



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CONSTITUTIONAL & JUDICIAL REVIEW DIVISION

JUDICIAL REVIEW NO. 28 OF 2019

IN THE MATTER OF: AN APPLICATION FOR

THE JUDICIAL REVIEW ORDER OF MANDAMUS

AND

IN THE MATTER OF: THE GOVERNMENT PROCEEDINGS ACT

AND

IN THE MATTER OF: MOMBASA CMCC NO. 1794 OF 2013

(LUCY NDUTA NG'ANG'A VS. THE ATTORNEY GENERAL)

BETWEEN

LUCY NDUTA NG'ANG'A.....APPLICANT

AND

1. THE PRINCIPAL SECRETARY,

MINISTRY OF INTERIOR AND

COORDINATION OF GOVERNMENT

2. THE ATTORNEY GENERAL.....RESPONDENTS

RULING

1. There are two applications before the court as follows:

(1) Notice of Motion dated 22/11/2019 filed by the Ex parte Applicant. The application prays for the following orders:

(i) That the application be certified urgent.

(ii) That the Honourable Court be pleased to find the 1st Respondent, Dr. Karanja Kibicho, and the 2nd Respondent, on. Paul Kihara Kariuki, in contempt of the court for willfully disobeying the order issued on 8/10/2019.

(iii) That the Honourable Court be pleased to grant leave for the committal to civil jail of the 1st and 2nd Respondents.

(iv) That the Honourable Court be pleased to commit the 1st Respondent, Dr. Karanja Kibicho, and the 2nd Respondent, Hon. Paul Kihara Kariuki, to civil jail for a period of six (6) months.

(v) That the costs of the application be borne by the Respondent.

(2) Notice of motion dated 30/1/2020 filed by the Attorney General/ Respondent on 7/2/2020. The application prays for the following orders:

(i) That the application be certified urgent and heard ex parte in the first instance.

(ii) That pending the hearing and determination of this application this Honourable Court strikes out names of Dr. Karanja Kibicho and Hon. Paul Kihara Kariuki from the application dated 23/1/2020 that is to be heard on the 11/3/2020.

(iii) That the costs of this application be borne by the Ex parte Applicant.

2. The first application is based on grounds that:

(a) This court on 8/10/2019 issued an order compelling the Respondents to satisfy the decree issued on 8/3/2016 in MOMBASA CMCC No. 1794 of 2013.

(b) The Respondents were served with the said order.

(c) Despite personal knowledge of the order, the Respondents have willfully disobeyed the same by blatantly refusing to satisfy the decree.

(d) In the circumstances, committal orders are the only and most efficacious mode of compelling the contemptuous Respondents to obey the court order and/or purge the contempt, thereby protecting the dignity of the court, the sacrosanctity of its orders, and the rule of law.

(e) The application is the only avenue available to the Applicant of enforcing the said orders.

3. The 2nd application is based on grounds that:

(i) That the Applicant's application be struck out with costs for non-compliance with the rules and the law since the orders to commit the persons of Dr. Karanja Kibicho and Hon. Paul Kihara Kariuki cannot be issued against them in person as the Principal Secretary in the Ministry of Interior and Coordination of Government and the Hon. Attorney General.

(ii) That Dr. Karanja Kibicho and the Hon. Paul Kihara Kariuki do not have the capacity to satisfy the decretal sum issued on 8/3/2016 in MOMBASA CMCCC No. 1794 of 2013.

(iii) That the 2nd Respondent or his agents ought not be condemned for actions taken in good faith, in their official capacity per Section 8 (1) and (2) of the Office of the Attorney General Act as read with Article 156 (7) of the constitution of Kenya.

(iv) That Dr. Karanja Kibicho is protected from personal liability for acts done in good faith in his official capacity per Section 22 of the National Government Coordination Act, 2013 and therefore the suit is non-starter.

(v) That Section 8 (1) and (2) of the Office of the Attorney General Act provides that (1) No criminal proceeding or civil suit shall be brought against the Attorney General, the Solicitor General or a subordinate office in respect of any proceeding in a court of law or in the course of discharging of the functions of the Attorney General under the constitution and this Act. (2) No matter or thing done by the Attorney General, the Solicitor General or a subordinate office shall, if the matter or thing is done in good faith for executing the functions, powers or duties of the Commission, render the Attorney General, Solicitor General or other subordinate officer personally liable to any action, claim or demand whatsoever.

(vi) That any liability resultant from a cause of action arising from acts of the Hon. Paul Kihara Kariuki, in his official capacity, is by law to be borne by government.

(vii) That Government Proceedings Act Section 13A determines the procedure on how to institute a suit against the government and/or a government officer upon travesty of justice which the Applicant did not follow.

(viii) That the application herein was supposed to be brought only against the Principal Secretary Ministry, department in the ministry and/or office of the Regional Coordinator in their official capacity and not the Hon. Attorney General Hon. Paul Kihara Kariuki in his personal capacity.

(ix) That the Attorney General is a necessary party in all suits against government ministries, departments and/or officers on their official capacity and not the Hon. Paul Kihara Kariuki in his personal capacity.

(x) That the Attorney General is a necessary party herein as the statements averred in the application are invoked to have been stated in the 2nd Respondents' cause of duty as the Attorney General, an appointee of his Excellency the President of the republic of Kenya and not in his capacity as a private citizen.

(xi) That the Hon. Paul Kihara Kariuki will suffer ridicule harassment, intimidation and embarrassment in his personal capacity as the Hon. Attorney General if this suit is not determined at the first instance.

(xii) The Hon. Paul Kihara Kariuki, the Attorney General, a presidential appointee is threatened with committal to civil jail in his personal capacity for performing his statutory duty in good faith.

(xiii) That the application against the person of the Hon. Paul Kihara Kariuki, the Attorney General is motivated by malice and merely meant to harass, intimidate and cause embarrassment to the defendant and the same ought to be struck out with costs.

(xiv) That it is in the best interest of justice and fairness that the orders sought in this application be granted.

4. The two applications were consolidated for hearing together.

5. However, before they could be heard Mr. Mkok, learned counsel for the Attorney General on 7/10/2020 said that the Attorney General was taking urgent measures to pay the decretal sum which gave rise to the Ex parte Applicant's application herein (the 1st application) and that there was indeed no need to have the two applications heard since the Ex parte Applicant's aforesaid application sought to enforce the payment of the underlying decree. The court, upon such submissions by Mr. Mkok, directed the parties to negotiate settlement as may be necessary but also directed them to file submissions should such negotiation fail. The matter was to be mentioned on 16/11/2020.

6. Parties filed submissions which I have considered. The issues before the court and which call for determination are:

(i) Whether the Respondents are in contempt of court

(ii) What orders should issue

Whether the Respondents are in contempt of court

7. This court on 8/10/2019 issued an order compelling the Respondents to satisfy the decree issued on 8/3/2016 in Mombasa CMCC No. 1794 of 2013. The Respondents were served with the said order but have willfully disobeyed the same, for a period over one year now.

8. Under the Contempt of Court Act contempt of court is categorized generally into civil contempt and criminal contempt. Civil contempt is defined as '*willful disobedience of any Judgment, decree, direction, order, or other process of a court or willful breach of an undertaking given to a court*'. There is an express order of this court issued on 8/10/2019 compelling the Respondents to satisfy the decree issued on 8/3/2016 in Mombasa CMCC No. 1794 of 2013. The said order was duly served upon the Respondents and they are yet to comply. No explanation has been offered by the Respondents as to why they have failed to comply.

9. The Respondents have resorted to Section 8 of the Office of the Attorney-General Act and Section 22 of the National Government Co-ordination Act which shield the Respondents from personal liability where the thing complained of is done in good faith.

10. The operative word in those provisions is good faith. The Supreme Court in **Bellevue Development Company Ltd v Francis Gikonyo & 3 others [2020] eKLR**, while discussing immunity of judicial officers, stated the following:

Article 160(5) grants judicial officers immunity if they act in "*good faith*". What therefore, is '*good faith*'? According to the Black's Law Dictionary, Ninth Edition at pg. 713, '*good faith*' is defined as "*A state of mind consisting in (1) honesty in belief or purpose, (2) faithfulness to one's duty or obligations, (3) observance of reasonable commercial standards of fair dealing in a given trade or business, or (4) absence of intent to defraud or to seek unconscionable advantage.*"

11. The decree in respect of which this court issued an order of mandamus was issued in the year 2016. The mandamus order has been in effect for over 1 year now. Despite that, the applicant has not been paid. The Respondents have a duty to the Applicant which they have not been faithful to. Going by the definition adopted by the Supreme Court, the actions of the Respondents are clearly devoid of any good faith.

What orders should issue

12. The punishment for contempt of court is set out in section 28 of the Act and includes a fine not exceeding Kshs. 200,000 or a custodial sentence of up to 6 months or both. The penalties issue as a matter of course following a finding of contempt.

13. However, it is also clear that the Respondents have not refused to pay the decretal sum. Punishment for contempt in civil matters should be reserved for the harshest of cases. It is not the intention of the civil process to punish people or to take people to jail. Mr. Mkok, learned counsel for the Attorney General, submitted that the application dated 30/1/2020 is worthy of consideration as payment is underway and the Respondents will soon pay the outstanding decree. Counsel submitted that the orders sought in the Applicant's Notice of Motion dated 22/11/2019 are not only drastic but would lead to unnecessary embarrassment to the office holders in their personal capacity and a disgrace to the executive arm of the government.

14. In the light of the foregoing this court finds that indeed the Respondents are in contempt of court. However, this court, having been made aware that the decree is in the process of being paid, will stay for a period of 90 days any consequences of the Ruling herein.

15. In the upshot the court finds that application No. 1 herein dated 22/11/2019 has been proved while the application by the Attorney General dated 30/1/2020 has not been proved. Orders are granted as follows:

(i) The court finds the 1st Respondent Dr. Karanja Kibicho and

the 2nd Respondent Hon. Paul Kihara Kariuki in contempt of the court for willfully disobeying the order issued on 8/10/2019.

(ii) The Respondents are given 90 days to satisfy the decree herein.

(iii) That if the Respondents fail to comply with Order (ii) above, the Respondents shall personally come to this court on 4/5/2021 to show cause why they should not be punished for contempt of court.

Orders accordingly.

Dated, Signed and Delivered in Mombasa this 26th day of January 2021.

E. K. O. OGOLA

JUDGE

Ruling delivered via MS Teams in the presence of:

Mr. Owino for Applicant

No appearance for Hon. Attorney General

Ms. Peris Court Assistant