REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

MISC. CAUSE NO. 3 OF 2018

IN THE MATTER OF: AN APPLICATION BY DANIEL WAWERU NJOROGE & 17 OTHERS

FOR A JUDICIAL REVIEW ORDER OF MANDAMUS

AND

IN THE MATTER OF: SECTION 5(1) OF THE JUDICATURE ACT, CAP 8 LAWS OF KENYA

AND

IN THE MATTER OF: THE CIVIL PROCEDURE RULES OF ENGLAND PART 81.12-14

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

THE PRINCIPAL SECRETARY,

MINISTRY OF INTERIOR AND CORDINATION OF NATIONAL

GOVERNMENT OF GARISSA.....RESPONDENT

EX-PARTE: DANIEL WAWERU NJOROGE & 17 OTHERS

RULING

Brief Facts

1. This Amended application dated 26th March 2021 brought under **Section 5(1) of the Judicature Act, Section 1A, 1B & 3A of the Civil Procedure Act, Section 8(2) and 9 of the Law Reform Act and the Civil Procedure Rules Part 81.12-14** seeks for orders that this court finds Hon. J. K Kibicho the Principal Secretary, Ministry of Interior and Coordination of the National Government guilty of contempt of court for disobeying court orders made on 7th February 2019 and do commit him to jail for a period of six(6) months. The application is supported by the Statutory Statement of facts of the Applicant.

2. In opposition to the application, the respondent filed Grounds of Opposition dated 13th July 2021 and filed on the same day.

3. Parties agreed to dispose of the application by way of written submissions.

Applicant's Case

4. It is the applicant's case that on 7th February 2019, this honourable court issued an order of *mandamus* to the respondent to pay the *ex parte* applicants the sum of Kshs. 2,664,886.75/- plus interest at court rates with effect from 17th August 2018 till payment in full. The respondent was served with the said court orders on 18th February 2019 and on 24th May 2019, together with the notice of penal consequences. Despite being served with the said orders the respondent has not satisfied the decretal amount. As such, the applicant states

that the respondent should be cited for contempt of court and be committed to jail for 6 months for disobeying the court order. Moreover, no appeal has been preferred against the said orders.

The Respondent's Case

5. It is the respondent's case that the application is fatally and incurably defective and has been brought in bad faith as the respondent is not in contempt of the order made on 7th February 2019 as the order had no timeline as to when the same ought to have been complied with. Furthermore, payment of the decretal amount is dependent on the availability of funds allocated to the respondent by parliament for purposes of settlement of the said claim and parliament is yet to allocate the funds.

6. The respondent contends that the ex parte applicants will not suffer any prejudice as the decretal amount ought to be paid with interest until payment in full. As such, the respondent prays that the application be dismissed with costs.

The Applicant's Submissions

7. The applicant reiterates the contents of its application and submits that the respondent was served with the application on 19th January 2021 and to date has never put in a response despite being given 14 days to file a response. As such, the applicant submits that it made its submissions on the premise that the application is unopposed.

8. The applicant submits that since the respondent has deliberately failed to comply with the said orders, he is eligible for committal to prison for contempt and defiance of the court orders and directives. Furthermore, the respondent has not advanced any reasons why the orders were not complied with for almost 3 years since they were issued. There being no explanation for non-compliance, the applicant contends that the respondent is not keen on complying with the same and should be cited for contempt and committed to jail for 6 months as prayed in the application.

The Respondent's Submissions

9. The ex parte applicants instituted a suit against the Attorney General, who was representing the respondent, for general damages for malicious arrest, illegal confinement, trespass to their persons and defamation of character and reputation and costs of the suit. Judgement was delivered on 30th November 2015 in favour of the ex parte applicants where the respondent was ordered to pay general damages of Kshs. 100,000/- for each ex parte applicant plus interest and costs. Costs were taxed on 21st July 2017 in the sum of Kshs. 288,884/- and a certificate to that effect was issued on 16th August 2018. The ex parte applicants moved the court through a Notice of Motion dated 21st December 2018 for orders of mandamus against the respondent compelling them to pay the sum of Kshs. 2,664,686.75/- to which the court granted the said orders on 7th February 2019. The ex parte applicants then lodged an application dated 26th March 2021 contending that the respondent has openly disobeyed the court order made on 7th February 2019 by failing to make the payment and should be cited for contempt of court.

10. The respondent relies on the case of **Samuel M. N. Mweru & Others vs National Land Commission & 2 Others (2020) eKLR** and submits that the applicant has not demonstrated that the respondent's conduct was deliberate thus not satisfying the high standard of proof applicable to committal to prison for contempt. The respondent further explains that they have not wilfully neglected to obey the court order but submits that the reason for not settling the claim is because parliament has not provided the monies required to settle the claim.

11. The respondent submits that the application has been brought in bad faith since the said orders do not provide a timeline within which the respondent ought to settle the claim. The respondent makes reference to the case of **Republic vs Cabinet Secretary, Ministry of Education & Another ex parte Thadayo Obando [2018] eKLR** as quoted in **Michael Sistu Mwaura Kamau vs Director of Public Prosecutions & 4 Others (2018) eKLR** and submits that an order must be clear and unambiguous for a litigant to sustain contempt proceedings and since the order made on 7th February 2019 possesses no timeline as to when the order should be complied with, the application is fatally and incurably defective.

12. Moreover, the respondent states that a government official is exempt from personal liability for a government debt that is due from the government and therefore unintentional disobedience as is the case herein is not sufficient to justify guilt in contempt proceedings. The respondent relies of the case of **Republic vs Chief Executive Officer, the Independent Electoral Boundaries Commission ex parte Office Technologies Limited [2021] eKLR** which cited the case of **Republic vs Principal Secretary, Ministry of Defence ex parte George Kariuki Waithaka [2019] eKLR** to support their contention.

13. The respondent contends that awarding costs is discretionary as provided in **Section 27 of the Civil Procedure Act** and the case of **Cecilia Karuru Ngayu vs Barclays Bank of Kenya & Another [2016] eKLR** and submits that the court should deny the applicant costs but award costs to the respondent as the application lacks merit and an abuse of the court process. The respondent urges the court to dismiss the application, as the applicant has not proved its case to the required standard.

Issues for determination

14. After careful analysis, the issue for determination is whether the applicants have established any basis for the orders sought to be granted.

The Law

15. **Section 5 of the Judicature Act** provides:-

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.

16. This was observed by the Court of Appeal in the case of **Christine Wangari Chege vs Elizabeth Wanjiru Evans & Others [2014] eKLR:-**

> **"Though the Court of Appeal of England and Wales was established in 1875, some 92 years before the commencement of the Judicature Act, 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 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 their place Supreme Court of Judicature, which must not be confused with the Supreme Court of the United Kingdom which was established only on 1st October 2009 assuming the judicial features of the House of Lords."**

17. The court has a duty to punish deliberate disobedience of its orders as the court does not make orders in vain. It is an established principle of law that in order to succeed in civil contempt proceedings, the applicant must establish:-

i. That the order relied on is clear and unambiguous

ii. That the respondent had the knowledge of the order and

iii. Demonstrate failure by the respondent to comply with the terms of the order.

Upon proof of these requirements, the presence of wilfulness and bad faith on the part of the respondent would normally be inferred, but the respondent could rebut this inference by contrary proof on a balance of probabilities. This was enunciated by **Mativo J** in **Samuel M. N. Mweru & Others vs National Land Commission & 2 Others [2020] eKLR**. Notably, as it was held in **Mwangi H. C. Wangondu vs Nairobi City Commission Nairobi Civil Appeal No. 95 of 1998** where he stated that the threshold of proof required in contempt of Court is higher than that in normal civil cases, and one can only be committed to civil jail or otherwise penalized on the basis of evidence that leaves no doubt as to the contemnor's culpability.

18. The Attorney General and the respondent was served with a copy of judgement on 30/08/2018 and acknowledged receipt. On 07/02/2019, this court issued an order of mandamus directed to the respondent compelling him to pay the applicants a sum of Kshs.2,664,686.75 together with interests at court rates with effect from the date of judgement 17th August 2018 until full payment. the process server filed a verifying affidavit confirming service of the said order on both the attorney general and the respondent on the 15th and 18th February respectively. He filed the affidavit of service on 20/05/2019 on one Ms. Mbiyu, the Chief Legal Officer in the respondent's officer who accepted service by signing.

19. The respondent's in its grounds of opposition, raised the defence of non-allocation of funds by parliament as his reason for not settling the claim. This was addressed by **Githua J** in **Republic vs Permanent Secretary, Ministry of State for Provincial Administration and Internal Security Exparte Fredrick Manoah Egunza [2012] eKLR** as follows:

> **"In ordinary circumstances, once a judgment has been entered in a civil suit in favour of one party against another and a decree is subsequently issued, the successful litigant is entitled to execute for the decretal amount even on the following day. When the Government is sued in a civil action through its legal representative by a citizen, it becomes a party just like any other party defending a civil suit. Similarly, when a judgment has been entered against the government and a monetary decree is issued against it, it does not enjoy any special privileges with regards to its liability to pay except when it comes to the mode of execution of the decree. Unlike in other civil proceedings, where decrees for the payment of money or costs had been issued against the Government in favour of a litigant, the said decree can only be enforced by way of an order of mandamus compelling the accounting officer in the relevant ministry to pay the decretal amount as the Government is protected and given immunity from execution and attachment of its property/goods under Section 21(4) of the Government Proceedings Act. The only requirement which serves as a condition precedent to the satisfaction or enforcement of decrees for money issued against the Government is found in Section 21(1) and (2) of the Government Proceedings Act (hereinafter referred to as the Act) which provides that payment will be based on a certificate of costs obtained by the successful litigant from the court issuing the decree which should be served on the Hon Attorney General. The Certificate of order against the Government should be issued by the court after expiration of 21 days after entry of judgment. Once the certificate of order against the Government is served on the Hon Attorney General, Section 21(3) imposes a statutory duty on the accounting officer concerned to pay the sums specified in the said order to the person entitled or to his advocate together with any interest lawfully accruing thereon. This provision does not condition payment to budgetary allocation and parliamentary approval of Government expenditure in the financial year subsequent to which Government liability accrues.**

20. In this country, the law on requirement of personal service has changed following a host of decisions by superior courts, including the Court of Appeal to the effect that knowledge of a court order supercedes personal service. In this case **Kenya Tea Growers Association Vs**

Francis Atwoli & 5 others Petition No. 64 of 2010, it was held:-

> ***"In the case before me, I am more than satisfied that even at the higher level of beyond reasonable doubt, when an individual has been served with and/or has knowledge of a court order but not only ignores it but in fact incites others to do the same, the threshold for contempt has been met. Francis Atwoli in fact went further to arrogate himself the decision to determine when the strike should end despite the fact that the Court order had stopped it. He went further to interpret it as made without jurisdiction and that only the "Workers Court", (the Industrial Court) had jurisdiction to determine the matter. He did not do so once but on a number of occasion as he flew by helicopter from place to place on 18th October 2012. His contempt was obvious and his conduct and words can attract no other finding.***

21. If the advocate of the party in contempt was present during the delivery of the judgement or had notice, of the orders, party is deemed to have knowledge of the order. The court of Appeal endorsed this position in the case of **Shimmers Plaza Limited Vs National Bank of Kenya(2015) eKLR** held as follows:-

> ***"The dispensation of service on the basis of notice or knowledge of the terms of an order will only apply to a court judgement or order requiring a person not to do an act, that is, a prohibitory order. The dispensation of service under rule 81.8***
>
> ***(1)is subject to whether the person can be said to have had notice of the terms of the judgement or order. The notice of the order is satisfied if the person or his agent can be said to either have been present when the judgment or order was given or made; or was notified of its terms by telephone, email or otherwise. In our view, 'otherwise' would mean any other action that can be proved to have facilitated the person having come into knowledge of the terms of the judgment and/or order. This would definitely include a situation where a person is represented in court by counsel. Once the applicant has proved notice, the respondent bears an evidential burden in relation to wilfulness and mala fides disobedience.***

22. In this application, it is on record and has been denied that the defendant who was the respondent herein the Principal Secretary Ministry of Interior & Coordination of National Government was served with the judgement in 2018 and with the order of *mandamus* in 2019. Service of the order of *mandamus* was done through the Chief Legal Officer of the Ministry who signed to acknowledge and in my view this was sufficient. It was notable that service of the order was not denied. The respondent was therefore aware of the order and cannot escape responsibility.

23. The respondent raised the issue that he cannot be cited for contempt because the order of mandamus had no timelines of payment of the decretal amount and was therefore ambiguous and incapable of merit in contempt proceedings.

The order issued by the court on 7th September 2019 reads as follows:-

> ***"An order of mandamus be and is hereby issued directed to the Principal Secretary, Ministry of Interior and Coordination of the National Government to pay the applicants the sum of Kshs.2,6664,686.75 together with interests from 17th August 2018 till payment in full……"***

24. The respondent apart from arguing that the order had no timelines upon which the respondent would have acted, did not cite any law to that effect. I am not aware of any law or procedural rules that require that a court of law in issuing a decree or an order of *mandamus* must give timelines for payment. Decrees and orders of *mandamus* are enforceable even where no timelines for payment have been set. If the argument of the respondent was to be taken, then decrees and orders would never be enforced. In my considered view, the mere absence of timelines in an order of *mandamus* does not render it ambiguous or inoperative. The order as it is imposes the obligation to pay the applicants the decretal amount that has remained unpaid for the last three(3) years. In any case, the judgement is still valid and has not been set aside.

25. The respondent in his grounds of opposition raised the defence of non-allocation of funds by Parliament as his reason for not satisfying the decree. This defence has been raised before other superior courts. In the case of **Republic Vs Permanent Secretary, Ministry of State for Provincial Administration and Internal Security Exparte Fredrick Manoah Egunza[2012]eKLR** as follows:-

> **"In ordinary circumstances, once a judgment has been entered in a civil suit in favour of one party against another and a decree is subsequently issued, the successful litigant is entitled to execute for the decretal amount even on the following day. When the Government is sued in a civil action through its legal representative by a citizen, it becomes a party just like any other party defending a civil suit. Similarly, when a judgment has been entered against the government and a monetary decree is issued against it, it does not enjoy any special privileges with regards to its liability to pay except when it comes to the mode of execution of the decree. Unlike in other civil proceedings, where decrees for the payment of money or costs had been issued against the Government in favour of a litigant, the said decree can only be enforced by way of an order of mandamus compelling the accounting officer in the relevant ministry to pay the decretal amount as the Government is protected and given immunity from execution and attachment of its property/goods under Section 21(4) of the Government Proceedings Act. The only requirement which serves as a condition precedent to the satisfaction or enforcement of decrees for money issued against the Government is found in Section 21(1) and (2) of the Government Proceedings Act (hereinafter referred to as the Act) which provides that payment will be based on a certificate of costs obtained by the successful litigant from the court issuing the decree which should be served on the Hon Attorney General. The Certificate of order against the Government should be issued by the court after expiration of 21 days after entry of judgment. Once the certificate of order against the Government is served on the Hon Attorney General, Section 21(3) imposes a statutory duty on the accounting officer concerned to pay the sums specified in the said order to the person entitled or to his advocate together with any interest lawfully accruing thereon. This provision does not condition payment to budgetary allocation and parliamentary approval of Government expenditure in the financial year subsequent to which Government liability accrues.**

26. This issue was addressed by **Nyamweya J** in **Republic vs Principal Secretary, Ministry of Defence ex parte George Kariuki Waithaka [2019] eKLR** where she stated as follows:-

> **"Non-allocation of funds by Parliament 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 April 2017 and the respondent did not indicate what steps if any, have been taken since then to effect payment of the monies due to the applicant."**

27. It is imperative to note that the respondent only filed grounds of opposition but no replying affidavit. It is the choice of a party to respond to the application as it suits him/her best. As things stand, the respondent has not explained whether he has made any efforts to include the debt herein in the Ministry budget estimates of any given year since 2019 when judgement was delivered. Such action would give Parliament material for allocating his ministry the funds that are required. It is trite that Parliament will not allocate any funds to government Ministries without budget estimates. Perhaps the respondent's ministry has not made any efforts to address the issue and are not in a hurry to do so.

28. The decisions of Githua J and Nyamweya J are not binding to this court but I agree with the reasoning in finding that non-allocation of funds by Parliament is not a justifiable excuse for failure to satisfy a decree by a Government Ministry and I hereby so find.

29. The applicant herein has established before this court that the respondent was served and has been aware of the judgement and of the order of *mandamus*. No satisfactory reason has been given for failure to disobey the court order issued on 17th September 2019. It has been established that the respondent has not made any efforts to satisfy the decretal amount upon which he can purge the contempt.

30. In my view, the respondent having been served with the order more than two years ago has unqualified obligation to obey the said order unless and until it is discharged as was held in the case of **Central Bank of Kenya & Another Vs Ratilal Automobiles Nairobi Civil Application No. 247 of 2006**. Contempt proceedings are subtle and criminal in nature and call for courts to impose criminal sanctions where one is found guilty of contempt.

31. It is my finding that the respondent wilfully and intentionally defied the orders of this court made on 7th September 2019 to pay Kshs.2,664,686.75 to the applicants in satisfaction of the decretal amount. Consequently, I find him guilty of contempt of the said orders.

32. The respondent shall meet the costs of these proceedings.

33. Sentencing is hereby reserved for the 18th day of January 2022 and summons requiring attendance of the respondent personally to issue and be served by the applicant's advocate.

34. It is hereby ordered.

DELIVERED, DATED AND SIGNED AT NYERI THIS 16TH DAY OF NOVEMBER 2021.

F. MUCHEMI

JUDGE

RULING DELIVERED THROUGH VIDEO LINK THIS 16TH DAY OF NOVEMBER 2021