



Republic v Municipal Council of Busia & another; Manwari t/a Manwari & Company Advocates (Exparte) (Judicial Review Miscellaneous Application 15 of 2011) [2024] KEHC 2967 (KLR) (15 March 2024) (Ruling)

Neutral citation: [2024] KEHC 2967 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUSIA
JUDICIAL REVIEW MISCELLANEOUS APPLICATION 15 OF 2011
WM MUSYOKA, J
MARCH 15, 2024**

BETWEEN

REPUBLIC APPLICANT

AND

MUNICIPAL COUNCIL OF BUSIA 1ST RESPONDENT

THE CLERK, MUNICIPAL COUNCIL OF BUSIA 2ND RESPONDENT

AND

**JULIUS ORINA MANWARI T/A MANWARI & COMPANY
ADVOCATES EXPARTE**

RULING

1. I am called upon to determine 2 applications, one dated 3rd November 2023, and the other 16th November 2023.
2. The Motion, dated 3rd November 2023, is by the ex parte applicant, and it seeks that Topister Wanyama, the County Executive Committee Member, in charge of Finance, Busia County Government, be cited for contempt of court, and upon being convicted, be sentenced to serve civil jail for 6 months. It is also sought that the said individual be found and cited for contravention of Chapter 6 of the Constitution of Kenya, 2010.
3. The background to that application is set out on the grounds on the face of the application, and the facts deposed to in the affidavit sworn in support. A mandamus order was made by the court on 30th July 2013, against the predecessor of the interested party, the 1st respondent herein, in favour of the ex parte applicant. The monies payable under that order were not paid, and the ex parte applicant began proceedings to have the order enforced, through contempt proceedings. An order was made on 17th



February 2022, for a notice to issue upon the County Executive Committee Member responsible for Finance. An application in those terms was filed, dated 28th February 2022. It was heard by the Deputy Registrar of this court, who ruled, on 28th June 2022, that the said County Executive Committee Member for Finance had failed to show cause, and gave the greenlight to the ex parte applicant to initiate contempt proceedings as against the said County Executive Committee Member for Finance. Those contempt proceedings were initiated, against Phaustine Barasa, the then County Executive Committee Member for Finance. The proceedings floundered, when it transpired that Phaustine Barasa had ceased to hold that office, as at 1st November 2023, when he was due to appear in court to show cause. His place has since been taken by Topister Wanyama, hence the current proceedings, which seek to have her cited for contempt of court.

4. The person to be cited, Topister Wanyama, has responded to the application, by way of grounds of opposition, and a replying affidavit.
5. In the grounds of opposition, dated 24th January 2024, it is averred that it had not been established that the person to be cited had knowledge of the order to pay, and that she acted in breach of that order; and that there was a pending application challenging the order which forms the basis for the application for contempt.
6. In her affidavit in reply to the Motion of 3rd November 2023, Topister Wanyama avers that she was unaware of the mandamus order of 30th July 2013, until she was served with the instant application. She states that for the 1 year that she had occupied the office of County Executive Committee Member, in charge of Finance, she was unaware of the order, nor of the proceedings, for the same had not been brought to her attention by her predecessor. When she enquired from the County Attorney, the existence of the order was confirmed to her. She further avers that the ex parte applicant had not made her aware of the order of the court to pay, and that it had not been shown that she had failed to pay, or had frustrated the process, or had disobeyed the order, or had acted in a manner that contravened Chapter 6 of the Constitution. She avers that she stands unheard, on the matter of contempt of court. She avers that as County Executive Committee Member, in charge of Finance, she was not the accounting officer for the County Government, as that role belonged to the Chief Executive Officer, by virtue of the provisions of the Public Finance Management Act and the County Governments Act.
7. The application, dated 16th November 2023, is at the instance of the person sought to be cited, Topister Wanyama. It seeks several orders: stay of proceedings relating to the application, dated 3rd November 2023, so that her application is heard first; review of the rulings of this court of 17th February 2022 and 27th October 2023, which designated the County Executive Committee Member, in charge of Finance, as the accounting officer for the County executive; and a finding that her citation for contempt of court infringed on her fair hearing rights under Article 50 of the Constitution. Her case is essentially that she was unaware of these proceedings and the orders made in them, until the application of 3rd November 2023 was served upon her. She argues that she is not the accounting officer for the County Government, under the Constitution, the Public Finance Management Act and the County Governments Act. She avers that the findings and holdings in the impugned rulings that her office was that of an accounting officer was erroneous.
8. To that application, the ex parte applicant has responded. His replying affidavit was sworn on 24th November 2023. He avers that the applicant, Topister Wanyama, was attempting to portray herself as a separate and distinct entity from the County Government of Busia. He argues that the single change of the physical face of the holder of the relevant office in charge of finance does not shift the basic liability to obey and comply with the order of mandamus. He further argues that the issues that she has raised



can only be properly raised by the interested party. He contends that although she pleads ignorance of the proceedings and the order, she has copiously made extensive references to the judgement and orders made in these proceedings. He argues that she is not the proper person to seek review of the orders given that the mandamus order was not directed at her.

9. Directions were given on 27th November 2023, for canvassing of the 2 applications simultaneously, by way of written submissions. Both sides have complied with the directions, by filing their respective written submissions, which I have read through, and noted the arguments made.
10. As the application of 16th November 2023 seeks stay of proceedings on that dated 3rd November 2023, on grounds that the County Executive Committee Member, in charge of Finance, was not the accounting officer for the County Government, and, therefore, she was not the proper person to cite for contempt of court, I shall start by considering that application. If I find merit in it, I shall have to stay the proceedings on the first application, and review the impugned orders. But if I do not find merit in it, I shall then consider the first application on its merits.
11. It is critical to identify the accounting officer in a government ministry or department, for it is that officer who should be called upon to account or answer for failure to comply with the order to pay comprised in the mandamus order. A mandamus issues to a duty bearer, requiring that person to do duty, by doing that which is commanded by the order. Where the order is for payment of money, then it ought to be directed at the person who has a duty to pay the money, which, in government set-ups, would be the accounting officer. Where the mandamus order is not complied with, it would be the accounting officer to answer for the non-compliance, and it would be that officer to be cited for contempt of court.
12. These proceedings date back to 2009, when various Advocate-Client bills of costs were taxed against the predecessor of the interested party, who has been sued in these Judicial Review proceedings as the 1st respondent, that is to say the Municipal Council of Busia. The 1st respondent was sued jointly with its accounting officer, the Town Clerk, named as the 2nd respondent. The Judicial Review proceedings herein were initiated in 2011, to recover the accumulated taxed costs, and the mandamus was specifically against the Town Clerk as the accounting officer for the 1st respondent. In the ruling of 30th July 2013, Kimaru J wrote:

“In the premises therefore, this court allows the Exparte Applicant’s application to be granted the Judicial Review orders of Mandamus. The Respondents are ordered to pay the Exparte Applicant the sum of Kshs. 7,804,294/- within thirty (30) days of this court’s ruling. The Respondents are hereby compelled by order of Mandamus to pay the above sum in performance of their statutory duty. The Exparte applicant shall have the costs of this application and costs for the application ...”

13. As all these events were happening, there were changes occurring with respect to the governance structures in this country, heralded by the promulgation of the *Constitution* of Kenya 2010, on 27th August 2010. Under that Constitution, the 1st respondent was phased out, together with the bureaucracy which ran it, including the 2nd respondent. The place of the 1st respondent was taken over by the interested party. The position of the 2nd respondent was, no doubt, taken over by whichever officer held the role of the accounting officer for or within the County Government. Under the Sixth Schedule (Article 262 of the *Constitution*), Transitional and Consequential Provisions, section 18 provides that the local authorities that existed under the Local Government Act, Cap 265, Laws of Kenya, and, therefore, under the old Constitution, continued to exist, subject to enactment of any law on the subject. The relevant legislation, the *County Governments Act*, Cap 265, Laws of Kenya, was



enacted as Act No. 17 of 2012, and commenced on 9th March 2013. So, by the time the instant suit was being commenced, the Local Government Act, which had established the 1st respondent, was still in force, and the 1st respondent still existed, it only ceased to exist on 9th March 2013, when the County Governments Act commenced, and it was succeeded by the interested party.

14. Regarding public finances, under which the issues at hand revolve, the Public Finance Management Act, Cap 412A, Laws of Kenya, was enacted, and commenced on 27th August 2012. Under section 103(3) of the Public Finance Management Act, the County Executive Committee Member, in charge of Finance, is designated as the head of the County Treasury. The accounting officer of a county government entity is defined in the Public Finance Management Act, at section 2(1)(b), with reference to section 148 of the Act. Section 148 empowers the County Executive Committee Member, in charge of Finance, to designate accounting officers for county government entities to be responsible for managing the finances of the county government entities as is specified in the designation. The designation has to be in writing. The person responsible for the administration of a county government entity, shall be the accounting officer responsible for managing the finances of that entity. A duty is cast on the County Executive Committee Member, for finance, to ensure that each county government entity has an accounting officer in accordance with Article 226 of the Constitution. The other critical provision is section 153 of the Public Finance Management Act, which makes the accounting officer responsible for managing assets and liabilities of the county government entity, in terms of the management of the assets and liabilities of the entity.

15. Section 2(1)(b) of the Public Finance Management Act states as follows:

““accounting officer” means—

- (a) ...
- (b) an accounting officer of a county government entity referred to in section 148;”

16. Section 103 of the Public Finance Management Act provides:

“ Establishment of county treasuries

- (1) There is established for each county government, an entity to be known as County Treasury.
- (2) The County Treasury shall comprise—
 - (a) the County Executive Committee member for finance;
 - (b) the Chief Officer; and
 - (c) the department or departments of the County Treasury responsible for financial and fiscal matters.
 - (a) the County Executive Committee member for finance;
 - (b) the Chief Officer; and
 - (c) the department or departments of the County Treasury responsible for financial and fiscal matters.



- (3) The County Executive Committee member for finance shall be the head of the County Treasury.”

17. Section 148 of the *Public Finance Management Act* provides:

“Designation of accounting officers for county government entities by the County Executive Committee Member for finance

- (1) 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.
- (2) 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.
- (3) A County Executive Committee member for finance shall ensure that each county government entity has an accounting officer in accordance with Article 226 of the *Constitution*.
- (4) The Clerk to the county assembly shall be the accounting officer of the county assembly.
- (5) A county government may, in order to promote efficient use of the county resources, adopt, subject to approval by the county assembly, a centralised county financial management service.”

18. Section 153 of the *Public Finance Management Act* states:

“Accounting officer to be responsible for managing assets and liabilities of county government entity

- (1) The accounting officer for a county Government entity—
 - (a) is responsible for the management of the entity’s assets and liabilities; and
 - (b) ...
 - (a) is responsible for the management of the entity’s assets and liabilities; and
 - (b) ...
- (2) ...”

19. What emerges from the above provisions is that the County Executive Committee Member, in charge of Finance, is head of the County Treasury, and thereby the person with overall superintendence over the finances of the County Executive. The County Executive Committee Member, in charge of finance, also designates the accounting officers for the various units of the County Executive, who are accountable to the County Assembly. Under the *Public Finance Management Act* the County Executive Committee Member, in charge of Finance, is not an accounting officer, as the holder of that office would not handle the day-to-day financial management of the accounts of the entity. Indeed,



under section 153, the accounting officer is responsible for managing the debts and liabilities of the County Government entity.

20. So, the question is, which County Government entity would be responsible for the debt owed to the ex parte applicant? It has to be the County Treasury. So, who is the accounting officer for the County Treasury? The [Public Finance Management Act](#) does not have a direct answer, for it has to be the person that the County Executive Committee Member, in charge of finance, has designated as accounting officer. She has not disclosed that person in her papers. She is the head of the County Treasury, and without information as to the person who the County Executive Committee Member, in charge of finance, has so designated accounting officer, and who should be responsible for settling the debt owed to the ex parte applicant, then she has to be held responsible as head of the County Treasury, by dint of section 103(3) of the [Public Finance Management Act](#). If the County Executive Committee Member, in charge of finance, is really keen on finding a solution to this dispute, she would disclose the person that she has designated as the relevant accounting officer. Her failure to make that disclosure is a pointer that she is not being faithful to the national values and principles enumerated in Article 10 of the [Constitution](#), on transparency and accountability. So, if she chooses to conceal the identity of the officer, that she has designated as accounting officer responsible for the debt owed to the ex parte applicant, then she should be held accountable as the head of the County Treasury and as the person who ought to designate the accounting officers.
21. The ruling by Karanjah J of 17th February 2022 is aligned to my view, and mine of 27th October 2023 merely follows that of 17th February 2022. The interested party is really doing nothing to resolve the matter, but is using excuses, of one kind or other, to run away from the responsibility of settling the said debt. I do not find any basis, upon which I can review the 2 impugned rulings, nor to grant any of the orders sought in the Motion, dated 16th November 2023.
22. I will now turn to the application, dated 3rd November 2023. Whereas Topister Wanyama maybe the correct person to tag, in terms of holding her responsible for settling the debt, the subject of these proceedings, as head of the County Treasury, and in absence of information as to who she has designated as accounting officer, who would be responsible for that debt, I feel that the ex parte applicant has been in a rush, in filing the instant application. These are quasi-criminal proceedings, where the person cited is exposed to criminal sanctions, of imprisonment or payment of a fine, for that is what sequestration is all about. All the safeguards that apply to criminal proceedings should, therefore, be accorded to such a person, and I am talking about the fair hearing principles in Article 50 of the [Constitution](#). That is why the issue of notice is critical, in terms of the person being served with all the relevant orders, and in particular that of 30th July 2013, which gives a timeframe of 30 days for compliance.
23. Topister Wanyama was not party to the proceedings that led up to the order of 30th July 2013. So, she cannot have been aware of the background. The debt was of no interest to her before she joined the interested party, and was assigned the docket relating to finance. Prudence required that the ex parte applicant serve her with the order, and he should have moved for contempt of court only after expiry of the 30 days given in the order. Service of the order, upon the previous accounting officer, is not good enough, for the purposes of holding Topister Wanyama accountable. Furthermore, from my review of the provisions of the [Public Finance Management Act](#), it appears that she may not even be the proper person to cite for contempt of court. The ex parte applicant ought to have sought to establish who the responsible accounting officer was, before mounting the instant application.
24. In view of what I have stated above, I am unable to find that Topister Wanyama should be cited for contempt of court, for the relevant order was never served on her, and it cannot be said that she has



defied the order by failing to settle the debt. The statutory duty to pay accrues upon the order being served on the person mandated by the law to pay, and that person should be the accounting officer.

25. The final orders that I shall make in the circumstances are:
- a. That the application, dated 16th November 2023, is dismissed in its entirety;
 - b. That before I can consider the application, dated 3rd November 2023, the order, of 30th July 2013, shall be served on the accounting officer responsible for settlement of the debts of the category of what is owed to the ex parte applicant;
 - c. That to facilitate (b), above, I hereby give Topister Wanyama, as County Executive Committee Member, in charge of Finance, 30 days to disclose, to the court, and to the ex parte applicant, the name and position of the person that she has designated as accounting officer for the county government entity that should be responsible for settling the debt owed to the ex parte applicant;
 - d. That in default of (c), above, Topister Wanyama shall be treated as the accounting officer responsible, and the ex parte officer shall be at liberty to serve the order of 30th July 2013 upon her;
 - e. That this matter shall be mentioned for compliance after 30 days, on a date to be appointed at the delivery of the ruling herein; and
 - f. That costs shall abide the final order to be made on the application, dated 3rd November 2023.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT BUSIA THIS 15TH DAY OF MARCH 2024

W MUSYOKA
JUDGE

Mr. Arthur Etyang, Court Assistant.

Advocates

Mr. Mogi, instructed by Manwari & Company, Advocates for the ex parte applicant.

Ms. Otsieno, instructed by the Office of the County Attorney, Advocates for the interested party.

Mr. Ouma, instructed by BM Ouma & Company, Advocates for Topister Wanyama.

