REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW NO. 398 OF 2012

IN THE MATTER OF AN APPLICATION BY DAVID PETER NDAMBUKI

TO INSTITUTE CONTEMPT PROCEEDINGS AGAINST THE RESPONDENT HEREIN IN RESPECT OF THE DISOBEDIENCE OF THE ORDERS ISSUED BY THIS HONOURABLE CURT ON THE 3RD MAY 2013 IN JR NO. 398 OF 2012

IN THE MATTER OF SECTION 38(d) OF THE CIVIL PROCEDURE ACT CAP 21 AND ALL OTHER ENABLING PROVISIONS OF THE LAW

IN THE MATTER OF THE CONSTITUTION OF KENYA ARTICLE 6 AND 176

AND IN THE MATTER OF THE COUNTY GOVERNMENT

IN THE MATTER OF HIGH COURT JUDICIAL REVIEW NO.398 OF 2012 AND CMCC NO. 8301 OF 2007

REPUBLIC……….………………………………………………..APPLICANT

VERSUS

NAIROBI CITY COUNTY…………………….......….………..RESPONDENT

EX-PARTE APPLICANT: DAVID PETER NDAMBUKI

RULING

Introduction

1. The Applicant herein has moved this Court by way of a Notice of Motion which was amended on 19th May, 2015 seeking the following orders:

a. **That this honourable court be pleased to issue an order that the Governor County Secretary of Nairobi City County be arrested and be detained in prison for a period not exceeding six months for contempt of the orders issued by this honourable court issued on the 3rd day of May 2013 ordering her him to satisfy the decree in Nairobi CMCC No. 8301 of 2007 and costs subsequently incurred thereto.**
b. **That costs of this application be provided for.**

Applicant's Case

2. The application was based on the following grounds:

   a. That the Respondent has failed, refused and/or neglected to satisfy the decree issued on the 17th of April, 2012 that necessitated institution of judicial review proceedings against and resulted to be order issued on the 3rd day of May 2013.

   b. That upto date the Respondent has not obeyed the said order and the court cannot issue orders in vain.

3. According to the applicant, judgment was entered against the Respondent on the 17th day of February 2012 for an amount of Kshs 700,000 together with costs and interests. Thereafter, the decree was issued on the 17th April 2013 for an amount of Kshs 1,139,775.50/= but the Respondent failed to satisfy the said decree prompting the applicant to institute these proceedings in which the applicant sought orders of mandamus compelling the Respondent to satisfy the said decree. The said proceedings resulted in issuance of the order compelling the first Respondent to pay the decretal sum.
4. It was the applicant's case that despite the foregoing, the Respondent has todate failed to the satisfy decree.
5. It was therefore the applicant's view that Respondent herein has failed, refused and/or neglected to satisfy the decree as issued by this honourable court hence the orders sought herein as court orders are not granted in vain and must be obeyed by all.

Respondent's Case

6. The Respondent opposed the application by way of a replying affidavit sworn by **Karisa Iha**, its director legal affairs on 17th June, 2015.
7. According to the deponent, on or about 20th January, 2014, he signed the payment voucher to the Applicant advocates **Messrs Kamau Kinga & Co. Advocates** of Kshs 1,139,775.50 and forwarded the same to the Accountant for payments vide a memo dated 16th January, 2014 who returned the same Memo with remarks "provide us with the original copy of the decree as certified by the court".
8. The Respondent's advocates then requested the applicant's advocates for the original decree to facilitate payment but the applicant's advocates have failed to supply the Respond with the original decree thus making it difficult to effect payment despite the Respondent's willingness to settle the same.
9. According to the deponent, there is no evidence of personal service of the court order upon the county secretary requiring him to pay the decretal amount. Additionally, for one to be cited for contempt of court, the Applicant must show that the alleged contemnor has previously been served in person with the orders in issue together with a penal notice on that behalf and has wilfully disobeyed the same.

Applicant's Rejoinder

10. By way of a rejoinder the applicant filed a supplementary affidavit sworn on 30th June, 2015 in which he reiterated the contents of the verifying affidavit and disclosed that the Respondent was served with the decree and that on the 5th February 2015 and the 11th day of February 2015 he wrote letters to the advocates asking them to advice their client to pay the decretal sum. In his evidence, all through the prosecution of the applications, the copy of the decree was in the pleadings and even on request, the Respondent was served with copies thereof as well as the certificate of taxation for costs of the Ex parte Applicant's bill of costs dated 2nd April, 2015 for an amount of Kshs 102,080/- which amount similarly remains unpaid.
11. It was averred that all through the prosecution of the judicial review proceedings and the contempt proceedings, the Respondent has always stated that it has never been served with the copies of the

attached documents herein and that it is the reason why it has not paid the decretal amount which is false. To the applicant, it is clear that it has been served and it is only excuse and delay tactic it is trying to employ to prevent the amended motion dated 19/5/2015 from being allowed.

Determination

12. I have considered the application and the material on record.
13. 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."

14. In ***Halsbury's Laws of England*, 4th 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."

15. 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."

16. 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."

17. 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".

18. 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.

19. 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".

20. 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.
21. 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."

22. 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 nolonger 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."

23. In this matter the only reason for non-satisfaction of the decretal amount is that the applicant has not furnished the respondent with the decree. The applicant has however, exhibited a copy of this Court's order issued on 3rd May, 2013 which is clear on the face of it to have been served on the

Respondent's predecessor.

24. A court order is binding on the party against whom it is addressed and until set aside remains valid and is to be complied with. I shudder to think of the place of our judicial system if parties are left to freely decide what court orders to obey and which ones to ignore. Parties must realise that once they are brought to court they are subject to the jurisdiction of the Court. Under Article 159(1) of the Constitution, Judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under the Constitution. In exercising judicial authority the Courts and Tribunals are, inter alia, to be guided by the principle that the purpose and principles of this Constitution shall be protected and promoted. Under Article 10(1) of the Constitution the national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them (a) applies or interprets this Constitution; (b) enacts, applies or interprets any law; or (c) makes or implements public policy decisions. Under clause (2)(a) of the same Article the national values and principles of governance include the rule of law. Musinga, J in Moses P N Njoroge & Others vs. Reverend Musa Njuguna & Another Nakuru HCCC No. 247 "A" of 2004 was of the view, which view I respectfully associate myself with, that the rule of law requires that orders of the Court be respected and obeyed and that duty equally applies even where a party is dissatisfied with an order and has appealed to an appellate court against the order, ruling or judgement. Contemnors, the learned Judge held, undermine the authority and dignity of the Courts and must be dealt with firmly so that the Court's authority is not brought into disrepute. The Judge was however of the view that that recourse ought not to be to a process of contempt in aid of a civil remedy where there is any other method of doing justice, and the jurisdiction of committing for contempt should be most jealously and carefully watched, and exercised with greatest reluctance and greatest anxiety on the part of the Judges to see whether there is no other mode which is open to the objection of arbitrariness, and which can be brought to bear upon the subject.

25. It is therefore my view and I so hold that the Courts are not only empowered to commit for contempt but are under a Constitutional obligation to uphold the rule of law and in doing so to commit for contempt if the conduct of parties invite such course.

26. It is trite law that where committal is sought for breach of an order, it must be made clear what the defendant is alleged to have done and that which is breached. The application must state exactly what the alleged contemnor has done or omitted to do which constitutes a contempt of court with sufficient particularity to enable him to meet the charge. The necessary information must be given in the notice itself. The slightest ambiguity to the order can invalidate an application for committal as ambiguity can in turn lead to the standard of proof, which is higher that the standard in civil cases but lower than criminal standard, not being attained especially on affidavit evidence. Therefore generally the law is that no order requiring a person to do or abstain from doing any act may be enforced by contempt unless a copy of the order has been served personally and endorsed with a notice informing him that if he disobeys the order he is liable to the process of execution. See **Republic vs. Commissioner of Lands & 12 Others *Ex Parte* James Kiniya Gachira Alias James Kiniya Gachiri Nairobi HCMA No 149 of 2002, Victoria Pumps Ltd & Another vs. Kenya Ports Authority & 4 Others [2002] 1 KLR 708** and **Jacob Zedekiah Ochino & Another vs. George Aura Okombo & 4 Others Civil Appeal No. 36 of 1989 [1989] KLR 165.**

27. However, where it has been brought to the Court's attention that its orders are being abrogated or abridged by brazen or subtle schemes and manoeuvres in the name of technical procedures, the Court cannot turn a blind eye to the same. As was held in **Gatharia K. Mutitika & 2 Others vs. Baharini Farm Ltd. [1985] KLR 227:**

"It is quite clear on the authorities that anyone who, knowing of an injunction, or an order of stay, wilfully does something, or causes others to do something, to break the injunction or interfere with the stay, is liable to be committed for contempt… The reason is that by doing so he (or she) has conducted himself (or herself) so as to obstruct the course of justice and so has attempted to set the order of the court at naught."

28. I therefore associate myself with **Lenaola, J** in **Basil Criticos vs. Attorney General & 4 Others [2012] eKLR**, **Republic vs. Minister of Medical Services Misc. Civil Application No. 316 of 2010** that:

"…the law has changed and so as it stands today, knowledge supersedes personal service and for good reason…where a party clearly acts and shows that he has knowledge of a court order, the strict requirement that personal service must be proved is rendered unnecessary."

29. This position was adopted by **Musinga, J** in **Republic vs. Minister of Medical Services** (supra) and **Kimaru, J** in **Gatimu Farmers Company vs. Geoffrey Kagiri Kimani & Others [2005] eKLR**. In the former case the learned Judge expressed himself as follows:

"Article 159(2) (d) of the Constitution requires the court to administer justice without undue regard to procedural technicalities. Article 10 of the Constitution stipulates various national values and principles of governance which bind all state organs, state officers, public officers and all persons whenever any of them applies or interprets the constitution or any law or implements public policy decisions. The values include the rule of law, good governance, integrity, transparency and accountability. The rule of law is vital in the stability of any nation and its institutions. In this new constitutional dispensation, it would be a mockery of justice for a respondent in contempt proceedings to come to court and say that even though he was aware of the terms of a prohibitory order, the order was not properly served upon him or that he considered the same to have some procedural defect, for example, lack of indorsement thereon, and therefore he ought not to be punished for contempt of court."

30. This is akin to the position taken by **Akiwumi, J** (as he then was) in **Kenya Tourist Development Corporation vs. Kenya National Capital Corporation Limited & Another Nairobi HCCC No. 6776 of 1992** when he expressed himself as follows:

"An injunction in prohibitory form operates from the time it is pronounced, not from the date when the order is drawn up and completed. Consequently the party against whom it is made will be guilty of contempt if he commits a breach of the injunction after he has received notice of it, even though the order has not been drawn up...Where an order requires a person to abstain from doing an act, it may be enforced, notwithstanding that service, of a duly endorsed copy of the order has not been served, if the Court is satisfied that pending such service, the person against whom enforcement is sought has had notice of the terms of the order either by being present when the order is made or being notified of the terms of the order whether by telephone, telegram or otherwise...It is of high importance that orders of the Court should be obeyed. Wilful disobedience to an order of the Court is punishable as a contempt of court and such disobedience may properly be described as being illegal...Those who defy a prohibition ought not to be able to claim that the fruits of their defiance are good, and not tainted by the illegality that produced them."

31. As stated in ***Halsbury's Laws of England***, 4th Edn. Vol. 5 para 65:

"Where an order requires a person to abstain from doing an act, it may be enforced notwithstanding that service of a duly indorsed copy of the order has not been served, if the court is satisfied that, pending such service, the person against whom enforcement is sought has had notice of the terms of the order either by being present when the order was made or being notified of the terms of the order, whether by telephone, telegraph or otherwise."

32. In this case it is not contended that the Respondents is unaware of the existence of the decree. The law enjoins any party to the proceedings to initiate the process of the extraction of a decree. In this case, a clear order made consequent to the decree was issued by this Court and its terms are very clear. Despite that the Respondent's officers have not yet complied therewith.
33. In the circumstances, I agree with the applicant that the reasons advanced by the Respondent for the failure to satisfy the decree are flimsy excuses meant to deny the applicant the fruits of his judgement.
34. In the premises I find that the County Secretary of the Respondent is in contempt of court and I hereby direct that warrants do issue to the Officer in Charge of Police Division, Central Police Station, Nairobi to forthwith apprehend the said Secretary and bring him/her forthwith before this

Court to show cause why appropriate punishment ought not to be meted to him/her.

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

Dated at Nairobi this 6th day of October, 2015

G V ODUNGA

JUDGE

Delivered in the presence of:

Miss Waweru for Mr Kinga for the applicant

Cc Patricia