



Misango v Principal Secretary Ministry of Tourism (Miscellaneous Civil Application E129 of 2023) [2023] KEHC 26819 (KLR) (21 December 2023) (Ruling)

Neutral citation: [2023] KEHC 26819 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
MISCELLANEOUS CIVIL APPLICATION E129 OF 2023
RE ABURILI, J
DECEMBER 21, 2023**

BETWEEN

FANUEL INZIRA MISANGO APPLICANT

AND

THE PRINCIPAL SECRETARY MINISTRY OF TOURISM RESPONDENT

RULING

Introduction

1. Before me, for determination is a Notice of Motion Application dated 10th August 2023. The Applicant seeks orders that:
 - i. That the respondent herein the Permanent Secretary Ministry of Tourism be committed to civil jail for a term of up to six months for Contempt of Court orders.
 - ii. That in the alternative the respondent the Permanent Secretary Ministry of Tourism do show cause why the State Department's property should not be attached for Contempt of Court orders
2. The Chamber summons is supported by the Affidavit of Aggrey Shikanga Shitsama and the grounds on the face of the summons.
3. It is the applicant's case that his case against the respondent sought compensation arising from an accident which occurred on 13.6.2013 involving government vehicle registration No. GKA 914K and the applicant's vehicle registration No. KAM 662Q wherein Judgement was entered in favour of the applicant on the 14.10.2014 and that despite a decree being drawn and payment sought from the relevant government ministry, the same was not paid.



4. The applicant avers that this prompted him to file Kisumu HC Judicial Review No.19 of 2019 seeking orders of mandamus compelling the government to pay leading up to Certificate of Costs for the decretal sum of Kshs. 936,060 plus interests and costs issued against the respondent on the 7.2.2018.
5. It was the applicant's case that in a ruling delivered on 22.9.2021 the respondent was ordered to pay the applicant a total sum of Kshs. 1,524,754.30 within 60 days but that to date, the respondent has blatantly failed and refused to comply with the court orders requiring it to settle the decretal sum plus interest that had cumulatively risen to Kshs. 1,983,414.70 as at 14.9.2021.
6. It was the applicant's case that the respondent is in contempt of court orders made by the court on 22.1.2015 and 23.9.2021 which were served upon him and continues to deprive the applicant of his right to enjoy the fruits of his judgement.
7. Despite service of the instant application, the respondent did not file any response.
8. In the oral hearing before court, Ms. Mutsami counsel for the applicant relied on the case of Shimmers Plaza Ltd v National Bank of Kenya where the Court of Appeal made it clear that court orders are not optional and that obedience of the same are demanded as a right and not a favour otherwise there will be anarchy and lawlessness.
9. Ms. Mutsami submitted that in 2019, the respondent asked them to submit their bank details for payment then went silent.
10. Ms. Orege for the respondents submitted that they had forwarded the payment request to Nairobi Head Office but that there may have been a communication breakdown and as such were seeking for 30 days to settle the claim. It was her submission that she had been informed by the state counsel of the ministry that the money for the payment was factored in the next budget.

Analysis and Determination

11. I have considered the application as filed and argued orally and the main issue for determination is whether the orders sought are merited.
12. In *Samuel M. N. Mweru & Others v National Land Commission & 2 others* [2020] eKLR Mativo J. (as he then was in the High Court) restated the test for establishing contempt where he stated that:

“ 40. It is an established principle of law that in order to succeed in civil contempt proceedings, the applicant has to prove

- (i) the terms of the order,
- (ii) Knowledge of these terms by the Respondent,
- (iii) Failure by the Respondent to comply with the terms of the order.

Upon proof of these requirements the presence of willfulness and bad faith on the part of the Respondent would normally be inferred, but the Respondent could rebut this inference by contrary proof on a balance of probabilities. Perhaps the most comprehensive of the elements of civil contempt was stated by the learned authors of the book *Contempt in Modern New Zealand* who succinctly stated: -

“ There are essentially four elements that must be proved to make the case for civil contempt. The applicant must prove to the required



standard (in civil contempt cases which is higher than civil cases)
that: -

- (a) the terms of the order (or injunction or undertaking) were clear and unambiguous and were binding on the defendant;
- (b) the defendant had knowledge of or proper notice of the terms of the order;
- (c) the defendant has acted in breach of the terms of the order; and
- (d) the defendants conduct was deliberate.”

13. In the instant case, there is a judgment delivered on 22.1.2015 against the applicant and another delivered on the 23.9.2021 in Kisumu HC Judicial Review No.19 of 2019 compelling the respondent to pay the applicant a total decretal sum of Kshs. 1,524,754.30 within 60 days.
14. From the record, it is evident that the respondent is aware of the two judgments as they have been represented by Counsel in the Office of Attorney General and Department of Justice in all the proceedings and they filed defences/responses in both suits. The Respondent did not file any affidavit to contest the averments in the application that it is in contempt of the said court orders. The two judgments against the respondent have not been set aside. No appeal has been filed in respect thereto. The two judgments are valid. The Respondent is aware of both but has since the judgments were delivered, failed to pay.
15. Accordingly, this court finds the application merited and proceeds to find the respondent herein Principal Secretary, Ministry of Tourism to be in contempt of court orders requiring settlement of decree for kshs 1,524,754.30 together with interest accrued as at 14/9/20121 and per the judgment and ruling on Mandamus Order issued vide JR No. 19 of 2019. Accordingly, the office holder of the office of Principal Secretary, Ministry of Tourism, who is the accounting officer of the Ministry is found to be in contempt of court orders and is hereby convicted of contempt of court orders and is hereby directed to appear before this court for mitigation and sentencing on 230th January, 2024.
16. This ruling and order to be extracted and be served on the Respondent and the Attorney General for compliance.
17. Costs of the application shall be to the applicant.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 21ST DAY OF DECEMBER, 2023.

R.E. ABURILI

JUDGE

