Wanyoike & 9 others v Mariru, Principal Secretary Ministry of Defence; Attorney General (Interested Party) (Judicial Review 100 of 2018) [2025] KEHC 3411 (KLR) (Judicial Review) (21 March 2025) (Ruling)

Neutral citation: [2025] KEHC 3411 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

JUDICIAL REVIEW

JUDICIAL REVIEW 100 OF 2018

JM CHIGITI, J

MARCH 21, 2025

BETWEEN

JAMES MWANGI WANYOIKE ..... 1ST APPLICANT

ANTONY NDIANGUI WAIGANJO ..... 2ND APPLICANT

JOHN KIPSANG LETING ..... 3RD APPLICANT

SAMMY KAHURA NGOMBO ..... 4TH APPLICANT

ROBERT CHELUGO MININGWOS ..... 5TH APPLICANT

SIMON NJIRU KINYUA ..... 6TH APPLICANT

TITUS TUMBO NGIO ..... 7TH APPLICANT

STEPHEN MWANGI MARION ..... 8TH APPLICANT

DEAVANS M. CHILELO ..... 9TH APPLICANT

MOHAMED OMAR MWAMANENO ..... 10TH APPLICANT

AND

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

AND

THE HONOURABLE ATTORNEY GENERAL ..... INTERESTED PARTY

RULING

1. The application before this Court is the Notice of Motion dated 11th November, 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 Exparte 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 Order and Decree of the Order of Mandamus given by this Honourable Court on 25th July 2018.

    3. That the Respondent 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) Hurlingam, 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 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 a Supporting Affidavit by James Mwangi Wanyoike sworn on 11th November, 2024, and a further affidavit by James Mwangi Wanyoike sworn on 19th February, 2025.

3. It is the Applicants case that this court delivered a judgment in High Court (Nairobi) Misc. Civil Suit No. JR. 1656 of 2005 (James Mwangi Wanyoike & 9 Others vs The Hon. Attorney General) and awarded various amounts of general damages to each of the Applicants who are all former Kenya Air Force officers, various amounts of general damages totaling to Ksh 23,500,000/- for violations of their fundamental rights in the aftermath of the failed 1st August 1982 military coup plus interest at Court rates from the date of judgment until payment in full.

4. The Applicants were also awarded costs of the petition. The costs were subsequently taxed in the sum of Kshs.1,479,185/- and a Certificate of Taxation to that effect issued on 20th November 2012.

5. A Certificate of Order against the Government in the said Misc. Civil Suit No. JR. 1656 of 2005 with the decretal sum, interest and costs then amounting to Ksh 26,357,851/- was issued on 29th November, 2012.

6. An amended Certificate of Order against the Government with the decretal sum, accumulated interest and costs then amounting to Ksh 29,228,500/- was issued on 23rd August 2013.

7. On 7th March 2018 the Applicants moved this court with judicial review proceedings seeking an Order of Mandamus and on 25th July 2018 this court in the presence of counsel for both the Applicants and the Respondent peremptorily granted Order of Mandamus compelling the respondent to effect payment to the Applicants of the judgment debt then standing at Ksh 42,015,077/-together with interest at the rate of 12% p.a. with no order as to costs for the judicial review application.

8. It is contended that a formal Decree of Order of Mandamus was issued by this Court on 5th October 2018 but despite service of the Decree of the Order of Mandamus endorsed with notice of penal consequences and demand letters for settlement of the Decree of Order of Mandamus on the office bearers of the respondent since 2018 including the present holder Hon. Patrick Mariru, none of the office holders of the respondent have ever communicated 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 outstanding.

9. The Applicants argue that Decree of the Order of Mandamus has never been appealed against or set aside and 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.

10. It is contended that 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 - the date of approval of the report of the Committee by the plenary of the Senate.

11. It is their case 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 continues outstanding.

12. This court on 16th November 2023 issued a Certificate of Order against the Government in this judicial review application with the-total judgment debt standing at Ksh 68,812,638.44.

13. It is argued that respondent Hon. Patrick Mariru has always been aware of the disobedience of the subject Decree as he was served by the advocates on record for the Applicants with the subject Decree endorsed with a Penal Notice and a letter demanding that he obeys the said Decree and the directive of Parliament by paying the judgment debt in the Order of Mandamus together with accrued interest as contained in the Certificate of Order Against Government.

14. The Applicants canvassed their application by way of written submissions dated 24th February, 2025.

15. It is submitted that the presumption of service where there is a report of service by a process server, the burden of proof lies on the party disputing service.

16. Reliance is placed in David Koome Matugi v APA Insurance Limited [2021] eKLR where Gikonyo J, held thus;

> Quite illuminating eminent work by Chitaley and Annaji Rao; the Code of Civil Procedure Volume II page 167 that: There is a presumption of service as stated in the process server's report, and the burden lies on the party questioning it, to show that the return is incorrect. But an affidavit of the process server is admissible in evidence and in the absence of contest it would normally he considered sufficient evidence of the regularity of the proceedings.

But if the fact of service is denied, it is desirable that the process server should be put into the witness box and opportunity of cross-examination given to those who deny the service. [Underlining mine for emphasis) [28] See also Shadrack arap *Baiywo vs. Bodi Bach KSM CA Civil Appeal No. 122 of 1986* fl987JeKLR, where the Court of Appeal quoted with approval the foregoing eminent writing. MB Automobile v Kampala Bus Service, (1966/EA 480 at page 484 is also pointedly relevant on this subject. [29] Accordingly, it was desirable for the party questioning the return of service, to put the process server in the witness box especially where, without such cross-examination, the court is likely to find that service was effected. Ultimately, the Appellant did not discharge the burden of disapproving service, and instead was preoccupied with the notion that the service will be invalidated nonetheless. On that basis, it should be accepted that the Appellant was served as per the contents of the affidavit of service. I so find. "

17. Reliance is also placed in the case of Shimmers Plaza Limited v National Bank of Kenya Limited [2015] eKLR where the court reiterated the position that the presence of counsel of the contemnor in Court when the order was given, and knowledge of the order supersede personal service. The court 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 for bidding 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: here 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."

18. It is also their submission that the respondent is a convicted contemnor who is yet to purge the contempt and he is a wanted fugitive from the law and thus the Respondent cannot have audience before this Court as was held by the Court of Appeal in the case of Dr. Fred Matiang'i the Cabinet

Secretary, Ministry of Interior and Co-ordination of National Government v Miguna Miguna & 4 others [2018]eKLR, where the court held thus;

> "In deserving cases, this Court has itself set its face firmly against granting contemnors audience until and unless they first purge their contempt and it shall continue to do so in such cases as evince a headstrong contumaciousness proceeding from a bold impunity, open defiance or cynical disregard for the authority of the Court and the integrity of the judicial system. Such pernicious conduct cannot be countenanced and those hell-bent on it will find neither help, nor refuge under a convenient and self-serving appeal to natural justice when their impudent conduct threatens the very foundation of the rule of law. While the right to fair hearing is sacrosanct and is one of the non-derogable rights in Article 25 of *the Constitution*, we affirm with this Court in A. B. & Another vs. R.B. 2016 eKLR that there may be instances where due to the risk of the rule of law being deliberately undermined, such right may be denied ... "

19. It is the Applicants' case that the Supreme Court has also affirmed the position that a contemnor has no right of audience until the contempt is purged as was held in the case of Bia Tosha Distributors Limited v Kenya Breweries Limited & 6 others [2023] KESC 14 (KLR).

20. It is also submitted that the Respondent was duly served and that the Respondent has not discharged that burden nor even attempted to. Instead, as the accounting officer, he has willfully and brazenly defied the decree of this Court and made plain his intention not obey it, even in future.

21. It is contended that 'lack of budget allocation for the decree' has been rejected by this Court in similar cases. In Gerald Joma Gichohi & 9 others v Hon. Patrick Mariru, Principal Secretary Ministry of Defence; BC Misc Application No. JR 289 of 2019 (Unreported) and Republic v Mwadosho & 9 others; Hon. Patrick Mariru, Principal Secretary Ministry of Defence (Respondent); Attorney General [2025] KEHC 17021 (KLR).

22. The Court of Appeal has similarly dismissed such an explanation for disobedience of a similar decree of the order of mandamus by the respondent's predecessor in the case of Muigai & 3 others v Estate of Captain Kariuki (DCD) & 8 others [2022) KE.CA 1138 (KLR), where the Court aptly held thus;

> "31. Under section 21(3) of the *Government Proceedings Act* payment of the amounts due to the respondents was to be made by the Accounting Officer for the Department of Defence. The 4th appellant swore an affidavit confirming that he was the accounting officer at the material time. The only explanation he gave for failing to make payment to the respondents was the fact that the amount was over Kshs 72 million, and that the amount had not been budgeted for. The 4th appellant did not explain efforts, if any, that had been made to provide for this sum or make any assurance off future payments. As at the time the appeal was being heard, almost five years had lapsed from the date the order of mandamus was issued, yet no payment had been made. The issue of budgetary allocation cannot, therefore, hold. We find that the 4th appellant who was the accounting officer, was indeed in contempt of the court order as it was his responsibility to obey the order and ensure that the decree of the court was satisfied."

The Respondent's case;

23. The Respondent opposes the Application through a Replying Affidavit sworn by Dr. Patrick Mariru, PHD, CBS, the Principal Secretary, Ministry of Defence. The same is dated 4th February, 2025.

24. It is deponed 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.

25. According to him, he cannot be accountable for what the Ministry of Defence is allocated and since there was no allocation from Parliament to settle the outstanding claims, it would be manifestly unjust for him to be held in contempt of court orders when he neither controls nor determines government funding for the same.

26. It is his case that from when he took over as Accounting Officer in the Ministry of Defence, he has been made aware that the Ministry has several decrees exceeding Kshs. 4 billion for which it is struggling to settle due to financial constraints even despite deliberations by the Senate.

27. It is his case that the instant judgment and order has never been brought to his attention and he has in no way ignored, disobeyed or acted contrary to any orders as alleged.

28. It is contended that he abides to the rule of law more-so, being the Accounting Officer to a Ministry that oversees a disciplined force and in no way mocks or undermines judicial authority of the court or his Oath of office.

29. It is averred that Contempt of court proceedings are not execution proceedings but 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*.

30. He further contends that committal of persons to civil jail without affording them an opportunity to be heard is unconstitutional and thus it would be manifestly unjust and against the rules of natural justice to commit him to civil jail since it will amount to being condemned unheard.

31. The Respondent filed written submissions dated 11th February, 2025.

32. It is his submission that failure to comply with the court orders is not deliberate but rather the failure to pay has been occasioned by the financial austerity measures which are circumstances that are beyond his control.

33. Further that payments by Government Ministries and Agencies rely on yearly budgetary allocations which are approved by the National Assembly which is an independent arm of Government who have the ultimate control and oversight over public expenditure.

34. In Braeburn Limited vs Gachoka & Another (2007) 2 EA 67, it was held that deprivation of a person's liberty must be based on proof beyond reasonable doubt that the person has the means to pay but has refused and/or neglected to pay. It is for this reason that the Civil Procedure Rules (Order 22 Rule 35) requires in mandatory terms for a Judgment debtor to be served with a Notice to Show Cause before a Warrant of arrest or Orders for committal to civil jail are issued.

35. Reliance is also placed in Kiarie Mbugua vs Njoki Mbugua (1992) eKLR. where Kuloba, J expressed himself as follows regarding civil jail:

> " The Committal to civil jail will be an end in itself, serving no useful purpose. It will be for vindictiveness only; but civil justice is placatory, not retaliatory and revengeful. As Courts

> administering civil justice, we do not sit here unleashing reprisals of vengeance to satisfy egoistic vendetta veneered with some court orders. Committal to civil jail is redressal, not merely punitory. In this case if the court sends the Defendant to civil jail for six months, the wrong will not have been redressed; her sojourn in jail will be punishment to her but will not enforce the Order said to be disobeyed"

36. The Respondent invokes section 21 (4) of the *Government Proceedings Act* which provides that the Court should not issue orders for executions or attachment enforcing any such money or costs, and no person shall be individually liable under any order for the payment by the Government or any Government department, or any officer of the Government as such of any such money or costs.

37. It is his submission that if all the mandatory requirements for contempt of court have been satisfied, committal to civil jail is a means to execute a decree and is not an end in itself.

38. The Respondent urges this court to exercise its discretion and decline to issue the orders for contempt of court against the Respondent as sought by the Applicants.

39. Reliance is placed in the case of Nyeri Civil Suit No. 101 of 2011 Wachira Karani vs Bildad (2016) eKLR, where it was it was held that in exercising discretion the courts must have due regard to the object of doing substantial justice to all the parties concerned and that technicalities of the law should not prevent the court from doing substantial justice.

40. It is the Respondent's case that the application is unjustified and baseless and the same should be dismissed for lack of merit.

Analysis and determination;

The issue for determination is whether or not the applicant has made out a case for the grant of the orders sought.

41. It is the Applicants case that this court delivered a judgment in High Court (Nairobi) Misc. Civil Suit No. JR. 1656 of 2005 (James Mwangi Wanyoike & 9 Others vs The Hon. Attorney General) and awarded various amounts of general damages to each of the Applicants who are all former Kenya Air Force officers, various amounts of general damages totaling to Ksh 23,500,000/- for violations of their fundamental rights in the aftermath of the failed 1st August 1982 military coup plus interest at Court rates from the date of judgment until payment in full.

42. An amended Certificate of Order against the Government with the decretal sum, accumulated interest and costs then amounting to Ksh 29,228,500/- was issued on 23rd August 2013.

43. On 7th March 2018 the Applicants moved this court with judicial review proceedings seeking an Order of Mandamus and on 25th July 2018 this court in the presence of counsel for both the Applicants and the Respondent peremptorily granted Order of Mandamus compelling the respondent to effect payment to the Applicants of the judgment debt then standing at Ksh 42,015,077/-together with interest at the rate of 12% p.a. with no order as to costs for the judicial review application.

44. It is contended that a formal Decree of Order of Mandamus was issued by this Court on 5th October 2018 but despite service of the Decree of the Order of Mandamus endorsed with notice of penal consequences and demand letters for settlement of the Decree of Order of Mandamus on the office bearers of the respondent since 2018 including the present holder Hon. Patrick Mariru, none of the office holders of the respondent have ever communicated 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 outstanding.

45. This court on 16th November 2023 issued a Certificate of Order against the Government in this judicial review application with the-total judgment debt standing at Ksh 68,812,638.44.

46. The Respondents case revolves around the lack of allocation of resources and in particular It is averred that Contempt of court proceedings are not execution proceedings but 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*.

47. He further contends that committal of persons to civil jail without affording them an opportunity to be heard is unconstitutional and thus it would be manifestly unjust and against the rules of natural justice to commit him to civil jail since it will amount to being condemned unheard.

48. It is his submission that failure to comply with the court orders is not deliberate but rather the failure to pay has been occasioned by the financial austerity measures which are circumstances that are beyond his control.

49. Payments by Government Ministries and Agencies rely on yearly budgetary allocations which are approved by the National Assembly which is an independent arm of Government who have the ultimate control and oversight over public expenditure.

50. This court is further guided by the case of Muigai & 3 others v Estate of Captain Kariuki (DCD) & 8 others [2022)KE.CA 1138 (KLR), where the Court aptly held thus;

> "31. Under section 21(3) of the *Government Proceedings Act* payment of the amounts due to the respondents was to be made by the Accounting Officer for the Department of Defence. The 4th appellant swore an affidavit confirming that he was the accounting officer at the material time. The only explanation he gave for failing to make payment to the respondents was the fact that the amount was over Kshs 72 million, and that the amount had not been budgeted for. The 4th appellant did not explain efforts, if any, that had been made to provide for this sum or make any assurance off future payments. As at the time the appeal was being heard, almost five years had lapsed from the date the order of mandamus was issued, yet no payment had been made. The issue of budgetary allocation cannot, therefore, hold. We find that the 4th appellant who was the accounting officer, was indeed in contempt of the court order as it was his responsibility to obey the order and ensure that the decree of the court was satisfied."

51. The Respondent does not deny knowledge of the decree orders or the amount owed as in the certificate of order. The decree holders have a legitimate expectation that they shall accept and enjoy the fruit of the judgment.

52. The Decree herein is more than seven years old. The unreasonable delay offends the Applicants legitimate expectation that it would enjoy the fruits of the judgment. Though financial austerity measures are an imperative in the running of the finances of the Government, the numerous budgetary cycles must not leave decree holders in limbo indefinitely.

53. This court appreciates the fact that payments by Government Ministries and Agencies rely on yearly budgetary allocations which are approved by the National Assembly. However, there must be a time

when the allocations to decree holders are reached in the allocation cycles. This must not be after seven years. This court is of the view that this amounts to a refusal to comply with the court order.

54. In so holding, I am guided by De Smith, Woolf & Jowell, "Judicial Review of Administrative Action" 6th Edn. Sweet & Maxwell page 609:

> " A legitimate expectation arises where a person responsible for taking a decision has induced in someone a reasonable expectation that he will receive or retain a benefit of advantage. It is a basic principle of fairness that legitimate expectations ought not to be thwarted. The protection of legitimate expectations is at the root of the constitutional principle of the rule of law, which requires predictability and certainty in government's dealings with the public."

55. Section 11 (2) of The *Fair Administrative Action Act* stipulates that in proceedings for judicial review relating to failure to take an administrative action, the court may grant any order that is just and equitable, including an order- (a) directing the taking of the decision; (b) declaring the rights of the parties in relation to the taking of the decision; (c) directing any of the parties to do, or to refrain from doing, any act or thing the doing, or the refraining from the doing, of which the court or tribunal considers necessary to do justice between the parties.

Order:

1. Hon. Patrick Mariru is hereby summoned to personally appear before this Court to show cause why he should not be cited and found guilty of Contempt of Court for disobeying and defying the Order and Decree of the Order of Mandamus given by this Honourable Court on 25th July 2018 on 23rd June 2025 at 11 AM in open court.
2. That costs to the Applicant.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 21ST DAY OF MARCH, 2025.

.....

J. CHIGITI (SC)

JUDGE