Norgen Enterprises Limited v County Secretary, County Government of Vihiga & 2 others (Judicial Review Application 14 of 2019) [2024] KEHC 14504 (KLR) (4 November 2024) (Ruling)

Neutral citation: [2024] KEHC 14504 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

JUDICIAL REVIEW APPLICATION 14 OF 2019

RE ABURILI, J

NOVEMBER 4, 2024

BETWEEN

NORGEN ENTERPRISES LIMITED ..... APPLICANT

AND

THE COUNTY SECRETARY, COUNTY GOVERNMENT OF VIHIGA ..... 1ST RESPONDENT

THE COUNTY EXECUTIVE MEMBER FOR FINANCE, COUNTY GOVERNMENT OF VIHIGA ..... 2ND RESPONDENT

THE COUNTY GOVERNMENT OF VIHIGA ..... 3RD RESPONDENT

RULING

1. This Ruling determines two main issues. The first issue is whether this court should punish the respondent/ Contemnors herein for contempt for failure to settle decree in this matter wherein the orders of mandamus were issued by this court compelling them to settle the decree being executed following judgment in the lower court in Kisumu CMCC No. 68 of 2017, which judgment together with costs have never been settled, and if so, what punishment should be meted out to the contemnors.

2. The second issue is whether this Court should find that these proceedings are null and void because the judgment in the lower court was rendered by a court that was devoid of pecuniary jurisdiction as raised by the respondents/ contemnors.

3. On the first issue, it is important to note that this Court did find the contemnors herein guilty of contempt of court for non-settlement of decree for mandamus compelling them to settle the said decree. What therefore remained was mitigation and sentencing. The respondents appeared in court and mitigated, besides arguing that the lower court lacked pecuniary jurisdiction to hear and determine the suit giving rise to these collateral proceedings against the respondents.

4. Since the issue of jurisdiction has been raised first, I will deal with it before venturing into the mitigations in the contempt proceedings and what punishment to impose upon the contemnors.

5. Before I do that, it is important to note that these proceedings are collateral proceedings from Kisumu Chief Magistrate's Court Civil suit No.68 of 2017 between Norgen Enterprises Ltd plaintiff v County Government of Vihiga wherein the exparte applicant herein sued the County Government of Vihiga and obtained judgment in its favour. As the decree was against the government, the exparte applicant sought and obtained leave of court to institute judicial review proceedings to compel settlement of the decree, which orders of mandamus were issued in favour of the exparte applicant. Still, payment was not forthcoming hence the exparte applicant filed for contempt of court against the respondents who never defended the contempt proceedings despite service of the application upon them hence, the contempt of court orders being issued against them.

6. So, when the day of mitigating reached, the respondents appeared in court with their County Attorney and County Solicitor who sought to stay the mitigations and proceedings to await the outcome of a constitutional petition filed by the respondents seeking to challenge the jurisdiction of the magistrate's court that heard and determined the suit whose decree is under execution vide these proceedings.

7. After hearing both parties on stay, this court directed that the issue of jurisdiction can be taken at any stage in the proceedings hence the respondents were free to raise the issue of jurisdiction in these proceedings for con sideration by this court. They then mitigated and raised jurisdiction as one of the issues for determination hence this ruling.

8. Therefore, does the fact of the lower court lacking pecuniary jurisdiction to hear and determine the suit and having so determined the suit on merit render these proceedings nullity or void ab initio as submitted by the respondents?

9. To answer the above question, I must answer the question of what jurisdiction is and what jurisdiction the Magistrates' Courts have, having regard to the submissions made by both parties on this issue.

10. The Black's Law Dictionary, 11th Edition, defines Jurisdiction as a court's power to decide a case or issue a decree.

11. In the case of Phoenix of E. A. Assurance Company Limited v S.M. Thiga T/A Newspaper Service [2019] eKLR, at Paragraph *2*, the Court of Appeal stated as follows on jurisdiction:

> " In common English parlance, Jurisdiction denotes the authority or power to hear and determine judicial disputes, or to even take cognizance of the same. This definition clearly shows that before a court can be seized of a matter, it must satisfy itself that it has authority to hear it and make a determination. If a court therefore proceeds to hear a dispute without jurisdiction, then the result will be nullity ab initio and any determination made by such court will be amenable to being set aside ex debito justitiae."

12. It is now long established that once a court finds that it has no jurisdiction, it must down its tools and should not take any further step. In the locus classicus case of Owners of the Motor Vessel 'Lillian S' v Caltex Oil (Kenya) Ltd [1989] eKLR, the Court of Appeal had the following to say about jurisdiction:

> " Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

13. On what jurisdiction of the Magistrates Courts have, the pecuniary jurisdiction of the Magistrates Court is capped at Ksh. 20,000,000/=. This is expressly provided for in section 7 of the *Magistrates' Courts Act* No. 26 of 2015 as follows:

> 7. Civil jurisdiction of a magistrate's court:-
> A magistrate's court shall have and exercise such jurisdiction and powers in proceedings of a civil nature in which the value of the subject matter does not exceed-
>
> (a) twenty million shillings, where the court is presided over by a chief magistrate;
>
> (b) fifteen million shillings, where the court is presided over by a senior principal magistrate;
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> (c) ten million shillings, where the court is presided over by a principal magistrate;
>
> (d) seven million shillings, where the court is presided over by a senior resident magistrate; or
>
> (e) five million shillings, where the court is presided over by a resident magistrate.

14. The next question is, does a decree which is issued by a magistrate's Court without pecuniary jurisdiction become null and void ab initio or is it voidable?

15. The respondents argued that the trial magistrate lacked jurisdiction to hear and determine the suit as the court's pecuniary jurisdiction was kshs 7,000,000 whereas the decree was in excess of kshs 11,000,000. Counsel submitted on behalf of the respondents that they had filed Constitutional Petition No. E016 of 2024 challenging that judgment and subsequent proceedings of the trial court.

16. In response, the applicant submitted on the issue of jurisdiction, asking whether the court should not sentence the contemnors because the court had no power to convict? He conceded that Jurisdiction is a question but challenged the respondents for bringing the issue of jurisdiction in these proceedings yet they had the window of appeal from the trial court that issued the decree and that the challenge was coming too late in the day, after 7 years following the judgment.

17. Mr. Otieno submitted that the convicts should have followed the procedure for challenging jurisdiction. That the doctrine of Res Judicata prohibits the Respondents from raising the issue of jurisdiction at this stage. He relied on Section 7 explanation 4 of the *Civil Procedure Act*. He submitted that when Mandamus application and contempt application were filed, the Respondents should have raised the issue of jurisdiction. He concluded that this court has no jurisdiction to deal with the question of jurisdiction 7 years later.

18. Counsel for the applicant submitted that there is no mitigation by the contemnors but an explanation why they are not paying the decretal sum. That there is no evidence that the Vihiga County Government has no funds. That thee *Public Procurement and Asset Disposal Act* PPADA prohibits Procurement of Public goods or services without ensuring that funds are available.He urged this Court to sentence the contemnors for failing to comply with orders of this court.

19. In a rejoinder, Mr. Musiega County Attorney Vihiga Count Government submitted reiterating that the issue of jurisdiction can be raised at anyvtime of the proceedings. That they could not effectively address the issues raised by Mr. Otieno as this court is not dealing with the Constitutional Petition as filed and that even Res judicata can only be raised in the petition.

20. County Attorney submitted further that this court has inherent powers under the High Court Organization and administration Act (HCOA) Act and supervisory powers under Article 165(6) and (7) of *the Constitution*.

21. He submitted that although the contemnors were in court, they were not well Healthwise.

22. The contemnors are in court and indeed are not well at all. Further, that the County Governments have Ministries responsible for specific expenditure and that those ministries must be targeted so that they are made aware of the claims. He further submitted that the judgment in the lower court was entered in default of appearance and defence hence the court did not have the opportunity to consider issues of procurement.

23. Counsel for the respondents submitted that all payments become avoided by the Treasury upon 30th June of each year. He pleaded with the court to allow the two officers to enjoy the freedom and initiate the process of settlement of judgment so long as it is still in place, subject to the question of jurisdiction raised.

24. Having heard the above submissions on jurisdiction, what is this court's finding and holding on the same?

25. I have explored the situation in Kenya and within the commonwealth nations on the issue of jurisdiction as raised and my findings are below, starting with India.

26. Quite recently in the Indian case of Smt. Mradula Sisodiya vs Ganesh Malakar on 14 October, 2024, citing Subhash Mahadevasa Habib (supra), the Supreme Court of India considered the effect of lack of pecuniary jurisdiction in detail and it was eventually held as under:

> "
>
> "33. What is relevant in this context is the legal effect of the so-called finding in OS No. 4 of 1972 that the decree in OS No. 61 of 1971 was passed by a court which had no pecuniary jurisdiction to pass that decree. The Code of Civil Procedure has made a distinction between lack of inherent jurisdiction and objection to territorial jurisdiction and pecuniary jurisdiction. Whereas an inherent lack of jurisdiction may make a decree passed by that court one without jurisdiction or void in law, a decree passed by a court lacking territorial jurisdiction or pecuniary jurisdiction does not automatically become void. At best it is voidable in the sense that it could be challenged in appeal therefrom provided the conditions of Section 21 of the Code of Civil Procedure are satisfied.
>
> Similarly, in 37. As can be seen, Amendment *Act 104 of 1976* introduced sub-section (2) relating to pecuniary jurisdiction and put it on a par with the objection to territorial jurisdiction and the competence to raise an objection in that regard even in an appeal from the very decree. This was obviously done in the light of the interpretation placed on Section 21 of the Code as it existed and Section 11 of the Suits Valuation Act by this Court in Kiran Singh v. Chaman Paswan [AIR 1954 SC 340 : (1955) 1 SCR 117] followed by Hiralal Patni v. Kali Nath [AIR 1962 SC 199 : (1962) 2 SCR 747] and Bahrein Petroleum Co. Ltd. v. P.J. Pappu [AIR 1966 SC 634 : (1966) 1 SCR 461] . Therefore, there is no justification in understanding the expression "objection as to place of suing" occurring in Section 21-A as being confined to an objection only in the territorial sense and not in the pecuniary

sense. Both could be understood, especially in the context of the amendment to Section 21 brought about by the Amendment Act, as objection to place of suing.

Thus, a decree passed by a Court lacking pecuniary jurisdiction does not automatically become void for that reason. At best it is voidable in the sense that it could be challenged in appeal therefrom provided the conditions of Section 21 of the CPC are satisfied.

The objection as regards pecuniary jurisdiction is to be taken before the Court of first instance at the earliest possible opportunity. Even the Appellate Court would not interfere in objection being raised to competence of a Court with reference to pecuniary limits of its jurisdiction unless there has been a consequent failure of justice. Such an objection as regards pecuniary jurisdiction cannot be raised in collateral proceedings or in execution proceedings since a decree passed by a Court lacking pecuniary jurisdiction is at best voidable and not void.

In the present case, upon the suit having been transferred from the Court of Civil Judge, Senior Division to the Court of Civil Judge, Junior Division no objection as regards pecuniary jurisdiction was raised by the judgement debtor. That fact cannot be disregarded only for the reason that she was ex-parte before the trial Court. No appeal has been preferred by the judgement debtor against the decree passed by the trial Court wherein it could have been possible for her to have raised a ground as regards pecuniary jurisdiction of the trial Court. The decree passed by the trial Court only for the reason that it was lacking pecuniary jurisdiction cannot be held to be a nullity and at best can be said to be voidable. Objection to its executability on ground of lack of pecuniary jurisdiction of the trial Court was not permissible to be raised in execution proceeding. The executing Court has hence not committed any error in rejecting the objection preferred by the judgment debtor.[emphasis added]

27. Back home in Geoffrey Macharia Muraya v Nelson Nzioki Kimeu & another [2022] eKLR, the Court of concurrent jurisdiction dealing with the question of competence of a suit where the trial court had no pecuniary jurisdiction persuasively, and I have no reason to differ, stated that:

> " Article 159 (2) (d) of *the Constitution* of Kenya 2010 provides as follows;
>
> In exercising judicial authority, the courts and tribunals shall be guided by the following principles-
>
> a) .....
>
> b) ....
>
> c) .....
>
> d) Justice shall be administered without undue regard to procedural technicalities.
>
> Sections 1A and 1B of the *Civil Procedure Act* provides as follows;
>
> 1A (1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.
>
> (2) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).

(3) A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the court.

1B (1) For the purpose of furthering the overriding objective specified in section 1A, the Court shall handle all matters presented before it for the purpose of attaining the following aims-

(a) the just determination of the proceedings;

(b) the efficient disposal of the business of the Court;

(c) the efficient use of the available judicial and administrative resources;

(d) the timely disposal of the proceedings, and all other proceedings in the Court at a cost affordable by the respective parties; and

(e) the use of suitable technology.

In my view, this court is enjoined by both Article 159 of *the Constitution* and sections 1A and 1B of *the Constitution* to uphold substantive justice without undue consideration to technicalities. I am clear in my mind that the issue of jurisdiction is not a matter of technicality but goes to the root of the power of the court to determine a matter. However, where different designations of magistrates have different pecuniary jurisdictions as spelt out in Section 7 of the Magistrates Courts Act, it becomes a matter of undue technicality to require one magistrate to strike out a suit that another magistrate has jurisdiction, when the matter was placed before the former for no fault at all of the Plaintiff. In my considered view, it would go against the spirit of Article 159 of *the Constitution* as well as Sections 1A and 1B of the Civil Procedure Rules, for the Senior Principal Magistrate to strike out a suit which the Chief Magistrate has jurisdiction to determine, merely because the matter had been placed before the Senior Principal Magistrate, instead of the Chief Magistrate."[emphasis added]

28. In Kiran Singh v. Chaman Paswan at paragraph *24* it was held, distinguishing between the inherent lack of jurisdiction and objection to territorial and pecuniary jurisdiction as follows:

> " ...The Code of Civil Procedure has made a distinction between lack of inherent jurisdiction and objection to territorial jurisdiction and pecuniary jurisdiction. Whereas, an inherent lack of jurisdiction may make a decree passed by that court one without jurisdiction or void in law, a decree passed by a court lacking territorial jurisdiction or pecuniary jurisdiction does not automatically become void. At best it is voidable in the sense that it could be challenged in appeal therefrom provided the conditions of section 21 of the Code of Civil Procedure are satisfied. It may be noted that Section 21 provided that no objection as to place the suing can be allowed by even an appellate or

29. Having considered the above authorities, it is clear that they are relevant to this case. These are collateral Judicial Review proceedings, not an appeal from the decree of the lower court. The trial Magistrate was one of the Senior Resident Magistrates serving under the Chief Magistrate, Kisumu Law Courts. She was not the head of station for the Court. She was assigned a file which she handled. Her pecuniary jurisdiction was Kshs 7 million yes. The respondents have been aware of the suit even if they now claim that it proceeded exparte yet they never sought to set it aside subsequently or even appeal against the

judgment and decree. They were served with judicial proceedings and from the court record, there were appearances by various counsel for the respondents who even sought for more time to settle the decree.

30. The record herein speaks for itself. The respondents never raised the issue of jurisdiction until they were found in contempt of court for failure to settle decree herein through judicial review proceedings.

31. In my humble view, the respondents are estopped from raising pecuniary jurisdiction in these proceedings which are not appeal proceedings. There is indeed, an established procedure for challenging decrees issued by the trial court and although they claim that they have filed a constitutional petition challenging that decree, and without delving much into that petition as it is not before me now for determination, those are different proceedings that will be handled on their own merits.

32. I am in agreement with the holding in the above cited Indian cases of Smt. Mradula Sisodiya vs Ganesh Malakar on 14 October, 2024, citing Subhash Mahadevasa Habib that:

> "....No appeal has been preferred by the judgement debtor against the decree passed by the trial Court wherein it could have been possible for her to have raised a ground as regards pecuniary jurisdiction of the trial Court. The decree passed by the trial Court only for the reason that it was lacking pecuniary jurisdiction cannot be held to be a nullity and at best can be said to be voidable. Objection to its executability on ground of lack of pecuniary jurisdiction of the trial Court was not permissible to be raised in execution proceeding. The executing Court has hence not committed any error in rejecting the objection preferred by the judgment debtor."

33. I equally accept the holding in the above cited Kenyan case of Geoffrey Macharia Muraya (supra) that:

> "..... However, where different designations of magistrates have different pecuniary jurisdictions as spelt out in Section 7 of the Magistrates Courts Act, it becomes a matter of undue technicality to require one magistrate to strike out a suit that another magistrate has jurisdiction, when the matter was placed before the former for no fault at all of the Plaintiff. In my considered view, it would go against the spirit of Article 159 of *the Constitution* as well as Sections 1A and 1B of the Civil Procedure Rules, for the Senior Principal Magistrate to strike out a suit which the Chief Magistrate has jurisdiction to determine, merely because the matter had been placed before the Senior Principal Magistrate, instead of the Chief Magistrate."

34. As earlier stated, it is now over seven years into the judgment which has taken different shapes including promises to settle in vain. It is unacceptable to allow such an issue of pecuniary jurisdiction to be raised now to defeat justice noting that it has not been shown what prejudice the respondents will suffer or have suffered.

35. In the end, I decline to accept the submission by the respondents that the decree subject of these judicial review proceedings, emanating from the judgment of the lower court being executed vide judicial review orders of mandamus is void.

36. Having declined to accept the issue of jurisdiction to be raised at this stage in these collateral proceedings, I now turn to the question of punishment for contempt of court.

37. Mr. Musiega County Attorney submitted in mitigation on behalf of the contemnors who were present in court that they have been at all times been willing to abide by the Rule of law. That they acknowledge that there is a judgment and unless other orders are made, the judgment has to be satisfied.

38. That they also acknowledge that prior to conviction of the contemnors, there was inaction which inaction can be explained as follows: that the CEC Finance came into office end of 2022 and that these proceedings were not brought to his attention personally. That he only learnt of the same on 2nd September 2024 when the order of this court was served by way of email.

39. On the part of the County Secretary, it was submitted that he came into office in 2020 and in the same vein, he was personally made aware of these contempt proceedings on 2nd September 2024, which facts explain why there has been inaction to satisfy the decree.

40. Further, that in the lower court, there was no appearance and defence but that as an office, they take the blame. That the convictees are ready and willing to abide by the court order as long as the judgment remains valid. However, that as they are government officers, the expenditure has to come from Vihiga County Government, not their personal coffers.

41. It was submitted that after the contemnors were served with the orders, they set in motion measures for settlement of the decree herein but because every expenditure is of Government governed by the Public Management Finance Act, no money can be spent outside the budget.

42. That they did not get the judgment when the financial year 2024/2025 budget had commenced. They therefore must get into supplementary budgeting if they have to settle decree which budgeting goes into the processes including public participation. Further, that this claim arose from Vihiga County Referral Hospital under the Department of Health Services so the money must come from that department. The Accounting officer is the Chief Officer who has to be prompted to identify the relevant vote and adjust the budget. The Chief Officer then makes proposals to the CEC for approval and sends it to the County Assembly for allocation and the controller of budget must approval.

43. That the convictees shall need time to complete the whole process to satisfy the decree since the last disbursement was in June 2024 and were still waiting for money from the National Government. That if the convictees go to jail, they will be suffering as individuals on behalf of the public.

44. Healthwise, it was submitted that the CEC Finance has diabetes and that he underwent an operation recently. He cannot withstand prison. The County Secretary on the other hand was said to suffer from arthritis and his leg swells. County Attorney denied that they contemnors were callous to the judgment creditor and submitted that they are addressing the issue of pending bills and if the services were provided then the exparte applicant is entitled to settlement.

45. Mr. Otieno David in response submitted that it was difficult to appreciate whether the applicants want to pay the debt or not. That some officials of government are known to disown actions of the previous office holders that, that appears to be the case here.

46. He submitted that there was no evidence that these officers came into office in the period stated, and that the judgment in the lower court was rendered 7 1/2 years ago on 20th March 2017 yet there was no explanation offered for non compliance. That the public officers did not have to wait for enforcement proceedings to comply, and that the money attracts interest.

47. Counsel submitted that there is no reason why the process stated have not been undertaken to settle the decree from the time Mandamus was granted on 15th October 2020. He submitted that enforcement of a court order cannot wait for public participation and that the funds must have been budgeted for but got misapplied and therefore the exparte applicant cannot suffer for misdeeds of public officers who fail to do their work. He blamed acts of public officials refusing to settle decrees leading to pending.

48. I have considered the mitigation by the respondents and the submissions by the applicant. The court already found the respondents to be in contempt and what remains, after mitigations above is what punishment to impose on the contemnors who are public servants acting on behalf of the county Government of Vihiga.

49. It is not in doubt as stated earlier in this ruling that the the respondents were duly notified of their obligation to settle the judgement of the Magistrate's Court and vide these juridical review proceedings, they were served with Certificate of order against the government and demand to settle the decree obtained via mandamus proceedings. They also appeared before this court through various counsel from the county government and the court record shows that they have been participating and even promise to settle the decree to no avail. The Court has already found them to be in contempt for failure to settle decree.

50. Based on the circumstances, the respondents in my view, deliberately failed to honour the court's decree and in effect have deprived the ex-parte applicant the fruits of its judgment since the 20.3.2017 when the primary decree was issued in Kisumu CM CC 68 of 2017 and considering that government budgets for its expenditure after every financial year, there is no tangible excuse as to why the county government of Vihiga failed to budget for the decretal amount in this case from the time of the primary decree in November, 2016 and/or from the time of the order of mandamus given through the deMarch 2017 till date.

51. However, as the respondents heavily relied on the issue of jurisdiction to argue their position, I shall grant them more time and opportunity to mitigate further on settlement of the decree and purging of the contempt.

52. I so order.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 4TH DAY OF NOVEMBER, 2024

R.E. ABURILI

JUDGE