



**Republic v County Government of Kitui; Fairplan Systems Limited (Exparte);
Ben Katungi (Contemnor) (Judicial Review Application E045 of 2021)
[2023] KEHC 21439 (KLR) (Judicial Review) (28 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 21439 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW**

JUDICIAL REVIEW APPLICATION E045 OF 2021

JM CHIGITI, J

JULY 28, 2023

BETWEEN

REPUBLIC APPLICANT

AND

THE COUNTY GOVERNMENT OF KITUI RESPONDENT

AND

FAIRPLAN SYSTEMS LIMITED EXPARTE

AND

BEN KATUNGI CONTEMNOR

RULING

1. The Ex parte Applicant herein is before this court vide an application dated 7th March,2023 which seeks the following orders;
 1. That Mr. Peter Mwikya Kilonzo do substitute Mr. Ben Katungi as the Contemnor herein.
 2. That this court do issue Summons to Mr. Peter Mwikya Kilonzo to appear in Court accordingly.
 3. That the honourable court be at liberty to grant any other orders it deems fit to meet the ends of justice.
 4. That costs of this application be provided for.



2. The application is supported by the grounds on its face and a supporting affidavit sworn by Arch. Julius M.F. Mutunga, who swears to be the Managing Director of the Ex parte Applicant on 7th March,2023.
3. The Ex parte Applicant's case is that pursuant to the Court's order of 14th July,2021 the Respondent was directed to pay to it the sum of Kshs.63,301,586.40/= together with the sum of Kshs.93,445.00/= being the amount payable as per the Certificate of Order against Government dated 10th March,2021 with respect to Nairobi High Court Application No.289 of 2017; Fairplan Systems Ltd vs, County Government of Kitui.
4. Mr Ben Katungi is said to have been cited for contempt and a warrant of arrest issued against him for failing to comply with the said order. Further that a total sum of Kshs.3,000,000.00/= was paid in partial settlement of the decretal sum leaving a balance of Kshs. 60,301,586.40/= with additional interest and Kshs.93,445.00/= being costs.
5. The deponent avers that subsequent to the elections of 2022 Mr. Katungi was replaced by Mr. Peter Mwikya Kilonzo who was appointed the new CECM, Finance and Economic Planning and Revenue Management and as such Mr. Katungi cannot continue to appear in court having ceased to hold the said office.
6. In response the Respondent filed a Replying Affidavit sworn by Peter Mwikya Kilonzo who swears to be an employee of the Kitui County Government on 18th May,2023.
7. In the affidavit Mr. Kilonzo argues that he is not the Accounting Officer of the County Government of Kitui and that he cannot therefore be held liable for the County.
8. He also contends that he is not aware that there are warrants of arrest that have been issued against Mr. Katungi. He also contends that the application mentions a decree that requires an amount of Kshs.63,000,000.00/= to be paid. This according to Mr. Kilonzo is exaggerated as the Judgment was for the sum of Kshs.42,000,000/= less the sum Kshs.18,000,000/= which has already been paid leaving a balance of Kshs. 26,000,000/=.
9. The deponent also contends that there was a stay of execution order that is yet to be set aside. Further that judicial liabilities cannot be transferred from one employee to another. He also argues that the decree the Ex parte Applicant intends to execute is irregular as a colossal sum has already been paid.
10. Further that this court ought to access all the pleadings, the calculations of abnormal interest and how the matter was conducted exclusively without full participation of the County Government of Kitui.
11. The application was canvassed by way of written submissions.
12. The Ex parte Applicant in its submissions dated 23rd May,2023 submits that it is not in contention that as shown by the Gazette Notice No. 136B dated 7th February,2023 Mr. Mwikya is the CECM for Finance for the Respondent and that the law is well settled that the CECM for Finance for a County Government is the Accounting Officer. Further that the contempt of court order was made against Mr. Ben Katungi in his capacity as the CECM for Finance of the Respondent and not in his personal capacity.
13. To support the above argument the Ex parte Applicant has cited section 21(3) of the Government Proceedings Act on satisfaction of orders against government and the cases of Republic -vs- County Chief Officer , Finance and Economic Planning, Nairobi City County Ex-Parte Stanley Muturi [2018] eKLR and Soloh Worldwide Inter-Enterprises -vs- County Secretary Nairobi County and Another [2016] eKLR where the courts have reiterated that the County Executive in Charge of Finance is the one with the overall financial obligation for the purposes of the affairs of the Government.



14. In conclusion the Ex parte Applicant argues that the only way Mr. Peter Mwikya Kilonzo's averment that he is not the Accounting Officer can hold water, is if he demonstrates to the Court that he has resigned, he is not the CECM Finance and another person occupies that office or if Gazette Notice No. 136B is revoked.
15. The Respondent also filed written submission which are dated 21st June,2023. In the submissions it is urged that Contempt of court proceedings are personal in nature and one cannot just be cited for the same, let alone be substituted without a proper reason or hearing being conducted.
16. Further that Mr. Peter Mwikyo Kilonzo cannot be said to have disobeyed any existing orders of the court as he was not at the time of the alleged breach, aware of any existing orders of the court.
17. The Respondent's submission is that neither the respondent nor Mr. Peter Mwikyo Kilonzo have interfered with any administration of justice or perverted the course of justice and as such Contempt of court proceedings cannot be commenced against him.
18. The Respondent also reiterates that an order for stay of execution was issued on 9th May,2022 and the same is yet to be set aside and that the applicant cannot again come to court with dirty hands seeking to proceed with contempt proceedings which had already been stayed by this Honourable Court. The case of Martin Nyaga Wambora & 4 Others vs. Speaker of the Senate & 6 others [2014] eKLR is cited to further support this argument.

Analysis and Determination

19. Having considered the facts of the case and each party's argument, I note that it is not in dispute that an order of mandamus compelling the Respondent herein to pay to the Applicant the sums of Kshs. 63,301,586.40 and Kshs. 93,445 was issued by this court on 14th July,2021 and served upon the Respondent. This has at the very least been confirmed by the Respondent in its written submissions.
20. The Supreme Court in Republic v Ahmad Abolfathi Mohammed & Another [2018] eKLR made the following observations on the necessity to punish for contempt:

“(23) Authorities on the necessity to punish for contempt are legion. We have considered those provided by the respondent, and also cite the following, in affirmation of the principle.

(24) In Econet Wireless Kenya Ltd V. Minister for Information & Communication of Kenya & Another [2005] 1 KLR 828 Ibrahim J (as he then was) relied on the Court of Appeal decision in Gulabchand Popatlal Shah & Another Civil Application No. 39 of 1990 (unreported), where the Court of Appeal stated as follows:

“It is essential for the maintenance of the Rule of Law and order that the authority and the dignity of our Courts are upheld at all times. The Court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors... In Hadkinson V. Hadkinson (1952) 2 All E.R. 567, it was held that:

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 void.”

(25) In *Att-Gen. v. Times Newspapers Ltd.* [1974] A.C. 273, Lord Diplock stated:

“.... There is an element of public policy in punishing civil contempt, since the administration of justice would be undermined if the order of any court of law could be disregarded with impunity.”

(26) The Court of Appeal in *A.B. & Another v R.B.*, Civil Application No. 4 of 2016 [2016] eKLR cited with approval the Constitutional Court of South Africa’s decision in *Burchell v. Burchell*, Case No.364 of 2005 where it was held:

“Compliance with court orders is an issue of fundamental concern for a society that seeks to base itself on the rule of law. *The Constitution* states that the rule of law and supremacy of *the Constitution* are foundational values of our society. It vests the judicial authority of the state in the court and requires other organs of the state to assist and protect the court. It gives everyone the right to have legal disputes resolved in the courts or other independent and impartial tribunals. Failure to enforce court orders effectively have the potential to undermine confidence in recourse to law as an instrument to resolve civil disputes and may thus impact negatively on the rule of law.”

(27) Ojwang, J (as he then was) in *B. V. Attorney General* [2004] 1 KLR 431 that:

“The Court does not, and ought not to be seen to, make Orders in vain; otherwise the Court would be exposed to ridicule, and no agency of the Constitutional order would then be left in place to serve as a guarantee for legality, and for the rights of all people.”

(28) It is, therefore, evident that not only do contemnors demean the integrity and authority of Courts, but they also deride the rule of law. This must not be allowed to happen. We are also conscious of the standard of proof in contempt matters. The standard of proof in cases of contempt of Court is well established. In the case of *Mutitika v. Baharini Farm Limited* [1985] KLR 229, 234 the Court of Appeal held that:

“In our view, the standard of proof in contempt proceedings must be higher than proof on the balance of probabilities, almost but not exactly, beyond reasonable doubt...The standard of proof beyond reasonable doubt ought to be left where it belongs, to wit, in criminal cases. It is not safe to extend it to an offence which can be said to be quasi-criminal in nature.”

(29) The rationale for this standard is that if cited for contempt, and the prayer sought is for committal to jail, the liberty of the contemnor will be affected.



As such, the standard of proof is higher than the standard in civil cases. This power, to commit a person to jail, must be exercised with utmost care, and exercised only as a last resort. It is of utmost importance, therefore, for the respondents to establish that the alleged contemnor's conduct was deliberate, in the sense that he or she willfully acted in a manner that flouted the Court Order.”

21. It is not in contention that there exists a valid court order dated 14th July,2021 against the Respondent requiring it to pay to the Ex parte Applicant the sum of Kshs. 63,301,586.40/= and 93,445/= which amounts are yet to be fully settled. This is confirmed by Mr. Peter Mwikya Kilonzo although he disputes the total decretal sum to be paid. He also alludes to a certain sum of the decretal amount having been settled.
22. It is also in the public domain that following the change of guard in our counties subsequent to the 2022 general elections there have been changes among the officers in the county offices and a good example would be our instant case. These officers upon assumption of office inherit the assets and liabilities of the office and such liabilities include the requirement to fulfil court orders that were not fulfilled by the previous office holders.
23. Mr. Peter Mwikya Kilonzo has challenged the application before this court for having been brought before court yet there are stay orders that are in place and are yet to be set aside. The Court has had due regard to the said orders which are dated 9th May,2022 where the Court made the following orders;

“It is hereby ordered:

 1. That mention on 24th May,2022.
 2. That the Warrant of Arrest issued on 26th April,2022 be stayed in the meantime.”
24. The Court notes from the record that when the matter came up for a mention on 24th May,2022 the Court directed that summons were to be issued to Mr. Katungi the contemnor to appear before the court in person on 7th June,2022 and that on the said date the Court directed that the decretal sum be paid by the 23rd June,2022 in default of which orders of court would take effect.
25. Can it then be said that there are stay orders in place yet the court in its order clearly states that the warrants issued are stayed pending the mention on 24th May,2022 and it further goes ahead to state that the court orders will take effect if the sums owed are not paid? The answer to this is in the negative.
26. It has also been contended that Mr. Peter Mwikya Kilonzo is not the correct officer to cite for contempt as he is the County Executive Committee Member and not the Accounting Officer of the Respondent herein.
27. The fact that Mr. Peter Mwikya Kilonzo is a CECM for Finance, Economics Planning and Revenue Management is one that is clearly evidenced by the Gazette Notice dated 7th February,2023.
28. The Court in the case of Republic v County Secretary, County Government of Kisumu & 2 others; Otieno Ragot & Co. Advocates (Exparte) (Judicial Review E014 of 2021) [2022] KEHC 13390 (KLR) (29 September 2022) (Judgment) while faced with the question as to whether the Respondents



therein were under a duty to pay the decreed sum of money as per the certificate of order against the government, held thus;

“Section 44 of the County Government Act establishes the office of the county secretary who is the head of the county public service. on the other hand, on the other hand, section 103 of the *Public Finance Management Act* No 18 of 2012 also establishes the county treasury comprising of the county executive member of finance, the chief officer and the departments of the county treasury responsible for finance and fiscal matters. Under section 103(3) of the said Act, the county executive committee member for finance is the head of treasury, and is thus the one responsible for matters finance in the county.

In view of the above legal provisions, I find and hold that in the instant case, the 1st and 2nd respondents are in law, jointly responsible for the satisfaction of court orders and decrees on payment of money owed by the county government of Kisumu by virtue of their roles and functions....”

29. I agree with the above reasoning of the court and as such Mr. Peter Mwikya Kilonzo as the current CECM for Finance, Economics Planning and Revenue Management is under an obligation to satisfy court orders and decrees on payment of money owed by the county government of Kitui.

30. The Court in the case of Mengich t/a Mengich & Co Advocates & another v Joseph Mabwai & 10 others [2018] eKLR held as follows;

“Contempt proceedings are quasi-criminal in nature and since the liberty of a person is at stake, the standard of proof is higher than in civil cases.”

31. As a party that has not been heard cannot be burdened with contempt proceedings this Court will give Mr. Peter Mwikya Kilonzo an opportunity to be heard before contempt proceedings are instituted against him.

Disposition:

32. As no compelling reasons have been brought before this Honourable Court as to why the Respondent has failed to comply with this court’s order of 14th July, 2021.

Order:

I make the following orders;

- i. That Mr. Peter Mwikya Kilonzo appear in person before this court on 22nd September, 2023 to show cause why he should not be committed to civil jail for failing to comply with this court’s orders.
- ii. That in default thereof, warrants of arrest be issued against Mr. Peter Mwikya Kilonzo.
- iii. The Applicant shall have the costs of this application. Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 28TH DAY OF JULY 2023

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J. CHIGITI (SC)
JUDGE

