



**Republic v Principal Secretary, Ministry of Transport & Infrastructure & another;
Charo (Exparte Applicant) (Environment and Land Judicial Review Miscellaneous
Application 48 of 2012) [2024] KEHC 1057 (KLR) (24 January 2024) (Ruling)**

Neutral citation: [2024] KEHC 1057 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
ENVIRONMENT AND LAND JUDICIAL REVIEW
MISCELLANEOUS APPLICATION 48 OF 2012**

OA SEWE, J

JANUARY 24, 2024

**IN THE MATTER OF AN APPLICATION FOR
JUDICIAL REVIEW ORDER OF MANDAMUS**

AND

**IN THE MATTER OF AN APPLICATION FOR AN ORDER OF
COMMITTAL TO CIVIL JAIL FOR CONTEMPT OF COURT**

AND

BETWEEN

REPUBLIC APPLICANT

AND

**THE PRINCIPAL SECRETARY, MINISTRY OF TRANSPORT &
INFRASTRUCTURE 1ST RESPONDENT**

THE ATTORNEY GENERAL 2ND RESPONDENT

AND

ELSON MWANGOVI CHARO EXPARTE APPLICANT

RULING

1. The Notice of Motion dated 2nd November 2022 was filed by the ex parte applicant, Elson Mwangovi Charo (hereinafter, “the applicant”) under Sections 1A, 1B and 3A of the *Civil Procedure Act*, Section 5 of the *Judicature Act*, Chapter 8, Laws of Kenya, the *Contempt of Court Act*, 1981 and Order 50 Rule 1 of the Civil Procedure Rules. The applicant thereby prayed for orders that:



- (a) Spent
 - (b) The Principal Secretary/Accounting Officer of the Ministry of Transport and Infrastructure be committed to prison and be appropriately punished for blatantly refusing, neglecting and/or failing to comply with and abide by the decree of this Court dated 26th July 2011 for payment of a decretal sum amounting to Kshs. 1,476,269.09 as of 2nd December 2014 plus accrued interest thereon making a total of Kshs. 1,834,681.10.
 - (c) That the costs of the contempt proceedings be borne by the concerned official personally as well as the respondents.
2. The application was premised on the grounds that, the aforesaid occupier of the office of the Principal Secretary against whom the application is made has no regard for the rule of law and/or authority or dignity of the Court; in that the person continues with malevolent conduct without any regard or respect whatsoever for the rule of law or for the orders of the Court. The applicant further alleged that the respondents' advocates have and continue to wrongfully frustrate the payment of the awarded costs owed to the applicant; and therefore that it is only fair and in the interest of justice that the application be allowed.
 3. In support of the application, the applicant relied on his own affidavit, sworn on 2nd November 2022 and the documents annexed thereto. He averred that the matter was last in court on 2nd December 2014 before Hon. Muriithi, J. when an order of mandamus was given compelling the Permanent Secretary in the Ministry of Roads to honour the decree issued on 26th July 2011 in Mombasa CMCC No. 5453 of 1999 as consolidated with Mombasa CMCC No. 5456 of 1999 in the sum of Kshs. 1,476,269.09. Hence, the applicant averred that, despite various attempts to reach out to the respondents for settlement, the respondents have refused, failed and/or neglected to pay the amount owed to the plaintiff, and continue with their contemptuous conduct in frustrating the payment process.
 4. The applicant further deposed that it is abundantly clear that the respondents are intent on persisting with their disobedient conduct; and therefore it is imperative, for the maintenance of the rule of law and good order, that the authority and dignity of the Court be upheld by enforcing the plain and unqualified obligation of the defendants to obey the orders of the Court. Accordingly, the applicant prayed that the orders sought herein be granted.
 5. The respondents opposed the application vide the Grounds of Opposition dated 11th April 2023. They contended that:
 - (a) The instant application is incurably defective, incompetent and an abuse of the court process and should therefore be dismissed forthwith with costs to the respondents.
 - (b) The application is premised on Section 5 of the *Judicature Act* which was repealed by virtue of the *Contempt of Court Act*, Chapter 46 of 2016 being declared unconstitutional vide the ruling delivered on 9th November 2018 in Constitutional Petition No. 87 of 2017: Kenya Human Rights Commission v the Honourable Attorney General & Another.
 - (c) The application is fatally defective as the alleged contemnor is not named.
 - (d) The applicant has not effected personal service of the application dated 2nd November 2022 upon any alleged contemnor.
 - (e) The law of contempt of court in England requires an applicant to seek leave before instituting contempt proceedings.



- (f) Under Section 7 of the [Contempt of Court Act](#), no contempt of court proceedings shall be instituted without the consent of the Attorney General.
 - (g) The application has been brought in contravention of Section 21(4) of the [Government Proceedings Act](#).
 - (h) Committing a public officer to civil jail for a government debt is unfair and unconstitutional.
6. The application was canvassed by way of written submissions, pursuant to the directions given herein on 19th April 2023. Accordingly, the applicant relied on his written submissions dated 30th May 2022. He similarly proposed the following three issues for determination:
- (a) Whether there is a decretal sum of Kshs. 1,834,681.10 owed to the applicant.
 - (b) Whether the respondent has been in contempt of the orders issued by the Court on 2nd December 2014.
 - (c) Who should bear the costs of the application?
7. Counsel for the applicant made reference to Section 5 of the [Judicature Act](#) as being sufficient for purposes of the instant application; and therefore the respondent cannot claim that the application is incompetent on account of the fact that the [Contempt of Court Act](#) was declared unconstitutional. Reliance was also placed on Republic v Attorney General & Another, Ex Parte Mike Maina [2020] eKLR and Econet Wireless Kenya Ltd v Minister for Information & Communication of Kenya & Another [2020] eKLR, among other authorities, for the principle that court orders must be obeyed. Accordingly, the applicant urged the Court to allow the instant application and pointed out that it is now over 8 years since the orders were made.
8. The respondents, on their part, relied on their written submissions dated 7th July 2023. They challenged the Court's jurisdiction to punish for contempt because, firstly the [Contempt of Court Act](#) was declared unconstitutional in Kenya Human Rights Commission v the Attorney General (supra) and secondly, Section 5 of the [Judicature Act](#) was repealed. Thus, according to the respondents, the notion that upon the declaration of the [Contempt of Court Act](#) as unconstitutional Section 5 of the [Judicature Act](#) was revived is misleading. Reliance was, in this regard, placed on Independent Electoral and Boundaries Commission & 4 Others v Ndii & 312 Others, Ojwang & 4 Other (Amicus Curiae) (Petition E291 of 2021 & Civil Appeal E292, E293 & E294 (Consolidated) [2021] KECA 363 (KLR) (20 August 2021) (Judgment) and the Owners of Motor Vessel "Lillian S" v Caltex Oil (K) Ltd [1989] KLR 1 for the proposition that without jurisdiction the Court has no power to entertain the instant application.
9. The respondents conceded that, in the absence of the law on contempt in Kenya, recourse would be had to the common law of England. It was therefore their contention that the instant application is, to that extent, fatally defective. In particular, the respondents contended that the applicant ought to have sought for leave under Order 52 of the Supreme Court of England Practice Rules. The case of Republic v County Council of Nakuru, Ex Parte Edward Alera t/a Genesis Reliable Equipment & 2 Others [2011] eKLR was relied on in this regard.
10. The respondents also took issue with the fact that the alleged contemnor was not personally served with the contempt application. They submitted that since a finding of disobedience entails penal consequences, it is imperative that the alleged contemnor be personally served with an application for contempt. The respondents relied on Joseph Peter Gichoya Mbogo c/o Stephen Macharia Kimani Advocate v Patrick Dennis Ok'eefee & Another [2006] eKLR and Nyamodi Ochieng Nyamogo & Another v Kenya Posts & Telecommunication Corporation [1994] eKLR to buttress the argument.



11. Lastly, the respondents faulted the applicant for his failure to name the alleged contemnor. They submitted that orders are made and directed to a specified individual for purposes of enforcement; and that in the absence of a name against whom the contempt order will be issued, the application becomes fatally defective. The respondents relied on *David Kiptum Yaror & 2 Others v Attorney General & 4 Others* [2015] eKLR for the posturing that the stringent procedural requirements provided for under Order 52 of the Rules of the Supreme Court of England ought to have been complied with by the applicant.
12. It was further the submission of the respondent that punishing an individual public officer for non-payment of a public debt is not only unfair but is also unconstitutional. Thus, they urged for the dismissal of the instant application for the reasons aforementioned and for the reasons that leave was not sought beforehand and because the consent of the Attorney General was not obtained as required under Section 7 of the *Contempt of Court Act*.
13. I have given careful consideration to the application in the light of the Grounds of Opposition filed by the respondents as well as the written submissions filed by either side. There is no doubt that this is a longstanding matter. The applicant had initially sued the Ministry of Public Works at the time for general and special damages and obtained judgment in his favour on 8th March 2010 for Kshs. 120,000/= as general damages and special damages of Kshs. 1,500/=. By May 2012, the decree had not been paid; and therefore the applicant opted to file this suit for an order of Mandamus, upon being granted leave in that regard. His prayer was granted on 2nd December 2014. The debt has, nevertheless, remained unpaid to date; hence the applicant resorted to filing the instant contempt application.
14. There is no dispute, therefore, that the respondent is indebted to the applicant, there being no evidence that the predicate judgment and decree were reversed on appeal; or that the same was reviewed or set aside by the trial court. The amount has, no doubt grown with time; and therefore this is not the place or occasion to challenge the computation of the principal sum; granted that the order of Mandamus, dated 2nd December 2014 was issued in the sum of Kshs. 1,476,269.09 for enforcement against the Permanent Secretary in the Ministry of Roads. Accordingly, granted the issues raised by the respondents in their Grounds of Objection and submissions, the issues for consideration are:
 - (a) Whether the Court has jurisdiction to hear and determine the instant application;
 - (b) Whether leave was a requirement;
 - (c) Whether service was effected;
 - (d) Whether consent of the Attorney General was a prerequisite;
 - (e) Whether the applicant has made out a good case to warrant the issuance of the orders sought herein.

A. On the jurisdiction of the Court:

15. The application is expressed to have been brought under 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.



16. Accordingly, counsel for the respondent expressed the view that, Section 5 of the *Judicature Act* having been repealed by the *Contempt of Court Act*, No. 46 of 2016, the Court has no jurisdiction to entertain contempt proceedings, let alone punish the respondents for contempt of court. In the argument of counsel for the respondent, Section 5 of the *Judicature Act* ceased to exist and therefore cannot be the basis of the instant application.
17. It is indeed the case that the *Contempt of Court Act* was declared invalid on 9 November 2018 for lack of public participation pursuant to Articles 10 and 118(b) of *the Constitution* in Kenya Human Rights Commission v Attorney General & Another [2018] eKLR. To my mind, since Section 5 of the *Judicature Act* was repealed the *Contempt of Court Act*, the effect of the nullification of the latter Act has the effect of reviving the Section 5 of the *Judicature Act*. I am fortified in this stance by 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...”

18. 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.”

19. In arriving at my conclusion above, I have also taken into account the decision of the Court of Appeal that formed the basis of the respondent’s submissions on jurisdiction, namely Independent Electoral and Boundaries Commission & 4 Others v Ndiu & 312 Others in which it was held:

361. The effect of a court’s declaration of invalidity of a statute or a provision within it could only be gleaned from the declaration itself. The court could make the declaration retrospective from the date of the enactment of the offending provision or statute. The court could choose to limit the retrospective effect of such a declaration or even to suspend it to a future date. Where, however, a declaration by the court was silent as to when it was to take effect, the date of the declaration was deemed to be the date of effect.



362. Although the effect of the decision in *Katiba Institute & 3 others v Attorney General & 2 others* [2018] eKLR was to render paragraph 5 of the Second Schedule to the IEBC Act to be ineffective and a nullity, the decision did not revive the former provisions. The argument that the High Court relied on non-existing provisions of statute was therefore with some merit. (per Hon. Tuiyott, JA)
20. I however find the above excerpt to present a different nuance and therefore distinguishable from the facts of the instant case, in which the entire Act was declared invalid, including the provision that repealed Section 5 of the *Judicature Act*. The effect, to my mind was a return to the situation as it was prior to the enactment of the *Contempt of Court Act*. In any event, as pointed out herein above, even without Section 5, the Court would still have recourse to Section 3 of the *Judicature Act* and invoke the English common law as well as the inherent jurisdiction of the Court. Indeed, *Samuel M. N. Mweru & Others v National Land Commission & 2 others* (supra) it was pointed out that:
- A court without contempt power is not a court.^[30] The contempt power (both in its civil and criminal form) is so innate in the concept of jurisdictional authority that a court that could not secure compliance with its own judgments and orders is a contradiction in terms, an “oxymoron.” Contempt power is something regarded as intrinsic to the notion of court; even obvious, I would say. In the common lawyer’s eye, the power of contempt “is inherent in courts, and automatically exists by its very nature.”
21. I therefore find no merit in the respondent’s contention that the Court lacks the requisite jurisdiction to entertain the instant application following the invalidation of the *Contempt of Court Act* and the repeal of Section 5 of the *Judicature Act*.

B. On the requirement for leave:

22. The second preliminary point raised by the respondents is that the application is incompetent because permission was not obtained prior to its institution as required by Order 52 Rules 1 and 2 of the Rules of the Supreme Court of England. They relied on *Republic v County Council of Nakuru, Ex Parte Edward Alera t/a Genesis Reliable Equipment & 2 Others* [2011] eKLR in which the procedure before and after seeking permission was reiterated. Needless to stated that the decision was that of the High Court; and that it has since been superceded by the decision of the Court of Appeal in *Christine Wangari Gachege v Elizabeth Wanjiru Evans & 11 others* [2014] eKLR, in which the view was propounded that:
- Today, in 2014, in considering the question raised in this application, those cases may not provide authority in terms of procedure in instituting an application for contempt. We must therefore ascertain the prevailing state of the law of contempt in England today. Following the implementation of the famous Lord Woolf’s “Access to Justice Report, 1996”, The Rules of the Supreme Court of England are gradually being replaced with the Civil Procedure Rule, 1999. Recently, on 1st October, 2012 the Civil Procedure (Amendment No. 2) Rules, 2012 came into force and PART 81 thereof effectively replaced Order 52 RSC in its entirety. PART 81 (Applications and Proceedings in Relation to Contempt of Court) provides different procedures for four different forms of violations.
- Rules 81.4 relates to committal for “breach of a judgment, order or undertaking to do or abstain from doing an act.”
- Rule 81.11- Committal for “interference with the due administration of justice” (applicable only in criminal proceedings).



Rule 81.16 – Committal for contempt “in the face of the court”, and Rule 81.17 - Committal for “making false statement of truth or disclosure statement.”

An application under Rule 81.4 (breach of judgment, order or undertaking) now referred to as “application notice” (as opposed to a notice of motion) is the relevant one for the application before us. It is made in the proceedings in which the judgment or order was made or the undertaking given. The application notice must set out fully the grounds on which the committal application is made and must identify separately and numerically, each alleged act of contempt and be supported by affidavit(s) containing all the evidence relied upon. The application notice and the affidavit or affidavits must be served personally on the respondent unless the court dispenses with service if it considers it just to do so, or the court authorizes an alternative method or place of service. It is clear from this summary that leave, now called “permission” is not required where committal proceedings relate to a breach of a judgment, order or undertaking. That position must be contrasted with the requirement in Rules 81.12 – committal “for interference with the due administration of justice” and 81.17 – Committal “for making a false statement of Truth or disclosure statement” where, in the former it is expressly provided that:- “The application for permission to make a committal application must be made by a part 8 claim form.....” And in the case of the latter, “A committal application in relation to a false statement of truth or disclosure statement in connection with proceedings in the High Court, a Divisional Court or the Court of Appeal, may be made only; a) with the permission of the Court dealing with the proceedings in which the false statement or disclosure statement was made.....” We find on the basis of the new Civil Procedure Rules (of England) which are now contained in the Second Supplement to the 2012 White Book that no leave is required before bringing an application, like the one before us, for committal for contempt relating to breach of this court’s order.”

23. I believe the foregoing to be the prevailing state of the law of contempt in England. (see for instance Samuel M. N. Mweru & Others v National Land Commission & 2 others, supra). I therefore find untenable the respondents’ argument that the instant application is incompetent for lack of leave.

C. On the issue of service:

24. The respondents also submitted that it was imperative that the contempt application be personally served on the alleged contemnors; and therefore, to the extent that this requirement was not complied with, the application is a non-starter. In this regard, they relied on two decisions pronounced in 1994 and 2006, namely Nyamodi Ochieng Nyamogo & Another v Kenya Posts & Telecommunications Corporation (supra) and Joseph Peter Gichoya Mbogo c/o Stephen Macharia Kimani Advocate v Patrick Dennis Ok’eeffee & Another (supra), respectively. In the first authority, it was held:

“Order 52 rule 3(3) of the Rules of the Supreme Court of England makes it mandatory that the Notice of Motion accompanied by a copy of the statement affidavit in support of the application for leave must be served personally on the person sought to be committed. Service was not proper. For all these reasons I am satisfied that contempt has not been proved against any of the defendants.”

25. Accordingly, the respondents submitted that since the applicant had not placed before the Court any proof of service of the Order of Mandamus upon the 2nd respondent, he is not entitled to the orders sought.
26. Rule 81.5 of the RSC of England sets out the manner of service of the application and provides that:



- (1) Unless the court directs otherwise in accordance with Part 6 and except as provided in paragraph (2), a contempt application and evidence in support must be served on the defendant personally.
 - (2) Where a legal representative for the defendant is on the record in the proceedings in which, or in connection with which, an alleged contempt is committed—
 - (a) the contempt application and evidence in support may be served on the representative for the defendant unless the representative objects in writing within seven days of receipt of the application and evidence in support;
 - (b) if the representative does not object in writing, they must at once provide to the defendant a copy of the contempt application and the evidence supporting it and take all reasonable steps to ensure the defendant understands them;
 - (c) if the representative objects in writing, the issue of service shall be referred to a judge of the court dealing with the contempt application; and the judge shall consider written representations from the parties and determine the issue on the papers, without (unless the judge directs otherwise) an oral hearing.”
27. A careful perusal of the file reveals that the instant application was duly served on the respondents and an Affidavit of Service to that effect filed herein on 16th November 2022, sworn by George Muchiri. The annexures to the application include the initial decree of the subordinate court dated 26th July 2011, the Order of Mandamus dated 2nd December 2014 as well as the Certificate of Order against the Government issued pursuant to Order 29 Rule 3 of the Civil Procedure Rules and Section 21 of the [Government Proceedings Act](#), among other documents. It is manifest therefore that the argument about service is utterly lacking in merit.
28. More importantly, the Court of Appeal was explicit in *Shimmers Plaza Limited v National Bank of Kenya Limited* [2015] eKLR that there has been a shift from the stringent requirement of personal service in favour of proof of knowledge of order, where applicable. Here is what the Court of Appeal had to say in this connection:
- “...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... Kenya’s growing jurisprudence right from the High Court has reiterated that knowledge of a court order suffices to prove service and dispense with personal service for purposes of contempt proceedings. For instance, Lenaola, J. in the case of *Basil Criticos vs Attorney General and 8 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.”
29. It is significant therefore that when the order was made, the respondents were represented by counsel. Hence, personal service is not a requirement in the circumstances of this case. Indeed, the Court of Appeal also pointed out, in the *Shimmers Plaza* case (*supra*), that:
- “...The notice of the order is satisfied if the person or his agent can be said to either have been present when the judgment or order was given or made; or was notified of its terms



by telephone, email or otherwise. In our view, 'otherwise' would mean any other action that can be proved to have facilitated the person having come into knowledge of the terms of the judgment and/or order. This would definitely include a situation where a person is represented in court by counsel. Once the applicant has proved notice, the respondent bears an evidential burden in relation to willfulness and mala fides disobedience...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."

30. It is therefore presumed that the respondents came into knowledge of the terms of the order on 2nd December 2014 when it was made in the presence of their counsel. Indeed, the record confirms that the application for an order of mandamus was unopposed. Thereafter, several notices to show cause have been taken out and duly served on the respondents to no avail. There is therefore credible proof that the respondent had notice of the order and its terms.

D. On whether consent of the Attorney General was necessary:

31. The respondents took the posturing that consent of the Attorney General was a prerequisite to the filing of the instant application. In this regard, reference was made to Section 7 of the *Contempt of Court Act*. That is clearly anomalous, granted that the *Contempt of Court Act* was invalidated as aforementioned. I therefore have no hesitation in disregarding that misconceived argument.

E. On the merits of the application for contempt:

32. Needless to say that court orders must be strictly obeyed. As was aptly stated by Romer LJ in *Hadkinson vs. 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)

33. Hence, it is now settled that in an application of this nature, an applicant must prove the following pre-requisites, namely:
- (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)



34. In the light of my findings hereinabove, it should be plain by now that the applicant has satisfied all the conditions aforementioned. He has demonstrated that he obtained a decree in Mombasa CMCC No. 5453 of 1999 as consolidated with Mombasa CMCC No. 5456 of 1999; and thereafter was granted an order of Mandamus in this suit on 2nd December 2014 for the enforcement of the decree. That order is yet to be obeyed by the respondents and no justification has been given for this state of affairs.
35. Accordingly, the expressions of the Court of Appeal in the Shimmers Plaza case are apt, namely, that:
- “... court orders must be obeyed. Parties against whom such orders are made cannot be allowed to trash them with impunity. Obedience of Court orders is not optional, rather, it is mandatory and a person does not choose whether to obey a court order or not. For as Theodore Roosevelt, the 26th President of the United States of America once said:
- "No man is above the law and no man is below it; nor do we ask any man's permission to obey it. Obedience to the law is demanded as of right; not as a favour."
36. It is therefore to no avail that the respondents now claim that it is unconstitutional to punish an individual on account of a debt owed by the state. The respondents are not here being compelled to pay the debt in their private capacity or from own personal funds. They are being called to account for disobedience of a lawful court order and for failure to discharge a duty they are bound to discharge by dint of Section 21 of the *Government Proceedings Act*. The provision states:
- (1) Where in any civil proceedings by or against the Government, or in proceedings in connection with any arbitration in which the Government is a party, any order (including an order for costs) is made by any court in favour of any person against the Government, or against a Government department, or against an officer of the Government as such, the proper officer of the court shall, on an application in that behalf made by or on behalf of that person at any time after the expiration of twenty-one days from the date of the order or, in case the order provides for the payment of costs and the costs require to be taxed, at any time after the costs have been taxed, whichever is the later, issue to that person a certificate in the prescribed form containing particulars of the order: Provided that, if the court so directs, a separate certificate shall be issued with respect to the costs (if any) ordered to be paid to the applicant.
 - (2) A copy of any certificate issued under this section may be served by the person in whose favour the order is made upon the Attorney-General.
 - (3) If the order provides for the payment of any money by way of damages or otherwise, or of any costs, the certificate shall state the amount so payable, and the Accounting Officer for the Government department concerned shall, subject as hereinafter provided, pay to the person entitled or to his advocate the amount appearing by the certificate to be due to him together with interest, if any, lawfully due thereon: Provided that the court by which any such order as aforesaid is made or any court to which an appeal against the order lies may direct that, pending an appeal or otherwise, payment of the whole of any amount so payable, or any part thereof, shall be suspended, and if the certificate has not been issued may order any such direction to be inserted therein.
 - (4) Save as aforesaid, no execution or attachment or process in the nature thereof shall be issued out of any such court for enforcing payment by the Government of any such money or costs as aforesaid, 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 money or costs.

37. In the result, I am satisfied that the applicant has proved to the requisite standard that the Principal Secretary, Ministry of Transport & Infrastructure, is in contempt of the court order issued herein on 2nd December 2014. Consequently, the Notice of Motion dated 2nd November 2022 is hereby allowed and orders granted as hereunder:

(a) That Notice to Show Cause be and is hereby issued to the Principal Secretary/Accounting Officer of the Ministry of Transport and Infrastructure to attend court for the purpose of showing cause why he should not be appropriately punished for refusing, neglecting and/or failing to comply with the order of this Court dated 2nd December 2014 for the payment of the sum Kshs. 1,834,681.10 to the applicant.

(b) That the costs of the contempt proceedings be borne by the respondents.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 24TH DAY OF JANUARY 2024

OLGA SEWE

JUDGE

