



REPUBLIC OF KENYA



**Njuguna v County Government of Nairobi (Application E039 of 2021)
[2024] KEHC 6667 (KLR) (Judicial Review) (7 June 2024) (Ruling)**

Neutral citation: [2024] KEHC 6667 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
APPLICATION E039 OF 2021**

J NGAAH, J

JUNE 7, 2024

BETWEEN

IRENE WANJIRU NJUGUNA APPLICANT

AND

COUNTY GOVERNMENT OF NAIROBI RESPONDENT

RULING

1. The application before court is the applicant’s notice of motion dated 21 November 2023 expressed to be brought under section 38(d) of the *Civil Procedure Act*, cap. 21. Apart from the order for costs, the only other order sought in the application is framed, thus:

“1. That this honourable court be pleased to issue an order that the County secretary of Nairobi City County be arrested and be detained in prison for a period not exceeding six months for contempt of the orders issued by this honourable court issued (sic) on the 13th day of October 2022 ordering him/her to satisfy the decree in Nairobi CMCC No. 2260 of 2010 issued on 15th January 2019 and costs subsequently incurred thereto.”

The application is supported by the affidavit sworn by the applicant on 6 December 2022.

2. According to the applicant, judgment was entered in her favour against the respondent on 15 January 2019 for the sum of Kshs. 5,315,193/= together with costs and interest in the Chief Magistrate’s Court Civil Case No. 2260 of 2019. An appeal against this judgment was struck out for the reason that it was filed without leave.

Although the respondent was served with the decree, it has failed to satisfy it.



3. The applicant initiated judicial review proceedings for an order of mandamus against the respondent. The application was successful and the order was obtained on 13 October 2022.
4. The respondent was served with the order on 17 October 2022 but it has not satisfied the decree. It is for this reason that the applicant seeks the County secretary of Nairobi City County government to be committed to civil jail for failing to pay the decretal amount.
5. The respondent opposed the motion and a replying affidavit to this end was sworn by W.S.Ogola who says that he is the acting county solicitor of the respondent. According to Mr. Ogola, the respondent does not deny that the applicant obtained a decree against the respondent as stated by the applicant in her affidavit. However, so he deposes, the decree has not been settled for the reason that this claim was inadvertently omitted from the 2023-2024 budget.
6. He has gone further to explain that any payment made by the Respondent has to be budgeted for in advance in any particular financial year in compliance with the provisions of *the Constitution*; the *Public Finance Management Act*, 2012 and the *County Government Act*, 2012. Accordingly, the Respondent found itself in a difficult position since the applicant cannot be paid out of the respondent's current budget.
7. It is Mr. Ogola's position that the Respondent has never refused, failed or neglected to settle the decretal sum because failure to pay has been occasioned by what he has described as "extenuating circumstances" beyond the respondent's control.
8. Before considering the submissions filed by the learned counsel for the respective parties, my attention has been drawn to the fact that this application is on all fours with an application dated 7 December 2022 filed by the applicant for similar orders. By a ruling I rendered on 25 September 2023, I dismissed the application. After considering the law and court decisions on applications for contempt, I noted in my ruling as follows:

"So, if considered from this legal background, the applicant's motion is found wanting in several respects.

First, though the county secretary of Nairobi County Government is the target of contempt orders, she or he is not named as the respondent. The respondent is the County Government of Nairobi. It has been noted that one of the procedural requirements in contempt proceedings is that "where the committal application is made against a person who is not an existing party to the proceedings, it is made against that person by an application notice..."

Secondly, there is no evidence that the order of mandamus was served upon the county secretary. In his affidavit of service, the process server who is alleged to have served the order states as follows:

2. That on the 17th day of October 2022, I received copies of the covering letter attaching an order from Kamau Kinga & Co Advocates, with instructions to serve upon the County government of Nairobi the respondent herein. That on the same day I proceeded to their offices at City Hall Annex 12th floor and upon arrival I presented the documents to the legal department.
3. That an officer in the said department acknowledged receipt by stamping on my copy of the covering letter together on the copy of the order.



4. That I return herewith the said order duly served according to the procedure.”

It is obvious from these depositions that the county secretary was not served personally with the order that he or she is alleged to have disregarded and therefore to be in contempt of. The order was simply served to a department and some unnamed person received the document. This is not sufficient service.

Thirdly, the order was not endorsed with the penal notice. It has been noted there must be permanently displayed on the front copy of the judgment or order served a warning to the person required to do or not to do the act in question that disobedience to the order would be contempt of court punishable by imprisonment, a fine or sequestration of assets. I need not belabour the point that without this display the judgment or order may not be enforced unless, of course, it is an undertaking contained in a judgment or order.

So even if the order had been personally served, it cannot be enforced because of this deficiency.

Finally, there no evidence that the motion was served personally to the county secretary. This is what the process server said in respect of service of the motion:

- “ 2. That on the 18th day of January 2023, received copies of the notice of motion from Kamau Kinga & Company advocates, with instructions to serve upon the County Government of Nairobi in the respondent herein. That on the same date I proceeded to their offices at City Hall Annex 12th floor and upon arrival I presented the documents to the legal affairs department.
3. That an officer in the said department acknowledged receipt by stamping on my copy.
4. That I return herewith the said notice of motion duly served according to the procedure.”

It is rather intriguing that two different documents served on two different occasions were served in similar circumstances which are that they were served in a particular department and a particular unnamed officer received the documents. I say so because this affidavit of service is word for word with the affidavit of service in respect of service of the order of mandamus.

Be that as it may, what comes out clearly is that the County secretary was not personally served with the motion.”

9. There is nothing in this application that suggests that the applicant took cue from my previous ruling and addressed the concerns I pointed out in that ruling in her quest to cite and commit the County Secretary of the County Government of Nairobi for contempt.
10. As a matter of fact, it is a glaring fact that the applicant has relied on the same affidavit of service in which the process server purported to have served a letter, in which the order is alleged have been enclosed. As the excerpt I have reproduced above shows, shows I held the service to have been ineffective.
11. As it was in the previous application, the person sought to be committed to court for contempt has not been named in the instant application. Again, the order has not been endorsed with penal notice.



The application was also not served on the alleged contemnor.

12. I am minded that the County Government of Nairobi responded to the application but the contempt proceedings are not against the County Government. They are quasi-criminal proceedings against a particular individual.
13. Inevitably, and for the second time, I am compelled to dismiss the applicant's application. I will, however, spare the applicant the order for costs for the reason that the decree remains unsettled and the respondent has admitted as such. It is so ordered.

DATED, SIGNED AND DELIVERED ON 7 JUNE 2024

NGAAH JAIRUS

JUDGE

