



Republic v Principal Secretary, Ministry of Interior & Coordination of National Government & another; Njoroje (Exparte Applicant) (Judicial Review Application 009 of 2021) [2024] KEHC 5112 (KLR) (16 April 2024) (Judgment)

Neutral citation: [2024] KEHC 5112 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
JUDICIAL REVIEW APPLICATION 009 OF 2021
SM MOHOCHI, J
APRIL 16, 2024**

BETWEEN

REPUBLIC APPLICANT

AND

PRINCIPAL SECRETARY, MINISTRY OF INTERIOR & COORDINATION OF NATIONAL GOVERNMENT 1ST RESPONDENT

THE HON. ATTORNEY GENERAL 2ND RESPONDENT

AND

JOSEPH KIMANI NJOROGE EXPARTE APPLICANT

JUDGMENT

1. Before me is a Notice of Motion Application dated 24th October 2023 filed pursuant to Section 5 of the *Judicature Act* (Cap. 8) and Section 3A of the *Civil Procedure Act* (Cap. 21) and all other enabling provision of the law including inherent jurisdiction of the Court seeking the following reliefs;
 - i. That, the Principal Secretary (State Department for Correctional Services), Ministry of Interior & Coordination of National Government be found to be in contempt of Court for disobedience of the orders of *mandamus* issued by this Honourable Court on or about 25th October 2021 in this matter and hence liable for imprisonment for a period not exceeding 6 months and or any other;
 - ii. That, this Honourable Court be pleased to issue any other order that it may deem reasonable and or expedient in the circumstances.
 - iii. That, cost of this application be provided for.



2. The application is based on the general grounds that: -
 - i. That, Court issued orders of *mandamus* on or about 25th October 2021, compelling / directing the Principal Secretary herein to pay the *Ex- Parte* Applicant Subject herein the sum specified therein.
 - ii. That, failure by the Principal Secretary herein to obey and comply with the Court order herein and pay the sum therein to the *Ex- Parte* Applicant despite being served with the same is contemptuous of this Court and amounts to disrespect, ridicule and or affront to the judicial authority of this Court.
 - iii. That, failure by the Principal Secretary to obey / comply with the Court order herein and pay the sum therein to the *Ex- Parte* Applicant despite being served with the same is immoral, conduct unbecoming, unethical and flies on the face of Chapter 6 of the Constitution of Kenya he/she being a public officer.
3. This Court had on the 9th of May 2023, directed the parties that the Notice of Motion would be heard and determined by way of written submissions and the matter was mentioned on 11th July 2023, 13th October 2023 and 7th December 2023 a period which the Respondent did not file any response or written submissions but rather kept on indicating that there was a draft consent to be executed which never was culminating this Court in fixing a ruling date.

Ex- Parte Applicant's Case

4. That, the *Ex- Parte* Applicant instituted Nakuru CMCC 994 of 2019 Joseph Kimani Njoroge - Vs- Ministry of Home Affairs & 5 others claiming damages as a result of Road Traffic Accident and judgement was delivered in his favour and Decree/certificate of costs and Certificate of order against the Government was drawn certifying the amount payable to him.
5. The Defendants/Judgement Debtor therein failed to honour/settle the said judgement as a result of which the Applicant commenced these Judicial Review proceedings for orders of *mandamus* against the Respondents herein and which were equally determined in his favour and an order of *mandamus* consequently issued compelling/directing the Respondent(s) herein to pay him the judgement sum in the lower Court plus costs and interest as more particularized in the order of *mandamus*, Certificate of Taxed Costs and a further order against Government annexed to the supporting affidavit to the application herein. The same were duly served upon the Respondents herein and despite demand, they failed to honour/comply with the same which necessitated filling of the current application.
6. It is not in dispute that the *Ex- Parte* Applicant has in place an order of *mandamus* against the Respondents herein compelling them to pay him his dues and which order has been duly served and stamped as received by the Respondents herein as exhibited by the copies attached to the supporting affidavit the Application.
7. However, and despite the foregoing, the Respondents herein have refused to pay his dues even after being served with a formal demand for payment or else he institutes this contempt of Court proceedings. As such and in the circumstances, we humbly that the application herein is justified and merited since there is no other avenue/remedy available to the subject herein to ensure that his dues are paid and also to enable the Court stamp its authority by ensuring compliance with its orders.



8. The *Ex- Parte* Applicant relies on the case of *Seventeenth Enterprises Ltd Vs Cabinet Secretary for Ministry of Interior and Coordination of National Government & 2 others* [2016]:-

...Execution as in ordinary proceedings is prohibited against the Government and its officers acting in their official capacities. This immunity was emphasized by Visram and Ibrahim, JJ (as they were) in *Kisya Investments Ltd vs. Attorney General & Another* [2005] 1 KLR 74, as follows: "Order 28, rules 2(1)(a), (2) and (4) of the *Civil Procedure Rules* subject themselves to the provisions of the *Government Proceedings Act* which include provisions prohibiting execution against or attachment in respect of the Government...The order of *mandamus* is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right or no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual...These principles mean that an order of *mandamus* compels the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed." This position is now underpinned in section 7(2)) of the *Fair Administrative Action Act* under which the Court is empowered to issue orders of Judicial Review where there was an abuse of discretion, unreasonable delay or failure to act in discharge of a duty imposed under any written law. In those circumstances section 11(1) of the said *Act* empowers the Court to issue an order compelling the performance by an administrator of a public duty owed in law and in respect of which the applicant has a legally enforceable right...in the present case the ex parte applicant has no other option of realizing the fruits of his judgement since he is barred from executing against the Government. Apart from *mandamus*, he has no option of ensuring that the judgement that he has been awarded is realized. Unless something is done he will forever be left baby-sitting his barren decree. This state of affairs cannot be allowed to prevail under our current Constitutional dispensation in light of the provisions of Article 48 of the *Constitution* which enjoins the State to ensure access to justice for all persons. Access to justice cannot be said to have been ensured when persons in whose favour judgements have been decreed by Courts of competent jurisdiction cannot enjoy the fruits of their judgement due to roadblocks placed on their paths by actions or inactions of public officers. Public offices, it must be remembered are held in trust for the people of Kenya and Public Officers must carry out their duties for the benefit of the people of the Republic of Kenya. To deny a citizen his/her lawful rights which have been decreed by a Court of competent jurisdiction is, in my view, unacceptable in a democratic society. Public officers must remember that under Article 129 of the *Constitution* executive authority derives from the people of Kenya and is to be exercised in accordance with the *Constitution* in a manner compatible with the principle of service to the people of Kenya, and for their well-being and benefit....The institution of judicial review proceedings in the nature of *mandamus* cannot be equated with execution proceedings. In seeking an order for *mandamus* the applicant is seeking, not relief against the Government, but to compel a Government official to do what the Government, through Parliament, has directed him to do. The relief sought is not "execution or attachment or process in the nature thereof". It is not sought to make any person "individually liable for any order for any payment" but merely to oblige a Government officer to pay, out of the



funds provided by Parliament, a debt held to be due by the High Court, in accordance with a duty cast upon him by Parliament. The fact that the Accounting Officer is not distinct from the State of which he is a servant does not necessarily mean that he cannot owe a duty to a subject as well as to the Government which he serves. Whereas it is true that he represents the Government, it does not follow that his duty is therefore confined to his Government employer. In *mandamus* cases it is recognized that when statutory duty is cast upon a Public Officer in his official capacity and the duty is owed not to the State but to the public any person having a sufficient legal interest in the performance of the duty may apply to the Courts for an order of *mandamus* to enforce it. In other words, *mandamus* is a remedy through which a public officer is compelled to do a duty imposed upon him by the law. It is in fact the State, the Republic, on whose behalf he undertakes his duties, that is compelling him, a servant, to do what he is under a duty, obliged to perform. Where therefore a public officer declines to perform the duty after the issuance of an order of *mandamus*, his/her action amounts to insubordination and contempt of Court hence an action may perfectly be commenced to have him cited for such contempt proceedings are no longer execution proceedings but are meant to show the Court's displeasure at the failure by a servant of the state to comply with the directive of the Court given at the instance of the Republic, the employer of the concerned public officer and to uphold the dignity and authority of the Court rules, or orders of a legislative or judicial body, due proceedings by disorderly behavior or insolent language, in its presence or so near thereto as to disturb the proceedings or to impair the respect to such body." In [Halsbury's Laws of England](#) it is stated:- "It was the plain and unqualified obligation of every person against or in respect of whom an order was made by a Court of competent jurisdiction to obey it unless and until it was discharged and disobedience of such an order would as a general rule result in the person disobeying it being in contemptan application to Court and punishable by committal or attachment by him not being entertained until he had purged his contempt" In book [The Law of Contempt](#) learned authors Nigel Lowe & Brenda Suftrin state a follows: "Coercive orders made by the Courts should be obeyed and undertakings formally given to the Courts should be honoured unless and until they are set aside. Furthermore, it is generally no answer to an action for contempt that the order disobeyed or the undertaking broken should not have been made or accepted in the first place. The proper course if it is sought to challenge the order or undertaking is to apply to have it set aside.

In [Econet Wireless Kenya Ltd vs Minister for Information & Communication of Kenya & Another](#) Ibrahim J (as he then was) stated as follows: -"It is essential for the maintenance of the Rule of Law and order that the authority and the dignity of our Courts are upheld at all times. The Court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors. It is the plain and unqualified obligation of every person against or in respect of whom, an order is made by Court of competent jurisdiction, to obey it unless, or orders of a legislative or judicial body, due proceedings by disorderly behavior or insolent language, in its presence or so near thereto as to disturb the proceedings or to impair the respect to such body." In Halsbury's Laws of England it is stated:- "It was the plain and unqualified obligation of every person against or in respect of whom an order was made by a Court of competent jurisdiction to obey it unless and until it was discharged and disobedience of such an order would as a general rule result in the person disobeying it being in contemptan application to Court and punishable by committal or attachment by him not being entertained until he had purged his contempt" In book [The Law of Contempt](#) learned authors Nigel Lowe & Brenda Suftrin state a follows: "Coercive orders made by the Courts should be obeyed and



undertakings formally given to the Courts should be honoured unless and until they are 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...In the present case the terms of the order are not in dispute. Knowledge or the order is not disputed. The alleged disobedience is not contested. I am satisfied that the applicant has demonstrated that there are sufficient grounds to warrant this Court to allow the application. Accordingly, I hereby allow the application dated 30th March 2015 and order as follows: - (i). That Principal Secretary, Ministry of Transport and Infrastructure and the Principal Secretary Ministry of Land, Housing and Urban Development be and are hereby committed to civil to jail for a term not exceeding six (6) for disobeying this Court's order issued on 3rd June 2013. (ii). That the said committal to civil jail may be dispensed with upon prompt payment to the ex parte applicant or his advocates on record of the full decretal sum awarded to Nyeri Civil Suit No. 341 of 1998. Orders accordingly.

9. And lastly the case of *Republic vs Permanent Secretary Office of The President Ministry of Internal Security & another Ex- Parte Nassir Mwandishi* [2014] eKLR:-

“It is not in doubt that section 21(4) of the *Government Proceedings Act* prohibits execution against the Government. Section 21 (3) of the said *Act* on the other hand provides:

“If the order provides for the payment of any money by way of damages or otherwise, or of any costs, the certificate shall state the amount so payable, and the Accounting Officer for the Government department concerned shall, subject as hereinafter provided, pay to the person entitled or to his advocate the amount appearing by the certificate to be due to him together with interest, if any, lawfully due thereon: Provided that the Court by which any such order as aforesaid is made or any Court to which an appeal against the order lies may direct that, pending an appeal or otherwise, payment of the whole of any amount so payable, or any part thereof, shall be suspended, and if the certificate has. 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 void...In the present case the terms of the order are not in dispute. Knowledge or the order is not disputed. The alleged disobedience is not contested. I am satisfied that the applicant has demonstrated that there are sufficient grounds to warrant this Court to allow the application. Accordingly, I hereby allow the application dated 30 March 2015 and order as follows: - (i). That Principal Secretary, Ministry of Transport and Infrastructure and the Principal Secretary Ministry of Land, Housing and Urban Development be and are hereby committed to civil to jail for a term not exceeding six (6) for disobeying this Court's order issued on 3rd June 2013. ii. That the said committal to civil jail may be dispensed with upon prompt payment to the ex parte applicant or his advocates on record of the full decretal sum awarded to Nyeri Civil Suit No. 341 of 1998. Orders accordingly.

Analysis and Determination

10. The High Court's authority to exercise supervisory powers over subordinate Courts and persons exercising administrative authority is a creature of Articles 10, 47, 165(6) and (7) and 232 of the *Constitution* and the provisions of the *Fair Administrative Actions Act, 2015*. Article 10 of the *Constitution* sets out the National Values and Principles of Governance that bind all state officers, state organs, public officers and all persons whenever they apply or interpret the *Constitution*, enact, apply or interpret any law, make or implement public policy decisions. The National Values and Principles of



Governance include: the rule of law, equity, inclusiveness, equality, human rights, non-discrimination, good governance, transparency, accountability, democracy and participation of the people.

11. Under Article 47(1) of the Constitution, 'every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.' The essence of the right to fair administrative action is to ensure administrative processes meet constitutional standards, the element that administrative act must be "lawful encapsulates the principle of legality and the fact it administrative action must be located in the law and must not be arbitrary.
12. In James Opiyo Wandayi v Kenya National Assembly & 2 others [2016] eKLR this Court, Odunga J., opined as follows:

“In my view Article 47 of the Constitution is now emphatic on the fairness of administrative action. The purpose of judicial review is to check that public bodies do not exceed their jurisdiction and carry out their duties in a manner that is detrimental to the public at large. It is meant to uplift the quality of public decision making, and thereby ensure for the citizen civilized governance, by holding the public authority to the limit defined by the law. Judicial review is therefore an important control, ventilating a host of varied types of problems, the focus of cases may range from matters of grave public concern to those of acute personal interest; from general policy to individualized discretion; from social controversy to commercial self-policy to interest; and anything in between. As a result, judicial review has significantly improved the quality of decision making. It has done this by upholding the values of fairness, reasonableness and objectivity in the conduct of management of public affairs. It has also restrained or curbed arbitrariness, checked abuse of power and has generally enhanced the rule of law in government business and other public entities. Seen from the above standpoint it is a sufficient tool in causing the body in question to remain accountable.”
13. Section 3 of the Fair Administrative Action Act, extends the scope of fair administrative action and judicial review to the administrative actions of public and private persons or bodies. The section expressly states that the Act applies to all state and non-state agencies including any person exercising administrative authority; performing a judicial or quasi-judicial function under the Constitution or any written law; or whose action, omission or decision affects the legal rights or interests of any person to whom the action, omission or decision in question relates.
14. Having said so, this Court thus Notice of Motion Application dated 24th October 2023 to be meritorious and the same is allowed.

Final Orders

15. Having found in favor of the *Ex- Parte* Applicant's notice of motion in the premises the Orders which commend themselves to me and which I hereby grant are as follows:
 - i. That, Dr. Salome Muhia- Beacco, CBS, the Principal Secretary (State Department for Correctional Services), Ministry of Interior & Coordination of National Government is hereby found to be in contempt of Court for disobedience of the orders of *mandamus* issued by this Honourable Court on or about 25th October 2021 in this matter and hence liable for imprisonment for a period not exceeding 6 months and or any other appropriate sanction.
 - ii. That, Dr. Salome Muhia- Beacco, CBS the Principal Secretary (State Department for Correctional Services), Ministry of Interior & Coordination of National Government is



hereby convicted and sentenced to personally pay a fine of Kshs 200,000/- and in default to serve sixty (60) days imprisonment at the Langata Women's Prison.

- iii. That, the said contempt of Court and sanctions thereof may be purged Dr. Salome Muhia-Beacco, CBS the Principal Secretary (State Department for Correctional Services), Ministry of Interior & Coordination of National Government, upon prompt payment to the ex parte applicant or his advocates on record of the full decretal sum plus costs awarded to Nakuru CMCC 994 of 2019 Joseph Kimani Njoroge -Vs- Ministry of Home Affairs &5 others.
- iv. That, failure to purge the contempt by Dr. Salome Muhia- Beacco, CBS the Principal Secretary (State Department for Correctional Services), Ministry of Interior & Coordination of National Government shall give rise to issuance of warrants of arrest and committal warrants for imprisonment forthwith being issued.

16. Finally, costs follow the event and thus I accordingly award costs to the *Ex- Parte* Applicant.

Orders accordingly.

SIGNED, DATED AND DELIVERED AT NAKURU ON THIS 16TH DAY OF APRIL 2024.

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MOHOCHI S. M.

JUDGE

