



Republic v County Executive Committee Member Finance & Economic Planning (County Government of Mombasa) & 3 others; Malombo t/a OM Robinson & Company Advocates (Exparte Applicant) (Judicial Review Application 06 of 2019) [2023] KEHC 20520 (KLR) (6 July 2023) (Ruling)

Neutral citation: [2023] KEHC 20520 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
JUDICIAL REVIEW APPLICATION 06 OF 2019**

OA SEWE, J

JULY 6, 2023

BETWEEN

REPUBLIC APPLICANT

AND

COUNTY EXECUTIVE COMMITTEE MEMBER FINANCE & ECONOMIC PLANNING (COUNTY GOVERNMENT OF MOMBASA) 1ST RESPONDENT

CHIEF OFFICER FINANCE (COUNTY GOVERNMENT OF MOMBASA) 2ND RESPONDENT

COUNTY ATTORNEY (COUNTY GOVERNMENT OF MOMBASA) 3RD RESPONDENT

COUNTY GOVERNMENT OF MOMBASA 4TH RESPONDENT

AND

ROBINSON ONYANGO MALOMBO T/A OM ROBINSON & COMPANY ADVOCATES EXPARTE APPLICANT

RULING

[1] The Notice of Motion dated January 26, 2023 was brought by the *ex parte* applicant, Robinson Onyango Malombo, T/A OM Malombo & Company Advocates (hereinafter “the applicant”) under Section 5(1) of the *Judicature Act*, Chapter 8 of the Laws of Kenya for orders that:

- (a) the Acting Chief Officer, County Government of Mombasa, Mr. Ayub Ridhwan, be committed to civil jail at Shimo La Tewa Prison and detained for a term of 6 months or such period as the Court will deem fit or be fined and imprisoned for contempt of court orders made on September 28, 2020.



- (b) That the costs of the application be provided for.
- [2] The application was premised on the grounds that on September 28, 2020, the applicant and the 2nd respondent agreed to compromise over 30 matters in which the applicant had obtained decrees and in some cases prerogative writs of mandamus to the tune of over Kshs 1 Billion, inclusive of interest. It was averred by the applicant that the parties thereafter recorded a Consent Order to the effect that the applicant would be paid a sum of Kshs 120,000,000/= (all inclusive); and that the said Consent Order provided, *inter alia*, that the said sum would be defrayed in monthly instalments of Kshs 5,000,000/=, payable on or before the 15th day of each month until payment in full.
- [3] The applicant further stated that, pursuant to the said Consent Order, the 2nd respondent proceeded to pay the sum of Kshs 69,480,000/= (inclusive of interest); and therefore that the 2nd respondent was in arrears to the tune of Kshs 71,080,000/= as at the date of the instant application. Thus, according to the applicant, the 2nd respondent has, since May 2022, failed to pay the instalments due and has persisted in that state of disobedience notwithstanding previous orders of the Court, including the ruling dated November 19, 2019 by Hon. Ogola, J. He added that the Court has a sacrosanct duty bestowed upon it to ensure that its orders are obeyed and its authority recognized and respected.
- [4] The application was supported the affidavit of Robinson Onyango Malombo, sworn on January 26, 2023 to which he annexed a copy of the ruling by Hon. Ogola, J. by which the officials of the County Government of Mombasa were cited for contempt and were to be arrested and committed to civil jail at Shimo La Tewa Prison.
- [5] The application was initially proceeded with *ex parte* and a ruling delivered on February 10, 2023. However, on the application of the respondent, the said ruling was set aside to give the respondent an opportunity of being heard on the application. Thereafter, the respondents filed a Replying Affidavit sworn on June 2, 2023 by Mr. Ridhwan Ayub Buhiri, the then acting Chief Officer Finance. He deposed that he served as the Chief Officer Finance and Economic Planning only in an acting capacity; and that a substantive Chief Officer has since been nominated, whose appointment was being processed by the County Assembly of Mombasa.
- [6] Mr. Ridhwan further averred that upon coming to know of the existence of the debt, he took steps and made part payment in the sum of Kshs 4,000,000/=; and that due to budgetary constraints he was unable to pay the entire sum due as the 4th respondent was yet to receive its disbursements from the National Government for the months of March, April, May and June 2023. Thus, Mr. Ridhwan averred that failure to pay off the debt was not a deliberate choice or an act of willful disobedience. He therefore prayed for the dismissal of the application dated January 26, 2023. He annexed copies of the Payment Vouchers dated April 23, 2023 and May 19, 2023 to augment his averment that he has so far effected payment to the tune of Kshs 4,000,000/=.
- [7] The application was urged by way of written submissions pursuant to the directions given on May 15, 2023. While Mr. Gomba does not seem to have filed his written submissions in respect of the contempt application, Mr. Tajbhai relied on his written submissions dated June 2, 2023. He urged the Court to consider whether the essential elements of contempt of court have been proved in this instance, particularly the following questions:
- (a) Whether there is evidence that the alleged contemnor was personally served with the order in question;
- (b) Whether the 2nd respondent has willfully disobeyed the orders of the Court.



- [8] In the submission of Mr. Tajbhai, no evidence was adduced by the applicant to demonstrate that the 2nd respondent was personally served with either the consent order or the instant application. He further submitted that there is no willful or express refusal by the 2nd respondent to settle the Consent Order, but that the delay has been due to budgetary constraints. Counsel relied on *Samuel M.N. Mweru & Others v National Land Commission & 2 Others* [2020] eKLR and emphasized the fact that contempt application is quasi-criminal with the likelihood that a person's liberty is at stake. He further pointed out that this is a public debt and is not personally owing from the 2nd respondent; and therefore that it would only be in the interest of justice that time be given for the debt to be fully settled.
- [9] Lastly, it was the submission of Mr. Tajbhai that, since Section 103(3) of the *Public Finance Management Act* identifies the County Executive Committee as the head of the County Treasury and therefore the correct person to look to for payment. He accordingly urged the Court to dismiss the contempt application dated January 26, 2023.
- [10] Section 5 of the *Judicature Act*, Chapter 8 of the Laws of Kenya under which the application was brought states thus:
- (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 the 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 criminal jurisdiction of the High Court."
- [11] It is important to bear in mind that contempt is an offence of a criminal character, therefore an application of this nature requires credible proof beyond the standard applicable to ordinary civil cases to warrant imprisonment of an alleged contemnor. The standard of proof in this regard was well discussed by the Court of Appeal in *Mutitika v Babarini Farm Ltd* [1985] eKLR thus:
- In, Re Breamblevale Ltd* [1969] 3 All ER 1062, Lord Denning MR. (as he then was), at page 1063, had this to say,
- "A contempt of court is an offence of a criminal character. A man may be sent to prison. It must be satisfactorily proved. To use the time-honoured phrase, it must be proved beyond reasonable doubt".
- With the greatest possible respect to that eminent English judge, that proof is much too high for an offence "of a criminal character" and, ipso facto, not a criminal offence properly so defined...
- ...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. We envisage no difficulty in courts determining the suggested standard of proof. 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 offence which can be said to be quasi-criminal in nature..."
- [12] With the foregoing in mind, I have looked at the record of the Court as against the averments made by the applicant. It is common ground that the parties recorded a Consent Order to the effect that the applicant would be paid a sum of Kshs 120,000,000/= (all inclusive) by the 3rd respondent. One of the terms of the said Consent Order was that the said sum would be defrayed in monthly instalments of Kshs 5,000,000/=, payable on or before the 15th day of each month until payment in full.
- [13] It is also evident from the uncontroverted evidence availed before the Court that, pursuant to the said Consent Order, the 4th respondent paid the applicant the sum of Kshs 69,480,000/= (inclusive



of interest); and therefore that County Government of Mombasa was in arrears to the tune of Kshs 71,080,000/= as at January 26, 2023 when the instant application was filed. The applicant contends that the 2nd respondent has not caused any payment to be made since May 2022 and has therefore acted in defiance of the ruling and orders of the Court dated November 19, 2019, as well as the subsequent consensual arrangements for payment.

- [14] That being the case, the next question to pose is whether the applicant has sufficiently demonstrated that the alleged contemnor, Mr. Ayub Ridhwan, was duly served with the Consent Order, or that he has knowledge of it. The general position remains that a court order must be extracted and served for compliance. In *Ochino & Another v Kombo & 4 Others* (supra), it was held that:

As a general rule, no order of court requiring a person to do or abstain from doing any act may be enforced (by committing him for contempt) unless a copy of the order has been served personally on the person required to do or abstain from doing the act in question.”

- [15] Nevertheless, in *Shimmers Plaza Limited v National Bank of Kenya Limited* [2015] eKLR the Court of Appeal made it clear that:

“...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... Kenya's growing jurisprudence right from the High Court has reiterated that knowledge of a court order suffices to prove service and dispense with personal service for purposes of contempt proceedings. For instance, Lenaola, J. in the case of *Basil Criticos v Attorney General and 8 Others* [2012] eKLR pronounced himself as follows:

“...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.”

- [16] Hence, given the background of this matter, there can be no doubt that the alleged contemnor has all along been aware of the orders; granted that the existence of the Consent Order, and the fact that the 4th respondent, through its chief officers, have been defraying the debt by way of instalments. The record further shows that the alleged contemnor's counsel, Mr. Tajbhai, has been attending court and promising settlement. In the premises, I entertain no doubt that the alleged contemnor had knowledge not only of the Consent Order, noting that he admitted to paying Kshs 4,000,000/= to the applicant between March and June 2023.

- [17] That said, the next question to consider is whether the 2nd respondent is the proper officer to look to for payment. This is because Section 21(3) of the *Government Proceedings Act* is explicit that:

“(3) If the order provides for the payment of any money by way of damages or otherwise, or of any costs, the certificate shall state the amount so payable, and the Accounting Officer for the Government department concerned shall, subject as hereinafter provided, pay to the person entitled or to his advocate the amount appearing by the certificate to be due to him together with interest, if any, lawfully due thereon...”

- [18] Section 103 of the *Public Finance Management Act* provides that:

The County Executive Committee Member for finance shall be the head of the County Treasury.”

- [19] In *Council of Governors & Others v The Senate* Petition No. 413 of 2014 [2015] eKLR the Court considered the meaning of the term “accounting officer” in relation to the County government under



the Constitution, the County Governments Act and the Public Finance Management Act. It observed as follows:

(134) The Petitioners have also sought the interpretation of the term “Accounting Officer”. In that regard, Article 226 of the Constitution provides;

- (1) Act of Parliament shall provide for -
 - (a)
 - (b) The designation of an accounting officer in every public entity at the national and county level of government.

(2) The accounting officer of a national public entity is accountable to the national assembly for its financial management, and the accounting officer of a county public entity is accountable to the county assembly for its financial management.

Pursuant to this provision, Parliament enacted the Public Finance Management Act. The appointment and designation of a County Government Accounting Officer is provided for under Section 148 of that Act, as follows;

1. A County Executive Committee member for finance shall, except as otherwise provided by law, in writing designate accounting officers to be responsible for managing the finances of the county government entities as is specified in the designation.
2. Except as otherwise stated in other legislation, the person responsible for the administration of a county government entity, shall be the accounting officer responsible for managing the finances of that entity.

(135) It therefore follows that “an accounting officer” for a County Government entity is the person so appointed and designated as such by the County Executive Committee Member for Finance under Section 148 of the Public Finance Management Act. Indeed, Section 148 (3) of the Public Finance Management Act mandates the County Executive Committee Member for Finance to ensure that each County government entity has an accounting officer as provided for under Article 226(2) of the Constitution.

[20] Likewise, in Republic v Kisii County Government Ex-Parte Peter Kaunda Nyamosi & 2 others [2018] eKLR

25. It is therefore clear that the accounting officer for the County Government is the County Executive Member for Finance. Since the order of mandamus was against the County Government, I do not think that this is fatal as the order of mandamus remains alive and the court may issue a notice to show cause against the accounting officer, upon whom the statutory duty is imposed, to ensure that its decision is enforced (see Consolata Kihara & 21 Others v Director of Kenya Trypanosomiasis Research Institute [2003] KLR 582 and Republic v County Chief Officer, Finance & Economic Planning, Nairobi City County (Ex Parte David Mugo Mwangi) NBI HC Misc. App. 222 of 2016 [2018] eKLR).”

[21] In the result, it is plain that, as the acting Chief Officer for Finance, Mr Ayub Ridhwan, is not the right person to cite for contempt and therefore that the application dated January 26, 2023 is, to that extent, misconceived. The same is hereby struck out with no order as to costs.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 6TH DAY OF JULY 2023



OLGA SEWE
JUDGE

