Republic v Nairobi City County & 3 others; Ndirangu t/a Mooreland Merchantile Co Ltd (Exparte) (Miscellaneous Application E054 of 2022) [2024] KEHC 2354 (KLR) (Judicial Review) (1 March 2024) (Judgment)

Neutral citation: [2024] KEHC 2354 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

JUDICIAL REVIEW

MISCELLANEOUS APPLICATION E054 OF 2022

JM CHIGITI, J

MARCH 1, 2024

BETWEEN

REPUBLIC ..... APPLICANT

AND

NAIROBI CITY COUNTY ..... 1ST RESPONDENT

COUNTY EXECUTIVE COMMITTEE MEMBER, FINANCE, NAIROBI CITY COUNTY ..... 2ND RESPONDENT

CHIEF OFFICER FINANCE, NAIROBI CITY COUNTY ..... 3RD RESPONDENT

SECRETARY, NAIROBI CITY COUNTY ..... 4TH RESPONDENT

AND

JOSEPH NDIRANGU T/A MOORELAND MERCHANTILE CO. LTD EXPARTE

JUDGMENT

1. The Application before this court is dated 2nd November, 2023 wherein the Applicant is seeking the following Orders:

    1. Thatwarrants of arrests be issued against Charles Kerich- County Executive Committee Member Finance and Economic Affairs, Nairobi City County and Asha Abdi- Chief Officer Finance, Nairobi City County the 2nd and 3rd Respondents herein, and be committed to prison for a period of time as this Honourable Court may deem fit.

    2. Thatthis Honourable Court be pleased to Order that Charles KerichCounty Executive Committee Member Finance and Economic Affairs, Nairobi City County and Asha Abdi-

Chief Officer Finance, Nairobi City County the 2nd and 3rd Respondents herein be arrested and brought before this Honourable Court for sentencing and/or committal to civil jail for a period of a period of time as this Honourable Court may deem fit until they Honour the Court Orders.

3. Thatthis Honourable Court be pleased to Order that Charles KerichCounty Executive Committee Member Finance and Economic Affairs, Nairobi City County and Asha Abdi-Chief Officer Finance, Nairobi City County the 2nd and 3rd Respondents herein to personally pay the sum of monies the Court may determine as a penalty for deliberately defying and violating the clear, concise and unequivocal orders of this Honourable Court given on 10th November, 2022.

4. Thatthe costs of this Application be provided for.

2. It is the Applicants case that it is trite law that to succeed in a contempt application, the applicant must prove the following; - a) The terms of the order b) Knowledge of the terms by the Respondent c) Failure by the Respondent to comply with the terms of the order. A comprehensive exposition of elements of civil contempt is discussed in Contempt in Modern New Zealand as follows; - '.... The applicant must prove to the required standard that; a) The terms of the order (or injunction or undertaking) were clear and unambiguous and were binding on the defendant b) The defendant had knowledge of or proper notice of the terms of the order c) The defendant has acted in breach of the terms of the order and d) The defendant's conduct was deliberate.

3. The respondents participated and were competently represented by an advocate throughout in the application for Mandamus and they were served with copies of the Court decree on 22nd November, 2022, 5th December, 2022 and 9th March 2023, and they have failed to pay the Applicant the decretal sum plus the cost of interest as per the Court's directions.

4. On 14th day of July, 2023 the court found the 2nd Respondent in contempt and A Notice to Show Cause was issued against the 2nd, 3rd and 4th Respondents within thirty (30) from today to show cause why contempt of Court proceedings should not be commenced against the Respondents for failure and/or refusal to pay to the Applicant the decretal sum.

5. On 19th September, 2023, this Honourable Court was kind enough to grant the Respondents more time to comply to no avail. From the foregoing your lordship, it is evident that the Respondents have had more than enough time and/or notice to pay the decretal sum as ordered by the Court but they have flagrantly and deliberately disobeyed the Orders of the Honourable Court.

6. On the issue of proper notice, what then amounts to "Notice"? The Black's Law Dictionary, 9th Ed defines notice as follows: -

> " A person has notice of a fact or condition if that person; i) Has actual knowledge of it, ii) Knows received information about it, iii) Has reason to know about it, iv) Knows about a related fact, v) Is considered as having been able to ascertain it by checking an official filing or recording."

7. The High Court in Meru in Judicial Review Application NoE003 of2021 Leopard Rock Mico Limited Versus Chief Officer Finance, County Government of Meru & 2 Others KLR while discussing the conduct of the 3rd Respondent, the County Finance Officer, Meru County, quoted the case of

Court of Appeal in shimmers Plaza Limited Versus National Bank of Kenya Limited Civil Appeal No. 33 of 2015 EKL as follows;

> " We reiterate here 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 a right; not as a favour. The courts should not fold their hands in helplessness and watch as their orders are disobeyed with impunity left, right and center. This would amount to abdication of our sacrosanct duty bestowed on us by *the Constitution*. The dignity, and authority of the court must be protected, and that is why those who flagrantly disobey them must be punished, lest they lead us all to a state of anarchy. We think we have said enough to send this important message across. Your Lordship, the record in this matter demonstrates that the Respondents has shown willful defiance and disrespect towards court orders and continues to refuse to comply with the directions and/or orders of the Honourable Court inspite of the several indulgence on the part of the Applicant and the Court and they are underserving of any further indulgence from this Court. The Court of Appeal in shimmers Plaza Limited Versus National Bank of Kenya Limited Civil Appeal No. 33 of 2012 observed as follows; "...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." In addressing the issue whether service of a judgment or order on the solicitor for the ministers is sufficient knowledge of the Order on their part to found liability in contempt, the Supreme Court of Canada in Bhatnager V. Canada (Minister of Employment and Immigration), (1990) 2S.C.R. 217 at p. 226, LJ Sopinka, held that: - "In my opinion, a finding of knowledge on the part of the client may in some circumstances be inferred from the fact that the solicitor was informed. Indeed, in the ordinary case in which a party is involved in isolated pieces of litigation, the inference may readily be drawn. In the case of Ministers of the Crown who administers large departments and are involved in a multiplicity of proceedings, it would be extraordinary if orders were brought, routinely to their knowledge, in such a case there must be circumstances which reveal a special reason for bringing the order to the attention of the minister." (Emphasis by underline) The Court went on to state that; "On the cases, there can be no doubt that the common law has always required personal service or actual personal knowledge of a court order as a pre- condition to liability in contempt.... knowledge is in most cases (including criminal cases) proved circumstantially, and in contempt cases, inference of knowledge will always be available where the facts capable of supporting the inference are proved. Similarly, in United States V. Revie 834 F.2d 1198, 1203 (5th Cir. 1987) the Court held that the defendant had adequate notice of a show cause order because his attorney was on notice. Therefore, a client may be similarly "served" with a court's order by his attorney's communication of its contents and this communication is presumed if the attorney has knowledge of the order."

8. The respondents were served with the Orders of this Honourable Court dated 18th July, 2023. Further, when the matter came up for mention to confirm compliance on 19th September, 2023, Counsel for

the Respondents requested for a further Thirty (30) days to satisfy the orders of the Court which was allowed.

9. The defendants have had adequate notice. Your lordship, it is worth noting that the respondent's failure to pay the applicant the decretal sum and interest is deliberate as they have had more than enough time to pay the applicant. Their acts and/or omissions continue to deny the applicant an opportunity to enjoy the fruits of the judgment. Even if we were to agree with them for a minute, the Court must ask itself how many finance budget have since been passed at the initial commencement of the suit herein?

10. According to the Applicant there has been more than enough time for the Respondents to make the necessary arrangements in terms of budget allocation to ensure that they get money to pay the Applicant and we there pray that this Court should not indulge the Respondents any further.

Respondents case:

11. It is the Respondents case:

    1. Thatthe Application is misadvised, fatally incompetent and incurably defective.

    2. Thatthe Respondent avers that the County Government Responsibilities with respect to management and control of Public Finance under the *Public Finance Management Act* CAP 412C of the Laws of Kenya gives the duty to pay out funds from the county Treasury upon the County Executive Committee member in charge of Finance and not the 1st Respondent as indicated in the Orders given on 7th April, 1997.

    3. Thatthe Court Oder made on 7th April, 1997 was issued against the 1st Respondent who is a wrong party. Therefore, the orders sought by the Applicant against the Respondents cannot be granted since the Applicant cannot found a cause of action by instituting a wrong party.

    4. Thatfurther, the 2nd, 3rd and 4th Respondents are public officers and are prohibited in Law; under sections 196 and 197 of the *Public Finance Management Act* (2012) from paying the Applicant as ordered for it would be an offence to spend any public funds without any prior authorization.

    5. Thatthe County Government has various competing interests catered for in the budget. The Honourable Court to allow for the Applicant's claim to be factored in the forthcoming budget as approved by the County Assembly since the County Executive cannot expend money not approved in the budget. It will amount to an illegality.

    6. Thatthe County Government has limited resources and is governed by statutory processes it must abide by before paying for anything.

    7. Thatthe immediate settlement of the Order would require Constitutional or County Legislation approval which has not been given to the Respondent because of the already closed budget cycle.

    8. Thatthe Respondents are currently not in a position to pay off the decretal sum since the County Government is in the middle of its financial year and such funds would have to have been provided for in the County budget.

    9. Thatthe Respondents are ready to pay once the same is allocated for, approved and passed by the County Assembly as provided for in section 125 of the *Public Finance Management Act* (2012).

10. Thatthe Court allow for the budgeting, allocation and approval of the amounts decreed through the procedures provided for under the County Government Act.

12. The respondents submit that the Court Oder made on 7th April, 1997 upon which the Application herein is premised was issued against the 1st Respondent who is a wrong party. The question that then needs to be answered is whether the 1st Respondent has a duty to act as demanded pursuant to the Oder made on 7th April, 1997. It is our submission that at the onset, this Application is premature, misconceived and bad in law in view of the fact that the writ of mandamus will not issue where there is not statutory duty imposed upon the 1st Respondent.

13. It is trite law under the *Public Finance Management Act* Cap 412 Laws of Kenya particularly Part IV of the County Government Responsibilities which makes provisions of the management and control of Public Finance that the Statutory duty to pay out funds from the County treasury, vests in the County Executive Committee in charge of Finance and not the 1st Respondent herein s such the 1stRespondent herein is wrongly suited. This position was also reiterated in Kenya National Examination Council —vs- Republic Ex party Geoffrey Gathenji Njorojie & Others (1997) eKLR.

14. In Abdi Kadir Salat Gedi —vs- Principal Registrar of Persons & Another (2014) eKLR the Honourable Judge while making a determination on the Order of Mandamus placed reliance on an authority in the Halsbury's Law of England 4th Edition Volume 1 at 111 paragraphs 89and 90 to rule, that:

> " The order of mandamus is of a most remedial nature and cannot be issued against a party not obliged to perform such a duty where the party alleged to have not performed such a statutory duty is to the discretion of the Court not a suitable party for the suit."

15. Under Section 104 (1) (a) and (b) of the *Public Finance Management Act*, it is the responsibility of the County treasury to prepare a budget for a county which is then submitted for approval by the County Assembly and thereafter under Section 118 Act, the County Treasury prepares a budget review and outlook paper to the County Executive which discusses the outlook paper and after approval it is laid before the County Assembly before it is published and publicized. This was reiterated in Petition No. 368 of 2014.

16. Placing premise on the foregoing, it is evident that the Orders sought by the Applicant do not lie against the 1st Respondent reason being that there is no statutory duty imposed upon the 1St Respondent to act as demanded rather the said duty lies upon the County Executive Committee member in charge of finance and not the Respondent as indicated in the Application.

17. They further submit that the Applicant has in his application failed to state the law under which the 1st Respondent has a duty to act as demanded. Given the fact that no nexus has been produced to show that there is a statutory duty imposed upon the 1st Respondent and orders sought, it follows consequently that the application is fatally and incurably defective as it does not lie in law. This was illustrated by the Supreme Court in the case of Daniel Kimani Njihia v. Francis Mwangi Kimani & Another [20151 eKLR where it was held among others that "The litigant should invoke the correct constitutional or statutory provision; and an omission in this regard is not a mere procedural technicality, to be cured under Article 159 of *the Constitution*." [Emphasis Added]

18. More recently, in Michael Mungai v Housing Finance Co. (K) Ltd & 5 other [2017] eKLR the Supreme Court held that: "In the case of Hermanus Phillipus Steyn v. Giovanni GnnechiRuscone, Supreme Court, Application No. 4 of 2012, this Court was categorical that a Court has to be moved under a specific provision of the law. The Court stated that: it is trite law that a Court of law has to be moved under the correct provisions of the law."

19. The duties of the 1st Respondent are provided for in The *County Governments Act* 2012 under section 44(3) and that the said office does not process, identify and/or effect any payments on behalf of the county government. Placing reliance on the foregoing, it is therefore our submission that the Applicants have not proved that the 1st Respondents has failed to or denied to pay the judgement debt.

Whether the orders sought can be granted?

20. The Respondents submit that given the fact that the 2nd, 3rd and 4th Respondents are public officers, it follows consequently that the said Respondents are prohibited in law from paying the Applicant as it is an offence to spend public funds without prior authorization pursuant to the provisions of Sections 196 and 197 of the *Public Finance Management Act*.

21. As earlier stated, the authorization for the payment of funds by the County Government is a 6-pronged process. This process includes the preparation of the county budget which is then presented to the County Assembly for approval then to the County Treasury pursuant to Section 118 Act of the Act, which then prepares and forwards a budget review and outlook paper to the County Executive which discusses the outlook paper and after approval it is laid before the County Assembly before it is published and publicized.

22. It is their submission that the immediate settlement of the Order would require Constitutional or County Legislation approval which has not been given to the Respondents because of the already closed budget cycle. As it stands, the Respondents are currently not in a position to pay off the decretal sum since the County Government is in the middle of its financial year and such funds would have to have been provided for in the County budget.

23. It is further their submission that the County Government has competing interests including settling decrees to the public but has limited resources as well as statutory processes to which it must abide by prior to the settlement of the same.

24. The respondents case is further that the County Government has various competing interests catered for in the budget, Applicant's claim should be allowed to be factored in the forthcoming budget as approved by the County Assembly taking into consideration the fact that the County Executive cannot expend money not approved in the budget as approved by the county assembly as doing so will be in contravention of the law thus amount to an illegality. The satisfaction of decrees and judgement is deemed to be expenditure by the County Government and as a result it must be justified in law and provided for in the County Government's expenditure.

25. The Respondents are ready to pay once the same is allocated for, approved and passed by the County Assembly as provided for in section 125 of the *Public Finance Management Act* (2012).

26. It is the Respondents plea to the Honourable Court to allow for the budgeting, allocation and approval of the amounts decreed through the procedures provided for under the County Government Act.

Analysis and determination

27. In the case of Teachers Service Commission V Kenya National Union of Teachers & 2 others (2013) eKLR where Ndolo J observed as follows:

> " The reason why courts will punish for contempt of court is to safeguard the rule of law which is fundamental in the administration of justice. It has nothing to do with the integrity of the Judiciary or the court or even the personal ego of the presiding Judge. Neither is it

about placating the applicant who moves the court by taking out contempt proceedings. It is about preserving and safeguarding the rule of law."

28. In Shimmers Plaza Limited v National Bank of Kenya Limited [2015] eKLR the Court of Appeal considered the following on knowledge of existence of a court order;

> " 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 the purposes of contempt proceedings, for instance, Lenaola J in the case of Basil Criticos v 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. I'm satisfied that the County Secretary and County Finance Executive Committee Member are aware of the order having attended court through counsel who has gone ahead to even file grounds of opposition and submissions and the issue of personal service is does not arise.

30. The Respondent's arguments are contradicting. On one side they claim that the Ex-parte Applicant has no claim against it and the side it advances an argument that the Respondent is not able to satisfy the decree at the moment due to insufficient budgetary allocation.

31. This kind of response leaves a lot to be desired. The Respondent cannot have its cake and eat it. The Respondents are liable and the lack of budgetary allocation cannot come to the aid of the Respondent. This being a fair administrative action court, I must invite the Respondent to consider the frustration that a decree holder is going through as he pursues the fruit of his judgment.

32. There must be closure to litigation. All decrees rank equally and the Judgment debtor cannot be heard to ride on the crest of an argument that it is settling other decrees.

33. The Court in the case of Republic v Principal Secretary, Ministry of Defence Ex parte George Kariuki Waithaka [2019] eKLR held as follows on the issue of budgetary allocation;

> " The defence of non-allocation of funds by Parliament was also raised by the Respondent in the present application in his replying affidavit. Odunga J. in his ruling of 12thFebruary 2018 extensively dealt with the defence as follows:
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> > "As regards lack of budgetary allocation, Githua, J in Republic vs. Permanent Secretary, Ministry of State for Provincial Administration and Internal Security Ex parte Fredrick Manoah Egunza [2012] eKLR expressed herself as follows:
> >
> > > "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. Unlike in other civil proceedings, where decrees for the payment of money or costs had been issued against the Government in favour of a litigant, the said decree can only be enforced by way of an order of mandamus compelling the accounting officer in the relevant ministry to pay the decretal amount as the Government is protected and given immunity from execution and attachment of its property/goods under Section 21(4) of the *Government Proceedings Act*. The only requirement which serves as a condition precedent to the satisfaction or enforcement of decrees for money issued against the Government is found in Section 21(1) and (2) of the *Government Proceedings Act* (hereinafter referred to as the Act) which provides that payment will be based on a certificate of costs obtained by the successful litigant from the court issuing the decree which should be served on the Hon Attorney General. The certificate of order against the Government should be issued by the court after expiration of 21 days after entry of judgment. 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. This provision does not condition payment to budgetary allocation and parliamentary approval of Government expenditure in the financial year subsequent to which Government liability accrues." [Emphasis added].

34. I associate 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.

35. This position was appreciated by this Court in Wachira Nderitu, Ngugi & Co. Advocates vs. The Town Clerk, City Council of Nairobi Miscellaneous Application No. 354 of 2012 in which this Court pronounced itself as follows:

> " I have however considered the other issues raised by the respondent with respect to its debt portfolio as against its financial resources. It is neither in the interest of this Court nor that of the ex parte applicant that the respondent should be brought to its knees. The Court appreciates and it is a matter of judicial notice that most of the local authorities are reeling under the weight of the debts accrued by their predecessors and that they are trying to find their footing in the current governmental set up. Accordingly, I am satisfied based on the material on record that the respondent ought to be given some breathing space to arrange its finances and settle the sum due herein."
>
> In my view 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."
>
> 48. Non-allocation of funds by Parliament is not an acceptable defence or justifiable excuse for non-payment of decretal sums ordered to be paid by

> Government officials, in the absence of any evidence of any attempts made by the responsible Government official to commence the process of such allocation. In the present case, this is particularly relevant given that the present contempt of Court proceedings commenced in April 2017, and the Respondent did not indicate what steps if any, have been taken since then to effect payment of the monies due to the Applicant."

36. The Respondent's argument that it lacks budgetary allocation is therefore not a valid reason for failing to comply with this court's orders.

37. This court has a duty to protect, promote and fulfil the rule of law under Article 20 of *the Constitution*. The Authority of the court under Article of *the Constitution* will be eroded if the court allows judgments debtors to disregard court orders.

38. Article 159 (1) of *the Constitution* provides that:

> "Judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under this Constitution. (2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles—
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> a. justice shall be done to all, irrespective of status;
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> b. justice shall not be delayed;
>
> c. alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3);
>
> d. justice shall be administered without undue regard to procedural technicalities; and
>
> e. the purpose and principles of this Constitution shall be protected and promoted."

39. The failure on the part of the court to enforce its orders amounts to a betrayal of the people of Kenya. This court shall not allow that. Impunity if allowed to thrive by way of disobedience of court orders will generate an affront of democracy and the rule of law. Impunity must be nipped at the bud.

40. Failure to enforce court orders effectively has the potential to undermine confidence in recourse to law as an instrument to resolve civil disputes and may thus impact negatively on the rule of law." Romer, L.J stated in Hadkinson –vs- Hadkinson, (1952) ALL ER 567, "it is the pain and unqualified obligation of every person against, or in respect of, whom an order is made by court of a 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." 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 irregular 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 and or irregular, and who might 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."

41. The Court of Appeal in Refrigeration and Kitchen Utensils Ltd.-vs- Gulabchand Popattlal Sha & Another, - Civil Application No. 39 of 1990, held, ".....It is essential for maintenance of the rule of law and good order that the authority and dignity of our Courts is upheld at all times." The above pronouncements of law ring true now as they did over Sixty (60) years ago when they were made in Hadkison's case.

Disposition

42. The Applicant has proven its case.

Order

1. Warrants of arrests are hereby issued against Charles Kerich- County Executive Committee Member Finance and Economic Affairs, Nairobi City County and Asha Abdi- Chief Officer Finance, Nairobi City County.
2. Charles Kerichand Asha Abdi shall be brought to court for mitigation and sentencing upon their arrest.
3. Prayer 4 is declined.
4. Costs to the Applicant.

DATED, SIGNED, AND DELIVERED AT NAIROBI THIS 1ST DAY OF MARCH, 2024.

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J CHIGITI (SC)

JUDGE