



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**JUDICIAL REVIEW DIVISION**  
**JUDICIAL REVIEW CASE NO. 100 OF 2015**

**IN THE MATTER OF AN APPLICATION BY JUNE SEVENTEENTH ENTERPRISES LIMITED FOR LEAVE TO INSTITUTE JUDICIAL REVIEW PROCEEDINGS SEEKING AN ORDER FOR MANDAMUS**

**AND**

**IN THE MATTER OF ARTICLE 23 (f) AND 47 OF THE KENYAN CONSTITUTION**

**BETWEEN**

**JUNE SEVENTEENTH ENTERPRISES LIMITED.....APPLICANT**

**VERSUS**

**THE CABINET SECRETARY FOR MINISTRY OF INTERIOR AND**

**COORDINATION OF NATIONAL GOVERNMENT.....1<sup>ST</sup> RESPONDENT**

**THE CABINET SECRETARY LAND, HOUSING AND URBAN DEVELOPMENT.....2<sup>ND</sup> RESPONDENT**

**THE HONOURABLE ATTORNEY GENERAL.....3<sup>RD</sup> RESPONDENT**

**RULING**

**Introduction**

1. On 2<sup>nd</sup> December, 2016, this Court issued an order of *mandamus* is hereby issued directed to the said accounting officers compelling them jointly and severally to pay to the *Ex-parte* Applicant the sum of Kenya Shillings 34,867,158.00. together with costs of the said application.
2. By a Notice of Motion dated 25<sup>th</sup> January, 2017, the ex parte applicant now seeks the following orders:
  - 1) The 1<sup>st</sup> and 2<sup>nd</sup> Respondents be summoned before this Honourable Court to show cause

why they should not be committed to civil jail for blatantly failing to comply with the decree issued by this Honourable Court on 2<sup>nd</sup> December, 2016.

2) On failing to show necessary cause, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents be committed to prison for a maximum period of six (6) months for contempt of this Honourable Court's decree issued on 2<sup>nd</sup> December, 2016.

3) The 1<sup>st</sup> and 2<sup>nd</sup> Respondents be barred from addressing this Honourable Court in this matter unless and until they have purged themselves of the contempt.

4) The Officers Commanding Central Police Station do execute Order 2 herein.

5) Such further and other relief be granted to the Ex-Parte Applicants as this Court deems fit.

3. According to the ex parte applicant, subsequent to the judgement herein, a decree was extracted on 9<sup>th</sup> December, 2016 compelling the 1<sup>st</sup> and 2<sup>nd</sup> Respondents jointly and severally to pay the Ex-parte Applicant the sum of Kshs.34,867,158.00 plus costs of the suit and thereafter service of the decree herein and the penal notice was effected upon the 1<sup>st</sup> and 2<sup>nd</sup> Respondents on 15<sup>th</sup> of December, 2016. Despite that the applicant has waited patiently for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to comply with the said decree or communicate to it on the way forward in vain and since then a period of more than one (1) month has lapsed without the 1<sup>st</sup> and 2<sup>nd</sup> Respondents satisfying the said decree.

4. To the ex parte applicant the 1<sup>st</sup> and 2<sup>nd</sup> Respondents have blatantly disregarded this Court's decree and decided to be indolent on complying with the same and have further failed, ignored and or refused to settle the decretal sum as directed by this Honourable court without tendering any explanation or purged the disobedience or contempt.

5. According to the ex parte applicant unless this court intervenes expeditiously, in the eyes of the Ex parte Applicants' members who are citizens of this Republic, there is a looming threat to the Country's reputation of having a Judiciary that spots a façade of Constitutionalism and the Rule of Law, but whose Orders are not worth the piece of paper they are printed upon; which is apparent and clear intent of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents by their contumacious conduct complained of hence the orders sought herein.

### **Respondents' Case**

6. In response to the application, the Respondents filed the following grounds of opposition:

1) **THAT** the Applicant has not brought his application within the Law and according to the Contempt of Court Act 2016.

2) **THAT** the Contempt of court Act commenced on 13<sup>th</sup> January 2017 yet the Applicant's, Application is dated 25<sup>th</sup> January 2017; hence it application should be guided by CAP 26 of 2016.

3) **THAT** the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents being government ministries and departments have not been served with any notice by court over this matter as per section 30 of the Contempt of Court Act, 2016.

4) **THAT** the notice issued by the Applicant's advocate though a letter dated 9<sup>th</sup> January 2017 does not qualify as a notice as per section 30 of CAP 46 2017 as the same should only be issued by court.

5) **THAT** all the respondents who are state officers have acted in good faith and diligence over

**this matter and should not be held in contempt of court.**

**6) THAT in the Circumstances and based on the foregoing reasons the Notice of Motion is misconceived and devoid of any merit and orders sought should not be granted.**

**7) THAT the application dated 25<sup>th</sup> January 2017 should be dismissed with orders as to costs.**

7. Apart from the said grounds the Respondent vide a replying affidavit sworn by the 1<sup>st</sup> Respondent averred that he is the accounting officer in the Ministry of Interior and Coordination of National Government as provided for under the provisions of the **Public Financial Management Act**, Chapter 412C of the Laws of Kenya. According to him, he does not personally do not owe the Ex parte Applicant any sum of money.

8. He averred that he is aware that any liability or expenditure incurred against the government can only be defrayed from moneys provided for by Parliament which has not provided his ministry with sufficient funds to settle the Ex parte Applicants Claim. According to the deponent, the satisfaction of a decree and Judgments is deemed to be expenditure by parliament and as result it must be justified in law and provided for in government expenditure.

9. It was averred that he can only be accountable for what he has received and since he has not received sufficient allocation for parliament to settle the outstanding claims which continue to accrue interest, it would be manifestly unjust for him to be held personally liable for not settling the ex parte applicants claim when he neither controls nor determines funding for the same.

10. It was contended that the courts have in several decisions held that the committal of persons to civil jail for failure to pay decretal sum is unconstitutional therefore the same cannot be a mode of execution against him for a debt that is not his but the Government's.

### **Determinations**

11. I have considered the application, the verifying affidavit as well as the submissions file on behalf of the parties herein.

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 which was assented to on 23<sup>rd</sup> December, 2016 and commenced on 13<sup>th</sup> 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. According to the foregoing provisions, 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 seems to be holding the view that he is not liable for the failure by his ministry to satisfy a lawful decree issued by this Court. With respect to the 1<sup>st</sup> Respondent, his view is misconceived. It is the accounting officer that is legally bound to satisfy a decree, **Goudie, J**, in **Shah vs. Attorney General (No. 3) Kampala HCMC No. 31 of 1969 [1970] EA 543** 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 designate* 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."

25. It must always be remembered that a judicial review application is neither a criminal case nor a civil suit hence the application ought to be brought against the person who is bound to comply with the orders

sought therein. In this case the 1<sup>st</sup> and 2<sup>nd</sup> Respondents are the accounting officers in their respective ministries and therefore the proper parties to answer on behalf of their ministries to settle decrees issued by the Court.

26. This is so due to the fact that 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.

27. In High Court Judicial Review Miscellaneous Application No. 44 of 2012 between the **Republic vs. The Attorney General & Another ex parte James Alfred Koroso**, I expressed myself as hereunder:

**“...the present case the ex parte applicant has no other option of realising the fruits of his judgement since he is barred from executing against the Government. Apart from *mandamus*, he has no option of ensuring that the judgement that he has been awarded is realised. Unless something is done he will forever be left baby sitting his barren decree. This state of affairs cannot be allowed to prevail under our current Constitutional dispensation in light of the provisions of Article 48 of the Constitution which enjoins the State to ensure access to justice for all persons. Access to justice cannot be said to have been ensured when persons in whose favour judgements have been decreed by courts of competent jurisdiction cannot enjoy the fruits of their judgement due to roadblocks placed on their paths by actions or inactions of public officers. Public offices, it must be remembered are held in trust for the people of Kenya and Public Officers must carry out their duties for the benefit of the people of the Republic of Kenya. To deny a citizen his/her lawful rights which have been decreed by a Court of competent jurisdiction is, in my view, unacceptable in a democratic society. Public officers must remember that under Article 129 of the Constitution executive authority derives from the people of Kenya and is to be exercised in accordance with the Constitution in a manner compatible with the principle of service to the people of Kenya, and for their well-being and benefit....The institution of judicial review proceedings in the nature of *mandamus* cannot be equated with execution proceedings. In seeking an order for *mandamus* the applicant is seeking, not relief against the Government, but to compel a Government official to do what the Government, through Parliament, has directed him to do. The relief sought 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 Accounting Officer 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 Public Officer in his official capacity and the duty is owed not to the State 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. In other words, *mandamus* is a remedy through which a public officer is compelled to do a duty imposed upon him by the law. It is in fact the State, the Republic, on whose behalf he undertakes his duties, that is compelling him, a servant, to do what he is under a duty, obliged to perform. Where therefore a public officer declines to perform the duty after the issuance of an order of *mandamus*, his/her action amounts to insubordination and contempt of Court hence an action may perfectly be commenced to have him cited for such. Such contempt proceedings are no longer execution proceedings but are meant to show the Court’s displeasure at the failure by a servant of the state to comply with the directive of the Court given at the instance of the Republic, the employer of the concerned public officer and to uphold the dignity and authority of the court.”**

28. This was the position adopted by Githua, J in **Republic vs. Permanent Secretary, Ministry of State**

for Provincial Administration and Internal Security Exparte Fredrick Manoah Egunza [2012] eKLR where the learned judge 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].**

29. 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.”**

30. 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.

31. However, at this stage of the proceedings, the only order that this Court can issue is a notice to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to show cause why contempt of court proceedings cannot be commenced against them. In my view that is the only order that this Court may grant at this stage taking into account the state of the law as it stands currently.

32. In the premises I hereby direct that a notice to show cause be served upon the 1<sup>st</sup> and 2<sup>nd</sup> Respondents calling upon them to show cause why contempt of court proceedings cannot be commenced against them. A copy of the said Notice is similarly to be served upon the 3<sup>rd</sup> Respondent.

32. The costs of this application are awarded to the ex parte applicant to be borne by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.

**Dated at Nairobi this 26<sup>th</sup> day of May, 2017**

**G V ODUNGA**

**JUDGE**

***Delivered in the presence of:***

**Mr. Adoli for the Applicant**

**CA Mwangi**