



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW MISC. APPLICATION NO. 252 OF 2015

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

THE HON. ATTORNEY GENERAL1ST RESPONDENT

THE SOLICITOR GENERAL.....2ND RESPONDENT

THE PERMANENT SECRETARY, MINISTRY OF EDUCATION, SCIENCE

AND TECHNOLOGY.....3RD RESPONDENT

EX PARTE APPLICANT : LUCY MUTHONI GATHARI

RULING

The Application

1. Lucy Muthoni Gathari, the *ex parte* Applicant herein, filed a Notice of Motion application dated 4th February 2020 and is seeking the following outstanding orders:

1. THAT the 2nd and 3rd Respondents herein, namely the Solicitor General in the Office of the Attorney General, Mr. Kennedy Ogeto and the Principal Secretary Ministry of Education, Science and Technology, Dr. Richard Belio Kipsang be cited for contempt of court for conscious and deliberate disregard, defiance and disobedience of this Court's orders made on 18th July, 2016 and issued on 25th July, 2016.

2. THAT the Court do issue warrants of arrest against the 2nd and 3rd Respondents being Mr. Kennedy Ogeto and Dr. Richard Belio Kipsang until satisfaction and/or payment of decretal sum to *ex-parte* applicant in full.

3. THAT the officer in charge of Vigilante House be ordered to carry out arrest and detention of the 2nd and 3rd Respondents and have the Respondents in custody until compliance with court orders.

4. THAT this court be at liberty to issue further or other orders as it may deem appropriate for the ends of justice.

5. THAT the Applicant be awarded the costs of this Application.

2. The application is supported by an affidavit of even date sworn by the *ex parte* Applicant, and she deponed that she was the Decree Holder in CMCC No. 8847 of 2003, wherein was awarded the decretal sum of Kshs. 455,086/- by a judgment dated 29th March 2011. Further, that a decree was extracted and thereafter served on the Respondents, and that despite several demands to the Respondents, they failed, refused and/or neglected to pay the aforesaid sum. Therefore, that she instituted judicial review proceedings through her advocates via a Notice of Motion dated 6th August, 2015 to compel the Respondent to pay the decretal sum plus interest, and judgment was subsequently issued in her favour on 18th July, 2016.

3. It is the *ex parte* Applicant's averment that thereafter her advocates filed a Bill of Costs and she was subsequently issued with a Certificate of Costs dated 7th March, 2017 after a taxation. She further averred that certified copies of the Decree issued on 25th July, 2016, the Certificate of Costs dated 7th March, 2017 and a Certificate of Order against the Government issued on 11th April, 2017 were served on the Respondents with the bank account details of her advocates, for purposes of settling the decretal amount, and a follow up made on 22nd June, 2017. However, that despite numerous reminders to settle the decretal sum plus interests, the Respondents have failed, refused or neglected to pay the aforesaid sum. The *ex parte* Applicant annexed copies of the decree, certificates and correspondence sent to the Respondents.

4. In conclusion the *ex parte* Applicant contended that the continued refusal by the Respondents to comply has proved detrimental to her and also to the general public through loss of public funds by way of accumulated interest. She also contended that public officers have a duty to defend and uphold the Constitution and it is in the interest of justice that the court does allow the Application.

The Responses

5. Kennedy Ogeto, the 2nd Respondent herein, filed a Replying Affidavit sworn on 6th July, 2020. He averred that he is aware that any liability or expenditure incurred against the Government can only be defrayed from money provided by Parliament, and a Ministry has to budget for the said claim upon receiving an advisory from the Office of the Attorney General requesting the said Ministry to settle the claim. It was his averment that vide letters dated 31st October, 2019 and 1st July, 2020, he advised the Principal Secretary Ministry of Education to settle the matter.

6. For that reason, he claimed that he has since discharged his duty in advising on settlement of the matter and that vide a letter dated 6th June, 2020 the Principal Secretary Ministry of Education wrote to the Principal Secretary National Secretary seeking authority and funds to settle the matter. He however expressed confidence that the matter will be settled once budgetary allocation is made to the Ministry of Education on the matter and authority from the National treasury to settle the same is granted. Indeed, he averred that he has sworn the affidavit to demonstrate good faith in compliance and towards the settlement of the matter.

7. The 3rd Respondent also filed a Replying Affidavit sworn on 6th July, 2020 by Dr. Belio R. Kipsang, the Principal Secretary Ministry of Education, State Department of Early Learning and Basic Education. He reiterated the averments made by the 2nd Respondent, save to add that the budget had now been read and each Ministry was allocated funds and were only awaiting authority from the National Treasury. However, he was opposed to the application seeking to cite them for contempt of court.

The Determination

8. Muigai, Kemei & Associates, the *ex parte* Applicant's advocates on record, filed written submissions dated 6th July 2020, and explained the circumstances leading to the award in CMCC Civil Suit No. 8847 of 2003. The counsel reiterated that the *ex parte* Applicant filed judicial review proceedings on 13th August, 2015, and an order of mandamus was issued in her favour on 18th July, 2016, whereby she extracted a Certificate of Order against Government on 11th April, 2017 and the same served on the Attorney General and the Principal Secretary, Ministry of Education by 24th April, 2017. Still, that the Attorney General has persisted in its refusal and/or negligence to comply.

9. Counsel went on to submit that the Attorney General is obligated under Article 156(6) of the Constitution to promote, protect and uphold the rule of law and defend public interest, and it is for this reason that the Applicant is seeking to have the Attorney General and the Principal Secretary, Ministry of Education imprisoned until the said orders are complied with. To buttress his argument, counsel relied on the case of **Kenya Human Rights Commission v Attorney General & another [2018] eKLR** where E. C. Mwita, J cited with approval the case of **Nthabiseng Pheko v Ekurhuleni Metropolitan Municipality & another CCT 19/11(75/2015)** whereby it was held that the rule of law, a foundational value of the Constitution requires that the dignity and authority of the courts be upheld. In conclusion, counsel urged that the court ought and should firmly enforce its orders by taking measures that compel government officials to comply with orders that are commands of the court.

10. Okumu Kevin Odhiambo, Litigation counsel in the Attorney General's Office filed written submissions dated 29th September, 2020 on behalf of the Respondents. Counsel reiterated the steps taken by the 1st and 2nd Respondents in obedience of the court orders, and submitted that the 1st and 2nd Respondents being the Chief Legal Advisors and representatives of the government in civil proceedings cannot be cited for contempt for any Ministry's failure to pay any owing decretal sums. Indeed, counsel submitted that the application dated 4th February, 2020 as against the 1st and 2nd Respondents is defective as it offends the provisions of section 12 of the Government Proceedings Act and the Office of the Attorney General Act, 2012 which specifies the role of the Attorney General.

11. Counsel was also of the view that the application as framed was made without placing due consideration the constitutional principle of public finance management. From the foregoing, counsel submitted that from the letters annexed to the replying affidavits, the process of obtaining funds from the National Treasury is already underway and is sufficient demonstration that the Respondents have collectively taken steps on obedience of court orders to have the matter settled.

12. As for the 3rd Respondent, it was submitted that the Ministry cannot be cited for contempt for failure to pay a decretal amount due without any appropriation by Parliament, having already requested for authority and funds towards the settlement of the matter. Counsel cited the Scottish case of **Stewart Robertson v Her Majesty's Advocate, 2007 HCAC 63** where Justice Clerk stated that contempt is constituted by conduct that denotes defiance of or disrespect towards the court or that willfully challenges or affronts the authority of the court or the supremacy of the law, whether in civil or criminal proceedings. Indeed, it was submitted that the Respondents as demonstrated in their replying affidavits dated 6th July, 2020 have not disobeyed any court order but have taken steps to ensure compliance with the court order.

13. On jurisdiction while relying on the case of **Owners of Motor Vessel “Lilian S” v Caltex Oil (K) Ltd, (1989) KLR**, counsel submitted that the *ex parte* Applicant has not invoked any known jurisdiction of the court to hear and determine the application. It was further their submission that declaration of the Contempt of Court Act to be unconstitutional has the consequence of divesting this Court of the jurisdiction to punish for contempt of court. Counsel was of the view that their submission is premised on the fact that there is now no substantive law that provides for what constitutes contempt of court, the procedure to be followed, power of and which court can punish for contempt of court and prescribes the penalty for contempt of court.

14. To buttress that argument, counsel cited the case of **Republic vs Deputy Commissioner for Labour & 2 Others Ex-parte Kevin Ashley & 2 others, (2016) eKLR** whereby Wasilwa J. held that a person cannot be charged for an offence that is not defined by law. This position was adopted by the courts in **Republic vs The Principal Magistrate’s Court at Githunguri Ex-Parte James Kahuhu Thuo, (2005) eKLR** and **Henry O. Edwin vs Republic, (2005) eKLR**. Counsel further submitted that the Contempt of Court having been declared unconstitutional, resort cannot be had to common law since the provisions of the Judicature Act that incorporated common law were similarly repealed. Further, the penalty for contempt of court is not prescribed under any statute and the procedure to be followed is also not provided.

15. Counsel further submitted that the *ex parte* Applicant has equally neither sought nor obtained leave to institute the application herein. Accordingly, the Attorney General submitted that the application is bad in law for non-compliance with the dictates of procedural propriety that is designed to protect the constitutional rights of alleged contemnors. To that end, counsel cited the Court of Appeal case of **Akber Abdullah Kassam Esmail vs Equip Agencies & 4 Others, (2014) eKLR** where it was held that the object of the discipline enforced by the Court in case of contempt of court is not to vindicate the dignity of the Court or the person of the Judge, but to prevent undue interference with the administration of justice. Accordingly, counsel submitted that the exercise of the contempt jurisdiction has traditionally been circumspect and subject to well-defined safeguards to keep it straight and narrow. Counsel therefore urged that the application should not be allowed and instead the Respondents be accorded time to allow the process to continue and ultimately allow settlement of the matter.

16. I have considered the respective arguments made by the parties, and note that a preliminary issue has been raised by the Respondents as regards the propriety of the instant application that needs to be disposed of first. The *ex parte* Applicant’s application has been brought pursuant to the provisions of the Constitution, the Civil Procedure Act and Rules the Contempt of Court Act of 2016 and the Government Proceedings Act. As observed by this Court in **Republic vs Kajiado County & 2 Others ex parte Kilimanjaro Safari Club Limited, (2019) e KLR**, the rules on the procedure in contempt of court applications under the High Court (Organization and Administration) Act are yet to be made by the Chief Justice under **section 39 (2) (g) of the Act**, and that the law that previously applied in this regard, namely the Contempt of Court Act of 2016, was declared invalid by the decision in **Kenya Human Rights Commission vs Attorney General & Another, [2018] eKLR**.

17. *In the circumstances, this Court is obliged to revert to the provisions of the law that operated before the enactment of the Contempt of Court Act, to avoid a lacuna in the enforcement of Court’s orders. The applicable law as regards contempt of court existing before the enactment of the Contempt of Court Act was restated by the Court of Appeal in Christine Wangari Gachege vs. Elizabeth Wanjiru Evans & 11 Others, [2014] eKLR. The Court of Appeal found that the English law on committal for contempt of court under Rule 81.4 of the English Civil Procedure Rules, which is applied by virtue of the provisions of the Judicature Act. In this respect I find that as the ex parte Applicant has relied section 3A of the Civil Procedure Act that give this Court inherent power to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court, the reliance on the Contempt of Court Act, and failure to cite the Judicature Act is not fatal. In any event, this Court is not precluded from applying the relevant and appropriate law to the instant application.*

18. The two substantive issues for determination in this application therefore are whether the 2nd and 3rd Respondents disobeyed the orders issued herein on 18th July, 2016, and if so, what penalties should be imposed upon them. Rule 81.8 of the English Civil Procedure Rules which now apply as explained in the foregoing, in this regard 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. Various Kenyan judicial decisions 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.

19. It has also 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.**

20. In the present application, it is evident that the Respondents were aware of the court orders granted herein on 18th July, 2016, and the question that needs to be answered is whether they have disobeyed the said orders. The mental element required for culpability for contempt arising out of disobedience of court orders, is that the disobeying party either intended to disobey, or made no reasonable attempt to comply with the order as held by the English House of Lords in **Heatons Transport (St Helens) Ltd v Transport and General Workers Union (1973) AC 15.**

21. The Supreme Court of Kenya also made the following observations as regards proof of contempt of court in **Republic v Ahmad Abolfathi Mohammed & Another [2018] eKLR**:

“ [28] It is, therefore, evident that not only do contemnors demean the integrity and authority of Courts, but they also deride the rule of law. This must not be allowed to happen. We are also conscious of the *standard of proof* in contempt matters. The standard of proof in cases of contempt of Court is well established. In the case of **Mutitika v. Baharini Farm Limited [1985] KLR 229, 234** the Court of Appeal held that:

“In our view, the standard of proof in contempt proceedings must be higher than proof on the balance of probabilities, almost but not exactly, beyond reasonable doubt...The standard of proof beyond reasonable doubt ought to be left where it belongs, to wit, in criminal cases. It is not safe to extend it to an offence which *can be said to be quasi-criminal in nature.*”

[29] The rationale for this standard is that if cited for contempt, and the prayer sought is for committal to jail, the liberty of the contemnor will be affected. As such, the standard of proof is higher than the standard in civil cases. This power, to commit a person to jail, *must be exercised with utmost care, and exercised only as a last resort.* It is of utmost importance, therefore, for the respondents to establish that the alleged contemnor’s conduct was deliberate, in the sense that he or she *willfully acted in a manner that flouted the Court Order.*”

22. The Respondents have raised the defence of non-allocation and unavailability of funds as the reasons for their inability to obey the Court’s orders. This defence has been addressed in similar cases in **Wachira Nderitu, Ngugi & Co. Advocates vs. The Town Clerk, City Council of Nairobi Miscellaneous Application No. 354 of 2012**, and in **Republic v Principal Secretary, Ministry of Defence ex parte George Kariuki Waithaka [2019] Eklr**, wherein it was held that non-allocation of funds is not an acceptable defence or justifiable excuse for non-payment of decretal sums ordered to be paid by Government officials, in the absence of any evidence of any attempts made by the responsible Government official to commence the process of such allocation

23. The 2nd Respondent in this regard annexed and brought evidence of letters dated 19th October 2019 and 1st July 2020 written to the 3rd Respondent informing of the court’s orders herein and advising on payment. The 3rd Respondent also brought evidence of a letter dated 6th June 2020 addressed to the Principal Secretary at the National Treasury seeing authority and funds to settle the matter. Given that the Respondents have demonstrated that they have taken steps to secure payment of the monies due to the *ex parte* Applicant, and have also requested for more time to do so, they cannot be deemed to be in willful disobedience of the orders granted herein on 18th July 2016.

The Disposition

24. I accordingly find that that the Respondents have shown steps taken to satisfy the decretal sum due to the *ex parte* Applicant, and they are not culpable for contempt of court. However, given the delay in satisfying the decree issued to the *ex parte* Applicant, I hereby dispose of the *ex parte* Applicant’s Notice of Motion application dated 4th February 2020 on the terms of the following orders:

I. The prayers in the *ex parte* Applicant’s Notice of Motion application dated 4th February, 2020 seeking committal, arrest and detention of the 2nd and 3rd Respondents herein for contempt of court are declined.

II. The *ex parte* Applicant shall be at liberty to pursue contempt of court proceedings against the 2nd and 3rd Respondents, in the event that there is no subsequent follow-up on payment and satisfaction of the decretal sum herein within 12 months of the date of this ruling.

III. There shall be no order as to costs.

25. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 19TH DAY OF OCTOBER, 2021

P. NYAMWEYA

JUDGE

DELIVERED AT NAIROBI THIS 19TH DAY OF OCTOBER ,2021

A. NDUNG’U

JUDGE