



**Republic v Attorney General & another; Githua (Exparte Applicant)
 (Judicial Review Miscellaneous Application E151 of 2021)
 [2023] KEHC 18613 (KLR) (Judicial Review) (14 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 18613 (KLR)

**REPUBLIC OF KENYA
 IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
 JUDICIAL REVIEW
 JUDICIAL REVIEW MISCELLANEOUS APPLICATION E151 OF 2021**

**JM CHIGITI, J
 JUNE 14, 2023**

BETWEEN

REPUBLIC APPLICANT

AND

**ATTORNEY GENERAL 1ST RESPONDENT
 PRINCIPAL SECRETARY, MINISTRY OF INTERIOR AND COORDINATION
 OF NATIONAL GOVERNMENT 2ND RESPONDENT**

AND

GODFREY NGANGA GITHUA EXPARTE APPLICANT

RULING

1. The Applicant herein filed an application by way of a Notice of Motion dated February 24, 2023, seeking Orders that:
 1. (Spent)
 2. The Hon. the Attorney General and the Principal Secretary to the Ministry of Interior and Coordination of National Government are in contempt of court for disobeying and /or wilfully disregarding the order of Mandamus made on 21st of November 2022 compelling payment of the decretal sum, interest and costs arising from Nairobi CMCC No. 6783 of 2014 (Godfrey Nganga Githua v. The Hon. Attorney General).
 3. Summons do issue against the Hon. the Attorney General and the Principal Secretary to the Ministry of Interior and Coordination of National Government to personally appear in court



on a date to be set by the court for purposes of issuing the order of committal and sentencing for a period of six (6) months or such other period that this Honourable Court shall deem fit and just.

4. This honourable court be pleased to issue such other orders as may seem just and expedient.
5. Costs of the Application be borne by the respondents.
2. The Application is founded on the grounds set out on the face therein and by a supporting affidavit sworn on February 24, 2023 by Godfrey Ng'ang'a Githua.
3. This matter was instituted by the *ex parte* applicant seeking Judicial Review orders of Mandamus directed against the Hon. Attorney General and the Principal Secretary to the Ministry of Interior and Coordination of National Government to compel them to pay the Applicants' decretal amount of Kshs. 700,000 together with certified costs of Kshs. 150,110 plus interest thereon at 12% per annum from 1st March 2017 until payment is full obtained in the Applicants' favour in Nairobi CMCC No. 6783 of 2014 –Godfrey Ng'ang'a Githua v. The Hon. Attorney General.
4. On November 21, 2022 Justice Ndung'u issued an order of mandamus directed against the respondents to comply and pay the applicants' decretal amount of Kshs. 700,000 together with certified costs of Kshs. 150,110 plus interest thereon at 12% per annum from March 1, 2017 until payment is full.
5. The applicant avers that the decree arising from Judgement were duly served upon the 1st and 2nd respondents on December 19, 2022 and January 19, 2023 respectively and due demand for payment of the amount made. The demand letter and decree are annexed and marked as GNG-1 and GNG-3 respectively.
6. The applicant further stated that the Principal Secretary to the Ministry of Interior and Coordination of National Government, as accounting officer of the Ministry, is under a public and legal duty to make the said payment and he has wrongfully refused to do so.
7. The applicant submitted that since the date of judgment and despite numerous reminders to the office of the Attorney General, the respondent Ministry has failed, refused and or neglected to settle the Decretal Amount plus costs.
8. The applicant further averred that failure by the 2nd respondent to satisfy a lawful decree (and the subsequent order of mandamus) is an illegality and the continued failure and refusal to settle the decree perpetuates an illegality and is a continuing contempt.
9. The respondent filed grounds of opposition dated May 16, 2023 opposing the Applicant's Notice of Motion dated February 24, 2023 on the following grounds:-
 1. That the Application herein is unmerited and therefore an abuse of the due process of the Court.
 2. That the Attorney General is not the Accounting officer in the Ministry of Interior and as such cannot be compelled to pay the decretal amount owing to the Applicant.
 3. That no proof that service of the order of Mandamus was personally effected on the principal secretary interior.
 4. That the order for mandamus served at the office of the permanent secretary was also not endorsed with a penal notice as required by law.



5. That the application is therefore defective and bad in law.
10. The Respondents contend that the 1st Respondent is not an accounting officer and that he is the legal representative of the government, hence the idea of having him committed to civil jail is misplaced and ill advised.
11. The respondents further submitted that service was not effected personally to the Respondents and even if service was done, the said order was not endorsed with a penal notice as required by law quoting the case of *Nyamodi Ochieng Nyasmogo & another v. Kenya Posts & Telecommunications Corporation* (1994) eKLR in dismissing an application for contempt, the court relied on the Court of Appeal decision in Civil Appeal no.95/1988 *Mwangi HC Wangonde v Nairobi City Commission*.

Analysis and determination:

12. I have carefully considered the Applicant’s notice of motion, the grounds as supported by the supporting affidavit, submissions by his counsel and the decisions relied on. I have also considered the Respondent’s grounds of opposition, the submissions and case law cited.
13. There are two issues for determination in this application. The first is whether the threshold to invoke contempt proceeding has been met and the last issue is whether the application for contempt is defective for lack of a Penal Notice?
14. Article 48 of the [Constitution](#) provides that:

“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.”
15. 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](#).
16. 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.”
17. The Law concerning Contempt of Court Proceedings is found under section 5 of the [Judicature Act](#) which provided that:

“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.”

Whether the threshold to invoke contempt proceeding has been met

18. The respondents argued that the Attorney General is not the Accounting officer in the Ministry of Interior and as such cannot be compelled to pay the decretal amount owing to the applicant.
19. I am of the view that when the Attorney General is sued on behalf of the government he is obliged to advise his client to pay any costs and liabilities that arise out of his representation.



20. 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:
- a. The terms of the order
 - b. Knowledge of these terms by the respondent
 - c. Failure by the respondent to comply with the terms of the order.
21. In the case of *Vimalkumar Bhimji Depar Shah & another v Stephen Jennings & 5 others* [2016] eKLR the court observed that:-
- “The order allegedly disobeyed must be in existence, it must be clear in its terms, it must have been served upon the respondent or the respondent must have actual or constructive knowledge of the order together with an endorsed penal notice warning of the consequences of disobedience.”
22. The 1st and 2nd respondents aver that there was no proof of personal service. Although personal service is the best mode of notifying the party of a court order, knowledge of a court order like in the instant case is sufficient.
23. In the court of Appeal decision of *Justus Kariuki Mate & another vs Martin Nyaga Wambora & another* (CA 24/2014) Nyeri, the CA per Visram, Koome and Odek JJA held that personal service of the order alleged to have been disobeyed is not mandatory. The court stated:
- “On the other hand, however, 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.”
24. The Court of Appeal in the case of *Shimmers Plaza Ltd v NBK* (2015) eKLR Karanja, Mwera, Mwilu JJA also approved the growing jurisprudence right from the High Court that has reiterated that knowledge of a court order suffices to prove service and dispense with personal service for the purposes of contempt proceedings. The Court of Appeal quoted Lenaola J in *Basil Criticos v Attorney General & 8 others* (2012) eKLR where the learned Judge pronounced himself thus:-
- “....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.”
25. The Affidavit of Service marked as GNG-3 produced before this Court is evidence of service that the decree arising from the Judgment was duly served upon the 1st and 2nd Respondents on December 19, 2022 and January 19, 2023 respectively.
26. Furthermore, letters annexed and marked as GNG-4 from the 1st Respondent confirming their commitment to settle the claim to the ExParte Applicant signifies knowledge of a Court order. One is left to wonder how the 1st Respondent would turn around and demand for a Penal Notice.
27. An essential for successful contempt proceedings is that the alleged contemnor must have committed a willful or deliberate disobedience or breach of an order. In this case, it is not in doubt that the court’s order was proper and out-rightly the same has been breached.



Whether the application for contempt is defective for lack of a Penal Notice.

28. The respondents submitted that the court order issued did not contain a penal notice as required by law and respondents cannot therefore be punished for contempt of the Order.

29. The court notes that the requirement of attachment of the penal notice has slowly been done away with as was held in Civil Appeal No. 33 of 2012 *Shimmers Plaza Limited v National Bank of Kenya Limited* [2015] eKLR (Karanja, Mwera & Mwilu, JJ.A)

“It has been held in several judicial decisions 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. See in this regard the decisions in *Kenya Tea Growers Association v Francis Atwoli & others*, Nairobi High Court Constitutional Petition No 64 of 2010, *Husson v Husson*, (1962) 3 All E.R. 1056, *Ronson Products Ltd v Ronson Furniture Ltd* (1966) RPC 497, and *Davy International Ltd v Tazzyman* (1997) 1 WLR 1256.”

30. In addition, on the above issue the court in *Oilfield Movers Limited v Zabara Oil and Gas Limited* [2020] eKLR stated as follows:

“30.Regarding the argument that the Order that was eventually served on the company did not carry a penal notice that does not carry the Respondent’s defence any further. Counsel who was present in court had to be aware of the consequences of disobedience of a court order, including the possibility of penal sanction. The onus was on Counsel present in Court, to not only communicate the contents of the order to the company and the responsible officials, but also to advise on the possible consequences of disobedience.”

31. I am satisfied that the Respondents were aware of the court orders granted by J. Ndung’u, as they participated in the proceedings leading to the said orders.

32. During the court proceedings both Respondents were represented by counsel who actively participated upto and including 21.11.22 when Judgment was delivered by Justice Ndungu.

33. From the foregoing, 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 Applicant’s access to justice.

34. This court is further guided and agrees with the findings in the case of *Republic v Permanent Secretary, Ministry of State for Provincial Administration and Internal Security Exparte Fredrick Manoah Egunza* [2012] eKLR where it was held as follows;

“In ordinary circumstances, once a judgment has been entered in a civil suit in favour of one party against another and a decree is subsequently issued, the successful litigant is entitled to execute for the decretal amount even on the following day. When the Government is sued in a civil action through its legal representative by a citizen, it becomes a party just like any other party defending a civil suit. Similarly, when a judgment has been entered against the government and a monetary decree is issued against it, it does not enjoy any special privileges with regards to its liability to pay except when it comes to the mode of execution of the decree. Unlike in other civil proceedings, where decrees for the payment of money or costs had been issued against the Government in favour of a litigant, the said decree can only be enforced by way of an order of mandamus compelling the accounting officer in



the relevant ministry to pay the decretal amount as the Government is protected and given immunity from execution and attachment of its property/goods under Section 21(4) of the Government Proceedings Act. The only requirement which serves as a condition precedent to the satisfaction or enforcement of decrees for money issued against the Government is found in Section 21(1) and (2) of the Government Proceedings Act (hereinafter referred to as the Act) which provides that payment will be based on a certificate of costs obtained by the successful litigant from the court issuing the decree which should be served on the Hon Attorney General. The certificate of order against the Government should be issued by the court after expiration of 21 days after entry of judgment. Once the certificate of order against the Government is served on the Hon Attorney General, section 21(3) imposes a statutory duty on the accounting officer concerned to pay the sums specified in the said order to the person entitled or to his advocate together with any interest lawfully accruing thereon. This provision does not condition payment to budgetary allocation and parliamentary approval of Government expenditure in the financial year subsequent to which Government liability accrues.”

Disposition:

35. The upshot is that the Application dated February 24, 2023 is meritorious and I find that the 2nd respondent is in contempt of Court for disobedience of the Court order issued on December 16, 2022.

Orders:

1. The Principal Secretary to the Ministry of Interior and Coordination of National Government is in contempt of court for disobeying and /or willfully disregarding the order of Mandamus made on 21st of November 2022 compelling payment of the decretal sum, interest and costs arising from Nairobi CMCC No. 6783 of 2014 (Godfrey Nganga Githua v. The Hon. Attorney General).
2. Summons do issue against the Principal Secretary to the Ministry of Interior and Coordination of National Government to personally appear in court on a date to be set by the court for purposes of issuing the order of committal and sentencing for a period of six (6) months or such other period that this Honourable Court shall deem fit and just.
3. Matter shall be mentioned July 12, 2023 in open court for sentencing.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 14TH DAY OF JUNE 2023.

.....

J. CHIGITI (SC)

JUDGE

