Republic v Attorney General & another; Mumira (Exparte) (Judicial Review Miscellaneous Application 85 of 2014) [2023] KEHC 18966 (KLR) (Judicial Review) (26 June 2023) (Ruling)

Neutral citation: [2023] KEHC 18966 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

JUDICIAL REVIEW

JUDICIAL REVIEW MISCELLANEOUS APPLICATION 85 OF 2014

JM CHIGITI, J

JUNE 26, 2023

BETWEEN

REPUBLIC ..... APPLICANT

AND

ATTORNEY GENERAL ..... 1ST RESPONDENT

PRINCIPAL SECRETARY, MINISTRY OF INTERIOR AND CO-ORDINATION OF NATIONAL GOVERNMENT ..... 2ND RESPONDENT

AND

DAVID KIRURI MUMIRA ..... EXPARTE

RULING

1. The application before this Court is ex parte applicant's notice of motion dated April 11, 2018 filed under articles 48 and 159 of the *Constitution of Kenya* 2010 and order 51 rule 1 of the *Civil Procedure Rules,2010*.

2. The application seeks several orders as follows;

    1. That this honourable court be pleased to order that the Principal Secretary, Ministry of Interior and Co-ordination of National Government, do appear and show cause why he should not be cited for contempt of Court for failing to pay the Ex-parte applicant the sum of Kes 250,000/- being the decretal amount in Kikuyu SRMCC No.153 of 2013 together with interest at 8% Per annum from August 4, 2008 till payment in full as ordered by this Court on the June 26, 2014.

    2. That this honourable court be pleased to order that the Principal Secretary, Ministry of Interior and Co-Ordination of National Government, do appear and show cause why he should not be

cited for contempt of Court for failing to pay the ex-parte applicant the sum of Kes 159,215/- being the costs of Kikuyu SRMCC No. 153 of 2013 together with interest at 8% per annum from June 26, 2014 till payment in full as ordered by this court on the June 26, 2014.

3. That in default thereof, the Principal Secretary, Ministry of Interior and Co-ordination of National Government does accordingly be punished for contempt of Court.

4. That the Principal Secretary, Ministry of Interior and Co-ordination of National Government be further ordered to pay further interest on the sum of Kes 409,215/- at the rate of 14% p.a. from the date of fling the application until payment in full.

5. That the costs of this application be provided for.

6. Any other orders that this Honourable Court deems just and fit to issue.

3. The application is supported by the grounds on its face and the Supporting Affidavit sworn by the ex parte applicant on April 11, 2018. In the affidavit Mr. Kiruri contends that vide a ruling delivered by this Honourable Court on June 26, 2014, the 1st respondent was ordered to pay him the sum of Kes 250,000/- being the decretal amount in Kikuyu SRMCC No. I53 of 2013 plus interest at 8% from August 4, 2008 until payment in full.

4. The 1st respondent is also said to have been ordered to also pay costs of the suit in Kikuyu SRMCC No. 153 of 2013 of Kes 63,715/- plus interest at 8% till payment full together with costs in this matter which costs were subsequently taxed by the Honourable Deputy Registrar at Kes 159,215/-.

5. It is the deponent's case that the 1st respondent, despite having been served with the Court Ruling delivered on 26th June,2014 and a Certificate of Costs dated 24th March,2015 and the numerous written demands and reminders from the ex parte applicant's advocates on record M/S J.K Kibicho & Company Advocates, the respondents have blatantly disobeyed the said order and have to date refused to pay the Ex parte applicant the monies owing.

6. The court notes that there is no response on record from the respondents.

7. The application was canvased by way of written submissions and similarly there are no written submissions on record on behalf of the Respondents.

8. The Ex parte applicant filed written submissions dated June 25, 2021 in which he identified three (3) issues for determination as follows;Whether this Honourable Court has jurisdiction to hear the *ex parte*'s Application dated April 11, 2018,Whether the 2nd respondent should be cited for Contempt of Court and whether costs of this Application ought to be granted to the *ex parte* applicant?

9. On the 1st issue the ex parte applicant submits that this court has inherent jurisdiction to hear and determine an application for Contempt of Court such as the one before this Court. To buttress this argument the applicant cites the cases of *Kiru Tea Factory Company Ltd v Stephen Maina Githiga & 14 others* [2019]eKLR and *JAS Kumenda & another v Governor County Government of Kisii & 5 others* [2019] eKLR which was cited in the case of *Woburn Estate Limited v Margaret Bashforth* [2016] eKLR. Section 3 of the *Civil Procedure Act* is also cited.

10. On the 2nd issue the ex parte applicant submits that he has met the high standards of proof beyond reasonable doubt that the 2nd respondent should be cited for Contempt of Court as was held in the South African case of Case No.364/2005 in the High Court of South Africa Eastern Cape Division *Burchell v Burchell*.

11. Further that upon the ex parte applicant instituting Kikuyu SRMCC No. 153 of 2005, judgment was delivered against the 1st respondent for the sum of Kes 295,068/= with costs which were certified to the amount of Kes . 63,715/=. Further, it is also submitted that a Court order was issued in JR MISC. Civil App. No. 85 of 2014 against the 1st respondent on October 23, 2015 compelling the 1st respondent to pay the ex parte applicant the decretal amount and interest arising from Kikuyu SRMCC No. 153 of 2005 together with costs as well as costs of the application.

12. It is also the ex parte applicant's submission that both judgments delivered in the said matters were clear, unambiguous and binding on the 1st respondent . The said orders it is submitted have not been set aside or appealed against despite there being knowledge of the same.

13. The respondent's counsel is said to have come on record on March 27, 2019 and was present on March 30, 2021 when an adjournment was sought to enable counsel to seek payment from the National Treasury in order to satisfy the amount owing to the applicant, however there was no attendance on the part of the respondents when the matter came up on 21st June,2021 to confirm the progress of the payment.

14. The Ex parte applicant also submits that the respondents' failure to comply undermines the authority of the courts and principle of the rule of law and to support this argument the case of *Kenya Human Rights Commission v Attorney General* [2018] eKLR is cited. The applicant also humbly implores this Court to rely on the case of *Republic v Permanent Secretary Office of the President Ministry of Internal Security & another ex parte Nassir Mwandihi* [2014] eKLR in citing the 2nd respondent for contempt.

15. The applicant also contends that as was held by the Court in *Republic v Principal Secretary, Ministry of Defence Ex parte George Kariuki Waithaka* [2019] eKLR the settlement of decretal sums by the Government whether National or County does not necessarily depend on the availability of funds. The respondents can therefore not hide behind this defence as it is an evasion of their responsibility to settle such obligations.

16. On the issue of costs, the Ex parte applicant submits that as is provided under section 27 (I) of the *Civil Procedure Act* costs largely follow the event and the court is given discretion to determine which party will meet the costs and to what extent.

17. In conclusion the ex parte applicant submits that costs should be granted to him as he has met the high standards of beyond reasonable doubt that the 2nd respondent should be cited for contempt of court.

Analysis and Determination

18. The issues that arise from the application before this court, the affidavit in support and documents attached therein, are as follows:

    i. Whether the respondents are guilty of disobeying the orders of court thus rendering them in contempt of court?

    ii. What orders should issue?

    iii. Who bears the costs of the application?

19. The obligation of every person to obey court orders was summed up aptly in the case of *Hadkinson v Hadkinson* (1952) 2 ALL ER56 as follows;

> " It was the plain and unqualified obligation of every person against or in respect of whom an order was made by a court of competent jurisdiction to obey it unless and until it was

discharged and disobedience of such an order would as a general rule result in the person disobeying it being in contempt and punishable by committal or attachment and in an application to the court by him not being entertained until he had purged his contempt. "

20. The Supreme Court in *Republic v Ahmad Abolfathi Mohammed & another* [2018] eKLR made the following observations:

> "(23) Authorities on the necessity to punish for contempt are legion. We have considered those provided by the respondent, and also cite the following, in affirmation of the principle.
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> (24) In *Econet Wireless Kenya Ltd v Minister for Information & Communication of Kenya & another* [2005] 1 KLR 828 Ibrahim J (as he then was) relied on the Court of Appeal decision in Gulabchand Popatlal Shah & another Civil Application No. 39 of 1990 (unreported), where the Court of Appeal stated as follows:
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> > "It is essential for the maintenance of the Rule of Law and order that the authority and the dignity of our Courts are upheld at all times. The Court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors... In *Hadkinson v Hadkinson* (1952) 2 All ER 567, it was held that: It is the plain and unqualified obligation of every person against or in respect of whom an order is made by a Court of competent jurisdiction, to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or void."
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> (25) In *Att-Gen v Times Newspapers Ltd* [1974] AC 273, Lord Diplock stated:
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> > "…. There is an element of public policy in punishing civil contempt, since the administration of justice would be undermined if the order of any court of law could be disregarded with impunity."
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> (26) The Court of Appeal in *A.B. & another v R.B*, Civil Application No. 4 of 2016 [2016] eKLR cited with approval the Constitutional Court of South Africa's decision in Burchell v. Burchell, Case No.364 of 2005 where it was held:
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> > "Compliance with court orders is an issue of fundamental concern for a society that seeks to base itself on the rule of law. The *Constitution* states that the rule of law and supremacy of the *Constitution* are foundational values of our society. It vests the judicial authority of the state in the court and requires other organs of the state to assist and protect the court. It gives everyone the right to have legal disputes resolved in the courts or other independent and impartial tribunals. Failure to enforce court orders effectively have the potential to undermine confidence in recourse to law as an instrument to resolve civil disputes and may thus impact negatively on the rule of law."

(27) Ojwang, J (as he then was) in *B v Attorney General* [2004] 1 KLR 431 that:

> "The Court does not, and ought not to be seen to, make Orders in vain; otherwise the Court would be exposed to ridicule, and no agency of the Constitutional order would then be left in place to serve as a guarantee for legality, and for the rights of all people."

(28) It is, therefore, evident that not only do contemnors demean the integrity and authority of Courts, but they also deride the rule of law. This must not be allowed to happen. We are also conscious of the standard of proof in contempt matters. The standard of proof in cases of contempt of Court is well established. In the case of Mutitika v Baharini Farm Limited [1985] KLR 229, 234 the Court of Appeal held that:

> "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...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 an offence which can be said to be quasi-criminal in nature."

(29) The rationale for this standard is that if cited for contempt, and the prayer sought is for committal to jail, the liberty of the contemnor will be affected. As such, the standard of proof is higher than the standard in civil cases. This power, to commit a person to jail, must be exercised with utmost care, and exercised only as a last resort. It is of utmost importance, therefore, for the respondents to establish that the alleged contemnor's conduct was deliberate, in the sense that he or she willfully acted in a manner that flouted the court order."

21. It goes without saying that the rule of law would be significantly threatened if the courts did not ensure that court orders were carried out. Without the application of sanctions for contempt of court, the court's orders would remain purely symbolic and not worth the paper they are printed on. I believe a judge is unfit to preside over the next trial if he or she chooses not to punish those who disobey his commands. After all, what good are legal procedures if the outcomes are unimportant?

22. The ingredients to be proved in a contempt application are well settled. The court in *Felicity Mutete Mutula v. Nairobi County Government* [2021] eKLR laid down the requirements thus;

> " From the foregoing rules, I would say that some of the salient features in an application for contempt of court are as follows:
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> 1. Disobedience of a court order or judgment is a foundation for contempt of court proceedings against the contemnor.
> 2. Where the contemnor is a company or other corporation, the committal order may be made against any director or other officer of that company.
> 3. The judgment or order in question must be served on the person required to do or not to do the act in question unless the court expressly dispense with personal service.

4. Where the person required to do or not to do an act is a company or other corporation, a copy of the judgment or order must also be served on the alleged contemnor.

5. Judgments and orders must be served personally.

6. The court may, however, dispense with personal service if it is satisfied that the contemnor had notice of the judgment or order:

   (a) By being present when the judgment or order was given or made; or

   (b) By being notified of its terms by telephone, email or otherwise.

7. The court may also dispense with personal service if it thinks it is just to do so or may make an order in respect of service by an alternative method or an alternative place.

8. There shall be permanently displayed on the front copy of the judgment or order served a warning to the person required to do or not to do the act in question that disobedience to the order would be contempt of court punishable by imprisonment, a fine or sequestration of assets. Without this display the judgment or order may not be enforced unless it is an undertaking contained in a judgment or order.

9. The contempt of court application shall be made by an application notice in the same proceedings in which the judgment or order was made.

10. 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 must also be supported by one or more affidavits containing all the evidence relied upon.

11. The application notice and the evidence in support must be served personally on the respondent although the court may dispense with service under paragraph (10) if it considers it just to do so; or may make an order in respect of service by an alternative method or at an alternative place."

23. These ingredients are summed up in the book Contempt in Modern New Zealand as follows;

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

24. In our instant case I note that it is not refuted that there is a valid subsisting order of the court which is yet to be set aside or varied and further that the decree of the Court issued in SRMCC NO.153 OF 2005 Kikuyu was served upon the 1st respondent *vide* a letter dated 26th November,2009.

25. This Court also notes that subsequent to the Court's order of 26th June,2014 where Odunga J (as he then was) issued an order of mandamus compelling the 1st respondent to pay the applicant herein the sum of Kes 250,000/= with interest at the rate of 8% per annum from August 4, 2008 till payment in full together with costs in the said sum of Kes 63,715/= plus the costs of the mandamus application, the 1st respondent has on several occasions appeared before court seeking adjournments on the premise that the Ministry would pay the sums owing to no avail. This is a clear indication that the respondents are aware that there is an existing court order that ought to be satisfied yet 14 years after the said order was made the same is yet to be done.

26. This court appreciates that any lapse in enforcement of court orders is a sure invite to a total breakdown of law and order and the rule of law as we know it.

Order:

27. Having established as much this court makes the following orders;

    i. That the Principal Secretary, Ministry of Interior and Co-Ordination of National Government, does appear before this Court on July 10, 2023 to show cause why he should not be cited for contempt of Court for failing to pay the ex-parte applicant the sum of Kes 250,000/- being the decretal amount in Kikuyu SRMCC No.153 of 2013 together with interest at 8% Per annum from August 4, 2008 till payment in full as ordered by this Court on the June 27, 2014.

    ii. That the Principal Secretary, Ministry of Interior and Co-ordination of National Government, does appear before this court on July 10, 2023 to show cause why he should not be cited for contempt of Court for failing to pay the ex-parte applicant the sum of Kes 159,215/- being the costs of Kikuyu SRMCC No. 153 of 2013 together with interest at 8% per annum from June 26, 2014 till payment in full as ordered by this Court on the June 26, 2014.

    iii. That in default of appearing before this Court, the Principal Secretary, Ministry of Interior and Co-ordination of National Government will be be punished for contempt of Court.

    iv. The ex parte applicant shall have the costs of this application.

    v. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 26TH DAY OF JUNE, 2023.

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JOHN CHIGITI (SC)

JUDGE