



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA**

**AT NAIROBI**

**CAUSE NO. 132 OF 2006**

**KENYA LOCAL GOVERNMENT WORKERS UNION .....**  
**CLAIMANTS**

**VERSUS**

**NAKURU COUNTY COUNCIL ON BEHALF OF NAIVASHA MUNICIPAL COUNCIL .....**  
**RESPONDENT**

**RULING**

1. The Notice of Motion Application in Cause No. 132 of 2006, was filed on 5<sup>th</sup> February 2015, seeking the following orders:
  - a. An order for contempt proceeding to commence against Joseph Mugosi Motari the Nakuru County Secretary and Kinuthia Mbugua, the County Governor for failing to comply with the terms of Judgment dated and delivered on 31<sup>st</sup> August 2007, by Hon. Paul K. Kosgei.
  - b. An order that the Nakuru County Secretary Mr. Joseph Mugosi Motari and the Governor, Hon. Kinuthia Mbugua be committed to Civil Jail for failing to comply with the terms of the Judgment dated and delivered on 31<sup>st</sup> August 2007 by Hon. Paul K. Kosgei.
  - c. An order that the County Secretary be compelled to comply with the terms of Judgment dated and delivered on 31<sup>st</sup> August 2007 by Hon. Paul K. Kosgei and that these orders should be enforced by the Governor Nakuru County.
2. The Application is based on the following grounds as set out in the statement of facts and Supporting Affidavit of Roba Duba dated 15<sup>th</sup> September 2014;
  - a. That Claimants' suit was heard and judgment was granted for the Claimants on 31<sup>st</sup> August 2007.
  - b. The Honourable Court ordered the respondent to reinstate all the Claimants without loss of benefits within fifteen (15) days from the date of the award issued by Honourable Paul K. Kosgei on 31<sup>st</sup> August 2007.
  - c. That for those dismissed / terminated employees who had attained the mandatory retirement age of 55 years, the services are hereby declared as 'Normal Retirement' and therefore full Retirement Benefits, be accorded to them by the Respondent.
  - d. That service of the award was effected on the County Secretary of Nakuru County.
  - e. That the Respondent has the mandate and duty to reinstate the thirteen (13) workers but has contemptuously and with vexation refused to effect the Judgment.

- f. That the Respondent filed a Judicial Review against the orders of the Court but the same was heard and dismissed by the trial judge.
  - g. That this Court has the necessary jurisdiction to effect contempt proceedings.
3. The Claimant / Applicant submits that the Respondent is the successor of Naivasha Municipal Council which was the Respondent in Cause No. 132 of 2001 and against whom the Judgment was made.
  4. That 6<sup>th</sup> schedule paragraph 31 of the Constitution of Kenya 2010, and sub-paragraphs (1), (2), (3) and (4) provides that:

*“31(1) unless this schedule provides otherwise, a person who immediately before the effective date, held or was acting in an office established by the former Constitution shall on the effective date continue to hold or act in that office under this Constitution for the unexpired period, if any, of the term of the person.”*

*“(2) subject to sub-section (7) and Section 24, a person who immediately before the effective date held or was acting in a public office established by law so far as is consistent with this Constitution shall continue to hold or act in that office as if appointed to that position under this Constitution.”*

5. In addition, the Applicant relied on paragraph 33 of the 6<sup>th</sup> schedule which provides:

*“an office or institution established under this Constitution is the legal successor of the corresponding office or institution, established under the former constitution or by an Act of parliament in force immediately before the effective date, whether known by the same or a new name.”*

6. The Applicant relies further on the finding of Romer J. in *Hadkinson V. Hadkinson* [1952] ALLER 567 as follows:

*“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.”*

7. Lord Cottenham L. in *Chukvs Cremer* (1) Coup Temp Cott 342 had this to say of Court orders;

*“for a party who knows of an order, whether null or valid, regular or irregular cannot be permitted to disobey it. It would be most dangerous to hold that the suitors or their solicitors could themselves judge whether an order was null or valid whether it was regular or irregular, that they should come to the Court and not take upon themselves to determine such question. That the course of a party knowing of an order which was null and irregular, and who might be affected by it, was plain, he should apply to Court that it might be discharged. As long as it exists, it should not be disobeyed.”*

## **Response**

8. The Respondent relies on the Replying Affidavit of Joseph Mugusu Motari, the County Secretary and Head of County Public Service of the Respondent.
9. The Respondent submits that there was no personal service of the certificate of urgency and notice of motion dated 5<sup>th</sup> February 2015 and order or Judgment of the court in respect of the Industrial Cause No. 132 of 2001 or Judicial Review No. 351 of 2010.
10. That pursuant to Section 5(1) of the Judicature Act, Section 63 of the Civil procedure Act, contempt of Court Act, 1981 of England and order 52 Rules 3 and 4 of the Supreme Court Practice Rules of England (Now replaced with Civil Procedure (Amendment No. 2) Rules, 2012).

- Personal Service of the certificate of urgency and the Notice of Motion dated 5<sup>th</sup> February 2015, the Judgment by Honourable Kosgei dated 31<sup>st</sup> August 2007 and the order together with the penal notice on the Respondent is a mandatory requirement in contempt of Court Proceedings.
11. The deponent states that the Claimant / Applicant has never, before seeking his arrest, served him with any Court Summons in this matter or brought to his knowledge that this attendance in Court was required in this matter.
  12. That it is his personal belief that the affidavit of service by the Claimant / Applicant in their Application alleging there was personal service of the certificate of urgency and the Notice of Motion dated 5<sup>th</sup> February 2015, the Judgment by Honourable Kosgei dated 31<sup>st</sup> August 2007 and the order together with the penal notice that the Claimant / Applicant filed with this motion is false and misleading and thus an abuse of the Court process.
  13. That the return of service does not show the time when the service was effected on the said person, the manner in which the summons were served, the name and address of the person identifying the person served, the exact place where the service was effected, whether or not the person served is known to the person the summons is meant for if the person is not known to the process server.
  14. That the Respondent has variously been served with regard to many debts inherited from the Naivasha Municipal Council and other preceding councils. That it would be against public interest and policy to commit the deponent to civil jail in this matter as it would open a floodgate of claims for creditors of the defunct Local Government Authorities which may result to his perpetual committal to civil jail a custody and that Nakuru County Government does not have sufficient resources to settle all debts owed by the defunct Local Authorities at once.
  15. That Article 11 of the International Convention on Civil and Political Rights guarantees the deponent basic freedom of movement in pursuance of economic social and cultural rights and prohibits enforcing payments of debt through imprisonment.
  16. That the officials could only be committed to Civil Jail on account of non-compliance with a Court order to pay money by Nakuru County Government where Nakuru County Government has funds and the officials have deliberately refused to pay funds earmarked for payment since the officials do not incur personal liability in the circumstances.
  17. That it is on account of limited resources at the disposal of Nakuru County Government in view of competing financial obligations that it has become difficult for Nakuru County Government to at once comply with the Court order that this Honourable Court made on 31<sup>st</sup> August 2007 for which it is regrettable.
  18. That the Transitional Authority under Section 4 of the Transition to Devolved Government Act, 2012 and Section 15 of the sixth schedule of the Constitution has the general mandate to facilitate and coordinate the transition to devolved system of Government and also to prepare and validate an inventory of all existing assets and liabilities of Government, public entities and defunct local authorities.
  19. That the Transitional Authority has publicized a Moratorium (which is still in force) on transfer on assets and liabilities as provided under Section 35 of the Transition to Devolved Government Act, 2012 which stipulates that a state organ, public office, public entity of Local Authority (defunct) shall not transfer assets of its liabilities during the transition period without seeking the approval of the Transitional Authority.
  20. That the members of the public were advised to register complaints regarding payment of claims on liabilities particularly creditors of the defunct local authorities to enable the state organ to verify the same and conclude a national wide audit of assets and liabilities of the defunct Local Authority before taking any action against a County Government. That this process is yet to be concluded and therefore the assets and liabilities of the Respondent are yet to be transferred by the National Government.
  21. That the proper party for the Applicant to demand payment for the legitimate claims duly verified emanating from the defunct local authorities is the national government. There has not been any agreement between the Respondent and national government to take over the mandate of the national government to pay remuneration for seconded employees during the transition period.
  22. That the Respondent has no obligation to the Applicant and the Application lacks merit and the same be dismissed with costs.
  23. The Applicant filed a Replying Affidavit of Roba Duba, the Secretary General of the Applicant

Union.

24. The Applicant has joined issues with the Respondents and reiterates the salient facts to wit;

That the Respondent is an employer of the grievant employees and is fully aware of the award of the Court to reinstate the Grievants. That the award was served and received by the Respondents. That Mr. Joseph Motari wrote a letter marked 'RD2' acknowledging that he is aware of the issues raised. That it is the Respondent that is liable to reinstate and pay the Grievants their duly owed remuneration and not the national government.

25. That the Respondent is in wilful defiance of a Court Judgment and order.

26. That the Court has determined the issues of liability and same cannot be apportioned to third parties. That the Court must stamp its authority in the interest of proper administration of justice.

**27. Issues in dispute**

- i. Whether Nakuru County Government is the legal successor of Naivasha Municipal Council.
- ii. Whether the Respondent is in contempt of Court.
- iii. If the answer to (i) and (ii) above is in the affirmative, what remedy is to be granted to the Applicant.

**Issue i**

28. Various decisions have been rendered by different Courts on the issue whether County Governments are the legal successors of the Local Authorities that existed prior to the promulgation of the Constitution of Kenya 2010 and therefore are legally bound to take over, the assets and liabilities of the defunct Local Authorities as contained in the Transition to Devolved Government Act, 2012.

29. In the case of **Argos Fisheries Limited Vs. Municipal Council of Mombasa, HCC, MBSA Civil suit No. 13 of 2008 [2014] eKLR** D. S. Majanja J. had this to say;

*“Although Courts have acknowledged that there are no transitional provisions in the County Government Act, 2012 dealing with actions and legal proceedings that were pending as at the date of the repeal of Local Government Act, the general Legal position adopted is that the legal proceedings which were instituted against defunct Local Authority should proceed against the County Government under whose jurisdiction the concerned Local Authority was located”*

and in **J.A. M. Umenda & another Vs. Municipal Council of Kisii & 6 others, Environment & Land Court of Kenya at Kisii Judicial Review Application No. 3 of 2013 [2013]eKRL** Okong’o J. stated:

*“Section 33 of the sixth schedule to the Constitution 2010 provides that an office or institution established under the Constitution of Kenya, 2010 is a legal successor of the corresponding office or institution or under a former Constitution or under a former Act of Parliament in force immediately before the effective date of the Constitution of Kenya, 2010 whether known by the same name or a new name County Government under the new Constitution took over the powers and functions of the local authorities as they were recognized and defined under the old Constitution and the local Government Act pursuant to the provisions of the said Section 33 of the sixth schedule to the Constitution of Kenya 2010, County Governments are therefore the natural and presumptive legal successors of the defunct local authority.”*

30. I am in total agreement with the views expressed by the two learned Judges above and hold that Nakuru County Government is the natural and presumptive legal successor of the defunct Naivasha Municipal Council. The Nakuru County Government is therefore legally bound by the Judgment of Hon. Paul K. Kosgei J. delivered on 31<sup>st</sup> August, 2007 in favour of the Claimant / Applicant against Naivasha Municipal Council.

31. It is equally true that the Governor of Nakuru County Council Mr. Kinuthia Mbugua and the

Secretary of the Nakuru County Council, Mr. Joseph Mogusi have a legal obligation to implement the said Judgment on behalf of the Respondent and I so find.

## Issue ii

32. The second issue is whether the Governor of the Nakuru County Government Mr. Kinuthia Mbugua and the Secretary of the Nakuru County Government Mr. Joseph Mogosi, are in wilful defiance of the Court orders and decree made pursuant to the Judgment of the Court delivered on 31<sup>st</sup> August 2007 and therefore in contempt of Court by
33. Failing to reinstate thirteen (13) Claimants without loss of benefits within 15 days from the date of the award issued by Hon. Paul K. Kosgei on 31<sup>st</sup> August 2007.
34. Failing to pay full retirement benefits to those employees who were found to have been unlawfully dismissed who had attained the mandatory age of 55 years.
35. It is in dispute whether the two officials of the Nakuru County Government received personal service of the Judgment and Decree extracted in terms of the Judgment with penal notice, a prerequisite to commence proceedings to commit the said officials for Civil jail for contempt of Court.
36. The Respondents submit that the Honourable Governor of Nakuru County and the County Secretary of Nakuru County were not duly served with copy of the certificate of urgency and notice of motion application dated 5<sup>th</sup> February 2015, the judgment dated 31<sup>st</sup> August 2008 and that no order or Judgment in respect of **Industrial Cause No. 132 of 2006** and **Judicial review No 351 of 2010** and therefore the officials cannot be held in contempt of Court.
37. The Respondent rely on the case of **Republic V. County Council of Nakuru exparte Edward Alera J/A Genesis Reliable Equipment & 2 others, Nakuru Judicial Review Case No. 74 of 2010 (2011) eKLR** as follows;

*“The substantive application, accompanied by a copy of the statement and affidavit in support of the application for permission must be served personally on the contemnor (Rule 3(3) unless the Court or Judge has dispensed with service or it or he thinks it just to do so (Rule 3(4)).”*

38. Furthermore, in the case of **Christine Wangari Gachege Vs. Elizabeth Wanjiru Evans & 2 11 others, Nairobi Civil Application No. 233 of 2007 (2014) eKLR**, the Court of Appeal Bench of P. Kihara Kariuki (P) Maragoi and Ouko JJA in their Judgment summarized the procedure for commencement and proceedings with contempt application as follows;

*“Following the implementation of the famous Lord Woolf’s “Access to Justice Report 1996”, The Rules of the Supreme Court of England are gradually being replaced with the Civil Procedure Rule, 1999. Recently, on 1<sup>st</sup> October, 2012 the Civil Procedure (Amendment No. 2) Rules, 2012 came into force and PART 82 thereof effectively replaced Order 52 RSC in its entirety. PART 81 (Applications and proceedings in relation to contempt of Court) provides different procedures for four different forms of violations. Rules 81.4 relates to committal for “breach of a judgment, order or undertaking to do or abstain from doing an act.” Rule 81.11 – committal for “interference with the due administration of justice” (applicable only in criminal proceedings).*

Rule 81.16 – committal for contempt “*in the face of the Court*”, and

Rule 81.17 – committal for “making false statement of truth or disclosure statement.”

39. An application under Rules 81.4 (breach of judgment, order or undertaking) now referred to as “application notice” (as opposed to a notice of motion) is the relevant one for the present matter. It is made in the proceedings in which the judgment or order was made or on the undertaking.
40. The application must set out fully the grounds on which the committal application is made and must identify separately and numerically, each alleged act of contempt and be supported by affidavit(s) containing all the evidence relied upon.
41. The application notice and the affidavit or affidavits must be served personally on the Respondent

- unless the Court dispenses with the service or it considers it just to do so, or the Court authorizes an alternative method or place of service.
42. The Respondents submit that a flaw in procedure in contempt proceedings is inexcusable given the drastic nature of the orders that are sought and urge the Court to dismiss the application.
43. From the totality of documents filed before Court it is patently clear that the Nakuru County Government and by implication the Governor and the secretary are fully aware of the judgment and order of the Court the subject of this dispute.
44. The Respondent have cited financial difficulties as the reason for the failure to implement the Court order.
45. However, contempt of Court Act, 1981 with recent amendments remains the substantive law of contempt of Court in England and is applicable Law in Kenya. Similarly the procedure continues to be that provided for under order 52 of the Rules of the Supreme Court. That the Rules of the Supreme Court continue to be gradually replaced by the Civil Procedure Rules following the Woolf Reforms. These will appertain in our jurisdiction until our law of contempt changes.
46. This position was stated by the Court of Appeal per P. Kihara Kariuki (P) Maraga & Ouko JJA in **Civil Application No. 233 of 2007 (UR 144 / 2007) Christine Wangai Gachege and Elizabeth Wanjiru Evans** and 11 others in which “*it is clear from this summary that leave now called “permission” is not required where committal proceedings relate to a breach of a judgment, order or undertaking.*”
47. The C.A. went on to hold;

*“We find on the basis of the new Civil Procedure Rules (of England) which are now contained in the second supplement to the 2012 White Book that no leave is required before bringing application like the one before us for committal for contempt relating to breach of this Court’s order.”*

48. On the issue of service which is relevant to the matter at hand, the position was restated by the HCC at Mombasa in **Civil Case No. 97 of 2001 Rodgers Muema, Nzioka Vs. Tiom – Kenya Limited** in which A. I. Hayanga J. citing the C.A. decision in **Mwangi Wang’ondu V. Nairobi City Commission Civil Appeal No. 95 of 1988** states as follows:

*“as a general rule no order of Court requiring a person to do or abstain from doing any act may be enforced unless a copy of the order has been served personally on the person required to do or to abstain from doing the act in question. The copy of the order served must be indorsed with a notice informing the person on whom the copy is served that if he disobeyed the order he is liable to the process of execution to compel him to obey it. This requirement is important because the Court will only punish for breach of injunction if satisfied that the terms of the injunction are clear and unambiguous that the Defendant has proper notice of the terms and that breach of the injunction has been proved beyond reasonable doubt.”*

49. The Court went on to say “*order of injunction can be any other order and need not only be an order of injunction.*”
50. Again citing the **Court of Appeal decision in Civil Application No. NAI 265 of 1993** when the Court quoted Hamburg’s Laws of England (4<sup>th</sup> Edi.1 Vol.9P. 3 of 61.
51. “*necessity of personal service as a general rule no order of Court requiring a person to do or abstain from doing any act may be enforced unless a copy of the order has been served on the person required to do or abstain from doing the act in question. Service on the advocate is not proper service in case of contempt. In contempt proceedings personal service is the procedure.*”
52. The Judge in Rodgers case stated;

*“we prefer to follow the decision in Wangondu’s case because it has followed the England law and procedure on the issue. It is clear that the law in England does not render a mere knowledge of all the terms and directions of the Court order and disobedience thereof by an alleged contemnor as being enough to commit him for contempt. A further essential*

*step is needed to be taken in the shape of endorsement of the penal consequence on the order served on the contemnor.”*

53.This Court is bound by the holding of the Court of Appeal in this respect.

54.It follows that this application cannot succeed for the reason that the Secretary General of the Claimant / Applicant Union, in the Affidavit supporting the Application for contempt proceedings does not state that personal service of the order of the Court with an indorsent of the penal consequence of the order was effected on the Governor and the Secretary of Nakuru County Government the alleged contemnors.

55.The Applicant has failed to prove beyond reasonable doubt that the cited contemnors are in contempt of Court.

56.The Application is dismissed with no order as to costs.

57.The Court however notes that, it would appear that the Respondents are aware of the existence of the Court order and their obligation to enforce it. Should a proper application be brought, the Court will not hesitate to punish those who may be perpetuating defiance of orders of this Court that have not been set aside.

**Dated and Delivered at Nairobi this 12<sup>th</sup> day of October, 2015.**

**MATHEWS NDERI NDUMA**

**PRINCIPAL JUDGE**