



Republic v County Government of Kisumu & another; Safety Surveyors Limited (Exparte) (Judicial Review Miscellaneous Application 12 of 2020) [2022] KEHC 12512 (KLR) (20 May 2022) (Ruling)

Neutral citation: [2022] KEHC 12512 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
JUDICIAL REVIEW MISCELLANEOUS APPLICATION 12 OF 2020**

JN KAMAU, J

MAY 20, 2022

IN THE MATTER OF THE APPLICATION IN THE NATURE OF JUDICIAL REVIEW FOR THE ORDER OF MANDAMUS

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF SECTIONS 7 & 8 OF THE LAW REFORM ACT CAP 26 OF THE LAWS OF KENYA

AND

IN THE MATTER OF ORDER 53 OF THE CIVIL PROCEDURE RULES 2010

AND

IN THE MATTER OF THE REFUSAL BY THE COUNTY EXECUTIVE OFFICER IN CHARGE OF FINANCE TO PAY THE APPLICANT

BETWEEN

REPUBLIC APPLICANT

AND

COUNTY GOVERNMENT OF KISUMU 1ST RESPONDENT

KISUMU COUNTY CHIEF FINANCE OFFICER INCHARGE OF

FINANCE 2ND RESPONDENT

AND

SAFETY SURVEYORS LIMITED EXPARTE



RULING

Introduction

1. In its Notice of Motion application dated 7th June 2021 and filed on 1st July 2021, the *Ex parte* Applicant sought for orders that the 2nd Respondent be cited for contempt of court and that he be committed to civil jail for disobedience and non-compliance of the orders of this court issued on 11th March 2021 in Judicial Review Miscellaneous Application No 12 of 2020. It also sought that the court declares the 2nd Respondent unfit to hold state and/or public offices and that the said orders to be enforced by the Officer Commanding in Kisumu Central Police Station.
2. Kigo Kariuki, Director of Safety Surveyors Ltd, swore an Affidavit on 7th June 2021 in support of the said application. The *Ex parte* Applicant averred that it filed an application dated 2nd November 2020 and on 11th March 2021, this court issued an order of mandamus directing the Respondents herein to pay it the sum of Kshs 6,319,513.30/= with interest accruing thereon at six (6%) per month until payment in full pursuant to the judgment against the 1st Respondent that was entered in Chief Magistrate's Court at Kisumu in Civil Suit No 254 of 2014.
3. It added that on the same date, this court also issued orders of mandamus directing the 1st and 2nd Respondents to immediately pay it the sum of Kshs 462, 252.30/= being costs of the suit pursuant to the Party and Party Bill of Costs that were assessed by the court.
4. It contended that it served the Respondents a copy of the application dated 2nd November 2020, a copy of the court's Order dated 11th March 2021 and a Notice dated 15th April 2021 demanding to be paid the decretal sum, the interest and costs thereon amounting to 48,490,553.38/= as at 15th April 2021, within 14 days thereon but that the Respondents had deliberately disobeyed the said orders thus undermining the authority of this court and the rule of law therefore infringing its right to access justice guaranteed under Article 48 of the Constitution of Kenya, 2010.
5. It stated that the said orders were made by a court with competent jurisdiction and therefore the Respondents had a plain and unqualified obligation to obey the orders of this court and comply with them. It was emphatic that court orders were not made in vain but were meant to be complied with. It added that if the Respondents had difficulties in complying with the said orders, then they ought to have informed it and the court of the same but they failed to do so.
6. It averred that it had continued to suffer unnecessary financial losses and violation of the right to access justice guaranteed under Article 48 of the Constitution as a result of the Respondents' disobedience of this court's orders.
7. It asserted that the 2nd Respondent was the accounting officer of the 1st Respondent and was responsible for authorising and approving any payments to third parties for and/or on behalf of the 1st Respondent hence he should be held responsible for any failure by the 1st Respondent to make payment as ordered by this court.
8. It urged the court not to shy away from its responsibility to deal firmly with proved contemnors to give assurance to litigants that courts have the ability to ensure obedience of its orders by punishing contemnors. It added that willful disobedience of court orders had 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.



9. It averred that it was in the interest of justice that the 2nd Respondent be committed to civil jail for disobeying the lawful orders of this court.
10. Its Written Submissions were dated 7th April 2022 and filed on 8th April 2022. Despite the Respondents having been served with the *Ex parte* Applicant's Notice of Motion application, orders giving them timelines to respond to the said application, Mention Notices to attend court, they failed to file any response or Written Submissions to the present Notice of Motion application and also failed to attend court.
11. This Ruling is therefore based on the *Ex parte* Applicant's Affidavit and Written Submissions which it relied upon in its entirety.

Legal Analysis

12. The *Ex parte* Applicant submitted that the orders of court had not been varied through a successful appeal or any other means and the Respondents therefore continued to be liable to pay the said sums.
13. It placed reliance on the case of *Tom Ojienda & Associates vs County Secretary Nairobi City County & Another* [2022] eKLR which cited the case of *Felicity Mutete Mutula vs Nairobi City County Government* [2021] eKLR where the court laid down the salient features in an application for contempt of court.
14. These were that disobedience of a court order or judgment was a foundation for contempt of court proceedings, where the contemnor was a company or other corporation, the committal order could be made against any director or other officer of that company, the judgment or order in question must have been served on the person required to do or not to do the act in question unless the court expressly dispensed with personal service, where the person required to do or not to do an act was a company or other corporation, a copy of the judgment or order must also have been served on the alleged contemnor. In addition, judgments and orders must have been served personally.
15. However, the court could dispense with personal service if it was satisfied that the contemnor had notice of the judgment. There had to be a warning permanently displayed on the front copy of the judgment or order warning the person that disobedience to the order would be contempt of court punishable by imprisonment or a fine and that the contempt of court application, notice and evidence in support must have been served personally on the respondent.
16. It contended that despite having knowledge of the orders, the Respondents had neither made any payments nor made effort or demonstrated their intention to pay. It added that therefore there was a glaring willful disobedience of the orders of court on their part.
17. Contempt of Court is in the nature of criminal proceedings and, therefore, proof of a case against a contemnor is higher than that of balance of probability as was held in the case of *Mutitika vs Baharini Farm Limited* [1985] KLR 229,234.
18. There cannot therefore be deliberate and willful disobedience, unless a contemnor had personal knowledge of the existence of that order and that he had deliberately and willfully disobeyed as was held in the case of *Econet Wireless Kenya Ltd vs Minister for Information & Communication of Kenya & Another* [2005] eKLR.
19. The power to punish for contempt is a discretionary one and should be used sparingly. This is because liberty of the subject is usually at stake and the applicant must prove willful and deliberate disobedience of the court order by the contemnor. Due to the gravity of consequences that ordinarily flow from



contempt proceedings, it is proper that the order be served and the person cited for contempt should have had personal knowledge of that order and willfully disobeyed the order.

20. A perusal of the court's record showed that when the *Ex parte* Applicant's Application dated 2nd November 2020 came up for hearing on 2nd March 2021, the Respondents were not present, either virtually or physically in court. The Affidavit of Service of Sharon Onyango that was sworn on 16th February 2021 and filed on 18th February 2021 showed that they had been duly served with a Hearing Notice. There was also no response to the said application. As the said application was unopposed, this court allowed the same in terms of prayers Nos (1), (2) and (3) accordingly. An order was extracted and issued on 11th March 2021. It read as follows:-

“It is hereby ordered:-

1. That an Order of Mandamus directing the 1st Respondent and the 2nd Respondent and/or severally, together with their agents or servants to immediately make payments of the Decretal sum of Kenya Shillings Six Million, Three Hundred and Nineteen Thousand, Five Hundred and Thirteen and Thirty cents (6,319,513.30/=) together with interest accruing at 6% per month, until payment in full, pursuant to the Judgment against the 1st Respondent obtained from the Chief Magistrate Court at Kisumu in Civil Suit No 254/2014.
 2. That an Order of Mandamus directing the 1st Respondent and the 2nd Respondent, jointly and/or severally, together with their agents and/or servants to immediately make payments of Kenya Shillings Four Hundred and Sixty-Two Thousand, Two Hundred and Fifty-Two and Thirty cents (462,252.30/=) being costs of the suit pursuant to the Party and Party Costs assessed by the Honourable Court.
 3. That Costs of the Application is awarded to the Applicant.”
21. Notably, the *Ex parte* Applicant demonstrated through Annexures KK-4a, KK-4b, KK-4c and KK-4d that it duly served the Respondents with the copy of the Application dated 2nd November 2020, the Order dated 11th March 2021 and a Notice to Pay dated 15th April 2021. The court had a keen look at the same and noted that they actually bore the stamp of the Respondents herein. However, despite having also been properly served with the present Notice of Motion application, the court order and Notice to Pay, the Respondents had not made any payment to date.
22. Contempt proceedings are a serious undertaking because a court exercising this jurisdiction is minded to ensure the orderly functioning of society and the rule of law. Taking into account the circumstances of this case and the material placed before court, this court was satisfied that the *Ex parte* Applicant had proved its case against the Respondent to the required standard and it had to step in to maintain the dignity and sanctity of the court.
23. Having said so, while the Court noted the *Ex Parte* Applicant's submissions that the 2nd Respondent was unfit to hold state and/or public office, it was of the view that such an order was not the nature of an order than could be made in an application in a miscellaneous application. It ought to be made in a substantive petition for consideration by the court.
24. Notably, Chapter Six (6) of the [Constitution](#) of Kenya sets out the qualities of a person to hold public office and sets out the processes in the event a state or public officer contravened Chapter Six (6) of the [Constitution](#) of Kenya. The court did not deem it necessary to say more on this issue.



Disposition

25. For the foregoing reasons, the upshot of this court's decision was that the *Ex parte* Applicant's Notice of Motion application dated 7th June 2021 and filed on 1st July 2021 was merited and the same be and is hereby allowed in terms of prayers Nos (b), (d) and (f) therein.
26. A warrant of arrest be and is hereby issued against the 2nd Respondent herein and to be effected forthwith.
27. Matter to be mentioned on 28th June 2022 with a view to establishing if the 2nd Respondent will have been arrested and/or for further orders and/or directions.
28. It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 20TH DAY OF MAY 2022

J. KAMAU

JUDGE

