



**Republic v County Secretary, Nairobi City County & 3 others; LUED(A)  
Chemicals Limited (Exparte Applicant) (Judicial Review E155 of 2022)  
[2024] KEHC 14760 (KLR) (Judicial Review) (11 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 14760 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
JUDICIAL REVIEW  
JUDICIAL REVIEW E155 OF 2022  
JM CHIGITI, J  
OCTOBER 11, 2024**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**THE COUNTY SECRETARY, NAIROBI CITY COUNTY ..... 1<sup>ST</sup> RESPONDENT**

**THE COUNTY EXECUTIVE MEMBER INCHARGE OF FINANCE, NAIROBI  
CITY COUNTY ..... 2<sup>ND</sup> RESPONDENT**

**THE CHIEF OFFICER FINANCE AND ECONOMIC PLANNING NAIROBI  
CITY COUNTY ..... 3<sup>RD</sup> RESPONDENT**

**NAIROBI CITY COUNTY ..... 4<sup>TH</sup> RESPONDENT**

**AND**

**LUED(A) CHEMICALS LIMITED ..... EXPARTE APPLICANT**

**RULING**

1. Before this court is an application seeking the following orders:
  1. ...Spent.
  2. That, this Honourable court be pleased to arrest set aside and/or stay the proceedings herein against one CHARLES KERICH & WILSON NJOROGE GAKUYA pending Hearing and determination of this Application inter partes.



3. That, this Honourable court be pleased to set aside and/or stay or vary the Orders of Contempt and all subsequent Orders issued on 4<sup>th</sup> April, 2024.
  4. THAT, costs of this application be provided herein.
2. The application is supported by the Affidavits of Charles Kerich & Wilson Njoroge Gakuya. According to Charles Kerich, he was never served with the proceedings that culminated in the orders that were issued by Hon. court. He was not in charge of finance matters of the county government. It is his case that he no longer occupies the office afore cited in the suit. He challenges the Affidavit of service of the process. He argues that had he been served with the court papers then he would have attended court and audit of public entities, by stating as follows;
- “(1) An Act of Parliament shall provide for-(a) the keeping of financial records and the auditing of accounts of all governments and other public entities, and prescribe other measures for securing efficient and transparent fiscal management; and (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.”
3. It is his case that in conformity with *the Constitution* Parliament enacted the *Public Finance Management Act* Cap 412A where Section 148 of the Act provides for Designation of Accounting Officers for county government entities by the County Executive Committee Member for finance;
- “(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.
  - (3) A County Executive Committee member for finance shall ensure that each county government entity has an Accounting Officer in accordance with Article 226 of *the Constitution*.
  - (4) The Clerk to the county assembly shall be the Accounting Officer of the county assembly.
  - (5) A county government may, in order to promote efficient use of the county resources, adopt, subject to approval by the county assembly, a centralized County Financial Management Service.”
4. The question of who the Accounting Officer in a County Government is, was dealt with in the case of Council of Governors & Others v The Senate Petition No 413 Of 2014 [2015] eKLR which was cited



with approval by the Honorable Justice E. K. Ogola in the case of Republic v County Secretary, County Government of Mombasa & 2 others Exparte Samuel Mutemi t/a Tudor Paradise [2021] eKLR;

“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 of 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

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*.”

5. It is their case that the contemnors are not the persons legally bound or authorized at law to pay the Respondent's dues, as they are not the Accounting Officers of Nairobi City County.
6. They argue that the contemnors have gone a step further and duly disclosed to the Honourable Court and the Respondent herein that the Accounting Officer for the Nairobi City County is the County Officer Finance and hence legally bound to pay the Respondent's Claim and that they would have made this information known to the Court had they been served with the application.

#### **The Respondent 's case;**

7. The Application is opposed by the Respondent who argues that the Contemnors were duly served with a Court decree/Order/order of mandamus issued 28<sup>th</sup> July 2023 on 17<sup>th</sup> August 2023. The same was served upon the Contemnors' County Attorney and their advocates R.M. Wafula Advocates.
8. It is also not disputed by the Contemnors that they were duly served with the Respondent's Notice of Motion application dated 30<sup>th</sup> September 2023, mention notices and ruling notices, which pleadings were duly served upon the Contemnors' County Attorney and their advocates R.M. Wafula



Advocates. According to him the respondents were served through the advocates who are on record for the continentals.

9. It is his case that there is no need for personal service in cases where the contemnor is represented by an advocate. According to the deponent, the contempt well subbed numerous occasions with court processes, applications notices for and for hearing. They chose not to attend court.
10. The decretal sum unpaid today and continues to uninterest.
11. The Contemnors are merely using the instant application to review the orders of mandamus issued on 28<sup>th</sup> July 2023. They submit that the Applicants should have filed an appeal and challenge the orders of mandamus issued on 28<sup>th</sup> July 2023. Therefore, They submit that the instant application is an abuse of the Court process, non-starter, incompetent and vexatious.
12. In addition, according to him, the instant application is incompetent, and a none-starter in law and it is fatally defective for failure to attach/annex the said Court Order. Further, the Contemnors have not met the conditions for review of a Court Order as required by Order 45 Rule 1 of the Civil Procedure Rules, 2010.
13. Reliance is placed on the decision of this Court in the case of Hosea Nyandika Mosagwe & 2 Others Vs County Government of Nyamira(2022) eKLR, where the Court considered implications of failure to annex a formal decree in a review application by stating as follows:-"Finally, the Application is irregularly in Court since an Application for Review ought to have annexed a formal extracted decree or order in respect of which the review is sought. No such a Decree was attached to the present Application which makes the Application fatally defective." (Emphasis mine)

#### **Analysis and determination:**

14. Following are the issues that need to be determined;

#### **I. Whether the failure to extract a decree or order in respect of which the review is sought is fatal.**

15. In applications under order 45 an applicant should annex a copy of the order they are seeking to review. The Applicants in this case did not annex the order that they are seeking to stay and to set aside in their application.
16. In the case of Suleiman Murunga Vs Nilestar Holdings Limited & Another (2015) eKLR, the Court held as follows: -

“The Plain reading of the above provision (referring to Order 45 Rule 1) is that an applicant for review ought to have annexed a formal extracted decree or order in respect of which the review is sought. In essence, judgment or ruling. Thus, where an applicant fails to annex the order sought to be reviewed, an application is defective. In the present application, the order that the Defendants sought to be reviewed was not annexed with the result that the Defendant’s application was fatally defective. I agree that a formal decree or order us a pre-requisite before an applicant can bring himself/herself within the ambit of order 45 of the Civil Procedure Rules as relates to review of the decree or order”

17. In the case of Haile Selassie Avenue Development Co. Limited v Josephat Muriithi & 10 others [2004] eKLR it was held that:

“The rules of procedure which regulate the trial process are intended to serve the constructive purpose of expediting trials, and facilitating judicial decision-making with finality. These



rules cannot be said to be oppressive to parties, or that they necessarily wreak injustice. On the facts of this particular case, the Defendants ought to have complied with these rules of procedure.”

The omission can be cured under Article 159 of *the Constitution*.

## **II. Whether or not the applicant is entitled to an order for stay of the orders of Orders issued on 4<sup>th</sup> April, 2024.**

18. The decision whether or not to set aside ex parte judgment is discretionary. It is not in doubt that the discretion is intended so to be exercised to avoid injustice and hardship resulting from accident, inadvertence or excusable mistake or error, but is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice. See *Shah vs. Mbogo & Another* [1967] EA 116.
19. In *Wachira Karani vs. Bildad Wachira* (2016) eKLR as was quoted in the case of *David Gicheru v Gicheha Farms Limited & another* [2020] eKLR the Court held that: -

“The fundamental duty of the Court is to do justice between the parties. It is in turn, fundamental that to that duty, those parties should each be allowed a proper opportunity to put their cases upon the merits of the matter...”
20. In considering whether or not to set aside a judgment, a judge has to consider the matter in the light of all the facts and circumstances both prior and subsequent and of the respective merits of the parties before it would be just and reasonable to set aside or vary the judgment, if necessary, upon terms to be imposed.
21. The allegations that the applicants were not served with the hearing notices and that they were not aware of the court proceedings is misplaced. The fact that the Applicants filed this application on its own shows that they were aware of the suit.
22. In any event, there is no need for personal service of notices as argued in a case like the instant application if the applicants were represented by counsel all along.
23. The impugned court proceedings took place over a long time and on the numerous occasions, the applicants were served with the hearing notices. They did not attend court. They cannot argue that they did not know of the existence of the proceedings.
24. It is my finding and I do hold that in order to balance scales of justice in a fair form the best the most appropriate orders to issue for the setting aside of the orders of this court conditionally.

### **Order;**

1. Prayer 1 is allowed.
2. The orders of this court of on 4th April, 2024 are hereby set aside on the following conditions.
3. The applicant shall deposit the decretal sum in the court within 21 days.
4. Failure to deposit the amount in the court as directed then the orders setting aside shall lapse automatically.
5. Costs in the cause.

It is so ordered.



DATED, SIGNED AND DELIVERED AT NAIROBI THIS 11<sup>TH</sup> DAY OF OCTOBER, 2024.

.....

J. M. CHIGITI (SC)

JUDGE

