Republic v County Secretary, Nairobi City County & another; Litswa & another (Ex parte) (Application 292 of 2019) [2024] KEHC 15161 (KLR) (Judicial Review) (2 December 2024) (Ruling)

Neutral citation: [2024] KEHC 15161 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

JUDICIAL REVIEW

APPLICATION 292 OF 2019

J NGAAH, J

DECEMBER 2, 2024

BETWEEN

REPUBLIC ..... APPLICANT

AND

COUNTY SECRETARY, NAIROBI CITY COUNTY ..... 1ST RESPONDENT

COUNTY CHIEF REENUE & ADMINISTRATION NAIROBI CITY COUNTY ..... 2ND RESPONDENT

AND

DORCAS KASEYI LITSWA ..... EX PARTE

ERIC LUGEYI LITSWA ..... EX PARTE

RULING

1. The application before court is a motion dated 27 February 2024 expressed to be filed under section 5 of the *Judicature Act*, cap. 8; sections 1A, 1B and 3A of the *Civil Procedure Act* and Order 53 of the *Civil Procedure Rules*. The prayers in the motion have been expressed as follows:

> " 1) That this Honourable Court be pleased to order the County Secretary and the County Chief Officer, Revenue Administration, Nairobi City County to appear and show cause why they should not be cited for contempt of court for failing to pay the Applicant the sum of Kshs. 1,721,917.80 together with interest thereon at the rate of 12% p.a. until payment in full as ordered by this court on the 6th October, 2021.

2) That the Respondents be committed to civil jail for disobeying the Order of the Honourable Court issued on 6th October, 2021 in HCJR Misc. Application No. 292 of 2019 and the Order dated 2nd December, 2020 in NBI CMCC NO. 7927 OF 2008 and Decree and Certificate of Costs issued on 22nd June, 2017.

3) That Patrick Analo Akivaga, the County Secretary; and Wilson Njoroge Gakuya, the Chief Officer, Revenue Administration, Nairobi City County be committed to civil jail for contempt of court.

4) That the costs of this Application be borne by the Respondents.

The application is supported by an affidavit sworn on 27 February 2024 by Mr. Erick Ligeyi Litswa.

2. According to the applicants, they obtained a judgment against the County Government of Nairobi in *Milimani Chief Magistrates Court Civil Case No. 7927 of 2008* on 29 February 2016. They subsequently extracted a decree and a certificate of order against government; the latter document was issued on 2 December 2020.

3. The County Government of Nairobi ignored, neglected or refused to settle the decree as a result of which the applicants moved this Honourable Court for the order of mandamus to compel the respondents to pay.

4. The order of mandamus was issued on 6 October, 2021 directing the respondents to honour the decree and a certificate of costs issued on 22 June, 2017 in *Milimani Chief Magistrates Court Civil Case No. 7927 of 2008*. The decretal sum which the respondents were ordered to pay is indicated to be a sum of Kshs. 1,721,917.80 together with costs and interest at the rate of 12% until payment in full.

5. The respondents, according to the applicant, were served with the order of mandamus on 7 December, 2021. However, to date, they have neglected, ignored or refused to comply with the order and settle the money decree.

   Apart from the decree, the applicants claim that there are also outstanding costs in *High Court Civil Appeal No. 304 OF 2018* owed to them by the respondents.

6. The applicant urges that the respondents are in contempt of court for failure to obey court orders. Therefore, that it is in the interest of justice that the orders sought here in this application be issued to protect the integrity and dignity of this Honourable Court.

   The respondents did not respond to the application.

7. In a similar, previous application filed by the applicants, I noted that in an application as the instant one, the applicant must demonstrate, among other things, that the order which the alleged contemnors are in breach of was served upon them or that it has been brought to their attention and that, if it was served, it was endorsed with a penal notice warning the contemnorthat disobedience of the order would be contempt of court punishable by imprisonment or a fine or sequestration of property. I held that an omission in respect of any of these two requirements is fatal to the application for contempt. I dismissed the applicants' application for lacking in these respects.

8. In reaching that conclusion, I noted that the law on this subject of contempt has been discussed by this Honourable Court and the Court of Appeal in several decisions and that every time this subject has arisen, my first port of call has been section 5 of the *Judicature Act*, cap. 8 which the applicants invoked then and now as one of the provisions under which their application has been made.

9. No doubt section 5 of the *Judicature Act*, cap. 8 remains the statutory basis upon which proceedings for contempt are taken. But this provision of the law says nothing more than remind the courts that the law to be applied is that applied in England and that a committal order can only be appealed against as if it was a criminal conviction. It reads as follows:

Contempt of court

(1) 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 such power shall extend to upholding the authority and dignity of subordinate courts.

(2) An order of the High Court made by way of punishment for contempt of court shall be appealable as if it were a conviction and sentence made in the exercise of the ordinary original criminal jurisdiction of the High Court.

10. In *Christine Wangari Gachege v Elizabeth Wanjiru Evans & 11 Others* (2014) eKLR the Court of Appeal reiterated that the only statutory basis for contempt of court as far as the Court of Appeal and the High Court are concerned is this provision of the law. It was optimistic, however, that the Kenya Contempt of Court Bill, 2013 which was then pending for tabling before parliament would be passed into law that would finally extricate us from the English law and practice in contempt of court applications.

11. The Bill was indeed debated and as a result the *Contempt of Court Act* No. 46 of 2016 was enacted. This piece of legislation was, however, short-lived because it was declared unconstitutional in November 2018 in Kenya Human Rights Commission v Attorney General & Another (2018) Eklr. Apparently, it had been passed without public participation and was also held to be an affront to the independence of the judiciary. The result was that we reverted to Section 5 of the *Judicature Act* on matters contempt.

12. But as has been noted, a critical look of this provision of the law shows that there is nothing much in it in terms of substance and procedure other than the obligation placed upon these courts to ascertain, at any given time, the law applicable in England for punishment and, certainly, the procedure for committal for contempt. In discussing this point the court of Appeal noted that it is up to the Court of Appeal (and I add, the High Court too) to ascertain the applicable law of contempt in the High Court of Justice in England, at the time an application (for contempt) is brought.

13. To this end the court adopted the words of H.G. Platt, J. and D.C Porter, Ag. J. (as they then were) In the matter of an application by Gurbaresh Singh & Sons Ltd, Miscellaneous Civil Case No. 50 of 1983 where they noted as follows:

> " The second aspect concerns the words of section 5- "for the time being", which appear to mean that this court should endeavour to ascertain the law in England at the time of the trial, or application being made. Sometimes it is not known, or may not be known exactly, what powers the court may have. It seems clear that the *Contempt of Court Act* 1981 of England is the prevailing law and the procedure is still that set out in order 52 of the Supreme Court Rules."

14. Rule 85.5 of the *Civil Procedure (Amendment No. 3) Rules* 2020 of England which would apply to contempt of court proceedings in this country by dint of section 5 of the *Judicature Act*, cap. 8 require that the order or judgment be served and be endorsed with the requisite notice. It reads as follows:

81. 4. —

(1) Unless and to the extent that the court directs otherwise, every contempt application must be supported by written evidence given by affidavit or affirmation.

(2) A contempt application must include statements of all the following, unless (in the case of (b) to (g)) wholly inapplicable—

a) the nature of the alleged contempt (for example, breach of an order or undertaking or contempt in the face of the court);

(b) the date and terms of any order allegedly breached or disobeyed;

(c) confirmation that any such order was personally served, and the date it was served, unless the court or the parties dispensed with personal service;

(d) if the court dispensed with personal service, the terms and date of the court's order dispensing with personal service;

(e) confirmation that any order allegedly breached or disobeyed included a penal notice;

(f) the date and terms of any undertaking allegedly breached;

(g) confirmation of the claimant's belief that the person who gave any undertaking understood its terms and the consequences of failure to comply with it;

(h) a brief summary of the facts alleged to constitute the contempt, set out numerically in chronological order;

(i) that the defendant has the right to be legally represented in the contempt proceedings;

(j) that the defendant is entitled to a reasonable opportunity to obtain legal representation and to apply for legal aid which may be available without any means test;

(k) that the defendant may be entitled to the services of an interpreter;

(l) that the defendant is entitled to a reasonable time to prepare for the hearing;

(m) that the defendant is entitled but not obliged to give written and oral evidence in their defence;

(n) that the defendant has the right to remain silent and to decline to answer any question the answer to which may incriminate the defendant;

(o) that the court may proceed in the defendant's absence if they do not attend but (whether or not they attend) will only find the defendant in contempt if satisfied beyond reasonable doubt of the facts constituting contempt and that they do constitute contempt;

(p) that if the court is satisfied that the defendant has committed a contempt, the court may punish the defendant by a fine, imprisonment, confiscation of assets or other punishment under the law;

(q) that if the defendant admits the contempt and wishes to apologise to the court, that is likely to reduce the seriousness of any punishment by the court;

(r) that the court's findings will be provided in writing as soon as practicable after the hearing; and

(s) that the court will sit in public, unless and to the extent that the court orders otherwise, and that its findings will be made public. (Emphasis added).

15. Of particular relevance is Rule 84.4 (2)(a) and (c) on the requirement of personal service and the penal notice.

The need to comply with these conditions, amongst others, is a question that has been settled by the Court of Appeal in its previous decisions where the question on these two conditions have come to the fore.

16. In the case of *Nyamodi Ochieng Nyamogo & Another v Kenya Posts & Telecommunications Corporation* (1994) eKLR, for instance, the twin issues of the necessity for personal service of both the order and the application for contempt and the endorsement on the face of the order of with the penal notice were discussed. As far as service is concerned, the Court of Appeal noted as follows:

> "The law on the question of service of order stresses the necessity of personal service. In *Halsbury's Laws of England* (4th Ed) Vol 9 on p 37 para 61 it is stated:
>
> "61. Necessity of personal service.
>
> As a general rule, no order of court requiring a person to do or abstain from doing any act may be enforced unless a copy of the order has been served personally on the person required to do or abstain from doing the act in question ..."
>
> Where the order is made against a company, the order may only be enforced against an officer of the company if this particular officer has been served personally with a copy of the order ..."

The court further noted:

> "Keeping the importance of personal service of the order in mind we now take a look at the aforesaid two copies of the order both of which bear the stamp of Wetangula & Co Advocates, in acknowledgement of receipt of the said orders. Service on Wetangula & Co does not constitute personal service on any of the three officers. It is a personal service on each one of them that is required to be effected by law. Service of the two orders on Wetangula & Co, Advocates, on 25th October, 1993, and 1st November, 1993, therefore, is a wasted effort."

17. The court described personal service as "an elementary but mandatory procedural rule which in contempt proceedings has (been) prescribed "personal service".

And on the need for endorsement of the order with the requisite warning of penal consequences, the court stated as follows:

> "Mr Lakha pointed out other flaws to which we will now turn our attention. He referred to the order and also to the application itself and pointed out the absence of a notice in the form of an endorsement thereon of penal consequences. It is not disputed that the copies of the order alleged to have been served on the three alleged contemnors and handed in by Mr Nowrojee during the hearing (instead of having been annexed to the application) do

not bear any such endorsement of penal consequence. Section 5(1) of the *Judicature Act* has given this Court the same power to punish for contempt of court as is for the time being possessed by the High Court of Justice in England. In England rule 5 of order 45 R S C 1982 Ed, governs the method of the enforcement by the Court of its judgments or orders in circumstances amounting to contempt of court (p766). Order 45/7 deals with matters relating to "Service of copy of judgment, etc, pre-requisite to enforcement under rule 5". The relevant procedural obligation is succinctly stated in order 45 rule 7/5 of the RSC 1982 Ed as follows:

"It is a necessary condition for the enforcement of a judgment or order under rule 5 by way of sequestration or committal, that the copy of the judgment or order served under this rule should have the requisite penal notice indorsed thereon."

"And a couple of paragraphs later is given the form that an endorsement is required to take, in the following words in the case of a judgment or order requiring a person to abstain from doing an act:

"If you, the within named A B disobey this judgment (or order) you will be liable to process of execution for the purpose of compelling you to obey the same."

"A similar form with suitable alterations is given in the case of an order against a corporation.

This Court in Court of Appeal Civil Appeal No 95/1988 Mwangi H C Wang'ondu v Nairobi City Commission (UR) confirmed the mandatory nature of the requirement of endorsement of notice of penal consequence on the order in the following words:

"In the present case, according to the affidavit of the appellant sworn on 26th January, 1988, in support of his application, the order alleged to have been disobeyed by the respondent was served on the respondent on 31st August, 1987, and a copy of that order which was annexed to the affidavit did not carry a notice of the penal consequences of disobedience as required by the Rules. It is clear from this that the appellant did not comply with the mandatory provisions of section 5(1) of the *Judicature Act* with the result that his application was incompetent. It must follow that there was no valid application for contempt of court before the judge."

The court concluded its discussion on this point by stating as follows:

> "As the copies of the orders produced before us are not so endorsed as required under the mandatory provisions of section 5(1) of the *Judicature Act* (cap 8) this application is incompetent and deserves to be dismissed on this account also."

18. Nothing much has changed in the applicants' instant application. As much as I can gather from the documents filed, there is none demonstrating that the respondents were personally served. As it was in their previous application, all the applicants have said in this application with respect to the service of the order is this:

> "7. That the respondents were served with the order of mandamus on 7th December 2021 but have still failed, refused and/or neglected to settle the sum due despite several reminders."

19. Apart from this deposition, there is no other evidence that the respondents or any of them was served with the order. No affidavit by a process server, for instance, has been filed to demonstrate where the

respondents were served and, in particular, the circumstances under which they were served. I am not satisfied this is sufficient service.

20. Secondly, it is also apparent on the face of the decree served upon the respondents, that there is no permanent display on the front copy of the order served a warning to the alleged contemnor that disobedience to the order would be contempt of court as prescribed by the rules.

21. I am a bit perturbed that the applicants have not taken cue from my previous ruling and complied with the two requisite conditions necessary for an application for contempt to succeed. Whatever reason there may be for their failure, their application is incompetent and misconceived. It is hereby dismissed. I make no order as to costs. Orders accordingly.

SIGNED, DATED AND DELIVERED AT NAIROBI ON 2 DECEMBER 2024

NGAAH JAIRUS

JUDGE