



**Kitetu v Machakos County & another (Miscellaneous Application 417 of 2013)
[2022] KEHC 11941 (KLR) (Judicial Review) (1 April 2022) (Ruling)**

Neutral citation: [2022] KEHC 11941 (KLR)

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

MISCELLANEOUS APPLICATION 417 OF 2013

J NGAAH, J

APRIL 1, 2022

BETWEEN

JUSTUS MAKAU KITETU APPLICANT

AND

MACHAKOS COUNTY 1ST RESPONDENT

MAKUENI COUNTY 2ND RESPONDENT

RULING

1 The applicant has moved this Honourable Court by a motion dated 28 February 2019 for the prayers in the following terms:

- "1. That this application be certified as urgent and its service be dispensed with due to its urgency.
2. That this Honourable Court be pleased to grant leave to the ex parte applicant to commence contempt proceedings against Hon. Dr. Alfred Mutua, the Governor of Machakos County and Hon. Pro. Kivutha Kibwana, Governor of Makueni County the respective Governors of the respondent counties herein.
3. That the respective Governors of the respondent counties herein Hon. Dr. Alfred Mutua, the Governor of Machakos County and Hon. Pro. Kivutha Kibwana, Governor of Makueni County be ordered and/or in any manner howsoever be directed to comply with the court orders of 10th July 2017 by Hon. Justice Odunga in lieu of which they be detained in prison for 6 months.
4. That the costs of this application be borne by the respondents."



2. The applicant has invoked sections 1, 1A, 1B, 3 and 3A of the Civil Procedure Act, Order 51 rule 1, sections 4 and 6 of the Contempt of Court Act 2016 and Article 159 of the Constitution as the provisions of the law upon which his application is based.
3. As far as the grounds are concerned, he contends that on 10 July 2017 this Honourable Court made a prerogative order of mandamus directed at the governors of Machakos and Makueni Counties respectively, directing them to pay the applicant certain sums of money. The governors were served with the orders but they disobeyed the order hence the instant application.
4. James Kathili, the Chief Legal Officer, Machakos County, swore a replying affidavit opposing the application. In the affidavit sworn on 25 September 2019, the deponent swore that the Governor of Machakos County is not the accounting officer of Machakos County and therefore he was wrongly joined in the proceedings. In any event, the Governor was not served with the order alleged to have been disobeyed.
5. Besides the replying affidavit, the 1st respondent also filed a notice of preliminary objection contending that the Contempt of Court Act No. 46 of 2016 which the applicant has invoked was declared unconstitutional.
6. The 2nd respondent also opposed the motion and to that effect filed a replying affidavit sworn by Shadrack Mwanzia Mutua Mulanga who is the Director of Legal Affairs of the 2nd respondent.
7. Like the 1st respondent, he contended that the Governor of the 2nd respondent is not its accounting officer and therefore he cannot be cited for contempt. Similarly, he also urged that the Governor was not served with the order in issue in that it depends on the answer to the question whether the respondents are accountants.
8. The resolution to the applicant's application against the accounting officers of their respective counties and secondly, whether they were served with the order of 10 July 2017.
9. In its pertinent part, the order of 10 July 2017 was couched as follows:
 1. That a prerogative order of mandamus do (sic) issue directed towards the respective governors of the counties herein or such other accounting officers (s) to compel them to:
 - i. That pay the amount of taxed costs plus interest to date and the amount of damages awarded to the applicant in July, 2008, (wef April 1998 at Kshs. 500,000.00 together with interest which amount of damages stood at Kshs. 9,000,000.00 as at 30th October and interest thereon.
 - ii. That the respondents do remove the licences it has allowed on the applicant's parcels of land measuring 2.3 acres and to demolish and remove from the said parcel all structures erected person (sic) at their own cost and expense."
10. It is not clear from the affidavit filed in support of the application whether both limbs of the order have been disobeyed. The first limb is obviously a satisfaction order against a Government which Governors generally, and the Governors for the respective counties of Machakos and Makueni, in particular, cannot be compelled to comply with. According to section 21(3) of the Government Proceedings Act, cap. 40, it is the accounting officers of both levels of government that ought to comply with such



orders and make the payments. It is necessary to reproduce the entire section in order to understand the context of section 21(3); it reads as follows:

Satisfaction of orders against the Government

- (1) Where in any civil proceedings by or against the Government, or in proceedings in connection with any arbitration in which the Government is a party, any order (including an order for costs) is made by any court in favour of any person against the Government, or against a Government department, or against an officer of the Government as such, the proper officer of the court shall, on an application in that behalf made by or on behalf of that person at any time after the expiration of twenty-one days from the date of the order or, in case the order provides for the payment of costs and the costs require to be taxed, at any time after the costs have been taxed, whichever is the later, issue to that person a certificate in the prescribed form containing particulars of the order:

Provided that, if the court so directs, a separate certificate shall be issued with respect to the costs (if any) ordered to be paid to the applicant.

- (2) A copy of any certificate issued under this section may be served by the person in whose favour the order is made upon the Attorney-General.
- (3) If the order provides for the payment of any money by way of damages or otherwise, or of any costs, the certificate shall state the amount so payable, and the Accounting Officer for the Government department concerned shall, subject as hereinafter provided, pay to the person entitled or to his advocate the amount appearing by the certificate to be due to him together with interest, if any, lawfully due thereon:

Provided that the court by which any such order as aforesaid is made or any court to which an appeal against the order lies may direct that, pending an appeal or otherwise, payment of the whole of any amount so payable, or any part thereof, shall be suspended, and if the certificate has not been issued may order any such direction to be inserted therein.

- (4) Save as aforesaid, no execution or attachment or process in the nature thereof shall be issued out of any such court for enforcing payment by the Government of any such money or costs as aforesaid, and no person shall be individually liable under any order for the payment by the Government, or any Government department, or any officer of the Government as such, of any money or costs.
- (5) _This section shall, with necessary modifications, apply to any civil proceedings by or against a county government, or in any proceedings in connection with any arbitration in which a county government is a party.

(Emphasis added).

11. According to section 148 (1) (3) of the *Public Management Finance Act*, No. 18 of 2012, accounting officers for County Governments are designated as such by County Executive Committee Members for finance and it is difficult to contemplate that a Governor who is the head of the County Government would be assigned such a task by a member whom he has appointed to serve in his Government under



Article 179(1)(b) of *the Constitution*. Section 148 of the *Public Finance Management Act* reads as follows:

148. Designation of accounting officers for county government entities by the County Executive Committee Member for finance
- (1) A County Executive Committee member for finance shall, except as otherwise provided by law, in writing designate accounting officers to be responsible for managing the finances of the county government entities as is specified in the designation.
 - (2) Except as otherwise stated in other legislation, the person responsible for the administration of a county government entity, shall be the accounting officer responsible for managing the finances of that entity.
 - (3) A County Executive Committee member for finance shall ensure that each county government entity has an accounting officer in accordance with Article 226 of *the Constitution*.
 - (4) The Clerk to the county assembly shall be the accounting officer of the county assembly.
 - (5) A county government may, in order to promote efficient use of the county resources, adopt, subject to approval by the county assembly, a centralised county financial management service. (Emphasis added).
12. If the Governors of the respective counties are not accounting officers of those counties, then they cannot be alleged to have disobeyed a court order that they are not bound by.
13. It has been urged by the applicant's counsel in his submissions that the second limb of the order is not a satisfaction order and which, therefore, as I understand him, is not targeted at the accounting officers. That may be so but then he seeks to cite the governors for disobeying the entire order and not just parts of it. Whether the Governors are culpable for disobedience of that limb of the order that is not necessarily for payment of money is also debatable considering that compliance of that part of the order is likely to fall under the docket of a particular member of the executive committee. It is the member or any other responsible officer of that committee that, in my humble, view would bear the burden.
14. That aside, assuming that the Governors were the proper parties to be cited, there still remains the issue of service of the order which, in my humble view, the applicant has not satisfactorily answered. It would appear from the affidavit in support of the motion that the order was not served.
15. The affidavit of service exhibited to the affidavit of the applicant in support of the motion shows that what was served was a mention notice dated 5 July 2017 and that the same was served on a firm of advocates identified as Makau & Mulei Advocates.
16. When the issue was raised by the respondents in their respective responses, the applicant belatedly filed an application seeking to introduce another affidavit of service allegedly sworn by the process server on 5 June 2019 to demonstrate that the respondents were served with order.
17. My concern with the affidavit sought to be introduced is that upto and until the application to introduce it was filed on 22 June 2020, the affidavit had not been filed although it is alleged in the same affidavit that service of the order was effected on 21 September 2017. As a matter of fact, it was never filed at all.



18. In view of the importance of service of the order in applications for contempt, the applicant owed this Honourable Court an explanation why, more than three years after the order was served, the affidavit of service had not been filed.
19. Even then, the purported affidavit of service was sworn, as noted, on 5 June 2019. The application to cite the respondents for contempt was filed 5 March 2019. What this means is that the application which, by its very nature, is based on the evidence proof of service of the order alleged to have been disobeyed, was filed without such evidence. In other words, the application was filed without any proof that the order in question had been served. If there was no proof that the order had been served at the time of filing the instant application, then the application has no factual basis at all.
20. It is worth noting that the application to introduce the purported affidavit of service was made after directions on the disposal of the application had been made. This is apparent from the record and also from the face of the applicant's application. Considering the timing and the circumstances under which the application is made, it is reasonable to conclude that the application is an afterthought and has no merits at all.
21. For the reasons I have given, I am inclined to dismiss the applicant's applications respectively dated 28 February 2019 and 17 June 2020. They are both dismissed with costs.

SIGNED, DATED AND DELIVERED ON 1 APRIL 2022

Ngaah Jairus

JUDGE

