



Republic v County Government of Mombasa; Barawa (Exparte Applicant) (Judicial Review Application 11 of 2019) [2025] KEHC 2897 (KLR) (7 March 2025) (Ruling)

Neutral citation: [2025] KEHC 2897 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
JUDICIAL REVIEW APPLICATION 11 OF 2019**

OA SEWE, J

MARCH 7, 2025

**IN THE MATTER OF EXECUTION PROCEEDINGS IN THE CHIEF
MAGISTRATE’S COURT AT MOMBASA IN CIVIL CASE NUMBER 905 OF 2012**

BETWEEN

REPUBLIC APPLICANT

AND

THE COUNTY GOVERNMENT OF MOMBASA RESPONDENT

AND

MOHAMED RAJAB BARAWA EXPARTE APPLICANT

RULING

1. The Notice of Motion dated 6th May 2022 was filed by the ex parte applicant, Mohamed Rajab Barawa (hereinafter, “the applicant”) under Section 5 of the *Judicature Act*, Chapter 8 of the Laws of Kenya and Section 2 Rule 81(4) of the English Civil Procedure (Amendment No. 2) Rules, 2012. The application seeks orders that:
 - a. The Court be pleased to order the County Executive Committee Member in charge of Finance, Mombasa County Government, be committed to civil jail for contempt of court for disobedience of court order in failing to remit the decretal sum together with interest and costs as decreed in Mombasa Chief Magistrate’s Civil Case No. 905 of 2012: Mohamed Rajab Barawa v Mombasa County Government.
 - b. The County Executive Committee Member in charge of Finance, Mombasa County Government be ordered to pay the costs of the application.
2. The application was premised on the grounds that judgment in Mombasa CMCC No 905 of 2012 was delivered on 25th January 2018 in which the ex parte applicant was awarded Kshs. 898,929/=. A



Decree and a Certificate of Costs were accordingly issued as well as an Order against the Government for purposes of Section 21 of the *Government Proceedings Act*. The applicant averred that, on the 27th June 2018, a copy of the said Decree and Certificate of Order against the Government were served upon the office of the County Attorney, County Government of Mombasa, along with a demand notice dated 12th June 2018.

3. It was therefore the contention of the applicant that the respondent had deliberately ignored the order of the Court in its failure to settle the decretal sum and therefore the County Executive Committee Member in charge of Finance, Mombasa County Government, ought to be committed to civil jail for contempt of court. This assertion was reiterated in the applicant's Supporting Affidavit, sworn on 6th May 2022. He traced the factual background of the application, setting out the previous orders and decrees of the Court issued in his favour. In particular, the applicant averred that, his application for the Order of Mandamus was granted on 25th September 2019; after which the respondent was notified accordingly vide a letter dated 27th September 2019.
4. The applicant also averred that, on account of non-payment, he was constrained to file an application for contempt dated 27th May 2020 which was dismissed on 30th November 2021 because he had sued the wrong party. He thereafter filed the instant application and now seeks to have the Accounting Officer of the respondent cited for contempt.
5. In a Further Replying Affidavit sworn on the 16th July 2024 by the respondent's County Attorney, Mr. Jimmy Waliula, the respondent acknowledged the debt and averred that it is desirous of settling it. To back up its assertions, the respondent exhibited copies of the various correspondence exchanged between the parties as well as copies of the payment voucher No. 805085 which was then in the process of payment. According to the respondent, the voucher was only one step away from payment. Accordingly, the respondent averred that delay in settlement of the decree was not deliberate; and that the inconvenience caused was highly regretted.
6. The application was urged by way of written submissions. Accordingly, in its written submissions dated 22nd August 2022, the applicant reiterated the factual background of the application as deposed to in his Supporting Affidavit. He relied on *Shimmers Plaza Limited v National Bank of Kenya Limited* [2015] eKLR, *Republic v The Kenya School of Law & another* [2015] eKLR and *Republic v Permanent Secretary, Office of the President, Ministry of Internal Security & another* [2014] eKLR to buttress his argument that this is a fit and proper case for the issuance of the orders sought.
7. There is no indication that the respondent filed written submissions. What is clear however is that, in the two affidavits sworn by its County Attorney, the respondent acknowledged the debt and expressed willingness to pay. Thus, the facts of this case are not in dispute. They were well summarized in the applicant's Supporting Affidavit and need no reiteration.
8. 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.
9. Needless to mention that the *Contempt of Court Act*, No. 46 of 2016, was declared invalid on 9 November 2018 for lack of public participation in *Kenya Human Rights Commission v Attorney*



General & Another [2018] eKLR. The effect of the decision, to my mind, was the revival of the Section 5 of the *Judicature Act*. I am fortified in this stance by the position taken in *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 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.”

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...”

10. 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.”

11. That said, it is now settled that in an application of this nature, an applicant must prove the following prerequisites:
- 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 vs. Kapurchand Depar Shah* [2016] eKLR)

12. The standard of proof in contempt matters was well 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...”

13. 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 vs. Minister for Information & Communication of Kenya & Another* [2005] KLR 828)

14. There is no dispute that an Order of Mandamus was issued herein on 14th October 2019, following the orders of the Court dated 25th September 2019; or that the Order was unambiguous. The only issue in contention is whether there has been deliberate failure to pay. In this regard, I have looked at the documents annexed to the respondent’s Further Replying Affidavit, in particular the payment voucher dated 16th July 2024. It does show that the respondent was in the process of making arrangements to pay.
15. Under those circumstances, it cannot be said that deliberate refusal to pay has been proved. I am therefore in agreement with the expressions of Hon. Mativo, J. (as he then was) in *Samuel M. N. Mweru & Others v National Land Commission & 2 others* (supra) that:

44. accidental or unintentional disobedience is not sufficient to justify one for holding guilty of contempt. It is further relevant to bear in mind the settled law on the law of contempt that casual or accidental or unintentional acts of disobedience under the circumstances which negate any suggestion of contumacy, would amount to a contempt in theory only and does not render the contemnor liable to punishment.

45. It should be noted that developing the common law thus does not require the prosecution to lead evidence as to the accused’s state of mind or motive: once the three requisites mentioned earlier have been proved, in the absence of evidence raising a reasonable doubt as to whether the accused acted willfully and mala fide, all the requisites of the offence will have been established. And as O’Regan J pointed out, the power to imprison for coercive and non-punitive purposes is ‘an extraordinary one’:-

“The power to order summary imprisonment of a person in order to coerce that person to comply with a legal obligation is farreaching. There can be no doubt that indefinite detention for coercive purposes may involve a significant inroad upon



personal liberty. Clearly it will constitute a breach of s 12 of *the Constitution* unless both the coercive purposes are valid and the procedures followed are fair. In this case there seems no doubt that the purpose is a legitimate one. It also seems necessary and proper, however, for the exercise of the power to be accompanied by a high standard of procedural fairness.’[48]

46. Contempt of court is not merely a mechanism for the enforcement of court orders. The jurisdiction of the superior courts to commit recalcitrant litigants for contempt of court when they fail or refuse to obey court orders has at its heart the very effectiveness and legitimacy of the judicial system. That, in turn, means that the court called upon to commit such a litigant for his or her contempt is not only dealing with the individual interest of the frustrated successful litigant but also, as importantly, acting as guardian of the public interest.^[49]

16. Accordingly, I find the application dated 6th May 2022 premature. The same is hereby struck out with no order as to costs.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 7TH DAY OF MARCH 2025

OLGA SEWE

JUDGE

