



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAIROBI**

**MILIMANI JUDICIAL REVIEW DIVISION**

**MISCELLANOUS CIVIL APPLICATION NO. 207 OF 2015 (JR)**

**IN THE MATTER AN APPLICATION BY DANSON MWANGI KIAWANO (SUING AS THE ADMINISTRATOR OF THE ESTATE OF THE DECEASED JULIUS MWANGI KIAWANO) FOR LEAVE TO APPLY FOR AN ORDER OF MANDAMUS**

**AND**

**IN THE MATTER OF THE COUNTY SECRETARY, NAIROBI CITY COUNTY**

**AND**

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

**BETWEEN**

**DANSON MWANGI KIAWANO**

**(suing as the administrator of the estate of the deceased**

**JULIUS MWANGI KIAWANO) .....APPLICANT**

**-versus-**

**COUNTY SECRETARY, NAIROBI**

**CITY COUNTY(sued as the successor of**

**CITY COUNCIL OF NAIROBI .....RESPONDENT**

**RULING**

**Introduction**

1. By a Notice of Motion dated 23<sup>rd</sup> March, 2016, applicant herein, **Danson Mwangi Kiawano**, seeks an order that the Couty Secretary Nairobi City County & Government together with any other accounting officer under him be and are hereby committed to civil jail for contempt of Court orders issued on 25<sup>th</sup>

February, 2016 herein. He also seeks the costs of this application.

2. According to the applicant, on 25<sup>th</sup> February, 2016, this Court entered judgement against the Respondent compelling the respondent to pay the applicant the sum of Kshs 1,939,149/- being the amount due to the applicant in respect of the judgement in Milimani CMCC No. 2606 of 2007 together with interest thereon at the rate of 12% per annum.

3. Thereafter the applicant wrote a letter dated 29<sup>th</sup> February, 2016 to the respondent as well as his advocate attaching a copy of the extracted court order seeking settlement thereof. However todate the said sum remains unsettled.

4. It was therefore contended that since the Respondent had been also served with the order and the penal notice, there are no reasons why the said sum remains unsettled todate.

5. The applicant averred that the Respondent, being the accounting officer of the County Government is under a public duty to settle the said sum but has failed to do so hence the orders sought in the instant application.

6. The Respondent did not respond to the application. Instead its learned counsel informed the Court that following the reading of the annual budge the Respondent was in the process of putting its house in order. That was on 28<sup>th</sup> June, 2016.

### **Determination**

7. I have considered the application and the material on record.

8. According to *Black's Law Dictionary*, 9<sup>th</sup> Edition at page 360:

**“Contempt is a disregard of, disobedience to, the rules or orders of a legislative or judicial body, or an interruption of its proceedings by disorderly behaviour or insolent language, in its presence or so near thereto as to disturb the proceedings or to impair the respect due to such a body.”**

9. In *Halsbury's Laws of England*, 4<sup>th</sup> Edition Volume 9 at paragraph 52 it is stated:

**“It is a civil contempt of court to refuse or neglect to do an act required by a Judgment or order of the court within the time specified in the judgment or order...A judgment or order against a corporate body may be enforced by an order of committal against the directors or other officers of the corporation.”**

10. Similarly, in Hadkinson vs. Hadkinson (1952) 2 All ER 56, the judges of the court of Appeal of England unanimously held that:

**“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 unless and until it 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.”**

11. In *The Law of Contempt*, Butterworths (1996) Pages 555 – 569 by Nigel Lowe and Brenda Sufrin it is stated that:

**“Coercive orders made by the courts should be obeyed and undertakings formally given to the courts should be honoured unless and until they are set aside. Furthermore it is generally no answer to an action for contempt that the order disobeyed or the undertaking**

**broken should not have been made or accepted in the first place. The proper course if it is sought to challenge the order or undertaking is to apply to have it set aside.”**

12. It is trite 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 with court orders the only option is to approach the 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. In **Econet Wireless Kenya Ltd vs. Minister for Information & Communication of Kenya & Another [2005] 1 KLR 828** Ibrahim, J (as he then was) stated:

**“It is essential for the maintenance of the rule of law and order that the authority and the dignity of our Courts are upheld at all times. The Court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors. It is the plain and unqualified obligation of every person against, or in respect of whom, an order is made by a Court of competent jurisdiction, to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or void”.**

13. This position was confirmed by the Court of Appeal in **Refrigerator & Kitchen Utensils Ltd. vs. GulabchandPopatlal Shah & Others Civil Application No. Nai. 39 of 1990.**

14. In **Central Bank of Kenya & Another vs. Ratilal Automobiles Limited & Others Civil Application No. Nai. 247 of 2006**, the Court of Appeal held that Judicial power in Kenya vests in the Courts and other tribunals established under the Constitution and that it is a fundamental tenet of the rule of law that court orders must be obeyed and it is not open to any person or persons to choose whether or not to comply with or to ignore such orders as directed to him or them by a Court of law. The consequences of failure to obey Court orders are that any action taken in breach of the court order is a nullity and of no effect.

15. Similarly, in **Awadh vs. Marumbu (No 2) No. 53 of 2004 [2004] KLR 458**, it was held that:

**“It must be remembered that court orders must be obeyed at all times in order to maintain the rule of law and good order. This of course means that the authority and dignity of our courts must be upheld at all times and this differentiates civilised societies from those applying the law of the jungle at times referred to as banana republics. It is the duty of the Court not to condone deliberate disobedience of its orders nor waiver from its responsibility to deal decisively and firmly with the approved contemnors.”**

16. The effect of grant of an order of *mandamus* was considered *in extenso* in High Court Judicial Review Miscellaneous Application No. 44 of 2012 between the **Republic vs. The Attorney General & Another ex parte James Alfred Koroso** where the Court expressed itself as follows:

**“...In the present case the *ex parte* applicant has no other option of realising the fruits of his judgement since he is barred from executing against the Government. Apart from *mandamus*, he has no option of ensuring that the judgement that he has been awarded is realised. Unless something is done he will forever be left baby sitting his barren decree. This state of affairs cannot be allowed to prevail under our current Constitutional dispensation in light of the provisions of Article 48 of the Constitution which enjoins the State to ensure access to justice for all persons. Access to justice cannot be said to have been ensured when persons in whose favour judgements have been decreed by courts of competent jurisdiction cannot enjoy the fruits of their judgement due to roadblocks placed on their paths by actions or inactions of public officers. Public offices, it must be remembered are held in trust for the people of Kenya and Public Officers must carry out their duties for the benefit of the people of the Republic of Kenya. To deny a citizen his/her lawful rights which have been decreed by a Court of competent jurisdiction is, in my view, unacceptable in a democratic society.**

Public officers must remember that under Article 129 of the Constitution executive authority derives from the people of Kenya and is to be exercised in accordance with the Constitution in a manner compatible with the principle of service to the people of Kenya, and for their well-being and benefit....The institution of judicial review proceedings in the nature of *mandamus* cannot be equated with execution proceedings. In seeking an order for *mandamus* the applicant is seeking, not relief against the Government, but to compel a Government official to do what the Government, through Parliament, has directed him to do. The relief sought is not “execution or attachment or process in the nature thereof”. It is not sought to make any person “individually liable for any order for any payment” but merely to oblige a Government officer to pay, out of the funds provided by Parliament, a debt held to be due by the High Court, in accordance with a duty cast upon him by Parliament. The fact that the Accounting Officer is not distinct from the State of which he is a servant does not necessarily mean that he cannot owe a duty to a subject as well as to the Government which he serves. Whereas it is true that he represents the Government, it does not follow that his duty is therefore confined to his Government employer. In *mandamus* cases it is recognised that when statutory duty is cast upon a Public Officer in his official capacity and the duty is owed not to the State but to the public any person having a sufficient legal interest in the performance of the duty may apply to the Courts for an order of *mandamus* to enforce it. In other words, *mandamus* is a remedy through which a public officer is compelled to do a duty imposed upon him by the law. It is in fact the State, the Republic, on whose behalf he undertakes his duties, that is compelling him, a servant, to do what he is under a duty, obliged to perform. Where therefore a public officer declines to perform the duty after the issuance of an order of *mandamus*, his/her action amounts to insubordination and contempt of Court hence an action may perfectly be commenced to have him cited for such. Such contempt proceedings are no longer execution proceedings but are meant to show the Court’s displeasure at the failure by a servant of the state to comply with the directive of the Court given at the instance of the Republic, the employer of the concerned public officer and to uphold the dignity and authority of the court.”

17. In this matter the Respondents do not dispute that they owe the applicant the said sum and that the same remains unpaid to date. No satisfactory explanation has been proffered to show why the said sum has not been settled to date.

18. In the premises I hereby direct the Secretary, the City County of Nairobi, or an officer competent to deal with the matter to appear before this Court to show why appropriate orders cannot be made against the said Secretary for not satisfying a lawful order of this Court.

19. The costs of this application are awarded to the Applicant.

**Dated at Nairobi this 6<sup>th</sup> day of September, 2016**

**G V ODUNGA**

**JUDGE**

**Delivered in the presence of:**

**Mr Makumi for the Applicant**

**Mr Ilako for the Respondents**

**Cc Mwangi**