



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL & JUDICIAL REVIEW DIVISION

JUDICIAL REVIEW APPLICATION NO. 366 OF 2014

IN THE MATTER OF AN APPLICATION TO APPLY FOR JUDICIAL

REVIEW ORDERS IN THE NATURE OF MANDAMUS

AND

IN THE MATTER OF ENFORCEMENT OF THE DECREE GIVEN ON 20TH FEBRUARY 2009

IN HC MILIMANI COMMERCIAL COURT CIVIL CASE NO. 800 OF 2002

GATEWAY INSURANCE COMPANY LTD V. NAIROBI CITY COUNCIL

AND

GATEWAY INSURANCE COMPANY LIMITED.....APPLICANT

VERSUS

**LUKE GATIMU, CHIEF OFFICER FINANCE AND ECONOMIC PLANNING...1ST
RESPONDENT**

**MORRIS OKARE, TREASURER NAIROBI COUNTY GOVERNMENT.....2ND
RESPONDENT**

DR. ROBERT AYISI, ACTING COUNTY SECRETARY.....3RD RESPONDENT

**NAIROBI COUNTY GOVERNMENT NAIROBI COUNTY GOVERNMENT....4TH
RESPONDENT**

RULING

Introduction

1. The Applicants herein, **Gateway Insurance Company Limited**, moved this Court by way of an Amended Notice of Motion date 21st March, 2016 seeking the following orders:

1. **This application be certified urgent and heard ex parte in the first instance in respect of prayer no 4 bellow.**

2. An order of committal to prison for contempt of court be made for such period as this Honourable Court may determine, against:

- a. Luke Gatimu- Chief Officer Finance and Economic Planning, Nairobi City Country Government;**
- b. Morris Okare- Treasurer. Nairobi City Country Government;**
- c. Dr. Robert Ayisi Secretary and Head of Public Service Nairobi City Country Government;**

For disobedience of the court order and the decree given by this Honourable Court on the 11th June 2015 and issued on 16th June 2015 in that they, Gatimu, Morris Okare, and Dr. Robert AYISI have disobeyed the said Order and Decree or aided and abetted to the commission thereof compelling the Respondents to pay to the applicant all amounts due to it emanating from the Judgment and Decree given by this Honourable Court in HCCC no 890 of 2002 on 20th February 2009.

3. This Honourable Court do issue an order of sequestration to sequester such real and personal properties to the full satisfaction of the amount decreed and owing of the following people:

- a. Luke Gatimu- Chief Officer Finance and Economic Planning, Nairobi City Country Government;**
- b. Morris Okare- Treasurer. Nairobi City Country Government;**
- c. Dr. Robert Ayisi Secretary and Head of Public Service Nairobi City Country Government;**

For disobedience of the court order and the decree given by this Honourable Court on the 11th June 2015 and issued on 16th June 2015 in that they, Gatimu, Morris Okare, and Dr. Robert Ayisi have disobeyed the said Order and Decree or aided and abetted to the commission thereof compelling the Respondents to pay to the applicant all amounts due to it emanating from the Judgment and Decree given by this Honourable Court in HCCC no 890 of 2002 on 20th February 2009

4. As a matter of urgency the Honourable Court be pleased to order issuance of summonses to attend court the same to be served by the Inspector General of Police, Vigilant House, Nairobi against Luke Gatimu, Morris Okare and Dr. Robert Ayisi on the date set for the hearing of this notice of motion and on failure to attend court as summoned to order their arrest and detention into remand prison during the period of hearing of the Notice of motion.

5. Costs of this application be provided for.

Applicants' Case

2. According to the Applicants, it commenced judicial review in the nature of mandamus to compel the Respondents to satisfy the decree issued by the High Court in HCC No. 890 of 2002. Consequently, on 11th June, 2015 this Court issued the said order and a decree was extracted on 16th June, 2015 which decree was served upon the Respondents.

3. It was averred that on 17th June, 2015 a demand for payment of the sum due was made but the Respondents contemptuously refused to respond thereto. To the Applicant the Respondents are contemnors of this Court and have total disregard for Court orders as they have never made any effort

whatsoever to settle the applicant's claims. By neglecting to settle the said judgement, the Respondents were accused of deliberately refusing to honour the judgement of the Court hence these proceedings.

Respondents' Case

4. In response to the application the Respondents filed the following grounds of opposition:

1. **That the orders as sought by the petitioners are not attainable.**
2. **That the application dated 21/3/2016 is made *malafide* and an utter abuse of the court process as the petitioner ought to have served the respondents with the decree from HCC 890 of 2002 allegedly issued on 20/2/2009 for the respondents to fathom what they are compelled to meet;**
3. **That there is no record or evidence of the decree that the respondents are compelled to meet nor was it ever served;**
4. **That compound interest per month at 24% by the applicant is ambitious and unfound and the same shall be contested at the hearing thereof.**
5. **That the honourable court should be cautious in granting orders especially in contempt proceedings, which degree is higher than that of balance of probability more so where there is neither proof of service nor knowledge of the orders the respondents are compelled to meet as is in the instant case.**
6. **That therefore the application dated 21/3/2016 smirks of malice and ought to be dismissed with costs.**

5. Apart from the grounds of opposition the Respondents filed a replying affidavit in which they averred that a major component in contempt proceedings is personal service and that since they were not duly served with a copy of the Certificate of Urgency and Notice of Motion Application dated 21st March 2016; and the Judgment allegedly issued on 20th February, 2009 in HCC. No. 890 of 2002; they were therefore not acting in contempt of court hence this Application is misguided and untenable.

6. The Respondents averred that the Affidavit of service by **Julius Mwangi** is first of all incomplete and undated and shows clearly that there was a lack of personal service on the part of **Luke Gatimu, Morris Okare** and **Dr. Robert Ayisi** (hereinafter referred to as "the Contemnors). Furthermore, this court has been shown that the Applicant's application dated 21st March, 2016 was not received personally by all the respondents and that the same applies to the award whose implementation they seek in HCCC No. 890 of 2002.

7. The Respondents averred that these proceedings, sought *inter alia*, to compel one **Lilian Ndegwa & Jimmy Kiamba** to meet an alleged decree emanating from HCCC No. 890 of 2002 and that subsequent to the orders obtained herein, the applicant sought to institute contempt proceedings against the aforementioned respondents but the same was dismissed on the premise that the said respondents had ceased being employees of Nairobi County Government. To the Respondents, these proceedings having been specific to **Jimmy Kiamba** and **Lilian Ndegwa**, the same cannot and should not be used as a leverage by the applicant to seek contempt proceedings against the Contemnors, as that would amount to violation of Article 47 of the Constitution of Kenya 2010 and the **Fair Administration Action Act** since they were never part of these proceedings.

8. It was contended that the application is wrongly before this honourable court, is misconceived, frivolous, vexatious, unmerited and an abuse of the court process. According to the Respondents the Applicant's application dated 21st March, 2016 has only been received by the Advocates for the respondents and not the respondents personally; hence the same cannot be equated to personal service. In

support of their case, the Respondents relied on *Halsbury's Laws of England* (4th Edition. Vol.9, Pg 3 of 61) that:

“necessity of personal service as a general rule no order of court requiring a person to do or abstain from doing any act may be enforced unless a copy of the order has been served on the person required to do or abstain from the act in question. Service on the advocate is not proper service in the case of contempt. In contempt proceedings, personal service is the procedure”

9. The Respondents also relied on Civil Procedure (Amendment No. 2) Rules, 2012, **Josephine Muthinja vs. Lilian Muthama & 2 Others [2014] eKLR**, **Sam Nyamweya & 3 Others vs. Kenya Premier League Limited & 2 Others [2015] eKLR**, **Basil Criticos vs. Attorney General and 8 Others [2012] eKLR**, **Kariuki and 2 Others vs. Minister for Gender, Sports, Culture & 2 Others [2004] 1 KLR 78**, **Ochino and Another vs. Okombo and 4 Others (1989) KLR**, **Justus Nyaribo vs. Clerk Nyamira County Assembly [2013] eKLR**, **Mutitika vs. Baharini Farm Limited (1985) KLR229, 23** and contended that the Applicant's application has failed to show proof of any personal service to the respondents with regards to the decree to be enforced and that they have absolutely no knowledge of any existing judgment and decree against them as alleged by the applicant. Based on the same decisions it was contended that the burden of proof in contempt of court is higher than balance of convenience but lower than that of criminal proceedings. Since they were unaware of the orders that gave rise to these proceedings, the Respondents contended that the orders sought herein cannot be granted.

10. The Respondents further contended that whereas the applicant is seeking compound interest per month at 24% the said rate is ambitious and unfounded as being a creation of the Applicant for its own frivolous and malicious and aimed at derailing justice and personal gain in this matter contrary to the public interest policy.

11. In the contemnor's view, as public officers, they are exempted from personal liability as clearly stipulated under section 52 of the ***Urban Areas and Cities Act*** as they have not willingly and knowingly omitted the alleged orders sought by the applicant. They therefore prayed that this Court exonerates them from any personal liability as provided by the law and proceeds to dismiss the Applicant's application for failing to meet the required threshold of contempt proceedings with costs.

Determination

12. I have considered the application and the material on record.

13. According to ***Black's Law Dictionary***, 9th Edition at page 360:

“Contempt is a disregard of, disobedience to, the rules or orders of a legislative or judicial body, or an interruption of its proceedings by disorderly behaviour or insolent language, in its presence or so near thereto as to disturb the proceedings or to impair the respect due to such a body.”

14. In ***Halsbury's Laws of England***, 4th Edition Volume 9 at paragraph 52 it is stated:

“It is a civil contempt of court to refuse or neglect to do an act required by a Judgment or order of the court within the time specified in the judgment or order...A judgment or order against a corporate body may be enforced by an order of committal against the directors or other officers of the corporation.”

15. Similarly, in **Hadkinson vs. Hadkinson (1952) 2 All ER 56**, the judges of the Court of Appeal of England unanimously held that:

“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 unless and until it 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.”

16. In *The Law of Contempt*, Butterworths (1996) Pages 555 – 569 by Nigel Lowe and Brenda Sufrin it is stated that:

“Coercive orders made by the courts should be obeyed and undertakings formally given to the courts should be honoured unless and until they are set aside. Furthermore it is generally no answer to an action for contempt that the order disobeyed or the undertaking broken should not have been made or accepted in the first place. The proper course if it is sought to challenge the order or undertaking is to apply to have it set aside.”

17. It is now trite that Court orders are not made in vain and are meant to be complied with and that if for any reason a party has difficulty in complying with court orders the honourable thing to do is to go 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”.

18. 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.*

19. 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. The consequences of failure to obey Court orders are that any action taken in breach of the court order is a nullity and of no effect.

20. Similarly, in *Awadh vs. Marumbu (No 2) No. 53 of 2004 [2004] KLR 458*, it was held that:

“It must be remembered that court orders must be obeyed at all times in order to maintain the rule of law and good order. This of course means that the authority and dignity of our courts must be upheld at all times and this differentiates civilised societies from those applying the law of the jungle at times referred to as banana republics. It is the duty of the Court not to condone deliberate disobedience of its orders nor waiver from its responsibility to deal decisively and firmly with the approved contemnors.”

21. The effect of grant of an order of *mandamus* was considered *in extenso* in High Court Judicial Review Miscellaneous Application No. 44 of 2012 between the *Republic vs. The Attorney General & Another ex parte James Alfred Koroso* where the Court expressed itself as follows:

“...In the present case the *ex parte* applicant has no other option of realising the fruits of his judgement since he is barred from executing against the Government. Apart from *mandamus*, he has no option of ensuring that the judgement that he has been awarded is realised. Unless

something is done he will forever be left baby sitting his barren decree. This state of affairs cannot be allowed to prevail under our current Constitutional dispensation in light of the provisions of Article 48 of the Constitution which enjoins the State to ensure access to justice for all persons. Access to justice cannot be said to have been ensured when persons in whose favour judgements have been decreed by courts of competent jurisdiction cannot enjoy the fruits of their judgement due to roadblocks placed on their paths by actions or inactions of public officers. Public offices, it must be remembered are held in trust for the people of Kenya and Public Officers must carry out their duties for the benefit of the people of the Republic of Kenya. To deny a citizen his/her lawful rights which have been decreed by a Court of competent jurisdiction is, in my view, unacceptable in a democratic society. Public officers must remember that under Article 129 of the Constitution executive authority derives from the people of Kenya and is to be exercised in accordance with the Constitution in a manner compatible with the principle of service to the people of Kenya, and for their well-being and benefit.....”

22. In this case the Respondents have raised the issue that since the contemnors were not served they cannot be committed for contempt. The current legal position on personal service was restated by **Lenaola, J** in **Basil Criticos vs. Attorney General & 4 Others [2012] eKLR**, **Republic vs. Minister of Medical Services Misc. Civil Application No. 316 of 2010** that:

“...the law has changed and so as it stands today, knowledge supersedes personal service and for good reason...where a party clearly acts and shows that he has knowledge of a court order, the strict requirement that personal service must be proved is rendered unnecessary.”

23. This position was adopted by **Musinga, J** (as he then was) in **Republic vs. Minister of Medical Services** and **Kimaru, J** in **Gatimu Farmers Company vs. Geoffrey Kagiri Kimani & Others [2005] eKLR**. In the former case the learned Judge expressed himself as follows:

“Article 159(2) (d) of the Constitution requires the court to administer justice without undue regard to procedural technicalities. Article 10 of the Constitution stipulates various national values and principles of governance which bind all state organs, state officers, public officers and all persons whenever any of them applies or interprets the constitution or any law or implements public policy decisions. The values include the rule of law, good governance, integrity, transparency and accountability. The rule of law is vital in the stability of any nation and its institutions. In this new constitutional dispensation, it would be a mockery of justice for a respondent in contempt proceedings to come to court and say that even though he was aware of the terms of a prohibitory order, the order was not properly served upon him or that he considered the same to have some procedural defect, for example, lack of indorsement thereon, and therefore he ought not to be punished for contempt of court.”

24. As stated in ***Halsbury’s Laws of England***, 4thEdn. Vol. 5 para 65:

“Where an order requires a person to abstain from doing an act, it may be enforced notwithstanding that service of a duly indorsed copy of the order has not been served, if the court is satisfied that, pending such service, the person against whom enforcement is sought has had notice of the terms of the order either by being present when the order was made or being notified of the terms of the order, whether by telephone, telegraph or otherwise.”

25. It is very important to understand the place of contempt in judicial review proceedings in particular orders of mandamus. As was held in **Republic vs. The Attorney General & Another ex parte James Alfred Koroso** (supra):

“The institution of judicial review proceedings in the nature of *mandamus* cannot be equated with execution proceedings. In seeking an order for *mandamus* the applicant is seeking, not relief against the Government, but to compel a Government official to do what the Government, through Parliament, has directed him to do. The relief sought 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 Accounting Officer 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 Public Officer in his official capacity and the duty is owed not to the State 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. In other words, *mandamus* is a remedy through which a public officer is compelled to do a duty imposed upon him by the law. It is in fact the State, the Republic, on whose behalf he undertakes his duties, that is compelling him, a servant, to do what he is under a duty, obliged to perform. Where therefore a public officer declines to perform the duty after the issuance of an order of *mandamus*, his/her action amounts to insubordination and contempt of Court hence an action may perfectly be commenced to have him cited for such. Such contempt proceedings are no longer execution proceedings but are meant to show the Court's displeasure at the failure by a servant of the state to comply with the directive of the Court given at the instance of the Republic, the employer of the concerned public officer and to uphold the dignity and authority of the court."

26. It follows that the contemnors are before this Court not in their personal capacities but because they are under constitutional and legislative obligation to ensure that Court decrees are satisfied by the County Government. In a sense it is the person currently holding the office concerned that becomes liable. It is therefore immaterial that the order of *mandamus* was issued against the former office holders. If the position were to the contrary, public authorities would simply escape liability by changing their officers as soon as decrees are issued against them. Such a scenario would clearly render access to justice, which in my view the realisation of the fruits of judgements is, a mirage.

27. The Respondents have further raised the issue of compound interest. In my view the rate of interest charged cannot be a ground for not settling what in the respondent's view is due and payable. The Respondents ought to show that in their view they have settled what is due and thereafter the issue of the actual sum payable can be determined by the Court. In other words the only issue in which the respondents can be heard on is that they have satisfied the decree.

28. To me the mere fact that there is a dispute as to the sum owing does not bar the Court from granting the orders sought so long as it is clear that the Respondent has not complied with the whole or part of the order. It is upon the Respondent to settle what, in its view, is due and then take the necessary steps for the determination of the sum, if any, not owing.

29. In the circumstances, the reasons advanced by the Respondents/Contemnors for the failure to satisfy the decree are flimsy excuses meant to deny the applicant the fruits of his judgement.

30. In the premises I hereby direct that **Luke Gatimu**, Chief Officer Finance and Economic Planning, Nairobi City Country Government; **Morris Okare**- Treasurer, Nairobi City Country Government; and **Dr. Robert Ayisi**, Secretary and Head of Public Service Nairobi City Country Government to appear before this Court to show why appropriate orders cannot be made against them for not taking the necessary steps to satisfy lawful orders of this Court.

31. The costs of this application are awarded to the Applicant.

Dated at Nairobi this 26th day of September, 2016

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Njiru for the Applicant

CA Mwangi