Republic v County Executive Committee Member, Finance & Economic Affairs Narok County Government & 2 others; Tom Ojienda & Associates (Exparte) (Application E100 of 2023) [2024] KEHC 11393 (KLR) (Judicial Review) (20 September 2024) (Ruling)

Neutral citation: [2024] KEHC 11393 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

JUDICIAL REVIEW

APPLICATION E100 OF 2023

J NGAAH, J

SEPTEMBER 20, 2024

BETWEEN

REPUBLIC ..... APPLICANT

AND

COUNTY EXECUTIVE COMMITTEE MEMBER, FINANCE & ECONOMIC AFFAIRS NAROK COUNTY GOVERNMENT ..... 1ST RESPONDENT

COUNTY SECRETARY, COUNTY GOVERNMENT OF NAROK .... 2ND RESPONDENT

CHIEF OFFICER, FIANCE/ COUNTY TREASURER NAROK COUNTY GOVERNMENT ..... 3RD RESPONDENT

AND

PROF TOM OJIENDA & ASSOCIATES ..... EXPARTE

RULING

1. The application before court is a motion dated 3 May 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 9th August, 2023 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. It is supported by the affidavit of Professor Tom Ojienda, who has introduced himself as the managing partner in the applicant firm of advocates.

3. Professor Ojienda has sworn that on 21 July 2023, his firm of advocates obtained a judgment against the County Government of Narok for the sum of Kshs. 45, 758, 170.20 together with interest and costs of Kshs. 30,000/=. A decree to this end was issued on 9 August 2023.

4. The judgment debtor refused, neglected or ignored to settle the decretal sum as a result of which the applicant moved this Honourable Court for the order of mandamus directed at certain officers of the County Government of Narok, compelling them to pay the decretal sum as specified in the mandamus order. The order was obtained and a decree issued on 9 February 2024.

5. Professor Ojienda has sworn further that on 10 August 2023 and 24 April 2024, he wrote demand letters addressed to the respondents asking them to settle the sum of Kshs. 66, 780,760.66/=. However, the respondents have to date refused to settle the outstanding sums in disregard of the Certificate of Order against government dated 9 August 2023 and the court order dated 2 February, 2024.

6. Mr. John Maiyani Tuya swore a replying affidavit opposing the application. He has sworn that he is the County Secretary, the 2nd respondent in this application, and that his affidavit is sworn on his own behalf and on behalf of the rest of the respondents.

7. 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 personal service. In particular, Mr. Tuya has sworn that copies of the orders exhibited to the applicant's affidavit and which are alleged to have been served upon the respondents do not bear the respondent's stamp and neither were they enclosed in the letter which the applicant's process server claims was sent to the respondents. He urges this Honourable Court to dismiss the application.

8. As much as the certificate of order against government was necessary in the application for the order of mandamus, 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 would be of consequence in the application for contempt. No doubt, 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. Subsection (3), in particular, reads as follows:

21. Satisfaction of orders against the Government

(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.

9. This provision of the law imposes a public duty on the accounting officer of the Government department concerned to pay whatever amount that appears in the certificate of order against government. Where he fails to perform this public duty a mandamus order would ensue to compel him to perform the public duty and make the payment. Only the order of mandamus would be the viable means through which the decree holder can enforce the decree because under section 21(4) of the *Government Proceedings Act*, the Government is insulated from execution or attachment. 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) Introductionparagraph 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:

> "
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> " 706. Public duties by government officials.
> 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 2 February 2024. 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. The depositions in Professor Ojienda's affidavit with respect to service of the order are as follows:

> " 15. Thaton 10th August 2023 and 24th April 2024, the Applicant wrote demand letters addressed to the respondents asking the respondents to settle the sum of Kshs. 66, 780,760.66/= due, but the Respondents have to date blatantly refused to settle the outstanding sums in utter disregard to the Certificate of Order dated 9th August 2023 and this Court's Oder dated 2nd February, 2024. (Annexed hereto and marked "PTO- 9" are copies of the letters dated 10th August 2023 and 24th April, 2024).
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> 16. That the Applicant filed an Affidavit of service dated 25th April 2024 depicting proof of service of the demand letters. (Annexed hereto and marked "PTO-10" is a copy of the Affidavit of Service dated 25th April 2024)
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> 17. That despite service of the said Certificate of Order and the Judgment of this Honourable Court issuing Mandamus Orders against the Respondents, the Respondents have to date blatantly refused to settle the decretal sum of Kshs. 66,780,760.66/= due and owing to the Applicant.
>
> 18. That the utter disobedience of the said Certificate of Order dated 9th August 2023 by Respondents herein means not only that the authority of this Court is trampled, but also that the Applicant is denied the chance to enjoy the fruits of its Judgment."

14. In the affidavit of service which professor Ojienda has made reference to, Mr. Kyalo Kamina who has introduced himself in that affidavit as "a process server authorised to serve court processes," has sworn as follows:

> " 2. That on the 25th April 2024, I received instruction from the firm of Professor Tom Ojienda & Associates Advocates to serve the letter dated 24th April 2024 upon 1. The County Secretary, Narok County Government, 2. The Chief Officer, Finance / County Treasurer, Narok County Government 3. The County Executive Committee Member, Finance and Economic Affairs, Narok County Government 4. The Governor, Narok County Government.
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> 3. That on the same day I travelled to Narok County Government offices and upon arrival and introductions as the purpose of my visit I was directed to the office of the County Secretary on the ground floor whereby the secretary accepted service of the letter by signing and stamping at the front face of my copy.
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> 4. 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 by stamping at the front face of my copy.

5. That further on the same day I went to the office of the County Executive Committee Member Finance and Economic affairs, Narok County, and upon arrival and introductions as to the purpose of my visit I served the secretary with copies of the letter which she accepted by stamping at the front face of my copy.

6. That further on the same day I went to the office of the Governor Narok County Government 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 signing and stamping at the front face of my copy."

15. It is apparent from these depositions that on 25 April 2024, the process server served a letter dated 24 April 204 upon the secretaries of the 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 server would serve the letter upon each of the secretaries and they would, in turn, stamp and sign on the face of the letter.

16. 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, he is not named as a respondent in these proceedings.

17. Prominent in the process server's affidavit of service is the fact that what was served was a letter and not the decree. As noted, this is the decree whose disobedience would form the basis of the contempt of court application before court.

18. 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.

19. 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.

20. In the case of Nyamodi Ochieng Nyamogo & Another v 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.

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 ..."

21. 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".

22. 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).

23. 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 DELIVERED ON 20 SEPTEMBER 2024

NGAAH JAIRUS

JUDGE