**Republic v Attorney General & 2 others; Patrick Ochwa, Samuel Ouma & Job Weloba t/a Cootow & Associates (Exparte) (Judicial Review 222 of 2017) [2021] KEHC 144 (KLR) (21 October 2021) (Ruling)**

Neutral citation: [2021] KEHC 144 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT MOMBASA**

**JUDICIAL REVIEW 222 OF 2017**

**JM MATIVO, J**

**OCTOBER 21, 2021**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**ATTORNEY GENERAL & 2 OTHERS ..... RESPONDENT**

**AND**

**PATRICK OCHWA, SAMUEL OUMA & JOB WELOBA T/A COOTOW & ASSOCIATES ..... EXPARTE**

**RULING**

1. This ruling determines the applicants' application dated 29th July 2021 seeking orders that the County Chief Officer-Finance, County Government of Mombasa and the County Executive Member of Finance & Economics have disobeyed the court order issued on 21st March 2018 directing the County Government of Mombasa to pay the applicant Kshs. 2,506,046.92 together with 14% interest arising from the judgment in CMCC No. 931 of 2021-Mombasa. The applicants also pray for an order that the said officers be committed to Civil jail for a term not exceeding 6 months for contempt of court orders issued on 21st March 2018. Lastly, they pray that the costs of the application be provided for.

2. The core grounds in support of the application are that the applicant obtained a decree in CMCC No. 931 of 2021-Mombasa and upon failure by the Respondents to settle the claim, the applicant obtained an order of mandamus on 21st March 2021 compelling the Respondent to pay the said sum together with 14% interest until payment in full. The applicant states that the Respondents have deliberately refused to comply with the said orders which amounts to contempt of court. Lastly, the applicants state that it is in the interest of justice that the orders sought be granted.

   The Respondents response

3. The Respondents' reply is contained in the Replying affidavit of Jimmy Waliaula, the Acting County Attorney, County Government of Mombasa dated 8th October 2021. The substance of the opposition is that contempt proceedings are quasi-criminal in nature, hence the need for this court to satisfy itself that that the Respondents were personally served or made aware of the order and whether they willfully disobeyed the order. Additionally, the order alleged to have been disobeyed was obtained ex parte, so it was necessary to serve and that service has not been proved. Further, that the County Government of Mombasa is currently financially constrained. Lastly, that the application is ill founded.

The submissions

4. Mr. Wafula, the applicant's counsel relied on the grounds in support of the application, the supporting affidavit and annexures. He submitted that the Respondent's arguments are essentially a response to the application for mandamus which has since been determined. He submitted that service of the order was effected upon the County Attorney.

5. Mr. Tajbhai representing the Respondent relied on the Replying affidavit filed on 8th October 2021 and submitted that contempt is quasi-criminal, hence the threshold is high and that personal service is a pre-requisite. He relied on the *Katsuri Limited v Kapurchand Depar Shah*[1] which underscored the high threshold for standard of prove in contempt cases. He also cited *Samuel M. N. Mweru & Others v National Land Commission & 2 others*[2] which laid down the ingredients to establish civil contempt. Lastly, he cited *Republic v Chief Land Registrar & another*[3] which restated the ingredients in order to succeed in an application for contempt.

Determination

6. I find it necessary to address a pertinent question which goes to the root of the legal competence of the instant application. The issue relates to the applicants' evident failure to comply with the provisions of Section 21 of the *Government Proceedings Act*[4] and Order 29 Rule (2) & (4) of the *Civil Procedure Rules*, 2010. Even though non-compliance of the said section is a pertinent a fairly dispositive issue, none of the parties addressed it. In my view, it would be a dereliction of duty to overlook such a clear statutory dictate.

7. Section 21 of the *Government Proceedings Act* provides: -

> Section 21 of the *Government Proceedings Act*[5] provides as follows: -
>
> 21. Satisfaction of orders against the Government
>
> (1) Where in any civil proceedings by or against the Government, or in proceedings in connection with any arbitration in which the Government is a party, any order (including an order for costs) is made by any court in favour of any person against the Government, or against a Government department, or against an officer of the Government as such, the proper officer of the court shall, on an application in that behalf made by or on behalf of that person at any time after the expiration of twenty-

1 {2016} e KLR.

2 {2020} e KLR

3 {2019} e KLR.

4 Cap 40, Laws of Kenya.

5 Ibid.

one days from the date of the order or, in case the order provides for the payment of costs and the costs require to be taxed, at any time after the costs have been taxed, whichever is the later, issue to that person a certificate in the prescribed form containing particulars of the order: Provided that, if the court so directs, a separate certificate shall be issued with respect to the costs (if any) ordered to be paid to the applicant.

(2) A copy of any certificate issued under this section may be served by the person in whose favour the order is made upon the Attorney-General.

(3) If the order provides for the payment of any money by way of damages or otherwise, or of any costs, the certificate shall state the amount so payable, and the Accounting Officer for the Government department concerned shall, subject as hereinafter provided, pay to the person entitled or to his advocate the amount appearing by the certificate to be due to him together with interest, if any, lawfully due thereon:

Provided that the court by which any such order as aforesaid is made or any court to which an appeal against the order lies may direct that, pending an appeal or otherwise, payment of the whole of any amount so payable, or any part thereof, shall be suspended, and if the certificate has not been issued may order any such direction to be inserted therein.

(4) Save as aforesaid, no execution or attachment or process in the nature thereof shall be issued out of any such court for enforcing payment by the Government of any such money or costs as aforesaid, and no person shall be individually liable under any order for the payment by the Government, or any Government department, or any officer of the Government as such, of any money or costs.

(5) This section shall, with necessary modifications, apply to any civil proceedings by or against a county government, or in any proceedings in connection with any arbitration in which a county government is a party.

8. Section 21 of the *Government Proceedings Act* has been the subject of judicial interpretation by our superior courts in numerous authorities. Perhaps the most detailed judicial exposition of the said section is to be found in *Republic v Permanent Secretary, Ministry of State for Provincial Administration and Internal Security ex parte Fredrick Manoah Egunza*[6] in which it was stated follows: -

> " In ordinary circumstances, once a judgment has been entered in a civil suit in favour of one party against another and a decree is subsequently issued, the successful litigant is entitled to execute for the decretal amount even on the following day. When the Government is sued in a civil action through its legal representative by a citizen, it becomes a party just like any other party defending a civil suit. Similarly, when a judgment has been entered against the government and a monetary decree is issued against it, it does not enjoy any special privileges with regards to its liability to pay except when it comes to the mode of execution of the decree. Unlike in other civil proceedings, where decrees for the payment of money or costs had been issued against the Government in favour of a litigant, the said decree can only be enforced by way of an order of mandamus compelling the accounting officer in the relevant ministry to pay the decretal amount as the Government is protected and given immunity from execution and attachment of its property/goods under Section 21(4) of the

[6] {2012} e KLR.

*Government Proceedings Act*. The only requirement which serves as 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* (hereinafter referred to as the Act) which provides that payment will 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. The certificate of order against the Government should be issued by the court after expiration of 21 days after entry of judgment. Once the certificate of order against the Government is served on the Hon Attorney General, section 21(3) 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...." [Emphasis mine].

9. The above section is to be read together with the provision of Order 29 Rule 3 of the Civil Procedure Rules, 2010 which provides for the application for a certificate under section 21 in the following words: -

> " Any application for a certificate under section 21 of the *Government Proceedings Act* (which relates to satisfaction of orders against the Government) shall be made to a registrar or, in the case of a subordinate court, to the court; and any application under that section for a direction that a separate certificate be issued with respect to costs ordered to be paid to the applicant shall be made to the court and may be made ex parte without a summons, and such certificate shall be in one of form Nos. 22 and 23 of Appendix A with such variation as circumstances may require."

10. Decisional law is in agreement (see Republic v Permanent Secretary, Ministry of State for Provincial Administration and Internal Security ex parte Fredrick Manoah Egunza (supra)) that the Certificate of Order against the Government is not only a requirement but it is also a condition precedent to the satisfaction or enforcement of decrees issued against the Government. Section 21 of the *Government Proceedings Act* provides that the Certificate of Order against the Government should be issued by the court after the expiry of 21 days from the date of entry of the judgment. Once the Certificate of Order against the Government is served, section 21(3) 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 thereto.

11. In the instant case, there is nothing to show that the above provisions of the law were complied with. In fact, there is no mention at all in the application whether the Certificate of Order against the Government was ever applied for as per Order 29 Rule 3 or obtained and served as provided under section 21 aforesaid. There is a difference between the decree and certificate of costs and the Certificate of Oder against the Government referred contemplated in section 21 and Order 29 Rule 3. Clearly, compliance with section 21 is not an option. It is a statutory dictate. In this regard, a reading of section 21 (4) leaves doubt that save as provided by the preceding provisions of the said section, no execution or attachment or process in the nature thereof shall be issued out of any such court for enforcing payment by the Government of any such money or costs as aforesaid, and no person shall be individually liable under any order for the payment by the Government, or any Government department, or any officer of the Government as such, of any money or costs.

12. The instant proceedings are in the nature of enforcement. Section 21 is wide enough to cover the process before this court. It is instructive to note the use of the word shall is deployed in section 21 (4). The classification of statutes as mandatory and directory is useful in analysing and solving the

problem of the effect to be given to their directions.[7] There is a well-known distinction between a case where the directions of the legislature are imperative and a case where they are directory.[8] The real question in all such cases is whether, a thing, has been ordered by the legislature to be done, and what is the consequence, if it is not done. The general rule is that an absolute enactment must be obeyed, or, fulfilled substantially. Some rules are vital and go to the root of the matter, they cannot be broken; others are only directory and a breach of them can be overlooked provided there is substantial compliance.

13. It is the duty of courts of justice to try to get at the real intention of the Constitution or legislation by carefully attending to the whole scope of a statute. Whether a statute is mandatory or directory depends upon the intent of the Legislature and not upon the language in which the intent is clothed. The meaning and intention of the Legislature must govern, and these are to be ascertained not only from the phraseology of the provision, but also by considering its nature, its design and the consequences which would follow from construing it in one way or the other.

14. The word "shall" when used in a statutory provision imports a form of command or mandate. It is not permissive, it is mandatory. The word shall in its ordinary meaning is a word of command which is normally given a compulsory meaning as it is intended to denote obligation.[9] The Longman Dictionary of the English Language states that "shall" is used to express a command or exhortation or what is legally mandatory.[10] Ordinarily the words 'shall' and 'must' are mandatory and the word 'may' is directory.

15. This court is being invited to find that the Respondents are in contempt of court and to commit them to prison for a term not exceeding 6 months. I have in my previous decisions started that in the hands of a private party, the application for committal for contempt is a peculiar amalgam,[11] for it is a civil proceeding that invokes a criminal sanction or its threat. While the litigant seeking enforcement has a manifest private interest in securing compliance, the court grants enforcement also because of the broader public interest in obedience to its orders, since disregard sullies the authority of the courts and detracts from the rule of law. The key question is whether constitutional values permit a person to be put in prison to enforce compliance with a civil order when the prequisites are established only preponderantly, and not conclusively? A high standard of proof applies whenever committal to prison for contempt is sought because contempt of Court is quasi-criminal in nature.

16. Two principals emerge from the foregoing. The first is liberty: - it is basic to our Constitution that a person should not be deprived of liberty, albeit only to constrain compliance with a court order, if reasonable doubt exists about the essentials. The second reason is coherence: - it is practically difficult, and may be impossible, to disentangle the reasons why orders for committal for contempt are sought and why they are granted: in the end, whatever the applicant's motive, the court commits a contempt respondent to jail for rule of law reasons; and this high public purpose should be pursued only in the absence of reasonable doubt.

7 *Dr Sanjeev Kumar Tiwari*, *Interpretation of Mandatory and Directory Provisions in Statutes: A Critical Appraisal in the Light of Judicial Decisions.* International Journal of Law and Legal Jurisprudence Studies: ISSN:2348-8212 (Volume 2 Issue 2 ).

8 Ibid.

9 See *Dr Arthur Nwankwo and Anor vs Alhaji Umaru Yaradua and Ors* (2010) LPELR 2109 (SC) at page 78, paras C - E, Adekeye, JSC .

10 This definition was adopted by the Supreme Court of Nigeria in *Onochie vs Odogwu* [2006] 6 NWLR (Pt 975) 65.

11 JRL Milton 'Defining Contempt of Court' (1968) 85 SALJ 387: 'The concept of contempt of court is one which bristles with curiosities and anomalies. Of the various examples which may be chosen to illustrate this point perhaps the most striking is that of the classification of contempts of court into civil contempt (or contempt in procedure) and criminal contempt.'

17. The omission to obtain and serve the Certificate of Order against the Government as dictated by the above provisions renders the instant application pre-mature and unsustainable. My reading of the nomenclature deployed in the said section is that it is couched in peremptory terms such that the Certificate of Order against the Government ought to be obtained and served before an enforcement action such as the contempt or mandamus can issue. Though I am not sitting an appeal, I am compelled to mention that with such clear statutory dictates, it is not clear how the writ of mandamus which is also an enforcement action was issued prior to complying with such a clear statutory edict.

18. It is impermissible to find an alleged contemnor guilty of contempt in the absence of conclusive proof of the essential elements. The requisite elements must be established beyond reasonable doubt. In such a prosecution the alleged contemnor is plainly an 'accused person.' I have severally stated that contempt of court is not merely a mechanism for the enforcement of court orders. The jurisdiction of the superior courts to commit recalcitrant litigants for contempt of court when they fail or refuse to obey court orders has at its heart the very effectiveness and legitimacy of the judicial system. That, in turn, means that the court called upon to commit such a litigant for his or her contempt is not only dealing with the individual interest of the frustrated successful litigant but also, as importantly, acting as guardian of the public interest.[12]

19. Flowing for the foregoing discussion, the conclusion becomes irresistible that the applicants' application dated 29th July 2021 is fit for dismissal. I therefore dismiss it with no orders as to costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 21ST DAY OF OCTOBER 2021**

**JOHN M. MATIVO**

**JUDGE**

12 (Fakie NO v CCII Systems (Pty) Ltd (653/04)[2006] ZASCA 52; 2006 (4) SA 326 (SCA) (31 March 2006))