



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW CASE NO. 176 OF 2015

NJENGA MWANGI WAHIRA & PARTNERS.....APPLICANT

VERSUS

THE COUNTRY SECRETARY

CITY COUNTY OF NAIROBI.....RESPONDENT

RULING

Background

1. The Respondent was compelled by this Court to pay the Applicant the decretal sum of Kenya shillings 1,677,990/=, in a judgment delivered on 27th July 2017. The said sum was owed as legal fees to the Applicant a result of acting for the Respondent in various legal matters. The Applicant thereafter, in a Notice of Motion dated 3rd October 2017, sought compliance by the Respondent, and upon default, Notice to Show Cause be issued against the Respondent to show cause why contempt proceedings should not be commenced against it.

2. A ruling was delivered thereon by Odunga J. on 8th March 2018 wherein the learned judge directed that a Notice to Show Cause do issue to the Respondent and /or the County Executive in charge of Finance to show cause why contempt proceedings should not be commenced against them, which Notice to Show Cause was duly issued on 28th March 2018 and served on the Respondent.

3. The advocates on record for the Respondent filed Grounds of Opposition dated 7th May 2018 in response to the notice to show cause. They were as follows

a) That the Respondents are not deliberately refusing to settle the decretal sum and pray for the Honourable Courts indulgence based on the following factors:-

b) That Judgement was delivered on 27th July, 2017 in favour of the Applicant. The said Judgement was delivered after the County's budget had been read and money apportioned towards other matters that had been earlier budgeted for. The Respondents have already forwarded the outstanding decretal sum to be factored in the forthcoming budget which is scheduled to occur in a few months from now. The Respondents cannot expend money not approved in the budget since will amount to illegality. The Respondents prayed that the Court indulges them and allow them to factor the said sum in the forthcoming budget.

c) That the County Government has limited resources and is governed by statutory processes it must abide by before paying for anything it is unable to settle the decretal sum immediately but will do so after the same is factored in the budget

d) That the immediate settlement of the order would require constitutional or county legislation approval which has not been given to the Respondent because of then already closed budget cycle.

e) That the Respondents are currently not in a position to pay off the decretal sum since the county government is in the middle of its financial year and such funds would have to have been provided for in the County budget

f) That the Respondents are ready to pay once the same is allocated for, approved and passed by the County Assembly as provided for in section 125 of the Public Finance Management Act(2012)

g) That the Court allow for the budgeting, allocation and approval of the amounts decreed through the procedures provided

for under the County Government Act.

4. The Applicant's Reply to the Grounds of Opposition dated 18th June 2018 was as follows:

- a) That the grounds enumerated in the Application are not based on law but are requesting the court to use powers it does not have to delay the proceeds of the Applicant's enjoyment of its judgment.
- b) That the legal costs were incurred on or around 2001 and the Respondents have always refused to make payment forcing the Applicant to go for judgment which the Applicant obtained on 27th July 2017
- c) The Applicant cannot be involved in the internal problems of the Respondents, and the court cannot be sought to give procedural orders
- d) That the Respondents have not showed good faith by even paying some of the decretal amount
- e) That the grounds of opposition should be dismissed with costs to the applicant.

5. The applicable law on the procedure after a Notice to Show Cause has been issued in contempt proceedings against a government department such as the Respondent is in section 30 of the Contempt of Court Act of 2015 which provides 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.”

6. The Court is granted the powers and discretion to commence contempt of Court proceedings in the event that there is no response from the alleged contemnor. What then happens when there is a response from the alleged contemnor, as was the case in the instant proceedings? It is my view that in such a circumstance it is upon the Court to consider the response, and particularly if the Respondent has complied with the orders of the Court, or if it has provided justifiable reasons why it has been unable to comply, which positions should be supported by cogent evidence. If no such compliance is shown or reasons are given, then the Court has no option but to commence contempt of Court proceedings against the Respondent.

7. In the present Notice to Show Cause proceedings, the main reason given by the Respondent is that the subject decretal sum was not budgeted for, and it seeks time to be able to pay the same in the next budgetary cycle. The Respondent did not appear at the hearing of the Notice to Show Cause on 30th July 2018.

8. Mr. Ochieng Oginga, the learned counsel for the Applicant, made oral submissions during the hearing, and contended that there has been no material placed before the Court to demonstrate any willingness or intent by the Respondent to settle the decretal sum. Further, that the continued delay in settling the decretal sum is infringing on the Applicant's right to equal protection of the law under Article 27(1) of the Constitution, his right to access to justice under Article 48, and his right to a fair hearing, as he cannot enjoy the fruits of his judgment.

9. When faced with a similar reason as that given by the Respondent herein, Odunga J. held as follows in **Republic v County Chief Officer, Finance & Economic Planning, Nairobi City County (Ex Parte David Mugo Mwangi) [2018] eKLR:**

“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.

30. It must however be remembered that Court orders are not made in vain and are meant to be complied with. If for any

reason a party has difficulty in complying therewith, the honourable thing to do is to come back to court and explain the difficulties faced by the need to comply with the order. Once a Court order is made in a suit the same is valid unless set aside on review or on appeal”

10. In the circumstances, I am of the view that the Respondent having given a reason for non-compliance and asked for this Court's indulgence, it should be given strict timelines within which to comply with the orders of this Court as to payment of the subject decretal sum, before contempt proceedings can commence.

11. The Orders which accordingly commend themselves to me are as follows:

1. The Respondent shall effect payment of the decretal sum of Kshs 1,677,990/= within 60 days of the date of this ruling.
2. In the event of default, the Applicant shall be at liberty to commence contempt of court proceedings against the County Secretary and the County Executive in Charge of Finance of the City County of Nairobi.
3. The Respondent shall pay the Applicant the costs of the instant Notice to Show Cause proceedings.

12. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 16TH DAY OF OCTOBER 2018

P. NYAMWEYA

JUDGE