



**Ochanda v Attorney General & another (Application 148 of 2013)
[2023] KEHC 22517 (KLR) (Judicial Review) (14 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 22517 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
APPLICATION 148 OF 2013
J NGAAH, J
JULY 14, 2023**

BETWEEN

ISAIAH OCHANDA APPLICANT

AND

THE HON. ATTORNEY GENERAL 1ST RESPONDENT

THE PRINCIPAL SECRETARY MINISTRY OF DEFENCE 2ND RESPONDENT

RULING

1. In a motion dated 18 August 2020, expressed to be brought under sections 1A, 3A and 3B of the *Civil Procedure Act*, the applicant seeks summons against Mr. Hillary Mutyambai to appear in court to explain why he has failed to arrest the Principal Secretary, Ministry of Defence.

I must hasten to say that Hillary Mutyambai is no longer the Inspector General of Police and therefore summoning him to explain failure to perform a task which, in his retirement, is ill-equipped to undertake would be an exercise in futility.

2. The person to be summoned is the current holder of the office of Inspector General of Police and I would have summoned him except for the reason that would become apparent in due course.

The background to this application is that Principal Secretary, Ministry of Defence has been held to be in contempt of the order of mandamus made by this Honourable Court. As a punishment for the contempt, on October 3, 2017, the court made an order to the effect:

1. That Mr. Saitoti Torome the Principal Secretary Ministry of Defence do pay a fine of Kshs.5,000,000/-, in default to serve six months imprisonment.
2. That the fine imposed to be paid within 7 days from the date hereof.



3. That as the Principal Secretary is not in court today despite several requests that he attends court, a warrant of arrest do and is hereby issued to be executed by the Inspector General of Police, arresting Mr. Saitoti Torome the Permanent Secretary Ministry of Defence and bring him before the court for purposes of committal to prison in the event that the fine of five million shall not have been paid within the next seven days from the date hereof.

3. The order was given and issued on October 3, 2017. However, to date, the fine has neither been paid nor the warrant of arrest executed hence the instant application.

A replying affidavit opposing the applicant's application sworn by Patrick Mariru, the current Principal Secretary in the Ministry of Defence is clear that the Permanent Secretary is aware of the order of mandamus for payment of the decretal sum and he is aware that his predecessor has been held to be in contempt of court. He is also aware that warrant of arrest is out against him.

But he is saying that he is not responsible because the warrant was issued against his predecessor and not against him.

In my view, this is more of a mitigating factor rather than a reason not to comply with the court order and satisfy the outstanding decretal sum.

4. The officer holder in the office of the Principal Secretary Ministry of Defence is responsible for all liabilities that accrue to that office.

According to section 21(3) of the *Government Proceedings Act*, cap. 40, one of the liabilities for which the Principal Secretary would be responsible, in his capacity as the accounting officer in the Ministry, is settlement of monetary decrees. He cannot pass the buck, so to speak, to his predecessor.

5. And just to discount the notion that the current Principal Secretary has nothing to do with the order of 3 October 2017, I will refer the respondents to sections 43 and 45 of the *Interpretation and General Provisions Act*, cap. 2.

Section 43 is on powers and duties of the holder of an office. It states as follows:

43. Where a written law confers a power or imposes a duty on the holder of an office as such, then, unless a contrary intention appears, the power may be exercised and the duty shall be performed by the person for the time being holding that office.

And to the particular question of whether the warrant of arrest would apply to the current Principal Secretary section 45 of the Act provides an answer. It states as follows;

45. In this Act and in any other written law, instrument, warrant or process of any kind, a reference to a person holding an office shall include a reference to any person for the time being lawfully discharging the functions of that office.

6. I need not say more except to remind the 2nd respondent that, in the wake of these provisions, there is no room for passing the buck to his predecessor. He bears the benefits and the burdens of the office he is now occupying.

I will, however, spare him forceful arrest by the police for purposes of being brought to court. For this reason, I will not require the Inspector General of Police to be in court to explain why he cannot arrest the Principal Secretary.

By his own affidavit, the Principal Secretary has demonstrated that he is aware of these proceedings and, most importantly, the order of which he has been held to be in contempt. I hereby issue summons for him to appear in court on September 26, 2023 to show cause why he should not be committed



to civil jail for failure to comply with the order of mandamus compelling him to settle the decretal amount. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI ON 14 JULY 2023.

NGAAH JAIRUS

JUDGE

