

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC. APPLICATION (JR) No. 208 OF 2015 (JR)

IN THE MATTER OF APPLICATION BY F. W. NJOROGE

T/A F. W. NJOROGE & CO. ADVOCATES FOR LEAVE

TO APPLY ORDERS OF MANDAMUS

AND

IN THE MATTER OF THE COUNTY SECRETARY, OLKEJUADO COUNTY GOVERNMENT

AND

**IN THE MATTER OF THE URBAN AREAS AND CITIES ACT AND COUNTY
GOVERNMENT ACTS**

BETWEEN

F. W. NJOROGE T/A F.W. NJOROGE & CO. ADVOCATES.....APPLICANT

VERSUS

COUNTY SECRETARY, ILKEJUADO COUNTY GOVERNMENT

(Sued as the successor of OLKEJUADO COUNTY COUNCIL)....RESPONDENT

RULING

1. On 25th January, 2016, after hearing the application dated 6th August, 2015, I issued an order of *mandamus* compelling the Respondent to pay the applicant the sum of Kshs 5,073,269.00 being the decretal sum arising from Nairobi HC Misc. Appl. No. 281 of 2012. On 18th July, 2016, I directed the Respondent to settle the said sum by way of Kshs 1.5 Million on or before the last day of October, 2016 and on the last day of the months of November, 2016, December, 2016 and February, 2017. The balance outstanding was to be paid on or the last day of April, 2017 and parties were given the liberty to negotiate the interest. The mater was then supposed to be fixed at the end of April, 2017 if it became necessary but they were given liberty to apply.

2. However following the said order, it would seem that there was non-compliance therewith. As a result, by way of a Motion on Notice dated 6th April, 2017, the ex parte applicant moved this Court seeking the following orders:

1. This application be certified as urgent and be heard *ex parte* in the first instance owing to its urgency.

2. Warrants of arrest and committal to civil jail be issued to the Applicant as against the respondent and do subsist in force till the decretal amount is paid in its entirety, owing to the Respondent's continued disregarding of this Court's Orders and specifically the order made on 18th July 2016 requiring the decretal sum to be settled in monthly instalments of Kshs. 1,500,000/= till payment in full with effect from 30th of October 2016.

3. The Warrants of Arrest and committal to civil jail be executed by the Commissioner of Police through the Officer Commanding Police Division in Nairobi and/or through any other officer in a position to execute them as may be ultimately designated by this Court.

4. The costs of this application be borne by the Respondent.

3. It was the applicant's case that on 18th July 2016 when this matter came up for Notice to Show Cause why the County Secretary of the Olekejuado County Government **Dr. Ole Kerei** should not be committed to civil jail, he was heard on proposals of how the entire decretal amount would be liquidated whereafter the Court ordered that the same be by way of monthly instalments of Kshs. 1,500,000/= till payment in full commencing the 30th of October 2016. As the Orders were made in the presence of **Dr. Ole Kerei** he is well aware of the same.

4. It was deposed that despite the respondent's knowledge of this order, the applicant's advocates did, on 1st of November 2016, write to the respondent's advocates informing them of the default and further of the intention to commit the respondents to civil jail due to their continued refusal to comply with this Court's orders. However the said letter did not elicit any response.

5. It was the applicant's case that as at 28th November 2016 the decretal amount together with interest had increased to Kshs 8,385,210.20 due to the interest accruing on the decretal amount as per the decree issue by this Court. However following the payment of the 1st instalment of Kshs 1,347, 412/= on 28th November 2016 the same reduced to Kshs 7,037,798.20/= but still continued to accrue interest and as at 9th February 2017 when the respondent made the 2nd instalment of Kshs 1,347,412/= the same had risen to Kshs 7,226,758.26/= due to aforesaid application of interest. With the payment of the 2nd instalment the same reduced to Kshs 5,879,346/= but has to date risen to Kshs 5,998,866.12 due to the aforesaid application of interest.

6. It was averred that save for those 2 instalments the respondents made, they were in arrears of 3 instalments totalling Kshs 4,500,000/= and has a deficit of Kshs 305,176/= for the 1st and 2nd instalment thus in total arrears of Kshs 4,805,176/=. The applicant disclosed that vide her advocates' letter dated 14th February 2017, she did ask the respondent to provide her with a withholding tax certificate as well as the "directive" referred to in their letters of 28th November 2016 and 9th February 2017 if at all that was the basis for retaining Kshs 305,176/=. However the Respondent did not supply the same and the said letter dated 14th February 2017 did not elicit any response. It was therefore the applicant's position that no reason has been demonstrated for retaining the sum of Kshs 305, 176/= which sum should be paid out to her.

7. To the applicant, as the respondent has not made any further payment the same has since escalated to Kshs 5,998,866.12 and continue to accrue interest at 14% till the same is paid in full. Apart from the said sum, there are costs of Kshs 262,940/= that were assessed by **Hon D. Mburu** (Deputy Registrar) on 24th January 2017 and Kshs 15,000/= by this Court on 4th of April 2017 when the Court dismissed the applicant's application dated 16th November 2016 for want of form.

8. The applicant asserted that as at the time of swearing this affidavit the decretal amount plus assessed costs stood at Kshs 6,277,806/= of which Kshs 4,805,176/= is in arrears which amount should have been fully settled by end of April 2017 if the respondents were to abide by this Court's orders. Instead of the respondents clearing the amount in arrears, their advocates wrote to the Court on 31st March 2017 with a copy to the applicant's advocates and confirmed that their advocates were holding onto the December 2016 instalment but for unknown reasons did not forward the same. From the contents of the letter dated 31st March 2017 the respondents' advocates confirmed having received payment for the month of December 2016 which payments the Applicant averred had not been made either to her or her advocates.

9. It was therefore the applicant's case that in view of the clear breach of the orders of 18th July 2016 the

applicant is with no remedy other than to enforce compliance which can only be by way of arrest and committal to civil jail.

Respondents' Case.

10. The application was however opposed by the Respondents. According to them, it is not disputed that indeed the ex parte applicant herein is a decree holder and that the respondent herein was present and aware of the consent order recorded and adopted in court on 18th July 2016. The Respondents also confirmed that the applicant's advocate wrote to them a letter dated 1st November 2016 reminding them of the remittance of the 1st instalments which was due on or before the last day of October 2016. Even prior to the receipt of the said letter from the applicant's advocates, it was averred by the Respondents that arrangements were being made for the payment of the said sums and in fact through a letter dated 28th November 2016 the respondents forwarded two cheques dated 29th November 2016 and that as at 28th November 2016 they only owed the ex parte applicant Kshs One Million Five Hundred Thousand (1,500,000/=) being the 1st Instalments for the month of October 2016 pursuant to the terms of the consent order dated 18th July 2016 less 10% withholding Tax as directed by the Kenya Revenue Authority.

11. It was therefore the Respondents' position that the assertion by the applicant that the Respondents owed her the sun of Kenya Shillings Eight Million Three Hundred and Eighty Five Two Hundred Twenty Cents (8,385,210.20) was untrue for reasons that the applicant had misconstrued the terms of the consent order by applying the interest rates monthly rather than annually and forgetting that once the decretal sum had been settled, the parties were liberty to negotiate on the interest as stipulated under clause 6 of the consent order.

12. The Respondents stated that to the best on their knowledge there was no any money due to the applicant since the next payable instalment of Kenya Shillings One Million Five Hundred Thousand (1,500,000.00) was to be due on the 30th November 2016.

13. The Respondents however admitted forwarding two cheques vide letter dated 9th February 2017 totalling to a sum of Kenya Shillings One Million Three Hundred and Forty Seven Thousand Four Hundred and Twelve (1,347,412.00) this being exclusive of the 10% withholding tax being taxed at the source as directed with the Kenya Revenue Authority.

14. It was therefore the Respondents' case that the amount of money claimed by the applicant herein is exaggerated as the exact amount of money that they owed is the instalment of February, 2017 being the sum of Kenya Shilling One Million Five Hundred Thousand (1,500,000/-) inclusive of the 10% withholding tax and the interest of 14% which was dependent upon negotiations of the parties.

15. The Respondents disclosed that they were fully aware that the Central Bank of Kenya and the Kenya Revenue Authority had issued a directive to all the County Governments to deduct withholding tax from the source and that it was due to this directive that they had always been deducting the 10% withholding tax from the applicant's monies hence the said deduction was done lawfully.

16. The Respondents averred that through the letter dated 11th April 2017 their advocates on record forwarded two cheques to the respondents' advocates being the payment for the instalment of December 2017. They further disclosed that they had released a further sun of Kenya Shillings One Million Five Hundred Thousand (1,500,000/=) through their advocates on record and based on the information received from the said advocates, the Respondents believed that they have already written 2 cheques dated 9th June 2017 which were to be forwarded to the respondent's advocates on 12th June 2017. Accordingly, the Respondents believed that the current payment will now completely settle the decretal sum and partly settle the interest and the costs herein.

17. The Respondents therefore tabulated its summary of accounts and arithmetic computations to all the

payments made by ourselves to the application to date as hereunder:

NO.	DATE	CHEQUE NO (S)	AMOUNT PAID
1.	2th October 2016	0417 and 0418	Kshs. 1,500,00.00
2.	9 th February, 2017	0441 and 0442	Kshs 1,500,000.00
3.	11 th April 2017	00492 and 00493	Kshs 1,500,000.00
4.	9 th June, 2017	00543 and 00544	Kshs 1,500,000.00
	TOTAL		Kshs 6, 000,000/-

18. The Respondents believed that they had already remitted instalments for October 2016, November 2016, December 2016 and February 2016 exclusive of the interest rate which would be dealt with once the decretal sum had been settled. According to them, they had already settled the sum of Kenya Shillings Five Million Seventy Thousand two Hundred & Sixty Nine only (5,073,269/-), the decretal sum and paid in excess of Kenya Shillings Nine Hundred and Twenty Six Thousand Nine and Thirty one (926,931.00) only. It was therefore their case that the amount of money stated therein was erroneous and in order to put the record straight they provided what in their view was the correct and accurate statement of payments as follows:-

- 1) The decretal sum as per the decree dated 18th June 2015 was Kenya Shillings Five Million Seventy Three Thousand Two Hundred & Sixty Nine 5, 073,269.00
- 2) The respondent has so far paid 4 instalments for the months of October 2016, November 2016, December 2016 and February 2017.
- 3) The issue of interest has been partly paid to a tune of (926,931.00) only but is still pending negotiations which was awarded at a rate of 145 p.a. effective from 22nd April 2012 and
- 4) Costs.

19. The Respondents explained that the delay in remitting the monthly payments was never intentional but was due to circumstances beyond their control and specifically due to the delays in getting the monies from the National Government. At all materials times when they got some funds from National Government they were always remit some monies to the applicant through their advocates on record.

20. It was however conceded that the Respondents' advocates on record wrote a letter addressed to Court notifying it that pending the delivery of the ruling as to whether they were in contempt of the court orders or not, they had released the 3rd instalment for the payment of the month December and the purpose of that letter was to notify the Court of current development as that time to enable it to arrive at a fair determination.

21. Based on information from their advocates, the Respondent believed that the instalments for the month of December 2016 was forwarded by their advocates through a letter dated 11th April 2017 enclosed with two cheques both dated 11th April 2017 bearing umbers 0493 and 0492 respectively.

22. The Respondents therefore averred that they are not so far in contempt of the court orders and the

orders sought by the applicant therein should be dismissed with costs.

Applicant's rejoinder

23. In her rejoinder the applicant averred that the respondent released the cheque referred to therein on 29th of November 2016 which was after the due date of 30th October 2016 hence was in contempt of Court. While conceding some of the averments in the replying affidavit, the Applicant however denied that the correct withholding tax should be 10% as the same does not relate to payment of dividends but 5% as the same could only be in payment of professional fees. It was disclosed that as per the presentation to official of County Governments by **John Onuonga ESQ**, the withholding tax professional fees is 5%. Moreover to date the respondent has failed to forward to the applicant's advocates the directive to deduct the withholding tax directly from the source despite alluding to the said directive severally.

24. It was the applicant's case that once the tax is withheld it is not forwarded to Central Bank which is not a collecting agent for Kenya Revenue Authority but rather to Kenya Revenue Authority itself and that in this case credit should not be given to the firm of **Naikuni, Ngaah & Miencha Co. Advocates** as they are not the Tax payers. Neither do the legal fees herein relate to service offered by their firm but rather the firm of F.W. Njoroge & Co. advocates in respect of which she is the proprietor.

25. In view of the above, the document attached by the respondents in which they purport to be a withholding tax certificate is not in fact one and that interest has been calculated annually and on a reducing balance. If at all the same had been wrongly calculated nothing would have been easier than the respondent recalculating the same and exhibiting their own version of the outstanding interest by way of evidence before the court or to her advocate. In the applicant's view, she was not under any obligation to be arm twisted by the respondent on what concession to give or waive any interest. In any event, the Bill of costs the subject of this matter was taxed in court way back in the year 2012, and the respondent completely declined to pay the same until the applicant brought the application herein. According to the Applicant, she provided evidence that the respondent has severally breached the court's directive on the payment of the monies owed to her and as such the respondent can only blame itself for the accrued interest for failing to pay in good time and choosing to have protracted litigation on the matter herein.

26. However the Applicant averred that on 8th June 2017 discussions were held between herself, her advocate and the respondents' County Attorney and the issue of interest ironed out and agreed upon in good faith but the respondent seems to have negated the same. The Applicant reiterated that as at 28th November 2016 the respondent owed her Kshs 8,385,210.20/= and was in arrears of Kshs 152,588/=, having not paid the entire sum of Kshs 1,500,000/= in full and/or issued a withholding tax certificate from K.R.A. In her view, nothing would have been easier than attaching that directive as well as proper withholding tax a certificate.

27. The applicant averred that as at the time of swearing her affidavit of 6th April 2017 the respondents were yet to forward their cheques dated 11th April 2017 which cheques were forwarded on 12th April 2017. She however confirmed that she had only received the sum of Kshs 1,347,412/= from the respondent but not the said sum of Kshs 1,500,000/= and was yet to be issued with a compliant withholding tax certificate from Kenya Revenue Authority. To her, despite the respondent having made these two subsequent payments, they are still in arrears of Kshs 3,582,982/= plus an additional sum of Kshs 73,629/= in further interest thus Kshs 3,656,611/= which amount should have been cleared by the end of April 2017 to avert further calculation of interest.

28. The applicant insisted that the respondent had only paid Kshs 5,389,648/= and not Kshs 6,000,000/= and that there was undue delay in forwarding the monthly remittances which delay was also attributable to the respondents' advocates whom her advocates have had to write to requesting the release of monies long paid to the respondents firm and expressing her dissatisfaction with how they were holding onto her money.

Determination

29. I have considered the foregoing.

30. In this case it is clear that the Respondent has not complied with the orders of this Court. It has however contended that the delay in remitting the funds to the applicant, was due to the failure by the National Government to remit payments to the County Governments.

31. This Court has held time and again that where a party has some difficulty in complying with an order of the Court the option is to approach the Court to vary the order. However non-compliance with the same is not an option.

32. In Wildlife Lodges Ltd vs. County Council of Narok and Another [2005] 2 EA 344 (HCK) the Court expressed itself thus:

“It was the plain and unqualified obligation of every person against or in respect of whom an order was made by a Court of competent jurisdiction to obey it until that order was discharged, and disobedience of such an order would, as a general rule, result in the person disobeying it being in contempt and punishable by committal or attachment and in an application to the court by him not being entertained until he had purged his contempt. A party who knows of an order, whether null or valid, regular or irregular, cannot be permitted to disobey it...It would be most dangerous to hold that the suitors, or their solicitors, could themselves judge whether an order was null or valid – whether it was regular or irregular. That they should come to the court and not take upon themselves to determine such a question. That the course of a party knowing of an order which was null or irregular, and who might be affected by it, was plain. He should apply to the court that it might be discharged. As long as it existed it must not be disobeyed...If there is a misapprehension in the minds of the defendants as to the reasonable meaning of the order, then the expectation of them is that they would have made an application to the court for the resolution of any misunderstanding and this would have been the lawful course...In cases of alleged contempt, the breach for which the alleged contemnor is cited must not only be precisely defined but also proved to the standard which is higher than proof on a balance of probabilities but not as high as proof beyond reasonable doubt...The inherent social limitations afflicting most people in a developing country such as Kenya have the tendency to restrict access to the modern institutions of governance, and more particularly to the judiciary which is professionally run, on the basis of complex procedures and rules of law. Yet, this same Judiciary is generally viewed as the impartial purveyor of justice, and the guarantor of an even playing ground for all, a perception which ought to be strengthened, through genuine respect for the courts of justice, and through compliance with their orders. Consistent obedience to court orders is required, and parties should not take it upon themselves to decide on their own which court orders are to be obeyed and which ones overlooked, in the supposition that this oversight will not impede the process of justice...Justice dictates even-handedness between the claims of parties; and if it the case that the plaintiff/applicant has not been accorded a level playing ground for the realisation of its economic activities, a matter that of course can only be established through evidence in the main suit, then the court ought to provide relief, by applying the established principles of law, one of these being the law of contempt...An *ex parte* order by the court is a valid order like any other and to obey orders of the court is to obey orders made both *ex parte* and *inter partes* since the Court by section 60 of the Constitution is the repository of unlimited first instance jurisdiction, and in this capacity it may make *ex parte* orders where, after a careful and impartial consideration, it is convinced that issuance of such an order is just and equitable. There is nothing potentially oppressive in an *ex parte* order, since such an order stands open to be set aside by simple application, before the very same court...Where a party considers an *ex parte* order to cause him undue hardship, simple application will create an opportunity for an appropriate variation to be effected thereto; and therefore there will be no excuse for a party to disobey a court order merely on the grounds that it had been made *ex parte* and this argument will not avail either

the first or the second defendant”.

33. In Republic vs. The Kenya School of Law & Another Miscellaneous Application No. 58 of 2014, this Court stated:

“Court orders, it must be appreciated are serious matters that ought not to be evaded by legal ingenuity or innovations. By deliberately interpreting Court orders with a view to evading or avoiding their implementation can only be deemed to be contemptuous of the Court. Where a party is for some reason unable to properly understand the Court order one ought to come back to Court for interpretation or clarification.”

34. In this case I wish to remind the public in general and the executive in particular of the views expressed by Lenaola, J, in Kariuki & 2 Others vs. Minister for Gender, Sports, Culture & Social Services & 2 Others [2004] 1 KLR 588 which views I associate myself with that:

“The instant matter is a cause of anxiety because of the increasing trend by Government Ministers to behave as if they are in competition with the courts as to who has more “muscle” in certain matters where their decisions have been questioned, in court! Courts unlike politically minded minister are neither guided by political expediency, popularity gimmicks, chest-thumping nor competitive streaks. Courts are guided and are beholden to law and to law only! Where Ministers therefore by their actions step outside the boundaries of law, courts have the constitutional mandate to bring them back to track and that is all that the courts do. Judicial review orders would otherwise have no meaning in our laws...Court orders must be obeyed whether one agrees with them or not. If one does not agree with an order, then he ought to, move the court to discharge the same. To blatantly ignore it and expect that the court would turn its eye away, is to underestimate and belittle the purpose for which Courts are set up.”

35. I similarly agree with the decision in Teacher’s Service Commission vs. Kenya National Union of Teachers & 2 Others Petition No. 23 of 2013 that:

“The reason why courts will punish for contempt of court is to safeguard the rule of law which is fundamental in the administration of justice. It has nothing to do with the integrity of the judiciary or the court or even the personal ego of the presiding judge. Neither is it about placating the applicant who moves the court by taking out contempt of court proceedings. It is about preserving and safeguarding the rule of law. A party who walks through the justice door with a court order in his hands must be assured that the order will be obeyed by those to whom it is directed. A court order is not a mere suggestion or an opinion on a point of view. It is a directive that is issued after much thought and with circumspection. It must therefore be complied with and it is in the interest of every person that this remains the case. To see it any other way is to open the door to chaos and anarchy and this Court will not be the one to open that door. If one is dissatisfied with an order of the court, the avenues for challenging it are also set out in the law. Defiance is not an option.”

36. The matter cannot be better expressed than in the words of Ojwang, J (as he then was) in B vs. Attorney General [2004] 1 KLR 431that:

“The Court does not, and ought not to be seen to, make Orders in vain; otherwise the Court would be exposed to ridicule, and no agency of the Constitutional order would then be left in place to serve as a guarantee for legality, and for the rights of all people.”

37. In Kenya Country Bus Owners Association & Ors vs. Cabinet Secretary for Transport & Infrastructure & Ors JR No. 2 of 2014 this Court sent a warning in the following terms:

“Where such dishonourable conduct is traced to a State Officer, the consequences are even greater. The Court would particularly be less sympathetic to persons who swear to protect

and defend the Constitution and thereafter violate the same with impunity. Our Constitution is still in its infancy. To violate it at this stage in my view amounts to defiling the supreme law of the land and that cannot be countenanced by any Court of law...Court proceedings and orders ought to be taken seriously and that it is their constitutional obligation to ensure that they are regularly appraised of the state of such proceedings undertaken by or against them or on their behalf and orders given by the Court and the Court will not readily accept as excusable the fact that they have delegated those duties to their assistants. Where there are pending legal proceedings they ought to secure proper legal advice from the Government's Chief legal advisers before taking any steps which may be construed as an affront to the Court process or which is calculated to demean the judicial process and bring it into disrepute."

38. As was held by **Musinga, J** (as he then was) in **Robert Kisiara Dikir & 3 Others vs. The Officer Commanding Keiyan General Service Unit (GSU) Post & 3 Others Kisii HCCP No. 119 of 2009**, if we show disrespect to the supreme law of the land, casual observance or breach with impunity by the Government or its servants and fail to punish or penalise those who violate important provisions we, as the temple of justice, will be encouraging such violation. Court orders, I must emphasise, are not subject to interpretation of the executive. Only Courts of law issuing the orders or Courts of higher jurisdiction are empowered to interpret Court orders.

39. In my view a person who, due to reasons beyond its control, finds himself in a position where he is unable or disabled from complying with the Court orders or directions ought to move the Court promptly for appropriate orders or directions. To simply ignore the orders or directions of the Court on the ground that one is unable to comply therewith can only amount to contempt.

40. Accordingly I find the application merited as the Respondents have unjustifiably failed to comply with the orders of this Court and are therefore in contempt. I therefore direct the Respondents' accounting officer to appear before this Court personally to show cause why appropriate sanctions ought not to be taken against him/her.

41. The costs of this application are awarded to the Applicant assessed in the sum of Kshs 15,000.00.

42. It is so ordered.

Dated at Nairobi this 30th day of January, 2018

G V ODUNGA

JUDGE

Delivered in the presence of:

Miss Mageto for Mr Naikuni for the Respondent

Mr Makumi for the Applicant

CA Ooko