



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT KISUMU

PET NO. 286 OF 2014

(Before Hon. Justice Hellen S. Wasilwa on 26th November, 2014)

1. NELCO MASANYA SAGWE
2. PETER ODERO ANDITIPETITIONERS

-VERSUS-

1. COUNTY SECRETARY, KISUMU COUNTY
2. COUNTY ASSEMBLY OF KISUMU
3. ELIUD OWEN OJUOK
4. NICHOLAS STEVEN OKOLA
5. HON. GABRIEL OCHIENG RESPONDENTS

RULING

This application before court was filed on 31.10.2014 through the firm of D. A. Oluoch & Co. Advocates. The application was brought under certificate of urgency and brought through a notice of motion brought under rules 23(1) & 24(1) of the Constitution (**Protection of Rights & Fundamental Freedom**) Practice & Procedure Rules 2013. The applicant sought orders that:-

- a) **The application be certified as urgent and the same be admitted to hearing *ex parte* this first instance for a consideration of the grant of interim conservatory orders as sought herein.**
- b) **Pending the hearing and determination of this application *inter parties*, a conservatory order of injunction be issued against the 1st and 2nd respondents, restraining them, their agents and/or any person claiming under them from obstructing, interfering with and/or in any manner preventing the 1st applicant Nelco Masanya Sagwe and the 2nd applicant Peter Odera Anditi from holding the offices of Clerk and Assistant Clerk of the County Assembly of Kisumu respectively and performing the functions and duties of the said offices pending the hearing and determination of this petition.**
- c) **Pending the hearing and determination of this application *inter partes*, a conservatory order of injunction be issued directed at the 3rd respondent, Eliud Owen Ojuok and the 4th respondent, Nicholas Steven Okola restraining them, their agents and or any person claiming under them from assuming offices and holding the positions of Clerk and Assistant Clerk of the County Assembly of Kisumu and purporting to perform the functions and duties of the said offices.**
- d) **Pending the hearing and determination of this application *inter parties*, an interim order of stay be issued against the 2nd respondent, County Executive of Kisumu, staying its decision and directions made on the 15th October 2014, purporting to and or deploying the 1st**

applicant, Nelco Masanya Sagwe, Acting Clerk and the applicant Peter Oder Anditi, Acting Assistant Clerk of the County Assembly of Kisumu from their offices to the positions of Assistant Sub County Administrators.

e) Pending the hearing and determination of this petition, this honourable court be pleased to grant prayers (b)(c)(d) & (e).

f) Such other and further orders and directions be issued as the circumstances of the case may require.

g) Costs of this application be provided for.

and was based on the following grounds:-

1. The applicants are the Interim Clerk, Kisumu County Assembly appointed pursuant to the provisions of Section 13 of The County Governments Act, Act No. 17 of 2012 by the Kisumu County Assembly Service Board.
2. The 2nd respondents jointly with others, pursuant to a meeting held on 15th October 2014 and without authority and jurisdiction, and following on an illegal process and contrary to law and the Constitution, have purported to suspend the applicant from performing the functions of his office.
3. Under the provisions of Article 176 of the Constitution of Kenya, The County Assembly of Kisumu is a constituent part of the County Government of Kisumu but independent in law from the County Executive of Kisumu.
4. The 1st interested party is mandated under the provisions of Section 12 of the County Government Act to constitute offices within the County Assembly Service and appointing and supervising office holders including the Clerk and Assistant Clerk of the County Assembly. The County Executive of Kisumu has no mandate or role in the appointment or removal of the Clerk and Assistant Clerk of the County Assembly of Kisumu.
5. Under Article 175 of the Constitution, County Governments are based on democratic principles and separation of powers as between the County Executive and the County Assembly. This principle enjoins each entity to be in charge of its affairs to the extent provided by the law and prohibits either of the two arms of a County Government from interfering with the functions vested in law on the other and accordingly the County Executive cannot purport to carry out the functions provided in law to the County Assembly and any such action would be illegal in law and null and *void ab initio*.
6. The applicants were never notified of the intention to remove them and or to suspend and or to deploy them and or the reason for such suspension and or such purported deployment at all, either before during and or after such purported action.
7. The applicants have thus been condemned unheard and their right to an open transparent, fair administrative action and the right to due process has been violated and is threatened with continued violation and has been denied the right to make representations to the allegations and have thus been condemned unheard.
8. The due process of the law has not been followed in the circumstances of the matters complained of and or pleaded in the petition and the application.
9. The right of the applicants to legitimate expectation that he would carry out the functions and duties and to enjoy freely the benefits of his office in the absence of legitimate complaints, have been violated and are threatened with continued violation.
10. An unqualified persons, in the person of the 3rd and 4th respondents has purportedly been appointed in an Acting Capacity in violation of the provisions of Section 64(1) as read with Section 13 of the County Governments Act.
11. The applicant's rights to fair administrative action envisaged, protected and guaranteed by the provisions of Article 47 of Constitution of Kenya, 2010 and the legitimate rights and expectation of the applicants as is being infringed on.

12. The applicants consequently stands to suffer loss and damage and risks losing their legitimate expectation and interest in the said positions which has crystallized, courtesy of an illegal process undertaken by the respondents in violation of the law.
13. And the applicants are apprehensive that unless the respondents are restrained by an order of injunction, they shall suffer and continue to suffer irreparable harm, loss and damage and their rights shall continue being violated.
14. The power to constitute offices in the County Assembly Service and to appoint and supervise office holders is a function bestowed by law only on the County Assembly Service Board but the 1st and 2nd respondents, in violation of the Constitution and the law, have usurped those functions and purported to carry out the said functions.
15. The power to appoint and or remove from office the Clerk of the County Assembly is vested by statute only on the County Assembly Service Board and not the respondents.
16. Under Article 23 of the Constitution, this court has jurisdiction to grant appropriate relief, including a declaration of right and or a conservatory orders as sought.
17. As a result of the respondent's actions, the petitioners now stands depicted and portrayed as corrupt and lacking in integrity and as having abused the functions of their offices and as having abdicated their statutory roles and duties, a charge that has no basis at all.
18. In any event, the positions of Interim Clerk, County Assembly of Kisumu and Assistant Interim Clerk, County Assembly of Kisumu were not vacant at the time the 3rd and 4th respondents were purportedly appointed to act in the said positions and this was an affront to the provisions of Section 69(2) of the County Government Act hence the said appointments ought to be outlawed.
19. Pursuant to letters dated 15th October 2015 addressed to the petitioners, the 2nd respondent, without authority and jurisdiction, have now purported to redeploy the applicants to be Assistant Sub County Administrators, a position which does not exist in law, the operations of the County Assembly.
20. The only statutory body with jurisdiction, which can move create and abolish offices and or to fill them, is the County Public Service Board and not the County Secretary and in violation of the elaborate and clear provisions of the law set out under Sections 59, 60, 61, 62, 63, 64, 65, 66 and 69 of the County Governments Act, and is thus illegal.
21. Under the provisions of Section 72 of the County Governments Act, the power to deploy a Public Officer from one Department to another is vested in the County Public Service Board and not the County Secretary and there is no such power to deploy an officer of the County Assembly Service Board by the Public Service Board which are all concurrent statutory public bodies.

The application is further supported by the annexed affidavit of Nelco Masanya Sagwe the applicant herein and other grounds adduced at the hearing thereof.

In the interim orders were granted in terms of prayers (a), (b), (c) & (d) and *inter partes* hearing ordered on 4.11.2014. Before *inter partes* hearing could commence however, the applicants filed yet another application dated 30th October 2014 whose nature is contempt. The applicants avers that despite the existence of a court order dated 21.10.2014, the respondents have continued to prevent the applicants from accessing their offices with impunity, in flagrant disobedience and/or disregard of the said order and have refused to obey it. They aver that the actions of the respondents are calculated to embarrass, ridicule and/or disparage the dignity and/or integrity of the honourable court and hence the application is to

vindicate the dignity of this court.

It is the applicants position that the issues they are raising in this application are grave in nature and have far reaching consequences to the general administration of justice. The applicants want the following found in contempt of court for disobedience of the court order issued on 21st October 2014:-

1. **County Assembly of Kisumu**
2. **County Secretary Humphrey Nakitare**
3. **Haggai Hawi Kadiri staff at the County Secretary's office**
4. **Eliud Owen Ojuok, Acting Clerk, County Assembly of Kisumu**
5. **Nicholas Steven Okola, Acting Assistant Clerk, County Assembly of Kisumu**
6. **Gabriel Ochieng, Acting Speaker County Assembly of Kisumu**
7. **Hezekiel Odhiambo Okelo, Acting Sergeant At Arms, County Assembly of Kisumu**
8. **William Ogada, Commissionare, County Assembly of Kisumu.**

The applicants want the court to cite and punish all the respondents named herein for disobeying and/or disregarding the lawful court orders issued and/or granted on 21.10.2014 and served upon the 1st, 2nd, 3rd, 4th and 5th respondents on 21.10.2014 and others as listed. The applicants want the court to impose a penalty of a fine of Kshs 500,000/= against each of the respondents and persons named herein for being in contempt of a court order and in default commit them to jail for a duration not exceeding 6 months and/or such shorter period as the court may deem fit and expedient.

The applicants also seek orders as follows:-

1. **The honourable court be pleased to issue an order to compel Eliud Owen Ojuok and Nicholas Stephen Okola to vacate office and to respectively hand over the functions of the office of the Clerk and Assistant Clerk, County Assembly of Kisumu to the applicants, Nelco Masanya Sagwe and Peter Odero Anditi forthwith and to forthwith cease acting as the Clerk and Assistant Clerk County Assembly of Kisumu in disobedience of court orders.**
2. **Court be pleased to issue an order to compel the Speaker, County Assembly of Kisumu and Kisumu County Assembly to unconditionally and immediately allow and facilitate the petitioners access and resumption of their offices and duties as interim Clerk and Assistant Clerk, Kisumu County Assembly as mandated by the orders of the court.**
3. **In the alternative, the honourable court be pleased to grant an Order of Sequestration to attach the properties of Humphrey Nakitare, Haggai Hawi Kadiri, Eliud Owen Ojuok, Nicholas Steven Okola, Hezbon Odhiambo Okelo and William Ogada, which properties be sold to defray the damages occasioned by the breach and/or disobedience of the Lawful Court Orders of the Court dated 21st day of October 2014.**
4. **An order be issued directed at all the respondents and the named Humphrey Nakitare, Haggai Hawi Kadiri, Eliud Owen Ojuok, Nicholas Steven Okola, Hezbon Odhiambo Okelo and William Ogada, the contemnors named in these proceedings and in deed all the staff of the Kisumu County Assembly and County Secretary of Kisumu from engaging in any or all activities that would otherwise undermine the court orders issued on 21st October 2014 and or any further orders in respect of the Petition herein.**
5. **An order be issued directed at all the members of Kisumu County Assembly whether elected or nominated, all staff and indeed the County Secretary who may be minded to act in a manner as to undermine the orders issued by the honourable court on 21.10.2014 be deemed to be in contempt of court and upon their identification, be committed to civil jail at Kodiaga Prison for a period not exceeding 6 months.**

This application is based on the annexed affidavit of Nelco Masanya Sagwe, the 1st petitioner/applicant herein and on the following grounds:-

- a. **Subsequent to obtaining to the conservatory orders, same were duly extracted and personally served upon all the five respondents on the 21st day of October, 2014 who have all, since then been aware of the existence of the orders.**

- b. The orders that were duly extracted and served, were duly endorsed with a penal notice, warning of the penal consequences in case of breach and/or disobedience of the same.
- c. Notwithstanding personal service of the court order upon all the respondents, and the other persons named herein, they have all chosen to disregard and/or disobey the same.
- d. The respondents have also interfered with the applicant's right to occupy and or to perform the duties of the office of the Clerk of the County Assembly and Assistant Clerk as directed by the Court in the order.
- e. At the instructions of The County Secretary, Humphrey Nakitare and Haggai Hawi Kadiri, Gabriel Ochieng and Eliud Owen Ojuok, the said Hezbon Odhiambo Okelo a Sergeant At Arms and the said William Ogada, a commissionare, did lock the offices of the Clerk and denied the 2nd petitioner the right to be at the County Assembly precincts.
- f. The action of all the respondents and the persons named and sought to be cited for contempt are contrary to the tenor of the court order and same amounts to disobedience of lawful court orders.
- g. The conduct of the respondents and the persons named is bound to set a dangerous precedent.
- h. The conduct of the respondent and the persons named militates against the Administration of Justice and the Rule of Law in general and the integrity and/or dignity of this honourable court and its process has been brought to disrepute.
- i. It is in the interest of justice that the named persons and the 3rd, 4th and 5th respondents all be cited and punished for contempt of the court because the applicants are bound to suffer irreparable loss as a result of the continued disobedience of the orders of the court.
- j. On 21st October, 2014, the County Assembly of Kisumu was duly served with the court order aforesaid through its Acting Clerk and Acting Speaker and the County Secretary was also served in person and all the persons named herein thereafter became personally aware of the orders. All the respondents are aware of these proceedings and the orders of the court.
- k. On numerous occasions since 21st October, 2014, the County Assembly of Kisumu and all the persons named herein have obstinately denied the applicants access to their office and the right to perform and carry out their duties claiming Executive Orders from above.
- l. In spite of personal knowledge of the court order aforesaid, Eliud Owen Ojuok and Nicholas Steven Okola unlawfully continues to act and to perform the functions and duties in the office of Clerk and Assistant Clerk of the County Assembly of Kisumu.
- m. On 23rd October 2014, Eliud Owen Ojuok issued and cause to be published a paid advertisement in his capacity as the Clerk, County Assembly of Kisumu announcing a vacancy in the office of Speaker, County Assembly of Kisumu and calling for applications and he has been categorical that the applicant are history as staff of the County Assembly of Kisumu.
- n. The County Assembly of Kisumu and the named persons are not only in contempt of court but have also violated Article 232(1)(f) of the Constitution of Kenya and Section 9(a), (b), 10 and 19 of the Public Officer Ethics Act, 2003, by misleading the public that the applicants are no longer needed at the County Assembly and that they have not been reinstated contrary to the orders granted on 21st October, 2014.
- o. In spite of being aware of the Court Order aforesaid, the respondent/contemnors have willfully disobeyed the same with impunity and have demonstrated their unwillingness to comply therewith.
- p. In the circumstances, committal proceedings are the only and most efficacious and efficient mode of compelling the contemnors to obey the Court Order and or to purge the contempt and to protect the dignity of the Honourable Court, the sacrosancty of its orders and the rule of law.
- q. The applicant have no other way of enforcing the said orders otherwise than through these proceedings.
- r. No leave of the court is required to institute contempt proceedings such as these when court orders are being disobeyed willfully and with impunity.
- s. This is a fit and proper case to grant the orders sought.
- t. It is in the interest of justice that the application herein be granted *Ex-Debito Justitiae*.

This application is also supported by the supporting affidavit of Nelco Masanya Sagwe herein dated 30.10.2014. The applicants in their submissions referred court to the case of **Ibrahim Hajj Issa V Kenya Meat Commission** & they narrowed the issues for determination as whether the respondents have disobeyed the orders of 21.10.2014. The applicants submitted that the respondents have not denied receiving the orders but are denying personal service. The applicants contend that the issue of personal service is no longer the test but whether the respondents were indeed aware of the court orders. They contend that in the affidavit of Samuel Onyango dated 10.11.2014 - **Annex FOO-1** i.e the hansard for Tuesday 21.10.2014, the respondents were aware of the court orders and at the bottom of the page, one John Kadede raised a point of order informing the house of the existence of a court order stopping what they were doing. At pg 13th, the 5th respondent replied and at pg 20 he continued to lecture the house on a court order which was served – in clear contempt of the court. That the Speaker was very clear and thanked the members.

Applicants referred court to the case of **Justin Kariuki Mate & Anor V Martin Nyaga Wambora** – In the Court of Appeal ruling – where the three judge bench raised this matter at page 13 of 15 of the authority and found that even if the court may find that the respondents were not personally served, they have become aware of the orders and knowledge supersedes service. This was also the case in the Court of Appeal Case No. 79/2000 **Dorothy K. Kwonyike T/A Luguyan Enterprises V Victoria Commercial Bank.**

On behalf of the 1st interested party the County Assembly Service Board, Mr. Okongo submitted that their position is that sanctity of the rule of law presupposes that the rule of law must be obeyed and especially if directed at public officers. It is his submission that this court issued orders on 21.10.2014 and all people mentioned have knowledge of the orders. He referred court to the Court of Appeal Case – **C.A No. 29/2014 – Wambora's Case** - where the law is clear. He submitted that previously it had been the law that personal service was important but the Country has shifted and now the knowledge of existence of the order supersedes personal service. He avers that in the state they are in, all of them as guided by the proceedings know that the court issued conservatory orders directing that petitioners were to continue performing duties they previously did. That in the position the 1st interested party holds – that the petitioners should be Clerk and Deputy Clerk. If that order has not been obeyed and 3rd and 4th respondents are carrying out duties of that office that is contempt of court and the County Assembly Public Service Board (CAPSB) through its chairperson has sworn an affidavit that despite orders of the court, the 3rd and 4th respondents are still describing themselves as Clerk and Asst. Clerk. 3rd respondent is still describing himself as Ag. Clerk and justifying himself. They submitted that the court has a duty to pass a message to those who hold public office of the importance of court orders. They submitted that what the 3rd and 4th respondents have done is contempt punishable by the law and they should be punished.

Mr. Otieno submitted on behalf of the 1st respondent, 2nd interested party and one Haggai Hawi mentioned at prayers No. 2 of notice of motion dated 30.10.2014 as an alleged contemnor. He referred court to the case of **John Mugo Gachuki V Nyamakima Co-op Ltd** by **J. Odunga** page 4 of 5 of the decision and submitted that there is no allegation that 1st respondent has done anything to breach terms of orders issued by court on 21.10.2014. He submitted that these proceedings connote criminal responsibility where *actus reus* and *mens rea* must be demonstrated. He submitted knowledge of service is important. He submitted that Haggai Hawi is not mentioned anywhere and he is not party to these proceedings and the application is meant to embarrass him. He asked court to dismiss the application against him with costs.

They also cited **Diana Kethi Kilonzo V IEBC Pet. No. 359/2013** the threshold and gist of the decision being that the Constitution grants different offices work to perform and in case of the County Secretary, S. 72(2) of the County Government Act, he performs his duties and should not be penalized for doing the same. It is alleged certain things were done at his instructions but this is not stated on oath. It must be shown that they took positive steps to do something. They submitted that it must be shown that there was a guilty mind and an act against the orders.

Mr. Rodi for 2nd and 5th respondents submitted that his clients were never served with any court order as

alleged. He stated that by the time it was alleged they were served, they were within the Assembly conducting the business of the day i.e impeachment of the Speaker among others. He stated that the petitioners were appointed under S.72(2) of County Governments Act 2012 by County Secretary and not under S. 13 of County Governments Act. He also submitted that service supersedes knowledge. He submitted that it is not clear who was served and whether he is an authorized agent. He also quipped on how the 1st respondent would be served and where and especially pursuant to National Assembly Powers and Privileges Act Cap 6 read with S. 17 of County Governments Act and Article 117 of Constitution – No service can be instituted within the Assembly. He also submitted that S. 4 of Cap 6 states that no criminal or civil proceedings can be instituted for words stated in the proceedings of the Assembly and the Assembly cannot be in contempt and neither can the Clerk – the 5th respondent. That the presiding Speaker cannot also be in contempt. He cited **Justus Nyaribo V Clerk Nyamira Assembly** which found that service is higher than the law. He also submitted that this court has no jurisdiction to investigate issues of the Assembly.

Mr. Wasuna for 3rd and 4th respondents submitted that there are no acts of alleged contempt before court which are proved to have been committed at the time of filing the application. He further submitted that the said acts must be supported by the affidavit of a person aware of those facts. However he submitted that in the affidavit of the 1st petitioner – para 6 he admits that his office was opened and he does not state who denied him the benefit of performing his duties. The affidavit does not state the duties 3rd and 4th respondents were doing. The respondents also submitted that the petitioners should not be believed as it is apparent that they didn't serve respondents personally as in their further affidavit – para 14, they stated that they served through the Clerk's office. He distinguished **Wambora's** case by stating that in that case, the order was in the public domain unlike in this case.

Mr. Olel also for 3rd and 4th respondents pointed out that the hansard pointed out does not relate to this case but to the impeachment of Speaker. He also submitted that there is nothing to show that the 3rd and 4th respondents are in contempt as words or acts complained of are stated and specified.

The petitioners counsel in further submission stated that there are letters written by 3rd and 4th respondents which are not retracted and that the respondents were aware of the others.

After hearing all submissions of the parties and after considering the pleadings, submissions and authorities cited, the issues for determination are as follows:-

- 1. Whether the respondents herein were served with the orders of this court dated 21.10.2014.**
- 2. If not served, whether the respondents had knowledge of the said orders of 21.10.2014.**
- 3. Whether personal service or knowledge is superior in matters of contempt.**
- 4. Whether there are any acts committed by the respondents in contempt of the order of 21.10.2014.**
- 5. What orders this court may grant in the circumstances.**

On the 1st issue, the affidavit of service in support of the application dated 30.10.2014 sworn by the process server Peter Ochara Anam states that on the 21.10.2014, he received copies of court order dated and issued on 21.10.2014 with a bundle of pleadings containing certificate of urgency dated 21.10.2014, notice of motion, supporting affidavit sworn on 21.10.2014 by Nelco Masanya Sagwe the 1st petitioner herein, supporting affidavit sworn on 21.10.2014 together with annexures and authority to act sworn and dated 21.10.2014 all scheduled for hearing on 4.11.2014. Annexures therein were from the firm of M/s D. A. Oluoch & Co. Advocates with instructions to serve on respondents and interested parties herein.

On this same day he proceeded to former Nyanza Provincial building and on 2nd floor served the County Secretary which service was accepted by one Patrick who accepted the documents but declined to stamp or sign on service documents at 3.30 pm. He states that on same day he went to Kisumu County Assembly offices along Uhuru Road next to District Headquarters Kisumu East and served the documents upon the Secretary to the Clerk County Assembly who was one Grace who accepted service but declined to sign.

At 4.40 pm, he served the Kisumu County Government Public Service Board at their offices at Municipal Hall Offices in front of the Kisumu Law Courts. Service was accepted by way of stamping at the back of service copy. The County Secretary is one Humphrey Nakitare. One Haggai Hawi Kadiri is a staff at the County Secretary's office. The affidavit of the process server does not however indicate how the two were served. The affidavit states that one Patrick was the one who received the documents at the County Secretary's office. Patrick is not known and his relationship with the office of the County Secretary is not explained. Under Order 5 rule 15, an affidavit of service should state the time and manner of service and the names and address of the person (if any) identifying the person served and witnessing the delivery or tender of summons. It is however not clear in the affidavit of Peter Anam how he knew this Patrick nor who identified him or if he was previously known to him and how. He also stated that the summons were received by the County Secretary whose name he does not mention. It is therefore clear that proper service on the County Secretary and Haggai Hawi Kadiri was not effected.

In the case of Eliud Ojuok and Nicholas Okola, the affidavit states that the documents were effected on one Grace, Secretary to the Clerk of County Assembly. The respondents have denied in their replying affidavit and steered clear of whether they were served or not. In their affidavit they tend to justify their actions stating that they were appointed to the offices they occupy. They further stated that the petitioners have not been locked out of their offices and were in the office on 27th October 2014 to collect their personal belongings. The affidavit goes on to justify removal of petitioners in the office and justifying why the deponents are in. Since the averments of the affidavit of service are not controverted, I find that service was effected on County Assembly and is the office where 3rd and 4th respondents were purportedly serving.

The 2nd interested party, Kisumu County Public Service Board was also served and the summons were served and stamped as received. It is therefore apparent that service was effected on 3rd, 4th respondents and the 2nd interested party. The 1st interested party accepted service through their counsel.

On service to the 2nd and 5th respondents, counsel submitted that they were never served as service cannot be effected within the Assembly. They referred court to S. 6 of Cap 6 which states that:-

“No process issued by any court in Kenya in exercise of its civil jurisdiction shall be served or executed within the precincts of the Assembly while it is sitting nor shall any such process be served or executed through the Speaker or any officer of the Assembly unless it relates to a person employed within the precincts of the Assembly or to the attachment of a member's salary.”

The respondents submitted that this privilege extends to the County Assembly and they cited Article 117 of the Constitution and S. 17 of the County Governments Act 2012 which states that:-

“The national law regulating the powers and privileges of Parliament shall with the necessary modifications apply to the County Assembly.”

It is true that the County Assembly enjoys certain powers and privileges as the National Assembly and especially when in session. It is for this reason that I find that 2nd respondent should not have been sued as an entity as it is protected when in session by virtue of S. 6 of Cap 6. However officers who serve within the precincts are not protected if they do any unwarranted act outside the proceedings of the Assembly.

The officers who serve within the Assembly sought to be cited in this case are; Gabriel Ochieng who was Ag. Speaker, Hesbon Odhiambo Okelo, Ag Sergeant At Arms and William Ogada, Commissionaire, County Assembly of Kisumu. Given the way service was effected on the County Assembly Clerk's Secretary and given that they are officers of the County Assembly, I find that they were all served with the order of the court which they have not denied.

As for the 5th respondent, the manner of service is not explained in the affidavit and I find he was also not served.

On the 2nd issue is whether the respondents had knowledge of the orders of the court of 21.10.2014. The petitioners submitted that indeed, they had knowledge of the order and that is why they all instructed counsel to appear for them. That may be true but the issue is when they had knowledge of the order. From the replies filed in court, knowledge was upon service on the parties the court has determined were served. Other knowledge was when they instructed counsel to represent them. The various replying affidavits were filed in court on 3.11.2014, i.e for 3rd and 4th respondents and for all others when they appeared in court on 4.11.2014.

On 3rd issue the petitioners and 1st interested party submitted that knowledge supersedes service. They cited the CA decision in **Justice Kariuki Mate & Anor V Martin Nyaga Wambora** [2014] Eklr.

In the CA decisions, the learned Judges of Appeal cited rule 81.10 of the Civil Procedure (Amendment No.2) Rules 2012 of England which states that:-

(3) “The application notice must

- a. **set out in full the grounds on which the committal application is made and must identify, separately and numerically, each alleged act of contempt including, if known the date of each of the alleged acts and**
- b. **be supported by one or more affidavits containing all the evidence relied upon.**

4. **Subject to paragraph (5) the application notice and the evidence in support must be served personally on the respondent.**

5. **The court may**

(a) dispense with service under paragraph (4) if it considers it just to do so or

(b) make an order in respect of service by an alternative method or at an alternative place.”

In this case however, the CA went further to restate rule 18.6 of the Civil Procedure (Amendment No. 2) Rules 2012 and Rule 18.8 in circumstances when the court can dispense with personal service of an order as follows:-

“In the case of a judgment or order requiring a person not to do an act, the court may dispense with service of a copy of the judgment or order in accordance with rules 81.5 to 81.7. If it is satisfied that the person had notice of it;

- a. **by being present when the judgment or order was given or made or**
- b. **by being notified of it's terms by telephone, email or otherwise.”**

The court made a finding that:-

“The trial court was correct in holding that the law as then was in contempt of court has since changed; the law as it stands today is that knowledge of an order is sufficient for purposes of contempt proceedings.”

That being the position as restated by the CA, in this case too I find that there was knowledge of the order of this court by the various respondents and interested party and despite the fact that in some cases there was no personal service, knowledge supersedes service.

Having heard knowledge of the order of this court of 21.10.2014 by fact that they responded to the petition and application, are there any acts committed or omitted to be done by the alleged contemnors in breach of this court's order?

As quoted above under rule 81.10, the exact acts done or omitted must be set out numerally and

separately and through affidavits. The petitioner has omitted to state what each of the contemnors did or omitted to do. The only incident which appears clear is that the 3rd and 4th respondents assumed offices and continued to act as Clerk and Assistant Clerk in offices they knew the court had ordered otherwise.

Even in their reply to the application, they are still trying to justify why they are in office thus accepting they are occupying the said offices though against the court order. It is therefore the finding of this court that the application as against all the intended contemnors save for 3rd and 4th respondents fail. However having knowledge of this court's order from this moment must forthwith obey the order as directed by court. As for 3rd and 4th respondents, I find they deliberately disobeyed this court's orders of 21.10.2014 despite knowledge of it and I find them guilty of contempt of court.

HELLEN S. WASILWA

JUDGE

26/11/2014

Appearances:-

Mr Onyango h/b Ken Omolo for 2nd petitioner

Yogo h/b PJ Otieno for 1st respondent present

Rodi for 2nd & 5th respondents present

Olel for 3rd & 4th respondents present

Miss Omboto for petitioners and h/b Mr. Okongo for interested party

CC. Wamache