



**Republic v County Secretary, Homabay County & another; Elyco Motors Ltd (Exparte Applicant)
(Judicial Review E004 of 2021) [2023] KEHC 3162 (KLR) (12 April 2023) (Judgment)**

Neutral citation: [2023] KEHC 3162 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
JUDICIAL REVIEW E004 OF 2021
RE ABURILI, J
APRIL 12, 2023**

BETWEEN

REPUBLIC APPLICANT

AND

COUNTY SECRETARY, HOMABAY COUNTY 1ST RESPONDENT

CHIEF OFFICER FINANCE, HOMABAY COUNTY 2ND RESPONDENT

AND

ELYCO MOTORS LTD EXPARTE APPLICANT

JUDGMENT

1. By a Notice of Motion Application dated 20th May 2022, the Exparte Applicant herein ELYCO Motors Limited seeks the following reliefs:
 - i. Both the holders of the office of the County Secretary, Homabay County, and Chief Officer Finance, Homabay County be cited for contempt and be committed to civil jail for a period of six (6) months for willful disobedience of the order of this court issued on 8th December 2021 requiring them to pay Kshs. 962,682 (Nine Hundred and Sixty-Two Thousand, Six Hundred and Eighty-Two) together with Kshs. 438,020 (Four Hundred and Thirty-Eight Thousand, and Twenty) being interest thereon at 14% p.a. from 1st April 2019 to date together with costs which have been taxed and certified by the Executive Officer at Kshs. 121,045 (One Hundred and Twenty-One Thousand and Forty-Five) plus Kshs. 15,534 (Fifteen Thousand, Five Hundred and Thirty-Four) being interest payable on the said costs from the 20th day of July 2021 to date.
 - ii. In the alternative, this court to issue an order for sequestration of the personal properties of the holders of the office of the County Secretary, Homabay County, and Chief Officer Finance,



Homabay County in order to satisfy the decree/certificate of order against the Government issued on the 30th July 2021.

- iii. The said officers be ordered to purge the contempt.
 - iv. The County government of Homabay be ordered to meet the costs of this application.
2. The Notice of Motion is supported by the affidavit of Elly Otieno and predicated on the grounds that:
- a. This matter was heard and determined on the 2nd day of December 2021, wherein the court issued an order of mandamus to compel the respondents to settle the decretal sum arising from the decree issued on 30th July 2021 by the Chief Magistrates Court at Kisumu Civil Case No. E239 of 2021 *Elyco Motors Limited versus the County Government of Homabay* as certified by the Certificate of Order against the Government issued on the 30th day of July 2021.
 - b. When the applicant's advocates went to the Respondent's County Offices to serve the order, the respondents declined to accept personal service, instead directing that the orders be served upon the County Attorney, Homabay County, which service was effected on the 9th day of December 2021.
 - c. The terms of the Court order were clear and unambiguous and the respondents through had proper and actual notice of the same by dint of the same being served upon the County Attorney in accordance with their directions.
 - d. This is not the first time the respondents have despised the orders of the court in this matter, having also declined to satisfy the decree of the Honourable Court/Certificates of order against the government issued on the 30th July 2021, which disobedience has led to the applicant taking a longer route of filing Judicial Review proceedings in order to enjoy the fruits of his judgement and as such is a indication of a blatant behaviour which is also not only deliberate but also contemptuous and felonious.
 - e. The conduct of the respondents is subverting the authority and dignity of the Honourable Court and must be dealt with firmly so that the Court's reputation and authority are not brought into ignominy.
 - f. Unless the orders sought are granted, the dignity, honour and authority with which this Honourable Court is held and ought to be held stand to be undermined and erode in the eyes of the right thinking members of society who are likely to hold the court in public ridicule and odium, thereby defeating the administration of justice.
3. The Respondents opposed the application *vide* Grounds of Opposition dated 18th January 2023 in which they raised the following grounds:
- i. That the application is inept, devoid of merit and brought in bad faith.
 - ii. That the application is an afterthought, lacking in substance, unnecessary, vexatious and frivolous.
 - iii. That the orders being sought are incapable of being granted under the provisions of the law on which the application is based.
 - iv. That the interest of justice and the balance of convenience tilts in favour of the application being dismissed.
4. The application was canvassed by way of written submissions.



The Exparte Applicant's Submissions

5. On behalf of the exparte applicant, counsel submitted that the Honourable Court issued an order of mandamus against the respondent on the 8th December 2021 compelling the respondent to settle the decretal amount on the certificate of order against the government issued on the 30th July 2021 and further that the order contained the penal notice as required by the procedure.
6. It was further submitted that the terms of the order were clear and unequivocal as to what was expected of the respondents.
7. The exparte applicant's counsel further submitted that the exparte applicant had complied with the requirements of obtaining an order of mandamus against the County Government as was stated in the case of *Associated Automobile Distributors (K) Ltd v Town Clerk, Municipal Council of Mombasa* [2017] eKLR.
8. The exparte applicant's counsel therefore submitted that the respondents had actual notice of both the mandamus court order and the Certificate of Order Against the Government rights from the moment the aid Order was issued. It was further submitted that the order issued on the 8th December 2021 had been received and stamped by the County Attorney of Homabay County Government as evidenced by exhibit EO1.
9. Further submission was that submitted that the respondents never defended the suit in Kisumu CMCC No. 239 of 2021 but only appointed an advocate when the instant application was served upon them, which advocate, under the respondents' instructions, was forced to enter into a consent on the 15th July 2022 wherein the respondents agreed to pay the amount of money that was due to the ex-parte applicant into a joint interest earning account.
10. It was submitted that the respondents had personal awareness of both the mandamus court order and the Certificate of Order Against the Government which they failed to obey and/or implement and that in this case, personal service was not tenable.
11. Reliance was placed on the case of *Republic v County Executive Committee Member (Finance) Embu County & 2 Others Ex parte Paul Maina t/a Pam Electrical Refrigeration & General Service* [2022] eKLR where it was held that if personal awareness of the court orders by the alleged contemnors is demonstrated, they will be found culpable of contempt even though they had not been personally served with the orders and penal notice.
12. The exparte applicant's counsel submitted that the court order issued on the 8th December 2021 required the respondents to settle the amount indicated in the Certificate of Order Against the Government which amount was still outstanding thus necessitating the instant application. The exparte applicant further urged the court to stamp its authority on this matter so as to restore its dignity as was held in *Soloh Worldwide Inter-enterprises v County Secretary Nairobi County & Another* [2015] eKLR.
13. Regarding costs, it was submitted that the same should be awarded to the *exparte* applicant as costs follow the event.

The Respondents' Submissions

14. On behalf of the Respondents, it was submitted that the exparte applicant had not demonstrated that the respondents were ever served with the order alleged to be disobeyed but rather that the same was



served on the County Attorney and further that the respondents were not made aware of the contents of the said order.

15. The respondents counsel submitted that knowledge was a matter of fact and that one must be made aware of the terms of the order as was held by the Indian Supreme Court in the case of *Mabinderjit Singh Biita v Union of India & Others* 1 A NO. 10 of 2010 (13th October 2011). It was submitted that for there to be wilful and deliberate disobedience, there must be shown that the contemnor had had knowledge of the existence of that order.
16. The respondent' counsel further submitted that contempt of court was in the nature of criminal proceedings and thus proof of a case against a contemnor must be higher than that of balance of probability as was held in the case of *Gatharia K. Mutikika v Baharini Farm Limited* [1985] KLR 227.
17. Regarding the prayer for sequestration of the personal properties of the respondents, it was submitted that to pierce the veil of the County Government and reach for the private properties of the respondents would be tantamount to infringing on the respondents' right to property as was allegedly held in the case of *Republic v Attorney General & Another Exparte Mike Maina Kamau* [2020] eKLR.
18. The respondents' counsel further submitted that the exparte applicant had not satisfied the threshold requirement for an application for contempt to be allowed and thus the Court ought to dismiss the application with costs to the respondents.

Analysis & Determination

19. I have considered the *exparte* applicants' application, the response thereto, submissions by counsel for both parties and the cited judicial pronouncements. What is before this Court for determination is an application to cite the respondents for contempt of court. The issue for determination is whether the application is merited.
20. The exparte applicant's case is that the respondents violated this Court's order issued on 8th December 2021 directing the respondents to pay Kshs. 962,682 (Nine Hundred and Sixty-Two Thousand, Six Hundred and Eighty-Two) together with Kshs. 438,020 (Four Hundred and Thirty-Eight Thousand, and Twenty) being interest thereon at 14% p.a. from 1st April 2019 together with costs which have been taxed and certified by the Executive Officer at Kshs. 121,045 (One Hundred and Twenty-One Thousand and Forty-Five) plus Kshs. 15,534 (Fifteen Thousand, Five Hundred and Thirty-Four) being interest payable on the said costs from the 20th day of July 2021.
21. The exparte applicant deposes that the respondents were served with the order through the County Attorney, Homabay County Government but that they failed to comply. The exparte applicant therefore seeks to cite the respondents for contempt of court for disobedience of that order. It was the exparte applicant's further case that the respondents' Attorney on record, on the 15th July 2022 entered into a consent whereby the respondents undertook to pay the decretal amount that was due to the exparte applicant, to be deposited into a joint interest-earning account within 45 days but failed to comply with the said consent.
22. The respondents on their part denied violating the court order as alleged. They also contended that they were not served with the court order personally but that the County Attorney was the one served and thus they were not aware of the said order.



23. Contempt of court is that conduct or action that defies or disrespects authority of the Court. *Black's Law Dictionary* 9th Edition, defines contempt as:

“The act or state of despising; the conduct of being despised. Conduct that defies the authority or dignity of a court or legislature. Because such conduct interferes with the administration of justice.”

24. Properly put, contempt is conduct that impairs the fair and efficient administration of justice. Contempt of court is not merely a mechanism for the enforcement of court orders. The jurisdiction of the superior courts to commit recalcitrant litigants for contempt of court when they fail or refuse to obey court orders has at its heart the very effectiveness and legitimacy of the judicial system. That, in turn, means that the court called upon to commit such a litigant for his or her contempt is not only dealing with the individual interest of the frustrated successful litigant but also, as importantly, acting as guardian of the public interest. See the holding in the case of *Samuel M. N. Mweru & Others v National Land Commission & 2 others* [2020] eKLR.

25. The *Contempt of Court Act* was declared unconstitutional by the High Court in *Kenya Human Rights Commission v Attorney General & Another* (2018) eKLR. This means that Section 5 of the *Judicature Act* was reinstated following the nullification of the *Contempt of Court Act*. This was the position taken by the Court in *Republic v Kajiado County & 2 others Ex parte Kilimanjaro Safari Club Limited* [2019] eKLR where the Court stated that:

“This section was repealed by section 38 of the *Contempt of Act* of 2016, and as the said Act has since been declared invalid, the consequential effect in law is that it had no legal effect on, and therefore did not repeal section 5 of the *Judicature Act*, which therefore continues to apply. In addition, the substance of the common law is still applicable under section 3 of the *Judicature Act*. This Court is in this regard guided by the applicable English Law which is Part 81 of the English Civil Procedure Rules of 1998 as variously amended, and the requirement for personal service of court orders in contempt of Court proceedings is found in Rule 81.8 of the English Civil Procedure Rules.”

26. Order 40 rule (3) of the *Civil Procedure Rules* (2010) provides that in cases of disobedience, or of breach of any terms of a temporary injunction, the court granting that injunction may order the property of the person guilty of such disobedience or breach to be attached, and may also order such person to be detained in prison for a term not exceeding six months unless in the meantime the court directs his release. The exparte applicant herein invoked this court's powers in terms of Order 40 Rule (3) of the *Civil Procedure Rules*.

27. Mativo J. (as he then was) restated the test for establishing contempt in *Samuel M. N. Mweru & Others v National Land Commission & 2 others* [2020] eKLR where he stated that:

“40. It is an established principle of law that in order to succeed in civil contempt proceedings, the applicant has to prove

- (i) the terms of the order,
- (ii) Knowledge of these terms by the Respondent,
- (iii) Failure by the Respondent to comply with the terms of the order.

Upon proof of these requirements the presence of willfulness and bad faith on the part of the Respondent would normally be inferred, but the Respondent



could rebut this inference by contrary proof on a balance of probabilities. Perhaps the most comprehensive of the elements of civil contempt was stated by the learned authors of the book *Contempt in Modern New Zealand* who succinctly stated:-

"There are essentially four elements that must be proved to make the case for civil contempt. The applicant must prove to the required standard (in civil contempt cases which is higher than civil cases) that:

- (a) the terms of the order (or injunction or undertaking) were clear and unambiguous and were binding on the defendant;
- (b) the defendant had knowledge of or proper notice of the terms of the order;
- (c) the defendant has acted in breach of the terms of the order; and
- (d) the defendant's conduct was deliberate.."

28. In the instant case, there is a decree issued on 30th July 2021 by the Chief Magistrate's Court at Kisumu in Civil Case No. E239 of 2021 Elyco Motors Limited versus the County Government of Homabay as certified by the Certificate of Order against the Government dated 30th day of July 2021. There is further, a judgment in this case Judicial Review Misc. Application No. E004 of 2021 delivered on the 8th December 2021 in which the *exparte* Applicant was granted orders as follows:

- i. An Order of mandamus be and is hereby issued to command and compel the respondents to settle the decretal summarizing from the decree issued on the 2nd July 2021 by the Chief Magistrates Court at Kisumu, Civil Case No. E239 of 2021 as certified by the Certificate of Order against Government issued on 30th July 2021.
- ii. The Cost of this application be borne by the respondents.

29. The Respondents are aware of the two judgments as they have been represented by Counsel in the suit before this Court throughout the proceedings. The authorities cited by the Respondents in respect of personal service upon the Contemnor are no longer valid as it has been held subsequently that knowledge of the Court orders is sufficient. See the Court of Appeal decision in *Shimmers Plaza Limited v National Bank of Kenya Limited* [2015] eKLR where it was held that:

"Would the knowledge of the judgment or order by the advocate of the alleged contemnor suffice for contempt proceedings" We hold the view that it does. This is more so in a case such as this one where the advocate was in Court representing the alleged contemnor and the orders were made in his presence. There is an assumption which is not unfounded, and which in our view is irrefutable to the effect that when an advocate appears in court on instructions of a party, then it behoves him/her to report back to the client all that transpired in court that has a bearing on the client's case."



30. Again in *Basil Criticos v Attorney General and 8 Others* [2012] eKLR Lenaola J. (as he then was) 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.”

31. The Respondents did not file any affidavit to contest the averments in the application and the depositions by the exparte applicant’s director. They only filed grounds of opposition.

32. It is not in dispute that the exparte Applicant has two judgments, one in Kisumu Civil Case No. E239 of 2021 and in Judicial Review Misc. Application No. E004 of 2021 herein for Mandamus compelling them to settle decree of the lower court. The two judgments have not been set aside. No appeal has been filed to challenge any of the two decrees issued by courts of competent jurisdiction. The two judgments are valid. The Respondents are aware of the two judgments and has never applied to set them aside. They even went ahead and instructed their Counsel to record a consent before this Court for the settlement of the said decrees but have since the judgments were delivered, failed to pay and no reasons have been advanced for such default.

33. Iam satisfied that the respondents herein are guilty of disobedience of this Court’s Orders issued on the 8th December 2021.They are accordingly convicted of contempt of court orders.

34. Consequently, I hereby order that the office holders of the respondents herein being the County Secretary, Homabay County Government and the Chief Officer in charge of Finance, Homabay County Government shall appear before this Court for mitigation and sentencing on 26/4/2023 and in default, a warrant of arrest shall issue for execution against them to be arrested and brought before this court for mitigation and sentencing. In the meantime, summons requiring the attendance of the said office holders of the respondents for mitigation and sentencing are hereby issued forthwith.

35. The respondents shall bear the costs of this Notice of Motion which I hereby set at Kshs 50,000.

36. I so order.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 12TH DAY OF APRIL, 2023

R.E. ABURILI

JUDGE

