



Republic v Tumbo, Acting County Secretary or the County Secretary Mombasa County & another; Veteran Pharmaceuticals Limited (Exparte Applicant) (Judicial Review Miscellaneous Application 375 of 2018) [2023] KEHC 17319 (KLR) (Judicial Review) (12 May 2023) (Ruling)

Neutral citation: [2023] KEHC 17319 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
JUDICIAL REVIEW MISCELLANEOUS APPLICATION 375 OF 2018**

**JM CHIGITI, J
MAY 12, 2023**

BETWEEN

REPUBLIC APPLICANT

AND

**JOB TUMBO, ACTING COUNTY SECRETARY OR THE COUNTY
SECRETARY MOMBASA COUNTY 1ST RESPONDENT**

**ASHA ABDI, CHIEF OFFICER FINANCE, MOMBASA
COUNTY 2ND RESPONDENT**

AND

VETERAN PHARMACEUTICALS LIMITED EXPARTE APPLICANT

RULING

1. The Applicant herein filed an application by way of a Notice of Motion dated March 6, 2020, seeking Orders:
 1. That this Honourable Court be pleased to punish the 1st and 2nd Respondents herein by imposing a fine to be determined by the Honourable Court upon the 1st and 2nd Respondents for willful disobedience of the Orders of this Honourable Court issued on January 22, 2019 in this cause.
 2. That an order for the arrest and committal to prison of Mr Job Tumbo, the acting County Secretary and or the Current County Secretary and Ms Asha Abdi the 1st and 2nd Respondent respectively be issued for their for wilful disobedience of the Judgment and decree of this Honourable Court issued on January 22, 2019.



3. That the costs of these contempt proceedings be borne by the Respondent.
2. The Application is founded on the grounds set out on the face therein and by a supporting affidavit sworn on March 6, 2020 by Robert Kamau Ngigi.
3. This matter was instituted by the Exparte Applicant seeking Judicial Review orders of Mandamus directed against the County Secretary and the County Treasurer to compel them to release and or pay the Applicants' decretal amount of Kshs 11,827,630 plus costs of Kshs 361,974 obtained in the Applicants' favour in Nairobi High Court Commercial and Admiralty Division Civil Case No 219 of 2015 – *Veteran Pharmaceuticals Vs Coast Provincial General Hospital* and the County Government of Mombasa together with accrued interest on the amount at the Court rate of 12% per annum from October 26, 2016 until payment in full.
4. Vide the Judgment of Lady Justice Nyamweya delivered on January 22, 2019 the Court issued an order of mandamus directed against the Respondents to comply and pay the Applicant a sum of Kshs 11,827,630 plus costs of Kshs 361,974 as well as interest at the court rate of 12% per annum from June 12, 2019 Until payment in full. The Court also assessed the cost of the judicial review proceedings at Kshs 30,000.
5. The Applicant avers that the Respondents were duly served with the Judgment dated April 12, 2019 and the decree issuing mandamus on June 12, 2019 and due demand for payment of the amount made but they have refused and neglected to obey the order of this Honourable Court. The forwarding letter and decree annexed and marked as RKWN-1 AND R KWN-2 respectively.
6. Since then the Respondents has paid partly Kshs 1,463,500 leaving the decretal balance of Kshs 15,112,032.30 and costs of Kshs 443,950 which amounts continue to accrue interest at courts rate of 12% PA until payment in full.
7. The Applicant avers that it is obvious that the Respondent will continue to disregard and disobey the orders of this Honourable Court unless appropriate measures are taken against the Respondent.

The Respondents:

8. The Respondents filed a Replying Affidavit of Jimmy Waliaula dated October 14, 2022. He averred that the debts emanating from HCCC No 219 of 2015 were not fully county liabilities as they were incurred in the year 2012 before the establishment of County Governments and municipal debts.
9. He stated that the debts were ideally supposed to go through identification, validation and verification process and institutional structures were established through the *Intergovernmental Relations Act, 2012* to facilitate the verification and transfer of assets and liabilities belonging to the now defunct local authorities. Therefore, the Applicant was required to submit its alleged contractual debt to the Transitional Authority for verification as required by law.
10. The Respondents further contended that failure of the Applicant to forward its then debt to the Transitional Authority Contravened Section 35 of the *Transition to Devolved Government Act, 2012* which stipulates that a state organ, public office, public entity of local authority (defunct) shall not transfer assets or liabilities during the transition period without seeking approval of the Authority. It was their contention that the above averments could not be earlier addressed before this court since the Applicant served them with a chamber summons application dated May 22, 2018 coming up for hearing on October 22, 2018 seeking leave to file for judicial review orders and a substantive motion dated November 5, 2018 also slated for hearing on October 22, 2018. As such, they could not defend



their position thereby suffering prejudice and occasioning this Honourable court to enter judgment without their response.

11. He further averred that the Respondents were never accorded an opportunity to be heard as neither of the Respondents herein were accounting officers of the Coastal General Teaching and Referral Hospital as the debt emanated from goods supplied to the Hospital.
12. He admitted that post 2013 the County Government was to consolidate and reconcile accounts especially with regards to medical services considering that the goods supplied to Coastal General Teaching and Referral Hospital were previously being paid by the District treasury.
13. The Respondents herein had also moved this court vide an application dated January 26, 2021 seeking this Honourable Court to vary, set aside and/or discharge the Judgment delivered on January 22, 2019 and the proceedings over the application dated June 7, 2019.
14. The matter was determined and the Application was dismissed by a ruling dated March 10, 2022 on grounds that the proceedings herein were in respect to enforcement of a decree in respect of HCCC No 219 of 2015 in favour of the Applicant whereby more than five (5) years down the line, the Applicant was yet to enjoy the fruits of their judgment.
15. This Court held that the delay caused by Respondent was inexcusable and the court cannot aid the Respondents' indolence having failed to enter appearance or file responses despite being served with the application therein and more so, seeking to vary the said orders two (2) years down the line.

Analysis and Determination:

16. I have read the Applicant's written submissions dated June 8, 2022 and the parties' arguments. The main issue for determination is whether the Respondents willfully disobeyed court orders.
17. The Respondents have not complied with the decree leaving the Applicant with little or no options than to move the court for contempt of court orders.
18. The Applicant submitted that the Respondent intentionally and willfully disobeyed the court orders and was therefore in contempt as they have not rebutted the fact that there is an order of Mandamus against them that was duly served on April 12, 2019.
19. The [Constitution](#) provides for the right to access justice under Article 48 of the [Constitution](#).

“The State shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice.”
20. Judicial review is one of the reliefs that an aggrieved party can invoke so as to compel the state to settle decrees emanating from court by way of judgments under Article 23 of the [Constitution](#). The same has its origin in Section 8 and 9 of the [Law Reform Act](#).
21. Contempt of court is that conduct or action that defies or disrespects authority of 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.”
22. The Law concerning Contempt of Court Proceedings is found under Section 5 of the [Judicature Act](#) which confers jurisdiction on the superior courts to punish for contempt.



23. The reason why courts punish for contempt is to uphold the dignity and authority of the court, ensure compliance with directions of the court, observance and respect of due process of law, preserve an effective and impartial system of justice, and maintain public confidence in the administration of justice by courts. Without sanctions for contempt, there would be a serious threat to the rule of law and administration of justice. For a party to be cited for contempt, he must have violated and or disobeyed an order that was directed at him.
24. “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 that power shall extend to upholding the authority and dignity of subordinate courts”.
25. It is an established principle of law that [See the High Court of South Africa in the case of *Kristen Carla Burchell v Barry Grant Burchell*, Eastern Cape Division Case No 364 of 2005] 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.
26. In this case, it is not in doubt that the court’s order was proper and out rightly the same has been breached and hence in this application currently before this court the main issue that I now must determine is whether the Respondents were aware of the court orders and whether the same was deliberately breached.
27. The threshold of proof required in contempt of Court is higher than that in normal civil cases, and one can only be committed to civil jail or otherwise penalized on the basis of evidence that leaves no doubt as to the contemnor’s culpability. This was the finding in the case of *Mwangi HC Wangonde v Nairobi City Commission*, Nairobi Civil Appeal No 95 of 1998.
28. It is clear from the affidavit of service, that the county attorney was served on behalf of the Respondents. The court has also taken note of the fact that the Respondents have already partly paid the decretal sum. I have no doubt that the Respondents had personal knowledge of the court order.
29. The explanations tendered by the Respondents as the reasons why they have not paid the Applicant are a clear afterthought tailored and or intended to deny the Applicants access to justice. They have indeed taken a slippery path of lies.
30. In *Republic v Permanent Secretary Office Of The President Ministry Of Internal Security & another Ex-Parte Nassir Mwandibi* [2014] eKLR the Court held as follows:
- “ 35. It is therefore clear that apart from the fact of the existence of a judgement against the government, the law recognizes that due to the special role played and the central position held by the Government in the management of the affairs of the country, there is a necessity for further proceedings to be undertaken before the judgement can be implemented.
 - 36. Where a party has complied with all the procedures leading to the grant of an order of mandamus to subject the party to the normal procedures relating to contempt of court proceedings would engender a miscarriage of justice



yet Article 159(2) (b) mandates that justice ought not to be delayed. To take a successful litigant in circles when adequate notices have been given to the Government to settle a decree would be to turn the legal process into a theatre of the absurd.”

Orders:

31. The Application dated March 6, 2020 is hereby allowed in the following terms: -

- i. The 1st and 2nd Respondents are hereby found to be in contempt of the order of this Honourable Court issued on January 22, 2019.
- ii. The Respondents shall attend court in person for sentencing on June 13, 2023.
- iii. Costs of the application are awarded to the Applicant.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 12TH DAY OF MAY 2023

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J. CHIGITI (SC)

JUDGE

