REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ANAIROBI

JUDICIAL REVIEW APPLICATION NO. 6 OF 2009

REPUBLIC...APPLICANT

VERSUS

COMMISSIONER FOR COOPERATIVE

DEVELOPMENT…………………………………….....1ST RESPONDENT

MWIRUTI SAVINGS & CREDIT

CO-OPERATIVE SOCIETY LIMITED….........................2ND RESPONDENT

EX PARTE: COUNTY COUNCIL OF KIAMBU

RULING

1. On 9th December, 2010, **Musinga, J** (as he then was) granted the orders sought vide the application dated 22nd January, 2009. The ex parte applicant was also awarded the costs of the application.

2. As a result of the said decision, the ex parte applicant's costs were on 18th April, 2012 taxed in the sum of Kshs 1,243,361/-. However, the Respondents were aggrieved by the decision of the learned Deputy Registrar and lodged a reference before this Court vide Chamber Summons dated 9th May, 2012. By a ruling delivered on 2nd March, 2015, this Court dismissed the said reference with costs to the respondent to the reference, the ex parte applicant herein.

3. On 3rd February, 2016 the learned Deputy Registrar issued a warrant of arrest against the Commissioner for Co-operative Development following an application to show cause. By an application dated 4th February, 2016, the Respondent sought to have the said warrants lifted. When the application came for inter partes hearing on 9th February, 2016, the Deputy Registrar was informed that the Respondent was willing to pay the whole amount and that the process for so doing had been commenced. As a result of the said representation the said warrants were with the consent of the learned counsel for the ex parte applicant suspended till 7th March 2016.

4. On 7th March, 2016 it transpired that the advocates for the Respondent had sought more documents such as certificate of costs and order to enable them settle the same and the said documents were duly furnished as requested. On the said date the respondents sought for more time to settle the sum due and based on the foregoing the advocate for the ex parte applicant acceded to 30 days and based on the foregoing the warrants were stood over for 30 days. The matter was stood over to 12th April, 2016 in the presence of the Commissioner. When the proceedings resumed on 12th April, 2016, the Commissioner

was contrary to the directions of the Court absent. However an issue was taken with respect to the amount due. This contention on the part of the Respondent was not received favourably by the Court which was of the view that the respondent was not exhibiting seriousness in the matter and proceeded to issue warrant of arrest against the Commissioner.

5. Based on an application dated 13th April, 2016, the Respondent once again applies for setting aside the warrants of arrest and the Court suspended the same for 15 days in order to enable the parties seek clarification from the Deputy Registrar on the amount due. On 6th June, 2016, the Deputy Registrar confirmed that the sum due was Kshs 1,243,361/-. When the parties appeared before the Court on 11th May, 2016, the Respondents' counsel once again affirmed their willingness to pay the sum due and informed the Court that the same was being processed. The Court then directed the Respondents to pay the said sum together with interest from the date of taxation till payment in full. The said payment was directed to be made within 14 days from the said date failure to do which the warrants of arrest would issue against the 1st Respondent.

6. Once again the order of the Court was not complied with and on 23rd May, 2016, I directed that the warrants be executed by the OCPD Central Police Station. On 20th June, 2016, this Court was informed that the Ministry had received the money from the Treasury and that what was pending was the transfer of the sum to the Attorney General's Chambers. The Court then directed the OCPD to avail the 1st Respondent in Court the same afternoon.

7. When the Commissioner was brought to Court that afternoon, he informed the Court that the money had been remitted to the legal representatives, the Attorney General and this was confirmed by counsel from the Attorney General's Chambers. However the said Counsel introduced another issue that they required Tax Compliance Certificate and account details. When the parties appeared before the Court on 8th July, 2016, the story changed to the need to have the order extracted before payment could be effected. This Court thereafter directed that the Accounting Officer in the AG's Chambers appear before the Court on 18th July, 2016 to shed light on why payment had not been effected. Instead of the said officer appearing in Court as directed, learned counsel for the Respondent requested for time to file an affidavit. The Court however extended the time for appearance of the said officer to 21st July, 2016. Once again there was no appearance by the said officer and despite the Court standing over the matter to the afternoon still there was no appearance by the said officer. The Court then directed that warrants do issue to the OCPD Central Police Station to arrest the Solicitor General, who is the accounting officer in the AG's office and on 5th August, 2016 the learned Solicitor General, **Mr Njee Muturi** appeared pursuant to the said warrants.

8. According to the affidavit sworn by **Mr Muturi**, upon receipt of the money, they indicated to the court and even wrote to the applicant's advocate that we were ready to pay the decretal amount once he availed the bank account details, tax compliance certificate and business registration certificate. It was deposed that the Ministry of Finance has vide a treasury circular dated 25th September 2009 directed all accountants to ensure that the following information is captured in the Government payment system in order to ensure a smooth transition from the cheque payment system; Bank account details of the supplier, Pin number, VAT number, Tax compliance certificate and Registration certificate. Acting on the above directive, the advocate of the Applicant was advised by Office of the Attorney General and Department of Justice through a letter dated 20th June 2016 that the sum of Kshs.1.243,361/= had been received from the Ministry of Industrialization and Enterprise development for onward transmission and that payment would be processed electronically upon being provided with the applicant's advocate's account information including the Tax Compliance Certificate.

9. It was disclosed that vide a letter dated 20th June 2016, the Applicant's advocates availed the required information but failed to provide the Tax compliance certificate stating that they were unable to attach the Tax Compliance Certificate as they had not applied for one for the year. **Mr Muturi** deposed that he had been reliably informed that in subsequent court appearances notably 21st July 2016, in a change of tune the advocate remained adamant and indicated to the court that though he has the tax compliance

certificate, he will not provide it at all. In so doing, he had not demonstrated what prejudice he was likely to suffer by providing the tax compliance certificate and in the absence of any explanation the same is in bad faith. To the deponent, the Respondent is unable to process payment on behalf of the applicant due to the fact that the Applicant's advocates have failed to avail Tax compliance Certificate which is a prerequisite document for purposes of processing payment by government entities. To him, the order requiring them to pay the money in court in aid of an advocate who has wilfully refused to provide a tax compliance certificate without any plausible reason undermines public finance management processes as demonstrated by the circular hence putting the wide range of reforms in the management of public financial resources to great risk of failure. In his view, the said order further disregards and exposes internal organizational structures in The Office of The Attorney General to bad precedent that presupposes the High Court as the governor of the Executive where every decision by the Executive will be subject to the scrutiny and approval or otherwise of the Court.

10. It was deposed that there is an elaborate procedure on payment from Government coffers which is underpinned by the provisions of article 206 of the constitution and it is not prudent for The Office of The Attorney General to effect payment contrary to set down regulations which have statutory and & constitutional underpinning to safeguard and effectively manage public funds. He contended that under Article 156(6) of the Constitution, the office of the Attorney-General is mandated to promote, protect and uphold the rule of law and defend the public interest. As such, it is in the interest of justice that in the circumstances the said decretal amount be retained in the deposit account of the Office of the Attorney General and Department of Justice until full compliance by the Applicant's advocates.

11. These issues were reiterated by the learned Solicitor General when he appeared before this Court

12. I have considered the foregoing.

13. With due respect to the legal representatives of the parties to this ruling, these proceedings manifest clear circumstances when parties' legal advisers may on occasion unnecessarily prolong the determination of proceedings which otherwise ought to have come to an end for no reason other than the exercise of legal ingenuity on the part of counsel at the expense of clients and the public. Similar circumstances arose in **Republic vs. Attorney General ex parte Mailbros Limited Misc Civil Application. No. 562 of 2006** in which this Court expressed itself as follows:

> **"I have anxiously considered the issues raised herein. The Respondent's contention is that since the applicant did not furnish the particulars of account, granting the orders as prayed would be tantamount to frittering away taxpayers money on an exercise that ought to have been concluded in March 2011. On the part of the applicant it is contended that it has never refused to accept payment save that it has been asking for proper reconciliation of the amount due before the settlement can be effected since it did not want to enter into a further dispute after the payment regarding the figures. With due respect to the parties herein, this is an exemplification of unnecessary dispute in which not only the valuable court time is unnecessarily wasted but public resources may end up being wasted on payment that ought not to have been made...**
>
> **Order 22 rule 1(1) of the *Civil Procedure Rules* provides:**
>
> ***All money payable under a decree or order shall be paid as follows—***
>
> ***(a) into the court whose duty it is to execute the decree;***
>
> ***(b) direct to the decree-holder; or***
>
> ***(c) otherwise as the court which made the decree directs.***
>
> **Why the Respondent did not deem it fit to settle the decree by paying the decretal sum into Court pursuant to the foregoing provisions when the applicant was not furnishing the**

particulars of the bank accounts is difficult to understand. There is no provision for deeming payment of a decretal sum when the same is transmitted to the judgement debtor's legal representatives as the Respondent purports to have done here. Whereas I agree that the decree holder ought not to be permitted to benefit from his own default in taking the necessary steps for the transfer of the decretal sum to him, the failure by the judgement debtor to make use of the alternative modes of settlement of a decree as provided by the law does not augur well for the favourable exercise of the Court's discretion in its favour. In this case it is clear that both parties are in default in co-operating with each other to bring this matter to an end with the result that the sum of Kshs 36,372.40 which was the decretal sum has escalated to an unimaginative sum of Kshs 1,736,025.00 which sum is expected to come from public coffers. This state of affairs cannot be condoned. 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 and under Article 129 of the Constitution of Kenya, Public officers must remember that 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. Under Article 10 of the same Constitution the national values and principles of governance stipulated therein bind all State organs, State officers, public officers and all persons whenever any of them makes or implements public policy decisions and one of the said principles is good governance, integrity, transparency and accountability. To fail to take an appropriate step with the result that public funds are pilfered or unnecessarily spent cannot, in my view, be termed as good governance.

Therefore I find the Respondent's excuse in not taking adequate steps to ensure that the decretal sum was settled within the shortest time possible in a manner provided by the law unsatisfactory."

14. In this case although **Ms Mbiyu**, learned counsel for the Solicitor General contended that Order 22 rule 1(1) aforesaid is inapplicable since the sum due herein was in respect of costs and not in respect of a decree or order, with due respect to learned counsel, this submission amounts to splitting hairs. On 11th May, 2016, **Korir, J** directed the Respondents to pay the said sum together with interest from the date of taxation till payment in full which payment was to be made within 14 days from the said date failure to do which the warrants of arrest would issue against the 1st Respondent. If that was not a Court order then this Court is lost as to what amounts to a Court order. In my view Order 22 rule 1(1) does not make distinctions between Court orders but is clear that it applies to all orders directing payments.

15. The learned Solicitor General seems to be of the view that a Court order is subject to internal procedures put in place by the executive. As was appreciated by **Majanja, J** in **Republic vs. Town Clerk of Webuye County Council & Another HCCC 448 of 2006**:

"...**a decree holder's right to enjoy fruits of his judgment must not be thwarted. When faced with such a scenario the Court should adopt an interpretation that favours enforcement and as far as possible secures accrued rights. My reasoning is underpinned by the values of the Constitution particularized in Article 10, the obligation of the court to do justice to the parties and to do so without delay under Article 159 (2) (a) & (b) and the Applicant's right of access to justice protected under Article 48 of the Constitution."**

16. As this Court appreciated in ***High Court Judicial Review Miscellaneous Application No. 44 of 2012*** between **Republic vs. The Attorney General & Another ex parte James Alfred Koroso**:

"…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"** [Emphasis added]

17. I also associate myself with the views expressed by **Githua, J** in **Republic vs. Permanent Secretary, Ministry of State for Provincial Administration and Internal Security Exparte Fredrick Manoah Egunza [2012] eKLR** that:

> **"In ordinary circumstances, once a judgment has been entered in a civil suit in favour of one party against another and a decree is subsequently issued, the successful litigant is entitled to execute for the decretal amount even on the following day. When the Government is sued in a civil action through its legal representative by a citizen, it becomes a party just like any other party defending a civil suit. Similarly, when a judgment has been entered against the government and a monetary decree is issued against it, it does not enjoy any special privileges with regards to its liability to pay except when it comes to the mode of execution of the decree. Unlike in other civil proceedings, where decrees for the payment of money or costs had been issued against the Government in favour of a litigant, the said decree can only be enforced by way of an order of mandamus compelling the accounting officer in the relevant ministry to pay the decretal amount as the Government is protected and given immunity from execution and attachment of its property/goods under Section 21(4) of the Government Proceedings Act. The only requirement which serves as a condition precedent to the satisfaction or enforcement of decrees for money issued against the Government is found in Section 21(1) and (2) of the Government Proceedings Act (*hereinafter referred to as the Act)* which provides that payment will be based on a certificate of costs obtained by the successful litigant from the court issuing the decree which should be served on the Hon Attorney General. The certificate of order against the Government should be issued by the court after expiration of 21 days after entry of judgment. Once the certificate of order against the Government is served on the Hon Attorney General, Section 21(3) imposes a statutory duty on the accounting officer concerned to pay the sums specified in the said order to the person entitled or to his advocate together with any interest lawfully accruing thereon. This provision does not condition payment to budgetary allocation and parliamentary approval of Government expenditure in the financial year subsequent to which Government liability accrues."**

18. In my view a person in whose favour a decree has been passed cannot be equated to a "supplier" in order for the internal payment process in the AG's Chambers to be applied to him. In any case, the AG's chambers in this case was not the organ making the payment but was just transmitting the same in its capacity as legal representatives. Where a party has complied with all the legal procedures entitling him to payment, to subject the party to other procedures not expressly provided for in law save for those that are meant to facilitate the payment such as the furnishing of particulars into which the sum is to be remitted 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 based on self inflicted internal mechanisms would be to turn the legal process into a theatre of the absurd especially when such mechanisms are clearly irrational such as terming a decree holder a "supplier". The requirement for suppliers to furnish certain particulars in my view is meant to verify the authenticity of the said suppliers and whether they satisfy the criteria under Article 227(2)(d) which deals with public procurement and asset disposal and provides for sanctions against persons who have defaulted on their tax obligations, or have been guilty of corrupt practices or serious violations of fair employment laws and practices. That provision however is

inapplicable to a decree holder.

19. 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."**

20. 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."**

21. 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."**

22. 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."**

23. 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."

24. 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 Court's of law issuing the orders or Courts of higher jurisdiction are empowered to interpret Court orders.

25. It is therefore my view and I hold that the manner in which the office of the Attorney General has conducted itself in these proceedings does not inspire confidence at all. The reasons relied upon in not settling the sum due herein are with respect flimsy and have no legal basis.

26. Having considered this matter and in order to do substantive justice to the parties considering the fact that the ex parte applicant's legal representatives have admitted that they in fact have Tax Compliance Certificate, I direct the Solicitor General to transmit the sum held by his office on behalf of the 1st Respondent herein which sum is payable to the ex parte applicant herein to the advocates for the applicant within 7 days of service on his office of the Tax Compliance Certificate and particulars of the said advocate's account.

27. In default of such payment, the learned Solicitor General shall be committed to serve 30 days for failure to comply with the orders of this Court.

28. Orders accordingly.

Dated at Nairobi this 14th day of September, 2016

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Mwaura for the Applicant

Mr Munene for Mr Odhiambo for the Respondent

Cc Mwangi