REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW NO. 148 OF 2013

IN THE MATER OF AN APPLICATION BY ISAIAH ODUOR OCHANDA TO CITE

THE PRINCIPAL SECRETARY–MINISTRY OF DEFENCE WITH CONTEMPT

AND

IN THE MATTER OF THE DECREE ISSUED IN HCC NO. 1051 OF 1996

AND

IN THE MATTER OF THE JUDICIAL REVIEW ORDERS OF MANDAMUS

ISSUED IN J.R. MISC. APPLICATION NO. 229 OF 2012

ISAIAH OCHANDA.....APPLICANT

VERSUS

THE ATTORNEY GENERAL.....1ST RESPONDENT

PRINCIPAL SECRETARY, MINISTRY OF DEFENCE...2ND RESPONDENT

JUDGMENT

1. By an amended notice of motion dated 9th December 2016, the exparte applicant Isaiah Ochanda seeks from this court orders:

> ***That the court be pleased to cite the Principal Secretary, Ministry of Defence for contempt of the court order issued by this court on the 21st November, 2012 in Miscellaneous Judicial Review Application No. 229 of 2012, and do order that he be committed to civil jail for a period not exceeding thirty days, for failure to comply with the same; and costs.***

2. The motion was brought under Order 52 Rule 3(3) of the Rules of the Supreme Court of England, Section 5(1) of the Judicature Act Cap 8 Laws of Kenya, and pursuant to the leave granted on 7th May 2013 by Honourable Odunga J to apply.

3. The motion is grounded on the reasons that despite the respondents being served with the order of mandamus, they have continued to disobey the said order with absolute impunity of this country's system

of justice and that such continued disobedience continues to visit gross injustice and colossal damage upon the applicant and that it is in the interest of justice that the very sacred rules of fair play, and the best interests and welfare of the applicant for whose prime benefit the said order was issued; and that the court finds in the applicant's favour and proceeds to grant the prayers sought.

4. The application is supported by a statutory statement, verifying affidavit of Isaiah Oduor Ochanda and annextures thereto.

5. The exparte applicant's case as per his depositions made on 9th December 2016 is that he was the decree holder in a civil suit which progressed to the Court of Appeal No. 212 of 2014 vide a judgment delivered on 9th December 2016, in which the Court of Appeal upheld the judgment for shs 19,078,191.78 in the decree dated 2nd March 2011 against the respondent.

6. That a Bill of Costs was taxed vide ruling of 6th October 2011 wherein the costs were assessed at Kshs 351,518.90 and a Certificate of Order Against the Government was issued; and that the total outstanding sum in the over 20 year old suit is kshs 22,916,828.34 as per the annexed Certificate of Order Against the Government, despite efforts to amicably seek out to the respondent to settle the claim arising from an accident.

7. That on 21st November 2012 this court did issue Judicial Review order of mandamus compelling the respondent to satisfy the decree in HCC 1051 of 1996 as per the proceedings herein but that since service of the order upon the respondent on 23rd November 2012, the respondents continue to ignore, refuse and or neglect to comply with the same and have hence exhibited gross impunity and disrespect for the country's judicial system.

8. That this application was brought as a last resort for the court to close this very long drawn cause.

9. That todate, the decretal sum is escalated to nearly shs 30,000,000 which should be paid to the applicant to meet his urgent medical and other needs.

10. The application is opposed by the respondents through grounds of opposition dated 10th February 2015 to the effect that:

> 1. Under Section 21(4) of the Government Proceedings Act, no officer of the government should be held individually liable for payment of money or costs ordered against the government or any government Department or any officer of the government and hence the present application is improper.
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> 2. The order sought against the Principal Secretary, Ministry of Defence is unconstitutional;
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> 3. There was no personal service upon the alleged contemnor as required by law;
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> 4. The order was never endorsed with a penal notice informing the alleged contemnor of the consequences of disobeying the order;
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> 5. The applicant's application violates the then Section 5 of the Judicature Act and the law applicable in the High Court of Justice in England i.e. Contempt of Court Act of 1981 and Part 81 of the Procedure set out in the Civil Procedure(Amendment No. 2) Rules, 2012.
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> 6. The respondent is pursuing an appeal from the judgment of the High Court.

11. The parties' advocates filed written submissions which they adopted wholly canvassing their respective client's position.

12. According to the exparte applicant through submissions filed on 24th March 2017, a similar

application for contempt of court came up for hearing and determination before Honourable Justice Korir J who on 5th December 2013 dismissed the application on the grounds of lack of personal service and upon the applicant lodging an appeal to the Court of Appeal, vide CA 212/2014, the learned Judges of Appeal vide their judgment delivered in 9th December, 2016 found fault in the High Court's finding that no personal services was effected nor penal notice given and allowed he appeal with costs. it was therefore submitted that this court would not concern itself with personal service as expressly stated by the Court of Appeal. That the respondent has not rebutted the facts of the application as was the case in the initial application which was dismissed by Korir J but on appeal, the appellate court faulted the High Court.

13. That at no time has the respondent ever indicated that it is unable to satisfy the decretal sum claimed and therefore the objections filed are intended to delay the applicant justice yet he is bed ridden since 1987 out of injuries sustained in a road accident hence the court should bring to a closure this case after nearly 30 years.

14. In the respondent's submission filed on 24th February 2017 the respondent's counsel Mr Kepha Onyiso reiterated the grounds of opposition as reproduced herein above and maintained that the Principal Secretary is not guilty of contempt of court and that therefore he cannot be committed to civil jail for contempt.

15. On whether the Principal Secretary in the Ministry of Defence is guilty of contempt, it was submitted that he was not served in person and that the affidavit of service does not disclose the name of legal officer who was served in the Department of Defence. Further, that the time of service was not disclosed and no penal notice was endorsed on the court order.

16. In addition, that it was not known which kind of ruling was allegedly served on the Principal Secretary. That under the cited law, personal service could not be dispensed with except by the order. Reliance was place on **Shimmers Plaza Ltd v NBK CA 33/2012 e KLR and Ochino & Another V Okombo & 4 Others [1989] KLR 165** and **Halsbury's Laws of England 9th Edition VOL. 9.**

17. On whether the Permanent Secretary can be committed to civil jail for contempt, reliance was placed on Section 21(4)of the Government Proceedings Act which prohibits a government officer being individually liable for payment of money or costs ordered against the government or any government department of any officer of the government. Further reliance was placed on Re **Zipporah Wambui Mathara, Nairobi HCC bankruptcy Cause No. 19 of 2010**. The respondent urged the court to dismiss the application.

DETERMINATION

18. I have considered the foregoing pleadings and submissions by the parties' advocates and the authorities relied on. In my view, the following issues flow for determination:-

1. ***Whether the respondent should be cited for contempt of court.***

2. ***Whether committal to civil jail for contempt of court is unconstitutional.***

3. ***What orders should this court make?***

4. ***Who should bear costs of this application for contempt proceedings?***

19. On whether the respondent Principal Secretary for defence should be cited for contempt of court orders, it is important to appreciate the history of this case and the orders in issue.

20. The applicant Isaiah Ochanda was employed as a soldier attached to 75 Artillery Battalion, Air Defence Unit. He filed a suit vide plaint dated 5th November 2000 in Nairobi HCC No. 1051 of 1996

against the Attorney General after being injured while on duty thereby suffering very serious injuries that rendered him paraplegic.

21. On 2nd March 2011, Justice Rawal (as she then was) entered judgment against the defendant (respondent) Attorney General and this is reflected in the Certificate of Order Against the Government issued on 14th November 2011 for shs 22,916,828.34 inclusive of costs and interest at 12% per annum from 3rd March 2010 to 3rd November 2011. The principal decretal sum was kshs 19,078, 191.78 whereas costs were assessed at Kshs 351,518.90.

22. The copy of judgment by Honourable Rawal J, Decree, Certificate of order Against the Government and Certificate of Taxation are all annexed to the verifying affidavit and supporting affidavits of the exparte applicant. The exparte applicant also annexed several letters addressed to the Attorney General asking for settlement of the decretal sum which documents bear stamps of acknowledgment by the office of the Attorney General.

23. When it became apparent that payment was not forthcoming the applicant filed Judicial Review proceedings in this matter and after obtaining leave from Honourable Korir J, filed an application for judicial review order of mandamus which application was allowed on 21st November, 2012.

24. The applicant then commenced contempt proceedings before Honourable Korir J as aforestated which application was dismissed on the grounds that the exparte applicant had not served the order personally upon the Respondent Principal Secretary and that no penal notice was given thereby prompting the applicant to lodge an appeal to the Court of Appeal. The **Court of Appeal vide Civ. Appeal No. Nairobi 212 of 2014** did reverse the order of dismissal and allowed the appeal, directing that the application for contempt be reheard afresh by another judge other than Honourable Korir J.

25. The Court of Appeal found that the High Court fell in error by dismissing the application on the grounds that no personal service was effected nor penal notice given.

26. The Court of Appeal also made it clear that in this case, there was no necessity for personal service nor penal notice and even if the Court would have so found the said penal notice and personal service be necessary, it would have in the circumstances of the case dispensed with general rules.

27. The court was also emphatic that procedural protection should not be construed in a manner that abrogates or renders the jurisdiction of the court to punish for disobedience of its order practically inoperative and that in appropriate cases, the court retains the discretion to dispense with procedural protection in the interest of justice, moreso, now that Article 159(2) (d) of the Constitution ordains that justice shall be administered without undue regard to procedural technicalities.

28. From the above findings by the Court of Appeal which findings bind this court and as I have no good reason to distinguish them as no such submission for distinction was placed before me, I must find, from the onset, that the issue of personal service and or penal notice is spent as it was determined by the Court of Appeal not to have been necessary in the circumstances of this case where there is a judgment of a court of competent jurisdiction which judgment has not been challenged by the respondent and a decree, certificate of costs and certificate of order against the government duly served upon the respondent's office and acknowledged by way of an official stamp which again the Court of Appeal concluded was more than sufficient, noting that there are several letters and notices served on the respondent calling for payment of the decretal sum; which the Court of Appeal concluded was for all intents, and purposes, an effectual penal notice as the object of the general rules had been substantially achieved.

29. In this case, the applicant's list and copy of documents filed on 23rd December 2016 shows that the Department of Defence, Legal Service Branch received the order of mandamus on 22nd August 2016 which order is dated 21st November 2012 was also served on the Attorney General the Principal Legal advisor to the National Government and also the Principal defendant/respondent in the main suit.

There is also a letter by Y.K. Kirui Colonel for Principal Secretary, dated 31st August 2016 addressed to the applicant's advocate Ngugi B.G. and Company Advocates referring to the letter of 15th August 2016 and requesting to be provided with the extracted order to enable them action as appropriate.

30. The question is, is Mr Kepha Onyiso litigation counsel who signed the grounds of opposition in this matter and who filed submissions opposing this application for contempt of court being honest with his submissions and grounds of opposition filed on behalf of the respondent when he claims that the affidavit of service filed by the applicant lacked material particulars?

31. The outright answer is a resounding no. I find that the respondent who has not filed any affidavit denying that there is a valid judgment and decree and or certificate of order against the government and or stating that there is an appeal or stay of execution of decree, is being mischievous and dishonest with the court and obstructive of the administration of justice. He is to say the least, by conduct, obstructing the cause of justice by deliberately using procedural technicalities to defeat justice and to circumvent the rule of law.

32. The decree in question has remained unenforced for over 20 years now. The case in the High Court was heard by Rawal J(as she then was), interpartes and the respondent was and has for all these years known or been made aware of the judgment of the court and actively participated in the Judicial Review proceedings for mandamus before contempt of court proceedings were initiated. That being the case, the respondent cannot be heard to pretend not to know which court order is due for compliance.

33. Court orders are never issued in vain. They are issued for compliance, however idiotic so that the person who considers the order idiotic is at liberty to challenge it. The respondent has not challenged the Judicial Review order of mandamus issued in this matter by Honourable Korir J. the application for contempt of court was dismissed but the Court of Appeal handed the applicant a lifeline. It is therefore disturbing that the respondent is raising the same technicalities as he did prior to the Court of Appeal's decision and which technicalities have the effect of reviewing the Court of Appeal decision.

34. The conduct of the respondent betrays the rule of law, not the dignity of the judge who issued the order of mandamus compelling the Permanent Secretary to settle decree in HCC 1051 /1996 by way of making payment to the applicant. The order was re-served on the office of the Permanent Secretary on 23rd November 2016 which was not the first time of service.

35. This court cannot help but find that the Permanent Secretary Ministry of Defence had deliberately and brazenly disobeyed the order of this court issued on 22nd November 2012 dated 21st November 2012 compelling him to pay to the applicant decretal sum in HCC 1051/1996 as per the certificate of order against the government.

36. The respondent is hiding under the provisions of Section 21(4) of the Government Proceedings Act That provision cannot cushion the Permanent Secretary against the order of mandamus which commands performance of a public duty by the accounting officer.

37. Mandamus is a Judicial Review remedy issued directed at a public officer or administrator, compelling performance of a public duty and in this case the public duty is the satisfaction of decree of this court by way of making payment to the applicant, from public resources, as ordered by Korir J on 21st November 2012.

38. And where such mandamus is issued and there is no compliance, the remedy is in citing the responsible public officer to whom the order was directed for compliance for contempt of court order. The legislative intention of the law of contempt was for the protection and promotion of the rule of law. Court orders, as earlier stated, must be obeyed by all and sundry and where there is demonstrable evidence of brazen disobedience as is the case herein, the court must as of necessity punish for contempt.

39. A person who is in contempt of court cannot claim that the punishment of committal to civil jail is unconstitutional because it deprives him or her of their constitutional liberty. The respondent has been accorded a fair hearing as stipulated in Article 50(1) of the Constitution.

40. As was held in **Republic v Permanent Secretary, Ministry of State for Provincial Administration and Internal Security Exparte Fredrick Manoah Egunza [2012] e KLR** , though persuasive but good law made by Githua J. that:

> ***" The only requirement which serves as a condition precedent to the satisfaction or enforcement of decrees for money issues against the government is found in Section 21(1) and (2) of the Government Proceedings 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 Honourable 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 Honourable Attorney General, Section 21(3) imposes a statutory duty on the accounting officer to pay the sums specified in the said order to the person entitled or to his advocate together with any interest lawfully accruing thereon."***

41. It should also be noted that the law does not condition settlement of decree on budgetary allocation. In any case, the decree subject of these proceedings is over 20 years old and each year that has passed, the Ministry of Defence is allocated funds for a case which proceeded interpartes and no doubt, provision for settlement of decrees emanating from courts is something each Government Ministry must make.

42. In **Republic vs Permanent Secretary of State for Provincial Administration** (supra) the court stated and I agree:

> ***"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. The respondent's claim that the applicant should have waited until the start if the next financial year to enforce payment of the decree issued in his favour cannot be sustained firstly because it has no legal basis and secondly because it is the responsibility of the government to make contingency provisions for its liabilities in tort in each financial year so that successful litigants who obtain decrees against the government are not left without a remedy."***

43. For the reasons stated above, I find that the respondent Permanent Secretary has brazenly disobeyed the order of Mandamus issued by this court on 21st November, 2012 by refusing to settle decree in HCC 1051 of 1996.

44. On the issue of whether punishment for contempt of court is unconstitutional, **petition No. 190/2011 in Beatrice Wanjiku & Another** is relevant where it was held:

> ***"The Civil Procedure Act and Rules provide legal regime of arrest and committal as a means of enforcement of a judicial debt. Article 11 of the ICCPR states that "no one shall be imprisoned merely on the ground of inability to fulfill a contractual obligation."***
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> ***I read merely as used above to mean that one cannot be imprisoned for the sole reason of inability to fulfill a contractual obligation. It means that additional reasons other then inability to pay should exist for one to be imprisoned. Article 11 recognized that in fact there may be instances where imprisonment for inability to fulfill a contractual obligation may be permitted. As there is no inconsistency between Article 11 of the convection and the general tenor of the committal regime under the Civil Procedure Act and Rules, the Provisions of Article 11 of the Convention are at best an interpretative aid."***

45. And in **Jayne Wangu Gachoka vs KCB Ltd Petition No. 51 of 2010** it was stated:

> " ***The deprivation of liberty sanctioned by Sections 38 and 40 of the Civil Procedure Act is permissible and is not in violation of either the Constitutional or the International Covenant on the Civil and Political Rights. The caveat, however, which has been emphasized in all the cases set out above, is that before a person can be committed to civil jail for nonpayment of a debt, there must be strict adherence to the procedure laid down in the Civil Procedure Act and Rules which proved the due process safeguards essential to making the limitation of the right to liberty permitted in this case acceptable in a free and democratic society."***

46. The above position is fortified by the decision in **Kenya Bus Services Ltd & Others v Attorney General and Others [2005] 1 EA 111** where it was held:

> ***"Fundamental rights cannot be enjoyed in isolation and by a select few while they trample on others or tread upon their rights since the enjoyment of fundamental rights and freedoms contemplates mutuality and an atmosphere of respect for law and order including the rights of others and the upholding of the public interest. The function of the court when faced with the task of establishing or determining the limitation and restrictions on the other hand is to do a balancing act and in this balancing act are principles, values, objectives to be attained, a sense of proportionality and public interest and public policy considerations.***
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> ***There cannot be a cause of action based on a lawful exercise of right of execution by interested parties since it is a serious contradiction to suggest that creditors who are enforcing their rights under the private law should be stopped from doing so because there are allegation of violation of the constitution by the state or government."***

47. In this case, my view is that provided the procedure for citing the alleged contemnor/creditor is followed in the manner provided for in law, the requirement of due process comparable to that in Article 50(1) of the Constitution is guaranteed to the contemnor.

48. Consequently, the respondent's submission that committal to civil jail is unconstitutional is cheap, escapist and devoid of any legal substance. The case of Zipporah Wambui Mathara relied on by the respondent is outmoded and is distinguishable as the judge therein (Koome J as she then was) was clear that there were other alternative modes of executing decree, before resorting to committal to civil jail which should have been the last resort. Moreso, the case in question did not involve decree against the Government but against a private person.

49. Throughout the proceedings leading to these contempt of court proceedings, the respondent has not indicated any reason why the decree subject matter of these mandamus proceedings has not been settled for over 20 years, despite several pleas by the exparte applicant decree holder who is said to be paraplegic and whose life expectancy continues to shrink day by day such that he may never live to enjoy the fruits of his lawful judgment.

50. The exparte applicant has for the last over 20 years been rendered a pious explorer and beggar in the judicial process. His human dignity has in my view been abused by the refusal to settle a money decree in his favour. I take judicial notice of the fact that treatment for a paraplegic is costly in the absence of medical insurance for majority of Kenyans.

51. In my humble view justice has been delayed and denied to the exparte applicant. The state should be the last entity to deny its citizens justice and or subject them to deplorable state of hopelessness due to the mental, physical and psychological torture associated with paraplegic state. There is absolutely no justification for such torture being meted out to the exparte applicant. The law and the court exist to vindicate the suffering of innocent persons and therefore access to justice cannot be said to have been ensured when persons in whose favour judgments have been decreed by courts of law or tribunals of competent jurisdiction cannot enjoy the fruits of their judgments due to road blocks placed on their paths by actions or inactions of others and especially when it is the state which is charged with the

primary responsibility of promoting and protecting those rights that is overtly trampling on its own citizens' rights through defeatist contentious and frivolous and vexatious objections and submissions.

52. Article 159 of the Constitution mandates this court to ensure that justice is administered without undue regard to technicalities and that justice is not delayed. The respondent has regrettably taken the exparte applicant through and into a circular frolic expedition and more so when sufficient time and concessions have been availed to the respondent to settle the decree.

53. In the end, the respondent's maneuvers have turned the legal process into a theatrical absurdity. I say so because the respondent is not denying that there is a decree in favour of the exparte applicant, for execution and neither are they saying that due process is not being followed in the enforcement of the said decree. The respondent is, with the help of some officers in the Office of the Principal Government Legal advisor-Hon Attorney General, procrastinating in the settlement of the court decree through technical ploys while the decretal sum continues to accrue interest to the detriment of Kenyan taxpayers.

54. There can be no rights of a top public servant which rights are not equal to the rights of an ordinary citizen of Kenya. The Constitution of Kenya, 2010 is clear at Article 27 that all persons are equal before the law and they all deserve equal treatment. There is no alternative mode of executing decree against the government. Therefore, is no reason why the respondent, from the date of decree/judgment has not challenged the decretal award before the Court of Appeal and if that had been done, a decision would not have taken 20 years to be rendered by the Court of Appeal.

55. It is for the above reasons that I find this application for contempt merited and allegations for brazen disobedience of the mandamus order made by Honourable Korir J on 21st November 2012 and issued on 22nd November, 2012 proved to the required standard of beyond the balance of probability and beyond reasonable doubt.

56. Accordingly, I find the office holder and accounting officer Principal Secretary, Ministry of Defence guilty of contempt of court order dated 21st November 2012 and issued on 22nd November 2012 and convict him accordingly for contempt of court order of 21st November 2012 in failing to make payment to the exparte applicant decree holder in HC 1051 of 1996 as compelled by the judicial review order in the nature of mandamus, and that committal to jail for such disobedience of court order would not be unconstitutional.

57. On what punishment the court should mete out to the Principal Secretary, Ministry of Defence, the court does appreciate that the Principal Secretary is an office holder and that before punishing him for contempt of court, he should be accorded an opportunity to give his mitigation and to even purge the contempt for which he has been found guilty and been convicted by this court before he is sentenced or punished as by law established.

58. Accordingly, I order that this matter shall be mentioned on 17thJuly, 2017 when the Principal Secretary/ Accounting officer, Ministry of Defence shall appear personally before this court and with his advocate to mitigate before the court can consider what is the appropriate sentence to be meted out.

59. For that reason, I direct the Deputy Registrar of this court to forthwith issue summons to appear and cause the same summons to be served upon the Principal Secretary Ministry of Defence together with a certified copy of this judgment for his perusal and compliance with regard to the purging of the contempt and making an appearance on 17th July 2017 for mitigation and sentencing.

60. To avoid taxpayers money going into litigation proceedings which have been in court for nearly 30 years and to bring to an end this legal battle, I shall exercise my discretion and order that each party shall bear their own costs of these contempt of court proceedings.

Dated, signed and delivered in open court at Nairobi this 24th day of May, 2017.

R. E. ABURILI

JUDGE

In the presence of:

Mrs Maina for the Respondent

Mrs Ochanda (exparte applicant’s spouse)

CA: George