



Republic v County Executive Committee Member Finance & Economic Planning (County Government of Mombasa) & 3 others; Malombo t/a OM Robinson & Company Advocates (Exparte) (Judicial Review Application 06 of 2019) [2023] KEHC 763 (KLR) (10 February 2023) (Ruling)

Neutral citation: [2023] KEHC 763 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
JUDICIAL REVIEW APPLICATION 06 OF 2019**

OA SEWE, J

FEBRUARY 10, 2023

BETWEEN

REPUBLIC APPLICANT

AND

COUNTY EXECUTIVE COMMITTEE MEMBER FINANCE & ECONOMIC PLANNING (COUNTY GOVERNMENT OF MOMBASA) 1ST RESPONDENT

CHIEF OFFICER FINANCE (COUNTY GOVERNMENT OF MOMBASA) 2ND RESPONDENT

COUNTY ATTORNEY (COUNTY GOVERNMENT OF MOMBASA) 3RD RESPONDENT

COUNTY GOVERNMENT OF MOMBASA 4TH RESPONDENT

AND

ROBINSON ONYANGO MALOMBO T/A OM ROBINSON & COMPANY ADVOCATES EXPARTE

RULING

[1] The Notice of Motion dated January 26, 2023 was brought by the ex parte applicant, Robinson Onyango Malombo, T/A O.M. Malombo & Company Advocates (hereinafter “the applicant”) under section 5(1) of the *Judicature Act*, Chapter 8 of the Laws of Kenya for orders that:

[a] the Acting Chief Officer, County Government of Mombasa, Mr. Ayub Ridhwan, be committed to civil jail at Shimo La Tewa Prison and detained for a term of 6 months or such



period as the court will deem fit or be fined and imprisoned for contempt of court orders made on September 28, 2020.

[b] That the costs of the application be provided for.

- [2] The application was premised on the grounds that on September 28, 2020, the applicant and the 2nd respondent agreed to compromise over 30 matters in which the applicant had obtained decrees and in some cases prerogative writs of *Mandamus* to the tune of over Kshs. 1 Billion, inclusive of interest. It was averred by the applicant that the parties thereafter recorded a Consent Order to the effect that the applicant would be paid a sum of Kshs. 120,000,000/= (all inclusive); and that the said Consent Order provided, inter alia, that the said sum would be defrayed in monthly instalments of Kshs. 5,000,000/=, payable on or before the 15th day of each month until payment in full.
- [3] The applicant further stated that, pursuant to the said Consent Order, the 2nd respondent proceeded to pay the sum of Kshs. 69,480,000/= (inclusive of interest); and therefore that the 2nd respondent was in arrears to the tune of Kshs. 71,080,000/= as at the date of the instant application. Thus, according to the applicant, the 2nd respondent has, since May 2022, failed to pay the instalments due and persisted in that state of disobedience notwithstanding previous orders of the court, including the ruling dated November 19, 2019 by Hon. Ogola, J. He added that the court has a sacrosanct duty bestowed upon it to ensure that its orders are obeyed and its authority recognized and respected.
- [4] The application was supported by the affidavit of Robinson Onyango Malombo, sworn on January 26, 2023 to which he annexed a copy of the ruling by Hon. Ogola, J. by which the officials of the County Government of Mombasa were cited for contempt and were to be arrested and committed to civil jail at Shimo La Tewa Prison.
- [5] Section 5 of the *Judicature Act*, Chapter 8 of the Laws of Kenya under which the application was brought states thus:

“(1) The High Court and the Court of Appeal shall have the same power to punish for contempt of court as is for the time being possessed by the High Court of Justice in England, and such power shall extend to upholding the authority and dignity of the subordinate courts.

(2) An order of the High Court made by way of punishment for contempt of court shall be appealable as if it were a conviction and sentence made in the exercise of the ordinary criminal jurisdiction of the High Court.”

- [6] It is important to bear in mind that contempt is an offence of a criminal character, therefore an application of this nature requires credible proof beyond the standard applicable to ordinary civil cases to warrant imprisonment of an alleged contemnor. The standard of proof in this regard was well discussed by the Court of Appeal in *Mutitika v Babarini Farm Ltd* [1985] eKLR thus:

“*In, Re Breamblevale Ltd* [1969] 3 All ER 1062, Lord Denning MR. (as he then was), at page 1063, had this to say,

“A contempt of court is an offence of a criminal character. A man may be sent to prison. It must be satisfactorily proved. To use the time-honoured phrase, it must be proved beyond reasonable doubt”.

With the greatest possible respect to that eminent English judge, that proof is much too high for an offence “of a criminal character” and, ipso facto, not a criminal offence properly so defined...



...In our view the standard of proof in contempt proceedings must be higher than proof on the balance of probabilities, almost but not exactly, beyond reasonable doubt. We envisage no difficulty in courts determining the suggested standard of proof. The standard of proof beyond reasonable doubt ought to be left where it belongs, to wit, in criminal cases. It is not safe to extend it to offence which can be said to be quasi-criminal in nature..."

[7] With the foregoing in mind, I have looked at the record of the court as against the averments made by the applicant. As the application is unopposed, it is indubitable that the parties recorded a Consent Order to the effect that the applicant would be paid a sum of Kshs. 120,000,000/= (all inclusive) by the 3rd respondent. One of the terms of the said Consent Order was that the said sum would be defrayed in monthly instalments of Kshs. 5,000,000/=, payable on or before the 15th day of each month until payment in full.

[8] It is also evident from the uncontroverted evidence availed before the court that, pursuant to the said Consent Order, the 2nd respondent paid the applicant the sum of Kshs. 69,480,000/= (inclusive of interest); and therefore that the 2nd respondent was in arrears to the tune of Kshs. 71,080,000/= as at January 26, 2023 when the instant application was filed. The applicant contends that the 2nd respondent has not made any payment since May 2022 and has therefore acted in defiance of the ruling and orders of the court dated November 19, 2019, as well as the subsequent consensual arrangements for payment.

[9] That being the case, the next question to pose is whether the applicant has sufficiently demonstrated that the alleged contemnor, Mr. Ayub Ridhwan, was duly served with the Consent Order, or that he has knowledge of it. The general position remains that a court order must be extracted and served for compliance. In *Ochino & another v Kombo & 4 others* (*supra*), it was held that:

“As a general rule, no order of court requiring a person to do or abstain from doing any act 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 act in question.”

10. Nevertheless, in *Shimmers Plaza Limited v National Bank of Kenya Limited* [2015] eKLR the Court of Appeal made it clear that:

“...this court has slowly and gradually moved from the position that service of the order along with the penal notice must be personally served on a person before contempt can be proved... Kenya's growing jurisprudence right from the High Court has reiterated that knowledge of a court order suffices to prove service and dispense with personal service for purposes of contempt proceedings. For instance, Lenaola, J. in the case of *Basil Criticos v Attorney General and Others* [2012] eKLR pronounced himself as follows:

“...the law has changed and as it stands today knowledge supersedes personal service... where a party clearly acts and shows that he had knowledge of a court Order; the strict requirement that personal service must be proved is rendered unnecessary.”

[11] Hence, given the background of this matter, there can be no doubt that the alleged contemnor has all along been aware of the orders; granted that the existence of the Consent Order, and the fact that the 3rd respondent, through its chief officers, have been defraying the debt by way of instalments. The record further shows that the alleged contemnor's counsel, Mr. Tajbhai, has been attending court and promising settlement. In the premises, I entertain no doubt that the alleged contemnor had knowledge not only of the Consent Order and the ruling dated November 19, 2019 but also the instant



application, in the light of the averments in the Affidavit of Service sworn by Paul Odhiambo Outah on February 1, 2023.

[12] As was well explicated in the *Shimmers Plaza Case* (*supra*), it must be reiterated that:

“... court orders must be obeyed. Parties against whom such orders are made cannot be allowed to trash them with impunity. Obedience of court orders is not optional, rather, it is mandatory and a person does not choose whether to obey a court order or not. For as Theodore Roosevelt, the 26th President of the United States of America once said:

“No man is above the law and no man is below it; nor do we ask any man's permission to obey it. Obedience to the law is demanded as of right; not as a favour.”

[13] In the result, I am satisfied that the applicant has made a good case to warrant the citing of the Acting Chief Officer Finance for the 4th respondent, Mr. Ayub Ridhwan, for contempt of court as prayed in the application dated January 26, 2023. Accordingly, it is hereby ordered and directed that Mr. Ayub Ridhwani do appear before this court to show cause why he should not be committed to jail for contempt of court.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 10TH DAY OF FEBRUARY 2023

OLGA SEWE

JUDGE

