



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW MISC. APPLICATION NO. 276 OF 2015

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

PRINCIPAL SECRETARY, MINISTRY OF DEFENCE.....3RD RESPONDENT

EX PARTE APPLICANT: GEORGE KARIUKI WAITHAKA

RULING

1. The Principal Secretary, Ministry of Defence, who is the Respondent herein, was found culpable for contempt of Court by this Court in a ruling delivered herein on 4th February 2019, for disobeying this Court's orders as regards of payment of decretal sums due to George Kariuki Waithaka, the *ex parte* Applicant herein. The Respondent's sentencing was however suspended for one year, pending any actions the Respondent may have wanted to take to purge the contempt. No such action was taken, and this Court directed that the Respondent would be sentenced on 28th July 2020, and that he or she be personally present in Court for this purpose.

2. The Respondent thereupon filed an application by way of a Notice of Motion dated 24th July 2020, in which he is seeking the following outstanding orders:-

a) **The Respondent's sentencing scheduled for 28 July 2020 be stayed pending the hearing and determination of the application herein.**

b) **This Court be pleased to discharge, vacate and or set aside the ruling of the Hon. Lady Justice P. Nyamweya delivered on 4 February 2019 finding the Respondent/Applicant herein culpable of disobeying court orders and for contempt of court.**

c) **The costs of the application be provided for.**

3. The application is supported an affidavit sworn on 24th July 2020 by Alice M. Mate, the Colonel in Litigation at the Kenya Defence Forces Headquarters. The *ex parte* Applicant filed a Replying Affidavit he swore on 17th August, 2020 in opposition to the Respondent's application. The parties' respective positions as urged in their pleadings are set out in the following sections of this ruling.

The Respondent's Case

4. The Respondent is apprehensive that if the ruling delivered by the Court was not set aside and the sentencing stayed, he would be penalised and his personal liberty guaranteed by the Constitution taken away for matters that are beyond his control. The Respondent deponed that the ruling of 4th February, 2019 was delivered against Saitoti Torome who held the office of Principal Secretary, Ministry of Defence during that period. That consequently, the current holder of the office is a stranger to the contempt of court proceedings and cannot be held liable for matters that took place before his tenure as Principal Secretary, Ministry of Defence. Further, that the Respondent was yet to be served personally, with the judgment delivered on 4th September, 2014 in **Milimani CMCC No. 9749 of 2003- George Kariuki Waithaka vs Attorney General & Another** and Certificate of Order against Government extracted therein, to allow him to perform his duties as Accounting Officer of the Ministry of Defence.

5. Therefore, that the non-payment and non-settlement of the decretal sum awarded in **Milimani CMCC No. 9749 of 2003 - George Kariuki Waithaka vs Attorney General & Another** had not been due to complete disregard for orders of this Court, but due to the failure by the *ex parte* Applicant to comply with the law to ensure compliance of the orders, and that this Court cannot penalise the Respondent for matters to which he is a stranger. In conclusion, that Respondent averred that it is in the interests of justice that the ruling of 4th February

2019 be discharged, vacated and/or set aside.

The ex parte Applicant's Case

6. The *ex parte* Applicant's case is that the instant application is an abuse of the process of the court, and was intentionally made to delay the sentencing of the Respondent herein. The *ex parte* Applicant contended that the Respondent is barred from making the application by the rule in **Mawani vs Mawani [1977] KLR 159**, because he has disobeyed its orders and has made the application before purging the contempt. Therefore, that he has no right to be heard. Further, that an advocate of a litigant cannot depone on facts of prejudice to be suffered by the Respondent as the order of 4th February, 2019 involves the personal liberty of the Respondent, not his advocate Accordingly, that this is a suitable case for striking out of both the said affidavit and the application.

7. The *ex parte* Applicant detailed the proceedings leading to the ruling made herein on 4th February 2019, and averred that despite the suspension of the sentencing for a whole year, the Respondent has not paid the decretal sum despite being served with the court orders and participating in these proceedings. He contended that Hon Saitoti Torome was the then Principal Secretary, Ministry of Defence when the order for sentencing was made, and that on 30th July, 2019, the current Principal Secretary, Ministry of Defence is Major General (Rtd) (Dr) Gordon Kihalangwa was appointed. Further, that upon taking up the office, Major General (Rtd) (Dr) Gordon Kihalangwa was left with the docket of the Ministry of Defence including the documents pertaining to this case and other pending decrees, and cannot claim ignorance.

8. It is also the *ex parte* Applicant's case that this Court lacks jurisdiction to entertain the application to discharge its order dated 4th February, 2019 as it is *functus officio*; and that the remedy of the Respondent was to appeal the decision which he did not. Further, that the court lacks jurisdiction under Order 45 Rule 1 of the Civil Procedure Rules to review an order made in judicial review proceedings; as the Respondent is in essence seeking to review the order of Hon. Justice Odunga granting an order of mandamus to compel the Respondent to pay the decretal amount.

9. It was also contended that the Respondent wrongly believes that he has to be personally served with the judgment and Certificate of Order against Government in order for him to take action on it, and that once a Certificate of Order against the Government is served on the Attorney General, section 21(3) of the Government Proceedings Act imposes a statutory duty on the accounting officer concerned to pay the sums specified in the said order to the person entitled or to his advocate together with any interest lawfully accruing thereon as was held by this Court in the ruling delivered on 12th February, 2018.

10. The *ex parte* Applicant asserted that the documents pertaining to this suit have been served on the Respondents on numerous occasions, and that Alice M. Mate has previously attended this matter in court and sent counsel to hold her brief and informed the court that the Respondent was making arrangements to settle the decretal amount. Therefore, that this application is meant to further delay the payment of the decretal sum and there is no reason why the same has not been paid to him.

The Determination

11. The instant application was canvassed by way of written submissions, and Special State Counsel Alice Mate filed submissions dated 13th August 2020 for the Respondent, while Kamau Kuria Company Advocates, the advocates on record for the *ex parte* Applicant, filed submissions dated 17th August, 2020. The *ex parte* Applicant has raised a preliminary issue about the jurisdiction of this Court to hear and determine the same. This preliminary issue was urged on three fronts. Firstly, that the Respondent is barred from making the application by the rule in **Mawani vs Mawani [1977] KLR 159** because he has disobeyed its orders and has no right to be heard. Also cited for this position were the decisions in **EAM vs PAA [2017] eKLR**, **County Government of Kirinyaga vs Kenya Medical Practitioners, Pharmacists & Dentists Union & 3 Others, Cabinet Secretary, Labour and Social Protection & another (Interested Party) [2019] eKLR** and **Kenya Medical Practitioners Pharmacists And Dentists Union and 43 Others v County Government of Kirinyaga and Others Court of Appeal at Nairobi, Civil Appeal No. 270 of 2019**.

12. Secondly, that this court is *functus officio* having made the orders made herein on 13th July, 2016, 12th February, 2018 and 4th February, 2019. Reliance was placed on the decisions in The Applicant submitted that the Court of Appeal in **Telkom Kenya Limited v John Ochanda (Suing on His Own Behalf and on Behalf of 996 Former Employees of Telkom Kenya Limited) [2014] eKLR**, **Bellevue Development Company Limited v Vinayak Builders Limited and Another [2014] eKLR**, and **Raila Odinga and 2 Others v Independent Electoral and Boundaries Commission and 3 Others [2013] eKLR**, on the application of the doctrine of *functus officio* and for the submission that the instant application does not fall within the exemptions to the doctrine of *functus officio*.

13. Thirdly and lastly, that Court cannot review its decisions on judicial review proceedings, and reliance was placed on the decisions in **Republic vs National Transport Services Authority ex-parte Extra Solutions Ltd [2017] eKLR** and **Uganda Martyrs Children's Home (Suing through the Trustee) Alphonse Mondiu vs Machakos County Co-ordinator of Children Services & Another [2020] eKLR**, that the judicial review jurisdiction is *sui generis* and restricted, and any person aggrieved by an order made in the exercise of the said jurisdiction of can only appeal to the Court of Appeal.

14. I will first dispose of the argument about this Court being *functus officio*, as the determination of the other preliminary issues raised by the *ex parte* Applicant are dependent on the findings made in this regard. The **Black's Law Dictionary, Ninth Edition** points out at page 743 that *functus officio* is a Latin term meaning "having performed his or her office", and refers to a situation where an officer or official body has no further authority or legal competence because the duties and functions of the original commission have been fully accomplished. A person is therefore said to be *functus officio* when he or she has acted as to exhaust the power that was being exercised, and that person may not further exercise that power. This rule as applied to judicial bodies is in instances where a Judge finally disposes of the matter before him or her, and neither that Judge or any other Judge of equal jurisdiction may vary that order.

15. In the Canadian case of **Chandler v. Alberta Association of Architects, [1989] 2 S.C.R 848** it was explained that the rule of *functus officio* holds that the court has no jurisdiction to reopen or amend a final decision, except in two cases: namely where there has been a slip in

drawing up the judgment, or where there has been error in expressing the manifest intention of the court. This position has also been upheld in various Kenyan cases including Chacha Mwita Mosenda v Baya Tsuma & 2 Others (2017) eKLR and Telkom Kenya Limited v John Ochanda (suing on his own behalf and on behalf of 966 former employees of Telkom Kenya Limited) (2014) eKLR, that was relied upon by both the *ex parte* Applicant.

16. The exceptions to the rule are also reflected in our Civil Procedure Act in sections 80 and Order 45 of the Civil Procedure Rules, and section 99 of the Civil Procedure Act, which provide for review of judgments and corrections of judgments respectively. Therefore, whether in its common law or statutory form, the rule on *functus officio* provides that it is only in strictly limited circumstances that a court can revisit an order or judgment, the main policy concern being that of finality of litigation.

17. In the present application, this Court is being asked to review the ruling delivered on 4th February 2019, which ruling found the Principal Secretary in the Ministry of Defence who was in office at the time in contempt of Court, and deferred his sentencing. At that point in time, the proceedings transformed in nature from civil to criminal proceedings, as it was found that the said official had committed an offence that attracts criminal penalties, including possible loss of liberty. As explained in the Australian case of Registrar of the Court of Appeal vs Maniam (No 2) (1992) 26 NSWLR 309 at 314:

“A conviction of contempt of court is a conviction of an offence, criminal in nature. Punishment of the convicted contemnor must therefore take into account the considerations normally applicable to the punishment of crime and apt to uphold the purpose of this jurisdiction, viz, the undisturbed and orderly administration of justice in the courts according to law. Thus, in determining the punishment which is apt to the circumstances which have led to a conviction of contempt, it is appropriate to bear in mind the purposes of punishing the contemnor; deterring the contemnor and others in the future from committing like contempts; and denouncing the conduct concerned in an approximately emphatic way”.

18. The question therefore that needs to be answered, is whether a conviction for contempt of court is amenable to review at the instance of a party who is not the contemnor, and whether it is capable of falling within the exceptions for review that are provided to the *functus officio* rule. In contempt of Court, the person convicted of contempt, also known as the contemnor, is subjected to a penalty. In effect, therefore, a finding of contempt of Court is a quasi-criminal finding that is personal and based on some culpability on the part of the contemnor. Such a finding of contempt and consequent penalty cannot therefore be transferred to succeeding accounting officers in Government proceedings, as any penal provisions require to be construed strictly.

19. The only transfer of liability that is provided for under the Government Proceedings Act in section 21(3) is that for money due from Government to succeeding accounting officers as long as the procedure therein is followed, as rightly pointed out by the *ex parte* Applicant. Section 21(4) also specifically provides that no Government Officer is individually liable under any order for the payment of any money or costs by the Government, or any Government department, or any officer of the Government. Contempt of Court on the other hand is an offence and genre of proceedings, and is governed by different laws and rules.

20. Consequently, upon leaving or change of office, a contemnor still remains convicted for the offence, and liable to be penalized. This is necessary not only to ensure obedience of Court orders and uphold the administration of justice, but also to ensure that there is no avoidance of penalization of Government officials by change of office. It is essential for the rule of law that no member of society, no matter how powerful, is allowed to be able to choose or avoid the laws or court orders that are to be observed and those that are not. It is thus my finding that a person who is aggrieved by a finding of contempt of Court cannot therefore seek to review the finding under the provisions of the Civil Procedure Act and Code, as such a finding is of a criminal nature, and can only seek to expunge it by way of appeal or constitutional petition, and not by review before this Court.

21. Lastly, the Respondent seeks review principally on the ground that there is now a different Principal Secretary in office, who cannot be subjected to sentencing. In essence the Respondent is seeking this Court to consider the issue of contumacy of the current office holder of the Principal Secretary, at the Ministry of Defence, which cannot be done in an application for review, and is essentially the subject of a new application. In any event, having not been the subject of conviction of contempt of Court, the current Principal Secretary cannot seek to review or appeal the said ruling. The *ex parte* Applicant is in this respect therefore at liberty to commence fresh contempt of Court application against the current office holder of the office of Principal Secretary at the Ministry of Defence.

22. The long and short of this Court’s findings is that the Principal Secretary at the Ministry of Defence in office as at the date of the ruling delivered herein on 4th February 2019 remains convicted for contempt of Court, and shall be the subject of sentencing by this Court.

23. The Respondent’s Notice of Motion application dated 24th July 2020 seeking a stay and review of this Court’s ruling delivered on 4th February 2019 is therefore declined with costs to the *ex parte* Applicant.

24. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 28TH DAY OF JUNE 2021

P. NYAMWEYA

JUDGE

DELIVERED AT NAIROBI THIS 28TH DAY OF JUNE 2021

J. NGAAH

JUDGE