



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**JUDICIAL REVIEW DIVISION**

**JUDICIAL REVIEW APPLICATION NUMBER E045 OF 2021**

**REPUBLIC.....APPLICANT**

**VERSUS**

**THE COUNTY GOVERNMENT OF KITUI.....RESPONDENT**

**FAIRPLAN SYSTEMS LIMITED.....EX PARTE**

**JUDGMENT**

1. The Ex parte Applicant herein is before this court vide an application dated 22<sup>nd</sup> July,2021 which seeks the following orders:
  - (i) ***THAT this matter be certified urgent, and service be dispensed with in the first instance.***
  - (ii) ***THAT Mr. Ben Katungi, the Respondent's County Executive Committee Member for Finance, Ministry of Finance and Economic Planning, do appear before this Honourable Court and show cause why he should not be cited for contempt of court for failing to pay to the ex-parte Applicant Kshs. 63,301,586.40/= and Kshs. 93,445/= being the amount payable to the ex-parte Applicant as per the judgment order of this court issued on 14<sup>th</sup> July,2021.***
  - (iii) ***THAT this Honourable Court be pleased to find and hold that Mr. Ben Katungi, the Respondent's County Executive Committee Member for Finance, Ministry of Finance and Economic Planning, is in contempt and has disobeyed the order the Court issued on 14<sup>th</sup> July,2021.***
  - (iv) ***THAT Mr. Ben Katungi be punished for contempt of court and be committed to civil jail for a period not exceeding six (6) months.***
  - (v) ***THAT costs of this application be borne by the Respondent.***
2. The application is supported by the grounds on its face and verified by the supporting affidavit of Arch. Julius M.F. Mutunga, the Managing Director of the ex-parte Applicant dated 22<sup>nd</sup> July,2021.
3. In the affidavit Mr. Mutunga swears that by a contract for consultancy services dated on 14<sup>th</sup> April, 2014, the ex parte Applicant was to provide architectural services for the construction of the County Headquarters Offices and Kitui Central Sub-County offices. That in accordance with the provisions of the consultancy contract, in the instance that a dispute arose between the parties the same would be referred to arbitration. During the subsistence of the agreement the parties had a dispute and the same was referred to arbitration and upon conclusion of the arbitration process a final Award was issued on 29<sup>th</sup> March,2017 in favor of the exparte Applicant for the sum of Kshs. 41,755,936.10/=. Subsequently, the ex-parte Applicant applied for correction on issues raised and admitted in the Final Award and the Arbitrator issued an Addendum to the Arbitral Tribunal Final Award.
4. It was deposed that the Respondent only paid Kshs. 462,741/= towards the entire Arbitrator's costs while the ex-parte Applicant paid the balance of the arbitrator's costs in order to obtain the Final Award. Further that the Respondent was required to pay the arbitral award within sixty (60) days from 29<sup>th</sup> March 2017 in default of which the amount was to attract interest. The deponent averred that the Respondent's failure to pay the Arbitral Award led to the filing of **Miscellaneous Civil Application No. 289 of 2017** where the ex parte Applicant herein sought recognition and enforcement of the Arbitral Award against the Respondent.

5. In his disposition, Mr. Mutunga stated that on 11<sup>th</sup> July, 2017 during inter-partes hearing in Miscellaneous Civil Application No. 289 of 2017, the Respondent did not oppose the ex parte Applicant's application and as such it was allowed as prayed and a decree extracted. The decree was subsequently amended by Parties' consent resulting to an Amended Decree dated 3<sup>rd</sup> March, 2020.

6. The ex parte Applicant served the Respondent with a Certificate of Order against the Government issued on 10<sup>th</sup> March, 2021 for the sums of Kshs. 63,301,586.40/= and Kshs. 93,455/= together with a demand letter for payment. It was deposed that the Respondent has neglected and refused to pay to the ex-parte Applicant the amounts due and that the only way the ex-parte Applicant herein can realize the fruits of its judgment is through this Honourable Court issuing an order of Mandamus against the Respondent for payment of the amount due.

7. The deponent contended that the Respondent's conduct offends the provisions of Article 47 of the Constitution of Kenya, 2010 which envisages fair, expeditious, efficient, lawful, reasonable, and procedurally fair administrative action.

8. In conclusion, it was averred that continued refusal, neglect, and failure by the Respondent to pay the sums due to the ex-parte Applicant has and continues to cause hardship to the ex parte Applicant and it is in the interest of justice that this honorable court does issue the orders sought.

## **RESPONSES**

9. There is no response on record from the Respondent.

## **WRITTEN SUBMISSIONS**

10. The ex parte Applicant herein filed written submissions dated 22<sup>nd</sup> October, 2021 in which two issues were flagged out;

- i. *Whether Mr. Ben Katungi should be punished for contempt of court order issued on 14<sup>th</sup> July, 2021*
- ii. *Who bears costs of this application?*

11. On the 1<sup>st</sup> issue it was submitted that Mr. Ben Katungi, by virtue of his office as the Respondent's County Executive Committee Member for Finance, Ministry of Finance and Economic Planning, is in contempt of court for disobeying the court order issued on 14<sup>th</sup> July 2021.

12. Learned counsel cited Section 21(3) of the Government Proceedings Act which imposes a statutory duty on the Accounting Officer of the Government to pay the money specified in a Certificate of Order against Government to the person so entitled or to his advocate. Further it was submitted that pursuant to Section 103 (2) (a) and (3) and Section 148 (2) and (3) of the **Public Finance Management Act, No.8 of 2012 (PMFA)**, a County Executive Committee Member for Finance is the Accounting Officer of a County Government. It was submitted that this Court has also numerously amplified the above provisions.

13. To support this argument learned counsel cited the case of **Republic -vs- County Chief Officer, Finance & Economic Planning, Nairobi City County Ex parte Stanley Muturi [2018] eKLR** as follows;

*"It is true that the County Executive in Charge of Finance is the one under obligation to pay funds, in the capacity as the accounting officer. It must always be remembered that a judicial review application is neither a criminal case nor a civil suit hence the application ought to be brought against the person who is bound to comply with the orders sought therein. In this case the person against whom the contempt proceedings ought to be commenced is the County Executive in Charge of Finance of the Nairobi County Government who is mentioned as one of the persons against whom the order is sought."*

14. To further buttress this argument learned counsel also cited the case **Soloh Worldwide Interenterprise vs. County Secretary Nairobi County & Another [2015] eKLR**.

15. It was contended that failure by an Accounting Officer to comply with a court order amounts to contempt of court as was held in the case of **Republic -vs- County Chief Officer, Finance & Economic Planning, Nairobi City County Ex parte Stanley Muturi supra** where the court held as follows;

*"In my view the failure by the accounting officer of a State organ, government department, ministry or corporation to put into motion steps 5 necessary for the settlement of or obedience of court decisions or facilitation of such settlement is prima facie evidence of neglect."*

16. In his argument, Mr. Lutta submitted that Mr. Ben Katungi was under a statutory obligation to comply with the court's order dated 14<sup>th</sup> July 2021 and that court orders must be obeyed by any person even public officers. Further, that his continued disobedience offends the provisions of Article 159(1) of the Constitution, 2010.

17. Learned counsel submitted that the Respondent's disobedience amounts to a breach of the ex parte Applicant's constitutional rights as provided under Article 47. The ex parte applicant contended that since execution proceedings cannot be executed against the Respondent this is the only way that it can realize the fruits of the judgment made in its favour.

18. The case of **HADKINSON -vs- HADKINSON (1952) 2 ALL ER56** was also cited where the court held as follows;

*“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 unless and until it 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.”*

19. Mr. Lutta submitted that in order to ensure proper dispensation of justice and to protect and promote the rule of law, Mr. Ben Katungi must be punished. In support of this argument counsel cited the case of **Republic v County Chief Officer, Finance & Economic Planning, Nairobi City County Ex Parte Stanley Muturi** (*supra*) where it was held as follows;

*“Court orders are not meant for cosmetic purposes. They are serious decisions that are meant to be and ought to be complied with strictly. As was held in Teacher’s Service Commission vs. Kenya National Union of Teachers & 2 Others Petition No. 23 of 2013:*

*“The reason why courts will punish for contempt of court is to safeguard the rule of law which is fundamental in the administration of justice. It has nothing to do with the integrity of the judiciary or the court or even the personal ego of the presiding judge. Neither is it about placating the applicant who moves the court by taking out contempt of court proceedings. It is about preserving and safeguarding the rule of law. A party who walks through the justice door with a court order in his hands must be assured that the order will be obeyed by those to whom it is directed. A court order is not a mere suggestion or an opinion or a point of view. It is a directive that is issued after much thought and with circumspection. It must therefore be complied with and it is in the interest of every person that this remains the case. To see it any other way is to open the door to chaos and anarchy and this Court will not be the one to open that door. If one is dissatisfied with an order of the court, the avenues for challenging it are also set out in the law. Defiance is not an option.”*

20. On who bears the cost it was submitted that had Mr. Katungi complied with the court order, the application before this court would not have been made and as such the Respondent ought to pay for costs.

21. In conclusion, Mr. Lutta submitted that this court ought to exercise its authority as conferred by section 5 of the Judicature Act. It was urged that Mr. Katungi ought to be punished for unmitigated contempt of court and committed to civil jail for a period not exceeding six months. Counsel sought for the application to be allowed as prayed.

22. I have considered the application, the supporting grounds and affidavit as well as learned submission by counsel. Of determination is whether the applicant has achieved the threshold for the grant of the orders sought. There is no dispute that indeed on 14<sup>th</sup> July, 2021 this Honourable court issued an order of mandamus against the Respondent compelling it to pay the decretal sum owed to the ex parte Applicant. There is evidence that the order is in the knowledge of the respondent herein. That order has not been complied with despite service.

23. No compelling reason has been advanced by the Respondent as to why the said amounts have not been cleared to date and there is nothing before this court to show that the said decree 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.

24. The obligation to obey orders of 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 court observed;

*“[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.”

25. In the case of **Republic v County Chief Officer, Finance & Economic Planning, Nairobi City County (Ex Parte David Mugo Mwangi) [2018] eKLR**, the Court made the following observations;

“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 vs. 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. vs. Gulabchand Popatlal Shah & Others Civil Application No. Nai. 39 of 1990**. In **Wildlife Lodges Ltd vs. 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”.

“32. In ***Central Bank of Kenya & Another vs. Ritalal 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.

“33. In ***Wildlife Lodges Ltd vs. 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.....”

“35. It was therefore appreciated by Ojwang, J (as he then was) in ***B vs. 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.””

26. I think I have made enough reference to case law to demonstrate that obedience of court orders is a serious matter. Any lapse in enforcement of court orders is a sure invite to a total breakdown of law and order and the rule of law as we know it. The inevitable result would be anarchy and an erosion of our social fabric. This court has an obligation to stand firm and guard against such an eventuality. This, it would achieve, by strict enforcement of its orders. There is evidence that the respondent is the officer obligated to settle the decree herein. He has knowledge of the order. He has not settled the amount or explained inability to pay or sought flexible payment terms. On the whole no compelling reasons have been brought before this Court as to why the Respondent has failed to comply with this court’s order dated 14<sup>th</sup> July, 2021. It is safe to infer that that the respondent’s conduct is deliberate, in the sense that he has *willfully acted in a manner that flouted the Court Order. It does not help the respondent’s case that the amounts to be paid are astronomical and that the applicant who has no other means of executing the decree has been exposed to economic hardship, which apparently, the respondent has been comfortable to swat away like an irritant mosquito. The demonstration of contempt in the matter is of monumental proportions.*

27. I find the respondent in contempt of the orders of this court for which he should be punished. Accordingly, I order that Mr. Ben Katungi appear in person before this court on 25<sup>th</sup> of April 2022 to show cause why he should not be committed to civil jail. In default of appearance, a warrant of arrest is to issue. The Applicant will have the costs of the application.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 21ST DAY OF APRIL 2022.**

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**A. K. NDUNG’U**

**JUDGE**