



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW MISCELLANOUS APPLICATION NO. 238 OF 2015

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

PRINCIPAL SECRETARY, MINISTRY OF

AGRICULTURE, LIVESTOCK & FISHERIES.....RESPONDENT

AND

ASSOCIATED ARCHITECTS.....1ST EX PARTE APPLICANT

HONGO ASSOCIATES.....2ND EX PARTE APPLICANT

OTIENO ODONGO & PARTNERS.....3RD EX PARTE APPLICANT

NGILU & ASSOCIATES.....4TH EX PARTE APPLICANT

RULING

The Application

1. The *ex parte* Applicants herein filed a Notice of Motion application dated 9th November, 2020, seeking orders that the Principal Secretary, State Department for Livestock, Ministry of Agriculture and Fisheries, the Respondent herein, be committed to civil jail for a period of six (6) months or any other period this Court may deem fit and appropriate, and that this Court be pleased to issue any such order as it may deem fit and just, including on costs.

2. The said application is supported by an affidavit of even date sworn by Kamawe Nugi, the Managing Partner of the 1st *ex parte* Applicant. It is the *ex parte* Applicants' case that a judgment was rendered by Aburili J. on 5th March, 2018, wherein the Court ordered that the Principal Secretary, State Department for Livestock, Ministry of Agriculture and Fisheries was under duty to satisfy the decree in HCCC No. 488 of 2013 for the principal sum, costs and interest outstanding at Kshs. 25,953,160.13, and that the *ex parte* Applicants had satisfied the court that they are entitled to the order of mandamus sought in their Notice of Motion date 26th October, 2015.

3. Consequently, that the *ex parte* Applicants duly extracted the decree and served it upon the Attorney General on 26th July 2019 and on the Respondent on 2nd August 2018, and filed an affidavit of service thereto on 18th October 2018. The *ex parte* Applicant contend that in blatant breach and utter contempt of the judgment and decree, the Respondent has failed, neglected and/or refused to pay the said sum of Kshs. 25,953,160.13/-. The averred that their advocates have made numerous follow ups and reminders to the Respondent and even sought the intervention of the Commission on Administrative Justice (Office of the Ombudsman) seeking settlement of the decree, but that the Respondent has ignored, neglected and/or refused to settle the same.

4. Accordingly, the *ex parte* Applicants urged that the authority and dignity of this Court has been gravely undermined, and will continued to be so undermined unless the Respondent is punished accordingly. It was further contended that the conduct of the Respondent in disobeying the judgment and decree and treating the same with contempt is against the law, and that the *ex parte* Applicants have no other means of enforcing the same.

The Response

5. In response, the Respondent filed a Replying Affidavit sworn on 31st March, 2021 by Harry Kimutai, the Principal Secretary in the State Department for Livestock in the Ministry of Agriculture, Livestock & Fisheries. He indicated therein that the *ex parte* Applicants instituted civil proceedings against the Ministry of Agriculture on 8th November, 2013 seeking payment for the contract sum of Kshs. 84,505,999/- plus interest and costs, and a judgment was delivered therein on 30th June, 2012 in the sum of Kshs. 142,179,531.15/- That on account of delay in settling the judgment debt, the *ex parte* Applicants instituted judicial review proceedings wherein they obtained an order of mandamus to compel the Ministry of Agriculture to settle the claim.

6. It is his contention that the State Department for Livestock in the Ministry of Agriculture made the said payment which was spread over a three-year period being 11th December, 2015, 10th December, 2016 and 5th May, 2017 upon agreement by the parties. However, that the *ex parte* Applicants sought a further payment of Kshs. 39,710,777.83/- which is alleged to have accrued as interest from 26th October, 2017 to 10th July, 2017, and the court in its judgment of 5th March, 2018, determined that although the judgment debt had been settled, the *ex parte* Applicants were entitled to payment of interest for the three-year period.

7. Subsequently, that the matter was referred to the Deputy Registrar for determination of the amount to be paid as interest, whereby it was determined that Kshs. 25,953,160.13/- had accrued on the judgment debt as interest and the court issued a decree to that effect. The Respondent averred that the Office of the Attorney General forwarded copies of the court's decision and advised the Ministry of Agriculture to settle the outstanding claim. It was further his contention that while the Ministry has attempted settle the same, the debt remains due to budgetary constraints being experienced at the Ministry therefore, the Ministry has written to the National Treasury on several dates seeking funds as well as authority to settle the debt. Indeed, it was his contention that the orders sought, if granted will occasion unnecessary embarrassment to the Respondent, and was therefore opposed to the application.

The Determination

8. Njoroge Regeru & Company Advocates, the *ex parte* Applicants' advocates on record, canvassed the application through written submissions dated 16th March 2021. On the law governing contempt, counsel submitted that vide a decision in the case of **Kenya Human Rights Commission v Attorney General & Another, (2018) eKLR**, the court declared the entire Contempt of Court Act as unconstitutional, and the governing law thus reverted to the law before the enactment of the said Act as was held in the case of **Republic vs Principal Secretary, Ministry of Defence Ex parte George Kariuki Waithaka, (2019) eKLR**. Counsel submitted that section 5 of Judicature Act is therefore the operative law that governs contempt of court. As such, Part 81 of the Civil Procedure (Amendment No. 2) Rules 2012 of England and Wales deals with applications and proceedings in relation to contempt of Court and gives this court power to punish for contempt.

9. Counsel also cited the case of **Samuel M. N. Mweru & Others vs National Land Commission & 2 Others (2020) eKLR** whereby the court laid down the parameters that must be established before a party succeeds in a contempt application. In respect to the ingredients that must be proved to make a case for contempt, counsel submitted that the terms of the decree were clear, unambiguous and binding upon the Principal Secretary, State Department of Livestock in the Ministry; the Principal Secretary, State Department of Livestock in the Ministry had knowledge of the decree as evidenced by the affidavit of service; the Principal Secretary has been in breach of the decree since being served on 2nd August, 2018 and; despite personal knowledge of the decree, the Principal Secretary in the Ministry's conduct of non-compliance has been deliberate.

10. Counsel went on to submit that the reason of "lack of budgetary allocation" advanced by the Principal Secretary vide his letter dated 28th January, 2020 as the reason for non-payment of the decretal sum is not an acceptable defence or justifiable excuse for non-payment of decretal sums by government officials. To buttress that argument, counsel cited the case of **Republic vs Principle Secretary, Ministry of Defence Ex-parte George Kariuki Waithaka (supra)**, whereby the court noted that once the certificate of order against 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 an interest lawfully accruing thereon. This provision does not condition payment to budgetary allocation and parliamentary approval of Government expenditure in the financial year subsequent to which Government liability accrues.

11. Indeed, that the court held that non-allocation of funds by Parliament 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 attempts made by the responsible Government official to commence the process of such allocation. Counsel submitted the instant application was personally served upon Mr. Harry Kimutai, the Principal Secretary on 25th January, 2021, but he declined to acknowledge service as outlined in the affidavit of service sworn by Wanjiru Carolyne on 15th March, 2021. In light of the above, counsel urged that the Principal Secretary, State Department of Livestock in the Ministry be found to be contempt of the decree of this Honourable Court and be committed to civil jail for six (6) months.

12. The Respondent did not file any submissions in respect to the application.

13. I have considered the arguments made by the parties, and the two main issues for determination in this application are whether the Respondent disobeyed the orders issued herein on 5th March, 2018, and if so, what penalties should be imposed upon him. 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**.

14. *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 of 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.

15. Rule 81.8 of the English Civil Procedure Rules 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.

16. 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.

17. In the present application, it is evident that the Respondent is aware of the court orders granted herein on 5th March, 2018, and the question that needs to be answered is whether he has 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.

18. 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.”

19. The Respondent has raised the defence of non-allocation and unavailability of funds as the reason for his 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 Waitthaka [2019] e KLR, 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

20. The Respondent in this regard averred that he has attempted to settle the said decretal sum, and annexed and brought evidence of a letter dated 25th November 2020 addressed to the Principal Secretary at the National Treasury in which he included the said decretal sum in the Ministry’s supplementary estimates and sought approval for its payment. Given that the Respondent has demonstrated that he has taken steps to secure payment of the monies due to the *ex parte* Applicants, and has also requested for more time to do so, he cannot be deemed to be in wilful disobedience of the orders granted herein on 5th March 2018.

The Disposition

21. I accordingly find that that the Respondent has shown steps taken to satisfy the decretal sum due to the *ex parte* Applicants, and he is thus 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* Applicants’ Notice of Motion application dated 9th November, 2020, on the terms of the following orders:

I. The prayer in the *ex parte* Applicants’ Notice of Motion application dated 9th December 2020 seeking committal of the Respondent to civil jail for contempt of court is declined.

II. The *ex parte* Applicants shall be at liberty to pursue contempt of court proceedings against the Respondent, 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.

22. 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