



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW MISC. APPLICATION NO. 93 OF 2008

BETWEEN

SURVEY CONSULT.....APPLICANT

VERSUS

THE TOWN CLERK, NAIROBI CITY COUNCIL.....RESPONDENT

RULING

The Application

1. Survey Consult, the Applicant herein, states that it sued the Town Clerk of Nairobi City Council (the Respondent herein) in 2001, for special damages of Kshs 350,000/- at the Chief Magistrate's Court, Nairobi. Further, that following a judgment delivered 21st November 2006 in its favour, a Decree was issued on 15th December 2006 for a total decretal sum of Kshs 625,934/=. However, that despite several demands and reminders for payment of the said Judgement award, the Respondent refused to pay up, and the Applicant consequently filed judicial review proceedings against the Respondent for the order of Mandamus to compel payment of the Judgement award.

2. Subsequently, that on 8th December 2009, this Court issued an order of mandamus compelling the Respondent to pay, within fifteen (15) days of the Court order, the decretal sum and costs in respect of the decree in Civil Case No. E J 96 of 2001 together with interest. Following the transition of the Respondent from being the Nairobi City Council to the Nairobi City County, the Applicant states that it has faced difficulties in following up on payment of the judgment. The Applicant has accordingly now filed an Amended Notice of Motion application dated 19th February, 2019, in which it seeks the following orders:

(a) That this Honourable Court be pleased to grant the firm of Asala & Kinyanjui Co. Advocates leave to come on record on behalf of the Applicant, herein, Survey Consult.

(b) That this Court be pleased to issue a 30 days' notice to the current holder of the County Secretary Office, of the Nairobi City County, Pauline Kahiga, to show cause why contempt of court proceedings should not be commenced against her for disobeying the Court Order issued on 8th December 2009.

(c) That the costs of this application be provided for.

3. The said application is supported by an affidavit dated 19th February 2019 sworn by Kamau Mucuha the Applicant's director. It was averred that there have been changes to the bearer of the office of the County Secretary of Nairobi City County, and that the aforesaid court order was served on Dr. Robert Ayisi on 11th November 2016, the then County Secretary of the Nairobi City County being the holder of the equivalent position of a town clerk as per the previous Nairobi City Council. Subsequently, that on 11th February 2019, the said court order was served on Pauline Kahiga, the current holder of the office of County Secretary of the Nairobi City County. However, that despite the service of the aforesaid court order containing a penal notice, no payments have been made to date. Currently, the decretal sum, costs and accrued interests stand over Kshs. 3,000,000. In conclusion it was averred that it is in the interest of justice that a notice to show cause is issued to the County Secretary.

4. This Court granted prayer (a) of the Amended Notice of Motion on 26th November 2018, when granting leave to amend and file the instant application, which prayer has therefore been overtaken by events. The only outstanding prayers for consideration are therefore prayers (b) and (c) of the said Motion.

5. The Respondent/alleged Contemnor in response filed grounds of opposition dated 29th October, 2020 in which the Respondent argued that the application was fatally incompetent and incurably defective and that the orders sought therein were devoid of merit. It was contended that the Respondent is not in direct control of County Government Funds being only an officer of the County Government, and that the duty lies

upon the County Executive Committee member in charge of finance. In addition, that the alleged contemnor is a public officer and is therefore prohibited under law particularly sections 196 and 197 of the Public Finance Management Act (2012) from paying the Applicant, as it is an offense to spend public funds without prior authorization.

6. It was further argued that the Respondent has competing interests that include settling of decrees to the public but it has limited resources as well as statutory processes to which it must abide by prior to the settlement of the same. Furthermore, that the alleged contemnor is currently not in a position to pay since the County Government is in the middle of its financial year and that such funds ought to be provided for in the County budget.

7. In conclusion, the Respondent claims that it is ready and willing to settle the decretal sum once the same has been allocated for, approved and passed by the County Government pursuant to the provisions of section 125 of the Public Finance Management Act (2012).

The Determination

8. The Applicant's advocate on record filed written submissions dated 15th September 2020. It was submitted that following the several transitions in the holder of the office of the County Secretary of the Nairobi City County, the Applicant has faced difficulty in following up for payment, and that despite the order containing a penal notice the decretal sum is yet to be settled.

9. On the issue as to whether the Court order was served on the officer bearer of Nairobi City Council, it was submitted that regardless of the challenges faced, the Applicant has ensured that the order has been served. Counsel cited the cases of **Teacher's Service Commission vs. Kenya National Union of Teachers & 2 Others [2013] eKLR** and of **Basil Criticos vs. Attorney General & Others [2012] eKLR** for the submission that knowledge of a court order supersedes personal service. It was further submitted that the alleged contemnor is well aware of the Court Order as well as the instant contempt proceedings in Court.

10. The Applicant further submitted that pursuant to the provisions of section 59 of the Urban Areas and Cities Act No.13 of 2011, as read with Section 33 of the Sixth Schedule of the Constitution, County Governments are the natural and presumptive legal successors of the defunct local authorities, and therefore the Nairobi City County succeeded the Nairobi County Council. Further, that the defunct office of the Town Clerk is equivalent to the current office of the County Secretary. In buttressing this argument counsel cited the case **Republic vs. County Secretary, Nairobi City County & another Ex Parte Wachira Nderitu Ngugi & Co. Advocates [2016] eKLR; Argos Furnishers Ltd vs. Municipal Council of Mombasa, HCCC No.13 of 2008; and Republic vs. Town Clerk of Webuye County Council & Another, HCCC 448 of 2006 .**

11. On the issue on whether a notice to show cause should be issued to the current office bearer of the Nairobi City Council, counsel cited the cases of **Teachers Service Commission vs. Kenya National Union of Teachers & 2 Others [2013] eKLR**, and **Kenya Tea Growers Association vs. Francis Atwoli and 5 others [2012] eKLR**, where the Courts held that the reason why courts will punish for contempt of court is to safeguard the rule of law which is fundamental in the administration of justice, and that ignoring the court order are a clear manifestation of wilful disobedience and contempt of Court and its orders.

*12. In conclusion, counsel submitted that the amended application has invoked section 5 of the Judicature Act and that following the declaration of the Court nullifying the Contempt Act (Act Number 46 of 2016), section 5(1) of the Judicature Act is revived and this court is clothed with the power to punish contempt. Counsel urged the Court to be guided by the decision in **Republic vs. University of Nairobi & Another Ex parte Nabiswa Wakenya Moses [2017] eKLR** where the Court issued a notice to the Contemnor to show cause why appropriate action should not be taken against him*

13. The Respondent's advocate filed written submissions dated 29th October, 2020. It was submitted that an order of committal ought to be issued to protect the legal rights of a decree holder to whom the judgement debtor has failed and/or refused to pay the decretal sum. It was further submitted that an order of committal to civil jail ought to be made as against the particular person who has failed to honour the Decree. The Respondents reiterated the averments made in its pleadings as regards the duty and ability of the alleged contemnor to pay the decretal sum, and cited the decisions in the cases of **Kenya National Examination Council vs. Republic Ex parte Geoffrey Gathenji Njoroge & Others (1997) eKLR** and **Abdi Kadir Salat Gedi vs. Principal Registrar of Persons & Another (2014) eKLR** on the circumstances when an order of mandamus can issue.

14. It is notable in this respect that a considerable part of the Respondent's pleadings and submissions seem to be on the question whether an order of mandamus can issue, which issue has already been dealt with finality by this Court in the judgment delivered herein on 8th December 2009.

15. It was further submitted that the Applicant has failed to state the law under which the Respondent has a duty to act, and counsel cited the cases of **Daniel Kimani Njihia vs. Francis Mwangi Kimani [2015] eKLR** and **Michael Mungai vs. Housing Finance Co. (K) Ltd & 5 Others [2017] eKLR** for the position that a litigant should invoke the correct constitutional or statutory provision.

16. I have considered the arguments made by the parties herein, and note that the Applicant's application was brought pursuant to among others, the provisions of the section 5 of the Judicature Act and section 40 of the Civil Procedure Act and Order 22 of the Civil Procedure Rules. This is as a result of the provisions of the Contempt of Court Act 2016 having been 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**.

17. 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.

18. 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 vs Kenya Posts and Telecommunications Corporation, (1994) KLR 1, and Ochino & Another vs 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.

19. Lastly, the law as regards culpability for contempt of court is that 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.

20. In the present application however, the outstanding prayer in the Applicants' Notice of Motion dated 19th February 2019 appears to be modelled along the procedure set out in section 30 of the Contempt of Court Act, which has since been declared unconstitutional. Subsection (1) of the section 30 of the Contempt of Court Act in this regard 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.

21. 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.

22. 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”.

23. It is thus evident that even if this Court has inherent jurisdiction and discretion to proceed with the hearing of the Applicants' Notice of Motion dated 19th February 2019, the prayers and procedure sought in the said Notice of Motion are incompetent, as both have expressly been found by a Court of competent jurisdiction to be unconstitutional. This Court is also precluded from applying any applicable law that would apply in the circumstances, as it is bound by the Applicants' pleadings. I am thus inclined to agree with the Respondents that the Applicants' Notice of Motion dated 19th February 2019 is not based on any known law, and cannot therefore stand.

24. The Applicant's Notice of Motion dated 19th February 2019 is accordingly struck out. For the avoidance of doubt, this finding is based on the procedure employed by the Applicant in presenting its application, and the question as to whether the Respondent is culpable of contempt has not been ventilated upon and still remains undetermined. The Applicant is therefore at liberty to institute a substantive application for contempt of Court against the Respondent in this regard.

25. Lastly, as the outcome herein has been caused by a change in the applicable law, each party shall bear their own costs of the Notice of Motion application dated 19th February, 2019.

26. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 11TH DAY OF JUNE 2021

P. NYAMWEYA

JUDGE

DELIVERED AT NAIROBI THIS 11TH DAY OF JUNE 2021

J. NGAAH

JUDGE