



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW APPLICATION NO. 302 OF 2015

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

THE CHIEF EXECUTIVE OFFICER, THE INDEPENDENT

ELECTORAL BOUNDARIES COMMISSION.....RESPONDENT

EX PARTE APPLICANT:

OFFICE TECHNOLOGIES LIMITED

RULING

1. The application that is the subject of this ruling is an Amended Notice of Motion dated 17th April, 2019 filed by the Applicant, Office Technologies Limited (hereinafter referred to as “the Applicant”) in which it was seeking orders that this Court punishes Mr. Marjan Hussein Marjan, the acting Chief Executive Officer of the Independent Electoral and Boundaries Commission, the Respondent herein, by way of committal to prison for a term not exceeding six months or a fine or both for having deliberately disobeyed the Court Orders and Judgement made by Hon. G.V. Odunga on 28th November, 2016. Further, that the Respondent be condemned to pay the costs of this application in any event.

2. The Application is supported by an affidavit sworn on 17th April, 2019 by Basil Serrao, a Director of the Applicant and a supplementary affidavit sworn on 18th September, 2019 by Stephen Gitonga Mureithi, the Applicant’s Advocate having the conduct of this matter. The Respondent filed a replying affidavit sworn on 18th February, 2020 by Wilfred Akhonya Mutubwa an Advocate of the High Court of Kenya practising as a partner in the firm of Messrs Lubulellah & Associates, Advocates, and who has the conduct of this matter on behalf of the Respondent. The Court directed the parties to canvass the application by the way of written submissions, which were filed by the respective advocates for the Applicant and Respondent and dated 17th October 2019 and 18th February 2020 respectively. The parties’ respective cases are summarised in the following sections.

The Applicant’s case

3. The Applicant contended that on 28th November, 2016 a judgment was delivered herein by Odunga , that compelled that Respondent’s Chief Executive Officer to forthwith and without delay, pay to the Applicant the full decretal sum due at such date including interest and costs.. However, that despite orders given on 28th November, 2016 and which the Respondent is aware of, the Respondent had failed and/or refused to pay the Applicant, which is a flagrant breach and disobedience of this Court. The Applicant also averred that it is being improperly denied the benefit of the judgment for an amount that has been pending since March 2013, and continues to suffer financial hardships due to the actions of the Respondent. The Applicant annexed a copy of the said judgment and decree together with a penal notice, which it stated was duly served, and also annexed a copy of the affidavit of service.

4. The Applicant explained in its supplementary affidavit that on 11th July, 2014, Ogola J. entered summary judgment in favour of the Applicant for Kshs. 220,440,000.00 plus interest as from March 2013, in **Nairobi HCCC No. 60 of 2014 - Office Technologies Limited vs Independent Electoral & Boundaries Commission**, and that the determination on the issue of the interest rate applicable was reserved. Further, that on 17th October, 2014, the court subsequently delivered a ruling on the issue of the applicable interest rate and ordered that it ought to be 15% per annum as from 14th March, 2013. It was averred that on the same dated on 17th October, 2014, the Respondent paid the principal sum of Kshs. 220,440,000.00, but omitted to pay the interest that had accrued as from 14th March, 2013. The Applicant added that on 7th May, 2015, a decree was issued showing that the interest from March 2013 to 11th July, 2014 was Kshs. 45,386.482.10, and that the costs of the suit were subsequently taxed at Kshs. 8,837,142.00 on the same date.

5. According to the Applicant, on 6th June, 2017, the Respondent paid a sum of Kshs. 54,223,624.00, omitting to pay the interest accrued on the principal sum from the period 11th July, 2014 and 17th October, 2014 when the principal sum was paid. Thereafter, that the matter was referred back to the Deputy Registrar to do a tabulation of the outstanding amount to enable the court make further directions, and that on 17th of September, 2018, the Deputy Registrar, Hon. Elizabeth Tanui, delivered a ruling that established the outstanding amount payable to the Applicant to be a sum of Kshs. 7,243,568.00, and a copy of the said ruling was annexed. Lastly, the Applicant contended that the Respondent was yet to pay the said outstanding amount.

The Respondent's Case

6. The Respondent on its part averred that it came to learn of the ruling delivered by Hon. Elizabeth Tanui on 17th September, 2018 when it came to its Advocate's knowledge upon service of the Applicant's supplementary affidavit upon the said Advocate's firm on the 4th February, 2020. According to the Respondent, the instant application is frivolous, vexatious, devoid of merit and mala fides for the reason inter alia, in that, the Applicant has never complied with Section 21(1) and (2) of the Government Proceedings Act which provides that payment must be based on a Certificate of Costs obtained by the successful litigant from the court issuing the decree, which should be served on the Hon. Attorney General, and a Certificate of order against the Government should be issued by the court after expiration of 21 days after entry of judgment. Further, that the Applicant had failed to exhibit the same within these proceedings.

7. It was also averred that as had been admitted by the Applicant, the Respondent paid the principal sum of Kshs. 220,440,000.00 on 17th October, 2014, and thereafter paid a further sum being accrued interest & costs of Kshs. 54,223,624/= on 6th June, 2017. It was contended that following these payments, the Applicant being dissatisfied, and being unable to agree with the Respondent as to whether there was any outstanding amount as interest, filed an application in **HCCC No. 60 of 2014** seeking the Deputy Registrar of the High Court Commercial and Admiralty Division, to certify the amount outstanding as interest and now payable in full & final settlement. The Respondent averred that the Deputy Registrar delivered a ruling thereon on the 17th September, 2018 finding the outstanding amount due and payable to the Plaintiff as being Kshs. 7,243,568 in its absence or its Advocates on record, and no order was extracted therefrom nor affidavit of service to show that the order was served upon the alleged contemnor personally or the Respondent.

8. The Respondent's case therefore is that he application for contempt is inherently defective for the following reasons:

(a) The Amended Notice of Motion application does not indicate the specific sum of money which the Applicant wishes the Respondent to be held in contempt for failing to pay.

(b) The decrees attached to the Applicant's affidavit in support of the said application do not indicate any definitive sums which the Applicant wishes the Respondent to specifically pay to it and purge the purported contempt.

(c) The Applicant has never extracted and served upon the Respondent, personally, the order of the court arising from the ruling of Deputy Registrar Elizabeth Tanui dated 17th September, 2018 in HCCC No. 60 of 2014, a ruling which has only been introduced into these proceedings through the supplementary affidavit only filed herein by the Applicant's Advocate on the 17th September 2019 and only served upon the Respondent's Advocates firm on the 4th February 2020. Further, the Applicant failed to serve the same upon the Respondent or its Advocates before instituting these proceedings.

9. Consequently, that the Respondent had never been aware or caused to be aware of exactly how much the Applicant seeks to be paid as a balance of the decretal sum, especially given the admitted substantial satisfaction of the decretal sums due to the Applicant, and there has therefore been no wilful refusal by the Respondent to satisfy any decretal sums as alleged. In addition, the ruling by the Deputy Registrar dated 17th September, 2018 only came to the Respondent's notice upon service of the same upon his firm on the 4th February, 2020. The Respondent averred that had it been properly and timeously served with a certified true copy of an order extracted from the ruling by the Deputy Registrar dated 17th September, 2018, and more-so a Certificate of Order against the Government in respect of the same, it would have promptly processed the payment being sought by the Applicant herein and obviated the institution of these proceedings.

10. It was also contended that there is no proof to the required standard that the Respondent had wilfully and deliberately violated the judgment of this Court, as it was not aware that there was any outstanding sum of money due and payable to the Applicant until the 4th February, 2020. Further, that the ruling by the Deputy Registrar dated 17th September, 2018 was never served upon the alleged contemnor personally prior to the institution of this application, and was only served upon his Advocates on the 4th February, 2020, which was an unreasonably short notice to expect him to comply with the same, given the stringent Government bureaucracies and the fact that the alleged contemnor had only recently taken office as Acting Chief Executive Officer of the Respondent. The Respondent elaborated on its constitutional functions, including its financial reporting, and the duties of the alleged contemnor as an accounting officer under the Public Finance Management Act.

11. In conclusion, the Respondent stated that it was yet to prepare estimates of the revenue and expenditure for the year, hence the funds for the payment of the money sought by the Applicant were yet to be processed, and it would require to be given time in order to have the same processed and paid to the Applicant.

The Determination

12. The main issue for determination herein is whether the alleged contemnor is culpable of contempt of Court. The Applicant submitted that it is common ground that Mr. Marjan Hussein Marjan, the Respondent's acting Chief Executive Officer, is its Accounting Officer. Further, that the affidavit of service filed on 26th June 2019 clearly indicates that the alleged contemnor was duly served, as well as the advocates on record for the Respondent. Reliance was placed on the case of **Shimmers Plaza Ltd vs NBK (2015) eKLR**, for the position that the alleged contemnor committed the act complained of with full knowledge or notice of the existence of the order of the court, and is guilty of

deliberately ignoring the court orders and judgement made by Odunga J. on 28th November, 2016. Counsel contended that it is common ground that the Respondent was represented in all the proceedings payment of the decretal sum due, and no appeal against the judgments, rulings or any other orders was made in the matters by the Respondent. Reliance was also placed on the case of **Elphas Odiwour Omondi vs Orange Democratic Party Movement & 5 Others** [2017] eKLR for the holding that where a party neither obeys the orders of the court nor approaches the court making appropriate prayers for extension of time or variation of order, the only possible inference in law is that such party disobeys the orders of the court.

13. Similarly, the decision in the case of **Republic vs Principal Secretary, Ministry of Defence ex parte George Kariuki Waithaka** [2019] eKLR was cited for the position that a government official is only exempt from personal liability for a government debt that is due from the government, but does not provide that a government official has immunity from obeying court orders as to the payment of a government debt, nor excuse such disobedience. Likewise reliance was placed on the holding in **Econet Wireless Kenya Ltd vs Minister for Information & Communication of Kenya & Another** [2005] KLR 828, that it is obligation of every person against whom an order is made by a court of competent jurisdiction, to obey it unless and until the order is discharged.

14. The Respondent on its part submitted that the standard of proof in committal proceedings for contempt of court is higher than proof on a balance of probabilities, though not as high as proof beyond reasonable doubt, as held by the Court of Appeal in the case of **Mutitika v. Baharini Farm Limited** [1985] KLR 229, 234, and upheld by the Supreme Court of Kenya in the case of **Republic vs Ahmad Abolfathi Mohammed & Another** [2018] eKLR . The Respondent in this regard submitted that a condition precedent to the satisfaction or enforcement of decrees for money issued against the Government is found in Section 21(1) and (2) of the Government Proceedings Act which provides that payment must be based on a Certificate of Costs obtained by the successful litigant from the court issuing the decree which should be served on the Hon Attorney General. However, that the Applicant had failed to exhibit the same within these proceedings.

15. The Respondent contended that the crucial nature of the requirement was elaborated by Githua J. in the case of **Republic vs. Permanent Secretary, Ministry of State for Provincial Administration and Internal Security Ex parte Fredrick Manoah Egunza** [2012] eKLR. Further, that in the case of **Republic vs Attorney General & another Ex Parte Ongata Works Limited** [2016] eKLR, the court affirmed the position that, even where the decree holder was to be entitled to interest, the Judgment Debtor is entitled to pay only that which appears on the Certificate of Order under Section 21 of the Government Proceeding Act. It was contended that in this matter, the Applicant had never obtained the requisite Certificate of Order nor served the same upon the alleged contemnor or the Respondent hence the standard of proof had not been surmounted.

16. The Respondent further submitted that to form the basis of committal for contempt of court, an order must be clear and unambiguous, as held in the decisions in **Amos Mathenge Kabuthu vs Simon Peter Mwangi** [2015] eKLR; **Jihan Freighters Ltd vs Hardware & General Stores Ltd** [2015] eKLR; and **Republic vs Cabinet Secretary, Ministry of Education & Another ex parte Thadayo Obando** [2018] eKLR. Further, that the Court of Appeal emphasized in **Jihan Freighters Ltd vs Hardware & General Stores Ltd (supra)** and in **A.B. & Another vs R. B.** [2016] eKLR, that to sustain committal for contempt of court, the order of the court that is alleged to have been deliberately disobeyed must be clear and precise so as to leave no doubt as to what a party was supposed to do or to refrain from doing. The Respondent in this regard reiterated that prior to the instant contempt of court application, and prior to 4th February 2020 when the Respondent's Advocates were served with the ruling issued by the Deputy Registrar on 17th September 2018, they were not aware of exactly how much the Applicant seeks to be paid as a balance of the decretal sums especially given that numerous substantial payments had already been made to the Applicant in satisfaction of the very decree it now alleges the Respondent is in breach of.

17. The Respondent contended that in the ruling by the Supreme Court in **Republic vs Ahmad Abolfathi Mohammed 3 & Another, Cr. App. No. 2 of 2018** it was affirmed that to commit for contempt of court, it must be proved that a person has willfully and deliberately violated or disobeyed a court order. Similar holdings in **Tribe Hotel Ltd v Josphat Cosman Onyango** [2018] eKLR and **Republic v City Council of Nairobi & 2 Others ex parte Kaka Travellers Co-operative Savings & Credit Ltd** [2012] eKLR. were also relied upon. The Respondent submitted that the Applicant had in this regard had admitted that the principal sum of Kshs. 220,440,000.00 was paid on 17th October 2014, and that a further sum of accrued interest & costs of Kshs. 54,223,624/- was also paid on 6th June, 2017, which demonstrates the Respondent's goodwill and its officers. Consequently, there was no proof to the required standard that the alleged contemnor had willfully and deliberately violated the judgment of this Court, as he only became properly aware of the exact money he should pay, on the 4th February, 2020, and should accordingly be given time to process the payment of the pertinent debt.

18. I have considered the arguments made by the parties herein, and note that the Applicant's application was brought pursuant to the provisions of the Judicature Act and Civil Procedure Act. This is as a result of the provisions of the Contempt of Court Act 2016 having been declared unconstitutional in a judgment delivered on 9th November 2018 by Mwita J. in **Kenya Human Rights Commission v The Hon. Attorney General & Another** (2018) eKLR.

19. In this regard, the English law on committal for contempt of court is applied by virtue of section 3(1) of the Judicature Act. Rule 81.8 of the English Civil Procedure Rules provides that unless the court dispenses with service, a judgment or order may not be enforced by way of an order for committal unless a copy of it has been served on the person required to do or not do the act in question. Rule 81.6 of the English Civil Procedure Rules specifically provides that the method of service shall be personal service, which is effected by leaving the order with the person to be served.

20. This Court notes that Kenyan courts have also held that personal service of orders and a penal notice is a requirement in contempt of court proceedings, and reference is made to the Court of Appeal decisions in **Nyamogo & Another v Kenya Posts and Telecommunications Corporation**, (1994) KLR 1, and **Ochino & Another v Okombo & 4 others** (1989) KLR 165 in this respect. It is also the position and it has been held in several judicial decisions that if personal awareness of the court orders by the alleged contemnors is demonstrated, they will be found culpable of contempt even though they had not been personally served with the orders and penal notice. See in this regard the decisions in **Kenya Tea Growers Association vs Francis Atwoli & Others** , Nairobi High Court Constitutional Petition No 64 of 2010, **Husson v Husson**, (1962) 3 All E.R. 1056, **Ronson Products Ltd v Ronson Furniture Ltd** (1966) RPC 497, and **Davy International Ltd vs Tazzyman** (1997) 1 WLR 1256.

21. In the present application, the Applicant annexed as Annexure "BSI" and relied on an affidavit of service filed in Court and sworn on 5th December 2016 by one Benson Munyoki Muema, a licenced Court process server. The said affidavit attested to the service of the judgment delivered herein by Odunga J. on 28th November 2016 and the decree and a penal notice both dated 2nd December 2016 on the Respondent's legal department and the Respondent's advocate on 5th December 2016. It is evident from the said affidavit of service that there was no service on the alleged contemnor. It is also notable that the affidavit of service filed on 26th June 2019 relied on by the Applicant was of service of the Amended Notice of Motion dated 17th April 2019 and not of the orders of the Court on the alleged contemnor.

22. However, it may be deemed that the alleged contemnor was aware of the Court's orders, as he and the Respondent do not dispute that the orders of mandamus compelling them to pay the outstanding decretal sum were granted herein on 28th November 2016, and also stated that payments were made of the principal interest and accrued interest they owed. The Applicant in this regard also admits that on 17th October, 2014, the Respondent paid the principal sum of Kshs. 220,440,000.00, and further, that on 6th June, 2017, the Respondent paid a sum of Kshs. 54,223,624.00, being the interest accrued on the principal sum from March 2013 to 11th July 2014 of Kshs. 45,386,482.10, and the costs of the suit which were taxed at Kshs. 8,837,142.00. The Applicant's grievance was that the Respondent has omitted to pay the interest accrued on the principal sum from the period 11th July, 2014 and 17th October, 2014.

23. The question that needs to be answered therefore, is whether the alleged contemnor is culpable for non-payment of the accrued interest outstanding as alleged by the Plaintiff. The law as regards culpability for contempt of court is that the act or omission constituting disobedience of an order may be intentional, reckless, careless or quite accidental and totally unavoidable. An intentional act may be done with or without an intention to disobey the order, and with or without an intention to defy the court. The element of contumacy, which requires flagrant defiance of, the authority of the court, is no longer necessary to establish breach of a court order. It is now established that the mental element for liability for contempt arising out of disobedience is simply that the disobeying party either intended to disobey, or made no reasonable attempt to comply with the order. See in this respect the English House of Lords decision in **Heatons Transport (St Helens) Ltd v Transport and General Workers Union (1973) AC 15.**

24. Two pertinent factors are relevant in this respect in the present case. Firstly, the Respondents have indicated the steps take to effect payment of the monies due to the Applicant. Notably, the principal sum has since been paid, this is also particularly relevant given that there was payment of interest and costs due as at 6th July 2017, and which made was after the orders given herein on 28th November 2016 in part settlement thereof.

25. Secondly, it is also not disputed that the genesis of the instant proceedings between the Applicant and the Respondent is a judgment which entered summary judgment in favour of the Applicant for Kshs. 220,440,000.00 plus interests as from March 2013, in **Nairobi HCCC No. 60 of 2014 - Office Technologies Limited Versus Independent Electoral & Boundaries Commission.** The Applicant has in this respect relied on the Ruling by Hon. Elizabeth Tanui dated 17th September, 2018 therein, which established the outstanding amount payable as being Kshs 7,243,568/=. However, the Applicant did not bring any evidence of service of this ruling or any orders or decree extracted therefrom on the alleged contemnor and Respondent, and in fact brings it on record for the first time after the filing of the Contempt of court application in a supplementary affidavit sworn on and filed in Court on 18th September 2019. The Respondent state that they only became aware of the said ruling on 4th February 2020 when served with the said supplementary affidavit.

26. Therefore, as at the date of the orders granted herein on 28th November 2016 and of the filing the instant contempt of Court application on 17th April 2019, the outstanding sum was not ascertained. In addition, after being ascertained, there is no evidence that it was brought to the attention of the alleged contemnor or Respondent for purposes of effecting payment.

The Disposition

27. I accordingly find that the outstanding sum payable by the alleged contemnor and Respondent was not ascertained by the judgment sought to have been disobeyed, and after the same was ascertained, that the Applicant did not prove that the orders on the sum payable were served or was within the knowledge of the alleged contemnor and Respondent as at the time of filing of the instant application. The alleged contemnor is accordingly not culpable for disobedience of this Court's orders of 28th November 2016 for these reasons.

28. The *ex parte* Applicant's Amended Notice of Motion dated 17th April 2019 is therefore found not to have merit and is hereby dismissed with no order as to costs.

29. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 31ST DAY OF MARCH 2021

P. NYAMWEYA

JUDGE

FURTHER ORDERS ON THE MODE OF DELIVERY OF THIS RULING

Pursuant to the Practice Directions for the Protection of Judges, Judicial Officers, Judiciary Staff, Other Court Users and the General Public from Risks Associated with the Global Corona Virus Pandemic dated 17th March 2020 and published 17th April 2020 in Kenya Gazette Notice No. 3137 by the Honourable Chief Justice, this Ruling was delivered electronically by transmission to the email addresses of the *ex parte* Applicant's and Respondents' Advocates on record.

P. NYAMWEYA

JUDGE