



**Republic v District Commissioner Kisii Central District & another;  
Omariba (Exparte Applicant) (Judicial Review Miscellaneous Application  
1 of 2005) [2024] KEHC 1373 (KLR) (14 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 1373 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISII  
JUDICIAL REVIEW MISCELLANEOUS APPLICATION 1 OF 2005  
TA ODERA, J  
FEBRUARY 14, 2024**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**DISTRICT COMMISSIONER KISII CENTRAL DISTRICT .. 1<sup>ST</sup> RESPONDENT  
TOM MONARI ONCHWANGI ..... 2<sup>ND</sup> RESPONDENT**

**AND**

**CLEOPHAS OTIENO OMARIBA ..... EXPARTE APPLICANT**

**RULING**

1. By a Notice of Motion dated 3.5.2021, the Ex-Parte Applicant, through the firm of Bosire Gichana & Co. Advocates, sought the following orders:
  1. That this Honourable Court do find the Respondents guilty of disobedience of this court’s order given on 5<sup>th</sup> May, 2006.
  2. That the Principal Secretary, Ministry of Interior and Coordination of National Government be committed to civil jail for a term not exceeding 6 months for contempt of court or having deliberately disobeyed orders of this Honourable court given on 14<sup>th</sup> day of March, 2006. Certificate of Order against Government issued on 15<sup>th</sup> November, 2006, and having failed to show cause why contempt proceedings should not be commenced.
  3. That costs of this Application be provided for.
  4. Any other or further orders of the court geared towards protecting the dignity and authority of the court.



2. The grounds on the face of the Application are that on 14.3.2006, the Court ordered the Respondents to pay the costs of the Application. The costs were taxed at KShs.697,720/= whilst interest stood at KShs.2,065,531/= as at 2.2.2021. The Respondents had actual personal knowledge of the order as they were served with the notice to show cause and contempt proceedings. The Principal Secretary, Ministry of Interior and Coordination of National Government had failed to satisfy the claim hence the instant proceedings for the recovery of KShs.2,065,531/=.
3. The Ex-Parte Applicant swore an affidavit on 3.5.2021 in support of the application. He deponed that a Court order was issued on 14.3.2006 ordering the Respondents to pay the costs of the application. The costs were taxed at KShs.697,720/= on 18.11.2006. A certificate of order for costs against the Government was issued on 15.11.2006 and served upon the Attorney General and the Respondent. He appealed against the said decision which appeal was subsequently dismissed. A Notice to Show Cause was served upon the Principal Secretary, Ministry of Interior and Coordination of National Government and the Attorney General. However, the Principal Secretary failed to attend court. He also deponed that the Principal Secretary, as the accounting officer, had actual personal knowledge of the order dated 5.5.2006. He deponed that the Respondents' conduct was meant to disparage the dignity and/or integrity of the court.
4. Mr. George Ndiritu, State Counsel (at the time appearing for the 1<sup>st</sup> Respondent), swore a Replying Affidavit on 14.4.2023. He deponed that the Ex-Parte Applicant had failed to demonstrate how the Principal Secretary had deliberately disobeyed the Court Order issued on 5.5.2006. He further deponed that there was no proof that the Court Order and Certificate of Costs dated 15.11.2006 were ever served upon the 2<sup>nd</sup> Respondent. He deponed that the Court Order was ambiguous as to who would bear the costs of the Application, i.e. the 1<sup>st</sup> or the 2<sup>nd</sup> Respondent. He added that the Court did not award the Ex-Parte Applicant interest on the costs and the claim had no legal basis. He deponed that the 1<sup>st</sup> Respondent was a National Government Administrative Officer appointed as such pursuant to Section 15 of the *National Government Co-ordination Act*, 2013. Civil proceedings against Government are governed by the *Government Proceedings Act*, Cap. 40 of the Laws of Kenya and Order 29 Rule 3 of the Civil Procedure Rules, 2010 set out the procedure for executing against the Government. In response to Paragraphs 8, 9 and 10 of the Ex-Parte Applicant's Supporting Affidavit, he said the Principal Secretary Ministry of Interior and Co-ordination of National Government was not served with the Court Order, Certificate of Costs, a Notice To Show Cause or the Certificate of Order against the Government. Therefore, there was no disobedience of the Court Order. He deponed that the proceedings were bad in law, statute time-barred and an abuse of the court process.
5. The 1<sup>st</sup> Respondent filed a Further Affidavit sworn on 8.11.2023 by Mr. George Ndiritu, State Counsel. He deponed that the Ministry of Interior and Co-ordination of National Government made the payment of KShs.697,720/= to the firm of Bosire & Gichana Co. Advocates vide electronic funds transfer. A receipt of the said transfer dated 26.5.2022 was attached as annexure GN-5. He deponed that the claim for interest on costs was misplaced as there was no order for the same. The Ex-Parte Applicant voluntarily executed the Discharge Voucher thus accepting the payment as full and final settlement of all claims against the Government in relation to the matter. There was therefore no outstanding amount due and owing from the 1<sup>st</sup> Respondent arising from the Court Order issued on 5.5.2006.

### **Determination**

6. I have considered the Application and the responses thereto.
7. This Court delivered a Ruling on this matter on 14.3.2006.



8. The Bill of Costs was taxed and a Certificate of Costs dated 15.11.2006 was issued. According to that Certificate of Costs, the Deputy Registrar assessed costs at KShs.697,720/=.
9. A Certificate of Order for Costs against Government dated 15.11.2006 was also issued. The same indicates that costs had been assessed at KShs.697,720/= and interest was payable on the said costs from 8 11.2006 until the date of payment.
10. Subsequently, there was considerable action by the Ex-Parte Applicant to recover these costs which would appear to have only borne fruit in the year 2022 as per the electronic funds transfer receipt produced by the 1<sup>st</sup> Respondent.
11. I note that the Ex-Parte Applicant's Counsel requested for time to file a Supplementary Affidavit. There is none on record. This Court subsequently issued directions that parties file submissions in the matter but none has done so.
12. The sum of KShs.697,720/= was paid on or around 16.5.2022. The 1<sup>st</sup> Respondent has produced proof of the same. The Ex-Parte Applicant did not deny receipt of the said sum of money. It would thus appear that the said monies were indeed paid to the Ex-Parte Applicant through his Advocates on record, Bosire Gichana & Co. Advocates.
13. The question that is left for this court to determine is whether indeed that was all that the Respondents were required to pay to the Ex-Parte Applicant as per the Ruling.
14. To my mind, the Ruling of this Court was clear. I will reproduce the last portion which is the bone of contention in this matter:

“The applicant will have costs of the application.”

15. Only costs were awarded. It would appear that at the point of extracting the Certificate of Order for Costs against Government is where things took a dive.
16. Order 21 Rule 7 of the Civil Procedure Rules, 2010 provides as follows:
  7. Contents of decree
    - (1) The decree shall agree with the judgment, it shall contain the number of the suit, the names and descriptions of the parties, and particulars of the claim, and shall specify clearly the relief granted or other determination of the suit.
17. Order 8 of the Civil Procedure Rules, 2010 provides for the procedure of preparation and dating of decrees and orders. It provides for when parties may initiate it and where the court may initiate it. However, the common denominator is that the decree must agree with the judgment, the same way an order must be consistent with the ruling.
18. The award of interest is discretionary. It is not a matter of right.
19. Section 27 of the *Civil Procedure Act* provides as follows:
  27. Costs
    - (1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that



the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers:

Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.

- (2) The court of judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.
20. The word used in Section 27[2] of the *Civil Procedure Act* is “may” which has been defined in legal parlance as indicating permissiveness, not mandatoriness. This would mean, therefore, where interest is not awarded, as in the case herein, it is deemed denied.
21. The discretionary nature of the award of interest was further discussed by the Court of Appeal in the case of *Otieno, Ragot & Company Advocates v Kenya Airports Authority* [2021] eKLR. In his concurring decision, W. Ouko (P) J., cited the decision of Onguto, J. in the case of *Mercy Nduta Mwangi t/a Mwangi Keng’ara & Company Advocates vs. Invesco Assurance Company Limited* [2017] eKLR where the Court held thus:
24. The court’s discretion to award interest extends, in my view, to reducing the period for which interest is payable on any award. The discretion also extends to altering the rate at which interest is payable on any award. And, the court may exercise both. Ordinarily, the conduct of the parties to the litigation will be a relevant factor to be considered by the court and where there has been delay in litigating, the question will be whether it was caused by the party claiming interest or the party liable to pay it. Even, where the law, including regulations, provide for payment of interest, the court may actually withhold awarding the same if justice requires that it be withheld.
22. Some courts have even gone ahead to hold that an award of interest is not the norm. I am persuaded by the case of *Jane Wanjiku Wambu v Anthony Kigamba Hato & 3 Others* [2018] eKLR, where Ngugi, J (as he then was) held:
38. Hence, like interest on damages, the Trial Court has a wide latitude to award interest on costs. However, there is no rule of thumb that a successful litigant who has been awarded costs must get interest on those costs. Indeed, the decision principle in our jurisdiction seems to run in the opposite direction; it is not normal to award interest on costs. This was the holding in *Hasanali v City Motor Accessories Ltd. & Others* [1972] EA 423
23. There was no basis, therefore, for the Deputy Registrar to include interest. In addition, Form 23 Appendix A of the Civil Procedure Rules, 2010 indicates that the clause on interest may be omitted where necessary which is indicative of the fact that interest may be awarded or not.
24. I hereby find and hold that the Certificate of Order for Costs against Government issued on 15.11.2006 was inconsistent with this Court’s Ruling. Pursuant to Section 3 and 3A of the *Civil Procedure Act*, I hereby direct the Deputy Registrar to amend the same to reflect the true position in this Court’s Ruling delivered on 14.3.2006.
25. With regard to the prayer for committal to civil jail, I am minded that contempt of court should be used cautiously and with great restraint. I am guided by the decision of the Court of Appeal in *Justus Kariuki Mate & Another v Martin Nyaga Wambora & Another* [Civil Application No. Nyeri 8 of



2011] (UR) [2014] eKLR, as cited in the case of Double Clean Limited & 4 Others v Jambo Holdings Ltd. & 2 Others [2016] eKLR where the Court stated, inter alia:

“9. The power of the guarding and protecting the authority and dignity of court orders although jealously guarded is also balanced with the prospect of an applicant being subjected to a punishment that may entail loss of his or her liberty. Thus courts always allow the applicant an opportunity to state his or her case.”

26. I am persuaded by the decision in the case of Directline Assurance Co. Ltd. v Jamii Bora Bank Ltd. & 5 Others (2015) eKLR where the Court held thus:

“13. Now to the second issue, what is the role of contempt proceedings in civil litigation? To my mind contempt proceedings are quasi-criminal in nature, and is a tool employed by a civil court to ensure obedience to the civil court’s orders and directions. A civil court has no interest in punishing a litigant, unless a litigant leaves the court with no option but to resort to quasi-criminal proceedings to punish a litigant. When a court orders (sic) are being disobeyed, or are about to be disobeyed, and the contemnor comes down and purges the contempt unless circumstances exist to suggest that the coming down, or the alleged purging of the contempt, is not genuine, or is done in bad faith, or is in itself a continuation of the original contempt. In accepting the coming down of the contemnor, the court will assess the reasons given for the disobedience, the time taken to come down, and the cost incurred in the process.”

27. I am in agreement with the said finding. Where the contempt is purged, unless other factors arise, there really would be no need to hold a party in contempt.

28. This Court accepts the contemnor’s purge.

29. I would like to address the issue raised by the 1<sup>st</sup> Respondent that the Certificate of Order of Costs against the Government issued on 15.11.2006 was ambiguous as it did not indicate who would bear the costs. The same is a non-issue in view of the payment made.

30. That said, it is trite law that where a party finds challenges in complying with a Court Order, it behooves the said party to go back to Court for clarification. It is not open for the said party to choose comply or otherwise. See Paragraph 28 of Crown Paints (Kenya) Limited v Dry Associates Limited (Civil Appeal 181 of 2019) [2023] KECA 1383 (KLR) (24 November 2023) (Judgment)

31. This is fortified by the principle that Court orders must be obeyed even where one is deemed irregular. If the regularity of the said Court Order comes into question, that party must immediately move the Court to take the necessary steps to regularize the situation. The Court of Appeal in the case of Mukuha v Gashwe & 14 Others (Civil Application E064 of 2023) [2023] KECA 1482 (KLR) (8 December 2023) (Ruling) in Paragraph 25 held thus:

25. ....It is trite that every person and institution is duty bound to obey the law, in order to enhance the rule of law, good order and due administration of justice. In *Hadkinson v Hadkinson* [1952] ALL ER 567, the court held that:

....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. Lord Cottenham, L.C., said in *Chuck-vs-Cremer* (1) (1 Coop. temp.Cott 342):

“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 exists it must not be disobeyed.”

32. The order for payments of costs as declared, meant that the Ex-Parte Applicant was at liberty to execute against the Respondents jointly or severally. Nonetheless, the sums have been paid and the same is a non-issue at this juncture.

33. In the end, the Application dated 3.5.2021 is dismissed.

**DATED, DELIVERED AND SIGNED AT KISII THIS 14<sup>TH</sup> DAY OF FEBRUARY 2024.**

**TERESA ODERA**

**JUDGE**

**In the presence of:**

Miss. Bosire for the Ex-Parte Applicant

Miss Osebe for the 1<sup>st</sup> & 2<sup>nd</sup> Respondents

Rose Kiinya -Court Assistant

