



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISUMU**

**MISC. APPLI. 223 OF 2010**

**HEZRON OSSOREY JURA .....APPLICANT**

**VERSUS**

**KENYA RAILWAYS CORPORATION .....RESPONDENT**

**RULING**

1, By a Notice of Motion dated the 12th of October 2015, the applicant herein **Hezbon Ossorey Jura Odongo** seeks the following orders:

- i. That the managing Director of Kenya Railways Corporation Atanas Maina show cause why he should not be committed to Civil jail.
- ii. That the applicant herein be granted orders to commit the respondent for contempt proceeding Managing Director Atanas Maina and the corporation secretary of Kenya Railways for refusing to obey mandamus order issued by this court and dated the 15th of April 2009 and disobeyed several times(sic).
- iii. That in the alternative the managing director's property be attached to certify the order of the court.
- iv. That the cost of this application be provided for.

**Applicant's case**

2. A brief summary of the facts in this case are that the applicant filed a civil suit against the respondent before the Chief Magistrate's court in Kisumu in CMCC NO. 464 OF 2003 and obtained a decree in the sum of Kshs. 4,620,777.85/-. It is the applicant's case that the respondent was duly served with the judgment, decree and certificate of order but the respondent blatantly declined to pay thereby prompting the applicant to apply for Judicial Review order of mandamus. Upon hearing the application the Court on 15th April 2009 issued an order of mandamus compelling the Managing Director of the Respondent to pay the aforesaid decretal sum. The Applicant served the order of mandamus dated 15th April, 2009, a notice of payment dated 2nd March 2010 and a certificate of costs dated 2nd December, 2009 upon the legal Officer of Respondent on the 10th of March 2010 but still no payments were made.

3. He concludes that to date the accrued decretal sum of Kshs. 10,247,289.70/- has not been paid by the Respondent and the same continues to attract an interest. It is his view that the Respondent has deliberately and blatantly refused to pay the said sum of money to the Applicant and is therefore disobeying a lawful court order. The Applicant sought and was granted leave to file contempt of Court proceedings against the Respondent on 18th September, 2015. It is on these grounds that the Applicant now seeks to have the 1st Respondent committed to civil jail.

**Respondent's case**

4. In objection to the application the respondent filed a notice of preliminary objection dated 2nd of December 2015 in which it states that the application is incompetent, bad in law, incurably defective and a waste of judicial time. It is the respondent's assertion that no personal service had been effected upon the managing director of the respondent and as such the application is unsustainable.

### **Determination**

5. Before delving into an analysis of the substance of the application herein, it is imperative that I dispose of a preliminary issue concerning the demise of the applicant. From the affidavit sworn by Margret Jura Odongo in support of the applicant's application, it is obvious that the plaintiff died on 30th December 2013 and he has not been substituted. **Order 24 Rule 1** and **Rule 3(2)** provide that substitution ought to be done within one year of the demise of a plaintiff. The rules provide as follows:

**“Order 24 (1) The death of a plaintiff or defendant shall not cause the suit to abate if the cause of action survives or continues.**

**(3)(1) Where one of two or more plaintiffs dies and the cause of action does not survive or continue to the surviving plaintiff or plaintiffs alone, or a sole plaintiff or sole surviving plaintiff dies and the cause of action survives or continues, the court, on an application made in that behalf, shall cause the legal representative of the deceased plaintiff to be made party and shall proceed with the suit.**

**3(2) Where within one year no application is made under sub-rule (1), the suit shall abate so far as the deceased plaintiff is concerned, and, on the application of the defendant, the court may award to him the costs which he may have incurred in defending the suit to be recovered from the estate of the deceased plaintiff:**

**Provided the court may, for good reason on application, extend the time.”**

6. Unlike in the case of a judgment-debtor, it will be noted that there is no provision in the Civil Procedure Act or the Rules for the legal representative of a deceased decree-holder to execute the decree or be a party to the suit without the necessity of being made a party in the proceedings by way of substitution. Under section 37 of the Act, where a judgment-debtor dies before the decree has been fully satisfied, the holder of the decree may apply to the court which passed it to execute the same against the legal representative of such deceased, or against any person who has intermeddled with the estate of such deceased, without the necessity of being made a party in the proceedings by way of substitution.

That being the case, the Applicant's case herein abated after one year of his demise as no application for substitution was made. The outstanding portion of the applicant's suit can, however, be revived upon application by the person claiming to be his legal representative. But there is a burden that such person must prove that he was prevented by any sufficient cause from continuing the suit.

7. I do hold that for this reason alone this application must fail. Even so I will proceed to deal with the main issue in this application.

8. The applicant seeks to have the Managing Director of the Respondent committed to civil jail for contempt of Court order of mandamus issued on 15th April 2009. On the other hand, the Respondent argues that the order was not served on the Managing Director in person and as such the application is incompetent and unsustainable. The applicant has been back and forth with applications trying to make the respondent comply with the order of the court. But every time he is met with the same question of service. I will agree with the Court in **Republic v Permanent Secretary Office Of The President Ministry Of Internal Security & another Ex-Parte Nassir Mwandishi [2014] eKLR** where the court stated that where an order of mandamus had been issued against a Government official there was no need for requiring personal service unlike in other contempt of Court proceedings. In that case the court had this to say:

**"It is therefore clear that apart from the fact of the existence of a judgement against the government, the law recognises that due to the special role played and the central position held by the Government in the management of the affairs of the country, there is a necessity for further proceedings to be undertaken before the judgement can be implemented. Where a party has complied with all the procedures leading to the grant of an order of mandamus to subject the party to the normal procedures relating to contempt of court proceedings would engender a miscarriage of justice yet Article 159(2)(b) mandates that justice ought not to be delayed. To take a successful litigant in circles when adequate notices have been given to the Government to settle a decree would be to turn the legal process into a theatre of the absurd. Accordingly I do not agree with the submissions made by the Respondent that even after an order of mandamus is issued the decree holder ought to be subjected to the technicalities of personal service and the penal notice. Such requirements are necessary in my view in the usual application for contempt where(sic) but not in judicial review orders of mandamus compelling a public officer to carry out a duty imposed by statute."**

9. To my understanding, the reasoning behind the above exposition is that an application for an order of mandamus against the Government is a very elaborate procedure. Before the Court issues such an order, there must be proof that the provisions of the *Government Proceedings Act* have been complied with respect to issuance of certificate of costs and certificate of order against the Government. After the issuance of the aforesaid documents, just like in any application for mandamus, there must be a demand for payment made by the decree holder to the relevant department seeking payment since in an application for an order of mandamus, the law as a general rule requires a demand by the applicant for action and refusal as a prerequisite to the granting of an order. See **The District Commissioner Kiambu vs. R and Others Ex Parte Ethan Njau**[1960] EA 109.

10. The said elaborate procedure is meant to give adequate notice to the Government to make arrangement to satisfy the decree. To again drag the applicant through the requirement of personal service after the elaborate procedure is to me a miscarriage of justice and bow to technicalities.

I also am guided by the holding of **Lenaola J** in the case of **Basil Criticos Vs Attorney General and 8 Others** [2012] eKLR where he stated that :-

***"...the law has changed and as it stands today knowledge supersedes personal service.....where a party clearly acts and shows that he had knowledge of a Court Order, the strict requirement that personal service must be proved is rendered unnecessary"***

11. However as already stated above this suit has abated and as such no orders can be made with regard to this application unless an application for substitution has been made and granted. The application is therefore dismissed with no order as to costs.

**Dated, signed and delivered this 10th day of March 2016**

**H. K. CHEMITEI**

**J U D G E**