



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISC. CIVIL APPLICATION NO. 148 OF 2011

SAMIRA AHMED MZAHIM

ABDULLATIF TAIB

NOOR ABDUL LATIF TAIB.....APPLICANTS

VERSUS

THE OFFICE OF THE PRESIDENT.....RESPONDENT

R U L I N G

1. For determination is the *ex parte* applicants' Notice of Motion dated 4/3/2016 seeking Orders that the court commits, Ms. Muthoni Kimani, C.F. Kimani, Rose Ombata and Mutia Iringo to Civil jail for a period of six (6) months or such other period as the court deems fit with or without an option of a fine for reasons that the said four (4) people have committed the offence of contempt of court in an identifiable and separate manner with dates or proximate dates of such contempt and continue with such contempt despite warnings and having been made aware of the consequences of such breaches.

2. The application is supported by an affidavit sworn by one USHWIN KHANNA, Advocate who says to have personal knowledge of the facts by virtue of having had the conduct of the proceedings since the year 1985 when HCCC No. 221, 222, 223 and 224 of 1985 were instituted and subsequent judgments entered on the 29/5/1989.

3. After judgments were delivered in those suits, there was no settlement of the resultant decrees hence this motion for Judicial Review was filed seeking to compel settlement by the Office of the President. The Motion was duly served but was never defended although several hearing notices were served upon the Respondent leading to the Notice of Motion being allowed as prayed.

4. However, in the interim, there had been exchange of correspondence between the Applicants advocates and the Office of the Solicitor General, Ms. Muthoni Kimani, the Senior Deputy Solicitor General in particular, which essentially disputed the calculation of the due decretal sum and making a demand that compliance be made to circular no. 18 of 2009 that introduced requirement that the payee provides to the office of the Solicitor General, Tax compliance certificate prior to payment. There then ensued further correspondence all of which point to the difference being the computation of the decretal sum in the decree and application of further interests. It is also evident that sometimes on the 22/11/2013 there was issued a warrant of arrest against the one Mr. Mutie Iringo in his capacity as the Principal Secretary, Ministry of Interior and Co-ordination of National Government. Nothing is disclosed in the file if he was ever arrested.

5. The applicants have gone to great lengths to demonstrate the requirements under the Government Proceedings Act for satisfaction of a decree have been met by the Applicants but there has not been settlement. Infact by three letters; dated 12/3/2012 and 23/4/2012 authored by one Muthoni Kimani, MBS, and that of 20/7/2012 authored by one Rose Ombata, the Respondent hold the firm ground that the full decretal sum is Kshs.8, 827,651 and that part of it has been reunited to the decree holder and part being Kshs.4,154,032.45 is held by the Attorney General **“till the decree holder shall have availed, the demanded tax compliance certificate”**.

6. In opposition to the application the Respondent filed an affidavit by one C.F. Kimani, a legal officer, Ministry of Interior and National Coordination. He is the 2nd Respondent. He opposes the application and asserts that it is an abuse of a court process as none of the persons cited for contempt is the accounting officer for the ministry hence they cannot be held responsible for failure to settle the decree. The deponent points out that Mr. Mutie Iringo was not the accounting officer in the ministry and has since left the position while the 1st & 3rd Respondents have also transferred their services to other offices but after fully co-operating and complying with the court orders. The deponent then asserts that the decretal sum was Kshs.8,827,651.45 as advised by the Attorney General, on the basis of which budgetary allocation was sought and payment made to the Attorney General in two (2) tranches. First payment was made to the Applicants advocates while the other was made to one ABDUL LATIF TAIB the second *exparte* applicant directly. Various documents have been exhibited in the affidavit including the extracted order of the court showing the decretal sum to be Kshs.22,190,361 and a letter by the said 2nd *exparte* Applicant showing that he had signed a discharge.

Submissions by the parties

7. Mr. Khanna who appeared for the Applicant submitted that the fact of the existence and the service of the order upon the Respondent is not in dispute and that the failure to pay so far can only be construed to mean disrespect to the court order. He cited the decision in ***M vs Home Office and another 1993] 3 ALL ELR 537*** for the proposition that a Minister who disregards a court order was subject to be punished for contempt against himself or the government department he represents.

8. The decision in ***Mutitika vs Baharini Farm Ltd*** was equally cited for the proposition that anybody who has the knowledge of the existence of a court order, does anything something or causes another person to do something in disregard of the order is liable to be punished for contempt because such a person has by his conduct obstructed justice.

9. For the Respondent, Mr. Munene wholly relied on the Replying affidavit filed and added that section 21(3) of the **Government Proceedings Act** mandate that a Certificate of Order against the Government must state the sum due and the particular accounting officer concerned with payment hence none of the Respondent can be held in contempt. He also pointed out that section 21(4) of the same Act outlaws individual and personal liability of any public officer.

10. He added that the initial decrees in the original suits in the sum of Kshs.8,527,651.45 has been paid in full and what was outstanding is only costs which can be pursued elsewhere upon a fresh Certificate of Order Against the Government. Finally he added that there is a dispute as to the sum due and that there was failure on the decree holder to comply with secular no. 18/2009.

11. In closing submissions Mr. Khanna for the Applicant stressed the point that the court order remain to be complied with todate and that there was never availed any justification for disobedience hence the Respondents need to be punished for contempt to safeguard the integrity of the court.

12. From the foregoing submissions, the only issue that presents itself for determination is whether or not there has been unjustifiable failure to comply with court orders and whether enforcement should be ensured by punishment for contempt. The starting point is that the person faulted for disobedience should be in a position to comply or advise compliance with order in lieu of punishment as at the date the order for punishment is being metted out. That is the essence of the requirement of the Government Proceedings Act that the Order be served on an Accounting Officer.

13. It is not in dispute that the order and Certificate of Order Against the Government issued in this matter disclose the decretal sum to be Kshs.22,190,361.00 with interests at 12% w.e.f. 1/12/11 till payment in full. It is also not in contest that out of that sum the sum of Kshs.8,827,651.45 has been paid. There is no doubt that Certificate of order Against the Government was duly served upon the Respondents. The 1st Respondent in this application authored the letter dated 7/6/2000 and abrogated to herself the duty to calculate the decretal sum due and asserted:-

“We have re-calculated the amounts due to the claimant and established that there was an error in the figures stated by the claimants advocate which had applied compounded interest rate. The correct amounts due applying simple interest rate are as follows:8,827,651.45”

14. That letter, to this court, is what informs the argument and position taken by the Respondent that there is a dispute as the sum payable. This court takes the view that once a court order is issued, any person upon which is served has no liberty to sit in the comfort of their office and correct it. Such a party is enjoined to approach the court and point out to court the error with the order with a view to having it rectified or even set aside. As things stand today no due stops have been undertaken to correct the Certificate of Order served upon the Respondents and the position taken that the sum demanded is not the current sum cannot therefore be right.

15. The first respondent to this application is not some lay person or just any other counsel. She is the Senior Deputy Solicitor General of the Republic of Kenya, a public officer and a creature of the law that is bound by not only good sense of responsibility but by the very foundation of principles of public governance that the rule of law be followed. The Kenyan Society chose the route of democracy and Rule of Law for their governance hence nobody, before we change course, is excused from following and observing the dictates of the Rule of Law. Instead all are bound to follow the law which lies the cardinal ingredient that court orders be obeyed.

16. In *Kenya Tea Growers Association vs Francis Atwoli & 5 Others*[2012] eKLR the court said:-

“I need not cite authority for the proposition that it is of high importance that orders of the courts should be obeyed, wilful disobedience to an order of the court is punishable as a contempt of court and I feel no doubt that such disobedience as being illegal....even if the defendant thought that the injunction was improperly obtained or too wide in its terms, that provides no excuse for disobeying it. The remedy is to vary or discharge it”.

17. Put in the context of this matter, as said before, that the calculation of the sum due under the decree could be erroneous or that there was a new legal requirement before payment was effected were indeed good grounds to have the order varied but it was not open for the 1st Respondent to *suo motto* work what she thought was the correct sum and stand by it. Such is the practice that demeans the administration of justice and open it to ridicule since a bystander may see that officer to be an overseer or some sort of prefect over the court system able and permitted to overrule it at will. That would be a breeding recipe for anarchy and loss of faith in the legal and orderly determination of legal dispute. Whenever there is a feeling that court orders are un-important or not worth obeying then there would be no need to keep the institution of the court and keep it running at the peoples' expense.

18. I am in no doubt that the 1st respondent was always in a position of responsibility not only to advise truthfully but also to ensure compliance with court orders and in purporting to countermand the order, she was wholly unjustified and unjustifiable. She being the legal advisor to the Government, the rest of the Respondents were bound to follow her advice and it is that advice contained in the letter I have reproduced above that has brought us to where we are today in this matter.

19. The Court of Appeal in *Mutitika vs Baharini Farm Ltd* set the rule quite succinctly when it said:-

“.....any one who knowing of an injunction, or an order of stay, wilfully does something, or causes others to do something, to break the injunction or interfere with the stay, is liable to be

committed for contempt. The reason is that by doing so he (or she) has conducted himself (or herself) so as to obstruct the cause of justice and has attempted to set the order of the court at naught”.

20. I find that the other Respondent relied on the advice of the 1st Respondent to take the stand they have taken. Their disobedience therefore follows for the conduct of the 1st Respondent. For that reason, I would excuse them for the advice they took but I find that the 1st Respondent is in contempt and deserves punishment for such contempt.

21. Having so found, I would not proceed to mete out any punishment but issue a notice to the 1st Respondent, Muthoni Kimani, MBS, the Senior Deputy Solicitor General, Attorney General’s chambers, to attend court on 10/5/2017 and show cause why she should not be punished for being in contempt of the court orders issued herein or the 27/6/2012 as well as the Certificate of Order against the Government dated the 24/4/2013 and compelling the, office of the President to pay to the *exparte* Applicants the sum of Kshs.22,190,361 plus interests calculated at 12% p.a. from the 1/12/2011 till payment in full.

22. The *exparte* applicants will extract this order and serve upon the 1st Respondent.

23. I award the costs of the application to the applicants.

It is so ordered.

Dated and delivered at **Mombasa** this **23rd** day of **March 2017**.

P. J. O. OTIENO

JUDGE