



Waweru t/a Mooreland Mercantile Co. Ltd v Nairobi City County & 3 others (Judicial Review Application E054 of 2022) [2023] KEHC 20101 (KLR) (Judicial Review) (14 July 2023) (Ruling)

Neutral citation: [2023] KEHC 20101 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
JUDICIAL REVIEW APPLICATION E054 OF 2022**

**JM CHIGITI, J
JULY 14, 2023**

BETWEEN

**JOSEPH NDIRANGU WAWERU T/A MOORELAND MERCANTILE CO.
LTD APPLICANT**

AND

**NAIROBI CITY COUNTY 1ST RESPONDENT
COUNTY EXECUTIVE COMMITTEE MEMBER, FINANCE NAIROBI CITY
COUNTY 2ND RESPONDENT
CHIEF OFFICER FINANCE, NAIROBI CITY COUNTY 3RD RESPONDENT
SECRETARY, NAIROBI CITY COUNTY 4TH RESPONDENT**

RULING

Brief Background

1. The application before this court is dated 21st December, 2022 wherein the Applicant seeks the following orders;
 - a. That this Application be certified as urgent and service thereof be dispensed with in the first instance.
 - b. That notice to show cause do issue to Charles Kerich- County Executive Committee Member Finance and Economic Affairs, Nairobi County to show cause why he should not be committed to civil jail and ordered to pay sum of monies as penalty for being in contempt of Court orders given on 10th November, 2022.



- c. That this Honorable Court be pleased to issue a declaration That Charles Kerich- County Executive Committee Member Finance and Economic Affairs, Nairobi County and all the other Respondents herein are in contempt of Court orders given on 10th November, 2022.
 - d. That this Honourable Court be pleased to order That Charles Kerich- County Executive Committee Member Finance and Economic Affairs, Nairobi County be arrested and brought before this Honourable Court for sentencing and/or committal to civil jail for a period of six months for contempt of court until he purges his contempt and be ordered to personally pay the sum of monies the court may determine as a penalty for deliberately defying and violating the clear, concise and unequivocal orders of this Honourable Court given on 10th November, 2022.
 - e. That this court be pleased to award costs of this Application to the applicant.
2. The application is supported by a Supporting Affidavit sworn by the Applicant Joseph Ndirangu Waweru.
 3. The *Ex parte* Applicant's case is That the Court issued clear and concise Court orders on 10th November, 2022 to the effect That an order of Mandamus was issued compelling the Respondents to pay the *Ex parte* Applicant the sum of Kshs, 9,307, 948.80/- being the unpaid balance of the decretal sum together with costs of the judicial review application. These orders it is argued were made in the presence of the representatives of both parties and further That the Respondents were also served with the Court Orders.
 4. The Applicant depones That he has issued several demand letters in writing through his advocates to the Respondents for payment as per the orders of this Honourable Court but they have failed to do so. The Respondent's conduct according to the Applicant is prima facie contempt of court and contempt of the Rule of law.
 5. The Respondents in response filed grounds of opposition dated 16th January,2023. The Respondents raise 12 grounds of opposition as follows;
 1. That the present Application is frivolous, vexatious and an abuse of the Court process and is a mere publicity stunt by the Applicant as it does not relate to the 1st Respondent.
 2. That neither the Decree nor the Court Order was served upon the Respondents nor their Advocates as alleged by the Applicant. That the Application is fatally incompetent and incurably defective.
 3. That the Orders sought by the Applicant do not lie as against the 1st Respondent as there is no statutory duty imposed upon them to act as demanded. The Applicant has not stated under which law the cited Respondent has a duty to act as demanded.
 4. That under Part IV — the County Government Responsibilities with respect to management and control of public finance under the *Public Finance Management Act* Cap 412C of the Laws of Kenya, the Statutory duty to pay out funds from the county Treasury vests in the County Executive Committee member in charge of finance and not the 1st Respondent herein thus the Respondents herein are therefore wrongly suited.
 5. That all expenditures by the County Government are appropriated by the County Assembly and not the Respondents in each financial year.



6. That the County Government has competing interests including settling decrees to the public but has limited resources and has statutory processes it must abide by before the settlement of the same. The services provided by the County Government serve approximately four million Nairobi residents yet no adequate resources are available.
 7. That the alleged contemnors are public officers and are prohibited in law; under sections 196 and 197 of the *Public Finance Management Act* 12012) from paying the Applicant as ordered for it would be an offence to spend any public funds without any prior authorization and budgetary appropriation.
 8. That the delay in satisfying the decree herein is due to the already closed budget cycle and That the Respondents awaits budgeting, allocation and approval of the decreed sum from the County Executive Committee Member in charge of Finance hence the Respondents have been wrongfully enjoined to the suit.
 9. That the immediate settlement of the Order would require Constitutional or County Legislation approval which has not been given to the Respondents due to the already closed budget cycle. That the closure of the budget cycle is beyond the Respondents' limits and/or intervention thus the delay in the said payment.
 10. The Respondents are currently not in a position to pay off the decree since the County Government is in the middle of its financial year and such funds would have to have been provided for in the County budget.
 11. The Respondents are ready to pay once the same is allocated for, approved and passed by the County Assembly as provided for in section 125 of the *Public Finance Management Act* (2012) and That it is only right for the Applicant to rest on the same until the budgeting, allocation and approval of the amounts as decreed herewith.
 12. That the Application is therefore, fatally incompetent and incurably defective and the Orders sought by the Applicant are devoid of merit hence the Application is hopelessly misadvised and ought to be struck out by this honorable Court with no reliefs granted to the Applicant.”
6. The application was canvassed by way of written submissions. The *Ex parte* Applicant filed written submissions on 28th March,2023 in which one main issue is identified for determination and That is whether the Respondents are in contempt of Court's Orders.
 7. The Applicant submits That it is trite law That to succeed in a contempt application, the applicant must prove the terms of the order, knowledge of the terms by the Respondent, failure by the Respondent to comply with the terms of the order and the defendant's conduct was deliberate.
 8. The Applicant submits That the respondents were served with copies of the Court decree dated 15th November,2022 on diverse dates between 22nd November, 2022, 5th December,2022 and 9th March,2023.
 9. It is the Applicant's case That as was held in the Court of Appeal case of *Shimmers Plaza Limited versus National Bank of Kenya Limited* [2015] eKLR and *United States v. Revie* 834 F.2d 1198, 1203 (5th Cir. 1987) the Respondents had adequate notice as counsel representing them was present during the entire application for Mandamus until when the case was concluded and judgment issued.
 10. It is submitted That the respondent's failure to pay the applicant the decretal sum and interest is deliberate as they have had more than enough time to pay the applicant. The cases of *Republic v*



Attorney General & another Ex parte Mike Maina Kamau [2020] eKLR and Hadkinson v Hadkinson, (1952) ALL ER 567, are cited on the deliberate disobedience of court orders.

11. The Applicant also cites the case of Refrigeration and Kitchen Utensils Ltd. v Gulabchand Popatlal Shah & Another, -Civil Application No.39 of 1990 where the court held That “... It is essential for the maintenance of the rule of law and good order That the authority and dignity of our courts is upheld at all times.”
12. The Respondents in their submissions dated 17th March,2023 refer to the case of Gatharia K Mutikika V Babarini Farm Limited [1985] KLR 227 on the need to prove contempt beyond a balance of probabilities but not beyond reasonable doubt.
13. The Respondent also submits That there cannot be deliberate disobedience, unless the contemnor had knowledge of the existence of That order and That That knowledge is a question of fact and one must be aware of the terms of the order. It is contended That there is no evidence That the Respondents were aware of the terms of the order despite their representatives having been court.
14. The Respondent contends That the Public Finance Management Act Cap 42 Laws of Kenya under Part IV of the County Government Responsibilities with respect to management and control of public finance provides That the statutory duty to pay out funds from the County Treasury vests in the County Executive Committee Member in charge of finance and not the 1st Respondent herein.
15. The Respondents submit That the alleged contemnors are public officers and are prohibited in law under Sections 196 and 197 of the Public Finance Management Act, 2012 from paying the Applicant as ordered as it would be an offence to spend any public funds without any prior authorization and budgetary appropriation as all expenditures by the County Government are appropriated by the County Assembly and not the Respondents in each financial year.
16. They also argue That the budget cycle is already closed and the same prevents the Respondents from obtaining Constitutional or County Legislation Approval, which would hasten the settlement of the Order. The Respondents also argue That they are waiting for the County Executive Committee Member in charge of finances to budget, allocate, and approve the decretal sum.

Analysis and Determination

17. Having considered the facts of the case and each party's argument, I find That the only issue for determination before this Court is whether the Respondents are liable for contempt of court.
18. The Supreme court in the case of Republic v Ahmad Abolfatbi Mohammed & Another Criminal Application No. 2 of 2018 stated as follows on the necessity to punish for contempt;

“(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 ER. 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 No.364 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.”

19. It is a known fact as has been acknowledged by the Parties before this court That there is a valid subsisting order dated 15th November,2022 yet to be satisfied by the Respondents herein and That although the Respondents raise the issue of not having been personally served with the Order by the Applicant the Respondents as has been demonstrated in their pleadings are well aware of the said order and its terms.



20. The Court of Appeal in the case of *Shimmers Plaza Limited v National Bank of Kenya Limited* [2015] eKLR held as follows on the issue of personal service;

“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. This is in line with the dispensations covered under 81.8 (1) (supra).

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 the purposes of contempt proceedings. For instance, Lenaola J in the case of *Basil Criticos Vs 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”

This position has been affirmed by this Court in several other cases including the Wambora case (supra).”

21. The Respondents also argue That the Orders sought by the Applicant do not lie as against the 1st Respondent as there is no statutory duty imposed upon them, to act as demanded further That the *Public Finance Management Act* vests the power to pay out funds from the County Treasury upon the County Executive Committee member in charge of finance and not the 1st Respondent herein and thus the Respondents herein have been wrongly suited.
22. The Court in the case of *Kenya Bankers Association v Rose Florence Wanjiru & 2 others* [2014] eKLR held as follows on joinder and misjoinder of parties;

“In any case, no suit can be defeated merely by reason of the misjoinder of parties.”

23. The Court in the case of *Republic v Principal Secretary, Ministry of Defence & another Ex Parte David Gitau Njau & 9 Others* [2018] eKLR stated thus;

20. In my view a party facing financial constraints is at liberty to move the Court for appropriate orders which would enable it to settle its obligations while staying afloat. That however, is not a reason for one to evade its responsibility to settle such obligations. In other words, financial difficulty is only a consideration when it comes to determining the mode of settlement of a decree but is not a basis for declining to compel the Respondent to settle a sum decreed by the Court to be due from it.”

Order:

- i. Charles Kerich- County Executive Committee Member Finance and Economic Affairs, Nairobi County and 3rd,4th and 5th Respondents herein are in contempt of Court orders given on 10th November, 2022.
- ii. A Notice to show cause do issue against the 2nd,3rd and 4th Respondents within thirty days (30) from today's to show cause why contempt of court proceedings should not be commenced against the



Respondents for failure and/or refusal to pay to the Applicant the sum of Kshs9,307,948.80/= being the unpaid balance of the decretal sum.

iii. This matter shall be mentioned on 19th September, 2023 to confirm compliance and for further directions.

iv. Costs shall be in the cause.

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

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J. CHIGITI (SC)

JUDGE

