



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MOMBASA**

**JUDICIAL REVIEW NO. 4 OF 2015**

**IN THE MATTER OF: AN APPLICATION BY: GA (minor suing through her father and next friend) JAO, FOR LEAVE TO APPLY FOR ORDERS OF MANDAMUS**

**AND**

**IN THE MATTER OF: THE NATIONAL INTELLIGENCE SERVICE ACT (NO. 28 OF 2012) LAWS OF KENYA**

**AND**

**IN THE MATTER OF: THE STATE CORPORATIONS ACT (CAP 446) LAWS OF KENYA**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**VERSUS**

**PRINCIPAL SECRETARY, NATIONAL TREASURY.....RESPONDENT**

**AND**

**THE DIRECTOR GENERAL,**

**NATIONAL INTELLIGENCE SERVICE.....INTERESTED PARTY**

**AND**

**GA (minor suing through her father and next friend) JAO.....EX PARTE APPLICANT**

**RULING**

1. What is before this court is a Notice to Show Cause for committal to civil jail dated 27/10/2020.
2. The applicant is claiming a sum of Kshs 199,960 being a balance /amount of decree together with interest, cost of execution and court collection fees making in all Kshs. 375,968.00.

**The Response**

3. The Attorney General filed a Replying Affidavit sworn on 21/7/2021 by **MARY N. KITI** Principal State Counsel on behalf of the respondent and interested party.
4. The Counsel avers that she wrote to the respondent and interested party after being served with the notice to show cause, and she annexed a copy of the letter. Counsel further avers that the ex parte applicant via e-mail dated 10/8/2020 was informed that the respondent's office was in the process of settling the award and they needed to avail copy of the judgement. A copy of the letter was annexed. The ex parte applicant has not availed the judgement in **CMCC No. 4945 of 2004** as proof of the same is a mandatory requirement to enable the process of settlement of the decretal amount.
5. Counsel submitted that the notice to show cause dated 27/10/2020 is premature, misconceived and an abuse of court process; that it is ex

parte applicant who has been delaying and making it difficult for the payment and or settlement for the decretal amount and not the respondent and not the respondent thus the ex parte applicant has come to court with unclean hands.

6. Counsel further submitted that the respondent has not in any way disregarded the orders of the court and has every intention of complying with the same as demonstrated above. That these acts by the ex parte applicant are mischievous and misleading to this court and are out to embarrass the respondent and interested party, and that for the interest of justice the ex parte applicant ought to avail a copy of the judgement to the respondents advocates as advised the advised by the e-mail dated 10<sup>th</sup> August, 2020 in order to settle the decretal amount.

7. The matter came up before this court on 29/7/2021 and counsel for the ex parte applicant informed the court that there was no settlement yet and urged the court to grant the orders as prayed.

### **Determination**

8. I have considered the motion. The only issue for determination is whether the respondent should be committed to civil jail.

9. The court in the case of **Republic v Permanent Secretary Office of the President Ministry of Internal Security & another Ex-Parte Nassir Mwandihni [2014] eKLR** stated:

*“It therefore follows from the foregoing discourse that the rules applicable to normal execution proceedings by way of committal to civil jail are not necessarily applicable to enforcement of an order of the Court arising from an order of mandamus by way of committal. It must be remembered that an application for an order of mandamus seeking an order compelling the Government to satisfy a decree is a very elaborate procedure. Before the Court issues such an order, there must be proof that the provisions of the Government Proceedings Act have been complied with respect to issuance of certificate of costs and certificate of order against the Government. After the issuance of the aforesaid documents, just like in any application for mandamus, there must be a demand for payment made by or on behalf of the decree holder to the relevant department seeking payment since in an application for an order of mandamus, the law as a general rule requires a demand by the applicant for action and refusal as a prerequisite to the granting of an order, though there are exceptions to the rule. See The District Commissioner Kiambu vs. R and Others Ex Parte Ethan Njau Civil Appeal No. 2 of 1960 [1960] EA 109; R vs. The Brecknock And Abergavenny Canal Co. 111 ER 395 and R vs. The Bristol and Exeter Railway Co 114 ER 859.*

*The said elaborate procedure is further meant to give adequate notice to the Government to make arrangement to satisfy the decree. The procedure, in my view is not meant to relieve the Government from meeting its statutory obligations to satisfy decrees and orders of the Court.....*

*It is therefore clear that apart from the fact of the existence of a judgement against the government, the law recognises that due to the special role played and the central position held by the Government in the management of the affairs of the country, there is a necessity for further proceedings to be undertaken before the judgement can be implemented. Where a party has complied with all the procedures leading to the grant of an order of mandamus to subject the party to the normal procedures relating to contempt of court proceedings would engender a miscarriage of justice yet Article 159(2)(b) mandates that justice ought not to be delayed. To take a successful litigant in circles when adequate notices have been given to the Government to settle a decree would be to turn the legal process into a theatre of the absurd.*

*Accordingly I do not agree with the submissions made by the Respondent that even after an order of mandamus is issued the decree holder ought to be subjected to the technicalities of personal service and the penal notice. Such requirements are necessary in my view in the usual application for contempt where but not in judicial review orders of mandamus compelling a public officer to carry out a duty imposed by statute.”*

10. An order for mandamus was issued on 7/5/2015.

11. I note that this matter has come up for mention severally to confirm payment of the decretal sum which has not materialized to date.

12. I also note that there are several notices to show cause on record issued against the respondent that date back to 2017.

13. I agree with the applicant on the position that to take a successful litigant in circles when adequate notices have been given to the Government to settle a decree would be to turn the legal process into a theatre of the absurd.

14. In this case it's clear that the respondent has been making empty promises on payment to the applicant which is evinced in the court proceedings. Thus the respondent cannot be seen to commit to settle the decree of the court and on the other hand claim not to be aware of the judgement of the court in **CMCC No. 4945 of 2004**, yet the respondent was also a party to that judgment and should also be having a copy thereof.

15. Accordingly, I direct that the person for the time being holding the position of the respondent to appear before this Court in person on 14/10/2021 to show because why warrant of arrest should not be issued with a view to committing him/her to civil jail.

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 20TH DAY OF SEPTEMBER, 2021.**

**E. K. OGOLA**

**JUDGE**

Ruling delivered via MS Teams in the presence of:

Mr. Mkok for Respondent

Mr. Maundu for Applicant

Ms. Peris Court Assistant