



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW CASE NO. 143 OF 2014

REPUBLIC.....APPLICANT

VERSUS

NAIROBI CITY COUNTY.....1ST RESPONDENT

EX PARTE:

ELMA LIMITED

RULING

The Application

1. Elma Limited is the *ex parte* Applicant herein (hereinafter “the Applicant”), and it commenced judicial review proceedings against Nairobi City County, hereinafter “the Respondent”) for certiorari and prohibition orders. The said orders were granted with costs to the Applicant by this Court (Odunga J.) in a judgment delivered on 8th October 2014. The Applicant thereafter filed a Party and Party Bill of Costs which was taxed at Kshs.6,713,161.00 in a ruling delivered herein on 25th February 2016 by Hon. R. Oganyo, the Taxing Master. The Applicant was aggrieved by the Respondent’s failure to make the payment of the said costs, and subsequently moved this Court *vide* a Notice of Motion dated 7th November 2017, which sought among other reliefs, that a notice to show cause be issued against the Respondent to show why contempt of court proceedings should not be commenced against it.

2. The application was heard in the absence of the Respondent and its officers who had been served, and subsequently allowed by the Court on 29th January 2018. The learned judge (Odunga, J) proceeded to direct that a Notice to Show Cause be issued to the Respondent, the Respondent’s Chief Officer in Charge of Finance and the Attorney General to show cause why contempt proceedings should not be commenced against them. The Notice to Show Cause was subsequently issued on 16th February 2018 and served on the relevant parties.

3. The Respondents then sought to respond to the Notice to Show Cause and filed a Replying Affidavit sworn on 12th April 2018 by Leboo Ole Morintant, its acting County Secretary. It was averred therein that the cause of action that triggered the proceedings herein arose during the transition period of the first Nairobi County Government. That, when the first County Government completed its term in or around August 2017, all the claims outstanding were categorized as pending bills and declared to the National Treasury, Controller of Budget, the Senate and National Assembly for evaluation and allocation of funds to service the pending bills. It was deponed that the Respondent on its part, constituted a Pending Bills Committee *vide* Kenya Gazette Notice No. 2101 of 2018, to fast track their evaluation and processing for payment upon receipt of the budget allocation for purposes of paying the pending bills. A copy of the said Gazette Notice was annexed,

4. It was therefore the Respondent’s averment that it had made diligent efforts to liaise with the budgetary organs to provide funding to settle all its genuine debtors in full. The Respondent termed the instant proceedings as premature and reiterated that neither it nor its employees, agents and/or servants were in contempt of any court orders, and urged the Court to dismiss and/or direct the Applicant to pursue its claim with the Pending Bills Committee.

5. The Respondent also filed Grounds of Opposition dated 13th July 2018 as follows:

1) That the Notice of Motion Application dated 7th November 2017 is premature as :

a) there is no mandamus order which has ever been sought or granted compelling the Respondent to pay the Applicant the sum of Kshs. 6,713,161.00 it is claiming.

b) the Applicant has hitherto never obtained nor served the Respondent with a certificate or order against the Government as required by the mandatory provisions of Section 21 of the Government Proceedings Act, Cap 40 Laws of Kenya.

2) That the alleged contemnors are non-suited in these proceedings as they are not the ones under the obligation to pay the funds of the Respondent and the County Executive Committee Member in charge of Finance is the one obligated to pay the funds of the Respondent.

3) That there is no court order that has been violated by the alleged contemnors.

6. The Applicant filed a Supplementary Affidavit sworn on 30th August 2018 by its Director, Amrital Singh Suri, in response to the Respondent's Replying Affidavit and Grounds of Opposition. It was averred therein that the Applicant duly submitted its claim to the Respondent on 11th April 2018 in response to the establishment of the Pending Bills Committee but the Respondent has neither paid the said amount or informed the Applicant of any progress on the processing of the payment to date. The Applicant in this respect annexed a copy a letter by its Advocates in which it submitted their claim to the Respondent.

7. It was further averred that the order of judicial review included the payments of costs, and it would be injudicious to claim that there is no order of mandamus compelling the Defendants to pay the sum of Kshs. 6,713,161.00. Further, that section 21 of the Government Proceedings Act does not apply to the instant proceedings, and that the County Secretary and the Chief Officer in charge of Finance (being the County Executive Committee Member in charge of finance) are rightly joined to this suit.

8. After the close of the pleadings, this Court directed the parties to file their respective submissions on the Notice to Show Cause. After the initial submissions were filed by the Applicant and Respondent, this Court directed the parties on 26th November 2018 to file supplementary submissions on the implications of the decision of the High Court (Mwita, J) in **Kenya Human Rights Commission v Attorney General & Another [2018] eKLR** wherein it was held inter alia that sections 30 and 35 of the Contempt of Court Act No. 2010 are inconsistent with the Constitution and therefore null and void, and that the entire contempt of Court Act was invalid for lack of public participation and encroaches on the independence of the Judiciary. The Applicant's and Respondent's respective cases as set out in their submissions now follow.

The Applicant's Case

9. The Applicant filed skeletal submissions dated 30th August 2018. It was submitted that the contents of the Respondent's Replying Affidavit and Grounds of Opposition were misplaced with no legal foundation for reasons that the Court heard and dispensed with the application dated 7th November 2018 on 29th January 2018 and issued the said Notice to Show Cause upon being satisfied that the said officers and the Respondent had been served. In any case there is no application to set aside the court orders made on 29th January 2018. Furthermore, that whereas at the trial stage of the proceedings the Respondent was represented by the firm of Evans Mogire Advocates, the Respondent failed to obtain leave to introduce its present firm, Musyoki Mogaka & Co. Advocates. It was submitted that the present firm filed a Notice of Appointment of Advocates, notwithstanding that there was an advocate on record for the Respondent, contrary to the provisions of Order 9 of the Civil Procedure Rules.

10. The Applicant also filed a Reply submissions to the Respondent's submissions dated 22nd November 2018, wherein the contents of the Applicant's skeletal submissions were reiterated. In addition, the Applicant in its supplementary submissions dated 20th February 2019 contended that the Court having heard, determined and allowed the application dated 7th November 2018, is *functus officio*. Reference was made to the case of **Law Society of Kenya v Kenya Revenue Authority & Another [2017] e KLR** for this position. It was submitted that the Court's present task is to deal with how to effect the orders of the court made on 29th January 2018. That, in any case the Court's power to deal with Contempt of Court is entrenched in the Constitution and the rule of law. Therefore, by declaring the Contempt of Court Act invalid, the Court's power to deal with contempt cases is not encumbered but in fact widened. The Applicant submitted that in view of Section 5(1) of the Judicature Act which gives the High Court power to punish for contempt, Article 159 of Constitution which places judicial authority on the courts and Sections 1A, and 1B of the Civil Procedure Act, the Court's power to punish for contempt is not limited and can be exercised *suo moto* and in any way the Court thinks just and expedient. Therefore, the summoning of the supposed contemnors to show cause was in order.

The Respondent's Case

11. The Respondent filed written submissions dated 2nd October 2018. It was submitted that whereas the Applicant obtained a certificate of taxation certifying that it was entitled to be paid by the Respondent the sum of Kshs. 6,713,161.00, it ought to also have obtained a certificate of order against the government. It was the Respondent's submission that after obtaining the certificate of order, the Applicant would then commence fresh judicial review proceedings against the Respondent seeking a mandamus order compelling the Respondent to pay it the said sum. That, the Applicant's failure to obtain a certificate of order against the government renders an application for mandamus order fatally and incurably defective. The Respondent cited the provisions of section 21 of the Government Proceedings Act and further relied on the case of **Republic vs County Secretary, Nairobi City County & Another Ex Parte Wachira Nderitu Ngugi & Co. Advocates [2016] e KLR** and **Republic vs County Secretary Migori County Government & Another [2018] e KLR**.

12. It was also submitted that the Respondent, its County Secretary and the Chief Officer in charge of Finance are non-suited for joinder in the instant proceedings, as the duty to pay out funds from the County Treasury is vested upon the County Executive Member in charge of finance. In this regard, the Respondent relied on Sections 103(1), 103(3) of the Public Finance Management Act, CAP 412C Laws of Kenya, and Sections 44(1), 44(3) of the County Governments Act. In response to the Applicant's submission that the firm of Musyoki Mogaka & Co Advocates ought to have filed a Notice of Change of Advocates and not a Notice of Appointment of Advocates, the Respondent argued that this was a question of form rather than substance, noting that the document filed did not occasion any injustice to the Applicant.

13. It was submitted that in any event the document served its intention, which was to inform the Applicant that a new firm of Advocates was acting for the Respondent. Contrary to the Applicant's assertions, the Respondent argued that the said Notice of Appointment did not offend the provisions of Order 9 rule 9 of the Civil Procedure Rules, which provision(s) was intended to protect the interests of an advocate who had represented a party until after judgment. That, the Respondent was previously represented by Evans Mogire, its in-house counsel, hence the issue of non-payment of legal fees to the previous advocates of the Respondents does not arise.

14. The Respondent, while citing Article 159 (2) (d) of the Constitution, argued that this Court is enjoined to administer justice without undue regard to procedural technicalities. It was submitted that striking out the Respondent's Affidavit without a formal application by the Applicant would impede the Respondent's access to justice as envisioned under Article 48 of the Constitution. Further, that this would amount to condemning the Respondent unheard contrary to the rules of natural justice. The Respondent made reference to Section 1A of the Civil Procedure Act, to wit, the overriding objectives of the Act and the Rules made thereunder are to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act. It was submitted that the Court was mandated to give effect to the overriding objective as provided under the said Section 1A.

15. The Respondent also filed supplementary submissions dated 1st March 2019, and urged that in light of the determination in **Kenya Human Rights Commission v Attorney General & Another [2018]**, the Notice of Motion Applicant dated 7th November 2017 cannot stand, for reason that the application was anchored on Section 30 of the Contempt of Court Act which has since been declared unconstitutional. The Respondent cited the case of **Beatrice Kedeversia Elachi vs Nairobi City County Assembly Service Board & 4 Others [2018] e KLR** wherein it was held that as the application therein had been anchored on the Contempt of Court Act which has now been declared invalid, it had no legs to stand and was terminated. It was submitted that since contempt proceedings are akin to criminal proceedings whereby the alleged contemnors risk imprisonment and loss of their liberty for the offence, it is important that the alleged contemnors are shown to be punished under a specific law.

16. It was further submitted by the Respondent that section 3A of the Civil Procedure Act cannot aid the Applicant as this general rule cannot apply where there is a specific Order and Rule, as this would amount to throwing the rules of procedure out of the window. It was submitted that Section 3A of the Civil Procedure Act is not a panacea for all ills. The Respondent cited **Elephant Soap Factory Ltd vs Nahashon Mwangi & Sobs Nairobi HCCC No. 913 of 1971** wherein it was held that the court will not invoke its inherent jurisdiction when there is an express provision dealing with the matter since the court may not nullify an express provision by invoking its inherent powers.

The Determination

1. I have considered the submissions made by the Applicant and Respondent, and would like to comment on a preliminary issue raised as regards whether the Respondent's Advocates are properly on record, having come on record after judgment was delivered herein by way of Notice of appointment. The Applicant also sought to have the pleadings filed by the said Advocates expunged from the record or this reason. I find that as this issue was not specifically pleaded and no prayers were made in this respect by the Applicant in its application, this Court cannot make any finding or orders thereon. The Applicant will therefore have to properly move this Court on the said issue, so that parties are granted the opportunity to be heard, and the Court to make a considered determination on the issue.

2. The substantive issues that therefore arise for determination are firstly, whether the Notice to Show Cause proceedings herein are competently before the Court, and if so, secondly, whether Notices to Show Cause should issue against the Respondent and its named officers.

3. On the first issue, at the time of the filing of the Applicant's application, the applicable law on the procedure in contempt of Court proceedings against a government entity such as the Respondent, and its named officers, was provided in section 30 of the Contempt of Court Act of 2015, which states as follows:

“(1) Where a State organ, government department, ministry or corporation is guilty of contempt of court in respect of any undertaking given to a court by the State organ, government department, ministry or corporation, the court shall serve a notice of not less than thirty days on the accounting officer, requiring the accounting officer to show cause why contempt of court proceedings should not

be commenced against the accounting officer.

(2) No contempt of court proceedings shall be commenced against the accounting officer of a State organ, government department, ministry or corporation, unless the court has issued a notice of not less than thirty days to the accounting officer to show cause why contempt of court proceedings should not be commenced against the accounting officer.

(3) A notice issued under subsection (1) shall be served on the accounting officer and the Attorney-General.

(4) If the accounting officer does not respond to the notice to show cause issued under subsection (1) within thirty days of the receipt of the notice, the court shall proceed and commence contempt of court proceedings against the accounting officer.

(5) Where the contempt of court is committed by a State organ, government department, ministry or corporation, and it is proved to the satisfaction of the court that the contempt has been committed with the consent or connivance of, or is attributable to any neglect on the part of any accounting officer, such accounting officer shall be deemed to be guilty of the contempt and may with the leave of the court be liable to a fine not exceeding two

hundred thousand shillings.

(6) No State officer or public officer shall be convicted of contempt of court for the execution of his duties in good faith.”

4. However, on 9th November 2018, the High Court (J. Chacha Mwita) in a judgment delivered in **Kenya Human Rights Commission v Attorney General & Another, [supra]** declared sections 30 and 35 of the Contempt of Court Act to be inconsistent with the Constitution and null and void, and also declared the entire Contempt of Court Act No 46 of 2016 invalid for lack of public participation as required by Articles 10 and 118(b) of the Constitution, and for encroaching on the independence of the Judiciary.

5. I am therefore obliged to revert to the provisions of the law that operated before the enactment of the Contempt of Court Act, to avoid a lacuna in the enforcement of Court's orders. It was in this respect observed in **Republic vs. Returning Officer of Kamkunji Constituency & The Electoral Commission of Kenya, HCMCA No. 13 of 2008**, that the High Court has the responsibility for the maintenance of the rule of law, hence there cannot be a gap in the application of the rule of law.

6. In addition, where there is a lacuna with respect to enforcement of remedies provided under the Constitution or an Act of Parliament, or if, through the procedure provided under an Act of Parliament, an aggrieved party is left with no alternative but to invoke the jurisdiction of the Court, the Court is perfectly within its rights to adopt such a procedure as would effectually give meaningful relief to the party aggrieved, in exercise of the inherent jurisdiction granted to the Court by section 3A of the Civil Procedure Act to grant such orders that meet the ends of justice and avoid abuse of the process of Court.

7. The procedure existing before the enactment of the *Contempt of Court Act* was restated by the Court of Appeal in **Christine Wangari Gachege vs. Elizabeth Wanjiru Evans & 11 Others, [2014] eKLR**. In that case the Court found that under Rule 81.4 of the English *Civil Procedure Rules*, which deals with breach of judgment, order or undertaking. The English law on committal for contempt of court was applied by virtue of section 5(1) of the Judicature Act which provided 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.”

8. This section was however repealed by section 38 of the Contempt of Act, and while the said Act is now no longer operative, the substance of the common law is still applicable under section 3 of the Judicature Act. This Court is in this regard guided by the applicable English Law which is Part 81 of the English Civil Procedure Rules of 1998 as variously amended, and the requirement for personal service of court orders in contempt of Court proceedings is found in Rule 81.8 of the English Civil Procedure Rules.

9. The said rule 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.

10. 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 v Kenya Posts and Telecommunications Corporation, (1994) KLR 1**, and **Ochino & Another v Okombo & 4 others (1989) KLR 165** in this respect.

11. 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** .

12. As regards culpability, no person will be held guilty of contempt for breaking an order unless the terms of the order are themselves clear and unambiguous as held in **Iberian Trust Ltd vs Founders Trust and Investment Co. Ltd (1932) 2 KB 913**. Furthermore, if the court is to punish anyone for not carrying out its order the order must in unambiguous terms direct what is to be done. It was held in **Radkin-Jones vs Trustee of the Property of the Bankrupt, (1965) 109 Sol. Jo. 334** that an order should be clear in its terms, and should not require the person to whom it is addressed to cross-refer to other material in order to ascertain its precise obligation.

13. In addition, 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.

14. Lastly on the applicable principles, it was held in **Mwangi H.C. Wangondu vs Nairobi City Commission, Nairobi Civil Appeal No. 95 of 1998** 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.

15. Applying these principles to the present application, it is evident that the Notice to Show Cause proceedings that are presently before this Court are in effect proceedings that are intended to culminate in leave to commence contempt of court proceedings

against the Respondent and its officers. No such procedure now exists in law, in light of the annulment of section 30 of the Contempt of Court Act, and also given that leave to commence contempt proceedings is no longer a requirement under English law. To this extent the Notice to Show Cause proceedings are now superfluous, and what an applicant is now required to demonstrate are the requirements of contempt of court enunciated in the foregoing in a substantive application for contempt of Court.

16. Even if the Notice to Show Cause proceedings had proceeded to their logical conclusion under the annulled Contempt of Court Act, it is my view that sufficient cause has been shown by the Respondent, as the Applicant did not demonstrate compliance with the Government Proceedings Act. Section 21 of the said Act provides for the as follows as regards the requirements to be met in the enforcement of orders as against Government in civil proceedings:

“(1) Where in any civil proceedings by or against the Government, or in proceedings in connection with any arbitration in which the Government is a party, any order (including an order for costs) is made by any court in favour of any person against the Government, or against a Government department, or against an officer of the Government as such, the proper officer of the court shall, on an application in that behalf made by or on behalf of that person at any time after the expiration of twenty-one days from the date of the order or, in case the order provides for the payment of costs and the costs require to be taxed, at any time after the costs have been taxed, whichever is the later, issue to that person a certificate in the prescribed form containing particulars of the order:

Provided that, if the court so directs, a separate certificate shall be issued with respect to the costs (if any) ordered to be paid to the applicant.

(2) A copy of any certificate issued under this section may be served by the person in whose favour the order is made upon the Attorney-General.

(3) If the order provides for the payment of any money by way of damages or otherwise, or of any costs, the certificate shall state the amount so payable, and the Accounting Officer for the Government department concerned shall, subject as hereinafter provided, pay to the person entitled or to his advocate the amount appearing by the certificate to be due to him together with interest, if any, lawfully due thereon:

Provided that the court by which any such order as aforesaid is made or any court to which an appeal against the order lies may direct that, pending an appeal or otherwise, payment of the whole of any amount so payable, or any part thereof, shall be suspended, and if the certificate has not been issued may order any such direction to be inserted therein.

(4) Save as aforesaid, no execution or attachment or process in the nature thereof shall be issued out of any such court for enforcing payment by the Government of any such money or costs as aforesaid, and no person shall be individually liable under any order for the payment by the Government, or any Government department, or any officer of the Government as such, of any money or costs.”

17. This position was explained in Republic vs Permanent Secretary Ministry of State for Provincial Administration and Internal Security (2012) e KLR where J. Githua held 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.”

18. Therefore, while there were orders for payment of costs given in the present judicial review proceedings, it is evident that there are additional procedures required to be followed under section 21(1) of the Government Proceedings Act, in terms of service of the required certificates on the Respondent and its accounting officers for a *prima facie* case to arise as regards their statutory duty to pay the claimed costs. No evidence of such service was produced by the Applicant, and to this extent I find that the Respondent and its officers did show sufficient cause why contempt proceedings cannot lie against them.

19. I therefore find that the Notice to Show Cause proceedings herein have been overtaken by events given the annulment of section 30 of the Contempt of Court Act on which the proceedings were grounded, In addition, it is also my finding that the said proceedings are also premature as compliance with section 21 of the Government Proceedings Act was not demonstrated by the Applicant.

20. In the premises, the Notice to Show Cause proceedings brought by the Applicant pursuant to the Notice of Motion dated 7th November 2017 are accordingly struck out. The Applicant is however at liberty to bring substantive contempt of Court proceedings under the applicable law. Lastly, since the circumstances giving rise to these orders are not of the Applicant's own making, there shall be no order as to costs.

21. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 9TH DAY OF APRIL 2019

P. NYAMWEYA

JUDGE