



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISUMU**

**JUDICIAL REVIEW NO. 10 OF 2019**

**REPUBLIC.....APPLICANT**

**VERSUS**

**CHIEF OFFICER DEPARTMENT OF TRADE,**

**INDUSTRY, TOURISM & ENTERPRENEURSHIP**

**COUNTY GOVERNMENT OF VIHIGA .....1<sup>ST</sup> RESPONDENT**

**COUNTY EXECUTIVE COMMITTEE**

**MEMBER FOR FINANCE**

**COUNTY GOVERNMENT OF VIHIGA..... 2<sup>ND</sup> RESPONDENT**

**EXPARTE APPLICANT: GALEXON KENYA LIMITED**

**RULING**

The application dated 24<sup>th</sup> April 2020 asks the Court to find that the Respondents are in contempt of the Orders granted on 27<sup>th</sup> February 2020.

1. The Applicants requested the Court to commit the Respondents to Civil Jail for a period of 6 months.
2. The Respondents have both confirmed having received the Order made on 27<sup>th</sup> February 2020. The said Order was worded as follows;

***“1. THAT the Notice of Motion dated 24<sup>th</sup> September, 2019 and filed on 27<sup>th</sup> September, 2019 is allowed as against the Respondents as prayed that is***

***i. THAT an Order of Mandamus commanding the Chief Officer, Department of Trade, Tourism and Industry, County Government of Vihiga and the County Executive Committee Member for Finance County Government of Vihiga, to settle the decretal sum together with interest and costs as awarded in Civil Suit No. 18 of 2017 as follows;***

- (a) Kshs 20,798,450/= being the contract sum;***
- (b) Kshs 6,190,330/= being interest at 14% as at 22<sup>nd</sup> July 2019;***
- (c) Kshs 2,396,554.99 as taxed by the Deputy Registrar.***

***2.. THAT each party to bear its own costs.”***

3. In their Replying Affidavits, the Respondents deponed that they do not have powers to pay or to authorize payment of the decretal amounts.

4. As far as the Respondents were concerned, any liability of expenditure against the County can only be defrayed from money that had been allocated, budgeted and provided by the County.

5. In this instance, the Respondents said that the amounts in issue were not eligible for payment at the time when the Order dated 27<sup>th</sup> February 2020 was received by them. They said that;

***“Upon receipt of the Court Order, the amounts owed will now be included in the upcoming auditor’s report as a bill eligible for payment.”***

6. The bottom-line is that the Orders commanding the Respondents to pay the decretal amounts has not been complied with.

7. I find that the Orders made by the Court on 27<sup>th</sup> February 2020 were not subject to the internal procedures or processes of the County Government.

8. It is not the inclusion of the amounts due in the

*“upcoming auditor’s report as a bill eligible for payment”,*

that will determine if or when the money will be paid.

9. The Respondents were ordered to pay the money due to the Applicant. If the Respondents or either of them believed that they had no powers to pay or to authorize payment, they could have lodged an appeal to challenge the Orders that had been directed at them.

10. As soon as the Respondents were served with the Orders of Mandamus, commanding them to settle the decretal sum together with interest and costs, they were a legal duty to comply with the said Order.

11. In the case of **ECONET WIRELESS KENYA LIMITED Vs MINISTER FOR INFORMATION & COMMUNICATION OF KENYA & ANOTHER [2005] 1 KLR 828** Ibrahim J. (as he then was) said;

***“It is the plain and unqualified obligation of every person against, or in respect of whom, an order is made by a Court of competent jurisdiction, to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or void.”***

12. In this instance, I have not found proof that the Respondents colluded or connived to disobey the court order.

13. Nonetheless, it was not necessary that such proof be tendered before the Respondents could be held to be in contempt of the Court orders.

14. If there were steps that ought to be taken by the Respondents in order to enable them comply with the orders, the onus was upon the Respondents to demonstrate to the Court that they had taken such steps.

15. In the case of **KENYA POSTS & TELECOMMUNICATIONS CORPORATION Vs PAUL GACHANGA NDARUA CIVIL APPLICATION NO. NAI 367 OF 2001**, the Court of Appeal made it clear that;

***“..... the failure by the accounting officer of a State Organ, government department, ministry or corporation to put into motion steps necessary for the settlement of or obedience of court decisions or facilitation of such settlement is prima facie evidence of neglect. It is simply not enough for such officer to say that he or she had informed the Treasury about the pending decision. He or she must show what steps he/she has taken in order to ensure that the decision is complied with.”***

16. The order in question was served upon the Respondents in February 2020. Since that date, there is no evidence of any steps taken by the Respondents to demonstrate the efforts made by them, with a view to ensuring compliance with the order.

17. In my considered view, it is definitely far from sufficient or reasonable explanation, for the Respondents to say that,

***“now the sums will be included in the upcoming auditor’s report as a bill eligible for payment.”***

18. The Respondents ought to have demonstrated to the court the steps they took over the last 3 months, but they have failed to do so. I therefore find them to be in contempt of court.

19. Before the Court hands down appropriate punishment, the Respondents will be given an opportunity for mitigation.

**DATED, SIGNED and DELIVERED at KISUMU This 27<sup>th</sup> day of May 2020**

**FRED A. OCHIENG**

**JUDGE**