



**Republic v County Government of Mombasa & 2 others; Meru Central Dairy Cooperative Unions Ltd (Exparte) (Judicial Review Application E025 of 2022) [2025] KEHC 1969 (KLR) (21 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 1969 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
JUDICIAL REVIEW APPLICATION E025 OF 2022  
J NGAAH, J  
FEBRUARY 21, 2025**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**COUNTY GOVERNMENT OF MOMBASA ..... 1<sup>ST</sup> RESPONDENT**

**COUNTY SECRETARY, COUNTY GOVERNMENT OF MOMBASA .... 2<sup>ND</sup> RESPONDENT**

**CHIEF OF FINANCE, COUNTY GOVERNMENT OF MOMBASA .... 3<sup>RD</sup> RESPONDENT**

**AND**

**MERU CENTRAL DAIRY COOPERATIVE UNIONS LTD ..... EXPARTE**

**RULING**

1. The application before court is the applicant’s motion dated 30 September 2024 and is expressed to be brought under section 8 of the *Judicature Act*, cap. 8; sections 3A, 38, 63(c) and (e) of the *Civil Procedure Act* cap. 21; section 21 of the *Government Proceedings Act*, cap 40 and; Order 22 Rules 1 and 8, and Order 51 Rule 1 of the *Civil Procedure Rules* 2010. The applicant seeks the following orders:

- “ 1. That the Honourable court be pleased to certify this application as urgent and a priority hearing date be given.
- 2. That this Honourable court be pleased to cite the 1<sup>st</sup> Respondents (sic) through its accounting officer herein for being in contempt of court orders issued on the 26th of April 2023.



3. That the Honourable Court be pleased to issue a Notice to Show Cause and warrants of arrest be issued against the 2nd, 3rd Respondent together with its Accounting Officer and their presence be availed in Court to explain their blatant disobedience of the Court Orders and refusal to pay the Applicant from a matter arising out of a debt acknowledged by the respondents and a duly recorded consent acknowledging the debt by the Parties in Court.
  4. That the Honourable Court be pleased to make an order directing the Respondents to purge the contempt by paying the sum of Kshs. 77,977,416.49 to the Ex-parte applicant and in default the 1st Respondent's Chief Officer Finance Swale Mwalizuma and Evans Oanda County Executive member finance be fined and detained in prison for a term not exceeding six (6) months for breach of their statutory duty as per Section 21(3) of the Government's Proceedings Act.
  7. (sic) That the Honourable Court be pleased to issue Orders to the Respondents to purge the contempt by effecting immediate payment of Kshs. 77,977,416.49 owing plus any further interests that may have accrued.
  5. That the cost of the application be borne by the Respondents.”
2. The application is supported by the affidavit of Ms. Kamoing' Judith, the learned counsel for the applicant.  
According to Ms. Kamoing', on 26 April 2023, the applicant obtained a decree compelling “the respondent through its accounting officer” to pay the applicant the sum of Kshs. 71,375,787/=. However, the respondents have failed to settle the decretal sum and hence denied the applicant the opportunity to enjoy the fruits of its judgment.
  3. The learned counsel for the applicant has sworn that the respondents' failure to comply with the court orders is deliberate and it is meant to subject the applicant to unwarranted frustrations. The applicant, it is urged, will suffer irreparable harm because it is likely to fall into liquidation as a result of its failure to meet its financial commitments.
  4. Nonetheless, the applicant states that out of the total debt due, the respondents have paid Kshs. 10,830,876.00 leaving a balance of Kshs. 77,977,416.49 together with interest.
  5. In response to the application, the respondents filed a replying affidavit sworn by Mr. Jimmy Waliaula, who has identified himself as the county attorney of the County Government of Mombasa.
  6. According to Mr. Waliaula, neither the Chief Officer Finance nor the County Executive Committee member for Finance and Economic Planning was served with the instant application or the order alleged to have been disobeyed. It is sworn that there is no evidence tendered by the applicant indicating service of either the order of mandamus or the Certificate of Order against the Government. In the absence of any evidence of service of the order the respondents are alleged to be in contempt of, the allegation that the respondents have disobeyed a court order is not true.
  7. One of the ways through which decrees or orders are enforced is, of course, execution or attachment. However, the Government is protected from such process of execution or other similar process in enforcement of decrees or orders by section 21(4) of the *Government Proceedings Act*. It is in the face of this protection from execution or attachment, that the only available route that was open to the applicant was to compel the respondents to perform their statutory duties under section 21(3) of the



Act and pay what has been decreed as due and owing to the applicant. No doubt, this was the rationale upon which the application must have been made and subsequently granted.

8. According to *Halsbury's Laws of England/Judicial Review* Volume 61 (2010) 5th Edition)/5. Judicial Remedies/ (1) Introduction paragraph 689:

“A mandatory order is, in form, a command issuing from the High Court, directed to any person, corporation or inferior tribunal requiring him, or them, to do some particular thing specified in the command which appertains to his or their office and is in the nature of a public duty (See *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997, [1968] 1 All ER 694, HL). The breach of duty may be a failure to exercise a discretion, or a failure to exercise it according to proper legal principles.”

This is reiterated in paragraph 703 which states:

“A mandatory order is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or it to do some particular thing specified in the order which appertains to his or its office and is in the nature of a public duty... the purpose of a mandatory order is to compel the performance of a public duty, whether of an inferior court or tribunal to exercise its jurisdiction, or that of an administrative body to fulfil its public law obligations. It is a discretionary remedy.”

9. And with particular reference to public officers who fail to perform their duty, paragraph 706 is clear that a mandamus order may be issued to compel them to carry out the duty. It reads as follows:

“706. Public duties by government officials.

If public officials or public bodies fail to perform any public duty with which they have been charged, a mandatory (mandamus) order may be made to compel them to carry out the duty (See *R v Metropolitan Police Comr, ex p Blackburn (No 3)* [1973] QB 241, [1973] 1 All ER 324, CA; *R v London Transport Executive, ex p GLC* [1983] QB 484, [1983] 2 All ER 262, DC.)”

10. It follows that in an application such as the one before court, the applicant is enjoined to demonstrate that despite the court having ordered any particular public officer to perform his public duty, the officer has refused, neglected or ignored to comply with the order. The order that would count in these circumstances, therefore, would not be a certificate of order against government but the order of mandamus which, in this case, would be encapsulated in the decree drawn from the judgment rendered on 26 April 2023. It follows that the question whether the decree was served upon the respondents, turns out to be key to the fate of the application.

11. Although, in her affidavit, Ms. Kamoing' has stated that a decree was obtained on 26 April 2023, there is no evidence of such a decree having been extracted; and, more importantly, there is no evidence that the decree, if ever it was extracted, was served. All Ms. Kamoing' has said with respect to what one would consider to be service of the decree is this:

“That the Respondents blatantly have assumed the disposition of 'too big to pay' and 'there is nothing that the Applicants can do about it' as all demand letters, all attempts to set up meetings to discuss dates of payment have yielded no fruits. Annexed and marked JK-3A & JK-3B are copies of demand letters duly served and even copies of demand letters to caution against the possibility of commencing garnishee proceedings”.



12. It is apparent from this deposition that no effort was made to serve the respondents personally with the judgment or decree. It is trite that personal service is a mandatory requirement in order to succeed in contempt of court proceedings. Writing of demand letters or holding meetings with the alleged contemnors cannot be an alternative to service of the decree or order that is said to have been breached.
13. Needless to reiterate that disobedience of a court order or judgment is the foundation for contempt of court proceedings against the contemnor. It is, therefore, a necessary prerequisite that before one is held to be in contempt, it must be demonstrated that he was aware of the order or judgment he is alleged to be in contempt of. In other words, proof of service of the order or judgment is necessary unless, for reasons to be stated, the court dispenses with service of the order or judgment on the alleged contemnor.
14. In the case of *Nyamodi Ochieng Nyamogo & Another versus Kenya Posts & Telecommunications Corporation* (1994) eKLR, the Court of Appeal emphasised the need for personal service of the order in issue and for such an order to be endorsed with the penal notice. As far as service is concerned the Court noted as follows:

“The law on the question of service of order stresses the necessity of personal service. In *Halsbury’s Laws of England (4th Ed)* Vol 9 on p 37 para 61 it is stated:

“61. 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 personally on the person required to do or abstain from doing the act in question ...”

Where the order is made against a company, the order may only be enforced against an officer of the company if this particular officer has been served personally with a copy of the order ...”

15. The court further noted:

“Keeping the importance of personal service of the order in mind we now take a look at the aforesaid two copies of the order both of which bear the stamp of Wetangula & Co Advocates, in acknowledgement of receipt of the said orders. Service on Wetangula & Co does not constitute personal service on any of the three officers. It is a personal service on each one of them that is required to be effected by law. Service of the two orders on Wetangula & Co, Advocates, on 25th October, 1993, and 1st November, 1993, therefore, is a wasted effort.”(Emphasis added.)

The court described personal service as “an elementary but mandatory procedural rule which in contempt proceedings has (been) prescribed “personal service”.

16. Rule 85.5 of the Civil Procedure (Amendment No. 3) Rules 2020 of England which would apply to contempt of court proceedings in this country by dint of section 5 of the *Judicature Act*, cap. 8 also require that the order or judgment be served and be endorsed with the requisite penal notice. It reads as follows:

81.4.

- (1) Unless and to the extent that the court directs otherwise, every contempt application must be supported by written evidence given by affidavit or affirmation.



- (2) A contempt application must include statements of all the following, unless (in the case of (b) to (g)) wholly inapplicable—
- (a) the nature of the alleged contempt (for example, breach of an order or undertaking or contempt in the face of the court);
  - (b) the date and terms of any order allegedly breached or disobeyed;
  - (c) confirmation that any such order was personally served, and the date it was served, unless the court or the parties dispensed with personal service;
  - (d) if the court dispensed with personal service, the terms and date of the court's order dispensing with personal service;
  - (e) confirmation that any order allegedly breached or disobeyed included a penal notice;
  - (f) the date and terms of any undertaking allegedly breached;
  - (g) confirmation of the claimant's belief that the person who gave any undertaking understood its terms and the consequences of failure to comply with it;
  - (h) a brief summary of the facts alleged to constitute the contempt, set out numerically in chronological order;
  - (i) that the defendant has the right to be legally represented in the contempt proceedings;
  - (j) that the defendant is entitled to a reasonable opportunity to obtain legal representation and to apply for legal aid which may be available without any means test;
  - (k) that the defendant may be entitled to the services of an interpreter;
  - (l) that the defendant is entitled to a reasonable time to prepare for the hearing;
  - (m) that the defendant is entitled but not obliged to give written and oral evidence in their defence;
  - (n) that the defendant has the right to remain silent and to decline to answer any question the answer to which may incriminate the defendant;
  - (o) that the court may proceed in the defendant's absence if they do not attend but (whether or not they attend) will only find the defendant in contempt if satisfied beyond reasonable doubt of the facts constituting contempt and that they do constitute contempt;
  - (p) that if the court is satisfied that the defendant has committed a contempt, the court may punish the defendant by a fine, imprisonment, confiscation of assets or other punishment under the law;
  - (q) that if the defendant admits the contempt and wishes to apologise to the court, that is likely to reduce the seriousness of any punishment by the court;
  - (r) that the court's findings will be provided in writing as soon as practicable after the hearing; and



- (s) that the court will sit in public, unless and to the extent that the court orders otherwise, and that its findings will be made public. (Emphasis added).

Of particular relevance to this application is Rule 84.4 (2)(a).

17. In the applicant's case, there is no evidence, as noted, that the decree was extracted or, if it was extracted, it was endorsed with the penal notice. In any event, the endorsement is inconsequential if the order is not served on the alleged contemnors in the first place.
18. For the reasons I have given, I find the applicant's application to be defective and incompetent. It is hereby dismissed. Considering that the decree has not been settled, I make no order as to costs. It is so ordered.

**SIGNED, DATED AND DELIVERED ON 21 FEBRUARY 2025**

**NGAAH JAIRUS**

**JUDGE**

