Spares & Services Limited v Attorney General & 4 others (Miscellaneous Civil Application 389 of 2009) [2024] KEHC 16113 (KLR) (20 December 2024) (Ruling)

Neutral citation: [2024] KEHC 16113 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

MISCELLANEOUS CIVIL APPLICATION 389 OF 2009

JRA WANANDA, J

DECEMBER 20, 2024

IN THE MATTER OF AN APPLICATION FOR AN ORDER OF CONTEMPT AGAINST THE ATTORNEY GENERAL AND THE SOLICITOR GENERAL, DEPUTY REGISTRAR, HIGH COURT OF KENYA, ELDORET, DISTRICT ACCOUNTANT UASIN GISHU DISTRICT, DISTRICT COMMISSIONER'S OFFICE, ELDORET ARISING FROM THE ORDERS OF THIS HONOURABLE COURT DATED 23RD MARCH 2010, 10TH OCTOBER 2013 AND 14TH OF FEBRUARY 2020

BETWEEN

SPARES & SERVICES LIMITED ..... APPLICANT

AND

THE ATTORNEY GENERAL ..... 1ST RESPONDENT

THE SOLICITOR GENERAL ..... 2ND RESPONDENT

THE DEPUTY REGISTRAR, HIGH COURT OF KENYA, ELDORET ..... 3RD RESPONDENT

THE DISTRICT ACCOOUNTANT, UASIN GISHU DISTRICT .... 4TH RESPONDENT

DISTRICT COMMISSIONER'S OFFICE, ELDORET ..... 5TH RESPONDENT

RULING

1. The genesis of this matter is the order made by the Court in Eldoret High Court Civil Case No. 11 of 1993 - Budhia Builders & Erectors vs Spares & Services Limited, which directed the Applicant to deposit a sum of Kshs1,419,825.90 as security in that suit. In compliance with the said order, the Applicant deposited the said sum in Court on 11/04/2003. Thereafter, upon the parties' consent order dated 3/08/2009, the Court directed that the said sum be released back to the Applicant. The said sum was however not released or paid as ordered thus prompting the Applicant to file these Judicial Review

proceedings against the Deputy Registrar, High Court of Kenya, Eldoret and the District Accountant-Uasin Gishu District, District Commissioner's Office, Eldoret seeking an order of Mandamus. The matter was then heard and determined in favour of the Applicant whereof by the orders made on 23/03/2010 by Hon. Mwilu J (as she then was), it was directed as follows:

i. That an order of judicial review by way of mandamus be and is hereby issued in favour of the Applicant compelling the Respondents:

   a. To release to applicant a sum of KShs.1,419,825.90 in accordance with the order of the court dated 03.08.2004 vide Eldoret HCC No. 11 of 1993 Bhudia Builders Erectors -Vs- Spares & Services Limited.

   b. To account for all the interests that may have accrued thereon for the period that they held the same.

ii. That costs of these proceedings be borne by the Respondents.

2. It is not in dispute that pursuant to the said order, the Respondents, on or about 11/03/2011, paid the principal sum of Kshs 1,419,825.90 to the Applicant. What now remains in contention is payment of interest claimed to have accrued on the principal sum, and also costs of the suit.

3. This Ruling is in respect of two Applications, which being related, were agreed by the parties, to be heard and determined together.

4. The 1st Application is the Amended Notice of Motion dated 25/05/2023. The same is filed by the ex parte Applicant through Messrs Otieno Ragot & Co. Advocates. The orders sought therein are as follows:

i. That the Respondents herein, the Attorney General and the Solicitor General be held in contempt of the Court and be punished accordingly, for continuing to disobey the orders of this Court dated 23rd March 2010, 10th October 2013 and 14th of February 2020, unless and until they comply with the said order.

ii. That the said Respondents herein be ordered to bear the costs of this application.

5. The Application is premised on the grounds appearing on the face thereof and is supported by the Affidavit sworn by one Mansukhlal R. Gudka, attached to the initial Notice of Motion dated 16/03/2023 (before the Amendment) and the Supplementary Affidavit sworn by the same deponent, attached to the present Amended Motion.

6. In the lengthy initial Affidavit, the deponent stated that having obtained the said order of 23/03/2010 referred to above, and after various correspondence, the principal sum was paid to the Applicant on 11/03/2011, 8 years after the same was deposited, but that the Respondents have however declined to remit the interest that the amount had accrued. He deponed further that subsequently, the Applicant filed its Bill of Costs which was taxed and allowed in the sum of Kshs 137,769.70, and the Certificate of Order for Costs against the Government, dated 28/06/2011, issued on 17/12/2012 and further, that on 4/06/2012, the Registrar of the High Court of Kenya communicated that they had forwarded the amount of Kshs 137,769.70 to the Respondents herein for onward transmission to the Applicant. He added that on 10/10/2013, the Court, vide the Ruling delivered on the same day, pronounced itself on the issue of the interest on the principal sum whereby it held that the amount of Kshs 1,419,825.90 had accrued interest and that the rate of the interest would be determined by the Deputy Registrar and that consequently on 24/05/2016, the Deputy Registrar fixed the rate of interest at 6% p.a on the principal sum from 3/08/2004 till the date of payment, which was 11/03/2011.

7. The deponent urged further that subsequently, the Applicant furnished the Respondents with a detailed calculation of the balance due, and which amounted to Kshs 734,096.20 and also provided the bank details in which the amount was to be deposited, and that on 3/10/2016, vide the letter to the Respondents, the State Counsel who had handled the matter on behalf of the Attorney General, beseeched the Respondents to pay the outstanding balance to the Applicant. He contended that when there was no response to the said letter, the Applicant obtained the Certificate of Order against the Government, dated 23/03/2010 and issued on 14/02/2020 and forwarded the same to the Respondents to which there was however still no response. According to him, despite numerous demands for payment and countless trips from Kisumu to Eldoret having been made requesting the Respondents to make the payment, the Respondents has never made good any payment, that there is no reasonable explanation that has been given for the continued reluctance to make the payment and that the Applicant is now desperate that the continued reluctance on the part of the Respondents is a clear indication that they have no intention at all to pay. He deponed that the Respondents' conduct constitutes a gross and blatant abuse of the office and the powers bestowed upon them by disobeying the direction of the Court to pay in a manner that can only be described as reckless.

8. At this point, I may comment that it is not clear to me why the deponent deemed it necessary to swear the Supplementary Affidavit since it is an exact "copy and paste replica" of the Affidavit above. For this reason, I will not recount it.

9. The 2nd Application is the Notice of Motion dated 24/10/2023 filed by the 1st Respondent, the Attorney General. On its part, this Application seeks orders as follows:

    i. [.....] spent

    ii. [.....] spent

    iii. That this Honourable Court be pleased to set aside, vary and/or review the Orders issued on 23/03/2010.

    iv. That the costs of this application be in the cause.

10. The Application is premised on the grounds appearing on the face thereof and is supported by the Affidavit sworn by Joyce Limiti Chilaka, a State Counsel in the Office of the Attorney General. She deponed that regarding the principal sum of Kshs 1,419,825.90, the Deputy Registrar of the High Court, in liaison with the District Accountant prepared a voucher and paid the same to the Applicant. She added that the sum deposited fell under July 1993 to 30/06/2003 and there was a directive that such deposits could only be released to the depositors after reconciliation by the Judiciary, the Office of the President and Treasury had been conducted and that this occasioned delay in releasing the funds to the Applicant. According to her, the delay was also occasioned by the delay by the Applicant in forwarding the requisite documents which included the original deposit receipts and account details. She urged pursuant to the order of Mandamus, the said monies were released to the Applicant vide the letter dated 23/03/2010. She submitted that the order states that the Respondents "account for all the interest that may have accrued" and that she wishes to categorically state that no interest accrued on the said deposit. She deponed further that deposits made to the Respondents do not attract interest as they are only deposited for safe custody in a Government account at the Central Bank, and not in a Commercial Bank. According to her, the sum of Kshs 137,769.70 which was taxed costs in the Judicial Review order was paid to the Applicant. She therefore concluded that the Applicant's claim for interest is misconceived.

DIVISION - Grounds of Opposition to the 1st Application (Attorney General)

11. Through the Attorney General, the Respondents filed Grounds of Opposition on 19/04/2023. In the same, it was stated that the Application is defective and incompetent as it is premised on the *Contempt of Court Act* and Section 5 of the *Judicature Act* which has since been declared unconstitutional and was repealed. It was further stated that the declaration of unconstitutionality of the Act had the consequence of divesting this Court of the jurisdiction to punish for Contempt of Court and that there is now no substantive law that provides for what constitutes contempt of Court, the procedure to be followed or prescribes the penalty thereof. It was further stated that Section 4 of the *Judicature Act* is not applicable in this case and that therefore the Application has been brought under the wrong provisions of the law. It was further that the Respondents are not the Accounting Officers of the Judiciary which is a separate entity and that therefore, the Respondents have been wrongly sued and that in the event the orders are issued, then the same shall be in vain. In conclusion, it was stated that the Attorney General has no statutory mandate to settle decretal sums on behalf of the Judiciary.

Replying Affidavit to the 1st Application (Attorney General)

12. The Deputy Registrar, High Court of Kenya, Eldoret (3rd Respondent), in opposition to the 1st Application, through the Attorney General, filed the Replying Affidavit sworn on 4/03/2024. The same is sworn by Rosemary Onkoba, the then Deputy Registrar. She reiterated the matters deponed that in the Affidavit sworn by Joyce Limiti Chilaka and deponed further that parties seeking refund of Court deposits are required to submit the original deposit receipt and account details and that the delay in making this payment was also occasioned by the delay by the Applicant in forwarding the requisite documents. She echoed the statement that in compliance with the order of Mandamus made herein by Hon. Mwilu J (as she then was) on 23/03/2010, the payment of the principal sum of Kshs 1,419,825.90 was made to the Applicant on 11/03/2011. She added that in further compliance, the sum of Kshs 137,769.70 which was taxed costs was also paid by the Judiciary to the Attorney General and was eventually transmitted to the Applicant by the District Accountant as confirmed vide the letter dated 15/11/2013. According to her therefore, the Applicant's claim for costs is misconceived.

13. The Deputy Registrar deponed further that the Certificate of Order Against the Government required the Respondents to "account" for all the interest that "may have accrued" on the principal sum and that therefore there is no order requiring the Respondents to pay interest to the Applicant. She reiterated that no interest accrued on the principal sum since Court deposits made to the Judiciary were only deposited for safe custody in a Government Account at the Central Bank of Kenya where the money did not attract interest.

Replying Affidavit to the 2nd Application

14. In opposition to the 2nd Application, Jude Ragot, the Advocate acting for the Applicant, swore the equally very lengthy Replying Affidavit filed on 1/12/2023. No wonder the same sounds more like Submissions rather that what would ordinarily be expected of an Affidavit. Be that as it may, he observed that by their Replying Affidavits cited above, the Respondents state that they have paid the principal sum of Ksh 1,419,825.90, and the costs of the proceedings, assessed and taxed at Ksh 137,769.70. He deponed that in view thereof, the Application is misconceived, frivolous and constitutes an abuse of the court process, for the reasons that the Respondents' foregoing explanations demonstrate that they have already complied with the Judgment as relates to all other aspects thereon, except the aspect of interest, which means from a practical point of view, that they are not aggrieved with any of those other aspects of the Judgment which they have complied with, apart from the alleged aspect of interest which they dispute. Another reason he raised is that the Respondents' said reason for seeking a review being allegedly that interest is not payable because such monies are kept in "a

government account with Central Bank, not a commercial Bank, which does not attract any interest" has certainly not been identified as a new issue of fact or law, which has suddenly become known to them. He averred that to the contrary, there is no proof availed of any bank or any account to which this monies was banked, or any deposit slip of any monies received when the principal sum was deposited. According to him therefore, there is no legitimate basis for this "strange" allegations.

15. He similarly deponed that, to the contrary, such a basic issue of payment of interest or not, would have reasonably been expected to be known to the Respondents by ordinary reasonable diligence of inquiry or otherwise being the account signatories thereof. He urged that this would have been known to the Respondents as far back as the date when the monies were deposited in 2003, when the issue was raised in this Judicial Review proceedings, and when the order for Mandamus was ultimately issued and served upon them. He deponed further that the Respondents were thus given a fair and reasonable opportunity to file their Response to these proceedings to challenge the prayer for interest but they did not do so. He urged that even when Judgment was subsequently delivered, and which was allowed without any contest from the Respondents' end, they neither challenged the same by way of review, or appeal, and have remained in that state of lack of any care or diligence in addressing the same, despite the Applicant's constant pleas for payment for the last 23 years, only to now raise the instant application for review. According to him, no explanation has been rendered why they have never found it appropriate to seek for review or appeal against the Judgment thus rendering the application flippant, reckless and motivated by an ill-advised attempt to defeat a fair and just execution, and as an afterthought, with the sole purpose to defeat the execution.

16. Counsel also deponed that the instant application is frivolous because this same issue of payment of interest was raised by the Respondents as far back as 21/9/2011 in response to his letter dated 6/9/2011, and that when the issue was presented before this Court for determination, the Court in its Ruling delivered on 10/10/2013, dismissed the argument and advised the Respondents to abide by the Judgment, or contest it by way of appeal or review. He deponed further that the 3rd Respondent promptly determined the interest rate to be 6% per annum, after hearing both parties and delivering a reasoned Ruling on 24/5/2016. He stated that the said Ruling is now the basis upon which the Applicant computed the claim for interest and costs of the suit at Ksh 734,096.20. He deponed further that the allegation by the Respondents that they have settled the costs of the suit at Ksh 137,769.70 is misconceived and without any basis in the absence of any payment voucher produced to demonstrate to whom that payment was made. He referred to the letters dated 4/6/2012 from the Registrar of the High Court in Nairobi addressed to the Chief Magistrate in Eldoret, which clearly indicated that the monies had been paid to the Solicitor General on 6/12/2011, and who has been sued herein for contempt for that reason. He also referred to the letter dated 21/6/2013 addressed to him clarifying that the monies are with the Solicitor General, and also the letter dated 3/10/2016 from the State Counsel requiring the Solicitor General and the Attorney General to settle the debt, plus interest as ordered by the Court.

Hearing of the Application

17. The Applications were canvassed by way of way of written submissions. The ex parte Applicant filed its Submissions on 18/06/2024 while the Attorney General filed on 5/08/2024.

Ex parte Applicant's Submissions

18. Counsel for the Applicant, in yet another very lengthy 17 page narrative, reiterated the matters already set out in the Affidavits recounted above and basically, in summary, submitted further that it is apparent from the correspondence exchanged, that the 1st and 2nd Respondents are holding the monies

constituting costs of the suit in the sum of Ksh 137,769.70 having received the same as far back as 4/6/2012 and despite the letter dated 21/6/2013 from the 3rd Respondent reminding them to release the same to the Applicant, without them denying holding the monies, or otherwise offering any explanation for their failure to release the same. He contended that this has been going on despite this Court in its Ruling of 10/10/2013, where all the Respondents were represented, having noted that the monies were indeed forwarded to the 1st and 2nd Respondents. According to him, the Applicant is entitled to the orders of contempt on this aspect, while the 3rd Respondent would not be held liable on disobedience on account of its correspondence showing that it released the same to the 1st and 2nd Respondent for onward transmission to the Applicant. Regarding the prayer for review, Counsel submitted that the same is an egregious afterthought for the Respondents' lack of due diligence not to have raised or sought any review or to appeal on the issue, despite having received gratuitous advice from the Court more than 13 years ago, as per the Ruling delivered by Hon. Justice Ngenye Macharia, on 10/10/2013.

19. Regarding the Attorney General's argument that the Judgment delivered on 10/03/2010 was one requiring them to only "account" for interest, which according to them, has been done, Counsel submitted that this is a misconceived argument because it is belated, and is inconsistent with the developments in this matter for the reasons that all the parties clearly understood the Judgment to have ordered them to account for the interest and pay the same to the Applicant. He reiterated that in the Ruling of Hon. Ngenye Macharia J delivered on 10/10/2013 titled, 'Ruling on Payment of Interest on Principal Sum', the Court captures the dispute to be the question whether interest is payable, and goes over the various decisions to justify its ultimate finding that interest is indeed payable, and that if the Respondents had a problem with it, then they ought to have appealed or sought review thereon. He also reiterated that the Court, on the issue of rate of interest, rendered a Ruling on 24/5/2016 holding that interest should be paid at 6% per annum. He added that the 3rd Respondent cannot have such an approbation and a reprobation as the same litigant in the same suit, where it approves of the same, and now turns out, when it is inconvenient to it, to disapprove of the same thing, without offering any explanation for this unusual approach. He further reiterated that Section 20 (1) and (2) of the *Government Proceedings Act*, as read with Section 26(1) and (2) of the *Civil Procedure Act*, allows for such interest to be paid.

20. According to Counsel, this Court is also on the spotlight considering the sensitivity of this matter, as being an adjudicator over its own peers and colleagues in the same station, against the interest of a litigant who seeks justice against those colleagues of the Court. Further, according to him, it would send the wrong signal if the Court were to make a decision against the weight of the law as set out in Order 45 of the Civil Procedure Rules, as read with Section 80 of the *Civil Procedure Act*, and the overriding objective of the law as contemplated by Sections 1A and 1B thereof. He urged the Court to dismiss the Application for review with costs, and contended that it would be best to assess such costs immediately without allowing the Respondents to continue with their usual game of delay by affixing a sum thereon. He proposed a sum of Ksh 50,000/- as such costs.

21. Counsel repeated the submission that the Applicant did obtain leave to commence contempt of Court proceedings against the Respondents, as per the order granted on 14/3/2023 and reiterated that it is however now established that such leave was not even necessary, hence the reason why the instant application is deliberately presented under the provisions under which it has been premised. He maintained that the Applicant has met the test for entitlement to an order for contempt against the Respondents, and has duly complied with the requirements of Sections 21 (1), (2), (3) and (4) of the *Government Proceedings Act*, which contemplates that the only mode of execution against the Government is by such a suit by Judicial Review for Mandamus, which the Applicant had obtained

by the order dated 10/3/2010. He added that where such an order for Mandamus is not complied with by Government officers, the same is enforceable by way of contempt proceedings after the requisite "Certificate of Order Against the Government" and "Certificate of Order for Costs against the Government" have been delivered to the Government officers responsible for the payment, and after more than 21 days have lapsed without the Respondents making good that payment. According to him, the public nature of the duty of the Respondents to settle the said monies arises from a reading of Articles 73 (1) and (2), 174 (a), 201(a), (d) and (e) of *the Constitution* of Kenya, on Leadership and Integrity provisions. He referred to the case of Jimi Wanjigi & Another vs. Inspector General of Police & 3 Others (2021) eKLR (Mrima J).

Attorney General's Submissions

22. On his part, State Counsel from the Attorney General's office submitted that the Application for setting aside or review was occasioned by the change of office and the challenges of getting instructions, that the matter was being handled by the Eldoret office and that when it was transferred to Nairobi, several Counsel handled it before it was re-allocated. Right away, it will be noted that these are new matters being irregularly introduced at Submissions stage, and which, for that reason, I will not consider.

23. Regarding costs of the suit taxed at the sum of Kshs 137,769.70, Counsel submitted that the same was paid by the Judiciary to the Attorney General and later transmitted to the Applicant by the District Accountant. Regarding the principal sum of Kshs 1,419,825.90, she reiterated that where a Court directs a litigant to deposit money in Court, the same is kept in safe custody in a Government account at the Central Bank and which is not an interests earning account. Regarding the delay to pay the principal sum, she reiterated the submission that at the material time, the Judiciary, the National and District Treasuries had commenced the process of delinking and that it was directed that reconciliation of accounts be first undertaken before any monies could be paid out, and that the delay to pay was therefore not intentional. She also reiterated that the wording of the Judicial Review order "may" indicated that the money deposited may or may not have accrued interest, and that in this case, it did not. She submitted that in the circumstances, any order requiring the 3rd Respondent to pay interest would be an undue burden on limited public funds and that this Court should find that the Respondents have accounted for the interest on the principal sum to be "nil" interest and they be deemed to have fully complied with the Court order dated 23/03/2010.

Determination

24. The issues arising herein for determination are evidently the following:

    i. Whether this Court has the jurisdiction to determine the issue of contempt of Court.

    ii. Whether the orders made herein on 23/03/2010 and on 10/10/2013, respectively, compelled the Respondents to pay to the Applicant interest on the principal sum.

    iii. Whether this Court should review or set aside the orders made herein on 23/03/2010.

25. Contempt of Court is that conduct or action that defies or disrespects authority of Court. Black's Law Dictionary 9th Edition defines contempt as follows:

> "The act or state of despising; the conduct of being despised. Conduct that defies the authority or dignity of a court or legislature. Because such conduct interferes with the administration of justice.

26. Regarding the Contempt of Court law in Kenya, on 9/11/2018, Mwita J, in Kenya Human Rights Commission vs. Attorney General & Another [2018] eKLR, declared the entire *Contempt of Court Act* No. 46 of 2016 to be invalid for lack of public participation as required by Articles 10 and 118(b) of *the Constitution* and found that the said Act as enacted encroached upon the independence of the Judiciary. In view thereof, in their Grounds of Opposition, the Respondents urged that that this declaration of unconstitutionality of the Act had the consequence of divesting the Courts of the jurisdiction to punish for Contempt of Court and that this Court cannot therefore hear or determine the Application for contempt of Court. Although I note that the Respondents never repeated this argument in their Submissions and may presumably have therefore abandoned the same, I will still consider and determine that issue as it is a challenge on this Court's jurisdiction.

27. Before enactment of the now invalidated Contempt of Act, Section 5 of the *Judicature Act*, Cap 8, was the only statutory basis with respect to the procedure for institution of contempt of Court proceedings. That said Section 5 was however itself repealed by the Contempt of Act 2016, which as aforesaid, was itself subsequently invalidated. Section 5(1) It had provided as follows:

> " The High Court and the Court of Appeal shall have the same power to punish for contempt of court as is for the time being possessed by the High Court of Justice in England, and that power shall extend to upholding the authority and dignity of subordinate courts."

28. It is however now generally accepted, and there are several Court pronouncements to that effect, that since the Contempt of Act 2016 was itself later declared invalid, the consequential effect in law is that the Act did not consequently assume any legal effect, and therefore could not have repealed Section 5 of the *Judicature Act*, which Section therefore continues to fully apply as before. In any event, The High Court would still be within its powers in assuming jurisdiction over matters of contempt of Court, even in the absence of a substantive statute addressing the issue, as it will be doing so in exercise of its inherent jurisdiction granted by Section 3A of the *Civil Procedure Act* which obligates the Courts to grant such orders that "meet the ends of justice" and "avoid abuse of the process of Court". There cannot therefore be any lacuna in respect to the enforcement of Court orders and the High Court has the responsibility for the maintenance of the rule of law, hence there cannot be a gap in the application of the rule of law. (See for instance, the decision of Nyamweya J (as she then was) in the case of Republic v Kajiado County & 2 others Exparte Kilimanjaro Safari Club Limited [2019] eKLR).

29. Although therefore, as it is currently, there is no specific statute that governs contempt of Court in Kenya, a party seeking recourse by contempt of Court proceeding is still perfectly entitled to fall back to the provisions of Section 3 of the *Judicature Act*. In view thereof, I reject the Respondents' argument that the declaration of unconstitutionality of the *Contempt of Court Act* 2016 had the consequence of divesting the Courts of the jurisdiction to punish for Contempt of Court. I am therefore not surprised that the Respondents did not revisit this line of argument in their Submission.

30. On the issue of "interest" on the principal sum, the wording of the order of Mandamus made by Mwilu J (as she then was) was to command the said Respondents to:

> " account for all the interests that may have accrued thereon for the period that they held the same."

31. It may be argued that the above order did not contain an express directive that the Respondents do pay interest on the principal sum. It may be argued that all that the order directed was that, in the event that any interest had accrued, then the Respondents do account for it. The order may then be argued to have meant that if, after the Respondents had accounted for the interest and it was then

established that indeed there was interest that had accrued and was being held in a bank account, then the Applicant would be at liberty to move the Court to order for release thereof to the Applicant. It may well be argued that the choice of the phrase "account for", rather than "pay to the Applicant" was deliberate. This then leads us to the subsequent Ruling made by Ngenye-Macharia (as she then was) on 10/10/2013.

32. To place the matter in its correct context, and to appreciate the manner in which Ngenye-Macharia J (as she then was) treated the issue of the interest on the principal sum, I reproduce the relevant portions of the said Ruling as follows:

> " What is however contentious is an amount of purported accrued interest against the sum of Kshs 1,419,825.90 deposited with the District Treasury, Eldoret. The Ex-parte Applicant claims this figure to the tune of Kshs 1,529,199.10. The Respondents position on the other hand is that the monies, having been deposited with the District Treasury could not accrue any interest. It is the submission of the Respondents that the money was only deposited with the District Treasury for safe custody.
>
> The Applicant's position is however different. That the Court decree was in express terms, that the said money should be paid together with the accrued interest from the date of the consent order dated 3rd August, 2004 which required that the money be released to the Applicant to the date when the Court shall release the money. The impression that I get from the tug of war that has persisted between the parties is that this Court should interpret for them the terms of the order issued by the Court. Due to the disagreement between the parties, the draft decree extracted by the Applicant has never been certified by the Deputy Registrar of this Court.
>
> The terms of the orders issued by the then Hon. Mwilu, J on 23rd March 2010 are in the express terms as submitted by Counsel for the Applicant. The Respondents may not have agreed with those orders but the right avenue is not to denounce the terms of the order, but rather seek redress through the judicial process that issued the order they do not agree with. Redress should have been sought by way of an appeal or even review or stay of that order.
>
> .....
>
> In the instant case, the order of the Court issued on 23rd March, 2010 has never been discharged, reviewed or set aside. The same should be obeyed to the letter, notwithstanding that the party against whom it is issued thinks it is irregular or wrong. If the latter feels aggrieved by the order, it should seek redress accordingly. In my view, the Respondents are using the wrong platform to canvass the reasons they think the order should not be obeyed. I am unable to come to their rescue, unfortunately.
>
> I am also aware that the amount of interest accrued against the principal sum would also be contentious. My considered view of arriving at the right figure would be by presenting the proposed figures before the Deputy Registrar for consideration. This is in view of the fact that, it must be argued at what rate the interest is payable giving regard to the fact that it must be argued at what rate the interest is payable giving regard to the fact that the sum may have been deposited in an ordinary bank account. This is an issue that can only be ably canvassed before the taxing officer."

33. It is therefore evident from the foregoing that Ngenye-Macharia J (as she then was), found that what was before her for determination the was interpretation of the order on interest on the principal sum as made earlier by Mwilu J (as she then was). The Judge then captured the Applicant's argument as

being that "the Court decree was in express terms, that the said money should be paid together with the accrued interest from the date of the consent order dated 3rd August, 2004". Although the Judge did not then expressly interpret the order, her verdict was that "the terms of the orders issued by the then Hon. Mwilu, J on 23rd March 2010 are in the express terms as submitted by Counsel for the Applicant".

34. In the light of the above, it is beyond argument that Ngenye-Macharia J's finding was that the Respondents had no choice but to pay the interest on the principal sum. She was emphatic that on this eventuality, she was unable to come to the Respondents' "rescue".

35. In any event, by applying for Review, variation and/or setting aside of the order made on 23/03/2010 and thus pleading with the Court to save them from paying the interest amount, it is evident that indeed the Respondents appreciated that the order obligated them to pay the interest on the principal amount.

36. Regarding the prayer for setting aside, varying or review of an order, Section 80 of the *Civil Procedure Act* provides as follows:

> " Any person who considers himself aggrieved—
>
> (a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
>
> (b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.

37. Order 45(1) of the Civil Procedure Rules then provides as follows:

> " 1.
>
> (1) Any person considering himself aggrieved—
>
> (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
>
> (b) by a decree or order from which no appeal is hereby allowed,
>
> and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay."

38. Order 45 therefore provides for 3 circumstances under which an order for review can be made. The first one is where there has been "discovery of new and important matter or evidence", the second is where there has been "a mistake or error apparent on the face of the record" and the third is "for any other sufficient reason". The Respondents have not disclosed the ground under which they have approached the Court but from the arguments preferred, appear to have come under the ground of "mistake or

error apparent on the face of the record". The question therefore is whether they have successfully brought themselves within that ground.

39. The phrase "an error apparent on the face of the record", was described by the Court of Appeal, in the case of Muyodi -v- Industrial and Commercial Development Corporation & Another (2006) 1 EA 243, in the following terms:

> "....in Nyamogo & Nyamogo -v- Kogo (2001) EA 174 this Court said that an error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is real distinction between a mere erroneous decision and an error apparent on the face of the record. Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by long drawn process of reasoning or on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error or wrong view is certainly no ground for a review although it may be for an appeal..."

40. The phrase was also described in the Tanzanian case of Chandrakhant Joshibhai Patel -v- R [2004] TLR, 218 as one that:

> "..... must be such as can be seen by one who runs and reads, that is, an obvious and patent mistake and not something which can be established by a long drawn process of reading on points on which may be conceivably be two opinions.'

41. There is also the case of National Bank of Kenya Limited v Ndungu Njau [1997] eKLR, where the Court of Appeal had the following to say:

> "A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review.
>
> In the instant case the matters in dispute had been fully canvassed before the learned Judge. He made a conscious decision on the matters in controversy and exercised his discretion in favour of the respondent. If he had reached a wrong conclusion of law, it could be a good ground for appeal but not for review. Otherwise, we agree that the learned Judge would be sitting in appeal on his own judgment which is not permissible in law. An issue which has been hotly contested as in this case cannot be reviewed by the same court which had adjudicated upon it."

42. It is therefore clear that "an error apparent on the face of record" must be one that is obvious to the eye, and self-evident. It must be one which when considered, would not yield two results and does not require elaborate arguments to be established.

43. In this case, the Respondents want the Court to review the order dated 23/03/2024 on the ground that the Court directed the Respondents to pay interest on the principal sum yet the said sum had

not placed in an interest earning bank account. The Respondents are therefore technically asking this Court reconsider the evidence that was presented before it and then render a decision that is different from the one it delivered. These actions are beyond the scope covered by the jurisdiction of Review. The same appears to be an appeal disguised as an Application for review. This Court cannot sit on appeal on its own decision as the law abhors such an action. Similarly, no "discovery of new and important matter or evidence" has been demonstrated. The Application, no doubt, fails to meet the threshold laid down.

44. Even more damning for the Respondents is that Order 45(1) expressly requires that an Application seeking review of an Order must be made without unreasonable delay. In this case, the order sought to be set aside, varied or reviewed was made on 23/03/2010, 14 years ago. The instant Application seeking review of that order was filed on 2/11/2023, 13 years later. This, by any means is a serious delay yet no proper or valid explanation has been offered for the same. The purported reasons advanced are so unconvincing and lame. It is also not lost on me that in her said Ruling of 10/10/2013, 10 years before the instant Application, Ngenye-Macharia J (as she then was) had indeed "advised" the Respondents that their recourse was to either apply for Review or to Appeal against the order. This, the Respondents never took cue of. In the circumstances, I find that by now purporting to suddenly remember to so act, the Respondents have moved after a woefully unexplained, inordinate and unreasonable delay. For a Court to set aside or review an order issued 14 years ago, it would require the existence of exceptional circumstances, none of which has been demonstrated herein. The Application is clearly an afterthought and I decline it.

45. Regarding the specific Respondent alleged to be at fault and identification of the correct Accounting Officers tasked with the duty to implement the Court order herein, in the instant Application, the Applicant has roped in the Attorney General and the Solicitor General and it is basically against these two that a finding of contempt of Court is sought. It is however not in dispute that the two Respondents in the initial action herein whereof the above orders were made on 23/03/2010 and on 10/10/2013, respectively, were the Deputy Registrar, High Court of Kenya, Eldoret and the District Accountant, Uasin Gishu District Commissioner, Eldoret. I note however that prior to filing the instant substantive Application, the Applicant, by its Notice of Motion dated 16/03/2020, sought leave to do bring such contempt of Court proceedings. The prayer for leave was premised as follows:

> "That leave be granted to the Applicant to institute contempt proceedings against the Respondents herein, the Attorney General MR. PAUL KIHARA KARIUKI and the Solicitor General herein MR. KENNEDY OGETO for having been and continuing to act in contempt of the orders of this Honourable Court dated 23rd March 2010 and issued on the 14th day of February 2020."

46. Indeed, the said Application came up before me inter partes on 14/03/2023, and in the presence of the State Counsel, Ms. Chilaka, I granted it as prayed. The Solicitor General and the Attorney General are therefore properly cited as the correct alleged contemnors herein.

47. Regarding the issue of the costs taxed at sum of Kshs 137,769.70, there is evidence vide the letter dated 4/06/2012, that the Registrar of the High Court released the same to the Solicitor General on 6/12/2011 for onward transmission to the Applicant. The Applicant denies that this money has been released to it and although the Respondents insist that the same was released to the Applicant, no proof of such release has been provided. In his Submissions, the Applicant's Counsel has submitted that the 3rd Respondent would not be held liable on disobedience on account of its correspondence showing that it released the same to the 1st and 2nd Respondent for onward transmission to the Applicant. I accept with this Submission and agree that the buck stops with the Solicitor General, and by extension, the Attorney General.

Final Orders

48. In light of the above, I order as follows;

i. The Respondent's Notice of Motion dated 24/10/2023 is hereby dismissed.

ii. In respect to the ex parte Applicant's Amended Notice of Motion dated 25/05/2023, I rule, direct and order as follows:

a. I hereby declare that the 1st and 2nd Respondents, namely, the Attorney General and the Solicitor General, respectively, are jointly and severally, obligated to pay to the Applicant the amount of Kshs 596,326.88, being interest on the principal sum of Kshs 1,419,825.90 and which interest was determined to be at the rate 6% per annum, accrued between 3/8/2004 when the order for release was made, to 11/03/2011 when the same was released, and as computed in the "Certificate of Order Against the Government", dated 23/03/2010 and issued on 19/02/2020, .

b. In respect to the issue of payment of costs taxed at the sum of Kshs 137,769.70, the Respondents having failed to prove onward transmission thereof to the Applicants, after receipt of the same from the Judiciary, the 1st and 2nd Respondents, namely, the Attorney General and the Solicitor General, respectively, are jointly and severally, similarly are found to be liable to pay the said amount to the Applicants.

c. As the matters in issue herein were contentious to a substantial extent, and thus susceptible to conflicting interpretations, the 1st and 2nd Respondents, namely, the Attorney General and the Solicitor General, respectively, will not outrightly be held to be in contempt of Court but since the matters in contention have now been conclusively clarified vide this Ruling, they shall be given a reasonable opportunity to make the said payment and remedy the omission and by so doing, avoid a finding of being in contempt of Court.

d. Accordingly, the 1st and 2nd Respondents, namely, the Attorney General and the Solicitor General, respectively, are given a period of ninety (90) days to make the said payments to the Applicant.

e. In default, the Court shall be at liberty to make a finding of contempt of Court against the 1st and 2nd Respondents and thereby mete out appropriate penalties and/or punishment.

iii. As the interpretation of the previous orders herein were contentious to some extent, each party shall bear its own costs of the two Applications herein.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 20TH DAY OF DECEMBER 2024

.....

WANANDA J. R. ANURO

JUDGE

Delivered in the presence of:

Mr. Ndolo h/b for Mr. Ragot for the Applicant

N/A for the Respondents

Court Assistant: Brian Kimathi