



Njau & 9 others v Mariru; Attorney General (Interested Party) (Application 303 of 2017) [2025] KEHC 1963 (KLR) (Judicial Review) (13 February 2025) (Ruling)

Neutral citation: [2025] KEHC 1963 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
APPLICATION 303 OF 2017
JM CHIGITI, J
FEBRUARY 13, 2025**

BETWEEN

**DAVID GITAU NJAU 1ST APPLICANT
SHABAN DOSHO MWADOSHO 2ND APPLICANT
JOHANA KIPTARUS KISORIO 3RD APPLICANT
HASSAN MOHAMED HASSAN 4TH APPLICANT
DANIEL WILLIAM KOI 5TH APPLICANT
KHAMISI ALI MWAMGUTE 6TH APPLICANT
PETER MUTUNE MUNGAI 7TH APPLICANT
JACOB MWALIKO WANGAI 8TH APPLICANT
ALFRED KAHINDHI MWATHETHE 9TH APPLICANT
GRAHAM WAMBAA NJAU 10TH APPLICANT**

AND

**HON. PATRICK MARIRU, PRINCIPAL SECRETARY MINISTRY OF
DEFENCE RESPONDENT**

AND

THE HON ATTORNEY GENERAL INTERESTED PARTY



RULING

1. The application before this Court is the Notice of Motion dated 30th July, 2024. The application is brought Under Section 5 of the *Judicature Act*, Rules 81.4 & 81.5 of the English Civil Procedure Rules (Amendment No. 3), 2023, Order 51 Rule 1 of the Civil Procedure Rules 2010 And the Inherent Power of the Court. It seeks the following orders:
 1. That this Contempt of Court Application Notice be certified as urgent and heard ex-parte in the first instance.
 2. That the Respondent herein Hon. Patrick Mariru, the Principal Secretary Ministry of Defence, do show cause why he should not be cited and found guilty of Contempt of Court for disobeying and defying the Judgment, Decree and the Order of Mandamus given by this Honourable Court on 16th March 2018.
 3. That the Respondent herein Hon. Patrick Mariru on failing to show cause be Summoned to personally appear before this Court for sentencing failing which a warrant of arrest be issued against him to be executed by the officer in charge of the Military Police (the Provost Marshall) at the Department of Defence (DoD) Hurlingham, Nairobi where he works and hand him over to the nearest regular police station, or by the Inspector General of Police or any County Police Commander or any police officer/s under them wherever the respondent may be found.
 4. That the Respondent herein Hon. Patrick Mariru be committed to prison for a period of six (6) months and/or fined out of his own personal money or punished in any other lawful manner that this Honourable Court shall deem fit and appropriate.
 5. That any other or further orders as this Honourable Court deems just do issue.
 6. That costs of this application be borne by the Respondent.
2. The application is supported by the affidavit of David Gitau Njau sworn on 30th July, 2024 and a Further Affidavit dated 11th October, 2024.
3. The Applicants' case is that on 1st November, 2013 a judgment was delivered in Nairobi High Court Petition No. 340 of 2012 (David Gitau Njau & 9 others v The Attorney General) wherein the court awarded uniform general damages to each of the applicants, the petitioners, against the Interested Party's line Ministry of Defence, for violation of their fundamental rights, amounting to Ksh 55,000,000/- plus interest at Court rates from the date of judgment until payment in full.
4. The applicants were also awarded costs of the petition which costs were taxed at the sum of Ksh 1,235,951.70 and a Certificate of Taxation to that effect issued on 6th April 2016.
5. A Certificate of Order against the Government was issued by this court on 4th May 2016 in the said Petition No. 340 of 2012 with the decretal sum, interest and costs then amounting to Ksh 72,455,677.70.
6. The Applicants contend that the decretal sum, certified costs and accrued interest having not been satisfied, on 9th June 2017 they took out the founding judicial review proceedings seeking an Order of Mandamus to compel the Respondent as the accounting officer to satisfy the said decretal sum, certified costs and accrued interest.



7. An Order of Mandamus compelling the Respondent to effect payment to the Applicants of the judgment debt then standing at Ksh 80,014,031.70 together with interest at the rate of 12% p.a., and half(½) costs of the judicial review application was issued on 16th March 2018 by Odunga, J, (as he then was), in the presence of counsel for the Applicants and the Respondent.
8. A formal Decree was issued by this Court on 5th April 2018.
9. The Applicants posit that the judgment and Decree have never been appealed against or set aside.
10. It is their case that despite service of the Decree endorsed with notice of penal consequences and demand letters for settlement of the office bearers of the Respondent have since 2019 failed to communicate to the advocates on record for the Applicants and in utter contempt of this Court and sheer disdain of the applicants the subject judgment debt continues to remain outstanding.
11. The costs of the judicial review were subsequently taxed in the sum of Ksh 254,430/- and a Certificate of Taxation thereof issued on 4th March 2019.
12. It is their case that the disobedience/defiance to settle the judgment debt herein was a subject of a petition to the Senate urging the Senate to compel the respondent to honour, obey and pay the said judgment debt to the applicants as determined by Court and after hearing the applicants, representatives of the Respondent's ministry and representatives of the Ministry of Finance and the National Treasury, the Senate in a report of the Standing Committee on National Security, Defence and Foreign Relations directed the respondent's ministry to pay the judgment debt herein within sixty (60) days from 3rd December 2019 which is the date of approval of the report of the Committee by the plenary of the Senate.
13. They argue that despite the directive of the Senate, none of the office bearers of the respondent have honoured the recommendation nor ever communicated to the advocates on record for the applicants and, in utter contempt of this honourable Court, in utter contempt of the Senate of Parliament of Kenya and in sheer disregard and disdain of the Applicants. The judgment debt herein continues outstanding.
14. On 16th November 2023 this Court issued a Certificate of Order against the Government in this judicial review application with the total judgment debt standing at Ksh 134,748,152.54.
15. They argue that the 1st Respondent infringed their constitutional rights under Articles 27, 40 and 47.
16. It is also their case that the Respondent has remained contemptuously mute prompting this application as a last resort.
17. The Applicants argue that it is the duty of the Respondent as the accounting officer of the Ministry of Defence to budget for allocation of the judgment debt herein and that the respondent has not averred of any steps, proposal or even intention of ever budgeting for the subject decree of Mandamus.
18. Further that the Respondent's replying affidavit is simply a plea of impunity to continue disobedience of the decree of this Court and it is evidence that he misled the National Assembly at his appointment hearing that he was going to attend to the issue of pending decrees upon assuming office.
19. They posit that Parliament through the Senate approved the payment of the judgment debt herein in its 2019 report and it is the Respondent who has deliberately refused to take advantage of the good will of Parliament to budget for the judgment debt herein in continued disobedience of both this Honourable Court and the Senate of Parliament of Kenya.
20. The Applicants canvassed their application by way of written submissions dated 11th November, 2024.



21. It is submitted that the Respondent concedes that he is the Principal Secretary, Ministry of Defence and thus under the Public Finance Management he is the accounting officer responsible for honouring the subject Decree.
22. It is their submission that the Respondent's replying affidavit does not deny the positive averments in the supporting affidavit showing the history of the case, including the intervention of the Senate.
23. The Applicants contend that the Respondent does not deny service of the subject Decree.
24. It is also their submission that the Respondent did not depose of any intention, plan or proposal to ever honour the subject Decree in the future.
25. They argue that the Respondent's defence is threefold in on the one hand he urges that he can only be held accountable for what the National Assembly has allocated against annual budgets prepared by his ministry and approved by the National Assembly, on the second hand he has not received an allocation to defray the subject Decree due to current austerity measures taken by the government and finally that the committal of a person to civil jail for failure to pay decretal sums is unconstitutional.
26. Reliance is placed on the case of *Shimmers Plaza Limited v National Bank of Kenya Limited* [2015]eKLR, where the court held thus:

“Of the four forms of violations, only the contempt for “breach of a judgment, order or undertaking to do or abstain from doing an act” has an outlined procedure of service of the order and the penal notice under rule 81.5, 81.6, 81.7 and 81.8. According to rule 81.9 all judgments or orders to do or not to do an act may not be enforced in contempt proceedings unless a warning to the person required to do or not do the act in question that disobedience to the order would be a contempt of court punishable by imprisonment, a fine or sequestration of assets, has been prominently displayed, on the front of the copy of the judgment or order served. Consequently, the court order and penal notice must be served simultaneously As a general rule under rule 81.6 all service under this breach should be personal service unless the court dispenses with the personal service under rule 81.8. “

The court further held:

“On the other hand, however, this Court has slowly and gradually moved from the position that service of the order along with the penal notice must be personally served on a person before contempt can be proved,. This is in line with the dispensations covered under rule 81.8(1) (supra). Kenya's growing jurisprudence right from the High Court has reiterated that knowledge of a court order suffices to prove service and dispenses with personal service for the purposes of contempt proceedings. For instance, Lenaola J in the case of *Basil Criticos Vs Attorney General and 7 Others* (2012/eKLR pronounced himself as follows: - “... the law has changed and as it stands today knowledge supersedes personal service ... where a party clearly acts and shows that he had knowledge of a Court Order; the strict requirement that personal service must be proved is rendered unnecessary.” This position has been affirmed by this Court in several other cases including the *Wambora* case (supra). It is important however that the court satisfies itself beyond any shadow of a doubt that the person alleged to be in contempt committed the act complained of with full knowledge or notice of the existence of the order of the Court forbidding it What then amounts to “notice” Black's Law Dictionary, 9th Ed defines notice as follows: - “A person has notice of a fact or condition if that person - Has actual knowledge of it; Has received information about it; Has reason to know it; [(knows about a related fact; is considered as having



been able to ascertain it by checking an official filing or recording." Would the knowledge of the judgment or order by the advocate of the alleged contemnor suffice for contempt proceedings " We hold the view that it does? This is more so in a case such as this one where the advocate was in Court representing the alleged contemnor and the orders were made in his presence. There is an assumption which is not unfounded, and which in our view is irrefutable to the effect that when an advocate appears in court on instructions of a party, then it behoves him/her to report back to the client all that transpired in court that has a bearing on the client's case. This is the position in other jurisdictions within and outside the commonwealth"

27. They submit that the defence by the Respondent that he has not received a budgetary allocation is simply untenable as was held in the case of Jacob Nturibi Japheth & 8 others v Principal Secretary Ministry of Defence [2022]eKLR.
28. They also place reliance in the case of Muigai & 3 others v Estate of Captain Kariuki (DCD) & 8 others [2022]KECA 1138 (KLR) and Gerald Juma Gichohi & 9 others v Hon. Patrick Mariru, HC Misc. Application No. 289 of 2019.
29. The Applicants also contend that the alleged lack of budget allocation for the judgment debt over the years, far from being a defence for non-payment, is itself a persistent, serious and material breach of management of public finance under section 94 (1) (a) (i) of the *Public Finance Management Act*.
30. They further rely on the case of Shimmers Plaza Limited v National Bank of Kenya Limited (supra), where the court reaffirmed the non-negotiable constitutional duty to obey court orders at the risk of being punished for contempt.

The Respondents' case;

31. In opposition to the Applicants' Application, the Respondent filed a Replying Affidavit by Dr. Patrick Mariru, PHD, CBS sworn on 8th October, 2024 and written submissions of even date.
32. The Respondent contends that the sum of money claimed by the Applicants is a colossal amount that must be factored in the Ministry's budget before any payment is authorized.
33. It is the Respondent's case that the satisfaction of decrees and judgment is deemed to be expenditure by Parliament and as a result it must be justified in law and provided for in government expenditure.
34. He argues that the Ministry of Defence has not received any allocation to settle the current claim due to the current austerity measures taken by the government and that he can only be accountable for what the ministry is allocated and since there was no allocation from parliament to settle the outstanding claim, it would be manifestly unjust for the court to hold him in contempt of court when he neither controls or determines the Government funding.
35. He avers that the allegation that he has refused, neglected or ignored to settle the Applicants' claim is false as he is constrained by the financial austerity measures. The Respondent contends that he respects the rule of law and can in no way mock or undermine judicial authority of the court.
36. It is his argument that that Contempt of court proceedings are not execution proceedings but are quasi-criminal in nature where every effort should be made to protect and uphold the constitutional liberties of the Respondent with emphasis on strict observance of the Constitutional Procedural minimums provided under Articles 25, 47 and 50 of *the Constitution*.



37. He further argues that the committal of persons to civil jail for failure to pay decretal sums is unconstitutional.
38. The Respondent submits that the prayers sought are against Section 21(4) of the Government Proceedings Act, Cap 40 Laws of Kenya and that the court order for payment of decretal sum is to the institution of the government. Therefore, the alleged execution against the person of the principal secretary in his individual capacity is illegal and unconstitutional.
39. Reliance is placed in the case of *Re the matter of Zipporah Wambui Mathara* [2010] eKLR where the court observed that imprisonment in civil jail goes against the International Covenant on civil and political rights.
40. The Respondent invokes Articles 28 and 29 of the Constitution of Kenya 2010 which provide for the rights to human dignity and freedom of security of the person.
41. Further Article 2(6) of the Constitution provides that any treaty or convention ratified by Kenya shall form part of the law of Kenya under the new Constitution. As such, the provision of Article 11 of the International Covenant on Civil and Political Rights which Kenya ratified on 1st May 1972 is part of the Kenyan law.
42. This covenant according to the Respondent makes provisions for the promotion and protection of human rights and recognizes that individuals are entitled to basic freedoms to seek ways and means of bettering themselves.
43. It is submitted that criminal penalties may not be imposed on someone who has not been afforded the protections that the Constitution requires of criminal proceedings. Therefore, it is the Respondent's assertion that this honourable court must satisfy itself on the satisfaction of the Constitutional procedural minimums provided under Article 25, 47 and 50 of the Constitution 2010.
44. The Respondent posits that the disobedience of the order of mandamus issued by this honourable court is not willful and it is beyond the control of the Respondent as the Ministry of Defence has not received any exchequer disbursement to settle the decree.
45. The Respondent prays that the Notice of Motion dated 30th July, 2024 be dismissed with costs.

Analysis and Determination

46. The following issues arise from the pleadings, the rival submissions and the authorities that parties rely on;
 - i. Whether the Applicants have made a case for the grant of the orders sought.
 - ii. Who shall bear the costs of the application.
47. It is not in dispute that on 16th November 2023 this Court issued a Certificate of Order against the Government in this judicial review application with the total judgment debt standing at Ksh 134,748,152.54.
48. The Respondent through his replying affidavit does not deny the positive averments in the supporting affidavit showing the history of the case, including the intervention of the Senate towards settling the decree. The Respondent does not also deny service of the subject Decree of the Order of Mandamus.
49. It is Hon. Patrick Mariru's case that he can only be held accountable for what the National Assembly has allocated against annual budgets prepared by his ministry and approved by the National Assembly



and he has not received an allocation to defray the subject Decree due to current austerity measures taken by the government.

50. In the case of *Republic v Principal Secretary, Ministry of Defence Ex parte George Kariuki Waithaka* [2019] eKLR the court held as follows on the issue of budgetary allocation;

“The defence of non-allocation of funds by Parliament was also raised by the Respondent in the present application in his replying affidavit. Odunga J. in his ruling of 12th February 2018 extensively dealt with the defence as follows:

As regards lack of budgetary allocation, Githua, J in *Republic vs. Permanent Secretary, Ministry of State for Provincial Administration and Internal Security Ex parte Fredrick Manoah Egunza* [2012] eKLR expressed herself as follows:

In ordinary circumstances, once a judgment has been entered in a civil suit in favour of one party against another and a decree is subsequently issued, the successful litigant is entitled to execute for the decretal amount even on the following day. When the Government is sued in a civil action through its legal representative by a citizen, it becomes a party just like any other party defending a civil suit. Similarly, when a judgment has been entered against the government and a monetary decree is issued against it, it does not enjoy any special privileges with regards to its liability to pay except when it comes to the mode of execution of the decree. Unlike in other civil proceedings, where decrees for the payment of money or costs had been issued against the Government in favour of a litigant, the said decree can only be enforced by way of an order of mandamus compelling the accounting officer in the relevant ministry to pay the decretal amount as the Government is protected and given immunity from execution and attachment of its property/goods under Section 21(4) of the *Government Proceedings Act*. The only requirement which serves as a condition precedent to the satisfaction or enforcement of decrees for money issued against the Government is found in Section 21(1) and (2) of the *Government Proceedings Act* (hereinafter referred to as the Act) which provides that payment will be based on a certificate of costs obtained by the successful litigant from the court issuing the decree which should be served on the Hon Attorney General. The certificate of order against the Government should be issued by the court after expiration of 21 days after entry of judgment. Once the certificate of order against the Government is served on the Hon Attorney General, Section 21(3) imposes a statutory duty on the accounting officer concerned to pay the sums specified in the said order to the person entitled or to his advocate together with any interest lawfully accruing thereon. This provision does not condition payment to budgetary allocation and parliamentary approval of Government expenditure in the financial year subsequent to which Government liability accrues.” [Emphasis mine].

51. In *Refrigeration and Kitchen Utensils Ltd. -vs- Gulabchand Popatlal Shah & Another*, Civil Application No. 39 of 1990 held:

“.....It is essential for the maintenance of the rule of law and good order that the authority and dignity of our courts is upheld at all times.”



52. The Black's Law Dictionary 9th Edition, defines contempt as:
- “The act or state of despising; the conduct of being despised. Conduct that defies the authority or dignity of a court or legislature. Because such conduct interferes with the administration of justice.”
53. In the case of *Econet Wireless Kenya Ltd v Minister for Information & Communication of Kenya & another* [2005] KLR 828, Ibrahim, J. (as he then was), underscored the importance of obeying court orders, stating:
- “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 whom an order is made by court of competent jurisdiction, to obey it unless and until the 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 the order believes it to be irregular or void.” (emphasis)
54. In the case of *Gatharia K. Mutikika v Baharini Farm Limited* [1985] KLR 227, the court held:
- “A contempt of court is an offence of a criminal character. A man may be sent to prison. It must be proved satisfactorily. It must be higher than proof on a balance of probabilities, almost but not exactly, beyond reasonable doubt. The standard of proof beyond reasonable doubt ought to be where it belongs, to wit criminal cases. It is not safe to extend it to offences which can be said to be quasi-criminal in nature. However, the guilt has to be proved with such strictness of proof as is consistent with the gravity of the charge ... Recourse ought not to be had to process of contempt of court in aid of a civil remedy where there is any other method of doing justice. The jurisdiction of committing for contempt being practically arbitrary and unlimited, should be most jealously and carefully watched and exercised with the greatest reluctance and the greatest anxiety on the party of the judge to see whether there is no other mode which is not open to the objection of arbitrariness and which can be brought to bear upon the subject... applying the test that the standard of proof should be consistent with the gravity of the alleged contempt... it is competent for the court where contempt is alleged to or has been committed, and or an application to commit, to take the lenient course of granting an injunction instead of making an order for committal or sequestration, whether the offender is a party to the proceedings or not.”
55. Further in the case of *Indian Airports Employees Union v Rania Catterie & Another* [AIR 1999 SC 880: 1999(2) SCC:537L the court held: -
- “in order to amount to "civil contempt" disobedience must be willful. If disobedience is based on the interpretation of court's order, notification and other relevant documents, it does not amount to willful disobedience”
56. In *Sheila Cassatt Issenberg & Watoto World Centre v Antony Machatha Kinyaniui (Civil Suit 19 of 2020)* 20211 KEHC 5692 (KLR) it was held:
- “... But even as courts punish for contempt to safeguard the peaceful and development of society and the rule of law, it must be borne in mind that the power to punish for contempt



is a discretionary one and should be used sparingly. That is why the court observed in *Carey v Laiken* (supra), that if courts were to find contempt too easily, "a court's outrage might be treated as just so much bluster that might ultimately cheapen the role and authority of the very judicial power it seeks to protect. The court's contempt power should be used cautiously and with great restraint. It is an enforcement power of last resort rather than first resort."

57. Upon analyzing the Respondent's case, what comes out in clear terms is the fact that the Respondent contends that the sum of money claimed by the Applicants is a colossal amount that must be factored in the Ministry's budget before any payment is authorized
58. The argument that the Ministry of Defence has not received any allocation to settle the current claim due to the current austerity measures taken by the government cannot come to the aid of the Respondent. This amounts to a conduct that defies the authority or dignity of a court.
59. It is unfortunate that this is a very old decree which has remained unsettled. The fair administrative action dictates that closure of such cases must take place within a reasonable time. A delay as in the instant suit cannot be said to be one that is reasonable in the eyes of any reasonable person and the same amounts to a denial of justice.
60. This court is under a duty under Article 3 and 20 of *the Constitution* to ensure that there is promotion of the rule of law as guaranteed under Article 10 of *the Constitution*.
61. The reasons that have been advanced by the Respondent to justify the none settlement are not tenable in the eyes of any democratic front. Austerity measures cannot amount to any justice if they yield no fruits to a decree holders like the Applicants.

Disposition;

62. The only way that justice will be served in this case is by allowing the application in line with the following terms.

Orders;

- a. Hon. Patrick Mariru, the Principal Secretary Ministry of Defence, is hereby cited for Contempt of Court for disobeying and defying the Judgment, Decree and the Order of Mandamus given by this Honourable Court on 16th March 2018.
- b. Hon. Patrick Mariru is hereby Summoned to personally appear before this Court for mitigation and sentencing on 29th April 2025 in open court at 11AM.
- c. The costs of the application to the Applicants.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 13TH DAY OF FEBRUARY, 2025.

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J.M. CHIGITI (SC)

JUDGE

