



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISII**

**CIVIL SUIT NO 17 OF 2013**

**SAMUEL KEROSI ONDIEKI T/A KEROSI ONDIEKI & CO ADVOCATE....PLAINTIFF/APPLICANT**

**VERSUS**

**NAROK COUNTY GOVERNMENT.....DEFENDANT/RESPONDENT**

**RULING**

**INTRODUCTION**

1. Before me is a Notice of Motion dated 19<sup>th</sup> November 2019 seeking the following orders:

1. THAT this honorable court do find the ACCOUNTING OFFICER (FINANCIAL ACCOUNTANT) AND CEC-FINANCE OF THE NAROK COUNTY GOVERNMENT guilty of disobedience of this court's decree given on 31/3/2003, an order of mandamus given on 3/6/2004; certificate of order against local government given on 17/5/2017.

2. THAT the ACCOUNTING OFFICER (FINANCIAL ACCOUNTANT) AND CEC-FINANCE OF THE NAROK COUNTY GOVERNMENT be committed to civil jail for a term not exceeding six (6) months for contempt of court or having deliberately disobeyed orders of this honorable court issued on 31/3/2003, 3/6/2004 and 17/5/2017.

3. Any other or further ordered of the Court geared towards protecting the dignity and authority of the Court.

3. THAT the costs of this application be provided for.

2. According to the supporting affidavit of Kennedy Bosire Gichana, the applicant alleges that despite this court's decisions of 31/3/2003, 3/6/2004 and 17/5/2017 the respondent has failed to pay the appellant the decretal sums and as a result failed to comply with the said court orders.

**BACKGROUND**

3. This court through a consent judgment of 4<sup>th</sup> February 2003 ordered the respondent (*Transmara County Council, now the Narok County government*) to pay the applicant a sum of Kshs 13,500,000/- to satisfy the claim as per the consent entered by the parties. Following the order of this court, the applicant filed **High Court Miscellaneous Application No. 134 of 2003** on 3<sup>rd</sup> June 2004 and obtained an order of mandamus directing the respondent to pay the applicant the said sum together with interest at the rate of 14% and costs taxed at Kshs 549,220/-.

4. The applicant contends that the Accounting Officer and the CEC-Finance of Narok County were served with the orders issued against the respondent. According to the applicant, the parties commenced further negotiations in the month of September 2014 and as a result the respondents agreed to satisfy the decretal sum through monthly installments of Kshs 5,700,000/- until the full sum was paid in full. The respondent paid the initial installment through the applicant's advocate's bank account on 6<sup>th</sup> February 2015. However, the bank account at Cooperative Bank Kisii branch was flagged at the instance of the Minister for Finance of the respondent and the funds were recalled by the Narok County government.

5. The applicants commenced execution process on 11<sup>th</sup> February 2015 after the respondent failed to comply with the terms of the agreement to settle the decretal amount. The applicant alleges that notice to show cause was issued and duly served upon the accounting officer to show cause why Kshs 38,307,488/- had not been paid but the respondent deliberately failed to attend court despite being served. When they failed to respond the court granted the applicant leave to proceed and commence contempt proceedings against them.

6. It is also the applicant's contention that the respondents have not filed an appeal and the applicants should be at liberty to access the monies paid under the decree in the account number [...] at the Co-operative Bank of Kenya Ltd Kisii branch. According to the applicant, the respondents have refused to allow his advocate access the money in the account and therefore the decree remains unsatisfied and the amount continues to remain outstanding.

### **THE APPLICANT'S SUBMISSIONS**

7. The applicant submitted that the Court should be guided by **Article 159(2) of the Constitution** in considering that the application was not filled under the **Judicature Act** but instead under the **Contempt of Court Act, 2016** which was declared unconstitutional. It was argued that the court granted leave for the applicant to take out contempt proceedings after the application for notice to show cause was filed. That service was done and an Affidavit of Service filed. On the issue of the decree being executed after 12 years it was submitted that there is an acknowledgement of payment in 2015 and thus time starts to run from the date of acknowledgement. It was further submitted that the consent was entered by the respondent's advocates who were properly on record. That if they have an issue with the advocates there is a procedure and they have to follow the said advocates. It was submitted that the interest accrued as a result of the delay occasioned by the respondent and that interest accrued from the date of filing the suit. That no appeal has been filed and there is no evidence of a filed memorandum of appeal.

### **RESPONDENT'S CASE**

8. The respondent filed a replying affidavit on 13<sup>th</sup> April 2021 deposed by Walter Chanua. According to the respondent, the applicant ought to have filed under the judicial review case and thus contend that the court should dismiss the application *in limine*. It was also averred that the application ought to be dismissed having been brought under the **Contempt of Court Act of 2016** which was been declared unconstitutional by the High Court on November 9<sup>th</sup> 2018 in **Kenya Human Rights Commission v Attorney General & Another 2018 eKLR**. It was argued that the application ought to have been brought under the Judicature Act.

9. The respondent also claimed that they had not been served with a notice to show cause as alleged find the applicant. The respondent also took issue with the fact that the applicant had attempted to execute the decree 12 years after it was issued. It was explained that due to the execution pressure the applicant was paid through his advocate the sum of Kshs 5,700,000/- which was acknowledged by the applicant. Although the respondent attempted to reverse the transaction upon learning that the decretal sum was disputed and the records were not clear. However, the respondent did not succeed in the reversal of the transaction as the applicant's advocate had already accessed the said fund.

10. It was advanced that after the said payment the respondent made several applications including an application dated 5<sup>th</sup> March 2015 seeking to set aside the decree on grounds that the respondent had discovered that the consent was entered by their then advocate without its authority. The respondent further disputes the interest sought in this case for reasons that it is more than the principal sum.

### **THE RESPONDENT'S SUBMISSIONS**

11. The respondent in opposing the application submitted that the application can only lie in the file or court that issued the order of mandamus, that is, **HC Misc 134/2003**. They contend that the court should consider the ruling of Nagillah J and dismissed the applicant's application. It was further submitted that this instant application ought to have been brought under **Section 5 of the Judicature Act** and therefore service of the application has to be personal. That there is no such Affidavit of Service indicating they were served with the application and decree and referred the court to the case of **Christine Wangare Gachaga v Elizabeth Wanjiru Evans 2014 eKLR**. They were also not served with the Notice to Show Cause.

12. The respondent admitted to the payment Kshs 5,700,000/- but that does not mean that they have not raised issues concerning the decree and they have filed an application dated 5<sup>th</sup> March 2015 seeking to set aside the consent order. They argued that they have not prosecuted because there was an attempt to settle the matter. They advanced that the interest claimed is Kshs 30,000,000/- which they described as illegal and unreasonable. They submitted that they need time to allocate funds and to make arrangements in the next financial year and thus the matter should be mentioned in September 2021 with a view of ascertaining if there are funds to be utilized towards payment of the decretal sum.

### **ANALAYSIS AND DETERMINATION**

13. The application before me is one on contempt proceedings against the contemnors, the Accounting Officer (Financial Accountant) and CEC-Finance of the Narok County Government for noncompliance with court orders.

14. First, I will deal with the issue of the validity of a decree as it was issued more than 12 years ago. **Section 4 (4) of the Limitation of Actions Act**, which provides as follows:

“An action may not be brought upon a judgment after the end of twelve years from the date on which the judgment was delivered, or (where the judgment or a subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods) the date of the default in making the payment or delivery in question, and no arrears of interest in respect of a judgment debt may be recovered after the expiration of six years from the date on which the interest became due.”

15. In this instant case however, it is not disputed that the respondent despite the lapse of the 12 years paid the applicant Kshs 5,700,000/- on 6<sup>th</sup> February 2015. The consent judgment having been adopted as an order of the court on 4<sup>th</sup> February 2003, the respondents by paying the Kshs 5,700,000/- to satisfy the decree admitted the judgment debt despite the 12 years having elapsed. It therefore follows that they should thus pay the applicant the judgment debt. On the issue of interest, I note that **Section 4 (4) of the Limitation of Actions Act** provides that **‘no arrears of interest in respect of a judgment debt may be recovered after the expiration of six years from the date on which the interest**

*became due*'. Therefore, the interest claimed cannot exceed more than the 6 statutory years as prescribed by the Act.

16. The second issue revolves around the contempt proceedings and the law governing them. The applicant has indicated that the application is brought under the **section 4(1) (a) and 28 of the Contempt of Court Act, 2016 ('the Act')**. It is not disputed that the Act was declared unconstitutional on 9<sup>th</sup> November 2018 in **Kenya Human Rights Commission v Attorney General & Another 2018 eKLR**. The applicant has argued that such an error was merely a technicality that can be cured by **Article 159 of the Constitution of Kenya**. The respondent on the other hand submitted that the application ought to have been brought under **section 5 of the Judicature Act**.

17. In **St Mary Academy Limited & another v Grace Njeri Mukora & another; Yvonne Jeruto & another (Contemnors) [2021] eKLR** the applicant's application was brought under **section 4, 5, 27 and 28 of the Contempt of Court Act 46 of 2016**. The Court in that case considered the finding in **Kenya Human Rights Commission v Attorney General & another [2018] eKLR declaring the Act unconstitutional and held that although the application was brought under incorrect provisions of the law, recourse would have to be the provisions of the Judicature Act**.

18. In **Clerk, Nairobi City County Assembly v Speaker, Nairobi City County Assembly & another; Orange Democratic Party & 4 others (Interested Parties) [2019] eKLR** the court held as follows;

"...section 28 of the ELRC Act is non-existent because it was repealed by Act No. 18 of 2014. I further agree that it was an error for the Petitioner to base his application on a repealed section of the law. However, I wish to observe that the application is not fatally incompetent because it has invoked section 5 (1) of the Judicature Act which is the main provision relating to contempt proceedings. I reiterate that under Article 159 of the Constitution this Court is to exercise its judicial authority without undue regard to technicality. I once again duplicate Order 51 rule 10 of our Civil Procedure Rules which provides the policy in cases the court is faced with an application which has not cited the correct law upon which it is brought or which fails to cite any provision at all:

"10(1) Every order, rule or other statutory provision under or by virtue of which any application is made must ordinarily be stated, but no objection shall be made and no application shall be refused merely by reason of a failure to comply with this rule."

46. I believe that the foregoing provision is the guiding policy for this Court and the courts below. The position may however differ a bit in the Supreme Court which is the apex court and where Order 51 Rule 10 is not part of the adjectival law. In the absence of a provision similar to order 51 rule 10 in the rules of procedure for the apex court, strict compliance with the law upon which the specific jurisdiction of the court is invoked would not be an option. Consequently, before the said Court, default to cite the correct provision may not be regarded as a mere technicality and that is reason why in my view only senior legal practitioners have access to the court."

19. **Section 5(1) of the Judicature Act** which provides 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."

20. In **Samuel M. N. Mweru & Others v National Land Commission & 2 others [2020] eKLR** the court observed as follows;

"23. Therefore, the law that governs contempt of court proceedings is the English law applicable in England at the time the alleged contempt is committed. Section 5 of the Judicature Act imposes a duty on the High Court, the Court of Appeal and law practitioners to ascertain the applicable law of contempt in the High Court of Justice in England, at the time the application is brought.

...

31. A court without contempt power is not a court. The contempt power (both in its civil and criminal form) is so innate in the concept of jurisdictional authority that a court that could not secure compliance with its own judgments and orders is a contradiction in terms, an "oxymoron." Contempt power is something regarded as intrinsic to the notion of court; even obvious, I would say. In the common lawyer's eye, the power of contempt "is inherent in courts, and automatically exists by its very nature."

21. The applicable law in this proceedings is **section 5 (1) of the Judicature Act**. The applicable procedure for instituting a contempt proceedings was discussed at length by the Court of Appeal in **Christine Wangari Gachege v Elizabeth Wanjiru Evans & 11 others [2014] eKLR**;

"Though the Court of Appeal of England and Wales was established in 1875, some 92 years before the commencement date of the Judicature Act, Cap 8, Laws of Kenya, the Act in the cited Section 5 simply directs that this court like the High Court must make reference to the powers exercised by the High Court of Justice in England and not those exercised by its counterpart, the Court of Appeal of England and Wales.

The High Court of Justice in England is that level of the court system in England, comprising three divisions; the Queen's Bench, the Chancery and the Family Divisions. That court draws its jurisdiction to punish for contempt of court from both the statute, namely the Contempt of Court Act, 1981 and the common law. But the procedure to be followed in commencing, prosecuting and punishing contempt of court cases was, until 2012, as will shortly be explained, provided for by **Order 52 Rules 1 to 4 of the Rules of the Supreme Court RSC**, made under the Supreme Court of Judicature Act, 1873 (or simply the Judicature Act,

1873). The Judicature Act, 1873 abolished a cluster of courts in England and Wales dating back to medieval periods, some with overlapping judicial powers, and in their place established the Court of Appeal, the High Court and the Crown Court all together to be known as the Supreme Court of Judicature, which must not be confused with the Supreme Court of the United Kingdom which was established only on 1<sup>st</sup> October, 2009 assuming the judicial functions of the House of Lords.

**Order 52 RSC**, until 2012 as alluded to earlier provided the procedure of commencing contempt of court proceedings. The procedure may be summarized as follows, in so far as it relates to the High Court of Justice: -

- i. An application to the High Court of England for committal for contempt of court will not be granted unless leave to make such an application has been granted.
- ii. An application for leave must be made ex parte to a judge in chambers and be supported by a statement setting out the particulars of the applicant as well as those of the person sought to be committed and the grounds on which his committal is sought, and by an affidavit verifying the facts relied on.
- iii. The applicant must give notice of the application for leave not later than the preceding day to the Crown Office.
- iv. Where an application for leave is refused by a judge in chambers the applicant may apply afresh to a divisional court for leave within 8 days after the refusal by the Judge.
- v. When leave has been granted, the substantive application by a motion would be made to a divisional court.
- vi. The motion must be entered within 14 days after the granting of leave; if not, leave shall lapse.
- vii. The motion together with the statement and affidavit must be served personally on the person sought to be committed, unless the Court thinks otherwise.

.....

Following the implementation of the famous Lord Woolf's "**Access to Justice Report, 1996**", The Rules of the Supreme Court of England are gradually being replaced with the Civil Procedure Rule, 1999. Recently, on 1<sup>st</sup> October, 2012 the Civil Procedure (Amendment No. 2) Rules, 2012 came into force and PART 81 thereof effectively replaced **Order 52 RSC** in its entirety. PART 81 (**Applications and Proceedings in Relation to Contempt of Court**) provides different procedures for four different forms of violations.

**Rules 81.4** relates to committal for "breach of a judgment, order or undertaking to do or abstain from doing an act."

**Rule 81.11-** Committal for "interference with the due administration of justice" (applicable only in criminal proceedings).

**Rule 81.16** – Committal for contempt "in the face of the court", and

**Rule 81.17** - Committal for "making false statement of truth or disclosure statement."

An application under **Rule 81.4** (breach of judgment, order or undertaking) now referred to as "application notice" (as opposed to a notice of motion) is the relevant one for the application before us. It is made in the proceedings in which the judgment or order was made or the undertaking given. The application notice must set out fully the grounds on which the committal application is made and must identify separately and numerically, each alleged act of contempt and be supported by affidavit(s) containing all the evidence relied upon.

The application notice and the affidavit or affidavits must be served personally on the respondent unless the court dispenses with service if it considers it just to do so, or the court authorizes an alternative method or place of service. [Emphasis mine]"

22. Having found that that the proper procedure involved the filing the application notice setting out the grounds on which the committal application is made and identifying each alleged act of contempt and be supported by affidavit. The Notice of Motion application dated 19<sup>th</sup> November 2019 is thus properly filed before this court and has clearly outlined the alleged acts of contempt. However, what is also crucial is that the application together with the supporting affidavit must be served personally on the respondent or contemnors.

23. Having carefully considered the affidavit of service dated 17<sup>th</sup> December 2019, Mr. Kerosi went to the office of the CEC Finance and served the Notice of Motion and the Supporting Affidavit on the secretary after being informed that the contemnors were not in their respective offices. The affidavit does not disclose the name of the secretary and in my view I find that the failures to disclose the name of the person served was fatal in light of the fact that the respondent have denied service.

24. The respondent also denied being served with the notice to show cause. Although there was an attempt to serve the Finance Officer and CEC-Finance of the Narok County government on 6<sup>th</sup> December 2019 with the notice to show cause, I find that the same was not personally served on the contemnors as the affidavit of service indicate that the notice to show cause was served by leaving the copies at the Respondent's front office as well as its gate. In **Basil Criticos v Attorney General & 8 others & 4 others [2012] eKLR** the

“The question I must answer is whether the procedure of instituting and prosecuting contempt of court application has been adhered to by the Petitioner. Over the years, the courts have been very strict in entertaining an application for civil contempt of court. Such an application can only be allowed only if the particular order of court has been served on that person and the copy of that order must be endorsed with a notice informing the person whom the copy is served that if he disobeys the Order, he is liable to the process of execution to compel him to obey the order - See Mwangi Wangondu v Nairobi City Commission CA 95/1988 (Unreported), Jacob Zedekiah Ochino and another v George Aura Okombo CA 36 of 1989 (unreported).”

25. The contemnors, the Accounting Officer (Financial Accountant) and CEC-Finance of the Narok County government ought to have been personally served with the orders, the notice to show cause and the application which seeking to commit them civil jail.

26. In the end, the application dated 19<sup>th</sup> November 2019 is accordingly dismissed. Each party to bear its own costs.

**DATED, SIGNED AND DELIVERED AT KISII THIS 10<sup>TH</sup> DAY OF JUNE, 2021**

**R. E. OUGO**

**JUDGE**

**In the presence of:**

**Mr. Bosire For the Applicant**

**Mr. Kerosi Applicant- Present**

**Mr. Chelanga For the Respondent**

**Ms. Rael Court Assistant**