



Republic v Attorney General; Ndirangu (Exparte Applicant) (Judicial Review E052 of 2020) [2024] KEHC 14509 (KLR) (Judicial Review) (21 November 2024) (Ruling)

Neutral citation: [2024] KEHC 14509 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
JUDICIAL REVIEW E052 OF 2020
JM CHIGITI, J
NOVEMBER 21, 2024**

BETWEEN

REPUBLIC APPLICANT

AND

ATTORNEY GENERAL RESPONDENT

AND

JACQUELINE WANGUI NDIRANGU EXPARTE APPLICANT

RULING

1. The application that is before this court for hearing and determination is the one dated 22nd September, 2023 wherein the applicant seeks the following orders:
 1. That this Honorable Court to issue an order for the committal of the Principal Secretary Ministry of Defence to civil jail for a period not exceeding 6 months from the date of issuing the Order for being in contempt of a Court order issued herein.
 2. That the costs of this Application be borne by the Respondent.
 3. That this Honorable Court be pleased to issue such other orders may be fair and just in the circumstances.
 4. That costs of this application be borne by the Respondent.
2. On 2nd June 2022, Parties entered into a consent before the Honourable Mr. Justice Anthony Ndungu with regards to the Application dated 23rd November, 2020 in the following terms:



- a. An order of mandamus be directed to the Principal Secretary of the Ministry of Defence as the Accounting Officer of the Ministry, compelling him to pay the Ex-parte Applicant the sum of Kshs. 380,887.11 and interest thereon at the rate of 12% per annum from 7th November 2017 until payment in full, being the decretal sum awarded to the ex-parte Applicant in CMCC No. 5510 of 2010 Jacqueline Wangui Ndirangu vs the Hon. Attorney General.
 - b. The Ex-Parte Applicant shall have the costs of the Notice of Motion dated 23rd November, 2020 of Kshs. 30,000/-.
3. It is the applicant's case that despite several reminders and knowledge of the aforementioned order, the Respondent has neglected, refused, ignored and or otherwise negligently failed to obey the orders.
 4. It is the applicant's case that the Respondent's is in blatant disregard of this Court's order of 2nd June 2022.
 5. It is further the applicant's case that the only means to recover a debt owed from the Government is to apply for an order of mandamus compelling the accounting officer in the relevant Ministry to pay the decretal amount as no execution or attachment can issue as against the Government.
 6. Reliance is placed in JR Misc Appl. No. 44 of 2012 (Republic v Attorney General & another Exparte James Alfred Koroso) held as follows:

“In the present case the ex parte applicant has no other option of realising the fruits of his judgement since he is barred from executing against the Government. Apart from mandamus, he has no option of ensuring that the judgement that he has been awarded is realised. Unless something is done he will forever be left baby-sitting his barren decree. This state of affairs cannot be allowed to prevail under our current Constitutional dispensation in light of the provisions of Article 48 of the Constitution which enjoins the State to ensure access to justice for all persons. Access to justice cannot be said to have been ensured when persons in whose favour judgements have been decreed by courts of competent jurisdiction cannot enjoy the fruits of their judgement due to roadblocks placed on their paths by actions or inactions of public officers...”

7. The order of mandamus was not sought and issued to make the Principal Secretary “individually liable for any order for any payment” but merely to oblige him as accounting officer to perform his statutory duty as accounting officer to pay the debt owed to the ex-parte applicant.
8. Reliance is placed in the Court of Appeal in Civil Application E279 of 2023 (Principal Secretary Ministry of Regional Development/or its Successor Ministry through the Attorney General -v- N.K Brothers Ltd) where in it was held as follows:

“It is the duty of the accounting officer of a government Ministry to act with respect to debts adjudged to be due from the Ministry. The accounting officer of a Ministry is the Principal Secretary. The only person who can be committed to civil jail for failure to obey court orders in the circumstances such as are before us is the person holding the position of the accounting officer.”



9. The Applicant further relied in Judicial Review 148 of 2013 (Isaiah Ochanda v Attorney General & another) as follows:

“The respondent is hiding under the provisions of Section 21(4) of the Government Proceedings Act That provision cannot cushion the Permanent Secretary against the order of mandamus which commands performance of a public duty by the accounting officer.

The Court in Petition No 51 of 2010 (Jayne Wangui Gachoka vs Kenya Commercial Bank Limited), the court held that: “The deprivation of liberty sanctioned by sections 38 and 40 of the Civil Procedure Act is permissible and is not in violation of either the Constitution or ICCPR.”

10. It is the Applicant’s case that the proceedings before the Court are not execution proceedings under Section 38 of the Civil Procedure Act.
11. The Application is founded on Section 5 of the Judicature Act and the inherent jurisdiction of the court to preserve its dignity and ensure compliance with its orders; and courts have held that committal to civil jail is not unconstitutional. See Judicial Review 148 of 2013 (supra), where the Court held that: “A person who is in contempt of court cannot claim that the punishment of committal to civil jail is unconstitutional because it deprives him or her of their constitutional liberty.”

The Respondents Case;

12. It is the respondent’s case that the Respondent herein initiated the settlement process in the month of June 2024.
13. The Respondent submits that it is still interested in settling the Ex-parte Applicant's claim out of court and the matter has been referred to the Hon. Attorney General seeking approval for payment of the decretal sum.
14. The Respondent argues that it has not refused, neglected or ignored to settle the Exparte Applicant's claim as alleged but the Ministry is in the process of payment of the Exparte Applicants claim.

Analysis and determination;

Analysis and determination.

15. It is not in dispute that parties the parties herein entered into a consent on 2nd June 2022, in the following terms:
- a. An order of mandamus be directed to the Principal Secretary of the Ministry of Defence as the Accounting Officer of the Ministry, compelling him to pay the ex-parte Applicant the sum of KShs. 380,887.11 and interest thereon at the rate of 12% per annum from 7th November 2017 until payment in full, being the decretal sum awarded to the ex-parte Applicant in CMCC No. 5510 of 2010 - Jacqueline Wangui Ndirangu vs the Hon. Attorney General.
 - b. The Ex-Parte Applicant shall have the costs of the Notice of Motion dated 23rd November, 2020 of KShs. 30,000/-
16. The consent remains unsettled and The Respondent points out that it is not refusing to pay the amount.



17. In its 2013 decision, *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, para. 94, the Supreme Court of Canada described how a State actor creates a legitimate expectation:

“... If a public authority has made representations about the procedure it will follow in making a particular decision, or if it has consistently adhered to certain procedural practices in the past in making such a decision, the scope of the duty of procedural fairness owed to the affected person will be broader than it otherwise would have been. Likewise, if representations with respect to a substantive result have been made to an individual, the duty owed to him by the public authority in terms of the procedures it must follow before making a contrary decision will be more onerous.”

18. Through the consent, the Respondent generated an expectation in the mind of the Applicant that it would settle the claim. The Respondent is seeking time to settle. It has made efforts towards settling the claim. However, justice delayed amounts to a denial of Justice. The prolonged delay in discharging its obligation is tantamount to a refusal on the part of the respondent to settle the claim.

19. That said, this court has a duty to promote the bill of rights. It is this court’s finding that the procedure for committal to civil jail must accord with the principles of fair hearing.

20. The Principal Secretary Ministry of Defence cannot be committed to civil jail without giving him an opportunity to appear before court to show cause why he should not be cited for contempt and thereafter committed to civil jail.

21. Article 47(1) of *the constitution* stipulates that Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

22. The court in *Grand Creek LLC & Another vs. Nathan Chesangmoson* [2015] eKLR held that -

‘In all cases where Order 22 Rule 18(1) of the Civil Procedure Rules applies, a Notice must be served upon the person against whom execution is applied requiring him to show cause, on a date to be fixed, why the decree should not be executed against him. It should be noted, however, that there must have been an application for execution of a decree for payment of money by arrest and detention in prison of a judgment-debtor. And Order 22 rule 31 will come into play where the court, instead of issuing a warrant of arrest, decides to issue a notice calling upon the judgment-debtor to appear before the court on a day to be specified in the notice and show cause why he should not be committed to prison. But where the judgment-debtor does not appear as directed in the notice, the court will issue a warrant for his arrest. This rule follows after section 38 and 40 of the *Civil Procedure Act*. The warrant of arrest is to bring the judgment-debtor to court and it is not an automatic committal to prison because the court will still be required to satisfy itself of all the requirements of Order 22 rule 33 and rule 34 of the Civil Procedure Rules. The proceedings under Order 22 rule 34 act as the safeguard against denial of liberty in execution of a decree without due process. And courts have comprehensively pronounced themselves on the constitutionality of the procedure of arrest and committal to jail in execution of a decree in not one case. See the cases cited by the Respondents, especially *National Bank of Kenya case* (supra), *Jayne Wangui Gachoka* (supra), *Braeburn Limited* (supra), *Beatrice Wanjiku and Ex parte Nassir Mwandithi* (supra). This point is settled that arrest and committal to prison in execution of a decree under the *Civil Procedure Act* and Rules is not unconstitutional as long as all the safeguards provided in law are afforded to the judgment-debtor. I so hold in this matter.”



Disposition;

23. The Respondent must first be granted an opportunity to show cause why he should not be committed to civil jail.

Order;

1. A Notice shall issue against the Principal Secretary Ministry of Defence to show cause why an order for the committal to civil jail for a period not exceeding 6 months from the date of issuing the order for being in contempt of a court order should not issue.
2. The Principal Secretary Ministry of Defence shall attend court in person to show cause why he should not be cited for contempt on 5th March, 2025.
3. The costs of this Application be in the cause.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 21ST DAY OF NOVEMBER, 2024

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J. CHIGITI (SC)

JUDGE

