



**Okolo v Cabinet Secretary, Treasury & another (Constitutional Petition
19 of 2014) [2023] KEHC 26809 (KLR) (19 December 2023) (Judgment)**

Neutral citation: [2023] KEHC 26809 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CONSTITUTIONAL PETITION 19 OF 2014**

RE ABURILI, J

DECEMBER 19, 2023

**IN THE MATTER OF THE CONTRAVENTION OF THE FUNDAMENTAL
RIGHT UNDER ARTICLE 47 OF THE CONSTITUTION OF KENYA, 2010
AND IN THE MATTER OF THE PENSIONS ACT, CAP 189, LAWS OF KENYA**

BETWEEN

HANNINGTON OWAKA OKOLO PETITIONER

AND

THE CABINET SECRETARY, TREASURY 1ST RESPONDENT

THE DIRECTOR OF PENSIONS 2ND RESPONDENT

JUDGMENT

1. If there are curses on this earth and if there are offices and office holders that appear to be cursed and therefore their fate should be sealed until the end of the world as was prophesied by the prophets, then that office and or office holder is none other than the office of Director of Pensions.
2. This is an office which is given the mandate of calculating and releasing for payment, monies due to those persons in the public service, who have rendered their faithful and agonizing services for long until their retirement. All that is expected of this office is to receive notification and files from the parent Ministries or State Departments where the retiree or pensioner served, with an indication that the public servant has finally finished his tour of duty and therefore the office of Director of Pensions should calculate and cause to be paid to the retiree/pensioner his or her dues.
3. The above is only but the ideal situation. The reality of the matter is that most retirees die without seeing or touching anything called pension, which is their accrued right. What the office of Director of Pension has done over a period of time is to dilly dally, refuse to see or hear the plight of retirees, give all manner of excuses for non-payment including oh, we have not seen the file, oh the calculations were wrong, oh the file is lost, oh and oh and oh!



4. Since the office of Director of Pensions has not devolved its services contrary to Article 6(3) of the Constitution which commands that:

“(3) A national State organ shall ensure reasonable access to its services in all parts of the Republic, so far as it is appropriate to do so having regard to the nature of the service, retirees from all over the territory of Kenya are therefore forced to travel to Nairobi on borrowed fare and accommodation to trace their files and or inquire on the progress in the calculation of their pension.

5. It appears that one has to keep track of their files by travelling and camping in the Capital City of Nairobi and ofcourse, there is never any guarantee that they would return home with anything in their hands. For those retirees without relatives or friends in the Capital City, and who would be willing to accommodate the poor retirees, what that means is that they have to pitch tent in the cold and dangerous streets waiting for Godot. This is not about waiting for a miracle from above the heavens. Waiting for Godot is not is about, according to the Oxford Advanced Learner’s Dictionary, a play (1952) by Samuel Beckett, originally written in French. It is about two men, Vladimir and Estragon, who are waiting for a third, Godot, to arrive. Very little happens, and during their long wait the men talk about their lives. Godot never comes, and the play suggests that life has no meaning and is full of suffering.

6. Sad but true tales appearing like movies are told of retirees dying without seeing a cent of the fruits of their long service- labour. This is not strange, anyway. It is normal. It is indeed normal for this very prestigious office which holds the purse for all retirees and even as I write this judgment, I am aware of the retired Judges, Judicial Officers and other public servants who are either dead or still on the que waiting for their pensions to be calculated, as they stare at the grave. They indeed stare at the graves because once a person retires, they lose their medical insurance benefits and with sicknesses that come with aging, those who serve faithfully and with integrity cannot afford hefty medical costs in hospitals. They cannot even afford to pay the now defunct National Hospital Insurance Fund. No wonder, many public servants scramble for public resources while in office by throwing integrity through the window in favour of a better life after retirement.

7. Many public servants have also died of ailments which could have been prevented, due to the stresses of following up on pension. No sooner had their clocks of retirements age ticked, than the monthly salaries were and are stopped with pay advises being done very fast with lightning speed. The same happens when a public servant dies. The rate and speed at which their salaries are stopped and their files closed is quite commendable!

8. Is the office of Director of Pensions inhabited by human beings? I ask this question many times as I write this brief Judgment asking myself why public servants must be compelled to perform their public duties and why, even after being compelled by courts of law, there is brazen disobedience of those orders with the attitude, I guess, u tado? Should I not suggest that the Office of Director of Pensions be assigned to a retiree? Should people who have never known the pain of no pay after retirement occupy these prestigious offices yet they are do not feel obliged to adhere to the provisions of Article 73 of the Constitution which stipulates that:

“73.

(1) Authority assigned to a State officer—

(a) is a public trust to be exercised in a manner that—



- (i) is consistent with the purposes and objects of this Constitution;
 - (ii) demonstrates respect for the people;
 - (iii) brings honour to the nation and dignity to the office; and
 - (iv) promotes public confidence in the integrity of the office
- (b) vests in the State officer the responsibility to serve the people, rather than the power to rule them.
- (2) The guiding principles of leadership and integrity include—
- (a) selection on the basis of personal integrity, competence and suitability, or election in free and fair elections;
 - (b) objectivity and impartiality in decision making, and in ensuring that decisions are not influenced by nepotism, favouritism, other improper motives or corrupt practices;
 - (c) selfless service based solely on the public interest, demonstrated by—
 - (i) honesty in the execution of public duties; and
 - (ii) the declaration of any personal interest that may conflict with public duties;
 - (d) accountability to the public for decisions and actions; and
 - (e) discipline and commitment in service to the people.”

9. Tales have also been narrated of how some retirees have had to oil the hands of some officials at the Pension Department with kickbacks before their files are processed for payment of pension.

10. When I read the mandate of the office of Director of Pensions which falls under the national Treasury, I find the following information:

“Mandate

Administration and payment of pensions, death gratuities and other retirement benefits to eligible public officers and dependants; operationalization of public sector pension laws and advise on public pension policy.[emphasis added]

“Mission



To ensure the timely, efficient and effective payment of pensions, gratuities and other benefits to eligible employees of the Kenyan Public Service so that they enjoy a dignified and secure livelihood in retirement.[emphasis added]

“Vision

To be a world class institution of excellence in management of Public sector retirement benefits[emphasis added]

“Core values

Courtesy, Integrity, Fairness, respect, Transparency, Accountability and Professionalism.”[emphasis added]

11. The question is, does this office live up to its mandate, missions, vision and core values? The tone of this judgment is one crying out for this 82 year old pensioner, Mzee Hannington Owaka Okolo. A man who faithfully served this nation with the Kenya Marine and Fisheries Institute and retired without any scandal unlike some of the public servants who are haunted out of offices with all manner of accusations.
12. The now very old, sickly and frail man retired in April 1992 which is nearly 32 years ago, is indeed a lucky man to be alive despite his tribulations in the hands of the office of Director of Pensions. He was never given all his terminal dues and he was compelled to file suit a year later vide Kisumu CMCC No. 221 of 1993 and the court ordered that he be paid Kshs.74,921.75 which is now so paltry that with the current inflation and high cost of living, it is nothing.
13. Surprisingly, from the documentary evidence contained in this file, despite the Kenya Marine and Fisheries Department remitting this money to the Director of Pensions for onward transmission to the Petitioner herein, to date, it is a song and the journey for the pensioner is nowhere near the end, claiming for this money. Is this what timeliness, efficiency and excellence means? Does this conduct guarantee the pensioner the right to they enjoy a dignified and secure livelihood in retirement?
14. The court did, vide a brief judgment rendered on 16th November 2015 by my brother Justice H. K. Chemitei, pronounce itself on what it considered and found that indeed, the Petitioner’s Socio-economic right to social security as espoused in Article 43(1) of the Constitution were violated. That pronouncement has remained a paper judgment as the petitioner remains a pious explorer in the judicial process, even with the various generous guarantees contained in the 2010 Constitution.
15. The learned Judge found that from the evidence adduced, the Petitioner had worked as a Civil Servant for 30 years and there was no reason why the Director of Pensions had not paid him his dues as ordered by the court. The court also observed that there had been the back and forth correspondence on the matter and that a pensioner has every right to enjoy his retirement fully, having served his country faithfully. The Petition dated 10th September 2014 was allowed with costs.
16. Today, the Retiree/Petitioner herein still carries a paper judgment. The question is, what is the office of Director of Pension still calculating over 32 years after retirement of Mzee Hannington Owaka Okolo?
17. From the documents filed in this Petition, the Petitioner served from 12th June 1963 to 4th October 1972 with the East African Railways and Harbours, from 5th October 1972 to 30th June 1977 with East African Community while from 1st July 1980 to 30th March 1992 with Kenya Marine and Fisheries Research Institute. He retired at age 50 years and is blessed to be alive over 30 years later.



18. The amount which he has been claiming for over 30 years now was an under calculation which was remitted to the Director of Pensions on 29th May 1997.
19. On 29th October 2018, this court issued the Judicial Review Order of Mandamus compelling the Respondents herein to work out the Petitioner's lump sum pension payment and monthly pension entitlement and pay him both with interest at court rates from 1st April 1992 on the lump sum payment and from the date the payment became due on the monthly pension payments until settlement in full and further costs of the suit as taxed on 23rd November 2016 at Kshs.222,060.
20. A certificate of costs was extracted and served on the Respondents and todate, the Petitioner is waiting for the payments as ordered by the court, despite his visits to the Pensions Department.
21. He sought and obtained leave of court to commence these contempt proceedings hence his application dated 15th April 2019. The original certificate of order against the Government dated 29th October 2018 is even getting too old and is worn out.
22. Perusing documentation in this file is in itself a painful traumatising experience even for the court. In this casefile, there is a back and forth correspondence.
23. When this application for contempt of court came up for hearing by way of written submissions, on 25th October, 2023, the litigation counsel who appeared for the respondents was at pains to submit. and asked the court not to write the judgment because they needed more time to pay rather than issue a judgment date. Is 30 years not sufficient time to calculate and pay pension?
24. The court asked her this question: "Have you filed any document in court showing compliance or is there any compliance with the order of mandamus? The answer was "No my lady."
25. The question is, what is it that the Petitioner is required to do that he has failed to do to enable the 2nd Respondent Director of Pensions comply with the order of mandamus as issued by this court? Does that office know that the amounts to be calculated attract interest each time there is non-payment and each time pleadings are filed and orders are issued, costs are incurred? should such public servants who cause loses to the public coffers not be ordered by the court to be surcharged to personally pay the interest accrued and the costs incurred, besides being declared to be in contempt of court where there is absolutely no reason for the contempt?
26. No compelling reason has been advanced by the 2nd Respondent as to why the said amounts have not been calculated and settled to date and there is nothing before this court to show that the said decree and order of mandamus dated 29th October 2018 has been set aside or varied by this Court or on Appeal, or that the Order of Mandamus issued by this Court has been stayed or set aside.
27. The obligation to obey orders of the court and the necessity to punish for contempt of court orders was explained in detail by the Supreme Court in *Republic v Ahmad Abolfathi Mohammed & Another* [2018] eKLR where the apex Court observed that:
 - (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 ER 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.”

28. In *Attorney General v Times Newspapers Ltd.* [1974] AC 273, Lord Diplock had this to say:

“.... 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.”

29. In *A.B. & Another v R.B.*, Civil Application No. 4 of 2016 [2016] eKLR the Court of Appeal cited with approval the Constitutional Court of South Africa in *Burchell v Burchell*, Case No.364 of 2005 where it was held that:

“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.”

30. In *B. v Attorney General* [2004] 1 KLR 431 J.B.Ojwang J (as he then was in the High Court) stated as follows:

“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.”

31. No doubt, 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. The courts are also conscious of the standard of proof in contempt matters. In *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.”

32. 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.”
33. In case of *Republic v County Chief Officer, Finance & Economic Planning, Nairobi City County (Ex Parte David Mugo Mwangi)* [2018] eKLR, the Court observed that:

“ 30. It must however be remembered that Court orders are not made in vain and are meant to be complied with. If for any reason a party has difficulty in complying therewith, the honorable thing to do is to come back to court and explain the difficulties faced by the need to comply with the order. Once a Court order is made in a suit the same is valid unless set aside on review or on appeal. In *Econet Wireless Kenya Ltd v Minister for Information & Communication of Kenya & Another* [2005] 1 KLR 828, Ibrahim, J (as he then was) stated:

“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. 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.”

31. This position was confirmed by the Court of Appeal in *Refrigerator & Kitchen Utensils Ltd. v Gulabchand Popatlal Shah & Others* Civil Application No. Nai. 39 of 1990. In *Wildlife Lodges Ltd v County Council of Narok and Another* [2005] 2 EA 344 (HCK) the Court expressed itself thus:

“It was the plain and unqualified obligation of every person against or in respect of whom an order was made by a Court of competent jurisdiction to obey it until that order was discharged, and disobedience of such an order would, as a general rule, result in the person disobeying it being in contempt and punishable by committal or attachment and in an application to the court by him not being entertained until he had purged his contempt. A party who knows of an order, whether null or valid, regular or irregular, cannot be permitted to disobey it...It would be most dangerous to hold that the suitors, or their solicitors, could themselves judge whether an order was null or valid – whether it was regular or irregular. That they should come to the court and not take upon themselves to determine such a question. That the course of a party



knowing of an order which was null or irregular, and who might be affected by it, was plain. He should apply to the court that it might be discharged. As long as it existed it must not be disobeyed... If there is a misapprehension in the minds of the defendants as to the reasonable meaning of the order, then the expectation of them is that they would have made an application to the court for the resolution of any misunderstanding and this would have been the lawful course...In cases of alleged contempt, the breach for which the alleged contemnor is cited must not only be precisely defined but also proved to the standard which is higher than proof on a balance of probabilities but not as high as proof beyond reasonable doubt...The inherent social limitations afflicting most people in a developing country such as Kenya have the tendency to restrict access to the modern institutions of governance, and more particularly to the judiciary which is professionally run, on the basis of complex procedures and rules of law. Yet, this same Judiciary is generally viewed as the impartial purveyor of justice, and the guarantor of an even playing ground for all, a perception which ought to be strengthened, through genuine respect for the courts of justice, and through compliance with their orders. Consistent obedience to court orders is required, and parties should not take it upon themselves to decide on their own which court orders are to be obeyed and which ones overlooked, in the supposition that this oversight will not impede the process of justice...Justice dictates even-handedness between the claims of parties; and if it be the case that the plaintiff/applicant has not been accorded a level playing ground for the realisation of its economic activities, a matter that of course can only be established through evidence in the main suit, then the court ought to provide relief, by applying the established principles of law, one of these being the law of contempt...An ex parte order by the court is a valid order like any other and to obey orders of the court is to obey orders made both ex parte and inter partes since the Court by section 60 of the *Constitution* is the repository of unlimited first instance jurisdiction, and in this capacity it may make ex parte orders where, after a careful and impartial consideration, it is convinced that issuance of such an order is just and equitable. There is nothing potentially oppressive in an ex parte order, since such an order stands open to be set aside by simple application, before the very same court...Where a party considers an ex parte order to cause him undue hardship, simple application will create an opportunity for an appropriate variation to be effected thereto; and therefore there will be no excuse for a party to disobey a court order merely on the grounds that it had been made ex parte and this argument will not avail either the first or the second defendant”.

34. In *Central Bank of Kenya & Another v Ratilal Automobiles Limited & Others* Civil Application No. Nai. 247 of 2006, the Court of Appeal held that Judicial power in Kenya vests in the Courts and other tribunals established under the *Constitution* and that it is a fundamental tenet of the rule of law that



court orders must be obeyed and it is not open to any person or persons to choose whether or not to comply with or to ignore such orders as directed to him or them by a Court of law.

35. In *Wildlife Lodges Ltd v County Council of Narok and Another* [2005] 2 EA 344 (HCK) the Court expressed itself thus:

“It was the plain and unqualified obligation of every person against or in respect of whom an order was made by a Court of competent jurisdiction to obey it until that order was discharged, and disobedience of such an order would, as a general rule, result in the person disobeying it being in contempt and punishable by committal or attachment and in an application to the court by him not being entertained until he had purged his contempt. A party who knows of an order, whether null or valid, regular or irregular, cannot be permitted to disobey it...”

36. As was appreciated by Ojwang, J (as he then was) in *B v Attorney General* [2004] 1 KLR 431t:

“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.”

37. I have said enough and made sufficient reference to case law to demonstrate that obedience of court orders is not a matter of discretion and that therefore any lapse in enforcement of court orders is a sure invite to a total breakdown of law and order and the rule of law. The inevitable result would be anarchy and an erosion of our social fabric. This court has an obligation to guard against such an eventuality. This, it would achieve, only by strict enforcement of court orders.

38. There is evidence that the 2nd respondent is the officer obligated to settle the decree herein. The office holder has knowledge of the order. There has been promise after promise of settlement of the decree in vain. If there was any issue with the decree in this petition, nothing prevented the 2nd respondent from seeking clarity of the order.

39. The decree remains barren, year after year, budget after budget and no compelling reasons have been advanced for non-compliance with the decree and the order of Mandamus. My conclusion is that the 2nd respondent's conduct is brazen and deliberate; in the sense that /she has willfully acted in a manner that scorns the Court Order and therefore the authority of the Court.

40. The Replying affidavit filed by the 2nd respondent only says in principle, that this is an old matter, and that the Respondents are willing to settle. What has held that hands of the Respondents is not stated.

41. I am in agreement with the Petitioner's submission that the Respondents' action of subjecting him to this kind of treatment is a shocking indictment of the way those entrusted with responsibility in government gives the government a bad name by behaving like economic terrorists to those who have served it.

42. It is now the reckoning time for the lies perpetuated by 2nd Respondent to cease. I reiterate that it is obvious that the 2nd respondent has not complied with the decree of this court and what the holder of that very important office has been doing through the office of the Attorney General is to promise that they are complying.

43. Compliance with court orders is not an issue for discussion and in this case which has been in this court for over 30 years. The age of the case too, give this court a bad name and is contrary to the dictates of Article 159 (2) (b) that Justice shall not be delayed. The delay herein in settling the decree has denied



justice to the applicant petitioner herein. When members of the public claim that courts take too long to determine disputes, they should use this simple case as a case study and judge for themselves.

44. As earlier stated, Article 159 of the Constitution abhors delayed justice and commands courts to administer justice without undue delay. It follows that a party who refuses to settle a decree, and more so, a state department whose employees earn from the public coffers, is a party who is hell bent to deny justice to citizens of this country, contrary to its mandate, mission and visions. Such a party is aiding and abetting the evil force in the fair and just determination of cases and impedes the administration of justice.
45. As to how pension should be calculated is nothing new to the Respondents herein as Section 10(1) of the Pensions Act as read together with the orders of this court which have been disobeyed make it easier for the Respondents to calculate and settle the claim due to the Petitioner.
46. The Petitioner had demonstrated in his elaborate supporting affidavit the steps he has taken since judgment of the court was rendered, to enable the Respondents to comply with court orders to no avail.
47. Instead, the Respondents only settled taxed costs. What was the basis for settling taxed costs and leaving out the substantive claim? My view is that since taxed costs ordinarily go to the advocate, the 2nd respondent expected to pay the advocate to go rest so that the petitioner's claim expires or abates naturally.
48. The various letters of correspondence annexed demonstrate that the director of pensions is not interested in bringing this dispute to an end. This is not an ordinary contempt of court proceeding. It is a proceeding where a public officer occupying a public office, well aware of their public duty to settle a decree of which they are party to, so brazenly uses technicalities and delaying tactics to deny the Petitioner/Pensioner his dues. Such brazen disobedience of court orders by Public Officers must be punished by the court. There is overwhelming evidence that the Respondents were not only aware of the court orders but they were served with a myriad of documents including decrees, certificate of costs and certificate of costs against the Government and that each time, they have been making fresh demands of the Petitioner knowing that the Petitioner is now worn out and likely to give up on the claim so that they can take his family in circles. That is impermissible.
49. It is scandalous for this court to keep writing rulings and judgments on this matter thirty years after judgment of the court. It is clear that the Director of Pensions has continued to lower the dignity of this court's judicial authority and has indeed obstructed and interfered with the administration of justice by the failure to comply with the Mandamus orders of this court issued on 29th October 2018.
50. I find that the holder of the office of Director of Pensions is in brazen disobedience of the orders of this court made on 29th October 2018 and is hereby found to be in contempt of the said court order.
51. I decline to find the Cabinet Secretary, Treasury to be in contempt of court orders aforesaid as the Treasury works through the Director of Pensions in the payment of pensions and in addition, the Cabinet Secretary is not the accounting officer of the Ministry. This is a matter that squarely falls within the mandate of the Directorate of Pensions.
52. The Petitioner shall also have costs of the application herein dated 25th May 2022 assessed at Kshs.50,000 to be paid alongside the decretal sum.
53. This order to be served upon the holder of the office of Director of Pensions who shall appear in court personally for mitigation and sentence on 30th January, 2024.
54. I so order.



DATED, SIGNED AND DELIVERED AT KISUMU THIS 19TH DAY OF DECEMBER, 2023.

R. E. ABURILI

JUDGE

