Republic v County Secretary, County Government of Narok & 2 others; Tom Ojienda & Associates (Ex parte Applicant) (Application E123 of 2022) [2024] KEHC 8622 (KLR) (Judicial Review) (18 July 2024) (Ruling)

Neutral citation: [2024] KEHC 8622 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

JUDICIAL REVIEW

APPLICATION E123 OF 2022

J NGAAH, J

JULY 18, 2024

BETWEEN

REPUBLIC ..... APPLICANT

AND

COUNTY SECRETARY, COUNTY GOVERNMENT OF NAROK .... 1ST RESPONDENT

CHIEF OFFICER, FINANCE/COUNTY TREASURER, COUNTY GOVERNMENT OF NAROK ..... 2ND RESPONDENT

COUNTY EXECUTIVE COMMITTEE MEMBER, FINANCE & ECONOMIC AFFAIRS, COUNTY GOVERNMENT OF NAROK ..... 3RD RESPONDENT

AND

PROF. TOM OJIENDA & ASSOCIATES ..... EX PARTE APPLICANT

RULING

1. The application before court is a motion dated 16 January 2024. The applicant seeks the following orders.

> " 1. This Application be certified urgent;
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> 2. This Honourable Court be pleased to cite the County Secretary, County Government of Narok, the Chief Officer, Finance/County Treasurer County Government of Narok and the County Executive Committee Member, Finance and Economic Affairs, County Government of Narok for being in

contempt of the Certificate of Order dated 28th June 2022 and punish them as per Section 5 of the *Judicature Act* for having deliberately disobeyed the Orders of this Honourable Court.

3. That summons be issued against the said County Secretary, County Government of Narok, the Chief Officer, Finance/County Treasurer County Government of Narok and the County Executive Committee Member, Finance and Economic Affairs, County Government of Narok to appear before this Court and show cause why they should not be committed to civil jail.

4. That the costs of this Application be borne by the Respondents."

2. The application is expressed to be made under Order 51 of the *Civil Procedure Rules, 2010*, sections 1A, 1B, 3A of the *Civil Procedure Act*, Cap. 21 and section 5(1) of the *Judicature Act*, Cap. 8. The application is supported by the affidavit of Professor Tom Ojienda, who has described himself as the managing partner in the applicant firm of advocates.

3. As far as it is relevant to this application, Professor Ojienda has sworn that his firm of advocates obtained a judgment against the County Government of Narok for the sum of Kshs. 8,842,648.00. The judgment debtor refused, neglected or ignored to settle the decretal sum as a result of which he moved this Honourable Court for the order of *mandamus* directed at particular officer of the County Government of Narok to compel them to pay the decretal sum as specified in the *mandamus* order. These officers have been named as the County Secretary; the Chief Officer, Finance/County Treasurer, Narok County; and, the County Executive Member, Finance and Economic Affairs. The order was obtained in those terms and issued on 11 December 2023.

4. Professor Ojienda has sworn that although the order for *mandamus* and the certificate of order against Government were served upon the respondents, the latter have ignored, refused or neglected to settle the decree. It is for this reason that he now seeks the respondents be cited for contempt for their refusal to comply with a valid court order and pay the applicant.

5. Mr. John Maiyani Tuya swore a replying affidavit opposing the application. He has sworn that he is the County Secretary, the 1st respondent in this application, and that his affidavit is sworn on his own behalf of the rest of the respondents.

6. Mr. Tuya has denied that he or any of the other respondents were served with the certificate of order against the government or the order of *mandamus* either as alleged by Professor Ojienda or at all. If anything, he has sworn, there is no evidence of such service.

7. I must state at the very outset that it is not the certificate of order against government that ought to be the basis upon which this application is founded; rather, it is the decree according to which the respondents were ordered to settle the decretal amount as set out in the certificate of order against government that counts. At this stage of the proceedings, the certificate of order against government would not be of much consequence. That order was only necessary in support of the application for the order of *mandamus*; to demonstrate that the respondents had been served with it but had either refused, neglected or ignored to settle the decretal amount hence the need for the order of *mandamus* to compel them to pay. Accordingly, its purpose was served once the order of *mandamus* was granted.

8. Needless to say, there is no doubt that the order of *mandamus* was obtained on the basis of section 21 of the *Government Proceedings Act*, cap. 40 which generally deals with the manner and procedure on enforcement of orders and decrees against Government. This section reads as follows:

21. Satisfaction of orders against the Government

(1) Where in any civil proceedings by or against the Government, or in proceedings in connection with any arbitration in which the Government is a party, any order (including an order for costs) is made by any court in favour of any person against the Government, or against a Government department, or against an officer of the Government as such, the proper officer of the court shall, on an application in that behalf made by or on behalf of that person at any time after the expiration of twenty-one days from the date of the order or, in case the order provides for the payment of costs and the costs require to be taxed, at any time after the costs have been taxed, whichever is the later, issue to that person a certificate in the prescribed form containing particulars of the order:

Provided that, if the court so directs, a separate certificate shall be issued with respect to the costs (if any) ordered to be paid to the applicant.

(2) A copy of any certificate issued under this section may be served by the person in whose favour the order is made upon the Attorney-General.

(3) 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 not been issued may order any such direction to be inserted therein.

(4) Save as aforesaid, no execution or attachment or process in the nature thereof shall be issued out of any such court for enforcing payment by the Government of any such money or costs as aforesaid, and no person shall be individually liable under any order for the payment by the Government, or any Government department, or any officer of the Government as such, of any money or costs.

(5) This section shall, with necessary modifications, apply to any civil proceedings by or against a county government, or in any proceedings in connection with any arbitration in which a county government is a party.

9. One of the ways through which decrees or orders are enforced is, of course, execution or attachment. However, the Government is protected from such process of execution or other similar process in enforcement of decrees or orders by section 21(4) of the *Government Proceedings Act*. It is in the face of this protection from execution or attachment, that the only available route that was open to the applicant was to compel the respondents to perform their statutory duties under section 21(3) of the *Act* and pay what has been decreed as due and owing to the applicant. This was the rationale upon which the application was made and subsequently granted.

10. According to *Halsbury's Laws of England*/Judicial Review Volume 61 (2010) 5th Edition)/5. Judicial Remedies/ (1) Introduction paragraph 689:

> " A mandatory order is, in form, a command issuing from the High Court, directed to any person, corporation or inferior tribunal requiring him, or them, to do some particular thing specified in the command which appertains to his or their office and is in the nature of a public duty (See *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997, [1968] 1 All ER 694, HL). The breach of duty may be a failure to exercise a discretion, or a failure to exercise it according to proper legal principles."

This is reiterated in paragraph 703 which states:

> " A mandatory order is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or it to do some particular thing specified in the order which appertains to his or its office and is in the nature of a public duty... the purpose of a mandatory order is to compel the performance of a public duty, whether of an inferior court or tribunal to exercise its jurisdiction, or that of an administrative body to fulfil its public law obligations. It is a discretionary remedy."

11. And with particular reference to public officers who fail to perform their duty, paragraph 706 is clear that a *mandamus* order may be issued to compel them to carry out the duty. It reads as follows:

> " 706. Public duties by government officials.
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> If public officials or public bodies fail to perform any public duty with which they have been charged, a mandatory (*mandamus*) order may be made to compel them to carry out the duty (See *R v Metropolitan Police Comr, ex p Blackburn* (No 3) [1973] QB 241, [1973] 1 All ER 324, CA; *R v London Transport Executive, ex p GLC* [1983] QB 484, [1983] 2 All ER 262, DC.)"

12. It follows that in an application such as the one before court, the applicant is enjoined to demonstrate that despite the court having ordered any particular public officer to perform his public duty, the officer has refused, neglected or ignored to comply with the order. The order that would count in these circumstances, therefore, would not be a certificate of order against government but the order of *mandamus* which, in this case, is encapsulated in the decree issued on 11 December 2023. It follows that the question whether the decree was served upon the respondents, turns out to be key to the fate of the application.

13. According to Professor Ojienda, demand letters respectively dated 10 August 2023 and 14 January 2024 were written to the respondents asking them to settle the decretal sum. Besides the demand letters, Professor Ojienda has sworn that:

> " 16. That the Applicant further filed an Affidavit of Service dated 16th January 2024 depicting proof of service of the demand letters together with the Certificate of Order dated 28th June 2022 on the respondents herein. (Annexed hereto and marked "PT0- 7"is a copy of the Affidavit of Service dated 16th January, 2024)."

14. The affidavit of service to which reference has been made in this deposition was sworn on 16 January 2024 by one Kyalo Kamina who has identified himself in that affidavit as "a licensed process server

authorised to serve civil processes." When, how and the circumstances under which he served the order in question are matters that he has deponed to in paragraphs 2 -7 of his affidavit.

15. I cannot do better than reproduce his depositions here verbatim, if not for any other reason, to appreciate whether service of the decree upon the respondents can be said to have been effective enough as to conclude that the respondents were aware of the decree but that they have disobeyed it. The process server swore as follows:

> " 2. That on the 19th December 2023, I received instructions from the firm of Professor Tom Ojienda & Associates Advocates to serve the letter dated 19th December 2023 upon 1. The County Executive Committee Member Finance & Economic affairs Narok County Government, 2. The County Secretary, Narok County Government, 3. The Chief Officer Finance / County Treasurer.
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> 3. That on the same day I travelled to Narok County offices and upon arrival and introductions (sic) as to the purpose of my visit I was directed to the office of the County Secretary whereby the secretary accepted service by stamping at the front face of the letter and the front face of the Certificate of Order against Government dated 28th June 2022.
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> 4. That further on the same day within Narok County I went to the office of the County Executive Committee Member Finance & Economic Affairs and served the secretary with a copy of the same letter which she accepted service by stamping at the front face of my copy and also on the front face of the Certificate of Order against Government dated 28th June 2022.
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> 5. That further on the same day I went to office of the Chief Officer Finance / County Treasurer and upon arrival and introductions as to the purpose of my visit I served the secretary with a copy of the said letter which she accepted service by stamping at the front face of my copy and also stamped the front face of the Certificate of Order against Government dated 28th June 2022.
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> 6. That further on the 15th January 2024 I went back to Narok County government offices and served the letter dated 12th January 2024 upon the above officers whereby the secretaries in the respective offices accepted service of the said letter by stamping at the front face of my copy and also the Certificate of Government dated 28th June 2022.
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> 7. That further on the 15th January 2024 within Narok County I went to the Office of the Governor Narok County Government, and served the letter dated 12th January 2024 which the secretary accepted service by stamping at the front face of my copy and the front face of the Certificate of Order against Government dated 28th June 2022."

16. It is apparent from these depositions that on 19 December 2023, the process server served a letter dated 19 December 2023 upon the secretaries of the three respondents. The circumstances under which the secretaries, apparently of the respondents, were served with the letter and a copy of the certificate of order against government appear to be similar. The process would serve the letter and the certificate of order against government would be served upon each of the secretaries and they would, in turn, stamp and sign on the face of the letter and the order.

17. The Governor's Secretary was also served and she accepted and acknowledged service in the same manner as the respondents' secretaries. It is not clear why the applicant felt it was necessary to serve the governor when the order in question was not directed at him. As a matter of fact, he is not alleged to have contravened the decree and, perhaps for this reason, neither is he named as a respondent in these proceedings.

18. Prominent in the process server's affidavit of service is the fact that what was served was a letter and a certificate of order against government and not the decree. As noted, this is the decree whose disobedience would form the basis of the contempt of court application before court. Although Ms. Msando, the learned counsel for the applicant, submitted at the hearing of this application that the order of *mandamus* was enclosed in the letter served on 19 December 2023, it is not so stated in the affidavit of service.

19. But even if it was enclosed as alleged, it is not acknowledged as having been served. Why the respective secretaries of the respondents would have chosen to acknowledge receipt of the certificate of order against the government and not that of *mandamus* yet the two orders are alleged to have been enclosed in the same letter raises doubt whether the decree was served at all.

20. It is also apparent from the process server's affidavit that no effort was made to serve the respondents personally. This sort of service is a mandatory requirement in order to succeed in contempt of court proceedings. In the instant case, it has not been shown that the process server made any attempts to serve the respondents personally before he settled on serving their secretaries. Neither has he stated that respondents had authorised these secretaries to receive process on their behalf.

21. Needless to reiterate that disobedience of a court order or judgment is the foundation for contempt of court proceedings against the contemnor. It is, therefore, a necessary prerequisite that before one is held to be in contempt, it must be demonstrated that he was aware of the order or judgment he is alleged to be in contempt of. In other words, proof of service of the order or judgment is necessary unless, for reasons to be stated, the court dispenses with service of the order or judgment on the alleged contemnor.

22. In the case of *Nyamodi Ochieng Nyamogo & Another versus Kenya Posts & Telecommunications Corporation* (1994) eKLR, the Court of Appeal emphasised the need for personal service of the order in issue and for such an order to be endorsed with the penal notice. As far as service is concerned the Court noted as follows:

> " The law on the question of service of order stresses the necessity of personal service. In *Halsbury's Laws of England* (4th Ed) Vol 9 on p 37 para 61 it is stated:
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> "61. Necessity of personal service.
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> As a general rule, no order of court requiring a person to do or abstain from doing any act may be enforced unless a copy of the order has been served personally on the person required to do or abstain from doing the act in question ..."
>
> Where the order is made against a company, the order may only be enforced against an officer of the company if this particular officer has been served personally with a copy of the order ..."

23. The court further noted:

> " Keeping the importance of personal service of the order in mind we now take a look at the aforesaid two copies of the order both of which bear the stamp of Wetangula & Co Advocates, in acknowledgement of receipt of the said orders. Service on Wetangula & Co does not constitute personal service on any of the three officers. It is a personal service on each one of them that is required to be effected by law. Service of the two orders on Wetangula & Co, Advocates, on 25th October, 1993, and 1st November, 1993, therefore, is a wasted effort."(Emphasis added.)

The court described personal service as

> " an elementary but mandatory procedural rule which in contempt proceedings has (been) prescribed "personal service".

24. Rule 85.5 of the *Civil Procedure (Amendment No. 3) Rules 2020* of England which would apply to contempt of court proceedings in this country by dint of section 5 of the *Judicature Act*, Cap. 8 also require that the order or judgment be served and be endorsed with the requisite penal notice. It reads as follows:

81.4.

(1) Unless and to the extent that the court directs otherwise, every contempt application must be supported by written evidence given by affidavit or affirmation.

(2) A contempt application must include statements of all the following, unless (in the case of (b) to (g)) wholly inapplicable—

a) the nature of the alleged contempt (for example, breach of an order or undertaking or contempt in the face of the court);

(b) the date and terms of any order allegedly breached or disobeyed;

(c) confirmation that any such order was personally served, and the date it was served, unless the court or the parties dispensed with personal service;

(d) if the court dispensed with personal service, the terms and date of the court's order dispensing with personal service;

(e) confirmation that any order allegedly breached or disobeyed included a penal notice;

(f) the date and terms of any undertaking allegedly breached;

(g) confirmation of the claimant's belief that the person who gave any undertaking understood its terms and the consequences of failure to comply with it;

(h) a brief summary of the facts alleged to constitute the contempt, set out numerically in chronological order;

(i) that the defendant has the right to be legally represented in the contempt proceedings;

(j) that the defendant is entitled to a reasonable opportunity to obtain legal representation and to apply for legal aid which may be available without any means test;

(k) that the defendant may be entitled to the services of an interpreter;

(l) that the defendant is entitled to a reasonable time to prepare for the hearing;

(m) that the defendant is entitled but not obliged to give written and oral evidence in their defence;

(n) that the defendant has the right to remain silent and to decline to answer any question the answer to which may incriminate the defendant;

(o) that the court may proceed in the defendant's absence if they do not attend but (whether or not they attend) will only find the defendant in contempt if satisfied beyond reasonable doubt of the facts constituting contempt and that they do constitute contempt;

(p) that if the court is satisfied that the defendant has committed a contempt, the court may punish the defendant by a fine, imprisonment, confiscation of assets or other punishment under the law;

(q) that if the defendant admits the contempt and wishes to apologise to the court, that is likely to reduce the seriousness of any punishment by the court;

(r) that the court's findings will be provided in writing as soon as practicable after the hearing; and

(s) that the court will sit in public, unless and to the extent that the court orders otherwise, and that its findings will be made public. (Emphasis added).

Of particular relevance to this application is Rule 84.4 (2)(a).

25. In the applicant's case, there is evidence that the decree was endorsed with the penal notice. However, the endorsement is inconsequential if the order is not served on the alleged contemnors in the first place.

For the reasons I have given, I find the applicant's application to be defective and incompetent. It is hereby dismissed. Considering that the decree has not been settled, I make no order as to costs. It is so ordered.

SIGNED, DATED AND POSTED ON THE CTS ON 18TH JULY, 2024

NGAAH JAIRUS

JUDGE