



Republic v Cabinet Secretary, Ministry of Agriculture Livestock, Fisheries and Co-operatives & another; Star Brilliant Limited (Exparte Applicant) (Judicial Review 1 of 2020) [2023] KEHC 26241 (KLR) (20 June 2023) (Ruling)

Neutral citation: [2023] KEHC 26241 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIVASHA
JUDICIAL REVIEW 1 OF 2020**

GL NZIOKA, J

JUNE 20, 2023

IN THE MATTER OF AN APPLICATION BY STAR BRILLIANT LIMITED FOR LEAVE TO APPLY FOR JUDICIAL REVIEW ORDERS OF CERTIORARI, MANDAMUS PROHIBITION AND DECLARATION

AND

IN THE MATTER OF THE MEAT CONTROL ACT, CAP 356

AND

IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT, 2015

AND

IN THE MATTER OF THE STATUTORY INSTRUMENTS ACT, 2013

AND

IN THE MATTER OF THE CIVIL PROCEDURE RULES 2010 ORDER 53

BETWEEN

REPUBLIC APPLICANT

AND

THE CABINET SECRETARY, MINISTRY OF AGRICULTURE LIVESTOCK, FISHERIES AND CO-OPERATIVES 1ST RESPONDENT

HON ATTORNEY GENERAL 2ND RESPONDENT

AND

STAR BRILLIANT LIMITED EXPARTE APPLICANT



RULING

1. By a notice of motion application dated; 21st May 2021, the applicant is seeking for orders that,
 - a. The 1st respondents be cited for contempt of court and committed to civil jail for a period of six (6) months and/or be ordered to purge the contempt of court on terms this court will deem just for being in contempt of orders of this Honourable Court issued on the 5th May 2021.
 - b. Summons do issue against the 1st Respondents to appeal before this Honourable Court and show cause why they should not be committed to civil jail for such a term as this court may deem fit.
 - c. The costs of this application be in favour of the applicant
2. The application is premised on the provision of; Order 40 Rules 1(a), 2, 4 and 10, Order 51 Rule 1 of the Civil Procedure Rules, 2010, section 30 of the Contempt of Court Act, 2016, and all enabling provisions of the law. It is also based on the grounds thereto and affidavit of Justus Maranga of the even date.
3. The deponent states that on 5th May 2021, the Honourable Court delivered a judgment and decreed as follows:
 - a. An order of *Certiorari* removing to this Honourable Court to be quashed the legal notice number 63 of 2020 issued by the 1st respondents
 - b. An Order of Prohibition prohibiting the 1st respondents, its officers and agents from issuing and implementing Legal Notice Number 63 of 2020.
 - c. An order of Declaration that the Legal Notice 63 of 2020 violates the rights of the applicant under Article 47 of the Constitution, section 5 and 6 of the Fair Administrative Action Act No. 4 of 2015 and provisions of the statutory instruments Act 2013.
4. That, the decree thereof was served upon the Director of Veterinary services so as to deploy a Meat Inspector at the applicant's premises, however, in flagrant disregard of the order, the director has failed and/or declined to deploy the Inspector, in an attempt to deny the applicant an opportunity to resume operations. That the failure to deploy the Meat Inspector can only be construed as continued violation of the applicant's rights.
5. It is further averred that, the courts process will be abused, and the integrity of the Judiciary which is fundamental for public confidence will be threatened and be brought into disrepute, if the court does not assert its authority and order the detention in prison of the contemnor for a period of six (6) months.
6. However, the application was opposed *vide* grounds of opposition, dated 5th October 2021, which states
 - a. That the application does not disclose the person or individual who is to be cited for contempt. The 1st respondents is an office and the orders sought herein cannot issue against it.
 - b. That there being no disclosure of the person being cited for contempt, the applicant has not effected service on any individual personally as required by the law.



- c. That the orders that were issues by the Honourable Court did not compel the respondents to do anything but made declarations that the Legal Notice No. 63 of 2020 is unconstitutional thus stands quashed and prohibited the respondents from acting on it.
 - d. That as such, as declared by the Honourable Court the said Legal Notice No. 63 of 2020 stands quashed and no evidence has been adduced that the respondents are still enforcing it.
 - e. That facts relied on by the applicant claiming that the Director of Veterinary refused to deploy a Meat Inspector are fresh facts that do not relate at all with the present application
 - f. That the application is seeking an order to compel to Director of Veterinary to deploy a Meat Inspector through the back door and in these contempt proceedings.
 - g. That the Honourable Court has already issued the orders of certiorari, prohibition and a declaration and hence it is now functus officio and cannot issue further orders being sought in this application
 - h. That the applicant has not adduced sufficient evidence or any evidence at all to prove that the 1st respondents has disobeyed court orders.
7. The application was canvassed through filing of submissions and subsequent highlighting thereof. The learned counsel for the applicant Mr. Wairegi reiterated that, the court quashed Legal Notice No. 63 of 2020 by the 1st respondents revoking the applicant's premises as a slaughter house, and as a consequence, the order to withdraw inspectors had no effect.
 8. That, the applicant has tried to engage the Director of Veterinary Service to appoint inspectors to it premises but that had not happened. That, there being no pending appeal or orders setting aside the judgment and, the respondents having failed to state the difficulties in complying with the court orders and they are in utter disobedience of court orders and/or decrees. He relied on the case of *Econet Wireless Ltd v Ministry of Information and Communication* (2005) eKLR where it was held that deliberate disobedience of orders will be dealt with firmly.
 9. He further argued that, the applicant has laid down the ingredients necessary for contempt and shown that the respondents are aware of the court orders but have failed to comply with the same and therefore the 1st respondents should be cited for contempt and appropriate orders issued.
 10. However, the respondents in their submissions dated 10th February 2022 argued that the application for contempt was incompetent as it was brought under section 30 of the *Contempt of Court Act, 2016*, which was declared unconstitutional in the case of *Kenya Human Rights Commission v Attorney General & another* [2018] eKLR.
 11. The respondents relied on the cases of; *Daniel Kimani Njibia v Francis Mwangi Kimani & another* [2015] eKLR and *Michael Mungai v Housing Finance Co. (K) Ltd v 5 Others* [2017] eKLR where the Supreme Court of Kenya, stated that parties must be clear on the jurisdiction they are invoking, through invoking the correct provision of *the Constitution* or Statute and that the omission is not a mere procedural technicality curable under Article 159 of *the Constitution* of Kenya, 2010.
 12. That, the in the circumstance, the default position in law is to revert to section 5 of the *Judicature Act*, for the procedure existing before the enactment of the *Contempt of Court Act*. That the Court of Appeal in *Christine Wangari Gachege v Elizabeth Wanjiru Evans & 11 Others* [2014] eKLR applied the English Law on committal for contempt of court was applied by virtue of section 5 (1) of the *Judicature Act*.



13. That the applicant had failed to personally serve the 1st respondents as required under Rule 81.8 of the English Civil Procedure Rules; neither did they apply for waiver of personal service of the application as required under Rule 81.6 of the English Civil Procedure Rules.
14. The respondents relied on the case of *Nyamogo & another v Kenya Posts and Telecommunication Corporation* (1994) KLR 1 and *Ochino & another v Okombo & 4 Others* (1989) KLR 165 where the Court of Appeal held that personal service of orders and a Penal notice are requirements in contempt of court proceedings.
15. That furthermore, the applicant failed to indicate the person being cited for contempt and therefore the orders cannot be granted against an office. That, in the case of *Mwangi H.C. Wangonde v Nairobi City Commission* Nairobi Civil Appeal No. 95 of 1998 the Court stated that the threshold of proof in contempt of court is higher than normal civil cases and one could only be penalized on the basis of evidence that leaves no doubt of the contemnor's culpability.
16. The respondents further submitted that in order to succeed in civil contempt proceedings, the applicant is required to prove, the terms of the order were brought to the knowledge of the respondents, and the respondents failed to comply with the terms, upon which the wilfulness and bad faith of the respondents will be inferred.
17. That, there are no orders requiring the Director of Veterinary Service to deploy Meat Inspectors as it was not an issue raised in the substantive motion thus, the respondents are not in contempt. Consequently, the application is an abuse of the court process and a waste of the court's time and should be dismissed.
18. The respondents cited extracts from Contempt in Modern New Zealand where it was stated that: -
 - " 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. "
19. The respondents reiterated that, the 1st respondents had not disobeyed the court orders given and therefore cannot be held in contempt and prayed that the application be dismissed with costs.
20. I have considered the application and note that, it is based on the provisions of section 30 of the Contempt of Court Act. However, it is noteworthy that Hon. Justice Mwita in the case of *Kenya Human Rights Commission v Attorney General & another* (2018) eKLR declared the entire Act as invalid for lack of public participation pursuant to Articles 10 and 118 (b) of *the Constitution* of Kenya, 2010 and that it encroached on the independence of the Judiciary. As a result thereof, the reliance on section 30 of the subject Act is not tenable.
21. Be that as it were, having declared the Act, unconstitutional the law applicable in the given circumstances is section 5 of the *Judicature Act* (Cap 8) Laws of Kenya which states: -



- (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 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 original criminal jurisdiction of the High Court.
22. Pursuant to the aforesaid, contempt proceedings are governed by English law. Pursuant thereto, Rule 81.4 of the English Civil Procedure (Amendment No. 3) Rules 2020, provides the procedure of commencing contempt proceedings. In addition Rule 81.5 provides the manner of service of the application and states in a nutshell, it is required that
- a. The application and evidence must be served upon the defendant personally;
 - b. If the defendant is represented, the application and evidence be served on the representative unless the representative objects in writing within seven days of receipt of the application and evidence in support
 - c. If the representative does not object the representative must provide to the defendant with the application and evidence in support and take all necessary step to ensure the defendants understand them
 - d. If the representative objects the issue shall be referred to the Judge and determined on written representation unless the judge direct for oral hearing.
23. To revert back to the matter, The first issue raised by the respondents is whether the alleged refusal by the director of Veterinary Services to appoint Meat Inspectors amounts to contempt of the subject court order herein. the respondents in response argue that, the Director of Veterinary Services was not a party to the main proceedings where the subject order was made. Thus he cannot be cited for contempt when that party was not even a party to the proceedings giving rise to the contempt.
24. In addressing the subject issue, I note that the parties to the main suit are Star Brilliant as the applicant, the Cabinet Secretary, Ministry of Agriculture, Livestock, Fisheries and Co-operatives, 1st respondent, and the Attorney General the 2nd respondent.
25. In my understanding, the parties to whom the judgment was addressed to act on were the respondents, being the Cabinet Secretary and the Attorney General. There is nowhere in the judgment that the Director of Veterinary Services was required to take any action.
26. Furthermore, the prayers that were sought for in that particular matter were basically three prayers:
- a. An order of Certiorari removing to this Honourable Court to be quashed the Legal Notice Number 63 of 2020 issued by the 1st respondent.
 - b. An order of Prohibition prohibiting the 1st respondent, his officers and agents from issuing and implementing Legal Notice Number 63 of 2020.
 - c. An order of Declaration that the Legal Notice 63 of 2020 violates the rights of the applicant under Article 47 of *the Constitution*, section 5 and 6 of the *Fair Administrative Action Act*, No. 4 of 2015 and provisions of the *Statutory Instruments Act*, 2013.



As can be seen, none of these prayers required the Director of Veterinary Services to do anything and the orders granted as reflected under paragraph 3 of this judgment did not address the subject matter under consideration.

27. Therefore since the Director of Veterinary Services was not a party to the suit, he cannot have been served with the court orders. The service should have been to the 1st respondent. And if the Director of Veterinary Services works under the Cabinet Secretary, then the Cabinet Secretary should be served to comply with the court order and can direct the Director on what to do to effect the court order.
28. And even so, I have read the judgment in depth and the entire file. This issue of appointment of Meat Inspectors was not canvassed in the main matter and my understanding and considered opinion is that it is a new issue.
29. My unsolicited advice is that the 1st respondent be served with the order and if there is need, the applicant can seek for an order of *mandamus* to compel him to do the statutory duty he is legally bound to do.
30. On that point, I do not see the need of delving into the merits of the case as the court's conclusion is that the contempt because my simple understanding is that these contempt proceedings are not directed to the right person and there is no evidence that the Cabinet Secretary has disobeyed the court order.
31. The applicant is better advised to pursue the Director of Veterinary Services independent of this matter. The application is disallowed.
32. Those then are the orders of the court.

DATED, DELIVERED AND SIGNED THIS 20TH JUNE 2023.

GRACE. L NZIOKA

JUDGE

In the presence of:

Mr. Wairegi for the applicant

N/A for the respondents

Ms. Ogutu: Court assistant

