REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

JUDICIAL REVIEW APPLICATION NO. 4 OF 2016

IN THE MATTER OF EMBU CONSTITUTIONAL PETITION NO. 56 OF 2009

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

THE ATTORNEY GENERAL.....1ST RESPONDENT

THE PRINCIPAL SECRETARY, MINISTRY OF INTERIOR

AND COORDINATION OF NATIONAL GOVERNMENT...2ND RESPONDENT

MUSA MOHAMMED DAGANE,

IBRAHIM MOHAMMED & 25 OTHERS.....EX-PARTE APPLICANTS

RULING

1. The application herein is dated 4.02.2020 and brought under Section 5(1) of the Judicature Act, Sections 1A, 1B and 3A of the Civil Procedure Act and wherein the ex-parte applicants seek for orders that this Honourable court be pleased to cite the acting Principal Secretary Ministry of Interior and Coordination of National Government, for contempt of the judgment issued on the 17.12.2018 by the Honourable Lady Justice F. Muchemi sitting at Embu in Judicial Review Misc. Application No. 4 of 2006; that the acting Principal Secretary, Ministry of Interior and Coordination of National Government be committed to civil jail for at least six months or such other period as the court may please; that this Honourable Court be pleased to impose a fine of at least five hundred thousand shillings against the contemnor or such other sum as it may deem appropriate in the circumstances; that the court be pleased to issue such other or further punitive orders in respect of the said contempt as may be necessary for the ends of justice to meet; and that the respondents bear the costs of the application.

2. The application is based on the grounds that the ex- parte applicants are holders of a decree in Embu Constitutional Petition No. 56 of 2009 and which decree together with the certificate of order were served on the respondents but they refused to settle the same. That the ex-parte applicants subsequently applied for judicial review orders to compel the Attorney General and the Principal Secretary, Ministry of Interior and Coordination of the National Government to comply with the judgment in Embu Constitutional Petition No. 56 of 2006 and the orders of *mandamus* were issued and the orders served on the respondents. That despite the respondent having been aware of the above orders, they have deliberately refused to pay the outstanding judgment debt and as such flagrant disobedience of court orders which is tantamount to contempt of court and its necessary to have the respondents cited.

3. The application is not opposed. At the hearing of the application, the Learned Counsel for the ex-parte applicants made oral submissions and wherein he prayed that the orders be issued as prayed.

4. I have considered the application herein and the annexures thereto and the oral submissions made in court. Despite the application being unopposed, it is the duty of this court to consider the same and see whether the same is merited. As such the issue for determination is whether the application herein is merited.

5. Section 5 of the Judicature Act Cap 8 of the Laws of Kenya bestows this court (and the Court of Appeal) with jurisdiction to punish for contempt of court. Indeed it is the section under which the application is brought.

6. Blacks Law Dictionary (Ninth Edition) defines contempt of court as:

> "***Conduct that defies the authority or dignity of a court. Because such conduct interferes with the administration of justice, it is punishable usually by fine or imprisonment***

7. As the Court of Appeal rightly found in **Fred Matiang'i the Cabinet Secretary, Ministry of Interior and Co-ordination of National Government –vs- Miguna Miguna & 4 others [2018] eKLR**, when courts issue orders, they do so not as suggestions or pleas to the persons at whom they are directed. Court orders issue *ex cathedra*, are compulsive, peremptory and expressly binding. It is not for any party; be he high or low, weak or mighty and quite regardless of his status or standing in society, to decide whether or not to obey; to choose which to obey and which to ignore or to negotiate the manner of his compliance.

8. In **Refrigerator & Kitchen utensils Ltd v Gulabchand Shah & others Civil Application No. Nai 39 of 1990** the Court of Appeal held that:

> ***"It was plain clear and unqualified obligation of every person against or in respect of whom an order was made by the court of competent jurisdiction to obey it until that order was discharged, and disobedience of such order would, as a general rule, result in the person disobeying it being in contempt and punishable by committal or attachment and in an application to the court by him not being entertained until he purged his contempt. A party who knows of an order, whether null and void, regular or irregular, cannot be permitted to disobey it… It would be most dangerous to hold that the suitors or their solicitors, could themselves judge whether an order was null or valid – whether it was regular or irregular… he should apply to the court that it might be discharged. As long as it exists, it must not be disobeyed."***

9. It is not in dispute that this court delivered a ruling on 17.12.2018 and wherein orders of *mandamus* were issued. The ex-parte applicants are the holders of the decree herein. There is no evidence of the respondents having settled the same or having proposed any mode of settling the same. There is no appeal or application for review of the Judgement and decree. As such the ex-parte applicants are rightfully before this court.

10. However, it is a principle of law that in order to succeed in civil contempt proceedings, the applicant has to prove the terms of the order, knowledge of these terms by the respondent and failure by the respondent to comply with the terms of the order. Upon proof of these requirements then a party can be said to have willfully and in bad faith (*mala fides*) disobeyed the said orders. (See **Samuel M. N. Mweru & Others –vs- National Land Commission & 2 others [2020] eKLR).** The burden of proof is on the applicant to proof the same to a standard of beyond reasonable doubt. (See **Regina Butt -vs- Haroon Butt and another [2016] eKLR** and **JGK -vs- FWK [2019] eKLR**

11. In the instant case, the ex-parte applicants deposed that their advocates on record served the respondents herein with a copy of the judgment issued on the 17.12.2018 (the ruling wherein the orders of *mandamus* were issued) but despite the same, the respondents have refused to honour the terms of the said judgment and that despite the incessant letters to the respondents requesting that they comply with the judgment, they have refused to do so.

12. In Kenya, contempt proceedings are governed by the law applicable in England as at the time the proceedings are instituted. This is since the Contempt of Courts Act was declared unconstitutional. **Rule 81. 5 of the English Civil Procedure (Amendment No.2) Rules 2012** provides that a Judgment/Order of the Court must be served upon the person required to do the act in question. However, the Court can dispense with such personal service under Rule 81.8 of the Rules which provides:

> ***"(1) In the case of a judgment or order requiring a person not to do an act, the court may dispense with service of a copy of the judgment or order in accordance with rules 81.5 to 81.7 if it is satisfied that the person has had notice of it—***
>
> ***(a) by being present when the judgment or order was given or made; or***
>
> ***(b) by being notified of its terms by telephone, email or otherwise.***
>
> ***(2) In the case of any judgment or order the court may—***
>
> ***(a) dispense with service under rules 81.5 to 81.7 if the court thinks it just to do so; or***
>
> ***(b) make an order in respect of service by an alternative method or at an alternative place."***

13. I have perused the annexures to the application and I note that indeed there are chase-up letters which were made to the respondents herein and in relation to the settlement of the decree herein. On the face of the said letters and which have not been disputed, it is my view that the respondents herein were served with the said order and as such are aware of the same. That being so, the 1st respondent has a duty to advise the 2nd respondent and/ or the government to pay the said decretal sum.

14. However, as I have already stated, for orders punishing a person for contempt of court to issue, the applicant must show that the orders were served personally on the alleged contemnor and in this case, acting Principal Secretary Ministry of Interior and Coordination of National Government. Despite the letters annexed to the application having been stamped as having been received by the respondents, there is nothing on record to show as to how the service was effected. The ex-parte applicants' advocates on record did not annex to the application evidence of the orders having been served on the alleged contemnor. I am alive to the decision by Lenaola J (as he then was) in **Basil Criticos –vs- Attorney General & 4 others [2012] e-KLR** to the effect that knowledge supersedes personal service and for good reason and where a party clearly acts and shows that he has knowledge of a court order, the strict requirement that service must be proved is rendered

unnecessary. There is nothing to show that the acting Principal Secretary Ministry of Interior and Coordination of National Government have had knowledge of the said orders.

15. I say so because as it can be seen from the application, the ex-parte applicants seek for orders committing the acting Principal Secretary Ministry of Interior and Coordination of National Government to civil jail and for the court to impose a fine of at least five hundred thousand shillings. The constitution guarantees right to liberty, and committal to civil jail definitely has the effect of curtailing that right.

16. There being no evidence of service of the order on the acting Principal Secretary Ministry of Interior and Coordination of National Government, the application herein is hereby struck out.

17. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 17TH DAY OF MARCH, 2021.

L. NJUGUNA

JUDGE

.....for the Applicant