Republic v County Secretary & 2 others; County Government of Mombasa (Interested Party); Mutemi (Exparte Applicant) (Judicial Review Application E004 of 2020) [2025] KEHC 5213 (KLR) (6 February 2025) (Ruling)

Neutral citation: [2025] KEHC 5213 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

JUDICIAL REVIEW APPLICATION E004 OF 2020

OA SEWE, J

FEBRUARY 6, 2025

BETWEEN

REPUBLIC ..... APPLICANT

AND

COUNTY SECRETARY ..... 1ST RESPONDENT

THE COUNTY EXECUTIVE COMMITTEE MEMBER FOR FINANCE ..... 2ND RESPONDENT

THE COUNTY GOVERNMENT OF MOMBASA ..... 3RD RESPONDENT

AND

THE COUNTY GOVERNMENT OF MOMBASA ..... INTERESTED PARTY

AND

SAMUEL MUTEMI ..... EXPARTE APPLICANT

RULING

1. Before the Court for determination is the Notice of Motion dated 22nd February 2024. It was brought by the ex parte applicant against Evans Oanda, the County Executive Committee Member for Finance and Gloria Mwasi, the Chief Officer of the County Government of Mombasa in furtherance of the Judgment delivered herein by Hon. Ogola, J. on 22nd June 2021. Hence, the applicant essentially seeks an order that the Court be pleased to cite Evans Oanda and Gloria Mwasi, the 2nd and 3rd respondents respectively for contempt of the Court's Orders issued on 22nd June 2021.

2. The application was premised on the grounds that the said Orders were made in the presence of the respondents' Advocate; and that the Decree issued in Mombasa CMCC No. 1861 of 2008 remains

unsettled. It was further deposed that, although the Order was duly served on the respondents together with a Penal Notice, the 2nd and 3rd respondents have refused to comply therewith.

3. The application was opposed by the respondents, to which end they relied on the Replying Affidavit sworn by the County Attorney of the Interested Party, Mr. Jimmy Waliaula. The contention of the respondents was that neither the 2nd respondent nor the 3rd respondent were personally served with the Order dated 22nd June 2021. It was further their assertion that the applicant has failed to prove the essential elements of contempt of court to warrant the issuance of the orders sought, namely, service of the order in question and willful disobedience.

4. The application was canvassed by way of written submissions pursuant to the directions of the Court given on 5th May 2024. Accordingly, the applicant relied on his written submissions dated 22nd March 2024. In addition to providing a summary the background facts, the applicant submitted on the applicable law on contempt and relied on various authorities to underscore the key elements of contempt. The authorities cited included:

   (a) Lena Chemoiwo v Bomas of Kenya; General Manager Bomas of Kenya Peter Gitaa & 2 others (Contemnor) 2021 eKLR;

   (b) Kenya Human Rights Commission v The Attorney General & another 2018 eKLR;

   (c) Shimmers Plaza Ltd v National Bank of Kenya Limited 2015 eKLR;

   (d) Refrigeration and Kitchen Utensils Ltd v Gulabchand Popatlal Shah & another, Civil Application No. 39 of 1990;

   (e) Tribe Hotel Ltd v Josphat Cosmas Onyango 2018 eKLR;

   (f) Council of Governors v Seth Panyako & others; Ministry of Labour and Social Protection & 2 others (Interested Parties) 2019 eKLR;

   (g) Cecil Miller v Jackson Njeru & another 2017 eKLR.

5. Hence, according to the applicant, it has been demonstrated that an order existed, that the order was unambiguous and that it was brought to the attention of the respondents. It was further the submission of the applicant that, in spite of service of the order along with a Penal Notice, the respondents have neglected, ignored or willfully refused to comply therewith.

6. In addition to the foregoing authorities, the applicant relied on Republic v the County Government of Kitui, Ex Parte Fairplan Systems Limited 2022 eKLR, the Council of Governors & others v The Senate 2015 eKLR and Solo Worldwide Inter-Enterprises v County Secretary, Nairobi City County and another 2016 eKLR, among others, to augment his submission that the 2nd and 3rd respondents are the proper officers to cite for contempt of court.

7. On their part, the respondents filed written submissions dated 7th June 2024. They proposed a single issue for determination, namely, whether they are guilty of contempt. They submitted that contempt of court, being quasi-criminal in nature, it was the duty of the applicant to prove the following ingredients:

   (a) Whether the respondents were personally served;

   (b) Whether the alleged contemnors were made aware of the Orders they are said to have disobeyed;

   (d) Whether the alleged contemnors willfully disobeyed the said Orders.

8. In the respondents' submission, there is no evidence herein to prove that the alleged contemnors were personally served or that they willfully disobeyed the Orders in question. They further submitted that the applicant has sued the wrong parties, and therefore that the application cannot stand muster. They relied on Samuel M.N. Mweru & others v National Land Commission & 2 others 2020 eKLR for the applicable principles.

9. I have given careful consideration to the application in the light of the written submissions filed by learned counsel for the parties. There appears to be no dispute as to the facts, notwithstanding that no Supporting Affidavit was filed by the applicant. The record confirms that a Decree was issued in Mombasa CMCC No 1861 of 2008: Samuel Mutemi T/A Tudor Paradise v The County Government of Mombasa for Kshs. 6,824,470 in favour of the applicant. The applicant was also awarded interest on the decretal sum together with costs of Kshs. 429,370/=.

10. There is further no dispute that, because the Decree of the lower remained unpaid, the applicant filed the instant judicial review application on 17th November 2020 seeking an Order of Mandamus to compel the respondents herein to pay the sums due in respect of Mombasa CMCC No. 1861 of 2008. In a ruling delivered on 22nd June 2021, the Court allowed the application and issued the orders sought by the applicant. Accordingly, a formal Order of Mandamus was extracted on 12th July 2021 for service on the respondents.

11. While the applicant contended that the Order, together with a Penal Notice appended thereto, was duly served on the respondents, the respondents vehemently denied such service. The applicant therefore relied on Shimmers Plaza for the proposition that, in any event, the Order was made in the presence of counsel for the respondents; and therefore personal service was not a prerequisite.

12. In the foregoing premises, the issue for determination is whether the elements of contempt of court have been satisfactorily proved herein; and if so, whether justifiable cause has been shown for the grant of the orders sought.

A. The applicable law:

13. As has been pointed out by the applicant the *Contempt of Court Act*, 2016, was declared invalid on 9 November 2018 for lack of public participation in Kenya Human Rights Commission v Attorney General & Another 2018 eKLR. In effect therefore, the applicable law in this regard is that which obtained prior to the passing of the *Contempt of Court Act*; as per Section 5 of the *Judicature Act*, Chapter 8 of the Laws of Kenya. That provision 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 the 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 criminal jurisdiction of the High Court."

14. In the case of Republic v Kajiado County & 2 others Ex parte Kilimanjaro Safari Club Limited 2019 eKLR, Hon. Nyamweya, J. (as she then was) took the view, which view I am in agreement with, that:

    26. 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 vs. 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 5(1) 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."

27. 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, and the requirement for personal service of court orders in contempt of Court proceedings is found in Rule 81.8 of the English Civil Procedure Rules.

15. Needless to say that contempt of court is an offence of a quasi-criminal character, and therefore an application of this nature requires credible proof of the requisite elements beyond the standard applicable to ordinary civil cases to warrant the Court's sanction. The standard of proof in this regard was discussed by the Court of Appeal in Mutitika v Baharini 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..."

A. On whether the application has been brought against the right parties:

16. Section 21(3) of the *Government Proceedings Act* is explicit that:

> (3) If the order provides for the payment of any money by way of damages or otherwise, or of any costs, the certificate shall state the amount so payable, and the Accounting Officer for the Government department concerned shall, subject as hereinafter provided, pay to the person entitled or to his advocate the amount appearing by the certificate to be due to him together with interest, if any, lawfully due thereon..."

17. The term "the accounting officer" has been the subject of interpretation in various decisions. For instance, in Council of Governors & Others v The Senate Petition No. 413 of 2014 2015 eKLR it was held:

> (134) The Petitioners have also sought the interpretation of the term "Accounting Officer". In that regard, Article 226 of *the Constitution* provides;

(1) Act of Parliament shall provide for -

(a) ....

(b) The designation of an accounting officer in every public entity at the national and county level of government.

(2) The accounting officer of a national public entity is accountable to the national assembly for its financial management, and the accounting officer of a county public entity is accountable to the county assembly for its financial management.

Pursuant to this provision, Parliament enacted the *Public Finance Management Act*. The appointment and designation of a County Government Accounting Officer is provided for under Section 148 of that Act, as follows;

1. A County Executive Committee member for finance shall, except as otherwise provided by law, in writing designate accounting officers to be responsible for managing the finances of the county government entities as is specified in the designation.

2. Except as otherwise stated in other legislation, the person responsible for the administration of a county government entity, shall be the accounting officer responsible for managing the finances of that entity.

(135) It therefore follows that "an accounting officer" for a County Government entity is the person so appointed and designated as such by the County Executive Committee Member for Finance under Section 148 of the *Public Finance Management Act*. Indeed, Section 148 (3) of the *Public Finance Management Act* mandates the County Executive Committee Member for Finance to ensure that each County government entity has an accounting officer as provided for under Article 226(2) of *the Constitution*.

18. Likewise, in Republic v Kisii County Government Ex-Parte Peter Kaunda Nyamosi & 2 others 2018 eKLR, the position taken was:

25. It is therefore clear that the accounting officer for the County Government is the County Executive Member for Finance. Since the order of mandamus was against the County Government, I do not think that this is fatal as the order of mandamus remains alive and the court may issue a notice to show cause against the accounting officer, upon whom the statutory duty is imposed, to ensure that its decision is enforced (see Consolata Kihara & 21 Others v Director of Kenya Trypanosomiasis Research Institute 2003 KLR 582 and Republic v County Chief Officer, Finance & Economic Planning, Nairobi City County (Ex Parte David Mugo Mwangi) NBI HC Misc. App. 222 of 2016 2018 eKLR)."

19. The same position was taken in Soloh Worldwide (supra) thus:

17. It therefore follows that the person who has the overall financial obligation for the purposes of the affairs of a County Government must be the County Executive in Charge of Finance and unless he shows otherwise, he is the one under obligation to pay funds, in the capacity as the accounting officer. It must always be remembered that a judicial review application is neither a criminal case nor a civil suit hence the application ought to be brought against the person who is bound to comply with the orders sought therein. In an application for mandamus where orders are sought to compel the satisfaction of a decree against a County Government, the

proper person to be a respondent ought to be the said County Executive in Charge of Finance unless he discloses that he had in fact appointed an accounting officer for that purpose..."

20. On the other hand, Section 44(3) outlines the duties of a County Secretary as follows: -

> (3) The county secretary shall—
>
> (a) be the head of the county public service;
>
> (b) be responsible for arranging the business, and keeping the minutes, of the county executive committee subject to the directions of the executive committee;
>
> (c) convey the decisions of the county executive committee to the appropriate persons or authorities; and
>
> (d) perform any other functions as directed by the county executive committee.

21. It is plain therefore that, in the absence of proof of appointment by the County Executive Committee Member for Finance of the accounting officer for the County Government of Mombasa, the proper person to look to for the settlement of debts owing from the County Government of Mombasa is the County Executive Committee Member for Finance. Accordingly, the application has been properly brought against the 2nd respondent. The joinder of the County Secretary was plainly unwarranted.

B. On whether the elements of contempt of court have been proved to the requisite standard against the 2nd respondent:

22. Contempt of court has been defined to mean conduct or action that defies or disrespects the authority of the Court. Hence, in Sheila Cassat Issenberg & Another v Antony Machatha Kinyanjui (supra) it was held:

> 57. As was again stated by the Supreme Court of India in Mahinderjit Singh Bitta v Union of India & Others 1 A NO. 10 of 2010 (13th October, 2011):
>
> > In exercise of its contempt jurisdiction, the courts are primarily concerned with enquiring whether the contemnor is guilty of intentional and willful violation of the order of the court, even to constitute a civil contempt. Every party is lis before the court and even otherwise, is expected to obey the orders of the court in its spirit and substance. Every person is required to respect and obey the orders of the court with due dignity for the institution. (Emphasis).

23. As to the elements that must be proved for an alleged contemnor to be held to be in contempt of court, the court in the Sheila Cassat Issenberg & Another v Anthony Machatha Kinyanjui (supra), after reviewing applicable precedents, continued thus:

> 58. The emphasis as shown in the above cases is that there must be "willful and deliberate disobedience of court orders." There cannot be deliberate and willful disobedience, unless the contemnor had knowledge of the existence of that order. And because contempt is of a criminal nature, it is always important that breach of the order be proved to the required standard; first, that the contemnor was aware of the order having been served or having personal knowledge of it, and second; that he deliberately and willfully disobeyed it.
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> 59. In Peter K Yego & others v Pauline Wekesa Kode, (Acc No. 194 of 2014, the court stated that "it must be proved that one had actually disobeyed the court order before being cited to contempt."

60. And in Katsuri Limited v Kapurchand Depor Shah 2016 eKLR, citing Kristen Carla Burchell v Barry Grant Burchell (Eastern Cape Division case No 364 of 2005), it was stated that "in order for an applicant to succeed in civil contempt proceedings, the applicant has to prove (i) the terms of the order, knowledge of the terms by the respondent, failure by the respondent to comply with the terms of the order."

61. The Cromwell J, writing for the Supreme of Canada in Carey v Laiken, 2015 SCC 17 (16th April 2015), expounded on the three elements of civil contempt of court which must be established to the satisfaction of the court, thus:

i) The order alleged to have been breached "must state clearly and unequivocally what should and should not be done." This ensures that a party will not be found in contempt where an order is unclear. An order may be found to be unclear if, for example, it is missing an essential detail about where, when or to whom it applies; if it incorporates overly broad language; or if external circumstances have obscured its meaning.

ii) The party alleged to have breached the order must have had actual knowledge of it. It may be possible to infer knowledge in the circumstances, or an alleged contemnor may attract liability on the basis of the willful blindness doctrine.

iii) The party alleged to be in breach must have intentionally done the act that the order prohibits or intentionally failed to do the act that the order compels. (emphasis)..."

24. Similarly, in case of Samuel M. N. Mweru & Others v National Land Commission & 2 others 2020 eKLR Mativo, J (as he then was) held as follows: -

It is an established principle of law that in order to succeed in civil contempt proceedings, the applicant has to prove

(i) the terms of the order,

(ii) Knowledge of these terms by the Respondent,

(iii). Failure by the Respondent to comply with the terms of the order. Upon proof of these requirements the presence of willfulness and bad faith on the part of the Respondent would normally be inferred, but the Respondent could rebut this inference by contrary proof on a balance of probabilities. Perhaps the most comprehensive of the elements of civil contempt was stated by the learned authors of the book Contempt in Modern New Zealand who succinctly stated: -

"There are essentially four elements that must be proved to make the case for civil contempt. The applicant must prove to the required standard (in civil contempt cases which is higher than civil cases) that: -

(a) the terms of the order (or injunction or undertaking) were clear and unambiguous and were binding on the defendant;

(b) the defendant had knowledge of or proper notice of the terms of the order;

(c) the defendant has acted in breach of the terms of the order; and

(d) the defendant's conduct was deliberate...."

25. Hence, the four elements of contempt that the applicant needed to prove are:

(a) was there an order of the court;

(b) was it clear and unambiguous;

(c) was it served and

(d) was it wilfully and intentionally disobeyed?

26. It is plain from the factual basis of the instant application that an order of Mandamus was issued herein on the 12th July 2021, and that it was clear and unambiguous. It was ordered thus:

(a) That this Court does hereby issue a writ of mandamus against the County Executive Committee Member for Finance and the Chief Officer, the County Government of Mombasa compelling them to forthwith satisfy the decree of the Honourable Court in Mombasa CMCC No. 1861 of 2008.

(b) That the costs of this application be borne by the Respondents.

27. Regarding service, the general position at law was well articulated by the Court of Appeal held as follows in Ochino & Another v Kombo & 4 Others (supra):

> As a general rule, no order of court requiring a person to do or abstain from doing any act may be enforced (by committing him for contempt) unless a copy of the order has been served personally on the person required to do or abstain from doing the act in question."

28. It is noteworthy however that, in Shimmers Plaza Limited v National Bank of Kenya Limited 2015 eKLR the Court of Appeal made it clear that:

> ...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 vs 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."

29. The court record confirms that the respondents were represented by Mr. Tajbhai on 22nd June 2021 when the order of Mandamus was issued. In the premises, the alleged contemnors have all along been aware of the existence of the Order and therefore cannot now feign ignorance. Indeed, in Shimmers Plaza, the Court of Appeal further held:

> ...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."

30. In the premises, I am in full agreement with the position taken by Hon. Tuiyott, J. (as he then was) in Oil Fields Ltd v Zahara Oil and Gas Limited 2020 eKLR that service is no longer necessary where a party is represented by counsel. The learned judge held:

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. That should be the correct legal position and I subscribe to it.

20. This position has been endorsed repeatedly by the Court of Appeal. See for instance Shimmers Plaza Limited -vs- National Bank of Kenya 2015 eKLR.

21. It would seem that the rationale for the rule is to protect the integrity and dignity of Court orders. To excuse a contemnor who has knowledge of a Court order simply because he has not been personally served is to open up Court orders and process to contemptuous and cynical disobedience.

22. And where a party is represented by an advocate, the party is deemed to have knowledge of a Court order if the party's advocate is aware of it."

31. It is a cardinal principle that court orders must be strictly obeyed, unless and until set aside, varied or discharged. This principle was aptly stated by Romer LJ in Hadkinson v Hadkinson 1952 AllER 567 thus:

> 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)

32. No effort has been made, thus far, to comply with the order. Moreover, there is no justification at all in the respondent's Replying Affidavit for non-payment. I therefore find that the 2nd respondent, as the Accounting Officer on whose shoulders the duty to pay rests, has wilfully and intentionally disobeyed the Court Order dated 22nd June 2021 and is consequently in contempt of court.

33. Accordingly, the application dated 22nd February 2024 is hereby allowed and orders granted in respect thereof as hereunder:

(a) That the County Executive Committee Member for Finance, County Government of Mombasa, be and is hereby found to be in contempt of the Court's orders given on 22nd June 2021;

(b) The County Executive Committee Member for Finance, County Government of Mombasa, be summoned to attend court to show cause why he should not be detained in prison for a period of six months or such period that the Court may please for contempt of court.

(c) That costs of the application be borne by the County Government of Mombasa.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT HOMA BAY THIS 6TH DAY OF FEBRUARY 2025

OLGA SEWE

JUDGE