



**Republic v Chief Officer Finance Vihiga County Government & another;
Trans Africa Motors Limited (Exparte Applicant) (Judicial Review
1 of 2023) [2023] KEHC 26737 (KLR) (18 December 2023) (Ruling)**

Neutral citation: [2023] KEHC 26737 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VIHIGA
JUDICIAL REVIEW 1 OF 2023
JN KAMAU, J
DECEMBER 18, 2023**

BETWEEN

REPUBLIC APPLICANT

AND

**CHIEF OFFICER FINANCE VIHIGA COUNTY GOVERNMENT 1ST
RESPONDENT**

**CHIEF OFFICER TRANSPORT & INFRASTRUCTURE VIHIGA COUNTY
GOVERNMENT 2ND RESPONDENT**

AND

TRANS AFRICA MOTORS LIMITED EXPARTE APPLICANT

RULING

1. The *Ex parte* Applicant’s Notice of Motion application dated and filed on 27th June 2022 sought that the Respondents be issued with a Notice to Show Cause (NTSC) why contempt of court proceedings should not be commenced against them for failing to pay it Kshs 11,107,157.43.
2. It also sought orders that the court cite the Respondents for contempt of court and commit them to civil jail and/or they be ordered to purge the contempt of court by payment (sic) of Kshs 11,107,157.43 or such other terms as the court would deem fit.
3. Martin Marshal Ramoya, the *Ex parte* Applicant’s Manager swore an affidavit in support of the said application on 27th June 2022. The *Ex parte* Applicant asserted that it filed suit against the Respondents herein for supply and delivery of Prime Mover with hydraulic winch *vide* Tender No RFQ/VCG/527/204-2015 in Kisumu CMCC No 32 of 2017 *Trans Africa Motors Limited v County Government of Vihiga* whereupon judgment was entered in its favour for the sum of Kshs 15,040,014/



- =. In the alternative, the Respondents were to return the said Prime Mover. The Respondents were also ordered to pay it costs that were assessed at Kshs 550,160/= and interest. The costs were taxed at Kshs 550,160/= and a decree was issued against the Respondents.
4. It averred that it served the Respondents with the decree, Certificate of Costs and Certificate of Order in compliance with Section 21 of the *Government Proceedings Act* Cap 40 (Laws of Kenya) and Order 29 of the *Civil Procedure Rules*, 2010 but they declined to pay the decretal sum. It therefore sought and obtained an order for mandamus to compel them to pay it the said decretal sum.
 5. Pursuant to several reminders, the Respondents had paid it a sum of Kshs 8,718,000/= leaving a balance of Kshs 10,556,997.43. It asserted that in the absence of any explanation or justification to effect full payment, the Respondents were in contempt of court orders and had continued to be in contempt of the court order with impunity. It therefore urged this court to allow its application.
 6. In opposition to the present application, on 17th January 2023, Etale Tunya, the Chief Officer for the Department of Transport and Infrastructure County Government of Vihiga swore a Replying Affidavit on behalf of the Respondents herein. The same was filed on even date.
 7. The Respondents stated that the contract between the County Government of Vihiga and the *Ex parte* Applicant herein was made in 2015 when the County Government came into existence. They averred that the Auditor General undertook an audit of the pending bills covering the period as at 30th June 2018.
 8. They admitted that the *Ex parte* Applicant supplied it the Prime Mover but at a sum of Kshs 15,040,014/= and that having paid it a sum of Kshs 11,717,000/=, a balance of Kshs 3,872,174/= being the balance of Kshs 3,322,014/= and the costs of Kshs 550,160/= was outstanding. They averred that they were willing to pay the same once the amount was budgeted in the financial year 2022-2023.
 9. They denied that they were in contempt of the court orders and asserted that it was not clear what the amount due to the *Ex parte* Applicant. They stated that they could not pay the amount before the Auditor General had audited the pending payments. They added that the *Ex parte* Applicant did not appear before the Auditor General for the verification of the documents.
 10. Martin Marshal Ramoya swore a Supplementary Affidavit on 7th March 2023. The same was filed on 8th March 2023. The *Ex parte* Applicant asserted that the Decree of the court was never challenged by way of an appeal and hence the Respondents ought not to bring issues of legibility or illegibility of pending bills. It pointed out that the calculations by the Respondents were not mathematically correct as the decretal sum continued to accrue interest until payment in full.
 11. It further averred that the Respondents could not purport to await the Supplementary budget having admitted that they owed it money and again assert that the payments were not audited. It was emphatic that the issue of the money owed was not in issue as an order of mandamus was issued by the court on 27th July 2021 which order had never been appealed against, reviewed and/or set aside.
 12. Its Written Submissions were dated 16th January 2023 and filed on 17th January 2023. Its Supplementary Written Submissions were dated 7th March 2023 and filed on 8th March 2023. The Respondents' Written Submissions were dated 11th April 2023 and filed on 12th April 2023. The Ruling herein is based in the said Written Submissions that all the parties relied upon in their entirety.



Legal Analysis

13. The *Ex parte* Applicant relied on the cases of [Republic v The Attorney General & Another Ex parte James Alfred Keroso](#) [2013] eKLR and [Council of Governors & 6 others v Senate](#) [2015] eKLR amongst other cases to support its argument that the Respondents were in contempt of court orders.
14. On their part, the Respondents asserted that the *Ex parte* Applicant's application was incompetent as drafted as the *Ex parte* Applicant had sued different parties than those who were in the order of mandamus of 27th June 2022. that it was seeking to enforce.
15. They added that the *Ex parte* Applicant had also put different figures in their different pleadings yet they were bound by their pleadings as was held in the case of [Daniel Otieno Migore v South Nyanza Sugar Co Ltd](#) [2018] eKLR. They averred that the *Ex parte* Applicant had failed to prove its case.
16. On 20th May 2020, Ochieng J (as he then was) granted the *Ex parte* Applicant herein leave to apply for an order for mandamus against the Chief Officer, Finance Vihiga.
17. The *Ex parte* Applicant amended its Notice of Motion application dated 11th January 2021 that was filed on 19th January 2021. The Respondents therein were shown as Chief Officer Finance, Vihiga County Government and Chief Officer, Transport and Infrastructure Vihiga County Government. In the present application, the parties had been indicated as In Charges of Finance and Transport and Infrastructure of the County Government of Vihiga.
18. To this extent, the present application was poorly drafted. However, this court did not deem it prudent to find the said application to have been incompetent and/or defective on account of the interchanged names. This was because Article 159(2)(d) of the [Constitution](#) of Kenya, 2010 mandates courts to administer justice without undue regard to procedural technicalities. Indeed, this court had inherent powers to set out the parties as they appeared in the initial pleadings and not in the manner they had not been put by the *Ex parte* Applicant herein with a view to determining the real issues between the parties herein.
19. Going further, this court took the firm view that the inclusion of the County Secretary County Government of Vihiga in the present application did not render the present application incompetent as the court could still proceed to determine the dispute between the parties who were actually before it as was provided in Order 1 Rule 9 of the [Civil Procedure Rules](#).
20. The said Order 1 Rule 9 of the [Civil Procedure Rules](#) provides that:-

“No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.”
21. A party may also not raise a technical objection to the form of a pleading. In this regard, Order 2 Rule 14 of the [Civil Procedure Rules](#) stipulates as follows:-

“No technical objection may be raised to any pleading on the ground of any want of form.”
22. Further, Order 51 Rule 10(2) of the [Civil Procedure Rules](#) states that:-

“No application shall be defeated on a technicality or for want of form that does not affect the substance of the application.”



23. Having said so, the County Secretary County Government of Vihiga was not a party to the proceedings herein as he was enjoined without leave of the court and ought to be struck out.
24. Turning to the substantive issue, while sitting and handling this matter at Kisumu High Court before it was transferred to this court, in its Ruling that it delivered on 27th July 2021, it granted the *Ex parte* Applicant an order for mandamus after being satisfied that the said Respondents had declined to remit to it payments as it had ordered.
25. In the said Ruling, this court observed that the Respondents had not given any cogent reason why the decree had not been settled more than three (3) years since the Decree and Certificate of Order against the government were issued. At the time, it considered the Respondents arguments about the pending bills and their legibility or illegibility. This issue was res judicata and could not be raised again at this point.
26. This court had due regard to the cases of *Awadh v Marumbu (No 2)* 2014 1 KLR and *National Lottery Limited v Betting Control & Licensing Board* [2001] eKLR where the common thread was that courts must guard and protect their dignity by ensuring that their orders are obeyed and when not obeyed, the contemnors should be punished.
27. Courts must never shy away from punishing contemnors because failing to do so has the risk of making a mockery of the entire judicial system. They must jealously guard their integrity and stamp their authority by ensuring that court orders are complied with.
28. However, courts should not be so overzealous to punish parties merely because their opponents have alleged that they have breached court orders. They must be satisfied that such contempt exists. In the absence of such proof, they must decline to grant such drastic orders because they have the potential of restraining a person's freedom as enshrined in Article 29 of the *Constitution* of Kenya, 2010.
29. Article 29(a) of the *Constitution* of Kenya provides as follows:-

“ Every person has the right to freedom and security of the person, which includes the right not to be deprived of freedom arbitrarily or without unjust cause.”
30. It was evident to this court that they had disobeyed its orders and were thus in contempt. Without belabouring the point, the court had no option but to ensure that it took action so as to maintain its integrity. It was persuaded to find and hold that the *Ex parte* Applicant had ably demonstrated that the Respondents were in breach of the court order of 27th July 2021.
31. The Respondents herein had sought to re-open the matter by arguing why they could not pay the bills. This was re-litigating the matter. Litigation had to come to a stop.

Disposition

32. For the foregoing reasons, the upshot of this court's decision was that the *Ex parte* Applicant's Notice of Motion application dated and filed on 27th June 2022 was merited and the same be and is hereby allowed in terms of Prayer No (2). The Respondents will bear the *Ex parte* Applicant's cost of this application.
33. It is hereby directed that the Respondents appear before this court on 11th April 2024 when this matter will be listed for Notice to Show Cause why contempt of court proceedings should not be commenced against them for failing to pay the *Ex parte* Applicant the sum of Kshs 11,107,157.43 that was due to it.



34. For the avoidance of doubt, it is hereby directed that the County Secretary County Government of Vihiga be and is hereby struck out from the proceedings herein for having been enjoined without leave of the court. Further, any order to be extracted herein shall have the parties as shown in this Ruling and in the order of 27th July 2021.

35. It is so ordered.

DATED AND DELIVERED AT VIHIGA THIS 18TH DAY OF DECEMBER 2023.

J. KAMAU

JUDGE

