



Republic v Attorney General & 2 others; Ochwa & 2 others (Exparte Applicants) (Trading as Cootow and Associates) (Judicial Review Miscellaneous Application 29 of 2017) [2025] KEHC 6309 (KLR) (9 May 2025) (Ruling)

Neutral citation: [2025] KEHC 6309 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
JUDICIAL REVIEW MISCELLANEOUS APPLICATION 29 OF 2017**

G MUTAI, J

MAY 9, 2025

BETWEEN

REPUBLIC APPLICANT

AND

ATTORNEY GENERAL 1ST RESPONDENT

**CHIEF OFFICER, COUNTY GOVERNMENT OF MOMBASA 2ND
RESPONDENT**

**COUNTY EXECUTIVE COMMITTEE MEMBERS FOR FINANCE COUNTY
GOVERNMENT OF MOMBASA 3RD RESPONDENT**

AND

PATRICK OCHWA EXPARTE APPLICANT

SAMUEL OUMA EXPARTE APPLICANT

JOB WELOBA EXPARTE APPLICANT

TRADING AS COOTOW AND ASSOCIATES

RULING

1. Vide a Notice Motion application dated 8th November 2024 the Exparte Applicants seek the following orders: -
 - a. Spent;
 - b. That the County Executive Committee Member, Finance, of the County Government of Mombasa has disobeyed and is in contempt of the orders of this court dated 9th March 2018



directing the County Government of Mombasa to pay the Exparte Applicant the sum of Kes.2,506,048/92 with interest thereon of 14% until payment in full;

- c. That the County Executive Committee Member, Finance, of the County Government of Mombasa be committed to civil jail for a term not exceeding six months, for contempt of court order dated 18th April 2024; and
 - d. The respondent bears the costs of the application.
2. In the grounds in support for the application and the affidavit of Mr Job Juma Weloba, it was stated that the Exparte Applicants obtained judgment in Mombasa CMCC No. 931 of 2012; Patrick Ochwa and others vs County Government of Mombasa, in which it was ordered that the County Government of Mombasa do pay the sum of Kes.2,506,048/92, together with interest thereon at the rate of 14% per annum, on account of legal services rendered to the said County Government by the Applicants' firm. The County Government of Mombasa failed to pay the decretal sum, forcing the Exparte Applicants to commence judicial review proceedings seeking mandamus to compel the Respondents to pay the decretal sum. The court issued an order to that effect on 9th March 2018.
 3. To date, the order to settle the decretal sum has not been complied with despite the Respondents being aware of it.
 4. It was urged that the Respondents have acted, and continue to act, in total disregard of the orders of this honourable court, and as such, the Respondents are undermining the authority of this court and the rule of law. The Exparte Applicants argued that the Respondents' conduct was deliberate and that they are therefore in contempt of court.
 5. The Exparte Applicants stated the orders were served. They attached the court order dated 9th March 2018, issued on 21st March 2018, to the County Secretary, Mombasa; the Certificate of Costs dated 19th October 2018; and a letter dated 26th April 2024, through which the Office of the County Attorney was served, as well as the letter dated 26th April 2024, vide which the Respondents sought more time to pay the debt.
 6. In the application, it was argued that the County Executive Committee Member, Finance, is, under Section 103(3) of the *Public Finance Management Act*, the head of the County Treasury and is thus responsible for the financial and fiscal matters of the County.
 7. The Exparte Applicant filed an affidavit of service, sworn on 19th November 2024, in which it was averred that the Exparte Applicant was prevented from effecting personal service on the Chief Officer, Finance, by the County security, and that service was effected instead on the County Attorney.
 8. The Respondents filed a Replying Affidavit, sworn by Mr Jimmy Waliaula, which states that the Respondents believe in the rule of law and wouldn't disobey court orders.
 9. The deponent averred that it needed to be shown that the Respondents were personally served or were otherwise made aware of it, and if they had willfully disobeyed court orders.
 10. Mr Waliaula contended that the County Executive Committee Member, Finance, wasn't personally served with either the order of mandamus or the Certificate of the Order against the County Government.
 11. Mr Waliaula denied that either the Chief Officer, Finance, or the County Executive Committee Member, Finance, is the accounting officer under section 45 of the County Government Act. The deponent also denied that the County Attorney or the County Secretary were recognized officers for purposes of payments, nor was a member of the County Treasury, as per section 103 of the *Public*



- Finance Management Act. He therefore denied that service of documents upon the said officials was effective. The said officer deemed the act to be one in futility.
12. It was also denied that service was effected. It was urged that a similar application was dismissed by Mativo, J, on 21st October 2021. Consequently, the Respondents' counsel urged that justification for holding the Respondents in contempt hadn't been proved.
 13. The Respondents' counsel thus urged that the application be dismissed for being without merit.
 14. The Respondents' counsel attached the ruling of this court, per Mativo, J (as he then was), in which the court declined to issue the orders sought because the Certificate of Order required under Section 21 of the Government Proceedings Act and Order 29, Rule 3 of the Civil Procedure Rules had not been issued.
 15. The application was canvassed by way of oral submissions.
 16. Ms Osewe, the learned counsel for the Applicants, stated that the orders sought to be enforced were issued on 9th March 2018. The Applicants had gone through severe hardships in seeking payment, to no avail. She averred that the Respondents had on two occasions made payment proposals which were not adhered to. She urged that, despite the order of mandamus being issued six years ago, there had been no reasonable payment proposal. She therefore prayed that the application be allowed.
 17. Ms Osewe denied that the matter was res judicata. She stated that the claim was a continuing one that would only be concluded once the payment in full was received. Counsel averred that since the Respondents had made payment proposals, it must be assumed that they were aware of the debt and their obligation to satisfy it. She therefore prayed that the application be allowed.
 18. On the other hand, Mr Tajbhai, learned counsel for the Respondents, urged that the application be dismissed. He relied on the Replying Affidavit sworn by Mr Jimmy Waliaula. Mr Tajbhai submitted that since the application sought to punish the Respondents for alleged contempt of court, there was a higher burden on the applicants. They had to show that there was personal service of the order, personal knowledge of the orders and willful disobedience of the orders.
 19. He urged that when the orders were issued, neither the Respondents nor their advocates were in court. He submitted that the County Executive Committee Member Finance wasn't served with the order and that, in any event, there was no evidence of such service. He relied on section 107 of the Evidence Act in support of his proposition that it was the duty of the Applicants to prove service of the court orders.
 20. Counsel further submitted that the application was res judicata as this court had determined a similar application on 21st October 2021. Even if it wasn't, Mr Tajbhai urged that the Applicants ought to have filed a separate application, which they hadn't done. Counsel stated that the application under consideration was therefore premature. He thus prayed that the application be dismissed.
 21. I have considered the application, the response thereto and the oral and written submissions of the parties. I must now make my determination as to whether there is merit in the application and what orders ought therefore to issue.
 22. Is the application res judicata? In my view, it isn't. The substratum of the applicant is the payment of the legal fees, which remain outstanding. The decision of Mativo, J, dealt with the issue of compliance with Section 21 of the Government Proceedings Act. I am not persuaded that, based on the said decision, this application is res judicata. The claim remains outstanding, and until it is satisfied, the Exparte Applicant is entitled to procure payments through enforcement action.



23. The essence of the law in contempt is to safeguard the integrity of the court and to uphold the principles of the rule of law.
24. In *Econet Wireless Kenya Ltd v Minister for Information & Communication of Kenya & another* [2005] KLR 828, Ibrahim, J. (as he then was), discussed the law on contempt and stated as follows:-
- “It is essential for the maintenance of the rule of law and order that the authority and the dignity of our courts are upheld at all times. The Court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors. It is the plain and unqualified obligation of every person against whom an order is made by court of competent jurisdiction, to obey it unless and until the 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 the order believes it to be irregular or void.”
25. *Koilel & 2 others v Koilel & another* [2022] KEHC 10288 (KLR), F Gikonyo, J stated as follows:-
- “Judicial borrowing from contemporary jurisdiction: 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; and (iii) Failure by the Respondent to comply with the terms of the order (*Kristen Carla Burchell vs Barry Grant Burchell*, Eastern Cape Division Case No. 364 of 2005).”
26. Although the Respondents’ counsel submitted at length on the need for personal service, I disagree with him on this point. The law in this regard has moved. There is now an emphasis on knowledge of the court order, rather than service.
27. This point was stated in the *Koilel* case (*supra*) in the following terms: -
- “34. The jurisprudence now favours knowledge of the existence of Court orders as opposed to strict personal service. In the case of *Shimmers Plaza Limited v National Bank of Kenya Limited* [2015] eKLR the Court of Appeal posed the question as to whether knowledge of a Court order or judgment by an Advocate of the alleged contemnor would be sufficient for purpose of contempt proceedings and answered the question in the affirmative stating: -
- “We hold the view that it does. This is more so in a case as this one, where 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 to report back to the client all that transpired in Court that has a bearing on the client’s case...”
28. In this case, the knowledge of the advocates can be deduced from their conduct. They made payment proposals, which they could only have made if they were aware of the judgment and the order compelling their clients to pay. In the circumstances, I am satisfied that the respondent knew of the order. The terms of the order were quite explicit on the issue of payments. To date, the decretal sum has not been satisfied. The Respondents have made promises that they haven’t honoured. Their actions



are willful and deliberate. In the circumstances, I find and hold that the Respondents are in contempt of court.

29. What orders should be issued? It is my view that the Court should not issue orders in vain. Court orders must be complied with. The Applicants have been denied payment for over 7 years. The Respondents have used technicalities to delay the day of reckoning. This court must take decisive action against such conduct.
30. As the County Executive Committee Member, Finance, of the County Government of Mombasa is in contempt of Court, I hereby sentence him to 6 months imprisonment. The sentence will, however, be suspended for 1 month to give the said officer a chance to procure payment and thus atone for his contemptuous action. This matter will be mentioned on 10th June 2025 in open Court before the Presiding Judge, Ngaah, J. The County Executive Committee Member, Finance, of the County Government of Mombasa is to be personally present.
31. I award the Applicants the costs of this application.
32. Orders accordingly.

DATED AND SIGNED IN MOMBASA THIS 9TH DAY OF MAY 2025. DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS.

GREGORY MUTAI

JUDGE

In the presence of:-

No appearance for the Applicants;

No appearance for the Respondents; and

Arthur – Court Assistant.

