REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISIONS

MISC.CIVIL APPLICATION NO.41 OF 2016

KAY CONSTRUCTION LIMITED.....APPLICANT

VERSUS

THE ATTORNEY GENERAL.....RESPONDENT

IN THE MATTER OF AN APPLICATION ON BEHALF OF KAY CONSTRUCTION LIMITED AGAINST SAITOTI TOROME, THE PRINCIPAL SECRETARY FOR THE MINISTRY OF DEFENCE, FOR AN ORDER OF COMMITALTO CIVIL FOR CONTEMPT OF COURT

RULING

1. The Ruling herein relates to an Amended Notice of Motion Application dated 29th June 2016, filed by the Plaintiff (herein "the Applicant"), under the provisions of Section 5(1) of the Judicature Act, (Cap 8) of Law of Kenya, Section 3A of the Civil Procedure Act (Cap 21), Laws of Kenya and all other enabling provisions of the Law.

2. The Applicant is seeking for orders that:

i. Spent

ii. Spent

iii. This Honourable Court be pleased to order Saitoti Torome, the Principal Secretary for the Ministry of Defence, be committed to Civil jail for disobedience of the order of the Honourable Court made in Misc. Civil Case No.39 of 2014, for such period as the Honourable Court may deem fit and just.

iv. Any other order deemed expedient in the circumstances.

v. The costs of this Application be provided for.

3. The Application is supported by the grounds on the face of it and an Affidavit sworn by Hasmita Patel, on 9th February, 2016. The Applicant avers that, the Parties herein entered into a contract dated 21st February 1991, whereby the Defendant (herein "the Respondent"), contracted the Applicant to undertake rehabilitation construction works on the aircraft pavement at the Laikipia Airbase. The construction was duly completed and a certificate of completion issued by the Respondent on 4th November, 1994.

4. However despite the Applicant discharging its obligation, the Respondent has failed to pay for the works done. As a consequent thereof, the Parties went through Arbitral proceedings and on 22nd February, 2011, and the Learned Arbitrator Eng. Joseph T. Thuo, rendered an Arbitral Award in favor of the Applicant, whereby the Respondent was directed to pay the Applicant a sum of Kshs.335,605,244.69, together with compound interest thereon at the rate of 16% per annum, from 21st April 2009 up to 30 days after the date of the award, and in the event of failure to effect the payment, to pay the Applicant compound interest on any outstanding amount at the rate of 16% per annum until the entire sum is fully and finally paid.

5. Subsequently, the Applicant made an Application to the Honourable Court seeking for orders of recognition and enforcement of the said Award. The Application was heard and allowed vide a ruling dated 17th April 2015, and embodied in decree dated 26th May, 2015. That pursuant to Section 21 of the Government Proceeding Act, the Applicant applied and was issued with a Certificate containing particulars of the order against the Government dated 16th July, 2015, certifying the amount payable to the Applicant by the Respondent at the time as Kshs.826, 720,638.69.

6. By a letter dated 20th July, 2015, the office of the Attorney General and the Cabinet Secretary for the Ministry of Defence (hereinafter "the Ministry") being the concerned government department, were served with the Certificate containing particulars of the order together with the ruling and the decree. However, the Respondent has neglected, failed or refused to effect the payments ordered by the Court.

7. On 10th November, 2015, the Applicant send a reminder letter, to which the Respondent replied vide a letter dated 11th November 2015, promising to organize a meeting between the Parties with a view to process payment. The Applicant agreed to indulge the Respondent for seven days. But one month went by and there was no meeting. The Applicant then wrote another letter dated 14th December 2015, protesting against the persistent outright disregard of the Law, and the delayed payments, but the payment was not made.

8. On 12th January, 2016, the Ministry of Defence held a meeting with the Applicant, whereupon the Applicant agreed to the former's proposal to pay the principal amount plus the accrued interest over the years based on the actual commercial bank rates, as opposed to the interest rate ordered as per the decree, together with the Arbitration and legal costs. The Applicant even went further to offer a discount of 7.5% on the interest, only if the amount was paid within thirty (30) days from 25th January, 2016, but still no payment was made.

9. The Applicant averred that subsequently, the Parties held over ten (10) negotiation sessions, during which the Ministry of Defense pressured him to accept a substantially lower amount of money. After going back and forth on the amount which the Ministry was willing to pay, the Applicant eventually agreed to accept a lower sum of Kshs 850,000,000 instead of the sum entitled of Kshs 1.4 billion, on the agreement that the negotiations would be completed in February, 2017 and that the monies would be paid within three (3) months thereof and completed by May, 2017. The payment was never effected.

10. It was averred that during the negotiation period, the Ministry received authority from, Pending Bills Committee, the Treasury, the Office of the Attorney General, to make the payment but has refused to sign the drawn out consent, and the Principal Secretary has out rightly refused to facilitate the settlement of the debt. In the meantime, the default continues to expose the public to a huge debt, where the public will be forced to bear the brunt of paying enormous amounts of money which could otherwise be avoided.

11. It is against this background that the contempt Application was filed seeking for the order of committal of the Principal Secretary to civil jail as herein prayed.

12. When the Parties first appeared in the Court, the Court directed the Respondent, to negotiate with the Applicant the terms of settlement of the debt out of Court, as the Respondent's challenge was inability to effect full payment of the sum sought due to its financial constraint. However as it will soon transpire herein the consent settlement out of Court did not materialize.

13. Be that as it were, the Application was served upon the Respondent who filed grounds of opposition dated 23rd February 2016. These grounds states that:

> *i. That the Decree is a money decree that cannot be executed by way of contempt proceedings*
>
> *ii. That there is no positive order issued by the Court, therefore there is no basis for alleging contempt*
>
> *iii. That the necessary leave to commence contempt proceedings was not obtained*
>
> *iv. That the alleged Contemnor cannot be held liable for payments of public debts.*
>
> *v. That the Decree in issue was not directed at the alleged Contemnor herein and therefore he could not be held in contempt thereof.*
>
> *vi. That the amount sought to be paid is not definite: there is a clear variance between the amounts stated in the Decree, Certificate of Orders and amounts stated in the supporting Affidavit of Hasmita Patel.*
>
> *vii. That Contempt proceeding are not execution proceedings and cannot be undertaken before execution proceedings are concluded.*
>
> *viii. That the Applicants have not alleged that they personally served the alleged Contemnor herein with any Order which had a penal notice and therefore the alleged Contemnor cannot be held to be in contempt*
>
> *ix. That since contempt proceedings may lead to depravation of the alleged contemnor liberty it is imperative that provisions of Article 50 of the Constitution are observed. The Contemnor must be personally served with all the specific allegations against him that the Contemnor must be informed of what he has been charged with, in this instance the Applicant has averred that it served the Office of the Attorney General and the Cabinet Secretary for the Ministry of Defence and the alleged Contemnor.*
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> *x. That the Application herein has been filed contrary to the express provision of Section 21(4) of the Government Proceedings Act No 47 of 1956.*
>
> *xi. That the Applicants have neither alleged nor proved that alleged Contemnor received funds from the Consolidated Funds to offset the Decree herein and has refused to pay the decretal sum to that extent, the alleged Contemnor cannot be said be in contempt.*

14. The Parties agreed to dispose of the Application vide written submissions. I have considered the same and find that the issue to consider is whether the Applicant has met the requirement for grant of an order that the Respondent is in contempt of the Court and whether the

Principal Secretary should be committed to civil jail for the contempt. The Respondent has also raised several issues for consideration through the grounds of opposition which will be considered herein.

15. First, the statutory provisions governing contempt of court are found under the *Contempt of Court Act*, 2016, (herein "the Act"). It stipulates that contempt includes: civil contempt which involves willful disobedience of any judgment, decree, direction, order, or other process of a Court or willful breach of an undertaking given to a Court. Section 30 thereof 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.***

15. Similarly, Section 63 (c) of the Civil Procedure Act, empowers the Court to grant a temporary injunction and in case of disobedience commit the person guilty thereof to prison and order that his property be attached and sold.

16. The Application herein has been brought under the provisions of Section 5(1) of the Judicature Act, (Cap 8) of Law of Kenya, which provide the procedure for institution of contempt proceedings and states as follows:-

> ***"(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 the exercise of the ordinary original criminal jurisdiction of the High Court."***

17. **It is noteworthy that prior to the** enactment of the Contempt of Court Act, Section 5 of the *Judicature Act*, imported the procedure for contempt of Court followed by the High Court of Justice in England. That procedure was considered by the Court of Appeal in the case of; ***Christine Wangari Gachege v. Elizabeth Wanjiru Evans & 11 Others [2014] eKLR*** in which the Court held that the only statutory basis for contempt of court law in so far as the Court of Appeal and the High Court are concerned is section 5 of the **Judicature Act.**

18. **I shall now deal with the issues raised by the Respondent for determination.** The Respondent argued that the decree is a money decree and therefore cannot be executed by way of contempt proceedings and that, there is no positive order issued by the Court, therefore there is no basis for alleging contempt. The Applicant responded by stating that the decree requires payment of money, thus it is positive.

19. In my considered opinion the issue at hand is whether there is an order of the Court that has been deliberately disobeyed. I find that, the Court delivered a ruling herein on 17th April, 2015 upholding the Applicant's chamber summons Application dated 13th October, 2014. The Application was seeking for, inter alia, order of recognition and enforcement of the Arbitral Award dated 22nd February, 2011 rendered by Engineer Joseph Thuo. The enforcement of the Award as a judgment of the Court has not been challenged or set aside. Hence the subsequent decree dated 26th May, 2015, showing the principal sum of Kshs. 355,605,969 payable within thirty (30) days of the date of the Award, plus compound interest at the rate of 16% per annum. The certificate required under the section 21 of the Government Proceedings Act was issued on 16th July 2015, showing a total sum of Kshs. 826,720,638.69. It is therefore clear that, the amount awarded to the Applicant is due for execution. I therefore find no merit in the Respondent's arguments that this decree is not a money decree. It is a clear claim in monetary terms.

20. **The next issue raised is whether the Principal Secretary was personally served with the subject cour**t order. The Respondent submitted that there is no Affidavit of service filed to prove that the Principal Secretary was served with the order. The case of; ***Munib Masri V Consolidated Contractors & 2 Others (2010) EWHC 2458,*** was relied on to argue that, service is a prerequisite to finding on contempt. The Respondent further argued that under Part 81 of the Rules of Supreme Court of England, which provide the procedure for making an Application for committal of a person to jail, it requires personal service of the order unless the Court dispenses with service. The Court was invited to take judicial notice of the fact that the Principal Secretary was sworn in the office on or about 18th day of December, 2015 and therefore cannot be deemed to have failed to honour the order as he was not in the office by the time of service. The Respondent also argued that, Rule 81.5 of the Supreme Court of England Rules, further requires that a penal notice be endorsed upon orders of the Court to be served upon the person required to do a particular act. However, from the orders attached by the Applicant herein, no such penal notice was

endorsed and neither was it served upon Ambassador Kaberia Kirimi, the Principal Secretary, the Ministry.

21. In response the Applicant submitted that Mr. Peter Kaberia had full notice of the particulars of this Application, hence filed the grounds of opposition, and cannot be alleging lack of notice of the same.

22. I have considered the issue of personal service and I find that the law requires that the Order alleged to have been disobeyed, the Penal notice and Application to show cause ought to be personally served upon the person alleged to be in contempt. The purpose of service is to notify the person accused of disobedience of the existence Court order and the prayers in the Application and accord the person an opportunity to be heard thereon. This is in accordance with the rules of natural justice that a person should not be condemned unheard.

23. Requirement of service is also supported by the provisions of Section 7(3) of the said Contempt of Court Act, which provide:

> ***"…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."***

24. In the case of; **Shimmers Plaza Limited v. National Bank of Kenya Limited (2015) eKLR** , the Court of Appeal had this to say on the issue of personal service;

> ***"(1) is subject to whether the person can be said to have had notice of the terms of the judgment or order. The notice of the order is satisfied if the person or his agent can be said to either have been present when the judgment or order was given or made; or was notified of its terms by telephone, email or otherwise. In our view, 'otherwise' would mean any other action that can be proved to have facilitated the person having come into knowledge of the terms of the judgment and/or order. This would definitely include a situation where a person is represented in court by counsel. Once the applicant has proved notice, the respondent bears an evidential burden in relation to wilfulness and mala fides disobedience. This Court in the Wambora case (supra) affirmed the application of these requirements.***

25. The Court further stated:-

> ***"On the other hand however, this Court has slowly and gradually moved from the position that service of the order along with the penal notice must be personally served on a person before contempt can be proved. This is in line with the dispensations covered under 81.8 (1) (supra).***
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> ***Kenya's growing jurisprudence right from the High court has reiterated that knowledge of a court order suffices to prove service and dispense with personal service for the purposes of contempt proceedings. For instance, Lenaola J in the case of Basil Criticos Vs Attorney General and 8 Others [2012] eKLR pronounced himself as follows:-***
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> ***"...the law has changed and as it stands today knowledge supersedes personal service.....where a party clearly acts and shows that he had knowledge of a Court Order; the strict requirement that personal service must be proved is rendered unnecessary"***
>
> ***This position has been affirmed by this Court in several other cases including the Wambora case(supra).***
>
> ***It is important however that the court satisfies itself beyond any shadow of a doubt that the person alleged to be in contempt committed the act complained of with full knowledge or notice of the existence of the order of the Court forbidding it. The threshold is quite high as it involves possible deprivation of a person's liberty. This standard has not changed since the old celebrated case of Ex parte Langley 1879, 13***
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> ***Ch D. 110 (C.A), where Thesiger L.J stated as follows. at p. 119:***
>
> ***"…the question in each case, and depending upon the particular circumstance of the case, must be, was there or was there not such a notice given to the person who is charged with contempt of Court that you can infer from the facts that he had notice in fact of the order which has been made? And, in a matter of this kind, bearing in mind that the liberty of the subject is to be affected, I think that those who assert that there was such a notice ought to prove it beyond reasonable doubt"***

26. In the instant case I have considered the documents annexed to the Affidavit in support of the Application and I find there were various correspondence between the parties as follows:

> *i. On 20th July 2015, the Applicant wrote to the Respondent including therein, the ruling of the Court recognizing the Arbitral Award, the decree and a certificate of costs. That letter was copied to the Cabinet Secretary Ministry of Defence.*
>
> *ii. On 10th November, 2015, the Applicant wrote to the Respondent and annexed thereto a decree and certificate of the Order issued pursuant to section 21 of the Government Proceedings Act. The letter was copied to the Cabinet Secretary Ministry of Defence, Chief of Defence Forces and his deputy.*
>
> *iii. On 11th November, 2015, the Ministry of Defence wrote back to the Applicant acknowledging receipt of the letter dated 10th November 2015 and the content thereof. The Ministry indicated they would hold a holding a meeting between the office of the Attorney General, the National Treasury and the Applicant with a view to obtaining closure in the matter. The letter was signed by C.W. Njuguna, Lt. Colonel, for the Permanent Secretary.*

iv. On 14^{the} December, 2015, the firm of Rachier & Amollo Advocates send a demand letter to the Respondent for payment of the decretal amount.

v. On 25th January, 2016, the Applicant wrote to the Department of Defence thanking them for attending the meeting held and indicating the amount payable as Kshs 1,018,233,104 while offering 7.5% discount on the interest only.

27. It is therefore clear from all these correspondence that all along, the Respondent has been aware of the existence of the subject Court Order requiring payment to the Applicant. As such the argument that there is no affidavit of service to prove the Respondent was aware of the Court order is baseless and untruthful. Even then, based on the above legal authorities cited, service need not be proved by filing of an affidavit thereof. The surrounding circumstances of the case can determine service.

28. This finding deals with the other issue raised by the Respondent to the effect that:- "since contempt proceedings may lead to depravation of the alleged contemnor liberty, it is imperative that provisions of Article 50 of the Constitution are observed and that the Contemnor must be personally served with all the specific allegations against him and be informed of what he has been charged with". The Respondent is represented by the office of the Attorney General and who have fully participated in the matter.

29. I shall now move to the issue of leave to commence contempt proceedings. The Respondent argued that the necessary leave was not obtained, but the Applicant submitted that following the enactment of the new Civil Procedure Rules of England (2012), which govern contempt proceedings in Kenya, it is no longer a requirement in law in Kenya to obtain leave to institute proceedings. Reference was made to the Court of Appeal holding in the case of ;**Christine Wangari Gachege Versus Elizabeth Wanjiru Evans & 11 Others (2014)eKLR** that leave or permission is no longer required in such proceeding and also **Shimmers Plaza Limited vs National Bank of Kenya Limited (2015)eKLR.** I uphold the Respondent's submissions.

30. The Respondent also argued that "the alleged Contemnor cannot be held liable for payments of public debts and that the decree in issue was not directed at the alleged Contemnor herein and therefore he could not be held in contempt thereof". The Applicant in response to this argument, submitted that it is not seeking that Mr. Saitoti Torome personally pays the money owing from government but to hold him liable for failure to discharge his duty as ordered by the Court; which is to facilitate the actual payment of the said money. In my opinion the Applicant is not sued in personal capacity and therefore the argument by the Respondent holds no water. He is an accounting officer in the Ministry.

31. The other issue raised by the Respondent is that "the amount sought to be paid is not definite as there is a clear variance between the amounts stated in the decree, Certificate of orders and amounts stated in the supporting Affidavit of Hasmita Patel". In response the Applicant argued that "the amount to be paid is bound to change so long as the interest continues to accrue; as the Court's order imposed compound interest at the rate of 16% p.a. on any part of the decretal sum that remains unpaid after the due date." In my opinion the issue as to amount owing is an arithmetic and an accounting issue that does not bar the Respondent from paying whatever is deemed due, neither can it be a ground to disobey the order to pay.

32. The next issue raised by the Respondent is that the Application herein has been filed contrary to the express provision of Section 21(4) of the Government Proceedings Act No 47 of 1956. However, the Applicant submitted that, pursuant to Section 21 of the Government Proceedings Act, the Applicant applied and was issued with the Certificate required dated 16th July, 2015, certifying the amount payable to the Applicant by the Respondent as Kshs. 826, 720, 638.69 at the time. The Court had the opportunity to see the said Certificate annexed to the Supporting Affidavit, and finds no basis for the Respondent's argument over the same.

33. The last submission by the Respondent was that, the Applicant must prove that the Principal Secretary acted in a manner that prejudices the administration of justice by refusing to obey the Court Order. That in any event, the Court should take judicial notice of the budgetary process and the fact that the Ministry draws its funds from the consolidated fund. Therefore can only factor in the budget for the financial year 2016/2017 the payment of this award alongside any other of its obligations that have arisen during this financial year. That the Applicant has neither alleged nor proved that alleged Contemnor received funds from the consolidated fund to offset the decree herein and has refused to pay the decretal sum and therefore the alleged Contemnor cannot be said to be in contempt.

34. However the Applicant maintained that the Principal Secretary became personally responsible as an Accounting officer to pay them. That the provisions of Section 21(3) of the Government Proceeding Act are couched in a mandatory terms that "he shall pay" therefore upon service of the order, failure to obey it, amounts to contempt of Court. The cases of; ***R Vs Kenya School of Law & 2 Others Ex Parte Juliet Wanjiru & 5 Others (2015) eKLR*** and ***Wildlife Lodges Ltd Vs County Council of Narok & Another. (2005)2 EA*** were cited. In the latter case, Hon. Mr. Justice Ojwang held that, the whole purpose of litigation as a process of judicial administration is lost if Court orders are violated with impunity. The case of ***Kenya Tea Growers Association V Francis Atwoli & 5 Others (2012)eKLR,*** was cited, where Hon. Justice Lenaola held that, a person who disobeys a Court order, whether he is a Party to the Proceedings in which the order was made or not, is guilty of contempt.

35. The Applicant submitted that the provisions of Section 21(4) of the Government Proceedings Act are irrelevant in the proceedings as the payment of the Applicant's money depends entirely on the Principal Secretary to arrange for funds from the consolidated fund, which he has refused to, do. The Applicant will not be able know whether the funds have been received or not.

36. I have considered the arguments above and find that once the Respondent was served with the Court order requiring them to pay the Applicant and they were not contesting the debt, as aforesaid, they were bound to pay. The issue of lack of funds is a different kettle of fish altogether. The Respondent can only negotiate payments by installment but cannot be allowed to frustrate the Applicant and deny them consumption of the fruit in its hand because of their financial constraints. In deed the Courts have clearly pronounced themselves on this issue.

37. In the case of; ***Republic vs. Permanent Secretary, Ministry of State for Provincial Administration and Internal Security Exparte***

Fredrick Manoah Egunza [2012] eKLR, the Court stated 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."***

38. In the case of; ***Wachira Nderitu, Ngugi & Co. Advocates vs. The Town Clerk, City Council of Nairobi Miscellaneous Application No. 354 of 2012*** Court stated 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."***

39. In the Court of Appeal case of; ***Justus Kariuki Mate & Another Vs Martin Nyaga Wambora & Another (2014) eKLR*** the Court held that:-

> "***When a litigant approaches the High Court seeking remedies for alleged breach of fundamental rights, the Court is mandated to determine the grievances and issue orders as it may deem fit. We agree with the learned trial Judges those orders were supposed to be obeyed with utmost obedience until set aside or successfully appealed against. We hasten to restate as it has been done many times before that disobedience of court orders seriously undermines the rule of law. Every time a person or an institution especially a public officer disobeys a court order, there should be no celebration. A disobedience of a court order should be treated as a funeral, with compassion for the death of the rule of law. The appellants who prepared the order paper and presided over the proceedings of impeachment after having been served with the orders cannot conveniently claim immunity and at the same time claim to respect and obey the law".***

40. Finally the Respondent argued that "Order 29 of the Civil Procedure Rules, 2010, exempts the Government from execution proceedings." That in order for a successful litigant to realise the fruits of the Judgment, the litigant has to institute Judicial Review Orders to compel the Principal Secretary as the accounting officer to satisfy the decree. To commit the Accounting Officer to Civil Jail will therefore amount to violation of his constitutional rights of freedom. Reference was made to the case of; ***In the Matter of Zipporah Wambui Mathere Mathiora 2010 eKLR.*** I have considered the said argument and I find that with due respect, that argument does not arise, the Respondents have fully participated in this matter and have even attempted to settle the debt. Therefore the said argument is an afterthought.

41. Be that as it were, as far as the 14th November, 2016, when the Parties appeared before the Court, the Learned Counsel Ms. Kilei representing the Respondent informed the Court that the Principal Secretary assumed office on 18th December, 2015 and that he was not aware of the subject Court Order. The Court invoked the provisions of Article 159(2), and directed the Parties to negotiate the matter out of Court, whereby the Principal Secretary was accorded an opportunity to appear before the Court to explain why the Court order has not been complied with.

42. On 8th December 2016, when the Parties appeared before the Court, the Respondent's Counsel told the Court that, a meeting between the Parties was scheduled for 20th December 2016 to discuss a settlement. The Respondent was accorded more time to 16th January, 2017. On that date, the Respondent did not appear in Court, even then, the Court accorded the Respondent more time to 2nd February, 2017 for the Principal Secretary to appear as ordered.

44. On 2nd December 2017, the Respondent sought for more time and once again, they were awarded the same to 9th February, 2017, the indulgence continued to 24th February, 2017 then 27th, 28th March 2017 when the Deputy Administration Officer Mrs. Janet Mugo, appeared on behalf of the Principal Secretary in the Ministry of Defence and told the Court that she had been instructed by the Principal Secretary to inform the Court that the Principal Secretary in the Ministry of Defence was going to have a meeting with the Principal Secretary National Treasury on 31st March, 2017 and thereafter meet the Claimant and the Lawyers on 4th July 2017 and then record a consent settlement. The Applicant was agreeable and the matter was stood over to 7th April 2017. Nothing much happened and a further mention was given for 16th, 29th and 30th June 2017, when the Applicant got tired and sought for orders prayed for in the Application herein.

45. From the foregoing, it is clear that the Principal Secretary has all along been aware of this matter and actively participated therein and is thus in contempt of the Order issued in Misc. Civil Case No. 39 of 2014, to pay the Applicant the decretal sum which unfortunately to the detriment of the tax payer continues to accrue unfounded interest.

46. However, before I order for committal of Mr. Saitoti Torome, the Principal Secretary in the Ministry of Defence, I order that, he be accorded an opportunity to offer mitigation before the sentence. In that regard, I order that the Parties take a mention date for sentencing.

47. Ordered accordingly.

Dated, delivered and signed on this 24th day of October, 2017 at Nairobi

G.L. NZIOKA

JUDGE

In the presence of:

Mr. Arua for the Applicant

Ms. Kanyi for the Respondent

Court Assistant Teresia