REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC. APPLICATION (JR) No. 208 OF 2015 (JR)

IN THE MATTER OF APPLICATION BY F.W.NJOROGGE

T/A F.W. NJOROGE & CO. ADVOCATES FOR LEAVE

TO APPLY ORDERS OF MANDAMUS

AND

IN THE MATTER OF THE COUNTY SECRETARY, OLKEJUADO COUNTY GOVERNMENT

AND

IN THE MATTER OF THE URBAN AREAS AND CITIES ACT AND COUNTY GOVERNMENT ACTS

BETWEEN

F.W. NJOROGE T/A F.W. NJOROGE & CO. ADVOCATES…….APPLICANT

VERSUS

COUNTY SECRETARY, ILKEJUADO COUNTY GOVERNMENT (Sued as the

successor of OLKEJUADO COUNTY COUNCIL)…….……RESPONDENT

RULING

1. On 25th January, 2016, after hearing the application dated 6th August, 2015, I issued an order of mandamus compelling the Respondent to pay the applicant the sum of Kshs 5,073,269.00 being the decretal sum arising from Nairobi HCMisc.Appl. No. 281 of 2012. On 18th July, 2016, I directed the Respondent to settle the said sum by way of Kshs 1.5 Million on or before the last day of October, 2016 and on the last day of the months of November, 2016, December, 2016 and February, 2017. The balance outstanding was to be paid on or the last day of April, 2017 and parties were given the liberty to negotiate the interest. The mater was then supposed to be fixed at the end of April, 2017 if it became necessary but they were given liberty to apply.

2. However following the said order, it would seem that there was non-compliance therewith. As a result by way of a Motion of Notice dated 16th November, 2016, the ex parte applicant moved this Court seeking the following orders:

1. This application be certified as urgent and be heard ex parte in the first instance owing to its urgency.

2. Warrants of arrest and committal to civil jail be issued to the applicant as against the respondent and do subsist in force till the decretal amount is paid in its entirety, owing to the respondent's continued disregarding of this court's orders and specifically the order made on 18/7/2016 requiring the decretal sum to be settled in monthly installments of Kshs 1,500,000/= till payment in full with effect from 30/10/2016.

3. The Warrants of Arrest and Committal to Civil jail be executed by the Commissioner of Police through the Officer Commanding Police Division I Nairobi and/or through any other officer in a position to execute them as may be ultimately designated by this court.

4. The costs of this application be borne by the respondent.

3. It was the applicant's case that though the respondent was to make good the first instalment on 30th October, 2016 he failed to make good of the same and so continued to do so hence there were fears that it would also default on the 2nd one which was due on 30th November, 2016 and all other subsequent ones. According to the applicant, despite cautioning the respondent that it would proceed with contempt proceedings, no response was forthcoming.

4. Accordingly on 8th November, 2016, the applicant's advocates requested the Deputy Registrar Judicial Review Division to be issued with Warrants of Arrest and Committal to Civil Jail as against the County Secretary Ole Kejuado County Council but the request was declined on the ground that without that specific order the registry was not in a position to process the sought warrants of arrest and committal to civil jail unless the court was moved and such orders obtained.

5. The applicant revealed that on 15th November, 2016, they wrote to the respondent's advocates informing them that the applicant was yet to receive the first instalment as directed and provided their bank details but similarly this letter did not elicit any response.

6. The ex parte applicants revealed that the decretal amount or any part thereof had not been paid directly to their client nor to the applicant. The applicants were therefore apprehensive that since the respondent had defaulted on paying the 1st instalment there are all likelihoods that the respondent would not only default on the 2nd instalment but all others hence the need for this court to take drastic measures to ensure the compliance of its orders.

7. In opposition to the application, the Respondent filed a replying affidavit sworn by its advocate on record in which, while acknowledging that there had been some slight delay by the 1st respondent in remitting the 1st instalment as directed by the court, it was deposed that the said advocate had personally communicated vide correspondence and telephone calls to the respondent raising serious concerns as to the delay of such payment in line with the court order, also highlighting the several complaint letter to the said advocate's office by the applicant's counsel.

8. It was averred that the respondent, in explaining the cause of the delay in remitting the funds to the applicant, informed the said advocates that receipt of any financial payments by the National Government to the County Governments such as the respondent had been very strenuous and stringent hence a slight delay in the November 2016 remittance.

9. The deponent disclosed that he had held numerous tele-conversations with the applicant's counsel **Mr. Makumi** explaining the respondent's predicament and that in fact the respondent's county attorney had personally paid a visit to **Mr. Makumi's** office to explain the respondent's predicament. It was disclosed that on 25th November, 2016 the said advocates received Kshs 1,347,000.00 vide RTGS from the respondent for onward transmission to the applicant's counsel, which monies were forwarded to them vide two cheques being numbers 000417 and 000418 of equal sum. The deponent however disclosed that

the deductions of the amount from Kshs 1,500,00.00 to Kshs 1,347,000.00 is as a result of a government's directive to have the payer retain the withholding tax payable to the Kenya Revenue Authority directly at the source, unlike in the past where the payee was expected to remit the same upon receipt of the monies.

10. Deponent assured the applicant that that the respondent would duly clear the decretal amount as awarded by the honourable court as they remained fully committed despite the unavoidable challenges beyond their control.

11. As the Respondent respects the order of this Court and cannot in any way whatsoever disregard them, it was its position that in the circumstances it is in the interest of natural justice, equity and conscience that this application be disallowed for the respondent to be allowed to comply fully with the court orders.

Determination

12. I have considered the foregoing.

13. It has been said time and again that counsel should not swear affidavit on disputed matters or matters that are likely to be disputed when the client is available and can depose to the said facts. The rationale for the said principle is not far-fetched. It is meant to insulate the advocate, an officer of the court, from the vagaries of litigation which, on occasions may be very unpleasant. By swearing an affidavit on such issues an advocate exposes himself to the process of cross-examination thus removing him from his role of legal counsel to that of a witness, a scenario which should be avoided by counsel at all costs. In my view, however innocent an averment may be, counsel should desist from the temptation to be the mouthpiece through which such an averment is transmitted.

14. In this case it is clear that the Respondent has not complied with the orders of this Court. It has however contended that the delay in remitting the funds to the applicant, was due to the failure by the National Government to remit payments to the County Governments. This Court has held time and again that where a party has some difficulty in complying with an order of the Court the option is to approach the Court to vary the order. However non-compliance with the same is not an option.

15. In **Wildlife Lodges Ltd vs. County Council of Narok and Another [2005] 2 EA 344 (HCK)** the Court expressed itself thus:

> **"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…In cases of alleged contempt, the breach for which the alleged contemnor is cited must not only be precisely defined but also proved to the standard which is higher than proof on a balance of probabilities but not as high as proof beyond reasonable doubt…The inherent social limitations afflicting most people in a developing country such as Kenya have the tendency to restrict access to the modern institutions of governance, and more particularly to the judiciary which is professionally run, on the basis of complex procedures and rules of law.**

Yet, this same Judiciary is generally viewed as the impartial purveyor of justice, and the guarantor of an even playing ground for all, a perception which ought to be strengthened, through genuine respect for the courts of justice, and through compliance with their orders. Consistent obedience to court orders is required, and parties should not take it upon themselves to decide on their own which court orders are to be obeyed and which ones overlooked, in the supposition that this oversight will not impede the process of justice… Justice dictates even-handedness between the claims of parties; and if it the case that the plaintiff/applicant has not been accorded a level playing ground for the realisation of its economic activities, a matter that of course can only be established through evidence in the main suit, then the court ought to provide relief, by applying the established principles of law, one of these being the law of contempt…An *ex parte* order by the court is a valid order like any other and to obey orders of the court is to obey orders made both *ex parte* and *inter partes* since the Court by section 60 of the Constitution is the repository of unlimited first instance jurisdiction, and in this capacity it may make *ex parte* orders where, after a careful and impartial consideration, it is convinced that issuance of such an order is just and equitable. There is nothing potentially oppressive in an *ex parte* order, since such an order stands open to be set aside by simple application, before the very same court…Where a party considers an ex parte order to cause him undue hardship, simple application will create an opportunity for an appropriate variation to be effected thereto; and therefore there will be no excuse for a party to disobey a court order merely on the grounds that it had been made ex parte and this argument will not avail either the first or the second defendant".

16. In **Republic vs. The Kenya School of Law & Another Miscellaneous Application No. 58 of 2014,** this Court stated:

"Court orders, it must be appreciated are serious matters that ought not to be evaded by legal ingenuity or innovations. By deliberately interpreting Court orders with a view to evading or avoiding their implementation can only be deemed to be contemptuous of the Court. Where a party is for some reason unable to properly understand the Court order one ought to come back to Court for interpretation or clarification."

17. In this case I wish to remind the public in general and the executive in particular of the views expressed by **Lenaola, J**, in **Kariuki & 2 Others vs. Minister for Gender, Sports, Culture & Social Services & 2 Others [2004] 1 KLR 588** which views I associate myself with that:

"The instant matter is a cause of anxiety because of the increasing trend by Government Ministers to behave as if they are in competition with the courts as to who has more "muscle" in certain matters where their decisions have been questioned, in court! Courts unlike politically minded minister are neither guided by political expediency, popularity gimmicks, chest-thumping nor competitive streaks. Courts are guided and are beholden to law and to law only! Where Ministers therefore by their actions step outside the boundaries of law, courts have the constitutional mandate to bring them back to track and that is all that the courts do. Judicial review orders would otherwise have no meaning in our laws… Court orders must be obeyed whether one agrees with them or not. If one does not agree with an order, then he ought to, move the court to discharge the same. To blatantly ignore it and expect that the court would turn its eye away, is to underestimate and belittle the purpose for which Courts are set up."

18. I similarly agree with the decision in **Teacher's Service Commission vs. Kenya National Union of Teachers & 2 Others Petition No. 23 of 2013** that:

"The reason why courts will punish for contempt of court is to safeguard the rule of law which is fundamental in the administration of justice. It has nothing to do with the integrity of the judiciary or the court or even the personal ego of the presiding judge. Neither is it about placating the applicant who moves the court by taking out contempt of court

proceedings. It is about preserving and safeguarding the rule of law. A party who walks through the justice door with a court order in his hands must be assured that the order will be obeyed by those to whom it is directed. A court order is not a mere suggestion or an opinion on a point of view. It is a directive that is issued after much thought and with circumspection. It must therefore be complied with and it is in the interest of every person that this remains the case. To see it any other way is to open the door to chaos and anarchy and this Court will not be the one to open that door. If one is dissatisfied with an order of the court, the avenues for challenging it are also set out in the law. Defiance is not an option."

19. The matter cannot be better expressed than in the words of **Ojwang, J** (as he then was) in **B vs. Attorney General [2004] 1 KLR 431**that:

"The Court does not, and ought not to be seen to, make Orders in vain; otherwise the Court would be exposed to ridicule, and no agency of the Constitutional order would then be left in place to serve as a guarantee for legality, and for the rights of all people."

20. In **Kenya Country Bus Owners Association & Ors vs. Cabinet Secretary for Transport & Infrastructure & Ors JR No. 2 0f 2014** this Court sent a warning in the following terms:

"Where such dishonourable conduct is traced to a State Officer, the consequences are even greater. The Court would particularly be less sympathetic to persons who swear to protect and defend the Constitution and thereafter violate the same with impunity. Our Constitution is still in its infancy. To violate it at this stage in my view amounts to defiling the supreme law of the land and that cannot be countenanced by any Court of law…Court proceedings and orders ought to be taken seriously and that it is their constitutional obligation to ensure that they are regularly appraised of the state of such proceedings undertaken by or against them or on their behalf and orders given by the Court and the Court will not readily accept as excusable the fact that they have delegated those duties to their assistants. Where there are pending legal proceedings they ought to secure proper legal advice from the Government's Chief legal advisers before taking any steps which may be construed as an affront to the Court process or which is calculated to demean the judicial process and bring it into disrepute."

21. As was held by **Musinga, J** (as he then was) in **Robert Kisiara Dikir & 3 Others vs. The Officer Commanding Keiyan General Service Unit (GSU) Post & 3 Others Kisii HCCP No. 119 of 2009**, if we show disrespect to the supreme law of the land, casual observance or breach with impunity by the Government or its servants and fail to punish or penalise those who violate important provisions we, as the temple of justice, will be encouraging such violation. Court orders, I must emphasise, are not subject to interpretation of the executive. Only Courts of law issuing the orders or Courts of higher jurisdiction are empowered to interpret Court orders.

22. It is therefore clear that precision is an important ingredient in contempt matters. The instant application was filed on 17th November, 2016 and the affidavit in support was sworn on 16th November, 2016. On 19th December, 2016, **Mr Makumi** learned counsel for the ex parte applicant acknowledged receipt of some payment on 29th November, 2016. On 13th February, 2017, **Mr Makumi** acknowledged receipt of a cheque for Kshs 1.5 million but in arrears. It is therefore clear that the position deposed to in the affidavit in support of the instant application does not reflect the current position. The ex parte applicant ought to have sought leave to file a supplementary affidavit in order to update the Court on the exact position of the matter.

23. In the premises I decline to issue the orders sought in this application which application is hereby struck out.

24. With respect to the costs, it is clear that the Respondent has not adhered to the Court order in the manner directed. Accordingly the costs of this application are awarded to the ex parte applicant and the same are assessed in the sum of Kshs 15,000.00 to be paid within 15 days from the date of this ruling.

25. It is so ordered.

Dated at Nairobi this 4th day of April, 2017

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Makumi for the ex parte applicant

Mr Rono for the Respondent

CA Mwangi