders in finality.

36. As part of my ruling, I rendered myself thus:

“I do agree with my learned colleague that reinstatement as a remedy should only be granted sparingly after hearing both parties. This court had at an interlocutory stage ordered reinstatement of the Applicants which is tantamount to deciding this case to conclusion.

The Applicants have not demonstrated that they cannot be compensated adequately in damages if the Respondents are found to have been wrong in terminating them. This court still has powers to grant other reliefs including reinstatement, re-engagement and compensation in damages in event this petition succeeds.

The upshot of this decree is that the court vacates the interim orders granted reinstating the Applicants in the positions previously held before their dismissal as Garissa County Executive Committee Members.

To preserve the positions previously held by the Applicants however, the Respondents are precluded from substantively filling the said positions pending the hearing and final determination of this Petition which in any case should be handled on priority basis given the nature of the orders sought in the final analysis”.

37. I declined to order reinstatement of the Applicants for the reasons given in my ruling. I am now being asked to vacate the same orders and grant stay in order to preserve the status quo and not render the intended appeal nugatory.

38. The question then is whether the above orders are capable of rendering the intended appeal nugatory?

39. My answer is No. It is a No because the positions of the Applicants remain intact. I made an order that they should not be substantively filed. That remains the position and if the Court of Appeal finds that they should be reinstated in the same positions, then vacancies will still be awaiting them.

40. Refusal to stay the order granted on 27.7.2015 will not in my view render the appeal nugatory and I do find so and I still find that on a balance of convenience, the convenience falls in favour of not reinstating them at this point than reinstating them and later may be found that they should not have been reinstated. We are dealing with the running of a County Government and it will be unfortunate and to the detriment of the affairs of the County to have staff already dismissed forced back in office.

41. I still hold that orders staying the orders of 27.7.2015 cannot be granted at this stage and this is due to reasons given in my ruling.

42. On the 3rd issue, this Court gave orders stopping substantive filing of the Applicants positions by the Respondents. The Applicants have submitted that in fact the Respondents have substantively filled those positions. The Respondents deny filing the said positions substantively and aver that interim measures were put in place to enable the County Government to continue running for the sake of the people of Garissa County.

43. The question then is whether the Respondents have substantively filled the position occupied by the Applicants as to be in contempt of this Court's orders. To answer this question I refer to the County Government Act under Section 35(1) of the County Government Assembly:

1. ***The Governor shall, when nominating Members of the Executive Committee:***
 - a. ***Ensure that to the fullest extent possible, the composition of the Executive Committee reflect Community; and***
 - b. ***Take into account the principles of affirmative action as provided for in the Constitution.***
2. **The county assembly shall not approve nominations for appointment to the executive committee that do not take into account:**
 - a. **not more than two thirds of either gender;**
 - b. **representation of the minorities, marginalized groups and communities; and**
 - c. **community and cultural diversity within the county.**

-----“.

44. From my reading of this provision of law, appointments to the executive committee starts with nomination by the governor and is followed by approval by the County Assembly under Section 38 of the County General Assembly:

“A person so appointed as a member of the County Executive Committee under Article 179 of the Constitution shall take the prescribed oath or affirmation of office provided in the Schedule to this Act before assuming office”.

45. The Applicants have stated that the Respondent, in blatant disrespect of this Court's Orders substantively filled those positions formerly occupied by the Applicants.

46. In their submissions, the Applicants have not shown that the Respondents have substantively filled up positions stopped by this Court by following the process stated above.

47. The Respondent had submitted that the fillings were temporarily done so that service delivery to the Residents of the County could not stall. The action complained of the letter of 27th July 2015 entitled: Government changes. In the letter at page 66 of the Petitioner Applicant's documents removed 7 clusters of Ministries with 7 Executive Committee Members.
48. It is evident that the Ministries were re-organized and others margined. But no appointment letters have been exhibited to show any substantial appointment as it was in the original case when the Applicants were appointed. It is therefore my finding that the Respondent have not been in contempt of this Court's orders as alleged by the Applicants.
49. Having found as above, I do find that orders given by this court on 27.7.2015 still stand. Orders given reinstating the Applicants are vacated hence forth. Hearing for the main Petition should now be set down on priority basis.

Read in open Court this 23rd day of February, 2016

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Otieno holding brief for Kanjama for Petitioners

Mokua holding brief for Ahmednasir and Mogaka for Respondents