



**REPUBLIC OF KENYA**

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

**(CONSTITUTIONAL AND JUDICIAL REVIEW DIVISION)**

**MISCELLANEOUS CIVIL APPLICATION NO. 136 OF 2014**

**IN THE MATTER OF: THE GOVERNMENT PROCEEDINGS ACT CAP 40 LAWS OF KENYA**

**IN THE MATTER OF: THE CIVIL PROCEDURE ACT, RULES 2010, CAP 21 LAWS OF KENYA, ORDER 53 RULE (1) (2)**

**IN THE MATTER OF: THE CONSTITUTION OF THE REPUBLIC OF KENYA, 2010**

**BETWEEN**

**BEN NJOROGI MITHAMO.....1<sup>ST</sup> APPLICANT**

**JOHN CHEGE GATETE.....2<sup>ND</sup> APPLICANT**

**AND**

**THE HON. SOLICITOR GENERAL.....1<sup>ST</sup> RESPONDENT**

**THE HON. ATTORNEY GENERAL.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. The Applicants are the decree holders in Kiambu SPMCC No. 148 of 2004 in which they were awarded Kshs 201,000 as general damages for unlawful arrest and illegal confinement.
2. They then sought and on 31<sup>st</sup> July, 2014 obtained an order of mandamus in these proceedings compelling the solicitor general to settle the decretal therein amounting to Kshs 352,305/= and further interests accrued on the principal sum.
3. It is the applicants' case that despite service of the said order on the respondents on 8<sup>th</sup> August 2014, the respondents have disregarded the same by failing to settle the sum due which now stands at Kshs 443,000/=, an action which the applicants contend is a direct assault and challenge to the supremacy of the law which ought not to be condoned by this Court hence the orders sought herein.
4. Despite being served with the instant application the respondents have not appeared. Accordingly the applicants seek an order citing the 1<sup>st</sup> respondent for contempt of court and his committal to jail therefor.
5. I have considered the application and the material on record.

6. 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”.**

7. 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.

8. 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”.

9. 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.

10. 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.”

11. 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."

12. In this matter, the Respondents have 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.

13. In the premises I find that the 1<sup>st</sup> Respondent, **the Solicitor General**, is in contempt of this Court.

14. In the result I hereby direct that warrants of arrest do issue to the OCPD Central Police Station to proceed to apprehend the said Solicitor General and bring him to Court forthwith to show cause why he cannot be punished accordingly.

15. The costs of this application are awarded to the Applicants.

**Dated at Nairobi this 15<sup>th</sup> July, 2015**

**G V ODUNGA**

**JUDGE**

**Delivered in the presence of:**

***2<sup>nd</sup> Applicant in person***

***Cc Miron***