REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS CIVIL APPLICATION NO. 368 OF 2016

REPUBLIC.....APPLICANT

VERSUS

CITY COUNTY OF NAIROBI

NOW COUNTY GOVERNMENT OF NAIROBI….1ST RESPONDENT

COUNTY SECRETARY,

COUNTY GOVERNMENT OF NAIROBI……...2ND REPONDENT

EX PARTE: KEPHA O. MAOBE & 365 OTHERS ON

THEIR BEHALF AND OF ALL RESIDENTS OF KIMATHI ESTATE

RULING

Introduction

1. On 31st January, 2017, I delivered a judgement in this matter in which I issued an order of an order of *mandamus* against the respondents compelling them to immediately pay the sum of Kshs 10,247,610.00 to the applicants. I also awarded the applicant costs of the application.

2. The applicant has now moved this Court vide a Notice of Motion dated 10th June, 2017 seeking the following orders:

> **1. That the Accounting Officer/ County Executive Finance, the Governor and the County Secretary of the County Government of Nairobi be and are hereby cited and convicted and sentenced for contempt for failing to comply with the orders of *mandamus* made on the 31st January 2017, to pay the Ex-parte applicant Kshs. 10, 247, 610/= pursuant to a certificate of order against the Government issued on the 13th June 2016 in NBI HCCC NO. 516 OF 1997.**
>
> **2. That costs be for the *ex parte* applicant.**

Applicants' Case

3. According to the applicants, they filed Nbi HCCC No. 516 of 1997 which proceeded to trial but was dismissed on the 20th June 2003. Being aggrieved, they lodged an appeal to the Court of Appeal, Civil

Appeal No. 8 of 2004, which also proceeded to trial and was determined on the 6th November 2015 in their favour so that the decree dated 20th June 2003 in the trial case was set aside and substituted with orders in the appellant's favour, with costs of the appeal.

4. The applicants then fled a party to party bill of costs dated 10th February 2016 against the 1st respondent in the trial case, Nbi HCCC No. 516 of 1997**,** which was taxed at Kshs. 10, 247, 610/=. They also applied for a certificate of order against the Government, which was made against the 1st respondent herein dated 14th June 2016. Thereafter the applicants made a demand for payment through the 1st respondent's advocates with no success.

5. As a result the applicant instituted Judicial Review proceedings against the respondents, from which orders of mandamus were issued compelling the respondents to pay the said sum Kshs. 10, 247, 610/=, which were served upon the 1st respondent's legal officer and a demand made but without success.

6. It was disclosed that this Court, on the 14th March 2017, directed that Notice to Show Cause why contempt proceedings could not be issued against the contemnors to issue hereafter such Notice to Show Cause was served upon the contemnors, the respondents and their advocates. Again, they failed to show cause as a result of which on the 24th May 2017, this Court directed that these contempt proceedings be commenced. It was the applicants' case that the 1st and 2nd respondents, by themselves and through their officers and sub ordinates, have failed to carry out their lawful duty to satisfy a lawful court order hence the justification for holding them in contempt.

7. Apart from retracing the history of the dispute the applicant contended that the respondents are continuing with constructions on premises which they forcibly took from the applicant without paying compensation as ordered by the court.

8. To the applicant, evidently the respondents have funds but they are refusing to pay its claim herein hence there is urgent need for them to pay up before continuing the constructions further.

Respondents' Case

9. In response to the application the Respondents filed grounds of opposition in which the following issues were raised:

> **1. That the order issued on 6/2/2017 directed to the respondents herein do not lie as against the respondents as there is no statutory duty imposed upon the respondents to act as demanded. That such order should therefore be referred to the County Executive Committee member in charge of finance and not the respondent herein who is wrongly suited.**
>
> **2. That at the outset, the said application is premature, misconceived and bad in law and the respondent will raise a point of law, to be determined *in limine* and that the applicant has mislead the court to issue order of mandamus against the respondent. In any case, the county government responsibilities with respect to management and control of public finance under the Public Finance Management Act CAP 412 C of the Laws of Kenya provides that the statutory duty to pay out funds from the county treasury vests in the County Executive Committee member in charge of Finance and not the Respondents herein.**
>
> **3. That the application is fatally incompetent and incurably defective.**
>
> **4. That the certificate of order against the government dated 19/6/2016 which the applicant purports to be blatantly disobeyed by the respondent was neither served upon the respondent as alleged by the applicant.**
>
> **5. That the letter dated 1/7/2016 allegedly sent to the respondents demanding for Kshs 10,247,610/= was never received as there is no evidence of receipt by way of acknowledge of**

receipt stamp on the face of the letter.

6. That the applicant has not stated under which law the sited respondents have a duty to act as demanded.

7. That the applicant cannot claim that the respondents are in contempt of court hereof since the respondents have no Authority to act as ordered.

8. That the respondent avers that the county Government responsibilities with respect to management and control of Public Finance under the Public Finance Management Act CAP 412 C of the Laws of Kenya gives the duty to pay out funds from the county Treasury upon the County Executive Committee member in charge of Finance and not the respondent herein thus the respondent herein in wrongly suited.

9. That the claim by the Applicant against the respondents for contempt of court is null and void. The applicant cannot found a cause of action by instituting a wrong party.

10. That the applicant's application is frivolous, vexatious and totally devoid of merit and *mala fides* for the reason *inter alia,* that that the applicant's Application dated 10/6/2017 is a waste of this honourable courts time and that the Applicant should have in the first place directed its claim of contempt to the County Executive Committee member in charge of Finance and not the Respondent herein.

11. That further, the alleged contemnor, is a public officer and is prohibited in law: under Sections 196 and 197 of the Public Finance Management Act (2012) from paying the applicant as ordered for it would be an offence to spend any public funds without any prior authorization.

12. That the respondent does not owe any duties or obligations to the applicant. In any case, the respondent should have been the one to move to court and claim damages from the applicant for wrongful institution and waste of this honourable court's time.

13. That the county government has various competing interests catered for in the budget. This honourable court to allow for the applicant's claim to be factored in the forthcoming budget as approved by the County Assembly since the County Executive cannot expend money not approved in the budget. It will amount to illegality.

Determinations

10. I have considered the issues raised herein.

11. The issues raised on behalf of the Respondents are issues which, in my view, ought to have been raised at the time of the hearing of the substantive application.

12. It must however be remembered that Court orders are not made in vain and are meant to be complied with. If for any reason a party has difficulty in complying with court orders the honourable thing to do is to come back to court and explain the difficulties faced by the need to comply with the order. Once a Court order is made in a suit the same is valid unless set aside on review or on appeal. In **Econet Wireless Kenya Ltd vs. Minister for Information & Communication of Kenya & Another [2005] 1 KLR 828, Ibrahim, J** (as he then was) stated:

"It is essential for the maintenance of the rule of law and order that the authority and the dignity of our Courts are upheld at all times. The Court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors. It is the plain and unqualified obligation of every person against, or in respect of whom, an order is made by a Court of competent jurisdiction, to obey it unless and

until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or void".

13. This position was confirmed by the Court of Appeal in **Refrigerator & Kitchen Utensils Ltd. vs. Gulabchand Popatlal Shah & Others Civil Application No. Nai. 39 of 1990**. In **Wildlife Lodges Ltd vs. County Council of Narok and Another [2005] 2 EA 344 (HCK)** the Court expressed itself thus:

"It was the plain and unqualified obligation of every person against or in respect of whom an order was made by a Court of competent jurisdiction to obey it until that order was discharged, and disobedience of such an order would, as a general rule, result in the person disobeying it being in contempt and punishable by committal or attachment and in an application to the court by him not being entertained until he had purged his contempt. A party who knows of an order, whether null or valid, regular or irregular, cannot be permitted to disobey it…It would be most dangerous to hold that the suitors, or their solicitors, could themselves judge whether an order was null or valid – whether it was regular or irregular. That they should come to the court and not take upon themselves to determine such a question. That the course of a party knowing of an order which was null or irregular, and who might be affected by it, was plain. He should apply to the court that it might be discharged. As long as it existed it must not be disobeyed…If there is a misapprehension in the minds of the defendants as to the reasonable meaning of the order, then the expectation of them is that they would have made an application to the court for the resolution of any misunderstanding and this would have been the lawful course…In cases of alleged contempt, the breach for which the alleged contemnor is cited must not only be precisely defined but also proved to the standard which is higher than proof on a balance of probabilities but not as high as proof beyond reasonable doubt…The inherent social limitations afflicting most people in a developing country such as Kenya have the tendency to restrict access to the modern institutions of governance, and more particularly to the judiciary which is professionally run, on the basis of complex procedures and rules of law. Yet, this same Judiciary is generally viewed as the impartial purveyor of justice, and the guarantor of an even playing ground for all, a perception which ought to be strengthened, through genuine respect for the courts of justice, and through compliance with their orders. Consistent obedience to court orders is required, and parties should not take it upon themselves to decide on their own which court orders are to be obeyed and which ones overlooked, in the supposition that this oversight will not impede the process of justice…Justice dictates even-handedness between the claims of parties; and if it be the case that the plaintiff/applicant has not been accorded a level playing ground for the realisation of its economic activities, a matter that of course can only be established through evidence in the main suit, then the court ought to provide relief, by applying the established principles of law, one of these being the law of contempt…An *ex parte* order by the court is a valid order like any other and to obey orders of the court is to obey orders made both *ex parte* and *inter partes* since the Court by section 60 of the Constitution is the repository of unlimited first instance jurisdiction, and in this capacity it may make *ex parte* orders where, after a careful and impartial consideration, it is convinced that issuance of such an order is just and equitable. There is nothing potentially oppressive in an *ex parte* order, since such an order stands open to be set aside by simple application, before the very same court…Where a party considers an *ex parte* order to cause him undue hardship, simple application will create an opportunity for an appropriate variation to be effected thereto; and therefore there will be no excuse for a party to disobey a court order merely on the grounds that it had been made *ex parte* and this argument will not avail either the first or the second defendant".

14. In **Central Bank of Kenya & Another vs. Ratilal Automobiles Limited & Others Civil Application No. Nai. 247 of 2006**, the Court of Appeal held that Judicial power in Kenya vests in the Courts and other tribunals established under the Constitution and that it is a fundamental tenet of the rule of law that court orders must be obeyed and it is not open to any person or persons to choose whether or not to comply with or to ignore such orders as directed to him or them by a Court of law.

15. In **Wildlife Lodges Ltd vs. County Councilof Narok and Another [2005] 2 EA 344 (HCK)** the Court expressed itself thus:

> **"It was the plain and unqualified obligation of every person against or in respect of whom an order was made by a Court of competent jurisdiction to obey it until that order was discharged, and disobedience of such an order would, as a general rule, result in the person disobeying it being in contempt and punishable by committal or attachment and in an application to the court by him not being entertained until he had purged his contempt. A party who knows of an order, whether null or valid, regular or irregular, cannot be permitted to disobey it…It would be most dangerous to hold that the suitors, or their solicitors, could themselves judge whether an order was null or valid – whether it was regular or irregular. That they should come to the court and not take upon themselves to determine such a question. That the course of a party knowing of an order which was null or irregular, and who might be affected by it, was plain. He should apply to the court that it might be discharged. As long as it existed it must not be disobeyed…If there is a misapprehension in the minds of the defendants as to the reasonable meaning of the order, then the expectation of them is that they would have made an application to the court for the resolution of any misunderstanding and this would have been the lawful course…In cases of alleged contempt, the breach for which the alleged contemnor is cited must not only be precisely defined but also proved to the standard which is higher than proof on a balance of probabilities but not as high as proof beyond reasonable doubt…The inherent social limitations afflicting most people in a developing country such as Kenya have the tendency to restrict access to the modern institutions of governance, and more particularly to the judiciary which is professionally run, on the basis of complex procedures and rules of law. Yet, this same Judiciary is generally viewed as the impartial purveyor of justice, and the guarantor of an even playing ground for all, a perception which ought to be strengthened, through genuine respect for the courts of justice, and through compliance with their orders. Consistent obedience to court orders is required, and parties should not take it upon themselves to decide on their own which court orders are to be obeyed and which ones overlooked, in the supposition that this oversight will not impede the process of justice…Justice dictates even-handedness between the claims of parties; and if it the case that the plaintiff/applicant has not been accorded a level playing ground for the realisation of its economic activities, a matter that of course can only be established through evidence in the main suit, then the court ought to provide relief, by applying the established principles of law, one of these being the law of contempt…"**

16. Court orders are not meant for cosmetic purposes. They are serious decisions that are meant to be and ought to be complied with strictly. As was held in **Teacher's Service Commission vs. Kenya National Union of Teachers & 2 Others Petition No. 23 of 2013**:

> **"The reason why courts will punish for contempt of court is to safeguard the rule of law which is fundamental in the administration of justice. It has nothing to do with the integrity of the judiciary or the court or even the personal ego of the presiding judge. Neither is it about placating the applicant who moves the court by taking out contempt of court proceedings. It is about preserving and safeguarding the rule of law. A party who walks through the justice door with a court order in his hands must be assured that the order will be obeyed by those to whom it is directed. A court order is not a mere suggestion or an opinion or a point of view. It is a directive that is issued after much thought and with circumspection. It must therefore be complied with and it is in the interest of every person that this remains the case. To see it any other way is to open the door to chaos and anarchy and this Court will not be the one to open that door. If one is dissatisfied with an order of the court, the avenues for challenging it are also set out in the law. Defiance is not an option."**

17. It was therefore appreciated by **Ojwang, J** (as he then was) in **B vs. Attorney General [2004] 1 KLR 431** that:

> **"The Court does not, and ought not to be seen to, make Orders in vain; otherwise the Court**

would be exposed to ridicule, and no agency of the Constitutional order would then be left in place to serve as a guarantee for legality, and for the rights of all people."

18. In this case there is no reason why the Respondents have not satisfied the order of this Court. Section 30(5) and (6) of the ***Contempt of Court Act*** provides that:

(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.

19. Section 109 of the ***Evidence Act*** provides that:

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

20. This burden is known as the evidentiary burden of proof in legal parlance. In this case, it is my view that once the judgement creditor proves that he has a decree in his favour, which decree remains unsatisfied, the burden must shift to the respondent to satisfy the Court that the inability to satisfy the decree is not due to collusion, consent, connivance or neglect on the part of its accounting officer. To paraphrase the position of the Court of Appeal in **Kenya Posts & Telecommunications Corporation vs. Paul Gachanga Ndarua Civil Application No. Nai. 367 of 2001** and **ABN Amro Bank, N.K. VS. Le Monde Foods Limited Civil Application No. 15 of 2002,** all an applicant in the position of the applicant herein can reasonably be expected to do, is to swear, upon reasonable grounds, that the Respondent's accounting officer has consented to or connived at the commission of the contempt or has neglected to take the necessary steps to comply with the order of the Court. In my view the failure by the accounting officer of a State organ, government department, ministry or corporation to put into motion steps necessary for the settlement of or obedience of court decisions or facilitation of such settlement is *prima facie* evidence of neglect. It is simply not enough for such officer to say that he or she had informed the Treasury about the pending decision. He or she must show what steps he/she has taken in order to ensure that the decision is complied with. The applicant is not for example expected to go into the bank accounts operated by a State organ, government department, ministry or corporation to see if there is any money there. As was held in **Kenya Posts & Telecommunications Corporation vs. Paul Gachanga Ndarua**, (supra):

"…the property a man has is a matter so peculiarly within his knowledge that an applicant may not reasonably be expected to know them. In those circumstances, the legal burden still remains on the applicant, but the evidential burden would then have shifted to the Respondent…"

21. Similarly the financial status of a judgement debtor is peculiarly within his knowledge and the failure to satisfy the Court that its accounts are in "the red", in my view, can only lead to a presumption that the contempt has been committed with the consent or connivance of, or is attributable to the neglect on the part the accounting officer, thus rendering such accounting officer guilty of the contempt.

22. In this case, the accounting officer is clearly the County Executive Committee member in charge of Finance of the 2nd Respondent herein.

23. Consequently, it is hereby directed that the said County Executive Committee member in charge of Finance do appear before this Court for purposes of sentencing.

24. Costs of the application are awarded to the applicant.

25. It is so ordered.

Dated at Nairobi this 16th day of November, 2017

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Ombwayo for the applicant

Miss Mwai for the Respondents

CA Ooko