



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT EMBU**

**MISCELLANEOUS CIVIL APPLICATION NO. E006 OF 2020**

**1. ELIJAH KITHAKA NTHIGA**

**2. SOSPETER MUTURI.....APPLICANTS**

**VERSUS**

**1. THE PRINCIPAL SECRETARY, MINISTRY OF INTERIOR AND**

**CO-ORDINATION OF NATIONAL GOVERNMENT.....1<sup>ST</sup> RESPONDENT**

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

**RULING**

1. The Applicant brought judicial review proceedings vide Miscellaneous Application No. 25 of 2018, seeking an order of mandamus to compel the Respondents to pay the decretal amount awarded in Embu Chief Magistrate's Court Civil Cases Numbers 161 of 2008 and 67 of 2007. The said orders were granted Embu Chief Magistrate's Court Civil Case Number 161 of 2008 and 67 of 2007.

2. By a notice of motion dated 23.10.2020 and filed under Section 5(1) of the Judicature Act, Cap 8 of Laws of Kenya, the Applicants sought for the following orders that:

*i. The current serving Principal Secretary, Ministry for Interior and Co-ordination of National Government be punished for contempt of court.*

*ii. Costs of this application be paid by the respondents.*

3. The application is premised on the grounds on its face and it's supported by the annexed affidavit of Eddie Njiru. The core grounds are that the High Court issued an order of *mandamus* compelling the Respondents to pay the applicants the decretal amount awarded in Embu Chief Magistrate's Court Civil Cases Numbers 161 of 2008 and 67 of 2007 amounting to Kshs. 79,055/= together with the costs and interest as per the certificate of costs dated 28.01.2020.

4. For whatever reason, the respondents chose to pay the decretal amount but failed and/or neglected to pay the costs of Kshs. 79,055/= together with interest. The applicant argues that the respondents are fully aware of the existence of the said certificate of costs in the following aspects; that on several occasions, the applicant's counsel spoke with a Mr. Charles Mutinda (Attorney General's Chamber's Nairobi) over the matter and at the request of Mr. Mutinda, he wrote the letter dated 31.03.2020 forwarding the documents in reference therein (letter marked ENIII) and that between 01.09.2020 to date, Mr. Mutinda and the applicant's counsel exchanged "online correspondences" in respect of the matter(a bundle of correspondence annexed and marked EN IV).

5. The respondents filed grounds of opposition that the application before the court is fatally defective, bad in law and not based on material facts and further that, the application as filed, is imprecise and frivolous. It is their case that the application is based entirely on conjecture, ill will and the same ought to be dismissed with costs.

6. The Applicant submitted that vide a judicial review application he obtained an order of mandamus compelling the respondent to settle the decrees sums awarded in the Embu Chief Magistrate's Court Civil Case Numbers 161 of 2008 and 67 of 2007 together with the costs of the judicial review application which was taxed at Kshs. 79,055/=. It is their case that, the respondents despite service have failed, refused and or neglected to file any response and for that reason, their application is unopposed.

7. They aver that they have presented before court evidence that shows that the respondents were served and are thus aware of the certificate

of costs dated 28.11.2020 but in blatant contempt, the respondent chose to ignore the same. It is their prayer that the application be allowed as prayed.

8. I have considered the application by the applicants, the response by the respondents and the submissions by the applicants.

9. The Contempt of Court Act is, however, no longer operational as from the date of the judgment declaring it unconstitutional in **Kenya Human Rights Commission v Attorney General & Another (supra)**. I am therefore obliged to revert to the provisions of the law that operated before the enactment of the Contempt of Court Act to avoid a lacuna in the enforcement of Court's orders. It was in this respect observed in **Republic v Returning Officer of Kamkunji Constituency & The Electoral Commission of Kenya HCMCA No. 13 of 2008**, that the High Court has the responsibility for the maintenance of the rule of law and hence there cannot be a gap in the application of the of law.

10. The Court of Appeal in **Christine Wangari Gachege v Elizabeth Wanjiru Evans & 11 Others, [2014] eKLR** found that the English law on committal for contempt of court under Rule 81.4 of the English Civil Procedure Rules, which deals with breach of judgment, order or undertakings, was applied by virtue of section 5(1) 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.”***

11. In the instant case, there are a judgment in Embu Chief Magistrate's Court Civil Cases Numbers 161 of 2008 and 67 of 2007 and a further Court Order on 17.09.2019 in favour of the Applicants in which they were granted orders as follows that: –

***(a) An order of mandamus is hereby granted to compel respondents to pay up the Decretal amount ordered in Chief Magistrate's Court Civil Case No's 161/2008 and 67/2007 together with costs and interest thereon from 16<sup>th</sup> and 17<sup>th</sup> January 2017 respectively.***

***(b) The costs of this application are awarded to the applicants.***

12. Mativo J. restated the test for establishing contempt in his decision in **Samuel M. N. Mweru & Others v National Land Commission & 2 others [2020] eKLR** where he stated –

***It is an established principle of law that in order to succeed in civil contempt proceedings, the applicant has to prove -***

***(i) The terms of the order,***

***(ii) Knowledge of these terms by the Respondent,***

***(iii) Failure by the Respondent to comply with the terms of the order.***

13. Upon proof of these requirements, the presence of willfulness and bad faith on the part of the Respondent would normally be inferred, but the Respondent could rebut this inference by contrary proof on a balance of probabilities.

14. In this case, the court orders were outright and unambiguous. I will proceed to determine *whether the respondents were aware of the material order and secondly, whether they acted in disobedience of the order without justifiable cause.*

15. Unless the court dispenses with service, a judgment or order may not be enforced by way of an order for contempt unless a copy of it has been served on the person required to do or not do the act in question. Rule 81.6 of the English Civil Procedure Rules specifically provides that the method of service shall be personal service, which is effected by leaving the order with the person to be served.

16. It is also the position, and 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 Court of Appeal decision in **Shimmers Plaza Limited v National Bank of Kenya Limited [2015] eKLR** where it was held that –

***“Would the knowledge of the judgment or order by the advocate of the alleged contemnor suffice for contempt proceedings” We hold the view that it does. This is more so in a case such as this one where the advocate was in Court representing the alleged contemnor and the orders were made in his presence. There is an assumption which is not unfounded, and which in our view is irrefutable to the effect that when an advocate appears in court on instructions of a party, then it behoves him/her to report back to the client all that transpired in court that has a bearing on the client's case.”***

17. Again, in **Basil Criticos v Attorney General and 8 Others [2012] eKLR** Lenaola J. (as he then was) 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.”***

18. Upon analysis of the evidence, I do note that service of the orders was effected by the learned counsel of the applicant upon the

respondents and further from the court record, the learned counsel for the respondent at one time was ready to discuss (in regard to the application at hand) an out of court settlement with the counsel for the applicant. The same is buttressed by the fact that the 1<sup>st</sup> respondent had initially paid the decretal amount thus only leaving out the costs of Kshs. 79,055/=. With the evidence at hand, this court is fully convinced that the respondents *were not only duly served with the necessary order but were also aware of the same, which was a command they were expected to heed in promoting constitutional values and principles of governance such as rule of law beside upholding the dignity and authority of the Court.*

19. The Respondents are aware of the two judgments as they have been represented by Counsel in all the proceedings and they filed responses. Further, they have already paid the principal sum save for the costs of the suit and interest.

20. As regards culpability, the act or omission constituting disobedience of an order may be intentional, reckless, careless, or quite accidental and totally unavoidable. An intentional act may be done with or without an intention to disobey the order, and with or without an intention to defy the court. The element of flagrant defiance of, the authority of the court, is no longer necessary to establish breach of a court order. It is now established that the mental element for liability for contempt arising out of disobedience is simply that the disobeying party either intended to disobey or made no reasonable attempt to comply with the order. See in this respect the English House of Lords decision in **Heatons Transport (St Helens) Ltd v Transport and General Workers Union (1973) AC 15.**

21. In addition, it was held in **Mwangi H.C. Wangonde v Nairobi City Commission, Nairobi Civil Appeal No. 95 of 1998** that the threshold of proof required in contempt of Court is higher than that in normal civil cases, and one can only be committed to civil jail or otherwise penalized based on evidence that leaves no doubt as to the contemnor's culpability.

22. The Court also observed that the respondents' inaction and neglect in that regard was a deliberate disregard of a valid court order which grossly undermined the dignity of this Court.

23. It is essential for the maintenance of the Rule of Law and order that the authority and the dignity of courts is 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. 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. [See **Econet Wireless Kenya Ltd vs. Minister for Information & Communication of Kenya & Another [2005] 1 KLR 828, Ibrahim, J** (as he then was)]

24. In the given circumstances, I therefore hold that the:

- i. The Respondents have been found to be in contempt of court orders.*
- ii. The 1<sup>st</sup> Respondent is hereby given a period of 30 days to purge the contempt.*
- iii. The matter shall be mentioned on a date to be fixed in court for further orders.*

25. It is so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 2ND DAY OF FEBRUARY, 2022.**

**L. NJUGUNA**

**JUDGE**

.....for the Applicants

.....for the Respondents