



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
MISCELLANEOUS APPLICATION NO. 276 OF 2015
IN THE MATTER OF THE CIVIL PROCEDURE ACT CAP
21 LAWS OF KENYA
BETWEEN
REPUBLIC.....APPLICANT
VERSUS
THE PRINCIPAL SECRETARY,
MINISTRY OF DEFENCE.....RESPONDENT
EX PARTE: GEORGE KARIUKI WAITHAKA
RULING

1. By an application dated 31st October, 2016, the applicant herein, **George Kariuki Waithaka**, seeks an order that **Amb. Kiriimi P. Kaberia**, the Principal Secretary, Ministry of Defence, the respondent herein has disobeyed the orders of this Court issued on 13th July, 2016 and that the said Principal Secretary be committed to civil jail for a period of 6 months or any other period or any other sanction as this Court may deem fit and appropriate. The applicant also seeks a provision for the costs of this application.
2. According to the application 13th July, 2016 this Court issued an order of mandamus compelling the Respondent to pay to the applicant the sum of Kshs 3,858,529/- plus interest at 12% per annum from 10th April, 2015 till payment in full.
3. According to the applicant following the extraction of the decree herein as well as the Certificate of Order Against the Government, the same were served upon the Attorney General on 16th April, 2015. Despite the service of the said documents, the Respondent has refused to settle the amounts claimed
4. The applicant therefore claimed that the failure to settle the said decree amounts to contempt of the Court hence this application.
5. The application was opposed by the Respondent who filed an affidavit sworn by **Saitoti Torome**, the acting Principal Secretary of Defence on 4th December, 2017.
6. According to the said affidavit, the Ministry was served with a Notice of entry of judgement despite the applicant having not been represented at the delivery of judgement due to non-service. It was disclosed that the Ministry learnt about the judgement and subsequent orders issued by the Court in CMCC No. 9749 of 2003 when the Ombudsman office wrote to the State Law Office concerning the matter and copied the said correspondence to the Ministry.
7. It was averred that upon receipt thereof, the Ministry sought to find out what the matter was all about and by the time it learnt of the judgement, the time allowed for appeal had already lapsed.
8. It was however averred that the Ministry, being desirous of pursuing an appeal against the said judgement has filed an application seeking leave to file the appeal out of time

9. It was revealed that every Government Department, including the Ministry of Defence is usually given budgetary allocation yearly through Parliament as presented by the Cabinet Secretary for Finance for the purposes of expenditure by the relevant Ministry for that financial year.

10. In the Respondent's view the decretal sum herein is colossal and was not allocated in the budget for the Ministry of Defence for this financial year hence the amount can only be factored in the next financial year budget and duly approved by the National Assembly

11. According to the Respondent, the delay in settling the decretal amount is not intentional and not an act of disobedience of the Court order but is affected by budgetary allocation and approval by the National Assembly on the expenditure of the Ministry after the same is factored in the budget proposal of the Ministry and is approved by the National Assembly.

12. Before dealing with the issues raised in this applicant, it is important to revisit the current position with respect to contempt of Court. Parliament vide Act No. 46 of 2016 enacted the **Contempt of Court Act, 2016** (hereinafter referred to as "the Act") which was assented to on 23rd December, 2016 and commenced on 13th January, 2017.

13. According to the said Act contempt includes civil contempt means wilful disobedience of any judgment, decree, direction, order, or other process of a court or wilful breach of an undertaking given to a court. It is therefore clear that the wilful disobedience of a judgement, decree or order properly constitutes contempt of Court. Section 30 of the said Act provides that:

(1) Where a State organ, government department, ministry or corporation is guilty of contempt of court in respect of any undertaking given to a court by the State organ, government department, ministry or corporation, the court shall serve a notice of not less than thirty days on the accounting officer, requiring the accounting officer to show cause why contempt of court proceedings should not be commenced against the accounting officer.

(2) No contempt of court proceedings shall be commenced against the accounting officer of a State organ, government department, ministry or corporation, unless the court has issued a notice of not less than thirty days to the accounting officer to show cause why contempt of court proceedings should not be commenced against the accounting officer.

(3) A notice issued under subsection (1) shall be served on the accounting officer and the Attorney-General.

(4) If the accounting officer does not respond to the notice to show cause issued under subsection (1) within thirty days of the receipt of the notice, the court shall proceed and commence contempt of court proceedings against the accounting officer.

(5) Where the contempt of court is committed by a State organ, government department, ministry or corporation, and it is proved to the satisfaction of the court that the contempt has been committed with the consent or connivance of, or is attributable to any neglect on the part of any accounting officer, such accounting officer shall be deemed to be guilty of the contempt and may with the leave of the court be liable to a fine not exceeding two hundred thousand shillings.

(6) No State officer or public officer shall be convicted of contempt of court for the execution of his duties in good faith.

14. It is therefore clear that before any civil contempt of court proceedings are instituted in disobedience of a judgement, decree or order, the applicant must first move the Court to issue a notice to show cause against the accounting officer of the State organ, government department, ministry or corporation concerned. Such notice is to be served on both the accounting officer and the Attorney General. If no response to the notice is received, the Court may then at the expiry of the said thirty days' notice period proceed to commence contempt of court proceedings against the concerned accounting officer. In my view the thirty days' period is meant to enable the Attorney General to give legal advice to the entity concerned and thus avoid the necessity of contempt proceedings. Where however the entity believes that contempt of court proceedings ought not to be commenced, the entity is required to within the said period show cause, in my view preferably by way of an affidavit why the said proceedings ought not to be commenced. The Court will then determine whether cause has been shown or not based on the material before it. Without the rules of procedure having been promulgated it is therefore my view that an application for notice ought to be accompanied by an affidavit and that application may be heard ex parte since the merits thereon may be dealt with when the cause is shown by the entity or public officer concerned.

15. Where no cause is shown and the contempt of court proceedings are commenced, the Court can however only find that officer guilty of contempt upon satisfactory proof that the said contempt has been committed with the consent or connivance of, or is attributable to any neglect on the part of the accounting officer. Such officer will then be liable to a fine not exceeding two hundred thousand shillings.

16. With respect to the contempt of court proceedings subsequent to the issuance of the notice to show cause, section 7(3) of the said Act provides that:

"...any proceedings to try an offence of contempt of court provided for under any other written law shall not take away the right of any person to a fair trial and fair administrative action in accordance with Articles 47 and 50 of the Constitution."

17. It follows that the rules of natural justice ought to be adhered to in respect of the proceedings subsequent to the notice to show cause. In this respect it is expected that the application seeking orders to commit for contempt ought to be served personally upon the person sought to be committed. Section 37 of the Act empowers the Chief Justice to make rules for the better carrying out of the purposes of the Act. Before the enactment of the Act, section 5 of the **Judicature Act** imported the procedure for contempt of court followed by the High Court of Justice in England. Whereas the said section was deleted by section 38 of the Act, the rules contemplated by section 37 have not yet been promulgated. In my view, in the absence of the rules of procedure the lacuna must be filled by the invocation of section 24 of the **Interpretation and General Provisions Act** which provides that:

Where an Act or part of an Act is repealed, subsidiary legislation issued under or made in virtue thereof shall, unless a contrary intention appears, remain in force, so far as it is not inconsistent with the repealing Act, until it has been revoked or repealed by subsidiary legislation issued or made under the provisions of the repealing Act, and shall be deemed for all purposes to have been made thereunder.

18. The procedure 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***. In that case the Court found that under Rule 81.4 of the ***Civil Procedure (Amendment No. 2) Rules***, 2012, which deals with breach of judgement, order or undertaking, the application for contempt is made in the proceedings in which the judgement or order was made or undertaking given by what is referred to as “application notice” which application is required to set out fully the grounds on which the committal application is made, identify separately and numerically, each alleged act of contempt and be supported by affidavit(s) containing all the evidence relied upon. The said application and affidavit(s) must be served personally on the respondent unless the Court dispenses with the same if it considers it just to do so or authorises an alternative mode of service. In that case, the Court of Appeal held that leave or permission is no longer required in such proceedings. In our case however, section 30(5) complicates the procedure by stating that the contemnor, in case of a State organ, government department, ministry or corporation ***may with the leave of the court be liable to a fine not exceeding two hundred thousand shillings.***

19. In my view, to require an applicant to apply for leave to impose a sentence after the Court has been satisfied that a contempt of court has been committed by a State organ, government department, ministry or corporation would negate the provisions of Article 159(2)(d) of the Constitution. It is therefore my view that an applicant for contempt may perfectly apply for leave to fine the contemnor in the same application seeking that the Court finds the Respondent to be in contempt. To that extent the leave would only be with respect to mitigating factors and the sentence to be meted.

20. It is therefore my view that the procedure described by the Court of Appeal ought to be adopted with necessary modifications. As was rightly stated in ***Republic vs. Returning Officer of Kamkunji Constituency & The Electoral Commission of Kenya HCMCA No. 13 of 2008***, Parliament intended and that the High Court has the responsibility for the maintenance of the rule of law hence there cannot be a gap in the application of the rule of law. Therefore where there is a lacuna with respect to enforcement of remedies provided under the Constitution or an Act of Parliament, or if, through the procedure provided under an Act of Parliament, an aggrieved party is left with no alternative but to invoke the jurisdiction of the Court, the Court is perfectly within its rights to adopt such a procedure as would effectually give meaningful relief to the party aggrieved. To fail to do so would be to engender and abet an injustice and as has been held before, a court of justice has no jurisdiction to do injustice. See ***M Mwenesi vs. Shirley Luckhurst & Another Civil Application No. Nai. 170 of 2000*** and ***Kenya Industrial Estates Ltd vs. Transland Shoe Manufacturers Ltd. & 2 Others Civil Application No. Nai. 364 of 1999.***

21. It has been recognised that the law may be thought to have failed if it can offer no remedy for the deliberate acts of one person which injures another. See ***Bollinger vs. Costa Brava Wine Co. Ltd [1960] 1 Ch. 262 at 238***. As was held in ***Chege Kimotho & Others vs. Vesters & Another [1988] KLR 48; VOL. 1 KAR 1192; [1986-1989] EA 57*** citing ***Midland Bank Trust Co. vs. Green [1982] 2 WLR 130:***

“The law is a living thing: it adopts and develops to fulfil the needs of living people whom it both governs and serves. Like clothes it should be made to fit people. It must never be strangled by the dead hands of long discarded custom, belief, doctrine or principle.”

22. It is therefore clear that the law must adapt to the changing social conditions and where unlawful interference with a citizen’s rights gives rise to a right to claim redress and if the ex parte applicant has a right he must of necessity have the means to vindicate it and a remedy if they are injured in the enjoyment or exercise of it since it is a vain thing to imagine a right without a remedy; for want of right and want of remedy are reciprocal. See ***Rookes vs. Barnard [1964] AC 1129*** and ***Ashby vs. White [1703] 2 Ld Raym.938; 92 ER 126.***

23. In ***Republic vs. Returning Officer of Kamkunji Constituency & The Electoral Commission of Kenya*** (supra) it was held that just as nature abhors a vacuum, even the enforcement of the rule of law abhors a vacuum or a gap in its enforcement. Accordingly the Courts should uphold the jurisprudence that helps to “illuminate the dark spots and shadows in all circumstances, so that justice as a beacon of light and democratic ideals is practiced and hailed at all times over the hills, valleys, towns and homes in this beautiful land of Kenya. The mantle of justice and the rule of law must cover all corners of Kenya in all stations. Courts have a continuing obligation to be the foremost protectors of the rule of law”.

24. In this case, the Respondents seem to be questioning the legality of the original judgement. With due respect it is too late in the day to do that. If the Respondent is aggrieved by the original judgement his recourse is to appeal against the same or seek an order reviewing and setting it aside. However the mere fact that an appeal has been filed does not operate as a stay or suspension of the decree arising therefrom. A party who wishes to stay the implementation of the order ought to make a specific application for such orders.

25. As regards lack of budgetary allocation, ***Githua, J in Republic vs. Permanent Secretary, Ministry of State for Provincial Administration and Internal Security Exparte Fredrick Manoah Egunza [2012] eKLR*** expressed herself as 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 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. *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.* [Emphasis mine].

26. I associate with the said decision and it is therefore my view that settlement of decretal sum by the Government whether National or County does not necessarily depend on the availability of funds. This position was appreciated by this Court in Wachira Nderitu, Ngugi & Co. Advocates vs. The Town Clerk, City Council of Nairobi Miscellaneous Application No. 354 of 2012 in which this Court pronounced itself as follows:

“I have however considered the other issues raised by the respondent with respect to its debt portfolio as against its financial resources. It is neither in the interest of this Court nor that of the ex parte applicant that the respondent should be brought to its knees. The Court appreciates and it is a matter of judicial notice that most of the local authorities are reeling under the weight of the debts accrued by their predecessors and that they are trying to find their footing in the current governmental set up. Accordingly I am satisfied based on the material on record that the respondent ought to be given some breathing space to arrange its finances and settle the sum due herein.”

27. In my view a party facing financial constraints is at liberty to move the Court for appropriate orders which would enable it to settle its obligations while staying afloat. That however, is not a reason for one to evade its responsibility to settle such obligations. In other words financial difficulty is only a consideration when it comes to determining the mode of settlement of a decree but is not a basis for declining to compel the Respondent to settle a sum decreed by the Court to be due from it. That objection therefore fails.

28. It must however be remembered that Court orders are not made in vain and are meant to be complied with. If for any reason a party has difficulty in complying with court orders the honourable thing to do is to come back to court and explain the difficulties faced by the need to comply with the order. Once a Court order is made in a suit the same is valid unless set aside on review or on appeal. In Econet Wireless Kenya Ltd vs. Minister for Information & Communication of Kenya & Another [2005] 1 KLR 828, Ibrahim, J (as he then was) stated:

“It is essential for the maintenance of the rule of law and order that the authority and the dignity of our Courts are upheld at all times. The Court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors. 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”.

29. This position was confirmed by the Court of Appeal in Refrigerator & Kitchen Utensils Ltd. vs. Gulabchand Popatlal Shah & Others Civil Application No. Nai. 39 of 1990. 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 be 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”.

30. In Central Bank of Kenya & Another vs. Ratilal Automobiles Limited & Others Civil Application No. Nai. 247 of 2006, the Court of Appeal held that Judicial power in Kenya vests in the Courts and other tribunals established under the Constitution and that it is a fundamental tenet of the rule of law that court orders must be obeyed and it is not open to any person or persons to choose whether or not to comply with or to ignore such orders as directed to him or them by a Court of law.

31. 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...”

32. Court orders are not meant for cosmetic purposes. They are serious decisions that are meant to be and ought to be complied with strictly. As was held in Teacher’s Service Commission vs. Kenya National Union of Teachers & 2 Others Petition No. 23 of 2013:

“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 or 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.”

33. It was therefore appreciated by Ojwang, J (as he then was) in B vs. Attorney General [2004] 1 KLR 431 that:

“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.”

34. In this case there is no reason why the Respondents have not satisfied the order of this Court. Section 30(5) and (6) of the *Contempt of Court Act* provides that:

(5) Where the contempt of court is committed by a State organ, government department, ministry or corporation, and it is proved to the satisfaction of the court that the contempt has been committed with the consent or connivance of, or is attributable to any neglect on the part of any accounting officer, such accounting officer shall be deemed to be guilty of the contempt and may with the leave of the court be liable to a fine not exceeding two hundred thousand shillings.

(6) No State officer or public officer shall be convicted of contempt of court for the execution of his duties in good faith.

35. Section 109 of the *Evidence Act* provides that:

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

36. This burden is known as the evidentiary burden of proof in legal parlance. In this case, it is my view that once the judgement creditor proves that he has a decree in his favour, which decree remains unsatisfied, the burden must shift to the respondent to satisfy the Court that the inability to satisfy the decree is not due to collusion, consent, connivance or neglect on the part of its accounting officer. To paraphrase

the position of the Court of Appeal in Kenya Posts & Telecommunications Corporation vs. Paul Gachanga Ndarua Civil Application No. Nai. 367 of 2001 and ABN Amro Bank, N.K. VS. Le Monde Foods Limited Civil Application No. 15 of 2002, all an applicant in the position of the applicant herein can reasonably be expected to do, is to swear, upon reasonable grounds, that the Respondent's accounting officer has consented to or connived at the commission of the contempt or has neglected to take the necessary steps to comply with the order of the Court. In my view 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. The applicant is not for example expected to go into the bank accounts operated by a State organ, government department, ministry or corporation to see if there is any money there. As was held in Kenya Posts & Telecommunications Corporation vs. Paul Gachanga Ndarua, (supra):

“...the property a man has is a matter so peculiarly within his knowledge that an applicant may not reasonably be expected to know them. In those circumstances, the legal burden still remains on the applicant, but the evidential burden would then have shifted to the Respondent...”

37. Similarly the financial status of a judgement debtor is peculiarly within his knowledge and the failure to satisfy the Court that its accounts are in “the red”, in my view, can only lead to a presumption that the contempt has been committed with the consent or connivance of, or is attributable to the neglect on the part the accounting officer, thus rendering such accounting officer guilty of the contempt.

38. What has however caused concern is that the orders sought herein are directed at one **Amb Kirimi P. Kaberia**, who is indicated as the Principal Secretary, Ministry of Defence. In the replying affidavit, it is indicated that the Acting Principal Secretary in that Ministry is in fact one **Saitoti Torome**.

39. It is clear that it is the accounting officer that is legally bound to satisfy a decree. This was the position of **Goudie, J**, in Shah vs. Attorney General (No. 3) Kampala HCMC No. 31 of 1969 [1970] EA 543 where the Learned Judge expressed himself, *inter alia*, as follows:

“Mandamus is essentially English in its origin and development and it is therefore logical that the court should look for an English definition. Mandamus is a prerogative order issued in certain cases to compel the performance of a duty. It issues from the Queen's Bench Division of the English High Court where the injured party has a right to have anything done, and has no other specific means of compelling its performance, especially when the obligation arises out of the official status of the respondent. Thus it is used to compel public officers to perform duties imposed upon them by common law or by statute and is also applicable in certain cases when a duty is imposed by Act of Parliament for the benefit of an individual. Mandamus is neither a writ of course nor of right, but it will be granted if the duty is in the nature of a public duty and especially affects the rights of an individual, provided there is no more appropriate remedy. The person or authority to whom it is issued must be either under a statutory or legal duty to do or not to do something; the duty itself being of an imperative nature... In cases where there is a duty of a public or quasi-public nature, or a duty imposed by statute, in the fulfilment of which some other person has an interest the court has jurisdiction to grant mandamus to compel the fulfilment...The foregoing may also be thought to be much in point in relation to the applicant's unsatisfied judgement which has been rendered valueless by the refusal of the Treasury Officer of Accounts to perform his statutory duty under section 20(3) of the Government Proceedings Act. It is perhaps hardly necessary to add that the applicant has very much of an interest in the fulfilment of that duty...Since mandamus originated and was developed under English law it seems reasonable to assume that when the legislature in Uganda applied it to Uganda they intended it to be governed by English law in so far as this was not inconsistent with Uganda law. Uganda, being a sovereign State, the Court is not bound by English law but the court considers the English decisions must be of strong persuasive weight and afford guidance in matters not covered by Uganda law...English authorities are overwhelmingly to the effect that no order can be made against the State as such or against a servant of the State when he is acting “simply in his capacity of servant”. There are no doubt cases where servants of the Crown have been constituted by Statute agents to do particular acts, and in these cases a mandamus would lie against them as individuals designated to do those acts. Therefore, where government officials have been constituted agents for carrying out particular duties in relation to subjects, whether by royal charter, statute, or common law, so that they are under a legal obligation towards those subjects, an order of mandamus will lie for the enforcement of the duties...With regard to the question whether mandamus will lie, that case falls within the class of cases when officials have a public duty to perform, and having refused to perform it, mandamus will lie on the application of a person interested to compel them to do so. It is no doubt difficult to draw the line, and some of the cases are not easy to reconcile... It seems to be an illogical argument that the Government Accounting Officer cannot be compelled to carry out a statutory duty specifically imposed by Parliament out of funds which Parliament itself has said in section 29(1) of the Government Proceedings Act shall be provided for the purpose. There is nothing in the said Act itself to suggest that this duty is owed solely to the Government...Whereas mandamus may be refused where there is another appropriate remedy, there is no discretion to withhold mandamus if no other remedy remains. When there is no specific remedy, the court will grant a mandamus that justice may be done. The construction of that sentence is this: where there is no specific remedy and by reason of the want of specific remedy justice cannot be done unless a mandamus is to go, then mandamus will go... In the present case it is conceded that if mandamus was refused, there was no other legal remedy open to the applicant. It was also admitted that there were no alternative instructions as to the manner in which, if at all, the Government proposed to satisfy the applicant's decree. It is sufficient for the duty to be owed to the public at large. The prosecutor of the writ of mandamus must be clothed with a clear legal right to something which is properly the subject of the writ, or a legal right by virtue of an Act of Parliament... In the court's view the granting of mandamus against the Government would not be to give any relief against the Government which could not have been obtained in proceedings against the Government contrary to section 15(2) of the Government Proceedings Act. What the applicant is seeking is not relief against the Government but to compel a Government official to do what the Government, through Parliament, has directed him to do. Likewise there is nothing in section 20(4) of the Act to prevent the making of such order. The subsection commences with the proviso “save as is provided in this section”. The relief sought arises out of subsection (3), and is not “execution or attachment or process in the nature thereof”. It is not sought to make any person “individually liable for any order for any payment” but merely to oblige a Government officer to pay, out of the funds provided by Parliament, a debt held to be due by the High Court, in accordance with a duty cast upon him by

Parliament. The fact that the Treasury Officer of Accounts is not distinct from the State of which he is a servant does not necessarily mean that he cannot owe a duty to a subject as well as to the Government which he serves. Whereas it is true that he represents the Government, it does not follow that his duty is therefore confined to his Government employer. In *mandamus* cases it is recognised that when statutory duty is cast upon a Crown servant in his official capacity and the duty is owed not to the Crown but to the public any person having a sufficient legal interest in the performance of the duty may apply to the Courts for an order of *mandamus* to enforce it. Where a duty has been directly imposed by Statute for the benefit of the subject upon a Crown servant as *persona designata*, and the duty is to be wholly discharged by him in his official capacity, as distinct from his capacity as an adviser to or an instrument of the Crown, the Courts have shown readiness to grant applications for *mandamus* by persons who have a direct and substantial interest in securing the performance of the duty. It would be going too far to say that whenever a statutory duty is directly cast upon a Crown servant that duty is potentially enforceable by *mandamus* on the application of a member of the public for the context may indicate that the servant is to act purely as an adviser to or agent of the Crown, but the situations in which *mandamus* will not lie for this reason alone are comparatively few...*Mandamus* does not lie against a public officer as a matter of course. The courts are reluctant to direct a writ of *mandamus* against executive officers of a government unless some specific act or thing which the law requires to be done has been omitted. Courts should proceed with extreme caution for the granting of the writ which would result in the interference by the judicial department with the management of the executive department of the government. The Courts will not intervene to compel an action by an executive officer unless his duty to act is clearly established and plainly defined and the obligation to act is peremptory...On any reasonable interpretation of the duty of the Treasury Officer of Accounts under section 20(3) of the Act it cannot be argued that his duty is merely advisory, he is detailed as *persona designata* to act for the benefit of the subject rather than a mere agent of Government, his duty is clearly established and plainly defined, and the obligation to act is peremptory. It may be that they are answerable to the Crown but they are answerable to the subject...The court should take into account a wide variety of circumstances, including the exigency which calls for the exercise of its discretion, the consequences of granting it, and the nature and extent of the wrong or injury which could follow a refusal and it may be granted or refused depending on whether or not it promotes substantial justice... The issue of discretion depends largely on whether or not one should, or indeed can, look behind the judgement giving rise to the applicant's decree. Therefore an order of *mandamus* will issue as prayed with costs."

40. It follows that the only person who can be committed is the person holding the position of the Accounting Officer at any given time. In this case, there is no allegation that **Saitoti Torome** is unaware of the decree in question. In my view the mere fact that office holders in a Government Department have changed does not render the application incompetent. Even where there is misjoinder or non-joinder it was held in **Republic Ex Parte the Minister for Finance & The Commissioner of Insurance as Licensing and Regulating Officers vs. Charles Lutta Kasamani T/A Kasamani & Co. Advocate & Another Civil Appeal (Application) No. Nai. 281 of 2005** by the Court of Appeal that:

"Suffice it to say that a defect in form in the title or heading of an appeal, or *a misjoinder or non-joinder of parties are irregularities that do not go to the substance of the appeal and are curable by amendment*...Is the form of title to the appeal as adopted by the Attorney General in this matter defective or irregular? We think not, as we find that it substantially complies with the guidelines set out by this Court". [Emphasis added].

41. This was the position adopted in **Consolata Kihara & 21 Others vs. The Director of Kenya Trypanosomiasis Research Institute Nairobi H.C. Misc. Appl. No. 594 of 2002 [2003] KLR 582**, where it was held that issues of joinder and misjoinder of parties are not of significance where no miscarriage of justice or any form of injustice is alleged as a result of the choosing of parties to the litigation. This position is even more relevant to proceedings in the nature of judicial review which are neither criminal nor civil and particularly in application for *mandamus* where what is sought is the enforcement of a decree against the respondent not in his personal capacity but in his official capacity. In such circumstances, the respondent is simply being compelled to facilitate the payment as opposed to imposing personal liability.

42. It is therefore my view that misjoinder or non-joinder ought not on its own be the basis upon which an otherwise competent application is to be dismissed where the substance of the reliefs sought can still be realised notwithstanding the irregularity.

43. Article 159(2)(d) of the Constitution enjoins this Court to administer justice without undue regard to technicalities of procedure, as long as the rules of natural justice are adhered to. At the end of the day the entity which is bound to settle the decree is the Government and not the said officer in his personal capacity.

44. In the premises I grant leave to the applicant to commence contempt of court proceedings against the Respondent.

45. The costs of this application are awarded to the ex parte applicant.

Dated at Nairobi this 12th day of February, 2018

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Tole for Dr Kamau Kuria for the applicant

CA Ooko