REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

MISCELLANEOUS APPLICATION NO. 479 OF 2018

In the matter of an Application by Power Pump Technical Co. Ltd for Judicial Review for Orders of *Mandamus*

BETWEEN

Power Pump Technical Co. Ltd and the County Government of Kitui

and

The Republic of Kenya.....Applicant

and

County Government of Kitui.....Respondent

and

Power Pump Technical Co. Ltd.....*Ex parte* Applicant

JUDGMENT

1. The *ex parte* applicant seeks an order of *Mandamus* to compel the Respondent to comply with a court Decree issued in High Court Milimani Misc. Application No. 192 of 2018 on 31st October 2018; and pay the *ex parte* applicant Ksh. 22.5 Million plus interests effective from 20th May 2011 until payment in full.

2. The *ex parte* applicant also prays for an order that in default of complying with the above order, the County Secretary, County Government of Kitui do serve six (6) months in civil jail for open disobedience of a lawful court order.

3. Lastly, the applicant also prays for costs of these proceedings.

Factual matrix

4. The *ex parte* applicant states that it entered into a contract with the County Council of Kitui, the Respondent's predecessor to construct a slaughter house at Kabati Market, within Kitui County on its behalf. It states that the contract contained an arbitration clause, and, that after a dispute arose, it was referred for arbitration, and, that, arbitrator delivered his final award on 8thDecember 2017, which was amended by consent on 16th January 2018.

5. The *ex parte* applicant states that despite the Respondent undertaking to pay the said sum vide a letter dated 21st December 2017, it failed, necessitating filing of High Court Misc No. 193 of 2018 seeking the adoption of award as a decree of the court, and, application was allowed with costs on 31st October 2018. It states that a copy of the ruling/decree was served upon the Respondent on 29th November 2018, but the Respondent failed, declined and or refused to satisfy the decree.

Legal foundation of the application

6. The *ex parte* applicant hinges its application on the grounds that the Respondent has a constitutional duty to obey and comply with lawful court orders, and, that, failure to comply with a lawful court order is an affront to the Constitution and the Rule of Law which the Respondent is bound to uphold at all times.

7. It also states that the continued and repeated failure by the Respondent to comply with lawful court orders will lead to the lowering of the dignity and standing of the court in the eyes of members of the public, thus, eroding public confidence in the judiciary. In addition, it states that this court has a duty to ensure that its orders are obeyed.

Respondent's Replying Affidavit

8. Alexander Kimanzi, the Acting County Secretary, Kitui County Government swore the Replying Affidavit dated 17th April 2019. He averred *inter alia* that their previous advocates did not advise them on the option of approaching the court to set aside the award, and, that,

their application for leave filed after three months was struck off.

9. He further averred that the arbitrator acted *ultra vires*, arbitrarily, capriciously and that the amended award is unconstitutional. He also deposed that the award was aimed at unjustly enriching the applicant because the tender value was Ksh. 4,427,863.80 but the arbitrator awarded an award which was five times the original value, that, is Ksh. 22,502,712/=. He also averred that the amount has not been previously budgeted for in the financial year 2018/2019, and, that, the auditor general is currently verifying claims at the County Governments and unless the said processes are finalized, payment will not be effected.

10. In addition, he averred that the said debt ought to be settled by the National Government since it was inherited from the defunct Kitui County Council.

***Ex parte* applicant's Supplementary Affidavit**

11. Philip Kioko Kathenge swore the supplementary affidavit dated 7thMay 2019 in response to the Respondents Replying affidavit. He deposed that the Respondent's Replying affidavit is misguided to the extent that it raises matters that ought to have been raised before the Arbitral Tribunal. He also averred that the issue of the variation of the contract was dealt with at the Tribunal and that it cannot be re-opened at this stage. He also averred that the same arguments were raised before the High Court, but they were dismissed. In addition, he averred that the Respondent seems to concede the application for *Mandamus* but cites budgetary constraints.

Determination

12. Upon analysing the facts presented by the parties, I find that two issues fall for determination.The first issue is whether the *ex parte* applicant has established grounds for the court to grant the order of *Mandamus* sought.

13. The *ex parte* applicant's counsel submitted that the applicant has established grounds for the court to grant the *Mandamus* sought. To buttress his argument, he relied on *Republic v Principal Secretary State Department of Interior, Ministry of Interior & Coordination of National Government & Principal Secretary ex parte Salim Awadh Salim & 12 Others*[1] and *Apotex Inc v Canada (Attorney General**[2]*** *and Dragon v Canada (Minister of Citizenship and Immigration).*[3]

14. In particular, counsel argued that there is a public duty on the part of the Respondent to settle the amount, which duty is owed to the applicant who has a right to be paid. He submitted that the applicant has been granted reasonable time to pay to no avail. He also stated that there is no other adequate remedy available to the applicant and that; *Mandamus* is the only avenue available to enforce the compliance by a public body. He argued that the balance of convenience is in favour of issuance of the order sought.

15. Counsel further placed reliance on *Republic v Town Clerk of Webuye County Council & Another*[4] a decision, which underscored a decree holder's right to enjoy the fruits of his judgment. In addition, it was held in the said decision that the constitutional right to access justice is negated if the fruits of a decree are not realized. To further buttress his argument that the *ex parte* applicant has no other option of realizing the fruits of his judgment, he relied on *Republic v The Attorney General & Another ex parte James Alfred Koroso*.[5]

16. The Respondents counsel correctly set out the tests for *Mandamus* as laid down in *Apotex Inc v Canada (Attorney Genera)* (supra) *Dragon v Canada (Minister of Citizenship and Immigration)*, (supra). The applicant's counsel also cited the same decisions.

17. The Respondent's counsel's position as I understood him is that since the debt was incurred by the defunct County Council of Kitui, it is not payable by its successor, the County Government of Kitui, and, that, the assets and liabilities of the defunct county council are yet to be transferred to the national government. He also argued that the Respondents lodged an appeal against the decree sought to be enforced.

18. The position taken by the Respondent in both its Replying affidavit and the submissions by its advocate is rather interesting. It ranges from a clear admission to in ability to pay citing budgetary constraints/allocation and a denial of liability. Its argument is further blurred by citing matters that either were raised or could have been raised before the arbitrator and also raising issues that were raised or ought to have been raised before the High Court, which confirmed the award. Worse still, suggesting that an appeal was preferred does not help at all because before me is a decree that has not been set aside, stayed, varied or overturned. Put differently, the matters raised by the Respondent do not serve any utilitarian value in confronting the application facing it. Moreover, this same Respondent undertook in writing to settle the amount, and failed to do so.

19. *Mandamus* will issue to compel a person or body of persons who has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed.[6] *Mandamus* is a judicial command requiring the performance of a specified duty, which has **not been** performed. Originally, a common law writ, *Mandamus* has been used by courts to review administrative action.[7]

20. *Mandamus* is employed to compel the performance, when refused, of a Ministerial duty, this being its chief use. It is also employed to compel action, when refused, in matters involving judgment and discretion, **but not to direct** the exercise of judgment or discretion in a particular way, nor to **direct the retraction or reversal of action already taken in the exercise of either**.[8]

21. *Mandamus* is a discretionary remedy, which a court may refuse to grant even when the requisite grounds for it exist. The court has to weigh one thing against another to see whether or not the remedy is the most efficacious in the circumstances obtaining. The discretion of the court being a judicial one must be exercised on the basis of evidence and sound legal principles. *Mandamus* is an equitable remedy that serves to compel a public authority to perform its public legal duty and it is a remedy that controls procedural delays.

22. The test for *mandamus* was set out in *Apotex Inc. vs. Canada* (*Attorney General*),[9] and, was discussed in *Dragan vs. Canada* (*Minister of Citizenship and Immigration*).[10] Bothcounsels cited these two decisions in this case. As expected, the counsel applied and interpreted

the same tests to suit their respective cases. I will list the eight factors laid down in the above two cases that must be present for the writ to issue and proceed to apply them to facts and circumstances of this case. The tests are:-

i. *There must be a public legal duty to act;*

ii. *The duty must be owed to the Applicants;*

iii. *There must be a clear right to the performance of that duty, meaning that:-*

a. The Applicants have satisfied all conditions precedent; and

b. There must have been:-

i. *A prior demand for performance;*

ii. *A reasonable time to comply with the demand, unless there was outright refusal; and*

iii. *An express refusal, or an implied refusal through unreasonable delay;*

iv. *No other adequate remedy is available to the Applicants;*

v. *The Order sought must be of some practical value or effect;*

vi. *There is no equitable bar to the relief sought;*

vii. *On a balance of convenience, mandamus should lie.*

23. The claim arises from an unsatisfied court decree, which has never been set aside, varied or reviewed. The Respondent is aware about the decree and even undertook in writing to pay the amount but failed to do so.

24. The Respondents were given notice to settle the decretal amount but they refused to pay. One of the requirements enumerated above is "a reasonable time to comply with the demand." In my view, the applicant has been afforded a reasonable time to pay.

25. The other test is "an express refusal, or an implied refusal through unreasonable delay." *"Unreasonable delay'* has been established in the present case. *Secondly,* an express refusal or even implied refusal has been established. No good cause has been shown as to why payment has not been effected. *Mandamus* can issue where it is clear that there is *wilful* refusal or *implied* and or *unreasonable* delay in complying with the court order.

26. Its trite that the ex parte applicant cannot levy execution against the Respondent, hence there is no other adequate remedy is available to the Applicant. I have no doubt in my mind that the order is of some practical value or effect to the *ex parte* applicant. I find no equitable bar to the relief to the order sought. Lastly, the on a balance of convenience, mandamus should lie in this case because the law and the facts favour the granting of the order.

27. *Mandamus* is the most effective remedy in the circumstances of this case as opposed to a legal remedy. The classification of a remedy as equitable brings into play a number of special doctrines that are peculiar to equitable remedies. (Similarly, the classification of a remedy as legal brings into play other special doctrines, though they lack the systematicity of the equitable doctrines.) The following examples though not exhaustive are useful.

28. *First,* an equitable remedy may be given only if legal remedies are inadequate. I have already stated that there is no other available and effective remedy. The decree cannot be executed against the Respondent.

29. *Second,* a claim for an equitable remedy is subject to special defences. These include laches, unclean hands, and undue hardship, a defence when the equitable remedy would be especially burdensome to the defendant (provided that the defendant has acted equitably). None of these defences has been cited in this case. The allegation of budget constraints does not meet this test. In any event, the Respondent has not acted equitably. I undertook in writing to pay, but defaulted. The same reasons raised before the arbitrator and before the High Court or which ought to have been the said forums have been cited here. This demonstrates elements of bad faith.

30. *Third,* a claim for equitable relief is subject to a stricter ripeness requirement. The instant application meets this test. There is no contrary argument before me.

31. Fourth, equitable remedies are subject to a specificity requirement— the decree embodying them must be worded specifically, to make clear what is required. I have no doubt that the decree being enforced is clear and specific.

32. Applying the above tests to the facts and circumstances of this case, I find and hold that the applicant has established grounds for the court to grant the order *Mandamus*.

33. I now turn to address the second issue, that is, whether this court should grant an order that in default of payment, the County Secretary,

County Government of Kitui do serve six (6) months in civil jail for open disobedience of a lawful court order.

34. The *ex parte* applicant's counsel argued that this prayer is warranted considering the Respondent's refusal to pay and in order to avoid future application for contempt.

35. The Respondent's counsels submissions submitted that the orders sought are premature, and, that, the court cannot predetermine whether contempt will be committed.

36. I proceed from the premise that it is a crime to unlawfully and intentionally disobey a court order.[11] This type of contempt of court is part of a broader offence, which can take many forms, but the essence of which lies in violating the dignity, repute or authority of the court.[12] The offence has in general terms received a constitutional 'stamp of approval,'[13] since the Rule of Law – a founding value of the Constitution – 'requires that the dignity and authority of the courts, as well as their capacity to carry out their functions, should always be maintained.'[14]

37. The question that warrants scrutiny is whether a court can issue an order decreeing that in default of complying with the order, the person upon whom the order is directed do serve six (6) months in civil jail for open disobedience of a lawful court order.

38. In the hands of a private party, the application for committal for contempt is a peculiar amalgam,[15] for it is a civil proceeding that invokes a criminal sanction or its threat. And while the litigant seeking enforcement has a manifest private interest in securing compliance, the court grants enforcement also because of the broader public interest in obedience to its orders, since disregard sullies the authority of the courts and detracts from the rule of law.

39. This court is being invited to find that a Respondent is guilty of contempt without establishing the essentials of whether or not contempt has been committed. The reasoning mounted by the applicant is that since the Respondent has persisted in its default, it is likely to disobey the court order, hence, as a precaution, let the court issue "a default order committing the Respondent to civil jail." In other words, the court is being asked to find a Respondent guilty of contempt in advance, that, it, before he disobeys the order. A writ of contempt does not operate like a prohibitory order or an in junction. The contempt must not only be alleged, but it must be proved.

40. The court is being invited to find a Respondent guilty of contempt long before the test whether contempt has been committed is established. The test for when disobedience of a civil order constitutes contempt has come to be stated as whether the breach was committed 'deliberately and *mala fide*.'[16] A deliberate disregard is not enough, since the non-complier may genuinely, albeit mistakenly, believe he/she is entitled to act in the way claimed to constitute the contempt. In such a case, good faith avoids the infraction.[17] Even a refusal to comply that is objectively unreasonable may be *bona fide* (though unreasonableness could evidence lack of good faith).[18] Put differently, this is an offence that has several defences, hence, the reason why a notice to show cause must issue followed by contempt proceedings.

41. These requirements – that is the refusal to obey should be both *wilful* and *mala fides*, and that unreasonable non-compliance, provided it is *bona fide*, does not constitute contempt – accord with the broader definition of the crime, of which non-compliance with civil orders is a manifestation. The offence is committed not by mere disregard of a court order, but by the deliberate and intentional violation of the court's dignity, repute or authority that this evinces.[19] It follows that such an order cannot be issued in anticipation.

42. Simply put, the elements of a civil contempt must be established beyond doubt before such an order can be issued. Perhaps the most comprehensive elements of civil contempt are succinctly stated in *Contempt in Modern New Zealand*[20] thus:-

"There are essentially four elements that must be proved to make the case for civil contempt. The applicant must prove to the required standard (in civil contempt cases which is higher than civil cases) that:-

> *(a) the terms of the order (or injunction or undertaking) were clear and unambiguous and were binding on the defendant;*
>
> *(b) the defendant had knowledge of or proper notice of the terms of the order;*
>
> *(c) the defendant has acted in breach of the terms of the order; and*
>
> *(d) the defendant's conduct was deliberate.*

43. On the face our liberal, transformative and progressive Constitution with an expanded Bill of Rights, a pertinent question warrants consideration. Do constitutional values permit a person to be put in prison to enforce compliance with a civil order when the requisites are not established through due process? Is it not true that a high standard of proof applies whenever committal to prison for contempt is sought because contempt of court is quasi-criminal in nature?

44. Two principals emerge. The *first* is liberty. It is basic to our Constitution that a person should not be deprived of liberty, albeit only to constrain compliance with a court order, unless the essentials have been established. Even where contempt proceedings are undertaken, if reasonable doubt exists about the essentials, the person cannot be committed. The *second* reason is coherence. It is practically difficult, and may be impossible, to disentangle the reasons why orders for committal for contempt are sought and why they are granted: in the end, whatever the applicant's motive, the court commits a contempt respondent to jail for Rule of Law reasons; and this high public purpose should be pursued only in the absence of reasonable doubt. Accordingly, it is impermissible to find an alleged contemnor guilty of contempt in the absence of conclusive proof of the essential elements. The requisite elements must be established beyond reasonable doubt. In such a prosecution the alleged contemnor is plainly an 'accused person.' It follows that an order committing a person for contempt cannot be issued as "a default order," to take effect after the anticipated disobedience, meaning that, the person will automatically go to prison without being

afforded a hearing.

45. As O'Regan J pointed out, the power to imprison for coercive and non-punitive purposes is 'an extraordinary one'**:-**

> *'The power to order summary imprisonment of a person in order to coerce that person to comply with a legal obligation is far-reaching… Clearly, it will constitute a breach of s 12 of the Constitution unless both the coercive purposes are valid and the procedures followed are fair. In this case, there seems no doubt that the purpose is a legitimate one. It also seems necessary and proper, however, for the exercise of the power to be accompanied by a high standard of procedural fairness.'*[21] *(Emphasis added)*

46. It is clear that contempt of court is not merely a mechanism for the enforcement of court orders. The jurisdiction of the superior courts to commit recalcitrant litigants for contempt of court when they fail or refuse to obey court orders has at its heart the very effectiveness and legitimacy of the judicial system. That, in turn, means that the court called upon to commit such a litigant for his or her contempt is not only dealing with the individual interest of the frustrated successful litigant but also, as importantly, acting as guardian of the public interest.[22]

47. Applying the principles discussed herein above to the facts of this case, I am clear in my mind that an order of contempt, taking away a citizens liberty cannot properly issue in advance just because a person is likely to disobey a court order. Such an order, if issued, cannot pass constitutional muster. It would be an affront to the Constitution. It would be against the principles safeguarding the right to be heard before an adverse decision is made. Since contempt is quasi-criminal in nature, such an order would amount to taking away the constitutionally guaranteed presumption of innocence and conviction before trial, which is impermissible.

Conclusion

48. Flowing from my above findings, the conclusion becomes irresistible that the application dated **8th** March 2019 is successful to the extent discussed above. Accordingly, I make the following orders:-

> *a. An order of Mandamus be and is hereby issued directed against the Respondent compelling it satisfy the Decree issued on **31st** October 2018 in Milimani **HC MISC App. No. 192 of 2018** and pay the ex parte applicant the sum of **Ksh. 22.5 Million** together with interest thereon with effect from 20th May 2011 until payment in full.*
>
> *b. That prayer three of the application is declined.*
>
> *c. That the Respondent do pay the ex parte applicant the costs of this application.*

Orders accordingly

Signed, Dated and Delivered at Nairobi this 15th day of July, 2019

John M. Mativo

Judge

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[1]{2018} e KLR.

[2]{1994} 3 SCR 1100

[3] {2003} 4 FC 189 (TD).

[4] {2014} e KLR.

[5] {2013} e KLR.

[6] See *Kenya National Examinations Council vs R ex parte Geoffrey Gathenji Njoroge & 9 Others* {1997} eKLR.

[7]W. G. & C. Byse, *Administrative & Review Law, Cases and comments* 119-20 (5th ed. 1970). Originally, mandamus was a writ issued by judges of the King's Bench in England. American courts, as inheritors of the judicial power of the King's Bench, adopted the use of the writ.

[8] *Wilbur vs. United States ex rel. Kadrie*, 281 U.S. 206, 218 (1930). See also Jacoby, The Effect of Recent Changes in the Law of "Non-statutory" Judicial Review, 53 GEO. IJ. 19, 25-26 (1964).

[9] 1993 Can LII 3004 (F.C.A.), [1994] 1 F.C. 742 (C.A.), aff'd 1994 CanLII 47 (S.C.C.), [1994] 3 S.C.R. 1100.

[10] 2003 FCT 211 (CanLII), [2003] 4 F.C. 189 (T.D.), aff'd 2003 FCA 233 (CanLII), 2003 FCA 233).

[11] *S v Beyers* **1968 (3) SA 70** (A).

[12] Melius de Villiers *The Roman and Roman-Dutch Law of Injuries* (1899) page 166: 'Contempt of court … may be adequately defined as an injury committed against a person or body occupying a public judicial office, by which injury the dignity and respect which is due to such office or its authority in the administration of justice is intentionally violated.' Cf *Attorney-General v Crockett* **1911 TPD 893** 925-6 per Bristowe J: 'Probably in the last resort all cases of contempt, whether consisting of disobedience to a decree of the Court or of the publication of matter tending to prejudice the hearing of a pending suit or of disrespectful conduct or insulting attacks, are to be referred to the necessity for protecting the fount of justice in maintaining the efficiency of the courts and enforcing the supremacy of the law.'

[13] *S v Mamabolo* **[2001] ZACC 17**; **2001 (3) SA 409** (CC) para 14, per Kriegler J, on behalf of the court (where contempt of court in the form of scandalising the court was in issue).

[14] Per Sachs J in *Coetzee v Government of the Republic of South Africa* **[1995] ZACC 7**; **1995 (4) SA 631** (CC) para 61, quoted and endorsed by the court in *Mamabolo* (above). In *Coetzee*, statutory procedures for committal of non-paying judgment debtors to prison for up to 90 days – which the statute classified as contempt of court – were held unconstitutional.

[15] JRL Milton 'Defining Contempt of Court' **(1968) 85 *SALJ* 387:** 'The concept of contempt of court is one which bristles with curiosities and anomalies. Of the various examples which may be chosen to illustrate this point perhaps the most striking is that of the classification of contempts of court into civil contempt (or contempt in procedure) and criminal contempt.'

[16] Frankel Max Pollak Vinderine Inc v Menell Jack Hyman Rosenberg & Co Inc **[1996] ZASCA 21**; **1996 (3) SA 355** (A) 367H-I; Jayiya v Member of the Executive Council for Welfare, Eastern Cape **2004 (2) SA 602**(SCA) paras 18 and 19.

[17]Consolidated Fish (Pty) Ltd v Zive **1968 (2) SA 517** (C) 524D, applied in Noel Lancaster Sands (Edms) Bpk v Theron **1974 (3) SA 688** (T) 691C.

[18] Noel Lancaster Sands (Edms) Bpk v Theron **1974 (3) SA 688** (T) 692E-G per Botha J, rejecting the contrary view on this point expressed Consolidated Fish v Zive (above). This court referred to Botha J's approach with seeming approval in Frankel Max Pollak Vinderine Inc v Menell Jack Hyman Rosenberg & Co Inc **[1996] ZASCA 21**; **1996 (3) SA 355** (A) 368C-D.

[19] See the formulation in *S v Beyers* **1968 (3) SA 70** (A) at 76E and 76F-G and the definitions in Jonathan Burchell *Principles of Criminal Law* (3ed, 2005) page 945 ('Contempt of court consists in unlawfully and intentionally violating the dignity, repute or authority of a judicial body, or interfering in the administration of justice in a matter pending before it') and CR Snyman *Strafreg* (4ed, 1999) page 329 ('Minagting van die hof is die wederregtelike en opsetlike (a) aantasting van die waardigheid, aansien of gesag van 'n regterlike amptenaar in sy regterlike hoedanigheid, of van 'n regsprekende liggaam, of (b) publikasie van inligting of kommentaar aangaande 'n aanhangige regsgeding wat die strekking het om die uitstlag van die regsgeding te beïnvloed of om in te meng met die regsadministrasie in daardie regsgeding').

[20] Available at *ip36.publications.lawcom.govt.nz*

[21]In *De Lange vs Smuts* [1998] ZACC 6; 1998 (3) SA 785 (CC) para 147.

[22] *Fakie NO v CCII Systems (Pty) Ltd* (653/04) [2006] ZASCA 52; 2006 (4) SA 326 (SCA) (31 March 2006).