

REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Judicial Review 345 of 2007

FRANCIS MUTHENGI NKARATU.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

Through the notice of originating motion dated 14th October, 2009 Francis Muthengi Nkaratu (now deceased) sought to commit the Permanent Secretary in charge of Provincial Administration and Internal Security in the Office of the President to prison for contempt of court for failing to comply with an order of mandamus issued in these proceedings on 21st September, 2007 directing the payment of a specified amount of money to him (the applicant) by the respondent. The applicant passed away before the application was heard and on 18th November, 2011 Nasarina Kaburi Francis and John Murithi Francis the proposed administrators of the estate of Francis Muthengi Nkaratu were allowed to take over the matter. The application was supported by, among other documents, an affidavit sworn on 11th February, 2009 by the deceased when he was applying for leave to institute contempt of court proceedings. In the said affidavit the deceased swore that a certified copy of this court's order dated 21st September, 2007 was served upon the Attorney General and the Permanent Secretary (respondent) on 17th October, 2007 and despite exchange of correspondences between his counsel and the two offices no payment had been made. The application therefore seeks the committal of the respondent to prison for failing to comply with this court's order.

The respondent opposed the application through grounds of opposition dated 30th April, 2010 and filed in court on the same date. Looking at the said grounds of opposition, it is clear that the respondent raised two issues namely:-

- (1) That the orders are not available to the applicant by virtue of Section 21 (4) of the Government Proceedings Act Cap 40 Law of Kenya; and
- (2) That there is no proof of personal service of the orders and application upon the respondent.

There are therefore two issues for consideration by the court namely whether the orders sought are available to the applicant and whether there was personal service upon the respondent.

It is now established that where a party is alleged to have disobeyed a court order there must be prove that the order in question together with a penal notice were served upon the said party in person. In the case before me there is no evidence of service of the order on the respondent. In fact the law also requires that an application for committal to prison for contempt of court must be personally served on the party who is sought to be committed to prison. Once again, there is no evidence that there was such service on the respondent. For those reasons alone this application should fail.

The second limb on which the application is attacked is that the order prayed for is not available to the applicant by virtue of the provisions of Section 21(4) of the Government Proceedings Act. Counsel for the respondent submitted that allowing the application would amount to executing a decree against the Government. On her part, counsel for the applicant was of the view that a civil servant can be committed to prison for disobeying a court order. She cited to this court a passage at page 902 of **DE SMITH'S**

JUDICIAL REVIEW, 6th Edition wherein the authors state that:-

“Failure to comply with a mandatory or prohibiting order or injunction, or an undertaking given to the court, is punishable as contempt of court. In theory all the normal sanctions are at the disposal of the court – imprisonment, sequestration, fine – in a case where a public authority fails to comply with a court order in judicial review, a mere finding of contempt rather than a penalty may suffice to mark the gravity of the situation.”

I agree with the said authors’ view. In this case the court directed the respondent to pay some money to the deceased. The respondent has not made any payment and neither has he given any reasons for failing to do so. The court cannot remain powerless in the face of blatant disobedience of its orders. I agree with the respondent’s counsel that one cannot execute a decree against the Government. There is, however, an unstated understanding that the Government will always pay its debts. When it fails to do so and the citizen approaches the court for assistance the court must come to the aid of the citizen. In fact the Constitution binds all of us to obey the law. A permanent secretary is the accounting officer of a given ministry. He must therefore obey court orders directing him or her to make certain payments. It is in the interest of the Government that the law is obeyed. The Government cannot exist in a lawless society. In fact the Constitution recognizes the rule of law as one of the national values and principles of governance (Article 10). The Constitution (Article 232) demands that those who have opted to serve in the public service must be accountable in their administrative acts and must transparently provide to the public timely and accurate information. I think in the Kenyan situation, a public officer found to be in contempt of court can be removed from office for being an enemy of the rule of law.

This application fails for the fact that the order of mandamus was not personally served on the respondent. It is, however, noted that the order of mandamus herein was issued in 2007 and five years later the respondent has not complied with it. The applicant passed away before enjoying the fruits of the court order. This court is not bereft of tools it can use to do what is just. This court has inherent powers to do what is right. As such the respondent is directed to appear before this court in person on 5th November, 2012 and indicate to the court how and when he intends to pay the claim herein. He need not appear in court if payment is made before then.

Dated and signed at Nairobi this 17th day of October, 2012

W. K. KORIR,

JUDGE