



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 6031 OF 1991

HARUN THUNGU WAKABA..... PLAINTIFF/DECREE HOLDER

V E R S U S –

THE ATTORNEY GENERAL..... DEFENDANT/JUDGEMENT DEBTOR

RULING

1) Ruth Wangare Thungu, the legal representative of the estate of Harun Thungu Wakaba, took out the motion dated 26.10.2015 and sought for inter-alia:

a) THAT leave be granted to the Applicant/Decree holder to bring contempt of court proceedings against Ms MUTHONI KIMANI the Senior Deputy Solicitor General and the Principal Secretary Ministry of Internal Security and Co-ordination of National Government.

b) THAT the contemnors Ms MUTHONI KIMANI the Senior Deputy Solicitor General and the Principal Secretary Ministry of Internal Security & Co-ordination of National Government be personally summoned to this honourable court immediately and be condemned for civil and criminal contempt of court by being imprisoned for a period of one year and a fine of ksh.1 million or both.

c) THAT the sum of Kshs1,947,386 plus interest at 12% since 7th December 2009, that is kshs.3,350,557 as on 1st October 2015 be paid to the decree holder's advocates Gitau J. H. Mwara advocates forthwith.

d) The court bailiff be ordered to serve the court summons on the contemnors to personally appear before this court to plead to the civil and criminal offence of criminal contempt of court.

e) THAT the costs of this application be provided for.

f) THAT the applicant be at liberty to apply for any further orders.

g) The respondents be condemned to bear the cost of this application.

2) The motion is supported by the affidavit of James H. Gitau Mwara, learned advocate for the plaintiff/applicant. The respondents filed a notice of preliminary objection to oppose the notice of motion. When the motion came up for interpartes hearing, learned counsels recorded a consent order to have the application disposed of by written submission.

3) I have considered the grounds stated on the face of the motion plus the facts deponed in the supporting

affidavit and the grounds stated on the notice of preliminary objection. I have also considered the written submissions filed by the applicant. The decree holder has stated that the plaintiff was awarded judgment for compensation as damages for illegal arrest, illegal detention, assault and malicious prosecution in the sum of kssh.1,947,386/=. It is further pointed out that no appeal has been preferred against the award. The applicant submitted that the respondents have failed to satisfy the decree despite having been served with the same. The applicant further pointed out that since there is no order for stay of execution, the orders sought vide the motion should be granted. It is argued that despite the decree and certificate of order against the government being served on the Attorney General on 3rd August 2010 and again on 21st October 2011 with a notice of penal consequences, M/s Muthoni Kimani, Senior Deputy Solicitor General, has personally refused to comply with the decree and order for the last 6 years forcing the applicant to obtain leave to institute contempt of court proceedings against them and the current principal secretary, ministry of Internal Security and Coordination of National Government who has personally refused to comply with the decree and order. The applicant also averred that in August 2012, Prof. Githu Muigai, made a public pronouncement that all permanent secretaries should comply with all court decrees and certificates of order against the government served upon them which the principal secretary, Ministry of Internal Security and Co-ordination of National Government has refused to comply with impunity for over 6 years.

4) The applicant further averred that on 20.8.2015, Prof. Githu Muigai, again publicly stated that he was not going to pursue any appeal related to damages awarded in torture related cases and yet the two (2) public officers have continued to defy this directive. The applicant cited *inter alia* **Nairobi H.C.C.C 2892 of 1992 James H. Gitau Mwara =vs= Attorney** in which it was held *inter alia* that

“failure to obey and comply with the orders was deliberate, wilful and without lawful or reasonable excuse, taking into account the facts and circumstances surrounding this case.”

5. The Attorney General, the 1st respondent filed a notice of preliminary objection to oppose the motion. It is argued that the application offends the provisions of Order 29 rule 2 (2)b of the Civil Procedure Rules. It is also argued that the entire motion offends Section 21 (4) of the Government proceedings Act Cap. 40 Laws of Kenya.

6. It is not in dispute that Lady Justice Ali-Aroni awarded the late Harun Thungu Wakaba judgment in the sum of ksh.1,947,386/= on 7.12.2009 as damages for the torts of illegal arrest, false imprisonment and malicious prosecution. It is also not disputed that no order for stay of execution of the decree has been obtained. It is also not in dispute that there is no evidence that an appeal has been preferred against the judgment of Lady Justice Ali-Aroni. It is further not contested that the decree and the certificate of the order against Government were served upon its chief legal adviser, the Hon. Attorney General. It is argued that despite being served, that the Senior Deputy Solicitor General M/s Muthoni Kimani has personally refused to comply with the order and the decree thus prompting the decree holder to take out the current motion. I have already stated that the Hon. Attorney General has raised a preliminary objection which is to the effect that the orders sought cannot be issued because if issued it will go against the provision of Section 21(4) of the Government Proceedings Act (Cap 40. Laws of Kenya). I have carefully considered the orders sought in the motion vis-a-vis the aforementioned provisions. It is apparent that the applicant is seeking to be granted the following orders:

i. An order for leave to commence contempt of court proceedings against Ms Muthoni Kimani, and Principal Secretary Ministry of Internal Security and Coordination of national Government.

ii. An order to have the duo personally (above) sentenced to serve prison terms for both civil and criminal contempt of court

iii. An order directing payment of the decretal sum be made to Gitau J. H. Mwara & Co. Advocates.

iv. An order directing the court bailiff to serve the summons upon the contemnors to appear before this court to take plea on the offence of civil and criminal contempt.

7) I have taken time to understand the applicant's application. The first prayer seeks for leave to commence contempt of court proceedings. The subsequent prayers are basically seeking for enforcement of the decree. In my humble view, the later prayers are premature because one is seeking for leave to commence contempt of court proceedings, one cannot purport to seek for enforcement of the decree at the same time. The order for leave to commence contempt proceeding must be obtained first and thereafter a formal application must be filed. As regards the main prayer for leave to commence contempt of court proceedings, I find the same to be inappropriate.

8) First, the applicant seeks to have those cited for contempt to be personally held liable. This in itself is contrary to the provisions of Section 21(4) of the Government Proceedings Act. For this reason, I find the preliminary objection raised by the Hon. Attorney General to be valid.

9) Secondly, the law contemplates that an order for mandamus to compel the relevant accounting officer to settle the decree has been applied and obtained. In this case none was shown to this court. For the above reason the motion must fail.

10) In the end the motion dated 26.10.2015 is found to be premature, incompetent and unmeritorious. The same is ordered

struck out.

11) In the circumstances of this case the appropriate order on costs is that each party should meet their own costs.

Dated, Signed and Delivered in open court this 29th day of September, 2016.

J. K. SERGON

JUDGE

In the presence of:

..... for the Plaintiff

..... for the Defendant