Republic v ndependent Electoral & Boundaries Commission; Scanad Kenya Limited (Ex parte Applicant) (Judicial Review Miscellaneous Application E125 of 2022) [2025] KEHC 8246 (KLR) (Judicial Review) (11 June 2025) (Ruling)

Neutral citation: [2025] KEHC 8246 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

JUDICIAL REVIEW

JUDICIAL REVIEW MISCELLANEOUS APPLICATION E125 OF 2022

RE ABURILI, J

JUNE 11, 2025

BETWEEN

REPUBLIC ..... APPLICANT

AND

THE INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION ..... RESPONDENT

AND

SCANAD KENYA LIMITED ..... EX PARTE APPLICANT

RULING

1. On 15th June, 2023, this Court rendered judgment issuing judicial review order of mandamus compelling the respondent herein IEBC to settle decree in the sum of KES 248,042,665.12 being the decretal amount together with interest at Court rates from the date of award until payment in full. The award arises from judgment on admission entered on 26th April 2021, by Lady Justice Grace Ngenye (as she then was) in HCCOM E085 of 2020. Decree was drawn and issued on 22nd June, 2023.

2. This was the second judgment on mandamus which again the respondent sought to set aside to allow them to respond to the application, by their application dated 31st August 2023. The court declined to set aside the said judgment.

3. In the application subject of this ruling, which application is dated 13th May 2024, the exparte applicant seeks orders that the Chief Executive Officer of the respondent be cited for contempt of court for disobeying mandamus orders of 15th June 2025. The applicant has sought many other orders but this court can only deal with one such prayer and any other order that it may issue must follow due

process as required by law, which includes mitigation and sentencing hence the court will not belabor reproducing the other prayers here.

4. The main ground upon which the application is predicated is that the respondent has not settled the decree and certificate of order against the Government as further decreed in the mandamus decree and has persisted in such refusal.

5. The application is supported by the affidavit sworn by Jimmy Munene the applicant's General Counsel and Group Data Protection Officer who, in his depositions, annexes all documents including the judgment and decree giving rise to the award, the Mandamus judgment and decree as well as certificate of order against the Government, decree for mandamus and evidence of service of the said documents upon the respondent.

6. There is also evidence that the respondent sought for allocation of funds from the National Treasury for settlement of decree in question, the decree having been considered to be a pending bill.

7. In the replying affidavit sworn by Chrispine Owiye the Director Legal Services of the respondent Commission, as sworn on 1st April 2025, it is deposed in concession that indeed judgment was entered against the respondent for the amount stated and that the Commission sought for funding from the National Treasury to settle the decree. That the Treasury took note of the pending bills by the respondent, to the tune of Kshs 2.3 billion but that the respondent was advised to settle the pending bills within its budgetary allocation while adhering to the guidelines under the *Public Finance Management Act*,2012.

8. That the respondent is willing to settle the decree and that it did pay Kshs 50m in December 2023. That the Commission is working within its budgetary constrains to settle the outstanding balance hence the failure to pay is not arbitrary or unreasonable.

9. That the CEO's hands are tied after he has done all he could to settle the decree and that non settlement is not his fault.

10. The application was heard orally with the parties' respective counsel reiterating the depositions in support of their client's positions.

Analysis and determination

11. I have considered the application and the response thereto. The issue for determination is whether the respondent's CEO should be cited for being in contempt of court orders of mandamus issued on 15th June, 2023 for settlement of decree in this matter which has a chequered history.

12. In the case of Hadkinson -Vs- Hadkinson (1952) 2 ALL ER 56 the court held:

> "It was the plain and unqualified obligation of every person against or in respect of whom an order was made by a court of competent jurisdiction to obey it unless and until it was discharged and disobedience of such an order would as a general rule result in the person disobeying it being in contempt and punishable by committal or attachment and in an application to the court by him not being entertained until he had purged his contempt."

13. Failure by an Accounting Officer to comply with court orders amounts to contempt of court as was held in the case of Republic -vs- County Chief Officer, Finance & Economic Planning, Nairobi City County Ex parte Stanley Muturi [2018] eKLR where the court held:

> "In my view the failure by the accounting officer of a state organ, government department, ministry or corporation to put into motion steps 5 necessary for the settlement of or obedience of court decisions or facilitation of such settlement is prima facie evidence of neglect."

14. The reason why courts punish for contempt of court was well stated in *Teacher's Service Commission vs. Kenya National Union of Teachers & 2 Others Petition No. 23 of 2013* as follows:

> "The reason why courts will punish for contempt of court is to safeguard the rule of law which is fundamental in the administration of justice. It has nothing to do with the integrity of the judiciary or the court or even the personal ego of the presiding judge. Neither is it about placating the applicant who moves the court by taking out contempt of court proceedings. It is about preserving and safeguarding the rule of law. A party who walks through the justice door with a court order in his hands must be assured that the order will be obeyed by those to whom it is directed. A court order is not a mere suggestion or an opinion or a point of view. It is a directive that is issued after much thought and with circumspection. It must therefore be complied with and it is in the interest of every person that this remains the case. To see it any other way is to open the door to chaos and anarchy and this Court will not be the one to open that door. If one is dissatisfied with an order of the court, the avenues for challenging it are also set out in the law. Defiance is not an option."

15. 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.

16. In this case, the accounting officer is the CEO of the Commission. It is claimed that he has done what he could to settle decree by paying Kshs 50 million IN 2023 and that he sought for allocation from the National Treasury but was advised to work within the Commissions' budgetary allocation.

17. The question is whether it is necessary to punish for contempt? The Supreme Court in Republic v Ahmad Abolfathi Mohammed & Another [2018] eKLR observed as follows:

> "(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.
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> (24) In Econet Wireless Kenya Ltd V. Minister for Information & Communication of Kenya & Another [2005] 1 KLR 828 Ibrahim J (as he then was) relied on the Court of Appeal decision in Gulabchand Popatlal Shah & Another Civil

Application No. 39 of 1990 (unreported), where the Court of Appeal 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... In Hadkinson v Hadkinson (1952) 2 All E.R. 567, it was held that: 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 void."

(25) In Att-Gen. v. Times Newspapers Ltd. [1974] A.C. 273, Lord Diplock stated:

> "…. There is an element of public policy in punishing civil contempt, since the administration of justice would be undermined if the order of any court of law could be disregarded with impunity."

(26) The Court of Appeal in A.B. & Another v R.B., Civil Application No. 4 of 2016 [2016] eKLR cited with approval the Constitutional Court of South Africa's decision in Burchell v. Burchell, Case No.364 of 2005 where it was held:

> "Compliance with court orders is an issue of fundamental concern for a society that seeks to base itself on the rule of law. *The Constitution* states that the rule of law and supremacy of *the Constitution* are foundational values of our society. It vests the judicial authority of the state in the court and requires other organs of the state to assist and protect the court. It gives everyone the right to have legal disputes resolved in the courts or other independent and impartial tribunals. Failure to enforce court orders effectively have the potential to undermine confidence in recourse to law as an instrument to resolve civil disputes and may thus impact negatively on the rule of law."

(27) Ojwang, J (as he then was) in B. V. Attorney General [2004] 1 KLR 431 that:

> "The Court does not, and ought not to be seen to, make Orders in vain; otherwise, the Court would be exposed to ridicule, and no agency of the Constitutional order would then be left in place to serve as a guarantee for legality, and for the rights of all people."

(28) It is, therefore, evident that not only do contemnors demean the integrity and authority of Courts, but they also deride the rule of law. This must not be allowed to happen. We are also conscious of the standard of proof in contempt matters. The standard of proof in cases of contempt of Court is well

established. In the case of Mutitika v. Baharini Farm Limited [1985] KLR 229, 234 the Court of Appeal held that:

> "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...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 an offence which can be said to be quasi-criminal in nature."

(29) The rationale for this standard is that if cited for contempt, and the prayer sought is for committal to jail, the liberty of the contemnor will be affected. As such, the standard of proof is higher than the standard in civil cases. This power, to commit a person to jail, must be exercised with utmost care, and exercised only as a last resort. It is of utmost importance, therefore, for the respondents to establish that the alleged." contemnor's conduct was deliberate, in the sense that he or she willfully acted in a manner that flouted the Court Order."

18. In Republic v County Chief Officer, Finance & Economic Planning, Nairobi City County (Ex Parte David Mugo Mwangi) [2018] eKLR, the Court observed:

> " 30. It must however be remembered that Court orders are not made in vain and are meant to be complied with. If for any reason a party has difficulty in complying therewith, the honorable thing to do is to come back to court and explain the difficulties faced by the need to comply with the order. Once a Court order is made in a suit the same is valid unless set aside on review or on appeal. In Econet Wireless Kenya Ltd vs. Minister for Information & Communication of Kenya & Another [2005] 1 KLR 828, Ibrahim, J (as he then was) stated:
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> > "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, 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 void".

19. This position was confirmed by the Court of Appeal in Refrigerator & Kitchen Utensils Ltd. vs. Gulabchand Popatlal Shah & Others Civil Application No. Nai. 39 of 1990. In Wildlife Lodges Ltd vs. County Council of Narok and Another [2005] 2 EA 344 (HCK) the Court expressed itself thus:

> " It was the plain and unqualified obligation of every person against or in respect of whom an order was made by a Court of competent jurisdiction to obey it until that order was discharged, and disobedience of such an order would, as a general rule, result in the person disobeying it being in contempt and punishable by committal or attachment and in an application to the court by him not being entertained until he had purged his contempt. A

party 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 a question. That the course of a party knowing of an order which was null or irregular, and who might be affected by it, was plain. He should apply to the court that it might be discharged. As long as it existed it must not be disobeyed...If there is a misapprehension in the minds of the defendants as to the reasonable meaning of the order, then the expectation of them is that they would have made an application to the court for the resolution of any misunderstanding and this would have been the lawful course...In cases of alleged contempt, the breach for which the alleged contemnor is cited must not only be precisely defined but also proved to the standard which is higher than proof on a balance of probabilities but not as high as proof beyond reasonable doubt...The inherent social limitations afflicting most people in a developing country such as Kenya have the tendency to restrict access to the modern institutions of governance, and more particularly to the judiciary which is professionally run, on the basis of complex procedures and rules of law. Yet, this same Judiciary is generally viewed as the impartial purveyor of justice, and the guarantor of an even playing ground for all, a perception which ought to be strengthened, through genuine respect for the courts of justice, and through compliance with their orders. Consistent obedience to court orders is required, and parties should not take it upon themselves to decide on their own which court orders are to be obeyed and which ones overlooked, in the supposition that this oversight will not impede the process of justice...Justice dictates even-handedness between the claims of parties; and if it be the case that the plaintiff/applicant has not been accorded a level playing ground for the realization of its economic activities, a matter that of course can only be established through evidence in the main suit, then the court ought to provide relief, by applying the established principles of law, one of these being the law of contempt...An ex parte order by the court is a valid order like any other and to obey orders of the court is to obey orders made both ex parte and inter partes since the Court by section 60 of *the Constitution* is the repository of unlimited first instance jurisdiction, and in this capacity it may make ex parte orders where, after a careful and impartial consideration, it is convinced that issuance of such an order is just and equitable. There is nothing potentially oppressive in an ex parte order, since such an order stands open to be set aside by simple application, before the very same court...Where a party considers an ex parte order to cause him undue hardship, simple application will create an opportunity for an appropriate variation to be effected thereto; and therefore there will be no excuse for a party to disobey a court order merely on the grounds that it had been made ex parte and this argument will not avail either the first or the second defendant".

20. In Central Bank of Kenya & Another vs. Ratilal Automobiles Limited & Others Civil Application No. Nai. 247 of 2006, the Court of Appeal held that Judicial power in Kenya vests in the Courts and other tribunals established under *the Constitution* and that it is a fundamental tenet of the rule of law that court orders must be obeyed and it is not open to any person or persons to choose whether or not to comply with or to ignore such orders as directed to him or them by a Court of law.

21. In Wildlife Lodges Ltd vs. County Council of Narok and Another [2005] 2 EA 344 (HCK) the Court expressed itself thus:

> "It was the plain and unqualified obligation of every person against or in respect of whom an order was made by a Court of competent jurisdiction to obey it until that order was

discharged, and disobedience of such an order would, as a general rule, result in the person disobeying it being in contempt and punishable by committal or attachment and in an application to the court by him not being entertained until he had purged his contempt. A party who knows of an order, whether null or valid, regular or irregular, cannot be permitted to disobey it..."

22. Ojwang, J (as he then was) in B vs. Attorney General [2004] 1 KLR 431 stated that:

> " The Court does not, and ought not to be seen to, make Orders in vain; otherwise, the Court would be exposed to ridicule, and no agency of the Constitutional order would then be left in place to serve as a guarantee for legality, and for the rights of all people."

23. From the many judicial pronouncements that I have cited above, it is clear that obedience of court orders is a grave matter. Any failure in the enforcement of court orders invites a total breakdown of law and order and the rule of law, whose inevitable result would be anarchy and an erosion of the country's social fabric.

24. The courts are under an obligation to guard against such a contingency and it can only achieve this by ensuring compliance with court orders.

25. The respondent's accounting Officer and Chief Executive officer/ Commission Secretary does not deny that he is under a public duty to settle decree. From December 2023 when he paid a portion thereof, there is no evidence that from the budgetary allocations for each year, he has made efforts to reduce the balance due on the decree.

26. It is not lost on this Court that the decree in question arises from the supply of electoral materials, an essential function that goes to the very heart of democratic governance and public participation in Kenya. It is therefore deeply troubling, and legally untenable, that the respondent, while having failed to settle debts lawfully incurred from previous electoral procurement, is, in just about two years' time, will be and is expected to actively prepare to engage in fresh procurement for the upcoming general elections, which mean everything to this beloved country, Kenya.

27. This raises a fundamental and unavoidable question: How did the respondent procure without funds in the first place and how does it intend to undertake further procurement while still in contempt of a valid court decree arising from identical obligations?

28. To proceed with new procurement without first settling outstanding court-sanctioned obligations not only violates the principles of prudent financial management under Article 201 of *the Constitution*, but also demonstrates a pattern of fiscal recklessness, disregard for the rule of law and indifference to the plight of suppliers who continue to suffer due to delayed or denied payments.

29. It is inconceivable and indeed impermissible, that a public body would repeatedly engage suppliers for critical national processes such as elections, yet fail to uphold its legal and financial responsibilities thereafter.

30. This Court must therefore question not only the legality of such procurement but also the integrity of a system that permits a public entity to incur debts without accountability or compliance with existing judicial directives.

31. In my humble view, any public entity that procures goods and services which are duly delivered and received for use, but subsequently fails, refuses, or neglects to pay for those goods or services, is, to say the least, committing an illegality. Such conduct is not only unacceptable but also a blatant violation

of the constitutional and statutory principles governing public finance, procurement and contractual obligations.

32. No public entity should be allowed to benefit unjustly at the expense of suppliers who have fulfilled their part of the bargain. To permit such behavior would be to sanction impunity, undermine the rule of law and erode the foundational values of fairness, accountability and good governance. Public entities must be held to the highest standard of integrity and must at all times act within the confines of the law. It follows that procurement without payment is not merely a breach; it is a grave abuse of public trust and a dereliction of legal duty.

33. Where there are no available funds, there ought to be neither procurement nor the commitment of public funds for goods or services. To engage in public procurement without a corresponding budgetary allocation is fiscally irresponsible and contravenes the principles of public finance management enshrined in *the Constitution* and relevant statutes.

34. Furthermore, once a court has issued a decree, the decree holder acquires a proprietary interest in the subject of that decree. The failure or refusal by a government entity to satisfy such a decree amount to a deprivation of property, an action that is constitutionally impermissible. Article 40 of *the Constitution* guarantees the right to property, and that guarantee extends to decree holders whose legal entitlements are enforceable against the State.

35. Deliberate non-compliance with court orders and failure to settle lawful debts undermines the rule of law and erodes public confidence in the administration of justice. Public institutions must therefore act, not only within the law but also in accordance with the constitutional values of accountability, transparency and respect for rights.

36. Having carefully considered the parties' positions in this matter, the orders previously issued by this Court and the conduct of the respondent post-decree, it is evident that the respondent and its accounting officer and CEO does not dispute the existence of a valid decree and a subsequent order of mandamus issued by this Court on 15th June 2023. However, the respondent seeks to justify its failure to comply with the court order by alleging that it has not deliberately refused to pay but was awaiting funding from the National Treasury.

37. This Court finds such reasoning untenable. It is on record that the National Treasury, far from withholding direction or funds, advised the respondent to organize and settle its obligations, including the subject decree, from its annual budgetary allocations. It is further noted that the respondent, as a government entity, an extremely important independent Constitutional Commission, receives Government funding annually and has not demonstrated that these funds have been entirely exhausted or that no provision could be made for the settlement of the outstanding decree.

38. The respondent has also not made any formal application before this Court seeking staggered or alternative payment arrangements. In the absence of such effort, this Court finds no bona fide intention on the part of the respondent to satisfy the decree.

39. The respondent's Commission Secretary and accounting Officer cannot be heard to say that his hands are tied when in fact, the Commission had the legal and fiscal means, along with express advice from the National Treasury, to meet its obligations. The continued failure to act in compliance with the court order amounts to willful disobedience.

40. Accordingly, this Court safely infers that the conduct of the Chief Executive Officer of the respondent, who is the accounting officer is deliberate and calculated to frustrate compliance with this Court's order.

41. This is not mere bureaucratic inertia; it is a clear, intentional flouting of a lawful court directive, and it strikes at the heart of the rule of law.In Republic v Principal Secretary, Ministry of Defence ex parte George Kariuki Waithaka [2020] eKLR, citing Githua, J in Republic vs. Permanent Secretary, Ministry of State for Provincial Administration and Internal Security Exparte Fredrick Manoah Egunza [2012] eKLR, the court was categorical that once a court has issued an order, the same must be obeyed. Lack of funds is not a justification for non-compliance and that a government entity must prioritize the satisfaction of court decrees within its budgetary allocations.

42. Furthermore, this Court aligns with the holding by courts in many decisions that a decree of the court is not a mere suggestion. It is binding and must be obeyed. If state officers are allowed to ignore court orders under the guise of lack of funds, the very foundation of the rule of law would be eroded.

43. It is also well-established that a decree holder acquires a proprietary interest in the subject of the decree, and non-settlement of such a decree amount to unlawful deprivation of property, contrary to Article 40 of *the Constitution*. It follows that a successful litigant has a right to enjoy the fruits of their judgment and failure by a government entity to honor a decree amount to deprivation of property protected under Article 40.

44. I reiterate that the respondent has neither sought leave to pay the amount in installments nor demonstrated inability to comply. In the absence of any effort toward partial compliance or formal engagement with this Court, I find and hold that no compelling or legally sufficient reason has been advanced for the respondent's failure to comply with the mandamus order dated 15th June 2023.

45. Accordingly, I find and hold that the applicant has established to the required standard, that the respondent's CEO who is the accounting officer of the respondent Commission, Mr. Marjan Hussein Marjan, being aware of a lawful order of mandamus and being under a legal duty to settle the decree subject of these proceedings, is guilty of contempt of mandamus order dated 15th June 2023 and I therefore convict him for contempt of court order of mandamus to settle decree.

46. The said Chief Executive Officer Mr. Marjan Hussein Marjan, who is the accounting officer of the respondent Commission who has been found to be in contempt of court order is hereby directed to appear before this court personally for mitigation and showing cause why this court cannot punish him for being in contempt of court and in the manner provided for in law.

47. The applicant shall have costs of this application assessed at Kshs 50,000 noting that it is the taxpayer that suffers more when decrees remain unsettled for long owing to accruing interest.

48. This ruling, order and notice to appear personally on 30th September, 2025 be served upon the respondent's chief executive officer/ accounting officer/ Commission Secretary.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 11TH DAY OF JUNE, 2025

R.E. ABURILI

JUDGE