



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CONSTITUTIONAL & JUDICIAL REVIEW DIVISION**

**JUDICIAL REVIEW NO. 38 OF 2012**

**IN THE MATTER OF: AN APPLICATION FOR AN ORDER OF MANDAMUS**

**AND**

**IN THE MATTER OF: THE SENIOR RESIDNET MAGISTRATE'S**

**(MOMBASA) CIVIL SUIT NO. 499 OF 1991 – RAMLA LALI**

**BAKARI VERSUS THE HON. ATTORNEY GENERAL**

**AND**

**IN THE MATTER OF: JUDGMENT DATED 30<sup>TH</sup> OCTOBER, 1995 IN**

**SRMCC (MOMBASA) CIVIL SUIT NO. 499 OF 1991 –RAMLA**

**LALI BAKARI VERSUS THE HON. ATTORNEY GENERAL**

**BETWEEN**

**RAMLA LALI BAKARI.....APPLICANT**

**AND**

**1. THE HON. ATTORNEY GENERAL.....RESPONDENT**

**2. THE PERMANENT SECRETARY**

**(OFFICE OF THE PRESIDENT–NAIROBI....INTERESTED PARTY**

**RULING**

**The Application**

1. The application before the court is Amended Notice of Motion filed herein on 21<sup>st</sup> November, 2016. The application prays for the follows orders:

(i) THAT the Respondent and Interested Party do immediately ensure payment of the sum ordered by this Honourable Court on 12<sup>th</sup> April, 2013 and said payment be finalized to the satisfaction of this Honourable Court.

(ii) THAT the Principal Secretary, Interior, Ministry of Interior and Coordination of National Government, office the President be cited for contempt of this Honourable Court and be committed to civil jail for 6 months for defying and being in flagrant and contemptuous breach of the Honourable Court's Orders of the 12<sup>th</sup> day of April 2013 issued by the Honourable Lady Justice Odero.

(iii) THAT the Respondents be condemned to pay the costs of this application.

2. The application is premised on the grounds set out therein and is supported by Affidavit of Ramla Lali Bakari, sworn on 10<sup>th</sup> August, 2016.

3. In brief, the Applicant's case is that this suit was initiated by way of Plaintiff's Complaint way back in July 1991 before **SENIOR RESIDENT MAGISTRATE'S COURT (MOMBASA) CIVIL CASE NO. 499 OF 1991**, with the Attorney General, the initial Defendant, filing their Statement of Defence in the matter on 14<sup>th</sup> February, 1992. The Court subsequently decided the suit in favour of the Plaintiff by its Judgment delivered on 30<sup>th</sup> October, 1995 by Honourable Matu Senior Resident Magistrate wherein it was judged that the Defendant do pay the Plaintiff Kshs. 138,088.10 with interest thereon at 14% per annum commencing 1<sup>st</sup> July, 1991 until payment in full. A Decree and Certificate of Order against the Government dated 31<sup>st</sup> July, 1996 was issued to reflect the above mentioned judgment and decree, with the Attorney General acknowledging receipt of the same vide their letter dated 21<sup>st</sup> September, 2004. Even after several attempts to have the said decree satisfied, the Defendant was not keen on acting on the said terms of the Judgment thereby necessitating Application dated 13<sup>th</sup> July, 2012 in which the applicant sought an order of Mandamus to compel satisfaction of the said Decree. Lady Justice M. Odero delivered a ruling on the Application dated 13<sup>th</sup> July, 2012 on 12<sup>th</sup> April, 2013 granting the Order of Mandamus. The Orders of the court dated 12<sup>th</sup> April, 2013 were duly extracted and served upon the Respondent and Interested Party together with the Penal Notices endorsed thereon severally and most recently on 18<sup>th</sup> March, 2016. The said orders were not obeyed but flagrantly ignored by the Respondent and Interested Party. To date, the said orders remain unsatisfied. The Respondent and Interested Party have intentionally committed acts of Contempt and disrespect to the Judicial Proceedings herein and in respect to this Court's Orders in particular. The applicant states that this Court has power, authority and indeed the duty to punish all who act with impunity and are in contempt of court and to establish due process and respect for the Rule of Law.

### **The Response**

4. The Respondent oppose the application vide Notice of Preliminary Objection dated 20<sup>th</sup> July, 2017, stating that the Notice of motion is incompetent, fatally defective and bad in law, and that the motion application contravenes the express provisions of **section 30 (2) of the Contempt of Court Act, 2016**.

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.

5. The Respondent's case is that it is 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 proceed to commence contempt of court proceedings against the concerned accounting officer.

### **Submissions**

6. Parties filed submissions which I have considered. In my view the following issues are to be determined in this matter.

(i) Whether there is a valid served court order;

(ii) Whether the court orders were disobeyed;

(iii) Whether this court can cite the Respondent and Interested Party for contempt of court and commit them to civil jail;

(iv) Whether Section 30(2) of the Contempt of Court Act, 2016 is applicable.

7. On the first issue, the applicant approached this court seeking an order of mandamus to compel the Respondent and Interested Party to pay the decretal amount to the Applicant. On 12<sup>th</sup> April, 2013 the court granted these prayers (see Affidavit by Ramla Lali Bakari marked “RLB003”). Those orders have neither been appealed nor set aside. They remain orders of this court. Furthermore the orders were served upon the Respondent and Interested party, who entered into several correspondences negotiating when payment should be made. However, no payment has to date been made. The Respondent and the Interested Party are the responsible state officers who are mandated by law to make such payments. They have not done that and they have not explained their failure. It is the duty of every person upon whom an order requiring compliance is served, to obey that order. The Respondent and the Interested Party herein are no exception.

8. The Law concerning Contempt of Court Proceedings is found under Section 5 of the Judicature Act and Section 63(c) of the Civil Procedure Act. Of relevance to this case is Section 5 of the Judicature Act which provides:-

**“5 (1) The High Court and the Court of Appeal shall have the same power to punish for contempt of court as is for the time being possessed by the High Court of Justice in England, and that power shall extend to upholding the authority and dignity of subordinate courts.**

**(2) An order of the High Court made by way of punishment for contempt of court shall be appealable as if it were a conviction and sentence made in exercise of the original criminal jurisdiction of the High Court.”**

**Rules 81.10** of England’s Civil Procedure (Amendment No.2) Rules **provides** for the procedural aspects of an application for committal. It provides as follows: -

**“(3) The application notice must—**

**a) set out in full the grounds on which the committal application is made and must identify, separately and numerically, each alleged act of contempt including, if known, the date of each of the alleged acts; and**

**b) be supported by one or more affidavits containing all the evidence relied upon.**

**(4) Subject to paragraph (5), the application notice and the evidence in support must be served personally on the Respondent.**

**(5) The court may—**

**a) dispense with service under paragraph (4) if it considers it just to do so; or**

**b) make an order in respect of service by an alternative method or at an alternative place.”**

9. In this case the court has noted that the Respondent herein is a Government Office and therefore the Applicant complied with Section 21 of the Government Proceedings Act and Order 29 (3) of the Civil Procedure Rules 2010. A ‘Certificate of Order against the Government’ was issued and is annexed to the Affidavit sworn by Ramla Lali Bakari and marked as **“RLB001”**.

10. Therefore, the Application is competently before this Court as all procedural requirements have been met, including proper service of the Application upon all the Respondents. Confirmation of receipt is evidenced by a letter from the Respondent confirming the same which is annexed to the Affidavit sworn by Ramla Lali Bakari and marked as **“RLB002”**.

11. The last issue is whether Section 30(2) of the Contempt of Court Act, 2016 would be applied to sustain the Preliminary Objection herein and to save the alleged contemnors from jail. I will address this issue at two levels. The first level is that the orders herein requiring compliance from the alleged contemnors were issued and served in the year 2013 before the said Contempt of Court Act came into being. The orders, and the disobedience thereon, came earlier in time. The said Act cannot be deemed to operate retroactively. Every law is promulgated to address future issue. Where a law is intended to operate retroactively, that intention will be made clear. The Respondents to this application have not shown this court that kind of intention. At the secondly level, and this is important, it is now common knowledge that the said Contempt of Court Act was recently declared unconstitutional in a constitutional court in Nairobi. It means that the said Act is as dead as a dodo and cannot be cited in any proceedings.

12. From the foregoing, it is the finding of this court that Section 30(2) of the Contempt of Court Act is not applicable to those proceedings. The totality of the foregoing is that the application by way of Amended Notice of Motion filed herein on 21<sup>st</sup> November, 2016 has merit and is allowed as prayed.

Orders accordingly.

**Dated, Signed and Delivered in Mombasa this 20<sup>th</sup> day of December, 2018.**

**E. K. O. OGOLA**

**JUDGE**

In the presence of:

Mr. Makuto for Respondent

N/A for Applicant

Court Assistant Kaunda