



Republic v Homa Bay County Assembly Service Board & 2 others; Otieno Ragot & Company Advocates (Exparte Applicant) (Miscellaneous Application E009 of 2023) [2025] KEHC 1815 (KLR) (18 February 2025) (Ruling)

Neutral citation: [2025] KEHC 1815 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
MISCELLANEOUS APPLICATION E009 OF 2023**

OA SEWE, J

FEBRUARY 18, 2025

**IN THE MATTER OF SECTION 21(1), (2), (3), (4) & (5) OF THE
GOVERNMENT PROCEEDINGS ACT, CHAPTER 40, LAWS**

AND

**IN THE MATTER OF SECTION 148(4) OF THE
PUBLIC FINANCE MANAGEMENT ACT, 2012**

AND

**IN THE MATTER OF ORDER 29 RULE 3 AND ORDER
53 RULES 3&4 OF THE CIVIL PROCEDURE RULES**

BETWEEN

REPUBLIC APPLICANT

AND

HOMA BAY COUNTY ASSEMBLY SERVICE BOARD 1ST RESPONDENT

THE CLERK, HOMA BAY COUNTY ASSEMBLY 2ND RESPONDENT

HOMA BAY COUNTY ASSEMBLY 3RD RESPONDENT

AND

OTIENO RAGOT & COMPANY ADVOCATES EXPARTE APPLICANT

RULING

1 Before the Court for determination is the Notice of Motion dated 4th June 2024. It is expressed to have been filed under Sections 1A, 3 and 3A of the Civil Procedure Act, Sections 3 and 51 of the Judicature Act, Chapter 8, Laws of Kenya, the Contempt of Court Act, 1981, Laws of England and the English



Civil Procedure Amendment No. 2 Rules 2012, Laws of England. The applicant thereby prayed for orders that:

- a That the respondents herein, the Clerk Homa Bay County Assembly, County Assembly Service Board Homa Bay County and Homa Bay County Assembly, be held in contempt of court and be punished accordingly for having been and continuing to act in contempt of the judicial review order of mandamus of the court issued on 22nd February 2024 until they comply with the said order.
 - b That the said respondents be ordered to meet the costs of the application.
- 2 The application was supported by the affidavit sworn on 4th June 2024 by Mr. Jude Ragot, Advocate. Therein, the applicant outlined the factual basis of the application and averred that, to date, there is an outstanding amount of Kshs. 2,522,706.10 due and owing from the 3rd respondent despite demands for payment. The applicant also averred that no reasonable explanation has been given by the respondents for their continued reluctance to make payment; and that unless punished for their continued contempt they have no intention to pay.
 - 3 The respondents opposed the application. They relied on the Replying Affidavit sworn on 17th July 2024 by the ag. Clerk at the time, Ms. Hana Awino Ager. She deposed at paragraph 2 of her affidavit that she was new in the office and therefore needed time to make arrangements to settle the debt; to which end, she asked for 60 days. The Affiant further averred that part payment had been made and therefore that the respondents are ready and willing to pay the debt. Copies of the payment vouchers were annexed to the Replying Affidavit, among other documents, to back up the averments of Ms. Ager that they were acting in good faith.
 - 4 The application was canvassed by way of written submissions. Counsel for the applicant filed written submissions dated 12th November 2024 in which he proposed a single issue for determination, namely: whether the applicant has satisfied the requisite tests to warrant issuance of an order for contempt against the respondents. In addition to addressing the Court on the applicable legal framework, the applicant endeavoured to demonstrate that the application has merits, granted the statutory duty of an accounting officer for purposes of Section 147 of the Public Finance Management Act and Section 17 of the County Assembly Services Act.
 - 5 The applicant further pointed out that the debt has been outstanding for the last ten years; which in itself is clear proof that the 2nd respondent, as the Clerk and accounting officer for both the 1st and 3rd respondents has neglected her statutory duties. Accordingly, the applicant proposed that an order issues convicting or otherwise holding the 2nd respondent in contempt as sought in the application and sentencing Ms. Hana Awino Ager, to a term of imprisonment. The applicant relied on Jimi Wanjigi & another v Inspector General of Police & 3 others [2021] eKLR to back up its submissions.
 - 6 In response to the applicant's written submissions, the respondents filed written submissions dated 20th November 2024. They focused on the threshold for contempt and whether the same has been met in this instance. The respondents placed reliance on Mberia & others v County Secretary County Government of Meru & 2 others; Kwiriga & 4 others Interested Parties Petition 1 of 2022 [2023] KEELRC 2310 and Gatharia K. Mutitika v Baharini Farm Ltd [1985] KLR 227 to buttress their submission that the applicant was under obligation to prove personal service or knowledge and violation of the court orders beyond reasonable doubt.
 - 7 One of the enabling provisions cited by the applicant is Section 5 of the Judicature Act, which states:



- 1 The High Court and the Court of Appeal shall have the same power to punish for contempt of court as is for the time being possessed by the High Court of Justice in England, and such power shall extend to upholding the authority and dignity of subordinate courts.
- 2 An order of the High Court made by way of punishment for contempt of court shall be appealable as if it were a conviction and sentence made in the exercise of the ordinary original criminal jurisdiction of the High Court.
- 8 That is as it should be, considering that the *Contempt of Court Act* was declared invalid on 9 November 2018 for lack of public participation pursuant to Articles 10 and 118b of the *Constitution in Kenya Human Rights Commission v Attorney General & Another* [2018] eKLR. The effect of the nullification of the latter Act has the effect of reviving the Section 5 of the *Judicature Act*. I am fortified in this stance by *Republic v Returning Officer of Kamkunji Constituency & The Electoral Commission of Kenya*, HCMCA No. 13 of 2008, in which it was held:

“The applicable law as regards contempt of court existing before the enactment of the Contempt of Court Act was restated by the Court of Appeal in *Christine Wangari Gachege v Elizabeth Wanjiru Evans & 11 Others*, [2014] eKLR. In that case the Court found that the English law on committal for contempt of court under Rule 81.4 of the *English Civil Procedure Rules*, which deals with breach of judgment, order or undertakings, was applied by virtue of section 51 of the *Judicature Act* which provided that:

“The High Court and the Court of Appeal shall have the same power to punish for contempt of court as is for the time being possessed by the High Court of Justice in England, and that power shall extend to upholding the authority and dignity of subordinate courts.”

This section was repealed by section 38 of the *Contempt of Act* of 2016, and as the said Act has since been declared invalid, the consequential effect in law is that it had no legal effect on, and therefore did not repeal section 5 of the *Judicature Act*, which therefore continues to apply. In addition, the substance of the common law is still applicable under section 3 of the *Judicature Act*. This Court is in this regard guided by the applicable English Law which is Part 81 of the *English Civil Procedure Rules* of 1998 as variously amended...”

- 9 Similarly in *Samuel M. N. Mweru & Others v National Land Commission & 2 others* [2020] eKLR, the above position was endorsed thus:

“I agree with the above reasoning that since the act that repealed section 5 of the *Judicature Act* ^[17] has been declared unconstitutional, the effect is that section 5 of the *Judicature Act* ^[18] still stands.”

10. Moreover, the applicant also relied on Section 3 of the *Judicature Act* and invoked the English common law as well as the inherent jurisdiction of the Court. Accordingly, granted the issues raised by the respondents in their Grounds of Objection and submissions, the issues for consideration are:
- c Whether service was effected;
 - e Whether the applicant has met the threshold to warrant the issuance of the orders sought herein.



11. The respondents submitted that it was imperative that the contempt application be personally served on the alleged contemnors. They relied on *Mutitika v Babarini Farm Ltd* supra to support their argument that service and other elements of contempt needed proof beyond reasonable doubt.
12. The standard of proof in this regard was well discussed by the Court of Appeal in *Mutitika v Babarini Farm Ltd* [1985] eKLR thus:

“*In, Re Breamblevale Ltd* [1969] 3 All ER 1062, Lord Denning MR. as he then was, at page 1063, had this to say,

“A contempt of court is an offence of a criminal character. A man may be sent to prison. It must be satisfactorily proved. To use the time-honoured phrase, it must be proved beyond reasonable doubt”.

With the greatest possible respect to that eminent English judge, that proof is much too high for an offence “of a criminal character” and, ipso facto, not a criminal offence properly so defined...

...In our view the standard of proof in contempt proceedings must be higher than proof on the balance of probabilities, almost but not exactly, beyond reasonable doubt. We envisage no difficulty in courts determining the suggested standard of proof. The standard of proof beyond reasonable doubt ought to be left where it belongs, to wit, in criminal cases. It is not safe to extend it to offence which can be said to be quasi-criminal in nature...”

13. It is therefore plain that the respondent’s were misguided in their submission that proof of contempt must be beyond reasonable doubt. Moreover, in *Shimmers Plaza Limited v National Bank of Kenya Limited* [2015] eKLR, the Court of Appeal made it clear that there has been a shift from the stringent requirement of personal service in favour of proof of knowledge of order, where applicable. Here is what the Court of Appeal had to say in this connection:

“...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... Kenya’s growing jurisprudence right from the High Court has reiterated that knowledge of a court order suffices to prove service and dispense with personal service for purposes of contempt proceedings. For instance, Lenaola, J. in the case of *Basil Criticos v Attorney General and 8 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.”

14. It is significant therefore that in this instance the respondents have all along been aware of the order of Mandamus and have conceded that part payment has been made. On the 18th September 2024 for instance, the court record shows that counsel for the respondents asked for a period of 30 days to enable them settle the debt. Under those circumstances, it cannot be validly argued that personal service was not effected.



15. Indeed, the Court of Appeal also pointed out, in the Shimmers Plaza case supra, that:

“...The notice of the order is satisfied if the person or his agent can be said to either have been present when the judgment or order was given or made; or was notified of its terms by telephone, email or otherwise. In our view, ‘otherwise’ would mean any other action that can be proved to have facilitated the person having come into knowledge of the terms of the judgment and/or order. This would definitely include a situation where a person is represented in court by counsel. Once the applicant has proved notice, the respondent bears an evidential burden in relation to willfulness and mala fides disobedience...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.”

16. In the premises, I have no hesitation in holding that the respondents were fully aware of the order in question.

17. Needless to say that court orders must be strictly obeyed. As was aptly stated by Romer LJ in *Hadkinson v Hadkinson* [1952] ALLER 567:

“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 even void.

For, a person who knows of an order, whether null or valid, regular or irregular cannot be permitted to disobey it. It would be most dangerous to hold that the suitors or their solicitors could themselves judge whether an order was null or valid. Whether it was regular or irregular, that they should come to the court and not take upon themselves to determine such question. That the course of a party knowing of an order which was null and irregular, and who might be affected by it, was plain, he should apply to court that it might be discharged. As long as it exists, it should not be disobeyed.” Also see *Econet Wireless Kenya Ltd v Minister for Information & Communication of Kenya & Another* [2005] KLR 828

18. Hence, it is now settled that in an application of this nature, an applicant must prove the following pre-requisites, namely:

- a that the terms of the order are clear and unambiguous;
- b That the contemnor had knowledge or proper notice of the order;
- c That the respondent has deliberately failed to obey the order;
see *Katsuri Limited v Kapurchand Depar Shah* [2016] eKLR

19. In the light of my findings hereinabove, it should be plain by now that the applicant has satisfied all the conditions aforementioned and that the order of Mandamus issued herein on 22nd February 2024 is yet to be obeyed by the respondents. It is likewise plain that no justification has been given for this state of affairs.



20. Accordingly, the expressions of the Court of Appeal in the Shimmers Plaza case are apt, namely, that:

“... court orders must be obeyed. Parties against whom such orders are made cannot be allowed to trash them with impunity. Obedience of Court orders is not optional, rather, it is mandatory and a person does not choose whether to obey a court order or not. For as Theodore Roosevelt, the 26th President of the United States of America once said:

“No man is above the law and no man is below it; nor do we ask any man’s permission to obey it. Obedience to the law is demanded as of right; not as a favour.”

21. In the result, I am satisfied that the applicant has proved to the requisite standard that the 2nd respondent as the accounting officer, is in contempt of the court order issued herein on 22nd February 2024. Consequently, the Notice of Motion dated 4th June 2024 is hereby allowed and orders granted as hereunder:

a That Notice to Show Cause be and is hereby issued to the Clerk/Accounting Officer of the County Assembly of Homa Bay to attend court for the purpose of showing cause why he/she should not be appropriately punished for refusing, neglecting and/or failing to comply with the order of this Court dated 22nd February 2024.

b That the costs of the contempt proceedings be borne by the respondents.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT HOMA BAY THIS 18TH DAY OF FEBRUARY 2025

OLGA SEWE

JUDGE

