

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT MOMBASA

CASE NUMBER: ELRCPET/E006/2022

JITEGEMEE SACCO SOCIETY LIMITED.....PETITIONER

VS

COUNTY GOVERNMENT OF MOMBASA.....RESPONDENT

RULING

Background

1. Before this Court is a Notice of Motion application dated 18th June 2024 by the Petitioner/Applicant, expressed to be under the provisions of Section 5(1) of the Judicature Act Cap 8 Laws of Kenya; Part 81.4 of the Civil Procedure Rules, 1999 of the Supreme Court of England; and Section 1A, 1B, 3A and 63 of the Civil Procedure Act.

2. The applicant seeks the following orders:

- a) THAT this application be certified as urgent and be heard as a matter of priority in this matter.
- b) THAT pending the hearing and determination of this application, a notice to show cause be issued against the 1st, 2nd and 3rd Affected Parties, to show cause why they should not be punished for contempt of the court orders issued on 31st July, 2023.
- c) THAT the 1st, 2nd and 3rd Affected Parties be held in contempt of court orders given on 31st July, 2023, for their failure to settle the decree issued herein now standing at Kshs. 227,919,327.08.

- d) THAT the court be pleased to order that the 1st, 2nd and 3rd Affected Parties be committed to prison for a period of 6 months for contempt of the court order given on 31st July, 2023 or any other appropriate sanction or penalty.
- e) THAT the costs of this application be provided for.

3. The application is based on the grounds obtained on the face thereof and the supporting affidavit of PETER SOMBA, sworn on the 23rd May 2024.

4. The Respondents and the Affected Parties oppose the application based on the grounds of opposition filed herein dated 19th June 2024.

The Application

5. The Applicant alleges that, by a judgment delivered on 31st July 2023, the Court issued an order of mandamus requiring the Respondents to pay the sum of Kshs. 206,928,312/- to the Petitioner within sixty (60) days from the date of the Judgment, failing which enforcement proceedings may be initiated against the Respondents. The said Judgment and/or decree was served upon the Respondents.
6. Upon the said Judgment, the Petitioner proceeded to file its Party and Party bill of costs, which was taxed on 14th March 2024, at Kshs. 2,367,467/-.
7. Upon the delivery of the judgment, the respondents engaged with the petitioners' chairperson and the chief executive officer. They conveyed that, through a letter dated 29th June 2022, their legal representatives had advised them to settle the decree, and arrangements had been made to do so. The respondents committed to settling the decree by November 2023. However, the respondents did not make any payments towards settling the decree.
8. It is further stated that vide a letter dated 10th January, 2024, the Petitioners reminded the Respondents to settle the decree. Still, the said letter did not elicit any action from the Respondents.
9. Through its letter dated 29th January 2024, the Petitioner informed the Respondents that its members, particularly the retired employees of the 1st

Respondent, planned to demonstrate on 8th February 2024. Consequently, a meeting was convened between the Chief Executive Officer and the Chairperson of the Petitioner, on the one hand, and the 2nd Affected Party, on the other. The Respondent still undertook to settle the decree.

10. Again, through a letter dated 19th April, 2024, the Petitioner reminded the Respondents to settle the decree as their members were suffering. However, the promises to settle the decree were empty.

11. Despite the Respondents and the Affected Parties being aware of the judgment or decree and having committed to settling it, they have failed to do so. The Affected Parties bear the primary responsibility to ensure compliance with the orders issued on 31st July 2023 against the Respondent.

12. It is further contended that the Affected Parties' refusal to ensure compliance with the orders granted on 31st July 2023 is intended to undermine the authority of the Court and impede the pursuit of justice. The aforementioned Affected Parties' act of contempt will not only hinder the course of justice but also potentially result in significant and irreparable damages to the Petitioner.

13. It is crucial for upholding the rule of law and maintaining good order that the authority and dignity of this Court be preserved by ensuring parties adhere to court orders. Consequently, the Affected Parties should be appropriately penalised, as they are in breach of this Court's orders. Their conduct clearly demonstrates a lack of regard, if any at all, for the rule of law, the sanctity of judicial proceedings, or the authority and dignity of this Court.

The Respondents' Opposition

14. The Respondents resist the application on the following principal grounds that:

- a. The application was not personally served upon the affected party.
- b. The application violates the Public Finance Management Act and the County Government Act.
- c. The application is an abuse of the Court process and should be dismissed.

The Petitioner's Submissions

15. The Applicant identifies the following issues for determination:

- i. Whether the Respondents and the Affected Parties have been properly served with the contempt proceedings;
- ii. Whether there are valid Court orders in existence;
- iii. Whether the Respondents knew of the existence of the said Court Orders;
- iv. Whether the Respondents have blatantly disobeyed the Orders of this Honourable Court made on 4.4.2017 and therefore guilty of contempt.

16. Regarding the first identified issue, the Applicant asserts that the Respondents and the Affected Parties were properly served and have appointed legal representation to defend them in the contempt proceedings. Consequently, it is unequivocal that the Respondent and the Affected Parties were duly served.

17. Regarding the second issue, it is submitted that a valid Court Order exists, made by this Court on 31st July 2023. Hon. Justice Agnes Nzei issued a mandamus order directing the Respondents to pay the sum of Kshs. 206,928,312/=. The order has not been appealed against, set aside, or varied. Therefore, it remains binding on the parties.

18. It is further submitted that there cannot be a doubt that the Respondents knew of the order of 31st July, 2023, as firstly, they were parties to the suit wherein the said orders were given. To support this point reliance has been placed on the decision in the case of Africa Management Communication International Ltd -vs Joseph Mathenge Mugo & Another (2013) eKLR where the Court held that when a party is faced with an application for contempt and it is alleged that there is in existence an order which he has disobeyed, it is incumbent upon him to show that he was not aware of the order.

19. Further reliance is placed on the case of Basil Criftcos vs Attorney General & 9 others (2012) eKLR where Lenaola J [as he then was] ".....the law had changed and as it stands today knowledge supersedes personal service.....where a party

clearly acts and shows that he had knowledge of a court order, the strict requirement that personal service must be proved is rendered unnecessary.”

20. On whether the Respondents have blatantly disobeyed the orders of this Court made on 31st July 2023 and are therefore guilty of contempt, the Applicant submits that an order of mandamus was issued for the payment of the foretasted sum, yet in a deliberate non-compliance with the order, the Respondents have neglected to pay.

21. Court orders are not issued in vain. A court order is binding on the party against whom it is directed and remains valid until it is set aside. A party that disobeys it generally risks being in contempt, which is punishable. This principle was affirmed in the case of Republic vs Kenya School of Law & 2 others ex parte Juliet Wanjiru & 5 others (2015) eKLR, which cites with approval the Court of Appeal in Refrigerator & Kitchen Utensils Ltd vs Gulabchand Shah & others, Civil Application No. Nai 39 of 1990 and Wildlife Lodges Ltd vs County Council of Narok & Another (2005) 2 EA 344, where the Court stated: “It was the plain and unqualified obligation of every person against 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 party disobeying it being in contempt and punishable by committal or attachment.....”.

22. Lastly, the Applicant argues that this Court is not only empowered under statute to punish for contempt but also has a constitutional obligation to uphold the rule of law and, in doing so, to commit for contempt if the conduct of parties invites such a course. Such is the case herein.

The Respondents’ Submissions

23. The Respondents submit that the instant application is irregular as it affronts the procedure that ought to be prior to filing Applications for contempt against Government officers such as the Respondents. Consequently, the Application is misleading and premature. It should thus be struck out.

24. The Respondents further submit that the Application is an abuse of the Court process as it was filed prematurely since section 21(4) of the Government Proceedings Act requires that Execution against the County Government can only proceed after the Applicant has sought and obtained an order of mandamus, otherwise as it is, the granting the Orders sought will be akin to holding the Respondents personally liable for the debts of the County Government of Mombasa.

25. Section 21(4) of the Government Proceedings Act provides explicitly as follows:

“Save as provided in this section, no execution or attachment or process in the nature thereof shall be issued out of any court for enforcing payment by the Government of any money or costs, and no person shall be individually liable under any order for the payment by the Government or any Government department, or any officer of the Government as such, of any money or costs.”

26. To support the foregoing submissions, the Respondents place reliance on the case of *Mwaka(124) v County Government of Machakos; Mutie & another (Contemnor)* (Miscellaneous Application E012 of 2021) [2023] KEELRC 13021 (KLR) (14 October 2023), where it was held as follows:

“Githinji J in *Republic v- Permanent Secretary, Ministry of State for Provincial Administration and Internal Security ex parte Fredrick Manoah Egunza* [2012] eKLR set the tone on the specialised process of execution following the new constitutional dispensation as follows:

“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 decreed 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 regard 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/offices under section 21(a) 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 the expiration of 21 days after entry of judgment. Once the certificate of order against the Government is served on the Honourable 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 their advocate, together with any interest lawfully accruing thereon. This provision does not condition payment on budgetary allocation and parliamentary approval of government expenditure in the financial year following the one in which government liability accrues.

27. Time and again, the courts have found that the proper procedure for executing an award or decree against the county government would be by compelling the accounting officer to pay by way of an order of mandamus. It is only after obtaining an order of mandamus that a decree holder can thereafter institute contempt proceedings should the officer fail to comply.”
28. It is argued that there was no personal service of any lawful order against the Respondents to warrant payment of the sums claimed by the Applicant.
29. The Applicant, through the Application, is requesting the Court to issue Orders against the Respondents that cannot be legally granted in the circumstances of

this matter. There is no evidence that the Applicant ever obtained a Certificate of Order against the County Government of Mombasa, nor that it has been personally served upon the Respondents, requiring them to satisfy the Court's Decree.

30. Moreover, even if such orders existed and had been served on the Respondents, the Applicants would then need to obtain an Order of Mandamus compelling the Respondents to pay the owed sum. It is only after proof of service of the Order of Mandamus and the Respondents' failure to pay the amount demanded under the Order that the Applicant could procedurally initiate contempt proceedings. As it stands, the instant application is premature, and there is no justification for the grant of the orders sought.

Analysis and Determination

31. I have carefully considered the Applicant's application, the grounds upon which it is premised, the affidavit in support thereof, the Respondents' grounds of opposition, and the respective submissions by Counsel for the parties, and the following issues emerge for determination; I. Whether the Applicant's instant application has been prematurely and improperly filed, and II. Whether the orders sought in the application can be granted.

32. By their petition dated 12th April 2022, the Petitioner initiated proceedings against two Respondents, the County Government of Mombasa [1st Respondent] and the C.E.M Finance and Economic Planning, County Government of Mombasa [the 2nd Respondent]. This Court notes that at no time was the petition amended to include additional Respondents. Consequently, the disposal orders of the judgment that resulted from the proceedings were binding on the two Respondents.

33. To bind other persons who were not made parties to the proceedings, and to whom the disposal orders of the Judgment did not explicitly or implicitly apply, required a Court order to cause them to be bound by the Judgment and therefore adhere to its terms.

34. The Affected Parties, the Chief Officer of Finance, County Government of Mombasa, and Evans Oanda, C.E.M., FINANCE & Government of Mombasa, did not participate in the proceedings from which the judgment with the disposal order of mandamus originated. Therefore, liability can only be imposed on them if there is a binding order that compels their compliance with the judgment. In this case, this may be achieved through the initiation and pursuit of judicial review proceedings for orders of mandamus.
35. The tone of the instant application indicates that the Respondents and the Affected Parties were aware of the Judgment and the ensuing decree, as Counsel represented them throughout the proceedings relating to the petition. I disagree with this suggestion; the Affected Parties were not parties to the petition and proceedings. Counsel for the 1st and 2nd Respondents did not represent them. The fact that they knew about the disposal orders cannot be presumed. The circumstances of precedents cited by Counsel for the Applicant are therefore distinguishable from those of the current matter. As such, they are irrelevant.
36. Undeniably, Justice Agnes Kituku Nzei, by her judgement delivered on 31st July 2023, held; “Consequently, and having considered the submissions filed herein, Judgment is hereby entered for the Petitioner against the Respondents jointly and severally for:
- I. The sum of Kshs.206,928,312.
 - II. An order of mandamus compelling the Respondents to pay the said sum of KShs. 206, 928,312 to the petitioner within sixty [60] days from the date of this judgment, for which execution proceedings may issue against the Respondents.
 - III. Interest on the awarded sum shall be calculated at court rates from the date of this judgment.
 - IV. Costs of the petition are awarded to the Petitioner.

37. Though the Learned Judge, Justice Nzei, granted the order of mandamus in her judgment, in my view, she deliberately directed that if the settlement of the decree was not done, its execution was to follow. The law recognises various modes of executing decrees; committal to civil jail or a fine, resulting from an

application for contempt, is not one of these modes. Put simply, execution of decree proceedings cannot be initiated and pursued through an application for contempt. The Applicant is seeking to execute the decree herein through such an application.

38. The manner of execution of decrees against the Government was discussed in *Republic v Permanent Secretary, Ministry of State for Provincial Administration and Internal Security, Ex parte Fredrick Manoah Egunza* [2012] eKLR [Supra]

39. Guided by the decision in the above-cited case, I find that the Applicant should have enforced the decree arising from the Judgment mentioned hereinabove through a writ of mandamus, compelling the accounting officer in the relevant docket of the 1st Respondent Government to pay the decretal amount. The initiation of contempt proceedings can only crystallise after the order is obtained, served, and disobeyed. That isn't the case in the current matter.

40. Issuance of a certificate of order against the Government and a failure to honour it within the requisite period are prerequisites for initiating a process towards enforcing a decree against the Government. The Applicant did not assert or demonstrate that the certificate was obtained, served, and disobeyed by the Accounting Officer of the 1st Respondent.

41. By reason of the foregoing reasons, I return that the Applicant's application is premature and improperly presented before this Court. It is hereby struck out.

READ, SIGNED AND DELIVERED THIS 18TH DAY OF SEPTEMBER 2025

SIGNED BY:

HON. MR. JUSTICE OCHARO KEBIRA