



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW MISC. APPLICATION NO. 476 OF 2016

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

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

CHIEF OFFICER, FINANCE/NAIROBI CITY COUNTY TREASURER.....2ND RESPONDENT

EX PARTE APPLICANT: MOHAMED TARIQ KHAN

RULING

The Application

1. The *ex parte* Applicant herein, Mohamed Tariq Khan, is seeking the following orders by way of an Amended Notice of Motion application dated 19th July 2019:

a. The summons be issued against the Respondents namely the County Secretary, Nairobi City County Leboo Ole Morintat and the Chief Finance Officer, Nairobi City County Halkano Waqo to appear before this Court and show cause why they should not be committed to civil jail for a period of six (6) months.

b. That this Court be pleased to make an order punishing the Respondents namely the County Secretary, Nairobi City County Halkano Waqo by way of committal to prison for a term not exceeding six months or imposing a fine or both, for having deliberately disobeyed the court order made by Hon. Justice G V Odunga on the 6th day of June, 2017.

c. That the Respondents namely the County Secretary, Nairobi City County Leboo Ole Morintat and the Chief Finance Officer, Nairobi City County Halkano Waqo be ordered to purge their contempt.

d. That the costs of this application be borne by the Respondents.

2. The application is supported by an affidavit sworn on 19th July 2019 by the *ex parte* Applicant. The grounds for the application are that on 6th June 2017, this Court issued an order of Mandamus directed to the County Secretary, Nairobi City County and the Chief Officer, Finance/ Nairobi City County Treasurer to comply with the Decree and Certificate of Order issued in the High Court Civil Case No. 339 of 2009 by paying to the Applicant the sum of Kshs. 4,331,397.26 being the decretal sum together with interest until payment in full. However, that despite being aware of the court orders and receiving written demand from the Applicant, the Respondents have willfully disobeyed this Court's Orders, by failing to pay the decretal amount of Kshs. 4,331,397.26 together with interest.

3. The *ex parte* Applicant annexed copies of the decree and of the letters written to the Respondent.

4. In response to the application, the named Respondents filed Grounds of Opposition dated 28th September, 2018. It was stated therein that the instant application is fatally incompetent and incurably defective. Further, they contended that the application is premature, misconceived and bad in law as contempt proceedings cannot lie as against the Respondents as stipulated by section 30(1) of the Contempt of Court Act, 2016. In addition, the Respondents contended that this Court has never issued a notice of not less than thirty days to the accounting officer, the 2nd Respondent herein requiring him/her to show cause why contempt of court proceedings should not be commenced against the

accounting officer as required by section 30(2) and (3) of the Contempt of Court Act, 2016.

5. It was also the Respondents' averment that Section 30 of the Contempt of Court does not provide for committal to civil jail where a State Organ, government department, ministry or corporation is guilty of contempt of court in respect of any undertaking given to a court by the State organ, government department, ministry or corporation and as such, the Court cannot grant the prayer. They further averred that the Respondents have not consented or connived to commit the alleged contempt of court and in any event, the court order issued on 6th June 2017 was issued against the wrong party and therefore the *ex parte* Applicant's claim against the Respondents is null and void. As such, the Respondents do not owe any duties or obligations to the *ex parte* Applicant.

6. Lastly, it was contended that the County Government responsibilities with respect to management and control of public finance under the Public Finance Management Act gives the duty to pay out funds from the County Treasury to the County Executive Committee member in charge of finance, and not the Respondents as indicated in the orders given on 6th June, 2017. Be that as it may, it was contended that the alleged contemnors are public officers and are prohibited in law under sections 196 and 197 of the Public Finance Management Act 2012 from paying the *ex parte* Applicant as ordered without prior authorization. Furthermore, it was averred that the County Government had various competing interests catered for in the budget and for this Court to allow the Applicant's claim to be factored in the forthcoming budget as approved by the County Assembly since the County Executive cannot expend money not approved in the budget as that will amount to an illegality.

The Determination

7. Tariq Khan & Company Advocates for the *ex parte* Applicant filed written submissions dated 8th September, 2020. Counsel submitted that disobedience of a court order is a serious offence in its nature and its consequence should be of the same degree as provided for under Order 40 rule 3(1), (2) & (3) of the Civil Procedure Rules. It was further submitted that these proceedings were taken out to ensure the rule of law is preserved, and that the Respondents are held accountable for their failure to pay the decretal sum, as compelled on 6th June, 2017.

8. To buttress his argument, counsel cited the case of **Teachers Service Commission vs Kenya National Union of Teachers & Anor (2013) eKLR** where the court observed that the law and punishment for contempt of court does not exist to protect the personal dignity of the Judiciary nor private rights of the parties or litigants but the fundamental supremacy of the law which is challenged as was held in the case of **Johnson vs Grant (1923) SC 789**.

9. Counsel further cited the case of **Kabuto Contractors Ltd v Nairobi City Council (2004) eKLR** where Ibrahim J (as he then was) upheld the holding of Mwera J. (as he then was) in **Aaron Gitonga Ringera & Others, Nairobi HCCC No. 1330 of 1991**, where it was held that contempt proceedings though necessary for administration of justice take on the feature of criminal proceedings as such, the greatest restraint and discretion should be used by the court in dealing with contempt of court. Further, that the court held that contempt is not only disobeying the order by non-payment, but also by totally and shamelessly disregarding it and not coming to court to explain the recourse reasons for non-payment or default.

10. Also cited was the case of **Hadkinson vs Hadkinson (1952) C.A 285**, where Rover L.J held that it is the plain and unqualified obligation of every person against or in respect of who an order is made by a court of competent jurisdiction to obey it until that order is discharged, even to cases where the person affected by an order believes its void. Accordingly, the *ex parte* Applicant urged that the application meets all the requirements set under law and ought to be allowed.

11. The Respondents did not file any submissions in respect to the application therein.

The Determination

12. There are three issues for determination in this application. The first is whether the application for contempt of Court is competently before this Court. If found to be competently filed the Court will proceed to consider the second issue which is whether the Respondents herein are culpable for contempt of Court, and the last issue is whether the *ex parte* Applicant merits the orders sought.

On the competence of the Application

13. The Respondents alleged that the application herein is incompetent for want of compliance with contempt proceedings cannot lie against the Respondents as stipulated by section 30(1) of the Contempt of Court Act, 2016. In this respect it is notable that the *ex parte* Applicant's Notice of Motion was brought pursuant to the provisions of section 5 of the Judicature Act, and sections 1A, 1B, 3A and 63(e) of the Civil Procedure Act. It is also notable that the Contempt of Court Act of 2016 was declared unconstitutional in a judgment delivered on 9th November 2018 by Mwita J. in **Kenya Human Rights Commission v The Hon. Attorney General & Another (2018) eKLR**.

14. This Court has had occasion to consider the question of the applicable law is in contempt of Court cases in light of the effect of the said declaration in the case of **Republic vs Principal Secretary, Ministry of Defence Ex parte George Kariuki Waitthaka [2019] eKLR**, and held that the law governing the power and procedure of the High Court to punish for contempt in an application such as the instant one is section 5 of the Judicature Act and section 36 of the High Court (Organization and Administration) Act. However, given that the Chief Justice had not promulgated rules under the High Court (Organization and Administration) Act to govern the procedure of initiation contempt proceedings, the procedure applicable is the English one as adopted the Judicature Act.

15. The court in that case found as follows as regards the applicable law:

“37.The procedure existing before the enactment of the Contempt of Court Act was restated by the Court of Appeal in Christine Wangari Gachege vs. Elizabeth Wanjiru Evans & 11 Others [2014] eKLR. In that case the Court found that under

Rule 81.4 of the English Civil Procedure Rules, which deals with breach of judgment, order or undertaking. The English law on committal for contempt of court was applied by virtue of section 5(1) of the Judicature Act which provided that:

“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 that power shall extend to upholding the authority and dignity of subordinate courts.”

38. This section was repealed by section 38 of the Contempt of Act, which Act is now no longer operative, however, the substance of the common law is still applicable under section 3 of the Judicature Act. This Court is in this regard guided by the applicable English Law which is Part 81 of the English Civil Procedure Rules of 1998 as variously amended...”

16. The Respondents relied on section 30 of the Contempt of Court Act of 2016 in this regard to argue that the application herein is incompetent. Subsection 1 of the said section provided that if a state organ, government, department, Ministry or corporation is guilty of contempt, the court should serve a 30 days’ notice on the accounting officer requiring the accounting officer to show cause why contempt proceedings should not be commenced against him/her. Subsection (2) stated that contempt proceedings should not be instituted against the accounting officer without the court issuing a thirty days’ notice to the officer and the notice so issued should be served on the accounting officer as well as the Attorney General. Subsection (4) proceeded to provide that if the officer fails to respond to the notice to show cause, the court will proceed to commence contempt proceedings and where the officer is found to be guilty of contempt he/she may with leave of the court be liable to a fine not exceeding two hundred thousand shillings. Similar prayers were sought by the Applicants in their Notice of Motion dated 14th February 2017, as illustrated earlier on in this ruling.

17. The procedure in section 30 of the Contempt of Court Act was a specific focus and the subject of specific findings in the judgment in **Kenya Human Rights Commission vs The Attorney General & Anor** (supra). The learned Judge made the following findings about the said section:

“82. The jurisdiction of the court to punish for contempt is meant to ensure that court’s decisions and directions are obeyed and enforced. The constitution in Article 27 gives all persons the right to equal protection and benefit of the law. However the impugned section 30, first states that no contempt proceedings can be instituted against a public officer unless a thirty days’ notice is issued and served both on the accounting officer and the Attorney General. And second, that where the accounting officer is found to be guilty of contempt he is to be fined two hundred thousand shillings.

83. Courts punish for contempt in order to preserve dignity and integrity of the court process, judicial system and for the benefit of the people by ensuring that its orders and processes are complied with. That notwithstanding, the impugned section requires the court to issue a 30 days’ notice before contempt proceedings are instituted. It must be appreciated that in some instances public officers would be required to comply with court orders or directions and perform some duties immediately to ensure the ends of justice. There would therefore be no rationale why a public officer who is in contempt of court for failure to comply with court orders or directions immediately thus interfering with the course of justice, should be given 30 days before contempt proceedings are initiated against him, taking into account the special nature of contempt proceedings yet others in similar misdeeds are not given such an opportunity.

84. This discriminatory and is aimed at hampering the court’s ability to enforce its processes for the benefit of those in whose favour it has found. It is against the principle that “all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered in the courts and the laws of the land should apply equally to all, save to the extent that objective differences justify differentiation” (Tom Bingam; *The Rule of Law*, London Penguin Press, 2010). I find no legitimate, reasonable or justifiable government purpose to be served by this differential treatment accorded to public officers as opposed to private citizens under the impugned provision.

85. The section has another problem. It prescribes only a fine of two hundred thousand shillings where an accounting officer has been found guilty of contempt compared to the sanctions in section 28(1) which prescribes a fine of two hundred thousand shillings, or six months imprisonment or both. Section 30 is clearly protectionist in favour of government officials yet both will have committed similar offence(s) of contempt. There can be no justification in a constitutional democracy to give public officers differential treatment to that accorded to other persons though both are in contempt. This is an unjustifiable discrimination that is outlawed by the constitution. It violates the principle that the laws of the land apply equally to all, save to the extent that objective differences justify differentiation”.

18. The *ex parte* Applicant’s application, having been brought pursuant to the provisions of the Judicature Act and Civil Procedure Act is accordingly found to be competently filed, as the provisions of section 30 of the Contempt of Court Act of 2016 are no longer applicable, having been declared unconstitutional.

19. In this regard, the English law on committal for contempt of court is applied by virtue of section 3(1) of the Judicature Act. Rule 81.8 of the English Civil Procedure Rules provides that unless the court dispenses with service, a judgment or order may not be enforced by way of an order for committal unless a copy of it has been served on the person required to do or not do the act in question. Rule 81.6 of the English Civil Procedure Rules specifically provides that the method of service shall be personal service, which is effected by leaving the order with the person to be served.

20. This Court notes that Kenyan courts have also held that personal service of orders and a penal notice is a requirement in contempt of court proceedings, and reference is made to the Court of Appeal decisions in **Nyamogo & Another v Kenya Posts and Telecommunications Corporation**, (1994) KLR 1, and **Ochino & Another v Okombo & 4 others** (1989) KLR 165 in this respect. It is also the position and it has been held in several judicial decisions that if personal awareness of the court orders by the alleged contemnors is

demonstrated, they will be found culpable of contempt even though they had not been personally served with the orders and penal notice. See in this regard the decisions in **Kenya Tea Growers Association vs Francis Atwoli & Others**, **Nairobi High Court Constitutional Petition No 64 of 2010**, **Husson v Husson**, (1962) 3 All E.R. 1056, **Ronson Products Ltd v Ronson Furniture Ltd** (1966) RPC 497, and **Davy International Ltd vs Tazzyman** (1997) 1 WLR 1256.

21. In the present application, the Respondents were aware of the court orders granted J. Odunga, as they participated in the proceedings leading to the said orders, and the *ex parte* Applicant also annexed a letter in the instant application dated 11th April 2018 sent to their Director of Legal Affairs, attaching the said decree. In addition, the *ex parte* Applicant, upon experiencing difficulties in personally serving the alleged contemnors with the instant application, and upon application, was granted leave by this court to serve the alleged contemnors with the application by way of an advertisement in the Daily Nation newspaper. The *ex parte* Applicant also filed an affidavit attesting to the substituted service by advertisement, and has therefore also complied with the requirement of service.

On Whether the Respondents are Culpable

22. It is not disputed that an order of mandamus was granted herein on 6th June 2017 directed to the County Secretary, Nairobi City County and the Chief Officer, Finance/ Nairobi City County Treasurer to comply with the Decree and Certificate of Order issued in the High Court Civil Case No. 339 of 2009 by paying to the Applicant the sum of Kshs. 4,331,397.26. Therefore, there is no misjoinder of parties in so far as the application for contempt of Court is concerned, as the said officers are the ones being cited for contempt. The opportunity to question if or not they were the proper parties to be sued as alleged was during the mandamus proceedings. In any event Odunga J. specifically addressed the issue of the Respondents' obligations to pay the decretal sum and noted that any misjoinder was not fatal to an application for mandamus as the enforcement of the decree was south against the Respondents in their official capacity and not personal capacity.

23. The explanation of approval for payment of the decretal sum was raised by the Respondents in this respect. It is notable that the same defence was raised and considered by Odunga J. in the judgment delivered herein on 6th June 2017. The issue of non-allocation of funds or unavailability of funds has been addressed in similar cases in **Wachira Nderitu, Ngugi & Co. Advocates vs. The Town Clerk, City Council of Nairobi Miscellaneous Application No. 354 of 2012**, and in **Republic v Principal Secretary, Ministry of Defence ex parte George Kariuki Waithaka** [2019] eKLR wherein it was held that non-allocation of funds is not an acceptable defence or justifiable excuse for non-payment of decretal sums ordered to be paid by Government officials, in the absence of any evidence of any attempts made by the responsible Government official to commence the process of such allocation. In the present case, this is particularly relevant given that the present contempt of Court proceedings commenced in July 2019, and the Respondents did not indicate what steps if any, have been taken since then to effect payment of the monies due to the *ex parte* Applicant.

24. It must also be emphasised that Court orders are not made in vain and are meant to be complied with. Once a Court order is made in a suit the same is valid unless set aside on review or on appeal, as held by the Court of Appeal in **Refrigerator & Kitchen Utensils Ltd. vs. Gulabchand Popatlal Shah & Others Civil Application No. Nai. 39 of 1990**, **Central Bank of Kenya & Another vs. Ratilal Automobiles Limited & Others Civil Application No. Nai. 247 of 2006**, and in **Wildlife Lodges Ltd vs. County Council of Narok and Another** [2005] 2 EA 344 (HCK), wherein the said Court expressed itself thus:

“It was the plain and unqualified obligation of every person against or in respect of whom an order was made by a Court of competent jurisdiction to obey it until that order was discharged, and disobedience of such an order would, as a general rule, result in the person disobeying it being in contempt and punishable by committal or attachment and in an application to the court by him not being entertained until he had purged his contempt. A party who knows of an order, whether null or valid, regular or irregular, cannot be permitted to disobey it...It would be most dangerous to hold that the suitors, or their solicitors, could themselves judge whether an order was null or valid – whether it was regular or irregular. That they should come to the court and not take upon themselves to determine such a question. That the course of a party knowing of an order which was null or irregular, and who might be affected by it, was plain. He should apply to the court that it might be discharged. As long as it existed it must not be disobeyed...If there is a misapprehension in the minds of the defendants as to the reasonable meaning of the order, then the expectation of them is that they would have made an application to the court for the resolution of any misunderstanding and this would have been the lawful course...”

25. Therefore, as regards culpability, the act or omission constituting disobedience of an order may be intentional, reckless, careless or quite accidental and totally unavoidable. An intentional act may be done with or without an intention to disobey the order, and with or without an intention to defy the court. The element of contumacy, which requires flagrant defiance of, the authority of the court, is no longer necessary to establish breach of a court order. It is now established that the mental element for liability for contempt arising out of disobedience is simply that the disobeying party either intended to disobey, or made no reasonable attempt to comply with the order. See in this respect the English House of Lords decision in **Heatons Transport (St Helens) Ltd v Transport and General Workers Union** (1973) AC 15.

26. In the present case, the Respondents have not brought any evidence of any attempts made to comply with the orders given herein by Odunga J. on 6th June 2017, and are thereby deemed to be in disobedience of the said orders.

On Whether the Relief sought is Merited

27. I accordingly find that that as the Respondents were aware of the orders given herein on 6th June 2017, and have not shown any steps taken to satisfy the decretal sum due to the *ex parte* Applicant as compelled in the said orders, they are culpable of disobeying the same and for contempt of court. The *ex parte* Applicant's Amended Notice of Motion dated 19th July 2019 is thus largely merited.

28. However, given the Respondents' reasons for non-payment of the decretal sum, the Court will grant the Respondents the opportunity to purge the contempt, and as a way of mitigating the sentence.

29. I accordingly order as follows:

I. The Respondent's sentencing for contempt of court is suspended for 6 (six) months from today's date, pending any actions the Respondents may want to take to purge the contempt.

II. Further directions will be given by this Court on 15th September 2021 as to the date for sentencing of the Respondents, and upon hearing the *ex parte* Applicant and Respondents on any actions taken to purge the contempt.

III. The Respondents shall meet the costs of the Amended Notice of Motion dated 19th July 2019.

30. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 12TH DAY OF MARCH 2021

P. NYAMWEYA

JUDGE

FURTHER ORDERS ON THE MODE OF DELIVERY OF THIS RULING

Pursuant to the Practice Directions for the Protection of Judges, Judicial Officers, Judiciary Staff, Other Court Users and the General Public from Risks Associated with the Global Corona Virus Pandemic dated 17th March 2020 and published 17th April 2020 in Kenya Gazette Notice No. 3137 by the Honourable Chief Justice, this Ruling was delivered electronically by transmission to the email addresses of the *ex parte* Applicant's and Respondents' Advocates on record.

P. NYAMWEYA

JUDGE