



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KERUGOYA

MISCELLANEOUS CIVIL APPLICATION NO. 4 OF 2019 (J.R)

IN THE MATTER OF KERUGOYA ELC NO. 34 OF 2020

(MILKAH MUTHONI WAGOCO)

VERSUS

THE COUNTY GOVERNMENT OF KIRINYAGA & 2 OTHERS

AND

IN THE MATTER OF GOVERNMENT PROCEEDINGS ACT AS APPLIED TO COUNTY GOVERNMENTS

REPUBLIC.....APPLICANT

VERSUS

THE COUNTY SECRETARY, COUNTY

GOVERNMENT OF KIRINYAGA.....1ST RESPONDENT

THE EXECUTIVE COMMITTEE MEMBERS FOR FINANCE,

COUNTY GOVERNMENT OF KIRINYAGA.....2ND RESPONDENT

RULING

Vide an Originating Application Notice brought under *Section 5 of the Judicature Act, Cap 8 of the laws of Kenya, Section 14 of the contempt of Court Act, 1981 of England, Cap. 49 of the laws of England and Rules 81.8 and 81.10 of part 81 of the Civil Procedure (Amendment No. 2) Rules, 2012 of England and Wales* the Applicant is seeking the following orders:-

- (1) That this Honourable Court be pleased to declare and hold that having been served/having been aware of the decree made by this Honourable Court on 4th December 2017 in this Petition, and the decree issued by this Honourable Court on 16th December 2020, in Kerugoya Environment and Land Court Misc. Civil Application No. 4 of 2019; Republic Vs The County Secretary; County Government of Kirinyaga and the Executive Committee member for Finance, County Government of Kirinyaga, the Respondent herein, have disobeyed the said decrees and hence are in civil contempt of Court.**
- (2) That the said County Secretary, County Government of Kirinyaga and the Executive Committee members for Finance, County Government of Kirinyaga, the Respondent herein, be each committed to civil jail for a period of six months or any other period or any other sanction as this Court may deem fit and appropriate.**
- (3) That the costs of this application be provided for.**

The said application is supported by the verifying affidavit of the Applicant sworn on 9th March 2021 and the following grounds:-

- (a) On 8th June 2020, this Honourable Court made orders in terms:

That an order of mandamus be and is hereby issued compelling the Respondents to pay the Applicant, the decretal amount of Ksh. 3,142,288/= plus interest at 12% per annum from August 2018, till payment in full.

(b) The view of this Honourable Court which was reiterated by the Court of Appeal in Refrigerator and Kitchen utensils Ltd Vs G.P. Shah and others, Court of Appeal at Nairobi, Civil Application No. 39 of 1990, is that it is essential for the maintenance of the rule of law and good order that its authority and dignity of our Courts be upheld at all times and further that the Court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with contemnors; the Respondent has undermined the rule of law authority and dignity of this Court;

(c) As held by the Court of Appeal in Christine Wangari Gachege Vs Elizabeth Wanjiru Evans & 11 Others (2014) e K.L.R, the law of contempt applicable is as contained in Part 81 of the Civil Procedure Rules (amendment No. 2) of the United Kingdom and that all that they require for the Applicant for the committal to jail is a statement, verifying affidavits and application, Notice be filed and served on the respondents; unlike the position before, no leave of the Court is required except in cases where the application is committal for breach of an undertaking and an advocate is involved.

(d) As held in Nairobi E.L.R.C Cause No. 1380 of 2013; Prof. Mwaniki Ngari Vs Prof. Akama & Another, unlike the position before where personal service of an order was required today, all that is required is knowledge of the content of the order whether served personally by fax, e-mail or other communications her ladyship Hon. Lady Justice Wasilwa stated the law as follows:

"The applicant submitted on this respect and cited J.Z. Ochino & Another Vs George A. Okombo & Others – Court of Appeal Nairobi C.A. No. 30 of 1989 which states as follows:-

“As we read the law, the effect of the English provisions is not as a general rule no order of Court requiring a person to do or abstain from doing any act which may be enforced by committing him for contempt unless a copy of the order has been served personally on the person required to do or abstain from doing the action”.

This decision was endorsing the fact of personal service and so are many other decisions; See e.g. Emma Wanjiku Ndungu Vs Francis Njoroge Kamau & 4 Others (2012) e K.L.R, Nyamoch Ochieng Nyamogo & Another Vs Kenya Posts & Telecommunications Corporation – Civil Application No. Nairobi 264/1993.

The law however has changed. I have had occasion to discuss this issue in Petition No. 286/2014 Kisumu Industrial Court Nelco Masanya Sagwa & Another Vs County Secretary, Kisumu County & 4 others where I cited the Court of appeal decision in Justice Kariuki Mate & Another Vs Martin Nyaga Wambora (2014) e K.L.R where the learned J.J.A. cited Rule 81.10 of the Civil Procedure (Amendment No. 2) Rules 2012 of England which states that:

(3) The Application Notice must:-

Set out in full the grounds on which the committal application is made and must identify separately and numerically each alleged act of contempt including, if known the date of each of the alleged acts and be supported by one or more affidavits containing all the evidence relied upon.

(4) Subject to paragraph (5), the application notice and the evidence in support must be served on the Respondent.

(5) The Court may

(a) Dispense with service under paragraph (4) if it considers it just to do so or

(b) Make an order in respect of service by an alternative method or at an alternative place”

In the Wambora case (supra), the Court of Appeal restated Rule 18.8 and stated as follows, as circumstances which the Court can dispense with personal service of an order:

“In the case of a judgment or an order requiring a person not to do an act, the Court may dispense with service of a copy of the judgment or order in accordance with Rules 81.5 & 81.7 if it is satisfied that the person had notice of it.

By being present when the judgment or order was given or made.

By being notified of its terms by telephone, e-mail or otherwise”.

The Court of Appeal made a finding that:-

“The trial Court was correct in holding that the law as this was in contempt of Court has since changed. The law as it stands today is that knowledge of law order is sufficient for purposes of contempt proceedings”.

This Court makes a finding that in this case, the law as restated is that where there is knowledge of a Court order, that supersedes personal service in contempt proceedings”.

(e) Being aware of/having been served the orders set out above, the 2nd Respondent herein has committed the acts of contempt set out in the verifying affidavit.

APPLICANTS CASE

In her verifying affidavit sworn on 9th March 2021, the Applicant deposed as follows:

- (1) That I am the Petitioner/Applicant herein.
- (2) That I crave the Court’s leave to refer to the proceedings and pleadings herein.
- (3) That I filed the petition herein in 2012.
- (4) That after the hearing was concluded, judgment was entered for me.
- (5) That I was awarded general damages in the sum of Ksh. 2.5 and costs in the sum of Ksh. 642,288. Annexed hereto marked MMW-1 is a bundle of the judgment, decree and certificate of taxation.
- (6) That I instituted this petition at Nairobi in 2012.
- (7) That on 13th September 2018, the decree and the certificate of taxation were served on the 2nd Respondent together with a demand letter. Annexed hereto marked MMW-2 is a copy of the demand letter.
- (8) That the said demand letter bears an acknowledgment of service of the said documents on the Respondents.
- (9) That the Respondents have disobeyed the said decree and certificate of taxation.
- (10) That I am advised by my Advocates, M/S Kamau Kuria & Company Advocates and I verily believe the same to be true that:-
 - (a) The Respondents have committed a contempt of Court.
 - (b) The contempt of Court Act governs enforcement of orders for payment of moneys against accounting officers.
 - (c) The 2nd Respondent is the accounting officer of the 1st Respondent.
 - (d) This Honourable Court has jurisdiction to commit to civil jail or fine any accounting officer who disobeys a Court order.
 - (e) The 2nd Respondent has disobeyed the orders of this Honourable Court taking the forms of the decree and the certificate of taxation.
 - (f) The law requires that this Honourable Court issues against the 2nd Respondent a notice to show cause why contempt of Court proceedings should not be instituted against him.
 - (g) This is a proper case for the notice to show cause to be issued against the 2nd Respondent.
 - (h) Waweru J. In Nairobi HCCC No. 2892 of 1993, James H. Gitau Mwara Vs The Attorney General expressed himself as follows:-

“The long and short is that there is a money decree in place in favour of the plaintiff against the defendant. There is no stay of execution of decree sought or granted.

Needless to say, Muthoni Kimani, Senior Deputy Solicitor General cannot appear to decree such stay of execution, no matter how noble her intentions. The defendant’s client ministry has released the necessary funds to the defendant to satisfy the decree for onward transmission to the plaintiff’s Advocates. The defendant’s duty is to release those funds, unless there is a stay of execution in place, duly sought and granted by this Court or the Court of Appeal. It is not open to the Senior Deputy Solicitor General to decide whether or not to release the funds. She does not in law have such discretion”.

THE RESPONDENTS CASE

The Respondents filed a Replying Affidavit sworn by one Caroline Kinyua who is the County Attorney and Legal Advisor of the 2nd Respondent herein where she deposed as follows:-

- (1) That I am the County Attorney and Legal Advisor in the County Government of Kirinyaga and being conversant with this matter, I am therefore competent to swear this affidavit.
- (2) That I have read and understood the contents of the Applicant's application dated 9th March 2021 and wish to respond as follows:-
- (3) That the application herein arises from a petition by the Applicant on 8th June 2012 where the Court delivered an ex-parte judgment on 16th June 2017 against the Respondents.
- (4) That the Respondents did not file a response to the said petition as they were not aware of the suit as the County Government of Kirinyaga was never served with the petition or any Court documents with regard to this suit.
- (5) That as a result, judgment was entered against the Respondents without being given a chance to set out their case regarding the suit and the Respondents were prejudiced all along until final determination of the matter.
- (6) That immediately upon being made aware of the said ex-parte judgment and this suit, the Respondents herein filed an application before this Honourable Court in ELC Case No. 34 of 2012 dated 6th December 2019 which is pending before this Honourable Court (Annexed hereto and marked "CK-1" is a copy of the application).
- (7) That in the said application, the Respondents seek to set aside the ex-parte judgment entered on 16th June 2017 and stay execution of the ex-parte judgment entered on the 16th June 2017 which is the subject of the present Judicial Review proceedings.
- (8) That the said application is now scheduled for ruling on 25th June 2021 before this Honourable Court.
- (9) That I have been informed by the advocates on record for the Respondent whose advice I verily believe to be true and correct that it is only in the interest of justice that this matter be held in abeyance awaiting the outcome of the application in ELC Case No. 34 of 2012.
- (10) That the suit property which gave rise to these proceedings forms part of land that was compulsorily acquired by the County Government of Kirinyaga for development and to safeguard public interest and therefore it is imperative that the ruling is first delivered before the Court can hear this application.
- (11) That since the Respondents are not the local authority against whom the judgment of 16th June 2017 was entered and they ought not to be compelled to satisfy the decree issued against the defunct local authority and consequently cannot be cited for contempt of a suit that they were not parties to.
- (12) That the Respondent having applied to set aside the judgment, this application should be dismissed and struck out to await the determination of the said application seeking to set aside the judgment which gave rise to these proceedings.
- (13) That where there is an application pending whose result may upset the decision sought to be implemented by way of judicial review, the Court is inclined to await the determination of the said application before granting the orders sought in order not to find itself in an untidy situation where an order is issued in respect of a judgment which may well be set aside.
- (14) That contempt of Court being quasi-criminal in nature, the standard of proof required for the Respondents to be found in contempt is beyond reasonable doubt standard that the Respondents breached the Court order flagrantly.
- (15) That the Respondents are not in willful disobedience of Court orders and only seek an opportunity to be heard on the petition filed on 16th June 2017 which led to the ex-parte judgment delivered on 16th June 2017.
- (16) That it is a fundamental rule of the Constitution that a person should not be deprived of liberty if reasonable doubt exists about the essentials and therefore the Respondents' liberty should not be curtailed on the basis of non-payment of the decretal sum which is challenged.
- (17) That the Applicant herein has failed to prove any breach of the Court order by the Respondents to the required standard.
- (18) That the Applicant will suffer no prejudice if the application is dismissed as she will have an opportunity to seek the same prayers if the application for setting aside the judgment fails.
- (19) The current application is pre-mature, misconceived, lacks merit, frivolous and an abuse of the Court process and therefore it should be dismissed with costs to the Respondents.

ANALYSIS AND DECISION

I have considered the Applicant's Originating application Notice, the verifying affidavit and the replying affidavit by the Respondent. I have also considered the rival submissions. The Respondent in their replying affidavit have raised a fundamental issue of a preliminary nature to the effect that these judicial review proceedings are seeking to enforce the judgment and decree in ELC Case No. 34 of 2012 delivered on

16th December 2017. The Respondent through their County Attorney in her replying affidavit to the Originating application on notice has deponed that she has filed an application seeking to set aside the said judgment and decree which these judicial review proceedings are seeking to enforce. A copy of the said application was annexed to her replying affidavit and marked "CK-1".

According to the Respondent, if the said application seeking to set aside the judgment and decree in ELC No. 34 of 2012 is successful, the Court will find itself in an untidy situation. Other than denying the contents of the replying affidavit, the Applicant did not specifically deny that there is a pending application dated 6th December 2019 seeking to set aside the judgment and decree of this Honourable Court delivered on 16th June 2017. I agree with the submissions by the Respondent that the present Originating application notice which seeks to enforce the judgment and decree of this Honourable Court is premature as there is an application seeking to upset the very same judgment and decree sought to be enforced.

The upshot of my analysis is that the Originating Application Notice dated 9th March 2021 is hereby struck out with no orders as to costs. It is so ordered.

RULING DATED, DELIVERED PHYSICALLY AND SIGNED IN KERUGOYA THIS 15TH DAY OF OCTOBER, 2021.

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E.C. CHERONO

ELC JUDGE

In the presence of:-

- 1. MR. ASIIMWE HOLDING BRIEF FOR MUNYORI**
- 2. RESPONDENT/ADVOCATE – ABSENT**
- 3. KABUTA, COURT CLERK – PRESENT.**