



**Tom Ojienda & Associates v County Secretary Nairobi City County
& another (Judicial Review Miscellaneous Application E314 of 2019)
[2024] KEHC 12872 (KLR) (Judicial Review) (24 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 12872 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
JUDICIAL REVIEW MISCELLANEOUS APPLICATION E314 OF 2019
JM CHIGITI, J
OCTOBER 24, 2024**

BETWEEN

PROF TOM OJIENDA & ASSOCIATES APPLICANT

AND

**THE COUNTY SECRETARY NAIROBI CITY COUNTY 1ST RESPONDENT
CHIEF OFFICER FINANCE/COUNTY TREASURER NAIROBI CITY
COUNTY 2ND RESPONDENT**

RULING

The Applicant's case:

1. The Exparte Applicant/Respondent instituted this suit against the 1st and 2nd Respondent on 12th November 2019 seeking an order of mandamus. The Application was determined on 25th March 2022.
2. The Exparte Applicant/Respondent thereafter filed an application against the 1st 2nd and 3rd Respondents dated 26th May 2023 seeking to inter alia cite the Respondents for contempt of Court.
3. On 29th May 2023 the court issued the following orders:
 1. That the application is hereby certified as urgent;
 2. That this Honourable Court hereby cite the County Secretary, Nairobi City County, the Chief Officer, Finance/County Treasurer, Nairobi City County and the County Executive Committee Member, Finance and Economic Affairs, Nairobi City County for being in contempt of the Judgement and Orders dated 14th May 2020 and punish them as per Section 5 of the Judicature Act for having deliberately disobeyed the order of this Honourable Court;



3. That summons are hereby issued against the said County Secretary, Nairobi City County, the Chief Officer, Finance/County Treasurer, Nairobi City County and the County Executive Committee Member, Finance and Economic Affairs, Nairobi City County to appear before this Honourable Court and Show Cause why they should not be committed to civil jail;
 4. That summons are hereby issued against the officers cited above to appear in person in Open Court on 27th June 2023 at 10.30am to Show Cause why they should not be punished.
4. The application that is before me for determination is the one dated 27th June 2023 where the Applicant is seeking the following orders: -
1. ...spent...
 2. That this Honourable Court be pleased to stay execution of the orders issued on 30th May 2023 and all the proceedings and other consequential orders pending the hearing and determination of this application.
 3. That this Honourable Court be pleased to set aside or vary the orders issued on 30th May 2023 by striking out the County Executive Committee, Finance and Economic Affairs, Nairobi City County as a Respondent in these Instant proceedings;
 4. That this Honourable Court be pleased to striking out the County Executive Committee, Finance and Economic Affairs, Nairobi City County as a Party in these instant proceedings and all orders affecting it be declared null and void;
 5. That the costs of this application be provided for.
5. The Application is supported by the affidavit of Mr. Charles Kerich. It is the Applicant's case that he was not a party to the proceedings that were instituted by the Exparte Applicants at inception.
 6. He argues that the County Executive Committee, Finance and Economic Affairs, Nairobi City County was introduced into the suit at the execution stage as a result of which he argues that he is being condemned unheard, offending his right to fair hearing.
 7. He wants a stay execution of the orders issued on 30th May 2023 and all the proceedings and other consequential orders to issue and that name of County Executive Committee, Finance and Economic Affairs, Nairobi City County be struck out of this suit.
 8. The Applicant submits that the law relating to joinder of a party to suit herein Application is well settled and procedure properly documented.
 9. Order 1 of the [Civil Procedure Act](#) guides parties on the manner for addition of parties to a cause of action like this instant case as follows:
 - a. A party must apply for the joinder of a party by way of chamber summons as provided under Order 1 Rule 14;
 - b. The Court on Its own motion joins a party to this suit.



10. Reliance is placed on the case of Gladys Nduku Nthuki v Letshego Kenya Limited; Mueni Charles Maingi (Intended Plaintiff) [2022] eKLR, where the Court stated as follows: -

... As regards his joinder as a Plaintiff, as indicated above he may only be so joined by the court on own motion or by an application by either party. Nambuye. J (as she then was) in Kingori vs. Chege & 3 Others [2002] 2 KLR 243 held that:

"...parties cannot be added so as to introduce quite a new cause of action or to alter the nature of the suit..."

11. It's the Applicant's submission that there was no application for joinder of the 3rd Respondent/Applicant before this Honourable Court, yet the prayers sought in the Application dated 26th May 2023 directly affect the 3rd Respondent/Applicant who is not a party to this suit.

12. The Applicant relies on Gladys Nduku Nthuki v Letshego Kenya Limited; Mueni Charles Maingi (Intended Plaintiff) [2022] eKLR, the Court stated as follows: -

...Order I rule 10 allows the Court to add a defendant on its own motion or upon application by either party either orally or formally by summons in chambers under Order 1 rule 22.

Similarly, in this case none of the parties to the suit has sought to have the Applicant joined as a party to the suit...."

13. It is his argument that the instant suit had only two Respondents: County Secretary, Nairobi City County and The Chief Officer, Finance/County Treasurer, Nairobi City County since its institution.

14. It is his case that at no point did the Exparte Applicant ever seek the joinder of the 3rd Respondent/Applicant and it is merely an afterthought. He also relies on the case of Marigat Group Ranch & 3 Others v Wesley Chepkoiment & 19 Others (2014) eKLR where the Learned Judge declined to allow joinder as defendant on the basis that where the Plaintiff has chosen to assert his rights against certain defendants and not others, the court should be slow in imposing other defendants upon him. It is his case that he has been irregularly joined into this suit and orders made against him.

15. Under Order 51 Rule 15 the court may set aside an order made Exparte. The discretion is intended so to be exercised to avoid injustice or 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.

16. No summons to enter appearance or vide an application for joinder were exercised by the Applicant/Respondent. He argues that the orders dated 30th May 2023 are determinative; the Honourable Court has adjudged the Respondents as contemnors even before the Application has been heard.

17. Reliance is placed in the case of R. v Race Relations Board Exparte Setrarajan [1976] I ALL ER.12 properly cited in Justice Amraphael Mbogholi Msagha V Chief Justice of The Republic of Kenya & 7 Others [2006] eKLR where he said-

"Where fairness requires ... depends on the nature of the investigation and the consequence that it may have on persons affected by the investigations, should be told of the case against him and afforded a fair opportunity of answering it..."



18. In *Ridge v Baldwin* [1963] 2 ALL ER. 66 equally cited in *Justice Amraphael Mbogholi Msagha v Chief Justice of The Republic of Kenya & 7 Others* (supra), it was observed of the principles of natural justice that: -

“An essential requirement for the performance of any judicial or quasi-judicial function is that the decision-makers observe the principles of natural justice”

and the Court at page 102 said-

“a decision is unfair if the decision-maker deprives himself of the views of the person who will be affected by the decision.”

19. He invokes the right to fair hearing enshrined under Article 50 of *the Constitution*; no citizen shall be condemned unheard. It is principle of natural justice that a party shall not be condemned unheard. The controversy before this Honourable Court is whether the Respondents ought to be cited for contempt.

20. In *Republic v Principal Magistrate's Court & 2 others Exparte Jack and Jill Supermarkets Limited* [2014] eKLR, contempt of court orders being quasi- criminal in nature, should be specific and be responded to specifically. It submits that the Court granted Exparte orders who is effect determines the Application without the participation of the Respondents.

21. Reliance is placed in the case of *Mureithi Charles & another v Jacob Atina Nyagesuka* [2022] eKLR, the Honourable Court stated in agreement as follows:

“I agree with the position holding of the Supreme Court of India which stated in *Sangram Singh vs. Election Tribunal, Koteh*, AIR 1955 SC 664, at 711 cited in the case of *Gerita Nasipondi Bukunya & 2 others v Attorney General* [2019] eKLR that:

“There must be ever present to the mind the fact that our laws of procedure are grounded on a principle of natural justice which requires that men should not be condemned unheard, that decisions should not be reached behind their backs, that proceedings that affect their lives and property should not continue in their absence and that they should not be precluded from participating in them...”

Exparte Applicants'/Respondent's Case:

22. The application is vehemently opposed by the Exparte Applicant who argues that application is misplaced.

23. It is its case that the County Executive Committee member, Finance and Economic Affairs was enjoined at the point of execution owing to the fact that he has the authority to cause the release of funds from the appropriate accounts for deposit to the Applicant's accounts in fulfillment of the decretal sum.

24. It is the Respondent's case that pursuant to Section 148 of the *Public Finance Management Act*, No. 18 of 2012, the County Executive Committee member, Finance and Economic Affairs is the overall Accounting Officer for the County with the power to designate accounting officers to be responsible for managing the finances of the county government entities as is specified in the designation.

25. As such, the County Executive Committee Member, the 3rd Respondent herein has the oversight power in the management of county finances and this includes the power to cause and ensure payment of pending county bills and debts.



26. It is his case that Judgement debts form part of the county debts and they therefore fall under the purview of the County Executive Committee member, Finance and Economic Affairs
27. The Exparte Applicant submits that the Applicant was properly joined in these proceedings as the Accounting Officer for the County Government.
28. Section 104 of the said Act provides the responsibilities of the County Treasury, headed by the County Executive Member to include; preparation of the annual budget and management of the County's debt.
29. Section 148 of the *Public Finance Management Act*, No.18 of 2012, provides that the County Executive Committee member, Finance and Economic Affairs is the overall Accounting Officer for the County with the power to designate accounting officers to be responsible for managing the finances of the county government entities as is specified in the designation.
30. Reliance is placed in Council of Governors & Others v The Senate Petition No 413 Of 2014[2015] eKLR as cited in Republic v County Secretary, County Government of Mombasa & another: Mwangi Njenga & Co Advocates (Exparte Applicant) (Judicial Review E024 of 2022) [2023] KEHC 22138 (KLR) (25 August 2023) (Judgment) where the court expressed itself as follows:

“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.
31. 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 lato, 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.
32. 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*."



33. It is his case that Section 44 of the Act provides for the establishment of the office of the County Secretary who is the secretary to the Executive Committee.
34. In the case of *Njenga Mwangi Wachira & Partners vs. County Secretary, City County of Nairobi* [2018] eKLR Mativo J. held:

“It is true that the County Executive in Charge of Finance is the one under obligation to pay funds, in the capacity as the accounting officer.”

Analysis and Determination:

35. Upon perusing the application, affidavits the parties’ submissions the court, finds the fall to be the issues for determination is whether this Court can grant the orders as sought.
36. The question as to who is the accounting officer of a county government was dealt with in *Council of Governors & Others v The Senate Petition No 413 of 2014* [2015] eKLR as cited in *Republic v County Secretary, County Government of Mombasa & another: Mwangi Njenga & Co Advocates (Exparte Applicant) (Judicial Review E024 of 2022) [2023] KEHC 22138 (KLR) (25 August 2023) (Judgment)* where the court expressed itself as follows:

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- (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.

37. 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.

38. 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*.

39. 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*.”



40. Section 44 of the Act provides for the establishment of the office of the County Secretary who is the secretary to the Executive Committee. The totality of the foregoing is that the Executive Member of finance is in charge of finances of the County while the County Secretary executes the mandate or decisions of the County Executive Committee.
41. The County Executive Committee Member, the 3rd Respondent herein has the oversight power in the management of county finances and this includes the power to cause and ensure payment of pending county bills and debts. Judgement debts form part of the county debts and they therefore fall under the purview of the County Executive Committee member, Finance and Economic Affairs.
42. It is argued that since the orders sought by the Applicant in its Application for contempt are to be executed and/or complied with by the 3rd Respondent who would ensure compliance therewith, it is important that the 3rd Respondent participates in these current proceedings and gives a clear account and explanation as to why the Applicant's decretal sums have not been paid, more than 5 years later.
43. Section 80 of the *Civil Procedure Act* and order 45 rule 1 of the Civil Procedure Rules donates power to this court to deal with Review orders which are also pivoted on sections 1A, 1B, 3 and 3A of the *Civil Procedure Act*. Generally, they stipulate the objectives of the Act and the overarching duties of courts; "Section 80 stipulates that," Any person who considers himself aggrieved—(a)by a decree or order from which an appeal is allowed by this act, but from which no appeal has been preferred; or(b)by a decree or order from which no appeal is allowed by this act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit".
44. While Order 45 rule 1 (1) provides as follows:
- "Any person considering himself aggrieved:(a)by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or(b)by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay".
45. The impugned orders that this court issued are;
1. That this Honourable Court hereby cite the County Secretary, Nairobi City County, the Chief Officer, Finance/County Treasurer, Nairobi City County and the County Executive Committee Member, Finance and Economic Affairs, Nairobi City County for being in contempt of the Judgement and Orders dated 14th May 2020 and punish them as per Section 5 of the *Judicature Act* for having deliberately disobeyed the order of this Honourable Court;
 2. That summons are hereby issued against the said County Secretary, Nairobi City County, the Chief Officer, Finance/County Treasurer, Nairobi City County and the County Executive Committee Member, Finance and Economic Affairs, Nairobi City County to appear before this Honourable Court and Show Cause why they should not be committed to civil jail;
- This court did not issue any order making the Applicant a party to this suit.



46. This court has noted that the Applicant did not annex the order he seeks to set aside to his Application.
47. In the case of *Suleiman Murunga v Nilestar Holdings Limited & Green Valley Limited* [2015] KEELC 264 (KLR); In the case of *Belgo Holdings Ltd v Robert Kotich Otach & Another* (2009) eKlr Lady Justice Lesiit yet again considered an objection that the order sought to be reviewed had not been annexed to the application as in the present case and the Applicant had argued the order was within the court record and needed not to be attached to the application. The learned Judge in her ruling cited with approval the decision of Nyarangi, J (as he then was in the case of *Bernard Githii on behalf of Mutathini Farmers Co. v Kihoto Farmers Co. Ltd* HCCC Nairobi 32 of 1974 where Nyarangi, J stated thus: -

“There is no decree drawn up and attached to the application. It is not as clear as it ought to be what aggrieves the Applicant. There has to be a decree or order in discovery of new and important matter or evidence-----before an application may be made for a review of a judgment”.

Lesiit, J for her part stated: -

“I respectively agree with the views of Nyarangi, J. it is trite that the decree or order sought to be reviewed must be annexed or attached to the application in order for the Applicant to clearly show what has aggrieved it. Before making the application, there must have been a decree or an order drawn which aggrieved the Applicant and that is the order or decree that it ought to have annexed to this application in its support. Failure to annex that decree or order is fatal to the application”.

The judge went on to state that, this court has added its voice to the debate whether or not failure to annex a formal decree or order to an application for review is fatal. In the case of *Julius Mukami Kanyoko & 2 others v Samuel Mukua Kamere & Another* (2014) eKLR while considering the application of Order 45 to an application for review while no formal order was annexed. I rendered myself 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 and/or ruling. Thus, where an Applicant fails to annex is sought to be reviewed such an application is defective. In the Defendant’s present application the order that the Defendants sought to be reviewed was not annexed with the result that the Defendants application was fatally defective. I agree that a formal decree and/or order is 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 and/or order”.

I do not suppose that the position has changed and to the extent that the Applicant in the present application did not annex or attach the order that she sought to be reviewed the application was fatally defective and would be unsustainable.

Although on that ground alone the application ought to be dismissed, I have also considered the substantive grounds put forth in support of the application and I am not persuaded even on merits the Applicant has demonstrated the discovery of any view matter or evidence which was not available at the time the ruling was made which would have any bearing on the ruling. Equally I am not satisfied there was any error apparent on the face of the record to justify a review of the order of injunction granted in favour of the plaintiff.



This is an application under Order XLIV Rule 1(1) and 2 and Order XXXVI Rule 12 of the Civil Procedure Rules (hereinafter referred to as “the Rules”) and Sections 3A and 63(e) of the Civil Procedure Act. In the main, the defendant seeks the following order:

“3. That this Honourable Court be pleased to review and vacate or set aside its orders made on October 19, 2001 to the extent that they required the Defendant to deposit Kshs. 155,361/= in Court within 30 days.”

Mr. Karanja who argued the application on behalf of the Plaintiff raised two points of law one which, in my view, is central to the determination of the application. Primarily, he submitted that the failure of the Defendant to annex the order sought to be reviewed rendered the whole application fatally defective.

I respectfully agree. In order to succeed on an application for review under Order XLIV of the Rules, one must show that he is aggrieved by a decree or an order. This cannot be done without annexing the decree or order for the Court to determine that point. I, therefore, agree with my Learned Sister the Honourable Lady Justice Jessie Lesii’s conclusion in *Gatimu Farmers Ltd. v John Njoroge Ndungu Nakuru HCCC 197/01* that failure to annex the order or decree sought to be reviewed renders an application for review fatally defective. On this conclusion alone, I do not see the need to consider the Defendant’s application further as no useful purpose will be achieved thereby.

I, therefore, strike out the Defendant’s application dated October 31, 2001 with costs to the Plaintiff.

48. In the instant suit, had the Applicant annexed the order it seeks to stay and set aside its supporting Affidavit, then he would have appreciated that the contents of order of he is asking this court to review the court is different from what he is seeking.

Disposition:

49. I find no justification to warrant the grant of the orders sought.

Order:

The application is dismissed with costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 24TH DAY OF OCTOBER, 2024.

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J. M. CHIGITI (SC)

JUDGE

