



**Republic v Principal Secretary, Ministry of Health & another; Mwangi  
(Exparte) (Judicial Review Miscellaneous Application 202 of 2017)  
[2023] KEHC 20397 (KLR) (Judicial Review) (13 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 20397 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
JUDICIAL REVIEW  
JUDICIAL REVIEW MISCELLANEOUS APPLICATION 202 OF 2017**

**JM CHIGITI, J  
JULY 13, 2023**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**THE PRINCIPAL SECRETARY, MINISTRY OF HEALTH ..... 1<sup>ST</sup> RESPONDENT**

**THE ATTORNEY GENERAL ..... 2<sup>ND</sup> RESPONDENT**

**AND**

**GEOFFREY GATWAI MWANGI ..... EXPARTE**

**JUDGMENT**

1. The Application before this Court is the Applicant's application dated March 10, 2021 seeking the following prayers;
  1. That this Honourable Court be pleased to issue to the 1<sup>st</sup> Respondent, as the accounting Officer of the Ministry of Health thirty days (30) notice to show cause why contempt of court proceedings should not be commenced against the said accounting officer for failure and/or refusal to pay to the Applicant party and party costs taxed and allowed on June 13, 2018 in the sum of Kshs 127,995/=.
  2. That this Honourable Court be pleased to order the 1<sup>st</sup> Respondent be committed to civil jail for a period of six months or for any other period that the court may deem fit for contempt of court orders issued on the 30<sup>th</sup>



of November, 2018 and in particular failure to pay taxed costs as per the Certificate of Order issued on 30<sup>th</sup> November, 2018.

3. That the Honourable Court be pleased to grant any other orders it deems fit.
  4. That the costs of this Application be provided for.
2. The Application is supported by the grounds on its face and an affidavit sworn by the *Ex parte* Applicant on March 10, 2021.
  3. The *Ex parte* Applicant's case is that on February 2, 2018 the Court issued an order of mandamus directing the Respondent's to pay him the decretal sum of Kshs 685,221/= awarded in the case of Kerugoya CMCC No181 Of 2010 Geoffrey Gatwai Mwangi v The Hon. Attorney General plus costs of the Judicial Review proceedings.
  4. Subsequently that a Bill of Costs was lodged on February 16, 2018 by his advocates and taxed on June 13, 2018 against the Respondents for the sum of Kshs.127,995/=. A Certificate of Order against Government dated November 30, 2018 is said to have been issued by virtue of the Certificate of Taxation dated July 4, 2018 but the sum of Kshs.127,995/= still remains unpaid.
  5. The Applicant contends that despite numerous reminders to the Attorney General and the Ministry of Health to settle the costs of Kshs.127,995/= the same stands unpaid.
  6. The Applicant further argues that the Certificate of Taxation, a Certificate of Order Against Government and a letter requesting for payment of the said costs was served upon the Respondents on March 2, 2021 but the amount still remains unsettled.
  7. The applicant argues that since the Order of Mandamus was issued they Respondent has only paid the decretal amount and have failed to settle costs of the suit and the Respondent is thus in contempt of this Court's orders.
  8. The *Ex parte* Applicant filed written submissions dated July 22, 2022 in which he cites Section 5 of the [Judicature Act](#) on the High Court and Court of Appeal's power to punish for contempt.
  9. The case of [Samuel M. N. Mweru & Others v National Land Commission & 2 others](#) [2020] eKLR is also cited where the Court cited with approval the case of [Republic v Kajiado County & 2 Others ex parte Kilimanjaro Safari Club Limited](#) J.R. No 390 of 2014 where it was held thus "the substance of the common law is still applicable under section 3 of the [Judicature Act](#)." The [Samuel M.N. Mweru](#) case (supra) is also referred to on the test for establishing contempt.
  10. The Court in the [Samuel M.N. Mweru](#)(supra) is said to have referred to the book Contempt in Modern New Zealand which provides for four essential elements that must be proved to make the case for civil contempt and these are that;
    - i. The terms of the order were clear and unambiguous and were binding on the defendant;
    - ii. The defendant had knowledge of proper notice of the terms of the order;
    - iii. The defendant has acted in breach of the terms of the order., and
    - iv. The defendants conduct was deliberate.



11. The *Ex parte* Applicant submits that the order to the Respondents is clear and unambiguous and there being no reference challenging the decision of the Deputy Registrar to tax the bill of costs the order comprised in the said certificate of taxation and order against Government is clearly binding.
12. The Respondents are said to be aware of the orders as they decided to only pay the decretal sum and refused to pay the costs of the suit and that the only possible inference is that they made a deliberate decision to only honour part of the award.
13. It is the *Ex parte* Applicant's submission that the Respondents did seek to be served with copies of the certificate of order against government and certificate of taxation twice and that the same is evidenced by the letter marked "GGM5" in the Applicant's supporting affidavit dated March 10, 2021.
14. The *Ex parte* Applicant also submits that the affidavit of service dated July 22, 2021 proves service of the present application by way of email vide the Respondents' last known email addresses, as well as at the offices of the 1<sup>st</sup> and 2<sup>nd</sup> respondent through their law clerks and mails clerks respectively. It is also contended that the Respondents are represented in the application before this court.
15. The case of *Henry Musemate Murwa v Francis Owino, Principal Secretary, Ministry of Public Service, Youth and Gender Affairs & another* [2021] eKLR is cited where the Court cited the Court of Appeal decision in *Shimmers Plaza Limited v National Bank of Kenya Limited* [2015] eKLR on the issue of personal service in contempt matters.
16. In conclusion the *Ex parte* Applicant submits that the Court's orders are clear and unambiguous, and that they were duly served and it is the Respondents who have decided to disobey those orders. The Applicant also submits that it is pertinent for this Court to punish them for the said contempt to ensure the rule of Law as well as secure the dignity of this Court. The case of *Shimmers Plaza Limited* (supra) is referred to further buttress this argument.

### **Analysis And Determination**

17. Having considered the issues raised before this court and the pleadings thereof, I note that the Respondents having failed to file a response to the application before this court implies that it is not in dispute that there are costs amounting to the sum of Kshs.127,995/= that are yet to be paid and that indeed on 2<sup>nd</sup> February, 2018 the court issued an order of mandamus against the Respondent and it is in this Judgment that the said orders of costs were granted to the *Ex parte* Applicant.
18. The Court notes that the Respondents have cleared the decretal sum that was owing and all that is left for settlement is the payment of costs for the suit.
19. A Certificate of Order Against Government together with a Certificate of Taxation in regards to the sum of Kshs.127,995 were served upon the 1<sup>st</sup> and 2<sup>nd</sup> Respondents on June 20, 2019 and on June 21, 2019 respectively and also on February 24, 2021 on both Respondents.
20. The Supreme court in the case of *Republic v Ahmad Abolfathi Mohammed & Another* [2018] eKLR stated as follows;

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“(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.



(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:

“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 E.R. 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.”

(25) In *Att-Gen. v. Times Newspapers Ltd.* [1974] A.C. 273, Lord Diplock stated:

“... 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.”

(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 No364 of 2005 where it was held:

“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.”

21. There being no compelling reasons advanced by the Respondents herein why the said orders have not been complied with and from the foregoing, I find that the 1<sup>st</sup> Respondent ought to be punished for failing to comply.

## Order

22. I make the following orders;



i. A thirty days (30) notice is hereby issued to the 1<sup>st</sup> Respondent within which to show cause why contempt of court proceedings should not be commenced against him for failure and/or refusal to pay to the Applicant party and party costs taxed and allowed on 13<sup>th</sup> June,2018 in the sum of Kshs 127,999/=.

ii. This matter shall be mentioned on September 18, 2023 to confirm compliance and for further directions.

iii. Costs shall be in the cause.

Dated, signed and delivered at Nairobi this 13<sup>th</sup> day of July 2023

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**J. CHIGITI (SC)**

**JUDGE**

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