Ndege v Principal Secretary, Ministry of Health & 2 others; Public Service Commission & another (Interested Parties) (Petition 32 of 2020) [2025] KEELRC 3426 (KLR) (27 November 2025) (Ruling)

Neutral citation: [2025] KEELRC 3426 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

PETITION 32 OF 2020

JW KELI, J

NOVEMBER 27, 2025

IN THE MATTER OF: AN APPLICATION BY DR. DAVID KAMAU NDEGE FOR ORDERS OF COMMITTAL FOR CONTEMPT OF THE DECREE/ORDERS/ JUDGMENT OF COURT ISSUED ON 23RD OCTOBER, 2020. AGAINST MS. MARY MUTHONI, CURRENT PRINCIPAL SECRETARY PUBLIC HEALTH-MOH

BETWEEN

DR DAVID KAMAU NDEGE ..... PETITIONER

AND

PRINCIPAL SECRETARY, MINISTRY OF HEALTH ..... 1ST RESPONDENT

MINISTRY OF HEALTH ..... 2ND RESPONDENT

HON ATTORNEY GENERAL ..... 3RD RESPONDENT

AND

THE PUBLIC SERVICE COMMISSION ..... INTERESTED PARTY

NATIONAL QUALITY CONTROL LABORATORY ..... INTERESTED PARTY

RULING

1. The Petitioner, vide his Notice of Motion application dated 29th January 2024, sought the following orders from the Court;

    a. Spent

    b. That this Honourable Court be pleased to cite the Principal Secretary Ministry of Health, Department of Public Health and Professional Standard, (currently Ms. Mary Muthoni) for

contempt of this court's Decree/Orders/judgment issued by Hon. Justice Byram Ongaya on 23rd October, 2020 in Petition.

c. That consequently, the Honourable Court be pleased to appoint an appropriate date for sentencing the said Principal Secretary to civil jail for a period six (6 months) or such other period as the Court may determine for contemptuous disobedience of the stated Decree/ Orders/Judgment.

d. That Contemnor, the Principal Secretary, is at liberty to purge the contempt before the appointed sentencing date.

e. That the Honourable court be pleased to issue any other Order deemed fit in the circumstances of this Application.

f. That costs be provided for.

2. The Respondents are opposed to the application and have filed a replying affidavit sworn on 16th September 2025 by the 1st Respondent (the Contemnor).

3. The issue for determination in the application was whether the application was merited.

Applicant's submissions

4. Whether applicant has proved, at least, almost beyond reasonable doubt, that the 1st respondent is in contempt of this court's decree/judgment -whereas it was not in contention, and indeed trite law, that; if cited for contempt, and the prayer sought is for committal to jail, the liberty of the contemnor will be affected, as such, the standard of proof is higher than the standard in civil cases; the Respondents unnecessarily spent significant effort on the issue (8 out of 25 substantive paragraphs). Thus, the real substantive issue that emerges is whether the applicant demonstrated deliberate disobedience of the orders of the court by the 1st Respondent. In Samuel M. N. Mweru & Others v National Land Commission & 2 others [2020] eKLR the court held that; "There are essentially four elements that must be proved to make the case for civil contempt: The applicant must prove to the required standard (in civil contempt cases which is higher than civil cases) that: -

(a) The terms of the order (or injunction or undertaking) were clear and unambiguous and were binding on the defendant;

(b) The defendant had knowledge of or proper notice of the terms of the order;

(c) The defendant has acted in breach of the terms of the order; and

(d) The defendant's conduct was deliberate. It is the last test in paragraph

(d) Above that warrants detailed consideration.

5. Whether Applicant has proved the terms of the order were clear and unambiguous and were binding on the 1st Respondent; At the 3rd paragraph of her Replying Affidavit, the 1st Respondent deponed as thus; That indeed a judgment was rendered by Justice Byram Ongaya in the matter herein, on the 23rd of October, 2020 ordering the 1st and 2nd Respondents to pay the Petitioner/Applicant his salary arrears since 2010 as a Pharmacist in Job Group Q. By her own paraphrased averments and submissions generally, the 1st Respondent has demonstrated clear and unambiguous understanding and import of the orders, as well as appreciation of its binding nature on her. Thus, on this, the Applicant has proved to the court beyond reasonable doubt that the terms of the subject orders were clear, unambiguous and binding to the 1st Respondent.

6. Whether Respondents had knowledge of/or proper notice of the terms of the order 4, the Applicant annexed to his supporting Affidavit sworn 29th January 2024 the following documents; which demonstrate that the 1st Respondent has sufficient knowledge and proper notice of the terms of the order:

    i. DK-1: letter by Applicant's Advocated dated 5th November 2020 containing copies of Decree and Judgment all received and stamped by 1st & 2nd Respondents on 6th November 2020

    ii. DK-2 are Applicant's four letters dated 23/11/20; 18/01/2021; 24/08/2021 and 21/09/2021 received and stamped by 1st Respondent being requests to be reinstated in the payroll as per the orders of the court.

    iii. DK-4a, 4b and 4c are copies of certificates of Taxation, Decretal Order and certificate of order against Government and Notice-all received by Respondents on 7th June 2023

    iv. DK- Notice for settlement of decretal sum in default filing of contempt of court proceedings -received on 02/01/2024 by 1st & 2nd Respondents.

    Further, the record will attest there has been more than 15 mentions in these proceedings since January 2024, and at least in 10 of them, the Respondent was seeking for grant of one more chance to settle decretal sum. The foregoing is testament that the Respondents had knowledge of or proper notice of the terms of the order beyond reasonable doubt, at least in the mind of the court.

7. Whether Respondents have acted in breach of the terms of the order 9. In spite of the foregoing steps by the Applicant, including but not limited to service of copies of Decree and Judgment on 6th November 2020; Applicant's four letters dated 23/11/20; 18/01/2021; 24/08/2021 and 21/09/2021 requesting to be reinstated in the payroll; service of copies of certificates of Taxation, Decretal Order and certificate of order against Government on 7th June 2023 and Notice for settlement of decretal sum in default filing of contempt of court dated 02/01/2024; the Respondents have not settled any part of decretal sum. At the 12th paragraph in her Replying Affidavit, the 1st Respondent confirmed that she is in breach of the terms of the orders when deposed as thus; "That it is for the above-stated reasons that payment of the decretal sum to the Petitioner/Applicant has been delayed". The foregoing and others prove beyond reasonable doubt that the Respondents have breached the terms of the Order.

8. Whether 1st Respondent has deliberately breached the terms of the order 12. What emerges from Respondent's twin Replying Affidavits sworn 16/09/025 and 02/10/2025, and attendant submissions dated 18/09/2025 is that she will not settle decretal sum until and unless Treasury provides funds specifically for that purpose;

    > but on the other hand, Treasury has vide its letter dated 12/03/2025, which the Respondents had concealed from the court, directed the 1st Respondent to settle the decretal sum from the 1st Respondent's Department of the Ministry of Health budgetary provisions of 2025/26 on priority basis and obviously, if any deficit will arise as a consequence, then Treasury will add funds to cover such eventuality. She has rejected the directive. The Supreme Court of Kenya in Republic v Mohammed & another [2018] KESC 51 (KLR) held that committal to civil jail requires prove of willful breach of the Court Order as thus; "If cited for contempt, and the prayer sought is for committal to jail, the liberty of the contemnor will be affected. As such, the standard of proof is higher than the standard in civil cases. This power, to commit a person to jail, must be exercised with utmost care, and exercised only as a last resort. It is of utmost importance, therefore, for the respondents to establish that the alleged contemnor's conduct was deliberate, in the sense that he or she willfully acted in a manner that flouted the Court Order. The court

of appeal in Woburn Estate Limited v Margaret Bashforth [2016] KECA 472 (KLR held that maneuvers like telling lies when questioned on compliance with the order amount to deliberate/willful disobedience, as thus; We reiterate that contempt proceedings being of quasi –criminal in nature and since a person may lose his right to liberty, each stage and step of the procedure must be scrupulously followed and observed. We bear in mind the often-cited passage attributed to Lord Denning In Re Bramblevale Ltd [1970] 1 CH 128 at page 137 that; "A contempt of court is an offence of criminal character. A man may be sent to prison for it. It must be satisfactorily proved showing that when the man was asked about it, he told lies. There must be some further evidence to incriminate him." . While O. Makau J of this court in Mberia & 3 others v County Secretary, County Government of Meru & 2 others; Kwiriga & 4 others (Interested Parties) [2023] KEELRC 2310 (KLR) held that failure to pay the salary amounts to deliberate or willful disobedience, that; In Republic v Ahmad Abolfathi Mohammed & another [2018] e KLR the Supreme Court held that: "This power, to commit a person to jail, must be exercised with utmost care, and exercised only as a last resort. It is of utmost importance, therefore, for the respondents to establish that the alleged contemnor's conduct was deliberate, in the sense that he or she willfully acted in a manner that flouted the Court Order." [Emphasis Added]I have already made a finding of fact that no reason was given for the withholding the salary for the said four months. The respondents have deliberately failed allow the applicants back to their office and withheld their said salaries for four months. The failure to pay the said salaries after the said court orders corroborates the applicants' case that the respondents had refused to comply with the said court orders. In the case of Teachers Service Commission v Kenya Union of Teachers & another [2013] eKLR Ndolo J held that: "Court orders are not meant for cosmetic purposes. They are serious decisions that are meant to be and ought to be complied with strictly." Again, O. Makau J in Hezekiah Chepkwony & 2 others v Cabinet Secretary, Ministry of Health & 2 others [2020] [2020] KEELRC 755 (KLR) on what amounts to deliberate or willful disobedience is; Having found that the 1st Respondent has violated the Judgment/ Decree rendered herein on 31.1.2020, it is necessary to consider whether he did so deliberately. In Republic v Ahmad Abolfathi Mohammed & another [2018] e KLR the Supreme Court held that: "This power, to commit a person to jail, must be exercised with utmost care, and exercised only as a last resort. It is of utmost importance, therefore, for the respondents to establish that the alleged contemnor's conduct was deliberate, in the sense that he or she willfully acted in a manner that flouted the Court Order." [Emphasis Added] I have carefully read through the Replying Affidavit sworn by the 1st respondent in opposition to the contempt application and the following paragraphs where it was deposed: That the judgment of 31st January, 2020 ... did not permanently shield and/or bar the petitioners from disciplinary action and/or deployment as long as the petitioners are employees of the Ministry of Health. That I have exercised my powers as authorized officer in Ministry of Health by deploying different officers in their various stations taking to account their efficiency and effectiveness of the public service delivery, national integration and representation of Kenya's diverse communities. That ... the deployments I have effected are in line with the judgment of this Honourable Court and the applicable law ..." In my view, the language and the innuendos in the foregoing and other paragraphs in the Replying Affidavit by the 1st Respondent, it is clear that the deponent alleged that he was advised by his counsel on the import of Judgment.

9. In this case; a. Lies to court: While Treasury PS letter dated 12/03/2025 (Annexure-MMM-1 in 1st Respondent's Replying affidavit sworn 02/10/2025) directed the 1st Respondent to prioritize settlement of decretal sum in the financial year 2025/26, as thus; The FY 2024/25 Budget is being

implemented in the context of a tight fiscal framework emanating from the withdrawal of the Finance Bill 2024, underperformance of the targeted revenues and emerging competing priorities. In this regard, the National Treasury is not in a position to provide the requested additional funding. The State Department is therefore advised to prioritize this request in the context of FY 2025/26 and the Medium-Term Budget. She had concealed the said letter and its actual content from court's scrutiny until the Applicant, who had had wind of it, filed an application for production of the said document that she produced it. Her averment at 6th and 8th paragraphs of Replying Affidavit of 16/09/2025 had concealed and twisted the directive, the purpose and intention of the letter; which had directed her to prioritize settlement of decretal sum in FY 2025/26, and from Departmental/Ministry's budget, but had instead deliberately misled the court, by averring quite the opposite, that Treasury will pay in unforeseen future when and if it finds funds, but for now, it has no funds, as thus; That pursuant to the Ministry's request, the National Treasury was, however, unable to provide the additional resources sought due to the tight fiscal frame work and prevailing economic conditions. That the Ministry is also seeking to have the decretal amount provided for in its first supplementary budget and will, in addition, apprise the National Treasury of the need to settle the decretal amount. b. It is now five years since the court issued Orders of Mandamus compelling Respondents to pay salary, not as pending bill, yet, no single cent has been paid. c. Even after the Judgment/Decree/Order of Mandamus (....and henceforth continue paying his monthly salary as he continues with discharge of his duties...) was delivered on 23rd October 2020 in the presence of the Counsel for Respondents and service of the same effected upon them on 5th November 2020 as already demonstrated, the Respondents refused to reinstate the applicant into the payroll for 14 months until he surrendered to his fate by resignation despite his four letters requesting for reinstatement into the payroll (See the four letters seeking reinstatement shown in annexure-DK-2). It did not need payment of arrears, just reinstatement into payroll for a start, it did not happen. Indeed, this deliberate refusal by the 1st Respondent to comply with this first simple step of the Orders of Mandamus surprised the 3rd Respondent, by dint of its statements at paragraph 24 & 25 of its letter to 1st Respondent-Annexure MMM-1 in 1st Respondent's Replying Affidavit of 16th September 2025, as thus; [24] Vide our letter dated 5th September 2023, we wrote to the Ministry inter alia requesting for clarification on whether the Ministry had continued paying the Petitioner his salary after the judgment up to his retirement .....[25] To facilitate our processing of the requisite payment advisory, we vide the letters dated 5th September 2023 and 7th September 2023, requested the Ministry to; calculate arrears from 2010 to the date of the judgment, confirm if the Petitioner was paid after the judgment was delivered ..... d. In any event, it should be noted that the 1st Respondent's letter dated 27/02/2015 to PS Treasury was not out of her initiative, but rather, borne out of court's directive upon Applicant's request. The record will attest to it and therefore, she is yet to make the first step of her own towards settlement of decretal sum, five years on. e. Further Lies: At paragraphs 9 to 12 That it is imperative to note that the State Department for Public Health and Professional Standards was established in 2022, vide Executive Order No. 1 of 2022 of 12", October, 2022; approximately two years after the delivery of the judgement. That in light of its recent establishment, and considering that the Judgment was delivered prior thereto, the State Department has encountered considerable challenges in aligning its institutional framework, administrative processes, and budgetary priorities to the requirements of the Honourable Court's Judgment notwithstanding its ongoing efforts to ensure eventual compliance. That notwithstanding the foregoing, the State Department remains committed to taking the requisite measures to facilitate settlement of the decretal amount, should this Honourable Court be pleased to grant the necessary time. That it is for the above-stated reasons that payment of the decretal sum to the Petitioner/Applicant has been delayed. Yet, unlike some other Ministries, Ministry of Heath has always existed from colonial times and it is from time to time split into two Departments which are then amalgamated into one in exercise of Presidential prerogative. While stating so, she may not have been privy to the fact that the subject judgment highlights the fact that the reason for stoppage

of Applicant's salary in 2010 was because he was alleged to have reported to the State Department for Public Health and Professional Standards instead of State Department of Medical Services within the Ministry of Health; a testament that Department for Public Health and Professional Standards is not new. f. More Lies to court: The record will attest there has been more than 15 mentions since January 2024 and at least in 10 of them, the Respondent was seeking for time to settle decretal sum by next mention, but it has turned out that nothing was happening towards payment. For instance, paragraphs 28-30 in Annexure MMM-1 to 1st Respondent's Replying Affidavit sworn 16/09/2025 already alluded to, is AG's letter to 1st Respondent on court attendance which reveals some of the lies to court, as thus; We attended court on 8thFebruary 2024 before Justice Ocharo Kebira for hearing of the contempt application. We sought for 14 days leave to file our response to the application and the court directed we file and serve our response within 14 days and that the matter shall be mentioned on 18th March 2024 to confirm compliance and or to take a ruling date. We consequently attended court on the March 2024 and we informed court that we were yet to comply with the previous directions and thus sought for 30 days leave to try and conclude the payment process. Vide our letter dated 19th February 2024, we wrote to the Ministry informing yourselves of what transpired in court and further sought for instructions in response to the application. We received telephone communication from Ms. Torome (head of the legal Department in the Ministry) who informed us that the Ministry is keen on paying the decretal sums once we forward to the Ministry the payment advise letter. Having eventually received the payment advise letter dated 6th August 2024 on 7th August 2024; # Why didn't the 1st Respondent pay? # Why didn't she write to Treasury in August 2024 if she believed only Treasury would pay? # Why did it wait until the applicant requested the court to order her to write to Treasury as it did for her to write to Treasury in February 2025?

10. The 1st Respondent has NOT provided any solution or hope in her two Replying affidavits as to when she will settle decretal sum and further submitted, despite the court having issued Orders of Mandamus on 23rd October 2020, that she will only pay upon court issuing further orders/supervision, at 23rd paragraph of its submissions as thus; A more just and proportionate approach is to grant the Respondent time, under Court supervision, to purge the contempt by ensuring the decretal sum is budgeted for and paid. 19. Your Ladyship, it is our humble submission that the foregoing are sufficient grounds in the premises of the legal principles set out by Supreme Court of Kenaya and other plethora decisions to find Respondents in deliberate disobedience of the orders of this honorable court.

11. WHETHER COURT SHOULD TURN TO LAST RESORT OF COMMITTING 1ST RESPONDENT TO CIVIL JAIL – In light of the foregoing deliberate disobedience of the orders of the court, and failure to provide any promissory settlement of the decretal sum and instead urging that, "A more just and proportionate approach is to grant the Respondent time, under Court supervision, to purge the contempt by ensuring the decretal sum is budgeted for and paid"; the same should be balanced with public interest for the blatant disregard of the court orders displayed by 1st Respondent is a recipe for anarchy to the extent that the 3rd Respondent believed that the 1st Respondent had reinstated the Applicant into the payroll, at paragraph 24 & 25 of Attorney General's letter to the 1st Respondent-Annexure MMM-1 in 1st Respondent's Replying Affidavit of 16th September 2025, as thus; [24] Vide our letter dated 5th September 2023, we wrote to the Ministry inter alia requesting for clarification on whether the Ministry had continued paying the Petitioner his salary after the judgment up to his retirement ..... [25] To facilitate our processing of the requisite payment advisory, we vide the letters dated 5th September 2023 and 7th September 2023, requested the Ministry to; calculate arrears from 2010 to the date of the judgment, confirm if the Petitioner was paid after the judgment was delivered. Nonetheless, we submit that if indeed the 1st Respondent is desirous to purge the contempt, she does not need the supervision of this honorable court but rather, utilize the following period for settlement of decretal sum: i. Between now and the time of delivery of the ruling. The Applicant is

able to withdraw the application, even on the eve of delivery of the Ruling as soon as contempt is purged. ii. Conscious of giving a chance to 1st Respondent, one of the Applicant's prayers is that upon conviction, the court be pleased to appoint a future date for sentencing, just to provide liberty to the 1st Respondent to purge the contempt.

13. What percolates from 1st Respondent's Replying Affidavit, the reason for blatant disobedience to court's orders with impunity, is Respondents' misinterpretation of section 21 (4) of the *Government proceedings Act*. However, Odunga J as he then was, in Republic v Permanent Secretary Office of The President Ministry of Internal Security & another Ex-Parte Nassir Mwandihi [2014] KEHC 6027 (KLR, held that the section only provides a long process to allow Government time to settle decretal sums otherwise the concerned officers are open for committal to civil jail if they disobey, as thus;

> It is not in doubt that section 21(4) of the *Government Proceedings Act* prohibits execution against the Government. However Section 21 (1) of the Act provides: ..... Section 21 (3) of the said Act on the other hand provides: ..... The effect of these provisions is that whereas execution proceedings as are known to law are not available against the Government, the accounting officer for the Government department concerned is nevertheless under a statutory duty to satisfy a judgement made by the Court against that department. As was held by Lord Goddard C. J.in the English case of R (Regina) vs. Dudsheath, ex parte, Meredith [1950] 2 ALL E.R. 741, at 743, Mandamus is neither a writ of course nor a writ of right, but will be granted if the duty is in the nature of a public duty, and specially affects the rights of an individual, provided there is no more appropriate remedy. See also Republic vs. Town Clerk, Kisumu Municipality, Ex Parte East African Engineering Consultants [2007] 2 EA 441. 28.This procedure was dealt with extensively in Shah vs. Attorney General (No. 3) Kampala HCMC No. 31 of 1969 [1970] EA 543 where Goudie, J eloquently, in my view, expressed himself, which expression I fully associate myself with, inter alia, as follows: ..... .Section 21(4) of the *Government Proceedings Act* Cap 40 Laws of Kenya provides: However, the preamble to Cap 40 provides that it is "An Act of Parliament to state the law relating to the civil liabilities and rights of the Government and to civil proceedings by and against the Government; to state the law relating to the civil liabilities of persons other than the Government in certain cases involving the affairs or property of the Government; and for purposes incidental to and connected with those matters". It follows that Cap 40 only applies to civil proceedings by and against the Government. It does not apply to proceedings which are not of a civil nature such as criminal proceedings. With respect to judicial review proceedings, it has been held time without a number that such proceedings are neither criminal nor civil. .. It therefore follows from the foregoing discourse that the rules applicable to normal execution proceedings by way of committal to civil jail are not necessarily applicable to enforcement of an order of the Court arising from an order of mandamus by way of committal. It must be remembered that an application for an order of mandamus seeking an order compelling the Government to satisfy a decree is a very elaborate procedure. Before the Court issues such an order, there must be proof that the provisions of the *Government Proceedings Act* have been complied with respect to issuance of certificate of costs and certificate of order against the Government. After the issuance of the aforesaid documents, just like in any application for mandamus, there must be a demand for payment made by or on behalf of the decree holder to the relevant department seeking payment since in an application for an order of mandamus, the law as a general rule requires a demand by the applicant for action and refusal as a prerequisite to the granting of an order, though there are exceptions to the

rule. Where a party has complied with all the procedures leading to the grant of an order of mandamus to subject the party to the normal procedures relating to contempt of court proceedings 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 when adequate notices have been given to the Government to settle a decree would be to turn the legal process into a theatre of the absurd. Accordingly, I direct that the Respondent appears before this Court either in person or by a legal representative to show cause a warrant of arrest ought not to issue for his arrest with a view to committing him to civil jail. 22. Similarly, the court in Republic v Tumbo, Acting County Secretary or the County Secretary Mombasa County & another; Veteran Pharmaceuticals Limited (Exparte Applicant) (Judicial Review Miscellaneous Application 375 of 2018) [2023] KEHC17319 (KLR) (Judicial Review) (12 May 2023) (Ruling) convicted the Principal Secretary section 24 (1) of *Government proceedings Act* notwithstanding as thus; Where a party has complied with all the procedures leading to the grant of an order of mandamus to subject the party to the normal procedures relating to contempt of court proceedings 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 when adequate notices have been given to the Government to settle a decree would be to turn the legal process into a theatre of the absurd." Orders: 31. The Application dated March 6, 2020 is hereby allowed in the following terms: - i. The 1st and 2nd Respondents are hereby found to be in contempt of the order of this Honourable Court issued on January 22, 2019. ii. The Respondents shall attend court in person for sentencing on June 13, 2023."

Respondent's submissions

14. Whether the Petitioner has established valid grounds to warrant this Court to cite the 1st Respondent for contempt. According to Black's Law Dictionary:- 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 behavior 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." In Halsbury's Laws of England it is stated: - "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 an application to court by him not being entertained until he had purged his contempt" In book The Law of Contempt learned authors Nigel Lowe & Brenda Sufrin state as follows: "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." Writing on proving the elements of civil contempt, learned authors of the book Contempt in Modern New Zealand have authoritatively stated as follows: - "There are essentially four elements that must be proved to make the case for civil contempt. The applicant must prove to the required standard (in civil contempt cases which is higher than civil cases) that: -

(a) the terms of the order (or injunction or undertaking) were clear and unambiguous and were binding on the defendant;

(b) the defendant had knowledge of or proper notice of the terms of the order;

(c) the defendant has acted in breach of the terms of the order; and

(d) the defendant's conduct was deliberate. It is the humble submissions of the Hon. Attorney General that contempt proceedings are quasi-criminal in nature and since the liberty of a person is at stake, the standard of proof is higher than in civil cases. This principle was reiterated in the case of Gatharia K. Mutikika vs Baharini Farm Ltd where it was held as follows: -

> "The Courts take the view that where the liberty of the subject is, or might be involved, the breach for which the alleged contemnor is cited must be precisely defined. A contempt of court is an offence of a criminal character. A man may be sent to prison. It must be satisfactorily proved... I must be higher than proof on a balance of probabilities, almost, but not exactly, beyond reasonable doubt. The standard of proof beyond reasonable doubt ought to be left where it belongs, to wit, in criminal cases. it is not safe to extend it to offence, which can be said to be quasi-criminal in nature. However, the guilt has to be proved with such strictness of proof as is consistent with the gravity of the charge... Recourse ought not be had to process of contempt of court in aid of a civil remedy where there is any other method of doing justice.

15. The jurisdiction of committing for contempt being practically arbitrary and unlimited, should be most jealously and carefully watched - "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." Writing on proving the elements of civil contempt, learned authors of the book Contempt in Modern New Zealand have authoritatively stated as follows: - "There are essentially four elements that must be proved to make the case for civil contempt. The applicant must prove to the required standard (in civil contempt cases which is higher than civil cases) that: -

(a) the terms of the order (or injunction or undertaking) were clear and unambiguous and were binding on the defendant;

(b) the defendant had knowledge of or proper notice of the terms of the order;

(c) the defendant has acted in breach of the terms of the order; and

(d) the defendant's conduct was deliberate.

8. Your Ladyship, it is the humble submissions of the Hon. Attorney General that contempt proceedings are quasi-criminal in nature and since the liberty of a person is at stake, the standard of proof is higher than in civil cases. This principle was reiterated in the case of Gatharia K. Mutikika vs Baharini Farm Ltd where it was held as follows: -

> "The Courts take the view that where the liberty of the subject is, or might be involved, the breach for which the alleged contemnor is cited must be precisely defined. A contempt of court is an offence of a criminal character. A man may be sent to prison. It must be satisfactorily proved... I must be higher than proof on a balance of probabilities, almost, but not exactly, beyond reasonable doubt. The standard of proof beyond reasonable doubt ought to be left where it belongs, to wit, in criminal cases. it is not safe to extend it to offence, which can be said to be quasi-criminal in nature. However, the guilt has to be proved with such strictness of proof as is

consistent with the gravity of the charge... Recourse ought not be had to process of contempt of court in aid of a civil remedy where there is any other method of doing justice. The jurisdiction of committing for contempt being practically arbitrary and unlimited, should be most jealously and carefully watched and exercised with the greatest reluctance and the greatest anxiety on the part of judges to see whether there is no other mode which is not open to the objection of arbitrariness, and which can be brought to bear upon the subject. A judge must be careful to see that the cause cannot be mode of dealing with persons brought before him. Necessary though the jurisdiction may be, it is necessary only in the sense in which extreme measures are sometimes necessary to preserve men's rights, that is, if no other pertinent remedy can be found.. Applying the test that the standard of proof should be consistent with the gravity of the alleged contempt it is competent for the court where a contempt is threatened or has been committed, and on an application to commit, to take the lenient course of granting an injunction instead of making an order for committal or sequestration, whether the offender is a party to the proceedings or not."

9. Further, in Peter IC Yego & Others vs Pauline Nekesa Kode the court recognizing that contempt of court is criminal, held that it must be proved that one has actually disobeyed the court order before one is cited for contempt. The applicant in a application for contempt must prove beyond peradventure that the respondent is guilty of contempt.

16. It is further the humble submissions of the Hon. Attorney General that although the proceedings are civil in nature, it is well established that an Applicant must prove the above aforesaid elements beyond reasonable doubt, at least higher than the standard in civil cases, The fact that the liberty of the Respondent could be affected means that the standard of prove is higher than the standard in civil cases. It is incumbent on the Applicant to prove that the Respondent's conduct is deliberate in the sense that she deliberately or wilfully acted in a manner that breached the order. The prayer sought is for committal for contempt. The power to commit for contempt is one to be exercised with great care. An order committing a person to prison for contempt is to be adopted only as a last resort. The 1st Respondent has presented uncontroverted evidence that upon receipt of advice from the Hon. Attorney General on 6th August 2024, the State Department for Public Health and Professional Standards in the Ministry of Health initiated steps to facilitate payment. Further, that on 27th February 2025, the Principal Secretary formally wrote to the National Treasury requesting additional resources to settle the decretal sum of KES 42,238,663.61. The National Treasury was, however, unable to provide the additional resources sought due to the tight fiscal frame work and prevailing economic conditions, but engagements have continued with a view to providing for the decretal sum in the supplementary budget. It is the humble submissions of the Hon. Attorney General that these steps negate any inference of deliberate or mala fide disobedience. The Respondent has actively sought compliance but is constrained by budgetary allocation processes that lie outside the direct control of the Principal Secretary. In addition to the foregoing, the Respondents also put reliance in the decision of the Supreme Court decision of India in the case of India Airports Employees' Union vs Ranjan Chatteriee &. Another AIR 1999 SC 880 stated; "In order to amount to civil contempt, disobedience must be willful If disobedience is based on the interpretation of the Court's order, notification and relevant documents, it does not amount to willful disobedience." It is therefore the submissions of the Respondents that the Petitioner/Applicant has not demonstrated willful disregard of the Court's Decree/Orders/Judgment as against the Respondents.

17. Whether committal of the Principal Secretary to civil jail is an appropriate and proportionate remedy in the circumstances? Section 21(4) of the *Government Proceedings Act* provides that public officers, acting as such, cannot be held personally liable for public debts. This provision reflects the principle that satisfaction of Decrees against Government is dependent on the public finance framework, particularly Parliamentary appropriation and exchequer release. In NR8 HC Judicial Review Miscellaneous Application No. 44 of 2012, Republic vs. The Attorney General & Another ex pane James Alfred Koroso, Odunga J. held; "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". The courts have recognised that fiscal constraints and the need for budgetary allocation can affect the timing of compliance. Further, that payments by Government Ministries and Agencies rely on yearly budgetary allocations which are approved by the National Assembly which is an independent arm of Government who have the ultimate control and oversight over public expenditure. Additionally, it is not only unfair but also impracticable to find a public officer personally liable for public debts. The Respondents submit that courts would not pronounce themselves in nullity. It is the Humble submissions of the Respondents that the in Respondent has presented uncontroverted evidence that upon receipt of advice from the Hon. Attorney General on 6th August 2024, the State Department for Public Health and Professional Standards in the Ministry of Health initiated steps to facilitate payment. Further, that on 27th February 2025, the Principal Secretary formally wrote to the National Treasury requesting additional resources to settle the decretal sum of KES 42,238,663.61. The National Treasury was, however, unable to provide the additional resources sought due to the tight fiscal frame work and prevailing economic conditions, but engagements have continued with a view to providing for the decretal sum in the supplementary budget. 1n Kisang v Judicial Service Commission [20231 KEELRC 2565, the Court held that: "The application assumes that the only sanction this Court can place on a contemnor is committal to civil jail. This is far from the truth. In fact, committal to civil jail should be the last penalty a court can dispense in a constitutional dispensation as is ours where individuals' liberty is one of those premier right! .In addition to the foregoing, the Petitioner seeks that this Honourable Court commits the 1st Respondent to civil jail for a period of six (6) months for alleged contempt. With tremendous respect, we submit that such a prayer is not grounded in any statutory law of Kenya. It is therefore our humble submissions that in the present case, the Respondent has demonstrated bona fide efforts to comply. Committal of the Principal Secretary, who lacks direct control over exchequer release, would amount to punishing an individual officer for systemic budgetary processes. A more just and proportionate approach is to grant the Respondent time, under Court supervision, to purge the contempt by ensuring the decretal sum is budgeted for and paid. Whether court should grant cyders sought by the Petitioner.

18. The Petitioner in his application has asked this honorable court find and hold the 1" Respondent cited herein to be in Contempt of the Court's Decree/Orders/Judgment issued herein by this Honourable Court on the 23rd October, 2020 and to commit the lit Respondent to civil jail respectively among other prayers. 1t is our submission that that the Petitioner has not demonstrated and or established that there was deliberate and/or willful disobedience of the Court's Decree/Orders/Judgment so as to prompt court to issue the orders as prayed for in the application. That it is upon this basis that we draw court's attention to this honorable court decision in Woburn Estate Limited v Margaret Bashforth [20161 eKLR where it cited with approval the often-cited passage attributed to Lord Denning in Re Bramblevale Ltd [1970] 1 CH 128 at page 137 that; "A contempt of court is an offence of criminal character. A man may be sent to prison for it. It must be satisfactorily proved showing that when the man was asked about it, he told lies. There must be some further evidence to incriminate

him." Attention is further drawn to the case of Woburn Estate Limited v Margaret Bashforth [2016] eKLR where this honorable court stated that: "We reiterate that contempt proceedings being of quasi-criminal in nature and since a person may lose his right to liberty, each stage and step of the procedure must be scrupulously followed and observed We bear in mind the often cited passage attributed to Lord Denning in Re Bramblevale Ltd [1970]! CH 128 at page 137 that; "A contempt of court is an offence of criminal character. A man may be sent to prison for it. It must be satisfactorily proved showing that when the man was asked about it, he told lies. There must be some further evidence to incriminate him. he Respondents also put reliance in the case of Salome Munubi 6. 3 others v Muhammad Swazuri & 2 others; Emmanuel Busera (Interested Party); Kabale Tache Arero (Contemnor) [2019] eKLR where the Court cited with approval this honorable court's decision in the case of Mutitika v. Baharini Farm Limited [1985] KLR 229, 234 where it was held as follows: The rationale for this standard is that if cited for contempt, and the prayer sought is for committal to jail, the liberty of the contemnor will be affected ,as such, the standard of proof is higher than the standard in civil cases. This power, to commit a person to jail, must be exercised with utmost care, and exercised only as a last resort It is of utmost importance, therefore, for the respondents to establish that the alleged contemnor's conduct was deliberate, in the sense that he or she wilfully acted in a manner that flouted the Court Order. That further, the Respondents in opposing the orders sought in the application and specifically an order for committal to civil jail, quote and put reliance in the case of Sheila Cassat (supra) where the Court stated that; "The court's contempt power should be used cautiously and with great restraint It is an enforcement power of last resort rather than first resort."

Decision

19. Currently we do not a substantive law on contempt following the decision in Kenya Human Rights Commission vs. Attorney General & Another [2018] eKLR, where Justice Mwita declared that the entire *Contempt of Court Act* No 46 of 2016 to be invalid for lack of public participation as required by Articles 10 and 118(b) of *the Constitution* and found that the said Act as enacted encroached upon the independence of the Judiciary. The decision is law for now.

20. Consequently, we revert to previous position where the law with respect to the procedure for institution of contempt of Court proceedings in this country was which is section 5 of the *Judicature Act* (Cap 8 Laws of Kenya). That 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.’

21. In the circumstances the applicable law that governs contempt of court proceedings is the English law applicable in England at the time the contempt was committed is as held by Justice Odunga in Alfred Mutua v Boniface Mwangi [2022] eKLR at paragraph 14 where the court upheld the decision of the Court of Appeal in Christine Wangari Gachege vs. Elizabeth Wanjiru Evans & 11 Others [2014] eKLR, Where 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*. The court upholds the decision by Justice Odunga.

22. The court found the decisions cited by the parties to be relevant on the jurisprudence on contempt of court. According to Black's Law Dictionary:- 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 behavior 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." In Halsbury's Laws of England it is stated: -

> "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 an application to court by him not being entertained until he had purged his contempt" The applicant submitted as follows- whereas it was not in contention, and indeed trite law, that; If cited for contempt, and the prayer sought is for committal to jail, the liberty of the contemnor will be affected, as such, the standard of proof is higher than the standard in civil cases; the Respondents unnecessarily spent significant effort on the issue (8 out of 25 substantive paragraphs). Thus, the real substantive issue that emerges is whether the applicant demonstrated deliberate disobedience of the orders of the court by the 1st Respondent (the Contemnor). In Samuel M. N. Mweru & Others v National Land Commission & 2 others [2020] eKLR Judgment2020-01-17High Court, the court held that; "There are essentially four elements that must be proved to make the case for civil contempt: The applicant must prove to the required standard (in civil contempt cases which is higher than civil cases) that: -
>
> (a) The terms of the order (or injunction or undertaking) were clear and unambiguous and were binding on the defendant;
>
> (b) The defendant had knowledge of or proper notice of the terms of the order;
>
> (c) The defendant has acted in breach of the terms of the order; and
>
> (d) The defendant's conduct was deliberate. It is the last test in paragraph
>
> (d) Above that warrants detailed consideration.”

23. The applicant on whether he had proved the terms of the order were clear and unambiguous and were binding on the 1st Respondent submitted that at the 3rd paragraph of her Replying Affidavit, the 1st Respondent deponed as thus; That indeed a judgment was rendered by Justice Byram Ongaya in the matter herein, on the 23rd of October, 2020 ordering the 1st and 2nd Respondents to pay the Petitioner/Applicant his salary arrears since 2010 as a Pharmacist in Job Group Q. That by 1st respondent’s own paraphrased averments and submissions generally, the 1st Respondent has demonstrated clear and unambiguous understanding and import of the orders, as well as appreciation of its binding nature on her. Thus, on this, the Applicant has proved to the court beyond reasonable doubt that the terms of the subject orders were clear, unambiguous and binding to the 1st Respondent. On whether Respondents had knowledge of/or proper notice of the terms of the order , the Applicant annexed to his supporting Affidavit sworn 29th January 2024 the following documents; to demonstrate that the 1st Respondent has sufficient knowledge and proper notice of the terms of the order: i. DK-1: letter by Applicant’s Advocated dated 5th November 2020 containing copies of Decree and Judgment all received and stamped by 1st & 2nd Respondents on 6th November 2020 ii. DK-2 are Applicant’s four letters dated 23/11/20; 18/01/2021; 24/08/2021 and 21/09/2021 received and stamped by 1st Respondent being requests to be reinstated in the payroll as per the orders of the court. iii. DK-4a, 4b and 4c are copies of certificates of Taxation, Decretal Order and certificate of order against Government and Notice-all received by Respondents on 7th June 2023 iv. DK- Notice for settlement of decretal sum in default filing of contempt of court proceedings -received on 02/01/2024

by 1st & 2nd Respondents. Further, he submitted that the record will attest there has been more than 15 mentions in these proceedings since January 2024, and at least in 10 of them, the Respondent was seeking for grant of one more chance to settle decretal sum. 8. The foregoing is testament that the Respondents had knowledge of or proper notice of the terms of the order beyond reasonable doubt, at least in the mind of the court. The court found the foregoing to be true facts.

24. It was not in dispute that the petitioner had complied with the legal requirements under the *Government Proceedings Act* and an Order of Mandamus had been issued, and the contemnor (1st respondent) was aware of the Court Orders. From the last replying affidavit dated 2nd October 2025 in these proceedings, the 1st respondent annexed the response by the treasurer to her letter of 27th February 2025. The letter was as follows-

> Ref: RES 1083/24/01'A'(78)
>
> Date: 12th March, 2025
>
> Mary Muthoni Muriuki, CBS Principal Secretary State Department for Public Health and Professional Standards Ministry of Health..
>
> Request for additional resources of Kshs.46,238,663.61 to cater for legal fees and court award at national quality control laboratory
>
> This is in reference letter Ref. No. MOH/PH/FIN/Budget/VOL III (80) dated 27th February, 2025 requesting for additional funding of KSh.46,238,663.61 to cater for settlement of a court award.
>
> The National Treasury has reviewed the request and noted that Dr. David Kamau Ndege a Pharmacist in J/G Q currently stationed at the National Quality Control Laboratory filed a petition 'NRB ELRC Petition No.32 of 2020' dated 26th February, 2020 seeking, inter alia, an Order of Mandamus compelling the Ministry of Health and the Hon. Attorney General to pay him, in arrears, his salary since 2010. It is further noted that the Courts delivered judgement in favour of the petitioner and the Office of the Attorney General & Department of Justice vide letter Ref: AG/LIC/MOH/26/20 dated 6th August, 2024 has advised the Ministry of Health to pay a sum of KSh.46,238,663.61 being the petitioners salary arrears, interest at Court rates and the costs of the petition.
>
> The FY 2024/25 Budget is being implemented in the context of a tight fiscal framework emanating from the withdrawal of the Finance Bill 2024, under- performance of the targeted revenues and emerging competing priorities. In this regard, the National Treasury is not in a position to provide the requested additional funding. The State Department is therefore advised to prioritize this request in the context of FY 2025/26 and the Medium-Term Budget.
>
> Yours Sincerely
>
> Dr. Chris Kiptoo, CBS
>
> Principal Secretary/The National Treasury"

25. The above letter by PS Treasury was produced by the 1st Respondent pursuant to application by the applicant dated 28th September 2025 and after several adjournments on request by the Hon. Attorney General. The application by the petitioner asking the 1st respondent to produce the response by the PS Treasury followed her replying affidavit dated 16th September 2025 to wit-'5. That due to the 2nd Respondent's budget constraints and insufficient funds to enable effecting of the decretal owed the

1st Respondent vide letter dated 27th February 2025 wrote to the National Treasury requesting for additional resources to settle the decretal amount of KES 42,238,663.61 to effect payment of the said sum to the Petitioner/Applicant. (Attached herewith is a copy of the letter dated 27th February, 2025 Ref. MOH/PH/FIN/BUDGET/VOL II (80) marked "MMM - 2")6. That pursuant to the Ministry's request, the National Treasury was, however, unable to provide the additional resources sought due to the tight fiscal frame work and prevalling economic conditions.7. That in its continued effort to ensure compliance with the judgment delivered by Justice Byram Ongaya on 23rd October 2020, the Ministry has persistently engaged the National Treasury with a view to addressing the requested amounts, subject to the availability of fiscal space.8. That the Ministry is also seeking to have the decretal amount provided for in its first supplementary budget and will, in addition, apprise the National Treasury of the need to settle the decretal amount."

26. The court agreed with the petitioner that the 1st respondent was not candid in her response for failing to disclose the advice by the Treasury that- 'The State Department is therefore advised to prioritize this request in the context of FY 2025/26 and the Medium-Term Budget.'. The 1st respondent was directed to budget for the decretal sum but she never disclosed that to the court yet the same would have led to the compliance with the Decree.

27. The court found that the 1st respondent was deliberate in failing to disclose to the court of the direction/advice of PS Treasury for her to budget for the Decretal sum settlement. The court upheld the decision by Odunga J (as he then was), in Republic v Permanent Secretary Office of The President Ministry of Internal Security & another Ex-Parte Nassir Mwandihi [2014] KEHC 6027 (KLR, where the Judge held –

> 'It is not in doubt that section 21(4) of the *Government Proceedings Act* prohibits execution against the Government. However Section 21 (1) of the Act provides: ..... Section 21 (3) of the said Act on the other hand provides: ..... The effect of these provisions is that whereas execution proceedings as are known to law are not available against the Government, the accounting officer for the Government department concerned is nevertheless under a statutory duty to satisfy a judgement made by the Court against that department. As was held by Lord Goddard C. J.in the English case of R (Regina) vs. Dudsheath, ex parte, Meredith [1950] 2 ALL E.R. 741, at 743, Mandamus is neither a writ of course nor a writ of right, but will be granted if the duty is in the nature of a public duty, and specially affects the rights of an individual, provided there is no more appropriate remedy. See also Republic vs. Town Clerk, Kisumu Municipality, Ex Parte East African Engineering Consultants [2007] 2 EA 441. 28.This procedure was dealt with extensively in Shah vs. Attorney General (No. 3) Kampala HCMC No. 31 of 1969 [1970] EA 543 where Goudie, J eloquently, in my view, expressed himself, which expression I fully associate myself with, inter alia, as follows: ..... .Section 21(4) of the *Government Proceedings Act* Cap 40 Laws of Kenya provides: However, the preamble to Cap 40 provides that it is "An Act of Parliament to state the law relating to the civil liabilities and rights of the Government and to civil proceedings by and against the Government; to state the law relating to the civil liabilities of persons other than the Government in certain cases involving the affairs or property of the Government; and for purposes incidental to and connected with those matters". It follows that Cap 40 only applies to civil proceedings by and against the Government. It does not apply to proceedings which are not of a civil nature such as criminal proceedings. With respect to judicial review proceedings, it has been held time without a number that such proceedings are neither criminal nor civil. .. It therefore follows from the foregoing discourse that the rules applicable to normal execution

proceedings by way of committal to civil jail are not necessarily applicable to enforcement of an order of the Court arising from an order of mandamus by way of committal. It must be remembered that an application for an order of mandamus seeking an order compelling the Government to satisfy a decree is a very elaborate procedure. Before the Court issues such an order, there must be proof that the provisions of the *Government Proceedings Act* have been complied with respect to issuance of certificate of costs and certificate of order against the Government. After the issuance of the aforesaid documents, just like in any application for mandamus, there must be a demand for payment made by or on behalf of the decree holder to the relevant department seeking payment since in an application for an order of mandamus, the law as a general rule requires a demand by the applicant for action and refusal as a prerequisite to the granting of an order, though there are exceptions to the rule. Where a party has complied with all the procedures leading to the grant of an order of mandamus to subject the party to the normal procedures relating to contempt of court proceedings 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 when adequate notices have been given to the Government to settle a decree would be to turn the legal process into a theatre of the absurd. Accordingly, I direct that the Respondent appears before this Court either in person or by a legal representative to show cause a warrant of arrest ought not to issue for his arrest with a view to committing him to civil jail''

28. The court established the case met the threshold for contempt of court. The court order of mandamus cannot be in vain. The 1st respondent has not demonstrated any practical steps towards compliance with directions /advice of the PS Treasury in the letter of 12th March 2025. The 1st respondent is held to be in contempt of court. To take a successful litigant in circles when adequate notices have been given to the Government to settle a Decree would be to turn the legal process into a theatre of the absurd. Accordingly, I direct that the 1st Respondent to appear before this Court on the 26th February 2026 either in person or by a legal representative to show cause why a warrant of arrest ought not to issue for her arrest with a view to committing her to civil jail.

29. It is so Ordered.

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 27TH DAY OF NOVEMBER, 2025.

J.W. KELI,

JUDGE.

In the Presence of:

Court Assistant: Otieno

Petitioner/ applicant – Ms Wafula h/b Masika

Respondent – Mochoge