



**Republic v Kenya Veterinary Vaccines Production Institute & another; Leeds Equipments & Systems Limited (Exparte) (Judicial Review 136 of 2019) [2022] KEHC 11161 (KLR) (Judicial Review) (23 June 2022) (Ruling)**

Neutral citation: [2022] KEHC 11161 (KLR)

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

**JUDICIAL REVIEW  
JUDICIAL REVIEW 136 OF 2019**

**AK NDUNG'U, J  
JUNE 23, 2022**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**KENYA VETERINARY VACCINES PRODUCTION INSTITUTE .... 1<sup>ST</sup>  
RESPONDENT**

**DR. JANE WACHIRA ..... 2<sup>ND</sup> RESPONDENT**

**AND**

**LEEDS EQUIPMENTS & SYSTEMS LIMITED ..... EXPARTE**

**RULING**

1. Pursuant to the Court's directions of July 27, 2020, before this court are 2 applications dated December 18, 2019 and December 20, 2019 respectively. The 1<sup>st</sup> application is filed by the 1<sup>st</sup> Respondent herein and it seeks the following orders;
  - i. Spent.
  - ii. An interim order of stay of execution of the Decree dated November 28, 2019 and delivered on December 9, 2019 be granted pending hearing and determination of this Application.
  - iii. An order of stay of execution of the Decree dated November 28, 2019 and delivered on December 9, 2019 be granted pending the lodging, hearing and determination of the intended appeal.
  - iv. Costs of this application be provided for.



2. The 1<sup>st</sup> Respondent contends that if stay of execution is not granted it will suffer substantial loss and damage as the *Ex Parte* Applicant will supply it with machines not fit for vaccine production processes. According to the 1<sup>st</sup> Respondent it requires machines that only fill liquids during vaccine processes while those to be supplied by the *Ex parte* Applicant can only fill powders. Secondly that the *Ex parte* Applicant's machines cannot cap the 1<sup>st</sup> Respondent's vaccine bottles as the height of the machine's filling line does not correspond with the height of the 1<sup>st</sup> Respondent's vaccine bottles.
3. According to the 1<sup>st</sup> Respondent awarding the tender to the *Ex Parte* Applicant will mean that the sum of Ksh 93 million of public funds will go to waste as it has no use for the machines bearing the specifications set by the *Ex parte* Applicant.
4. The *Ex parte* Applicant in response to the instant application filed Grounds of Opposition in which 6 grounds were raised. It is contended that this honourable court is *functus officio* and that there is no positive order capable of being stayed. Further that the application has the effect of reviving the dismissed Judicial Review Application No 142 of 2018. It is also the *Ex parte* Applicant's case that the said application offends the provisions of section 8 and 9 of the [Law Reforms Act](#).
5. It is the *Ex parte* Applicant's case that this Court does not have jurisdiction to grant the stay order sought by the 1<sup>st</sup> Respondent for the reason that there is no suit pending before the court as the Court already rendered Judgment on the said matter. To support this argument, the case of [Republic v Human Resource Advisory Committee-Rural Electrification Authority & another Ex parte Irene Chesang](#) [2018] eKLR was cited.
6. In addition, it is the *Ex parte* Applicant's argument that a Judicial Review Court cannot grant an order of injunction as it falls outside the reliefs available to it according to the provisions of section 8 of the [Law Reform Act](#).
7. I have considered the pleadings and arguments advanced by the parties herein. The issue for determination is whether the Respondents/Applicants have provided sufficient reasons to warrant this court to stay the execution of the Decree dated November 28, 2019 and delivered on December 9, 2019 directing the 2<sup>nd</sup> Respondent herein to award the tender to the *Ex parte* Applicant.
8. I have also had an opportunity to look at the proceedings before the Public Procurement Review Board and the Judgment of Nyamweya J (as she then was) and also the Judgment of Bwononga (J) that the Respondents herein intend to appeal. The Respondents' case before the Board was that it terminated the said Tender as it lacked sufficient funds to finance the required amounts quoted by Tenderers despite the Procuring Entity having chosen the Tenderers with the lowest bid prices. Worth noting also is that the said termination was done after all stages of evaluation had been completed and several bids found responsive.
9. Before Nyamweya J (as she then was) the Respondents' herein purported to fault the Review Board for failing to take into consideration the fact that the *Ex parte* Applicant's bid was not responsive to which the court held as follows;

“In addition, the issue of the technical responsiveness of the Interested Party's bid was not raised by the Interested Party of the Applicant in the Request for Review, neither did the Applicant bring any evidence to show that it raised the said issue in the Request for Review, and that the Respondent failed to address it. The Respondent cannot therefore be accused of failing to consider the same in the context of the Interested Party's Request for Review as a relevant factor, even though it has powers to review the technical responsiveness of a bid.”



10. An Order of Mandamus was subsequently issued by Bwononga J directing the 2<sup>nd</sup> Respondent to satisfy the orders of the Tribunal and the Court by awarding the tender to the *Ex parte* Applicant. It is this order that the Respondents seek to stay pending the determination of an intended appeal.
11. The law on stay of execution is provided under Order 42 Rule (6) (2) of the [Civil Procedure Rules 2010](#). An application for stay of execution can only succeed if the applicant satisfies the following criteria:
  - “(1) The applicant must show that he or she has filed the notice of appeal and that the stay of execution has been filed without undue delay.
  - (2) Secondly, from the facts of the case appealed from the applicant would suffer substantial loss unless stay of execution is granted.
  - (3) That the application has provided security for due performance of the decree or any such order which may be issued by the court at the end of the determination of the appeal.
12. It is not in contention that the Respondents herein filed a Notice of Appeal on December 13,2019, this was 4 days after being issued with the Court’s Decree and further that in the Application before this Court the Respondents state that they are ready to provide security in the terms and conditions as may be set by the Honourable court.
13. The Respondents’ contention that that they will suffer substantial loss if the said orders are not set aside as the *Ex parte* Applicant is likely to supply the 1<sup>st</sup> Respondent with machines not fit for vaccine production processes and that, Additionally, awarding the tender to the *Ex Parte* Applicant will mean that the sum of Kshs 93 million of public funds will go to waste as it has no use for the machines bearing the specifications set by the *Ex parte* Applicant needs a keener interrogation.
14. During the tendering process that was undertaken to completion the Respondents had the opportunity to identify whether the machines to be supplied by the *Ex parte* Applicant were what was required for the said purpose. There is evidence that this was done since according to the Procurement Manager’s professional report, only a few out of the tenderers who had tendered their bids had responsive bids. The Respondents seem to suggest that the suitability of the machines had not been considered and that it only became apparent upon the filing of an Appeal against the decision of the Board. The Respondents, as has been established by the proceedings before the Review Board annexed herein, did not raise this issue before the Tribunal nor was it raised in the Professional opinion of the Procurement Manager, despite the same being a key factor in evaluation of the bids. A further reading of the proceedings before the Review Board will show that the Respondents’ case was that the impugned tender was terminated due to budgetary constraints.
15. The respondent applicant cannot at this late stage when applying for a stay of execution seek to change the substratum of their case before the Board and before the review court. It is worthwhile to note that what is sought to be stayed is the order of mandamus issued by Bwononga J compelling the Respondents to award the subject tender to the *Ex Parte* Applicant. The order of mandamus sought to enforce the judgement of the court in Judicial Review Application No 142 of 2018 in which the Respondents case had been dismissed. The proceedings in the application for an order of mandamus and in Judicial Review Application No 142 of 2018 are joined at the hip and cannot be severed. The order in Judicial Review Application No 142 of 2018 was a negative order. The court cannot stay a negative order as there is nothing to stay.



16. Mativo J in *Rana Auto Selections Ltd & 2 others v Kenya Revenue Authority & another* (Judicial Review Application 9 of 2020) [2021] KEHC 323 (KLR) (18 November 2021) (Ruling) stated,
- “Decided cases reveal that our courts have been categorical that once the High Court dismisses a Judicial Review application, thereby issuing a negative order incapable of being executed, the only remedy for an aggrieved person is to appeal. This position was articulated in *Cortec Mining Kenya Limited v Cabinet Secretary, Attorney General & 8 others* in which the applicant had appealed to the Court of Appeal against a High Court decree ensuing from a judgment in Judicial Review proceedings in which the applicant had sought orders of *certiorari* and *mandamus* but the High Court found it devoid of merit and dismissed it”.
17. The application dated December 18, 2019 is thus without merit and is one for dismissal.
18. The 2<sup>nd</sup> Application dated December 20, 2019 is by the *Ex parte* Applicant herein which seeks the following orders;
- i. That this Application be certified urgent and service of the same be dispensed with in the first instance.
  - ii. That notice to show cause do issue to Dr Jane Wachira, the Accounting Officer of Kenya Veterinary Vaccines Production Institute to show cause why she should not be committed to civil jail and ordered to pay sum of monies as penalty for being in contempt of the Decree issued on December 11, 2019.
  - iii. That this Honorable Court be pleased to issue a declaration that Dr Jane Wachira, the Accounting Officer of Kenya Veterinary Vaccines Production Institute is in contempt of the Decree issued on December 11, 2019.
  - iv. That this Honourable Court be pleased to order that Dr Jane Wachira, the Accounting Officer of Kenya Veterinary Vaccines Production Institute be arrested and committed to civil jail for a period the court may determine and be ordered to personally pay the sum of monies the court may determine as a penalty for deliberately defying and violating the clear, concise and unequivocal Decree of this Honourable Court issued on December 11, 2019.
  - v. That the Costs of this Application be awarded to the *Ex parte* Applicant.
19. It is the *Ex Parte* Applicant’s case that despite the Court granting an Order of Mandamus against the 2<sup>nd</sup> Respondent and a Decree being issued on December 11, 2011 and a letter dated December 13, 2019 requesting the Respondents to comply with the said order being served, the 2<sup>nd</sup> Respondent has deliberately failed/ refused to honour the said Decree.
20. The *Ex parte* Applicant contends that the Appeal by the Respondents was instituted without any stay of execution and that the said appeal is against the Orders of Mandamus and not the orders made in JR No 142 of 2018 and Request for review No 34 of 2018 and therefore the Respondents acted in breach of the said orders as they ought to have applied for a stay of the order earlier.
21. The 2<sup>nd</sup> Respondent is faulted for deliberately disobeying court orders in a matter that has been already dealt with by already by the court and the public procurement administrative review board. It is the Respondent’s case that obedience of a court order is fundamental to the administration of justice and rule of law. To support this argument, the cases of *Econet Wireless Kenya Limited vs Minister for Information & Communication of Kenya & Another* and *Teachers Service Commission vs Kenya National Union of Teachers & 2 Others* [2013] were cited.



22. It is the *Ex parte* Applicant's case that Contempt of court is an affront to judicial authority and therefore is not a remedy chosen by a party but is invoked to uphold the dignity of the court. The case of *Miguna Miguna v Fred Matiang'i, Cabinet Secretary Ministry of Interior and Co-ordination of National Government & 8 others* [2018] eKLR was cited in this regard.
23. In their defense the Respondents filed a Replying Affidavit sworn by Dr Wachira on January 13, 2020 and Grounds of Opposition dated December 3, 2021. The Respondent's case is that being aggrieved by the decision of November 28, 2019 an appeal was instituted and that at the time of filing the said Replying Affidavit the 2<sup>nd</sup> Respondent herein was awaiting the typed and certified copies of the proceedings in order to file a Record of Appeal. Further that an application for stay of execution had also been filed.
24. The Respondents also argued that the Respondent's conduct was not willful or deliberate but that they were having issues complying with the Decree for the reasons that the machines to be supplied by the *Ex parte* Applicant were not fit for the purpose and awarding the said tender to the *Ex parte* Applicant would negate the principles encapsulated under Article 201(d) and 227(1) of the *Constitution* of Kenya, 2010.
25. In addition, the Respondent urged that the instant Notice of Motion is barred by section 178(1) of the *Public Procurement and Asset Disposal Act*, 2015. The decree is also said to be null and void pursuant to the provisions of section 175(3) of the *Public Procurement and Asset Disposal Act*, 2015.
26. The Respondents contended that for the application to succeed the *Ex parte* Applicant is required to prove that the Respondents have deliberately and intentionally disregarded the court order in issue which fact it has been unable to prove. To support this argument, the Respondents cited the case of *Samuel M N Mweru & Others v National Land Commission & 2 Others* [2020] eKLR.
27. I have considered the application, the supporting grounds and affidavit as well as learned submission by counsel. The sole issue for determination is whether the *Ex parte* Applicant has achieved the threshold for the grant of the orders sought. It is evident that there is no dispute that a Decree was issued by the court on December 11, 2019 compelling the 2<sup>nd</sup> Respondent to award the said tender 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.
28. 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 *Hadjinson 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. Babarini 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.”

29. From the foregoing it is evident that obedience to a court order is not optional on the part of the party required to to comply with it. This court has a responsibility to promote the rule of law through a vigilant enforcement of its orders. The opposite would be a sheer invite to anarchy and disorder.
30. No plausible explanation has been given for the 2<sup>nd</sup> Respondent’s failure to comply with this court’s order dated November 28, 2019. On the material before court, 2<sup>nd</sup> Respondent’s actions were purposeful, in the sense that she knowingly disobeyed the Court Order with an attempt to introduce extraneous reasons for inability to comply, reasons that are not sustainable at this stage as they ought to have been dealt with at the tendering stage and in earlier proceedings before this court and the Public Procurement Administrative Review Board. I find the 2<sup>nd</sup> Respondent in contempt of the orders of this court for which she should be punished.
31. Accordingly, I make the following orders;
- i. The Respondent’s Application dated December 18,2019 is dismissed with no orders as to costs.
  - ii. The *Ex parte* Applicant’s application dated December 20, is allowed with costs.
  - iii. The 2<sup>nd</sup> Respondent herein, Dr. Jane Wachira is ordered to appear in person before this court on September 27, 2022 to show cause why she should not be committed to civil jail. In default of appearance, a warrant of arrest is to issue.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 23<sup>RD</sup> DAY OF JUNE ,2022**

**A K NDUNG’U**

**JUDGE**

