



Republic v Wajir County Government & 2 others; Jibril Noor t/a Bashir & Noor Advocates & another (Exparte Applicants) (Judicial Review Application E001 of 2021) [2024] KEHC 1184 (KLR) (8 February 2024) (Ruling)

Neutral citation: [2024] KEHC 1184 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARISSA
JUDICIAL REVIEW APPLICATION E001 OF 2021
JN ONYIEGO, J
FEBRUARY 8, 2024**

BETWEEN

REPUBLIC APPLICANT

AND

**WAJIR COUNTY GOVERNMENT 1ST RESPONDENT
COUNTY SECRETARY WAJIR COUNTY 2ND RESPONDENT
COUNTY EXECUTIVE COMMITTEE MEMBER, FINANCE 3RD
RESPONDENT**

AND

**JIBRIL NOOR T/A BASHIR & NOOR ADVOCATES EXPARTE APPLICANT
YUSUF BASHIR T/A BASHIR & NOOR ADVOCATES .. EXPARTE APPLICANT**

RULING

1. Vide Wajir PMs court civil suit no 2 of 2020, Hon. Mugendi entered judgment against the respondents in favour of Exparte applicants on 7th August 2020. The order directed the respondents to Pay khs9,096,515 to the exparte applicants being a debt arising from legal services rendered by the exparte applicants to the respondents. Subsequently, the applicants extracted a decree and certificate of costs dated 18th September 2020 which they served on 20th September. Pursuant to the [Government proceedings Act](#), they served the certificate of order against Government on 12th March 2021.
2. Having defaulted in honouring the claim, the exparte applicants moved this court vide a notice of motion dated 1st July 2021 seeking mandamus order directing the respondents to honour the claim. On 10th February 2022, Hon. Justice Aroni entered judgment granting the order directing payment of the outstanding amount together with interest.



3. Defiant of the order, the ex parte applicants filed the application dated 23rd May 2022 seeking to commit the 2nd and 3rd respondents to civil jail for contempt of court. In response, the respondents filed the application dated 26th April 2023 seeking to stay and or set aside the application of 23rd May 2022.
4. Before me therefore for determination are two but interrelated and consolidated applications dated 26.04.2023 and 23.05.2022 filed by the respondents through the firm of Gedi & Associates Advocates and the Ex parte applicants filed through the firm of Chege, Kamau & Co Advocates respectively.
5. The application dated 26.04.2023 sought for orders that:
 - i. Spent.
 - ii. Pending the hearing and determination of this application inter partes, this Honourable Court be pleased to issue an order stopping, staying and /or setting aside the application to commit the 2nd and 3rd respondents to civil jail and instead give the respondents/applicants a chance to be heard.
 - iii. Costs of this application be provided for.
 - iv. This Honourable Court be pleased to issue further or better orders as shall meet the ends of justice.
6. The application is premised on the grounds on the face of the application and the annexed affidavit of Naema Ibrahim sworn on 26.04.2023 wherein it was deponed that the subject matter Kes. 9,096,515 amounts sought arose from the works done during the tenure of the former County Government of Wajir under the leadership of H.E Amb. Mohamed Abdi Mohamud and Mr. Ahmed Ali Muktar. That the current governor had no communication on the said matter as it was not only served upon the previous governor but also via WhatsApp on the personal numbers of the 2nd and 3rd respondents.
7. That the current government is on a mission to audit and authenticate all bills that were inherited from the previous administration as it prepares to make the payments and as such, it would be prudent that the orders sought herein be granted. Additionally, it was urged that the 47 county Governments had not received disbursements from the National Government for their operations and so satisfying the said decree would be an uphill task. That the parties herein stood to suffer no prejudice should this court grant the orders as prayed.
8. The ex parte applicants, via a replying affidavit sworn on 03.07.2023 in opposing the application stated that the application not only lacks a legal basis but also intends to delay the process of realizing their dues. That the application is a clear admission of inability to pay citing budgetary constraints and not a denial of liability. They argued that seeking stay/setting aside of orders not yet granted is tantamount to applying short cut on the court's process to the detriment of the decree holder.
9. He reiterated that contrary to the respondents' averments, all the four contracts were entered into between the years 2015 and 2017, for the provision of legal services to the 1st respondent. That the said services were offered during the tenure of the current governor, H.E Amb. Ahmed Abdullahi. He argued that the applicants are not only aware of the court's decree and judgment but have also been served with the said decree and judgment and are yet to comply. That the only recourse left for the ex parte applicant/respondent is the commission of the respondents to civil jail to ensure compliance. It was urged that payment of decretal obligations is not subject to issue of budgetary allocation and parliamentary approval of government expenditure in the financial year subsequent to which government liabilities accrue.



10. That in the interest of justice, this Honourable Court ought to dismiss the application herein with costs and thereafter commit the respondents/ contemnors to civil jail.
11. The court directed that the application be canvassed by way of written submissions and only the respondent complied with the said order.
12. The ex parte applicants in opposing the application submitted that the respondents were aware of the orders as the same have been in existence and their terms clear and unambiguous. It was urged that the court orders have not been appealed nor reviewed and as such, continue to be validly in existence hence binding. That the respondents have been represented by counsel in all the stages of this suit including the date of delivery of judgment on 10.02.2022.
13. That besides the presence in court and knowledge on the part of the respondents' counsel, the ex parte applicants served all the respondents thrice with the court order and judgment in this matter. They contended that the averment of inability to satisfy the decree is not tenable. Reliance to support the same was placed on the case of Republic v County Chief Officer, finance & Economic Planning, Nairobi City County (ex parte David Mugo Mwangi) [2018] eKLR where it was held that lack of funds is an insufficient justification for non-compliance with a court decree. This court was therefore urged to dismiss the application herein.
14. This court has considered the application herein together with the replying affidavit and submissions made by the ex parte applicants.
15. The respondents did not deny that there was a decree that is yet to be satisfied. The only issue they are raising is that the stated amount sought was for works done during the tenure of the former County Government of Wajir under the leadership of H.E Amb. Mohamed Abdi Mohamud and Mr. Ahmed Ali Muktar. That the current governor had no communication on the said matter as it was not only served upon the previous governor but also the same was served via WhatsApp on the personal numbers of the 2nd and 3rd respondents. There is no doubt that the 2nd and 3rd respondents are the accounting officers of the 1st respondent.
16. In the case of Council of Governors & Others v The Senate Petition No. 413 of 2014 [2015] eKLR, the Court expressed itself as follows:

“The Petitioners have also sought the interpretation of the term “Accounting Officer”. In that regard, Article 226 of *the Constitution* provides;

- (1) Act of Parliament shall provide for -
 - (a)
 - (b) The designation of an accounting officer in every public entity at the national and county level of government
- (2) The accounting officer of a national public entity is accountable to the national assembly for its financial management, and the accounting officer of a county public entity is accountable to the county assembly for its financial management.

Pursuant to this provision, Parliament enacted the *Public Finance Management Act*. Thus the appointment and designation of a County Government Accounting Officer as provided for under Section 148 of that Act is as follows:



- i. A County Executive Committee member for finance shall, except as otherwise provided by law, in writing designate accounting officers to be responsible for managing the finances of the county government entities as is specified in the designation.
 - ii. Except as otherwise stated in other legislation, the person responsible for the administration of a county government entity, shall be the accounting officer responsible for managing the finances of that entity.
17. It therefore follows that “an accounting officer” for a County Government entity is the person so appointed and designated as such by the County Executive Committee Member for Finance under Section 148 of the *Public Finance Management Act*.
18. Therefore, the person who has the overall financial obligation for the purposes of the affairs of a County Government must be the County Executive in Charge of Finance and unless he shows otherwise, he is the one under obligation to pay funds, in the capacity as the accounting officer.
19. It is trite that at the end of the day, the entity which is bound to settle the decree is the County Government of Wajir and not the said officers in their personal capacity. [See Council of Governors & Others v The Senate Petition[supra].
20. As regards the existence of the competing interests and the fact that the 47 county Governments had not received disbursements from the National Government for their operations, Githua, J in Republic v Permanent Secretary, Ministry of State for Provincial Administration and Internal Security Exparte Fredrick Manoah Egunza [2012] eKLR expressed herself that the orders by the court are not conditional to payment in regards to budgetary allocation and parliamentary approval of Government expenditure in the financial year subsequent to which Government liability accrues.”
21. I associate myself with the said decision and it is therefore my view that settlement of decretal sum by the Government whether National or County does not necessarily depend on the availability of funds.
22. In the case of Republic v County Chief Officer, Finance & Economic Planning, Nairobi City County (Ex Parte David Mugo Mwangi) [2018] eKLR, Odunga J was of the view that:

“...a party facing financial constraints is at liberty to move the Court for appropriate orders which would enable it to settle its obligations while staying afloat. That however, is not a reason for one to evade its responsibility to settle such obligations. In other words, financial difficulty is only a consideration when it comes to determining the mode of settlement of a decree but is not a basis for declining to compel the Respondent to settle a sum decreed by the Court to be due from it. That objection therefore fails.
23. 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 honourable 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.
24. In Central Bank of Kenya & Another v 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.



25. It is against the reasons noted above that I find that the application herein is devoid of any merit. The orders sought are premature and anticipatory and seeking to stay or set aside what has not been granted yet. Accordingly, the application is dismissed for lack of merit.
26. I will now turn to the application dated 23.05.2022 seeking for orders as follows:
- i. That notice do issue to the 2nd and 3rd respondents to show cause why they should not be committed to civil jail for disobedience of this court's decree issued on 21.02.2022 by Hon. Lady Justice Ali Aroni.
 - ii. That the 2nd and 3rd respondents be committed to civil jail and detained for such period as this Honourable Court deems fit for contempt of this court's decree issued on 21.02.2022 by Hon. Lady Justice Ali Aroni.
 - iii. That costs of this application be granted.
27. The application is premised on the grounds set out on the face of it and the annexed affidavit of Jibril Noor. The core grounds are that the court having issued an order of mandamus compelling the first Respondent either by itself or through the 2nd and 3rd Respondent to pay the ex parte applicants Kes. 9,096,515/- and the same having been disobeyed contempt orders should follow.
28. The ex parte applicants aver that the respondents are aware of the decree arising from the subject judgement and that they have deliberately ignored, willfully declined and/or refused to comply. It was contended that despite the demand and service of the decree and certificate of order against the Government, the Respondents have refused to settle the amounts claimed thus undermining the integrity and authority of the court.
29. The respondents filed a replying affidavit sworn on 07.06.2023 reiterating the content contained in the affidavit in support of the application already dismissed herein above. It was deposed that; the amounts sought are for services that were rendered during the tenure of the former County Government of Wajir; the decree was served to the respective individuals holding the respective positions at that very time as the same was done via WhatsApp; the 1st respondent was in a mission to audit and authenticate all bills that were inherited from the previous administration as it prepared to make the payments.
30. Additionally, it was urged that the 47 County Governments had not received disbursements from the National Government for their operations and so satisfying the said decree was an uphill task.
31. The court directed that the application be canvassed by way of written submissions and both parties complied with the said order.
32. The ex parte applicants submitted that the test of establishing whether there was a contempt on the court orders was well restated by Mativo J in Samuel M.N. & others v National Land Commission & 2 Others [200] eKLR where the court held that it is established principle of law that in order to succeed in civil contempt proceedings, the applicant has to prove: the terms of the orders, knowledge of these terms by the respondents and failure by the respondent to comply with the terms of the order.
33. On the issue whether there existed a court order whose terms were clear, unambiguous and binding on the respondents, the ex parte applicants submitted that on 10.02.2022, Aroni J. (as she was then) delivered the judgment in favour of the ex parte applicants. That the said order which was not ambiguous has not been appealed or set aside and as such, continue to validly exist.
34. On whether the respondents had knowledge of or proper notice of the terms of the order, it was submitted that the respondents were represented by a counsel even on the day that Aroni J. delivered



her ruling. That besides the presence and knowledge on the part of the respondents' counsel, the ex parte applicants served all the respondents thrice with the said order and the judgment to wit; on 24.02.2022, through their counsel; on 04.04.2023, the same were served physically in their offices and via WhatsApp on 20.04.2022. Reliance to support the position that service was proper as the same could be effected on the respondents through their agents was placed on the case of Agencies Ltd v Attorney General Nairobi HCCC No. 1459 of 1999 where the court stated as follows:

“the Government acts through its human agents. The human agents are its tools. The scope of the authority and powers of the government servant and agent is set by the government...”

35. On whether the respondents acted in breach of the terms of the order, it was submitted while adopting the finding of Lenaola J. (as he was then) in the case of Basil Criticos v attorney General & 8 Others [2012] eKLR, that a respondent who had been informed of a court order through counsel or service but fails to comply, acts in breach. It was argued that it has been 18 months since the court issued the said judgment yet the respondents have not complied despite service and having knowledge.
36. The respondent in their submissions stated that contempt of court is in the nature of criminal proceedings and therefore, proof of a case against a contemnor is higher than that of balance of probability. That the same is so because liberty of the subject is usually at stake and the applicant must prove willful and deliberate disobedience of the court order if he were to succeed. To that end, reliance was placed on the case of Gatharia K. Mutikika v Baharini Farm Limited [1985] KLR where the court stated that:

“A contempt of court is an offence of a criminal character...however, the guilt has to be proved with such strictness of proof as is consistent with the gravity of the charge...”
37. On a balance of probability, the respondents submitted that the ex parte applicants did not prove that the orders prayed are deserving since their main agenda is simply to settle a vendetta. The respondents relied on the case of Mbugua v Mbugua [1992] KLR 448 where Kuloba J. stated that, committal to civil jail should not be used for ulterior motive or be vindictive.
38. In the end, the respondents urged that they should not be found in contempt of the court order as the ex parte applicants did not demonstrate that they willfully and deliberately disobeyed the court order.

Determination

39. I have considered the application by the ex parte applicants and the response thereof. There is no dispute that there is a decree in place arising from the lower court's decision and the judgment of the high court issuing a mandamus order.
40. From the onset, the respondents argued that the amount sought was for services that were rendered during the tenure of the former county government of Wajir. That the decree was served to the respective individuals holding the respective positions at that very time as the same was done via WhatsApp. And that they were facing budgetary constraints.
41. The above notwithstanding, it is of importance to note that Section 33 of the Sixth Schedule to *the Constitution* provides that an office or institution established under *the constitution* of Kenya, 2010 is a legal successor of the corresponding office.



42. To buttress this view, the court in *J.A.S Kumenda & Another v clerk Municipal Council of Kisii & 6 Others*, ELC at Kisii, Judicial Review Application No. 3 of 2013 [2013] eKLR observed that:

“...Pursuant to the provisions of the said section 33 of the 6th Schedule to *the constitution* of Kenya 2010, County Government are therefore the natural and presumptive legal successors of the defunct local authorities.

43. From the above, it is my considered view that even if the order herein was served upon the then respective office holders, it follows that the obligation remains on the office and not on a person in an individual capacity. It is my considered view that the 2nd and the 3rd respondents herein are rightly enjoined and therefore should honour the orders previously issued by this Honourable Court.

44. The *Contempt of Court Act* is, however, no longer operational as from the date of the judgment declaring it unconstitutional in *Kenya Human Rights Commission v Attorney General & Another* [2018] eKLR. I am therefore obliged to revert to the provisions of the law that operated before the enactment of the *Contempt of Court Act* to avoid a lacuna in the enforcement of Court orders. It was in this respect observed in *Republic v Returning Officer of Kamkunji Constituency & The Electoral Commission of Kenya HCMCA No. 13 of 2008*, that the High Court has the responsibility for the maintenance of the rule of law, hence there cannot be a gap in the application of the rule of law.

45. The Court of Appeal in *Christine Wangari Gachege v Elizabeth Wanjiru Evans & 11 Others*, [2014] eKLR found that the English law on committal for contempt of court under Rule 81.4 of the English Civil Procedure Rules, which deals with breach of judgment, order or undertakings, was applied by virtue of Section 5(1) of the *Judicature Act* which provides that:

“The High Court and the Court of Appeal shall have the same power to punish for contempt of court as is for the time being possessed by the High Court of Justice in England, and that power shall extend to upholding the authority and dignity of subordinate courts.”

46. In *Katsuri Limited v Kapurchand Depor Shah* [2016] eKLR, citing *Kristen Carla Burchell v Barry Grant Burchell* (Eastern Cape Division Case No. 364 of 2005) it was stated that “in order for an applicant to succeed in civil contempt proceedings, the applicant has to prove -

- i. The terms of the order,
- ii. Knowledge of these terms by the Respondent,
- iii. Failure by the Respondent to comply with the terms of the order.

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

48. In this case, the court orders were outright and unambiguous. It cannot be said that the same could not be understood or be interpreted to make out what was desired to happen. Therefore, it is imperative to determine whether the respondents were aware of the material order, ordering them to pay the amount in question; and secondly, whether they acted in disobedience of the order without justifiable cause.

49. It is trite that unless the court dispenses with service, a judgment or order may not be enforced by way of an order for contempt unless a copy of it has been served on the person required to do or not do the act in question. Rule 81.6 of the English Civil Procedure Rules specifically provides that the method of service shall be personal service, which is effected by leaving the order with the person to be served.



50. It is also the position, and it has been held in several judicial decisions that if personal awareness of the court orders by the alleged contemnors is demonstrated, they will be found culpable of contempt even though they had not been personally served with the orders and penal notice. [See Court of Appeal decision in *Shimmers Plaza Limited v National Bank of Kenya Limited* [2015] eKLR] where it was held that: –

“Would the knowledge of the judgment or order by the advocate of the alleged contemnor suffice for contempt proceedings” We hold the view that it does. This is more so in a case such 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/her to report back to the client all that transpired in court that has a bearing on the client’s case.”

51. In the same breadth, in *Basil Criticos v Attorney General and 8 Others* [supra] Lenaola J. (as he then was) 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.”

52. In the instant case, the amount sought was for services that were rendered during the tenure of the former county government of Wajir. That the decree was served to the respective individuals holding the respective positions at that very time as the same was done via WhatsApp. The ex parte applicants on the other hand opposed the same by stating that on 24.02.2022, the ex parte applicants’ counsel served the 1st respondent through his email while the 2nd and 3rd respondents were served through their counsel’s WhatsApp numbers.

53. Apparently, the respondents did not deny knowledge of the said debt. In fact, the respondent stated that the amounts sought are for works done during the tenure of the former County Government of Wajir under the leadership of H.E Amb. Mohamed Abdi Mohamud and Mr. Ahmed Ali Muktar. With this evidence in place, I am satisfied that service was made upon the respondents and further that they were in the know of the court orders.

54. It is now established that the mental element for liability for contempt arising out of disobedience of a court order is simply that the disobeying party either intended to disobey or made no reasonable attempt to comply with the order. [See in this respect the English House of Lords decision in *Heaton’s Transport (St Helens) Ltd v Transport and General Workers Union* (1973) AC 15].

55. Similarly, the court in the case of *Canadian Metal Co. Ltd v Canadian Broadcasting Corp* (No.2) 48 D.L.R. (30), stated that:

“To allow court orders to be disobeyed would be to tread the road to anarchy. If orders of the court can be treated with disrespect, the whole administration of justice is brought into scorn....if the remedies that the courts grant to correct....wrongs can be ignored, then there will be nothing left for each person but to take the law into his own hands. Loss of respect for the courts will quickly result into the destruction of our society.”

56. As already mentioned elsewhere in this ruling, there is an assumption which is not unfounded, and which 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. To that extent knowledge of service of the order is not disputed.

57. In the case of *Republic v County Secretary Nairobi County & 3 Others: Koceyo & Co & Company Advocates (Ex parte)* [2020] eKLR, the court held that it is the obligation of Government in conjunction with the treasury to ensure that all funds are allocated towards the settlement of liabilities owed by the government.

“The respondents submitted that the County Government requires a vote to pay which can only be raised if an amount is budgeted for. That if they are condemned to pay the amount forthwith, they shall be committing a crime contrary to section 196 and 197 of the *Public Finance Management Act* of Kenya. It is their case that for the ex parte applicant to be paid the decretal amount, then the same ought to be budgeted for since the respondents would be going against the provisions of the said Act. I need to underscore the point that settlement of decretal sum by the County Government does not necessarily depend on the availability of funds; the defence of non-allocation of funds by the County Assembly as raised by the respondents was equably dealt with in a case where Githua J. in *Republic v Permanent Secretary, Ministry of state for Provincial Administration and Internal Security Exparte Fredrick Manoah Egunza* [2012] eKLR stated that:

“In ordinary circumstances, once a judgment has been entered in a civil suit in favour of one party against another and a decree is subsequently issued, the successful litigant is entitled to execute for the decretal amount even on the following day. When the Government is sued in a civil action through its legal representative by a citizen, it becomes a party just like any other party defending a civil suit. Similarly, when a judgment has been entered against the government and a monetary decree is issued against it, it does not enjoy any special privileges with regards to its liability to pay except when it comes to the mode of execution of the decree...Once the certificate of order against the Government is served on the Hon Attorney General, Section 21(3) imposes a statutory duty on the accounting officer concerned to pay the sums specified in the said order to the person entitled or to his advocate together with any interest lawfully accruing thereon.

58. It is essential for the maintenance of the Rule of Law and Order that the authority and the dignity of courts is upheld at all times. The court will neither condone deliberate disobedience of its orders nor shy away from its responsibility to deal firmly with proved contemnors.
59. In the instant case, the orders made by this court have not been appealed against nor set aside. 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. [See *Econet Wireless Kenya Ltd vs. Minister for Information & Communication of Kenya & Another* [2005] 1 KLR 828 Ibrahim, J (as he then was)].
60. Considering the circumstances of this case and the material placed before this court, I find and hold that the application herein has merits and it is hereby allowed in the following terms: -
- i. The 2nd and 3rd respondents are hereby found to be in contempt of the court order in question.
 - ii. The respondents to comply with the court order of 21.02.2022 within 30 days.
 - iii. The matter shall be mentioned on 14th March 2024 for further orders.



iv. The 2nd and 3rd respondents to appear personally before the court in default warrant of arrest to issue

v. Costs of the application are awarded to the ex parte applicants.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 8TH DAY OF FEBRUARY 2024.

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J. N. ONYIEGO

JUDGE

