



Republic v County Government of Garissa & 4 others; Holwadag Construction Company Limited (Exparte Applicant) (Judicial Review Miscellaneous Application E004 of 2023) [2025] KEHC 7052 (KLR) (22 May 2025) (Ruling)

Neutral citation: [2025] KEHC 7052 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARISSA
JUDICIAL REVIEW MISCELLANEOUS APPLICATION E004 OF 2023**

**JN ONYIEGO, J
MAY 22, 2025**

BETWEEN

REPUBLIC APPLICANT

AND

THE COUNTY GOVERNMENT OF GARISSA 1ST RESPONDENT

THE CHIEF OFFICER, FINANCE GARISSA COUNTY 2ND RESPONDENT

THE COUNTY SECRETARY, GARISSA COUNTY 3RD RESPONDENT

THE COUNTY EXECUTIVE COMMITTEE MEMBER(CEC FINANCE & ECONOMIC PLANNING) GARISSA COUNTY 4TH RESPONDENT

THE COUNTY ATTORNEY, GARISSA COUNTY 5TH RESPONDENT

AND

HOLWADAG CONSTRUCTION COMPANY LIMITED EXPARTE APPLICANT

RULING

1. The application herein is anchored on the fact that the ex parte applicant sued the 1st respondent vide Garissa High Court Civil Suit No. E001 of 2022 for the recovery of a liquidated sum of Kes. 33,614,829/- with interest and costs. That the said suit arose from the contractual relationship between the ex parte applicant and the 1st respondent for the construction of a water reservoir at Gababa Centre, Ijara Sub County whereby the 1st respondent agreed to pay the ex parte applicant a sum of Kes. 58,523,841/- for the work done.
2. That the ex parte applicant performed its contractual obligations to conclusion but the 1st respondent paid an amount of Kes. 24,909,012 /- with a balance of Kes.33614,829/- which the ex parte applicant



sued vide Garissa High Court Civil Suit No. E001 of 2022. It is noted that the 1st respondent neither entered appearance nor filed a defence culminating to entry of interlocutory judgment on 24.11.2022 in favour of the ex parte applicant for the sum of Kes.33614,829/- together with interest and costs. That the 1st respondent has been duly served with a decree and a copy of a certificate of order against the government but the 1st respondent has failed to comply. That in the interest of justice, the respondent be cited for contempt to ensure compliance and to uphold the dignity and authority of the court.

3. That the ex parte applicant filed an application seeking for orders for mandamus but via consent entered on 21.05.2024, counsel for the parties herein agreed that an order of mandamus does issue to the 2nd respondent to pay the ex parte applicant the outstanding amount together with costs and interests.
4. The respondents having declined to settle the amount owed to the ex parte applicant, the exparte applicant has since filed the application before this Court being a Notice of Motion dated 27.01.2025 brought under article 159(2)(d) of *the constitution*, sections 1A,1B &3A of the *Civil Procedure Act*, section 5(1) of the *Judicature Act*, Order 51(1) of the Civil Procedure Rules and all enabling provisions of the law. The ex parte applicant seeks the following orders: -
 - i. Spent.
 - ii. That the 2nd and 4th respondents being the 1st respondent's chief finance officer and the county executive committee member in charge of finance and economic planning respectively, do appear before this court and show cause why they should not be cited for disobeying court orders given on 21.05.2024 requiring them to pay to the ex parte applicant the decretal sum of Kes. 58,489,802.46/- interests inclusive and the certified costs of Kes 1,010,360/- on account of judgment entered against the 1st respondent on 24.11.2022 in Garissa High Court Civil Case No. E001 of 2002.
 - iii. That this Honourable Court be pleased to find that the 2nd and 4th respondents being the 1st respondent's chief finance officer and the county executive committee member in charge of finance and economic planning respectively are in contempt of court for disobeying the orders of the court given in this matter on 21.05.2024.
 - iv. That upon finding the 2nd and 4th respondents being in contempt of court on account of orders given in this matter on 21.05.2024, this Honourable court do punish them for contempt of court and commit them to civil jail for such a period as the court may deem fit.
 - v. That costs of this application be borne by the respondents
 - vi. That this Honourable court do make further orders in the interest of justice.
5. The application is based on the grounds set out in the statutory statements and verifying affidavit dated on 28.07.2023 deposing that despite this court issuing orders on 21.05.2024, the respondents have declined and/or neglected to comply with the said orders.
6. The respondent did not file any response to the application and the court directed that the application be canvassed by way of written submissions.
7. The ex parte applicant via submissions dated 01.04.2025 urged in regards to the following:
 - i. Whether this Honourable court has the jurisdiction to grant the prayers sought herein.
 - ii. Whether the 4th respondent is the accounting officer of the 1st respondent.
 - iii. Whether this Honourable Court should punish the 4th respondent of contempt of court.



- iv. Who bears the costs of this application?
8. Regarding the first issue whether this court has jurisdiction to deal with this matter, counsel referred to section 5(1) of the *Judicature Act* Cap 8 which stipulates that:
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 that power shall extend to upholding the authority and dignity of subordinate courts.
9. In the same breadth, reliance was placed on the case of Christine Wangari Gachege vs Elizabeth Wanjiru Evans & Others Civil Application No. 233 of 2007 (2014) eKLR where the court held that leave is not required where committal proceedings relate to a breach of a judgment, order, or undertakings.
10. That on the basis of the foregoing, this Honourable court has jurisdiction to issue the orders sought herein.
11. On the second issue, it was submitted that section 21(3) of the *Government Proceedings Act* imposes a statutory duty on the accounting officer of the government to pay the money specified in a certificate of order against the government to the person entitled or to his advocate. Further, section 103 (2)(a) and 3 and section 148(2) (3) of the *Public Finance Management Act*, No. 8 of 2012 a county executive committee member is the accounting officer of the county government. That the position has been re-affirmed in various judicial pronouncements to wit the case of Republic vs County Chief Officer, Finance & Economic Planning, Nairobi City County ex parte Stanley Muturi [2018] eKLR where the court observed that:
- “It is true that the county executive in charge of finance is the one under the 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 civil suit hence the application ought to be brought against the person who is bound to comply with the orders therein. In this case, the person against whom the contempt proceedings ought to be commenced is the county executive in charge of finance of the county...”
12. It was further urged that the allegation of non-allocation and/or unavailability of funds as stated by the respondents is not a valid reason not to pay the ex parte applicant it’s dues. In the same breadth, the 4th respondent herein being the accounting officer of the county is thus under the obligation to honour the dues of the ex parte applicant.
13. On the third issue, counsel submitted that the 4th respondent is guilty for contempt of court orders as he has failed to honour this court’s orders issued on 21.05. 2024. This court was urged to exercise its powers and punish the 4th respondent to preserve its constitutional order which serve as a guarantee for legality and for the rights of all the people. To that end, reliance was placed on the case of Republic vs Ahmad Abolfadhi Mohammad & Another [2018] eKLR where the court made the following observations:
- 23”. Authorities on the necessity to punish for contempt are legion. We have considered those provided by the respondent, and also cite the following, in affirmation of the principle.”
14. Similarly, reliance was placed in the case of Econet Wireless Kenya Limited vs Minister for Information and Communication of Kenya [2005] eKLR and MNM vs JMM [2022] eKLR where the respective courts held that it is essential for the maintenance of the rule of law and order that the authority and the dignity of the courts are upheld... and that in order to find a person guilty of contempt, there must be proof of willful and intentional disobedience of a court order.



15. Thus from the above, this court was urged to find the 4th respondent guilty for contempt of its orders and proceeds to punish him.
16. On costs, counsel submitted that the 4th respondent having failed to pay the ex parte applicant despite the court ordering so, he should be condemned to cater for the costs herein. In the end, this court was implored to allow the application as prayed.
17. The respondent on the other hand filed submissions dated 04.04.2025 submitting that in as much as this court possess the jurisdiction to entertain the suit herein, it must act prudently. In that regard, reliance was placed in the case of *Gathura vs Equity Bank Limited* [2017] eKLR, where the court underscored the need for prudence in the exercise of contempt powers and further emphasized the importance of balancing individual rights against adherence to court order.
18. That in as much as the *Public Finance Management Act* (No. 18 of 2012) specifically, section 47 stipulates that the accounting officer is responsible for the financial management of a county entity, section 46 of the same Act stipulates that the budgetary provisions and framework must be followed, which inherently includes financial allocations made by the county assembly and the national government.
19. It was contended that there is no willful disobedience of the court orders to establish contempt. That for a court to reach such a determination, an applicant must provide clear and convincing evidence of deliberate failure to comply. To that end, reliance was placed on the case of *Sheilla Cassatt Issenberg & Another vs Antony Macharia Kinyanjui* (2021) eKLR where the court held that:

“Contempt of court is in the nature of criminal proceedings and therefore, proof of a case against a contemnor is higher than that of balance of probability. This is because the liberty of the subject is usually at stake and the applicant must prove willful and deliberate disobedience of the court if he were to succeed.”
20. Consequently, counsel urged that punishing the 4th respondent for contempt of court would undermine the principles of justice, particularly given the steps taken to remedy financial obligations in a responsible manner.
21. On costs, counsel contended that the general principles governing costs in civil proceedings is encapsulated under section 27 of the *Civil Procedure Act*. That where public officers such as the 4th respondent act within their official capacity, this principle ought not to be tempered with. In the end, this court was urged to dismiss the application recognizing the genuine and ongoing attempts to fulfill the obligation.
22. I have considered the application herein together with the submissions by both parties. The only issue for determination is whether the respondents are in contempt of court order.
23. From the record, it is not controverted that this court issued an order of mandamus on 29.05.2024 but the 4th respondent is yet to yield to the same. Thus, the orders of the court have not been honoured hence the application herein.
24. From the record, this court discerns that the ex parte applicant performed its contractual obligations to conclusion but the 1st respondent has not. It is also noted that the 1st respondent neither entered appearance nor filed defence culminating to the entry of interlocutory judgment delivered on 24.11.2022 in favour of the ex parte applicant for the sum of Kes.33614,829/- together with interest and costs.



25. On whether this court is possessed with requisite jurisdiction to entertain this matter, the Court of Appeal in *Christine Wangari Gachege vs Elizabeth Wanjiru Evans & 11 Others*, [supra] 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 provides 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.”

26. Therefore, this court is possessed of the necessary jurisdiction to entertain the matter a fact which is not disputed.

27. The next question is whether the respondents are in contempt of the court order. In order to find a person guilty of contempt, there must be proof of service of the order in question; the order must clear and that there is willful and intentional disobedience of the court order. In the case of *Samuel M. N. Mweru & Others vs National Land Commission & 2 others* [2020] eKLR Case (Supra), Mativo J set down the test for contempt as follows:

“ 40. 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.

28. Therefore, upon proof of the above requirements, the presence of willfulness and bad faith on the part of the respondents would normally be inferred, but the respondents could rebut this inference by contrary proof on a balance of probabilities.

29. In instant case, the court ordered the respondent to pay the ex parte applicant the decretal sum together with interest and costs. Therefore, it cannot be said that the same could not be understood or be interpreted to make out what was desired to happen. It was clear that the respondents were to comply with the court’ directions in paying the ex parte applicant the amount owed together with interests and costs.

30. Of importance to note is the fact that the respondents at this stage cannot be heard urging this court to recognize their alleged genuine and ongoing attempts to fulfil their obligations. It is not in doubt that the respondents are and have always been aware of the orders as the same is buttressed by the affidavit of service sworn by the process servers stating how service was effected upon the respondents and further, the respondents are represented by an advocate in the suit herein and therefore, knowledge of the court’s orders cannot be denied. [See *Nyamodi Ochieng Nyamogo & Another vs Kenya Posts & Telecommunications Corporation* (1994) eKLR].



31. On whether the 4th respondent is the accounting officer, I seek for guidance in the case of Council of Governors & Others vs The Senate Petition No. 413 of 2014 [2015] eKLR where the Court expressed itself as follows:

“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.

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*.

As regards the accounting officer for the County Assembly, Section 148(4) of the *Public Finance Management Act* provides that; “The Clerk of the County Assembly shall be the accounting officer of the County Assembly”.

Having found as we have, it follows that the question posed by the Petitioners as to whether the County Governor is an



Accounting Officer, must be answered in the negative. He is not an Accounting Officer and we have said why.”

32. 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. In the same breadth, the 5th respondent cannot be found liable for contempt for the reason that his/her work is clearly stipulated as that of offering legal advice unto the respondents. On whether the other respondents adhere to the said advice or not is not to be attributed on the attorney.
33. It is essential for the maintenance of the Rule of Law and Order that the authority and the dignity of courts is upheld at all times. The court will neither condone deliberate disobedience of its orders nor shy away from its responsibility to deal firmly with proved contemnors.
34. There is no doubt that the orders made by this court have not been appealed against nor set aside. It therefore follows that the respondents and specifically the 4th respondent has an obligation to honour the said orders to the fullest.
35. In the given circumstances, I find that the application has merit and it is hereby allowed in the following terms: -
 - i. The 4th respondent is in contempt of the court order.
 - ii. The respondents to comply with the court order made on 29.05.2024 within 30 days in default the court shall be at liberty to mete out any other appropriate measures it may deem fit including committal to civil jail.
 - iii. The matter shall be mentioned on 14-7-2025 to confirm compliance with the orders in (ii) above.
 - iv. Costs of the application awarded to the ex parte applicant.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 22ND DAY OF MAY 2025

J. N. ONYIEGO

JUDGE

