



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

MISCELLANEOUS CIVIL APPLICATION NO 141 OF 2014

SOLOH WORLDWIDE INTER-ENTERPRISES.....APPLICANT

VERSUS

COUNTY SECRETARY NAIROBI COUNTY.....1ST RESPONDENT

COUNTY TREASURER NAIROBI COUNTY.....2ND RESPONDENT

RULING

Introduction

1. The Applicants are the decree holders in CMCC No. 5352 of 2007 - **Soloh Worldwide Inter-Enterprises Limited vs. City Council of Nairobi** vide a decree given on the 13th of May 2011. In the said decree the Applicant was awarded the principal sum of Kshs. 1,258,306/= and costs of Kshs. 145, 323 together with interest thereon at court rates.
2. Thereafter the Applicant instituted these proceedings and by its judgement dated 13th November, 2014, this Court granted an order of mandamus directing the Respondents to honour the said judgement. The Applicant contends that despite the foregoing the Respondent has not done so and now vide its application dated 16th February 2015 seeks substantially an order that **Lilian Ndegwa**, the Respondent's County Secretary and **Jimmy Mutuku Kiamba**, its Treasurer and Chief Accounting Officer be committed to prison for a period of 6 (six) months or such period as the Court deems fit and just.
3. The Applicant avers that the judicial review proceedings referred to above were heard by this court and an order given on the 13th of November 2014 wherein the Respondents were directed to immediately and without delay cause to be paid to the Applicant the outstanding sum of Kshs. 2,652,033.69 and costs amounting to Kshs. 145,325 together with accrued interest thereon in settlement of the decree given on 13th May 2011 on the 1st of December 2014 the Respondents were duly served with a copy of the order given by this court together with a notice of penal consequences endorsed thereon and the same was served through the office of the Deputy Director Legal Services. That order, it was deposed, was accompanied by a letter written by their Advocates, M/s Kagwimi Kangethe & Company Advocates.
4. It was the Applicant's case that despite being aware of the terms of the Order given on the 13th of November 2014 and the notice of penal consequences endorsed thereon and further despite several

demands from the counsel for the Applicant, the Respondents have refused and/or neglected to pay the outstanding decretal sum, costs together with the accrued interest thereon.

5. The Applicants averred that the 2nd Respondent a **Mr. Jimmy Mutuku Kiamba** being the Chief Accounting Officer of the Nairobi City County is obliged to ensure compliance with the order given on the 13th November 2014 and to forthwith settle the outstanding decretal amount and costs as ordered herein.

6. In the Applicant's view that the conduct of the Respondents constitutes a wilful, blatant disobedience and breach of the order given by this court on the 13th of November 2014, a clear indication that the Respondents do not have any regard and/or respect of the orders given by this court and as such they deserve to be punished by an order for committal.

7. Based on legal advice, it was contended disobedience of a court order is a serious issue which should be dealt with swiftly and decisively in order to restore the authority and dignity of this court.

8. The Applicants submitted that the Law of Contempt is expressly provided for under the Kenyan Law in Section 5 of the **Judicature Act** Cap 8 Laws of Kenya where it is provided that the High Court and the Court of appeal shall have the same power to punish for contempt of court as is for the time possessed by the High Court of Justice in England and that power shall extend to upholding the authority and dignity of the subordinate courts. The jurisdiction of the High Court of Justice in England in matters of contempt is provided for in Order 52 of the **Rules of the Supreme Court** and under the said rules, *inter alia* the Applicant must file and serve copies of the statement and affidavit verifying the facts. The Applicants submitted that they have fully complied with the requirements of the law by filing all the relevant pleadings and that this honourable court has the jurisdiction to hear and determine the application.

9. To the Applicants it is a cardinal principle of the law of contempt that orders made by a court of law must be obeyed and that disobedience of a court order is a serious issue which should be dealt with swiftly and decisively in order to restore the authority and dignity of the court and in support of their case, they relied on the holding of the Court of Appeal in **Commercial Bank of Africa Ltd vs. Isaac Kamau Ndirangu Civil Appeal N. Nai 157 of 1991**

10. They further cited ***Halsbury's Laws of England, 4th Edition Volume 9 at paragraph 52*** where 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.”

11. The Applicants therefore argued that an officer of a corporation can be punished for contempt on behalf of a corporation.

12. The applicant sought support from **Hadkinson vs. Hadkinson (1952) 2 ALL ER 56**, where 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.”

13. Further reliance was placed on ***The Law of Contempt, Butterworths (1996) Pages 555 – 569*** by **Nigel Lowe and Brenda Sufrin** where 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.”

Determination

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

15. In my view it is important to examine the current status of the legal regime relating to contempt in this country.

16. In contempt of Court matters, the first port of call with respect to the procedure for institution of contempt of Court proceedings in this country is section 5 of the *Judicature Act* Cap 8 Laws of Kenya which section provides:

(1) The High Court and the Court of Appeal shall have the same power to punish for contempt of court as is for the time being possessed by the High Court of Justice in England, and that power shall extend to upholding the authority and dignity of subordinate courts.

(2) An order of the High Court made by way of punishment for contempt of court shall be appealable as if it were a conviction and sentence made in the exercise of the ordinary original criminal jurisdiction of the High Court.

17. As this Court has held before, it is unfortunate and regrettable that in this age and era, our procedure, with respect to punishment for contempt in our Court is referable to the procedure in the High Court of Justice in England.

18. Therefore the law that governs contempt of court proceedings is the English law applicable in England at the time the contempt was committed. The procedure in the High Court of Justice in England was considered in detail by the Court of Appeal in **Christine Wangari Gachege vs. Elizabeth Wanjiru Evans & 11 Others [2014] eKLR**. In that case the Court recognised that the only statutory basis for contempt of court law in so far as the Court of Appeal and the High Court are concerned is section 5 of the *Judicature Act*.

19. The High Court of Justice in England comprises three (3) divisions – the Chancery, the Queens Bench and the Family Divisions. It is true that following the implementation of **Lord Woolf’s “Access to Justice Report, 1996”**, the *Rules of the Supreme Court* of England are being replaced with the *Civil Procedure Rules, 1999* and pursuant thereto the Court of Appeal in the above decision recognised that on 1st October, 2012 the *Civil Procedure (Amendment No. 2) Rules, 2012*, came into force and Part 81 thereof effectively replaced Order 52 of the *Rules of the Supreme Court* which was the Order dealing with the procedure for seeking contempt of Court orders in the High Court of Justice in England, in its entirety. Under Rule 81.4 which deals with breach of judgement, order or undertaking, referred to as “application notice”, the application is made in the proceedings in which the judgement or order was made or undertaking given and the application is required to set out fully the grounds on which the committal application is made, identify separately and numerically, each alleged act of contempt and be supported by affidavit(s) containing all the evidence relied upon. The said application and affidavit(s) must be served personally on the respondent unless the Court dispenses with the same if it considers it just to do so or authorises an alternative mode of service. The Court of Appeal held that leave or permission is no longer required in such proceedings (relating to a breach of a judgement, order or undertaking) as opposed to committal for interference with the due administration of justice or in committal for making a false statement of Truth or disclosure statement.

20. According to *Black’s Law Dictionary*, 9th 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.”

21. In my considered view, 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 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. 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”.

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

23. 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”.

24. 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.

25. 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.”

26. 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.”

27. In this matter as rightly pointed out by the Applicant, the Respondent has not explained to the Court the reasons why the orders of this Court have not been complied with. In the circumstances, there is no basis upon which this Court can excuse the failure to comply with this Court’s decision.

28. In the premises I find that **Lilian Ndegwa**, the Respondent’s County Secretary and **Jimmy Mutuku Kiamba**, its Treasurer and Chief Accounting Officer are in contempt of this Court.

29. In the result I hereby direct that warrants of arrest do issue to the OCPD Central Police Station to proceed to apprehend the said persons and bring them to Court forthwith to show cause why they cannot be punished accordingly.

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

Dated at Nairobi this 2nd day of June, 2015

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Kangethe for the ex parte Applicant

Cc Patricia