REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

MISCELLANEOUS CIVIL APPLICATION NO 141 OF 2014

SOLOH WORLDWIDE INTER-ENTERPRISES……..…..APPLICANT

VERSUS

COUNTY SECRETARY NAIROBI COUNTY……..1ST RESPONDENT

COUNTY TREASURER NAIROBI COUNTY…….2ND RESPONDENT

RULING

Introduction

1. By a ruling dated 2nd June, 2015, in these proceedings, this Court directed that warrants of arrest do issue to the OCPD Central Police Station to proceed to apprehend **Lilian Ndegwa**, the Respondent's County Secretary and **Jimmy Mutuku Kiamba**, its Treasurer and Chief Accounting Officer and bring them to Court forthwith to show cause why they could be punished. It would seem that by the time the said ruling was handed down, certain changes took place within the Respondent County that made it impossible to effectuate the resulting order thus necessitating the filing of the current Motion dated 9th July, 2015 by which the applicant herein, **Soloh Worldwide Inter-Enterprises Limited** seeks the following orders:

1. **That this application be certified as urgent and the same be heard ex parte in the first instance due to its urgent nature.**
2. **That the Order given by the Honourable Mr. Justice G.V. Odunga on 2nd June 2015 be reviewed and the order of contempt be substituted and issued against the current office bearers of the Respondents namely, GREGORY MWAKANONGO the acting County Secretary of Nairobi County and LUKE GATIMU, the acting Chief Finance Officer respectively.**
3. **That in the ALTERNATIVE, an Order of committal to prison be issued against GREGORY MWAKANONGO, the acting County Secretary Nairobi County, and LUKE GATIMU, the County Treasurer and Chief Accounting Officer Nairobi County for a period of Six (6) months or such period as this honourable court may deem fit and just.**
4. **That an ex parte Order be issued directing the said GREGORY MWAKANONGO and LUKE GATIMU to forthwith appear in court personally and show cause why they cannot be punished for failing to pay the outstanding decretal sum as ordered on 13th November 2014.**
5. **That the costs of this application be borne by the Respondents.**

2. According to the Applicant, it is the decree holder in CMCC No. 5352 of 2007 between Soloh Worldwide Inter-Enterprises Limited –vs- City Council of Nairobi vide a decree given on 13th May 2011 which was given on the 13th of May 2011 and in which the Applicant was awarded the principal sum of Kshs. 1,258,306/= and costs of Kshs. 145, 323 together with interest thereon at court rates.
3. It was averred that as a result of the failure to satisfy the said decree, the Applicant moved this Court to compel the Respondents to settle the said decree by way of an order of mandamus which this Court granted by its judgement dated 13th November, 2014 in which this Court directed the Respondent to forthwith and without delay cause to be paid to the Applicant the outstanding decretal sum of Kshs. 2,652,033.69 and costs amounting to Kshs. 145,325/- together with accrued interest thereon in settlement of the decree given on 13th May 2011 in Nairobi CMCC No. 5352 of 2007. Despite being served with the said order no payment was made. As a result thereof, the Applicant instituted contempt of court proceedings and by a ruling given on 2nd June 2015 this found that **Lilian Ndegwa** (the then County Secretary) and **Jimmy Mutuku Kiamba** (then County Chief Accounting Officer) were in contempt of court and further ordered that a warrant of arrest be issued against the said officers.
4. It was averred that the said **Lilian Ndegwa** and **Jimmy Mutuku Kiamba** had been suspended from employment by the time the said ruling was delivered and that **Gregory Mwakanongo** and **Luke Gatimu** are the current County Secretary and County Treasurer respectively. The Applicant contended that the said persons were duly served with a copy of the ruling of 2nd June, 2015 on 4th June 2015 together with a copy of the order given on 13th November 2014 and a covering letter thereof and they were categorically requested to settle the decree as ordered by the court in their capacity as the current office bearers failure to which the Applicant would cite them for contempt. However the said persons seem not to have been moved by the applicant's threats as no positive action was taken.
5. In the Applicant's view, the said inaction constitutes a wilful, blatant disobedience and breach of the orders given by this Court hence amounts to the failure by the Respondents to purge their contempt hence the instant application.

Respondent's Case

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

    1. **That the application is fatally incompetent and incurably defective.**

    2. That the application is premature as costs in the suit are yet to be taxed as is required by law. A decree cannot be executed in piece meal.

    3. That the orders sought by the Applicant do not lie against the Respondents as there is no statutory duty imposed upon them to act as demanded. The Applicant has not stated under which law the cited Respondents have a duty to act as demanded.

    4. That under Part Iv – County Government Responsibilities with respect to management, and control of Public Finance under the Public Finance Management Act Cap 412C of the Law of Kenya, the statutory duty to pay out funds from the country treasury vests in the County Executive Committee in charge of Finance and not the Respondent herein thus the Respondent herein are wrongly suited.

    5. That the application is frivolous, vexatious and an abuse of the court process and is a merely publicity stunt by the Applicant as it relates to the Respondents.

    6. That the Respondents have since filed an appeal against the judgement herein.

Determination

7. I have considered the application, the affidavit in support, the grounds of opposition and the submissions filed.
8. The Respondent has taken issue with the procedure adopted by the Applicant and contended that the Applicant ought to have notified the Respondent of its intention to institute contempt proceedings. This issue in my view necessitates the examination of the current legal regime relating to contempt in this country other than contempt in the face of the Court which is governed by the provisions of the ***High Court (Organisation and Administration) Act***.
9. In contempt of Court matters, the first port of call with respect to the procedure for institution contempt of Court proceedings in this country is section 5 of the ***Judicature Act*** Cap 8 Laws of Kenya which section provides:

   (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.

10. As this Court has held before, it is unfortunate and regrettable that in this age and era, our procedure, with respect to punishment for contempt in our Court is referable to the procedure in the High Court of Justice in England.
11. Therefore the law that governs contempt of court proceedings is the English law applicable in England at the time the contempt was committed. The procedure in the High Court of Justice in England was considered in detail by the Court of Appeal in **Christine Wangari Gachege vs. Elizabeth Wanjiru Evans & 11 Others [2014] eKLR**. In that case the Court recognised 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***.
12. The High Court of Justice in England comprises three (3) divisions – the Chancery, the Queens Bench and the Family Divisions. It is true that following the implementation of **Lord Woolf's** "***Access to Justice Report, 1996***", the ***Rules of the Supreme Court*** of England are being replaced with the ***Civil Procedure Rules, 1999*** and pursuant thereto the Court of Appeal in the above decision recognised that on 1st October, 2012 the ***Civil Procedure (Amendment No. 2) Rules***, 2012, came into force and Part 81 thereof effectively replaced Order 52 of the ***Rules of the Supreme Court*** which was the Order dealing with the procedure for seeking contempt of Court orders in the High Court of Justice in England, in its entirety. Under Rule 81.4 which deals with breach of judgement, order or undertaking, referred to as "application notice", the application is made in the proceedings in which the judgement or order was made or undertaking given and the 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. The Court of Appeal held that leave or permission is nolonger required in such proceedings (relating to a breach of a judgement, order or undertaking) as opposed to committal for interference with the due administration of justice or in committal for making a false statement of Truth or disclosure statement.
13. It therefore follows that it is nolonger necessary in contempt relating to disobedience of a Court order to notice of intention to institute the same.
14. It was further contended that the correct person to have been cited for contempt should have been the Respondent's County Executive in charge of Finance. In other words the Respondents have raised the issue whether the Respondents are the ones against whom the orders ought sought herein to issue. In **Shah vs. Attorney General (No. 3) Kampala HCMC No. 31 of 1969 [1970] EA 543** where **Goudie, J** 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."

15. From the foregoing it is clear that an order of mandamus can issue against an officer in the exercise of his or her official duties as long as there is a duty imposed on him or her by virtue of holding the said office to act in a particular manner.
16. This discourse leads me to a determination of who is the accounting officer of a County Government? The issue was resolved in **Council of Governors & Others vs. The Senate Petition No. 413 of 2014 [2015] eKLR** where the Court expressed itself as follows:

"The Petitioners have also sought the interpretation of the term "Accounting Officer". In that regard, Article 226 of the Constitution provides;

(1) Act of Parliament shall provide for -

(a) ….

(b) The designation of an accounting officer in every public entity at the national and county level of government

(2) The accounting officer of a national public entity is accountable to the national assembly for its financial management, and the accounting officer of a county public entity is accountable to the county assembly for its financial management.

Pursuant to this provision, Parliament enacted the Public Finance Management Act. The appointment and designation of a County Government Accounting Officer is provided for under Section 148 of that Act, as follows;

1. ***A County Executive Committee member for finance shall, except as otherwise provided by law, in writing designate accounting officers to be responsible for managing the finances of the county government entities as is specified in the designation.***
2. ***Except as otherwise stated in other legislation, the person responsible for the administration of a county government entity, shall be the accounting officer responsible for managing the finances of that entity.***

It therefore follows that "*an accounting officer*" for a County Government entity is the person so appointed and designated as such by the County Executive Committee Member for Finance under Section 148 of the Public Finance Management Act. Indeed, Section 148 (3) of the Public Finance Management Act mandates the County Executive Committee Member for Finance to ensure that each County government entity has an accounting officer as provided for under Article 226(2) of the Constitution.

As regards the accounting officer for the County Assembly, Section 148(4) of the Public Finance Management Act provides that; "*The Clerk of the County Assembly shall be the accounting officer of the County Assembly*".

Having found as we have, it follows that the question posed by the Petitioners as to whether the County Governor is an Accounting Officer, must be answered in the negative. He is not an Accounting Officer and we have said why."

17. It therefore follows that the person who has the overall financial obligation for the purposes of the affairs of a County Government must be the County Executive in Charge of Finance and unless he shows otherwise, he is the one under obligation to pay funds, in the capacity as the accounting officer. 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 an application for mandamus where orders are sought to compel the satisfaction of a decree against a County Government, the proper person to be a respondent ought to be the said County Executive in Charge of Finance unless he discloses that he had in fact appointed an accounting officer for that purpose. However, as this application is merely seeking to substitute the respondents in place of those against whom orders had been made and whose shoes they got themselves into, no issue arises in respect thereof. As this Court appreciated in **Council of Governors & Others vs. The Senate** (supra):

"…the role of the Governor under Section 30(3) (f) of the County Governments Act is critical in fiscal management at the County level. He is the Chief Executive Officer and the buck stops with him in the management of county resources. It is critical that such a provision exists so as to ensure responsibility of public resources which would ultimately enhance the national values as provided for under Article 10 of the

Constitution as well as the spirit and tenor of constitution."

18. In any case, mere misjoinder ought not to be fatal to the application though the Court may in exercise of its discretion deny the applicant, even if successful, costs of the application. An issue as to the effect of misjoinder in judicial proceedings was the subject of determination in **Republic Ex Parte the Minister For Finance & The Commissioner of Insurance as Licensing and Regulating Officers vs. Charles Lutta Kasamani T/A Kasamani & Co. Advocate & Another Civil Appeal (Application) No. Nai. 281 of 2005** in which the Court of Appeal stated:

"Suffice it to say that a defect in form in the title or heading of an appeal, or a misjoinder or non-joinder of parties are irregularities that do not go to the substance of the appeal and are curable by amendment...Is the form of title to the appeal as adopted by the Attorney General in this matter defective or irregular? We think not, as we find that it substantially complies with the guidelines set out by this Court".

19. Article 159(2)(d) of the Constitution enjoins this Court to administer justice without undue regard to technicalities of procedure, as long as the rules of natural justice are adhered to. At the end of the day the entity which is bound to settle the decree is the County Government and not the said officer in his personal capacity.
20. With respect to the contention that the Respondent lodged an appeal, it is trite law that an appeal does not operate as a stay of either execution or proceedings and that is all I wish to say on the matter.
21. In the result the Notice of Motion dated 9th July, 2015 succeeds and I grant the following reliefs:

1. **That the Order given herein on 2nd June 2015 is hereby reviewed and the order of contempt is substituted and issued against the current office bearers of the Respondents namely, Gregory Mwakanongo the Acting County Secretary of Nairobi County and Luke Gatimu, the acting Chief Finance Officer respectively.**
2. **That the said Gregory Mwakanongo and Luke Gatimu are directed to appear in court personally to show cause why they cannot be punished for failing to pay the outstanding decretal sum as ordered on 13th November 2014.**
3. **In light of the misjoinder of parties there will be no order as to costs.**

22. Orders accordingly.

Dated at Nairobi this 14th day of June, 2016

G V ODUNGA

JUDGE

Delivered in the presence of:

Miss Mwai for the Respondent

Cc Mutisya