



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

MISCELLANEOUS CIVIL APPLICATION NO 60 OF 2019

REPUBLIC.....APPLICANT

VERSUS

THE SECRETARY, MIGORI COUNTY GOVERNMENT.....RESPONDENT

EX PARTE: PETER MUDIDA AND ROSE MUDIDA

RULING

1. The genesis of this matter dates back to 27th May 2019 when the ex-parte applicant through a notice of motion dated 23rd May 2019 sought the following order:

1. *That an Order for Mandamus do issue compelling the Respondent, the Secretary Migori County Government to pay the decretal amount in High Court Civil Suit No 121 of 1996 for Kenya Shillings 2,000,000/- inclusive of interest at the rate of 12% p.a. with effect from the 25th day of November 2016 until payment in full plus costs of the suit taxed at Kenya Shillings 505,675/- only inclusive of interest thereon at 14% p.a with effect from the 31st day of October 2017 until payment in full.*

2. After hearing the application on 18th June 2019, I granted the sole prayer in the application.

3. In due course, the ex-parte applicant filed an application dated 10th December 2019 seeking inter alia the following reliefs:

1. *THAT this honourable Court be at liberty to commit the County Secretary of Migori County Government, MR. CRISTOPHER RUSANA to Civil Jail for a term not exceeding six (6) months for blatant breach or disobedience of the Order of this Honourable Court dated 18th June 2019.*

2. *THAT this Honourable Court be pleased to impose such further monetary penalties and costs of and incidental to this application and the Order be made that the Respondent named herein do pay the same personally.*

3. *THAT this Honourable Court do compel the Respondent to comply and enforce the Orders granted herein.*

4. Following the hearing of the application this court granted prayer 1 of the application dated 10th December 2019. The Respondents was consequently called upon to show cause, if any, why he should not be held to be in contempt of court.

5. The Respondent subsequently filed a replying affidavit on 15th October 2020 urging this court to lift the Notice to Show Cause. According to the affidavit filed, the respondent made the following averments:

2. *THAT the Notice to Show Cause issued against me in this matter is in breach of the law under Section 30 of the Contempt of Court Act No 46 of 2016 in the following respect:*

a) *No prior notice has been issued to me to show cause why contempt of court orders proceedings should not be commenced against me.*

b) *No contempt of court proceedings have been conducted against me pursuant to the issuance of the said notice.*

c) *No notice under section 30 of the said Act has been issued to the Attorney General before commencement of contempt of court*

proceedings against me.

d) It has not been shown that the alleged contempt of court has been committed with my consent or convenience or is attributable to any act of neglect on my part.

3. THAT issuance of the NTSC against me without due process being followed amounts to infringement of my constitutional rights to a fair trial.

4. THAT I urge the Honourable court to lift the NTSC issued against me to allow compliance with due process.

5. THAT be as it may, the County Government of Migori is aware of the decree that gave rise to the proceedings herein.

6. THAT on my part I have taken necessary steps within my lawful mandate as County Secretary, County Government of Migori, to have the County Government settle the decretal sum herein this being a historical claim inherited from the former Town Council of Migori and in spite of the cash crunch that County Governments are undergoing in Kenya.

7. THAT on 30th June 2020 I made a demand by issuing a memo to the Chief Officer of Finance & Economic Planning of the County Government of Migori to pay the decretal sum without delay.

8. That I verily believe that the County Government of Migori is keen to settle the debt as stated as soon as funds are available and that there is no deliberate act to obstruct and/or delay settlement of the said decretal sum as would amount to disobedience of the court order as alleged by the applicant or at all.

6. A supporting affidavit dated 5th July 2021 was also filed by the County Attorney of County Government of Migori, Matiko Mang'ere. He deposed that the Migori County Government had prioritized payment of the judgment sum of this suit; hence payment was to be done in the month of September 2021 upon release of funds by the National Treasury.

ANALYSIS AND DETERMINATION

7. At this stage, I must say that this court already satisfied itself that adequate notice was given to Migori County Government to make arrangement to satisfy the decree. The respondent was served with the notice of motion dated 23rd May 2019 but failed to appear at the hearing thereof.

8. At the hearing of the said application, the court was satisfied that the respondent had a public legal duty to pay the decretal sum to the applicant but it had failed to do so. The court through an order of mandamus directed the respondent to pay the applicant the sums claimed in his application as there was no other adequate remedy is available to the Applicants.

9. On 29th July 2020, I found that the applicant was in contempt of court orders and directed that a notice to show be issued against him.

10. **Mr. Nyagwencha**, counsel for the applicant submitted that the respondent has been served with all court orders but has blatantly failed to comply with the said orders.

11. The respondent's counsel, **Mr. Nyasimi**, in his oral submissions before the court cited provisions of the **Contempt of Court Act No 46 of 2016** that was declared unconstitutional in **Kenya Human Rights Commission v Attorney General & another [2018] eKLR**.

12. The respondent argued that that the County Government of Migori took over from the county council which owed a lot of debt, however, he intends to take steps to pay the debt that was previously owed by the county council.

13. However, having considered the proceedings before the court, the respondent through counsel had earlier intimated that they were in the process of making payment and were indulged on several occasions to satisfy the decree. The court took into consideration that indeed it had taken over debts and had come up with a scheme to settle them and allowed them to do so. Unfortunately, the decretal sum remains unpaid despite their assurances that the debt would be cleared in September of 2021. In **Republic v County Chief Officer, Finance & Economic Planning, Nairobi City County Ex Parte Stanley Muturi [2018] eKLR**

*“...settlement of decretal sum by the Government whether National or County does not necessarily depend on the availability of funds. This position was appreciated by this Court in **Wachira Nderitu, Ngugi & Co. Advocates vs. The Town Clerk, City Council of Nairobi Miscellaneous Application No. 354 of 2012** in which this Court pronounced itself as follows:*

“I have however considered the other issues raised by the respondent with respect to its debt portfolio as against its financial resources. It is neither in the interest of this Court nor that of the ex parte applicant that the respondent should be brought to its knees. The Court appreciates and it is a matter of judicial notice that most of the local authorities are reeling under the weight of the debts accrued by their predecessors and that they are trying to find their footing in the current governmental set up. Accordingly, I am satisfied based on the material on record that the respondent ought to be given some breathing space to arrange its finances and settle the sum due herein.”

29. In my view a party facing financial constraints is at liberty to move the Court for appropriate orders which would enable it to settle its obligations while staying afloat. That however, is not a reason for one to evade its responsibility to settle such obligations.

In other words, financial difficulty is only a consideration when it comes to determining the mode of settlement of a decree but is not a basis for declining to compel the Respondent to settle a sum decreed by the Court to be due from it. That objection therefore fails.”

14. The orders of this court have not been complied with despite this court having granted the respondent several opportunities to comply with the order. In **Wildlife Lodges Ltd vs. County Council of Narok and Another [2005] 2 EA 344 (HCK)**, the Court stated as follows:

“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...”

15. It is not in doubt that the respondent has neglected to settle the decree of this court in **HCCS No 121 of 1996** that was issued on 28th June 2017 before taxation of costs. This court therefore finds that the Secretary, Migori County Government, Mr. Christopher Rusana is in contempt of the court orders issued on 18th June 2019. The Secretary, Migori County Government, Mr. Christopher Rusana having failed to demonstrate why he should not be held to be in contempt of court orders, I therefore direct that he should appear before this Court on 15th February 2022 for purposes of sentencing.

16. Costs are awarded to the applicant.

DATED, SIGNED AND DELIVERED AT KISII THIS 15TH DAY OF DECEMBER, 2021.

R. E. OUGO

JUDGE

In the presence of:

Mr. Nyangwencha	For the Applicant
Mr. Aswani	Present
Respondent	Absent
Isindu	Court Assistant