

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**JUDICIAL REVIEW DIVISION**  
**JUDICIAL REVIEW APPLICATION NO. E085 OF 2024**

**BETWEEN**

**BARASA KUNDU NYUKURI.....APPLICANT**

**AND**

**THE PRINCIPAL SECRETARY, MINISTRY OF INTERIOR AND  
COORDINATION OF NATIONAL GOVERNMENT...1<sup>ST</sup> RESPONDENT**

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

**RULING**

1. On 14<sup>th</sup> May 2025, this Court delivered judgment issuing judicial review order of mandamus compelling the Principal Secretary, who is also the accounting officer, Ministry/State Department of Interior and Coordination of National Government or its successor in title to settle certificate of order of costs against the Government dated 18<sup>th</sup> December, 2023 amounting to Kshs 1,543,758 and that in default, the applicant decree holder was at liberty to apply.
2. Vide a Notice of motion dated 19<sup>th</sup> December, 2026, the applicant seeks from this Court orders that the accounting officer, respondent herein do appear in Court personally and show cause why he should not be held to be in contempt of court orders, to be cited to be in contempt of court orders of 14<sup>th</sup> May 2025 and to be committed to civil jail for a period not exceeding six months.

3. The application is supported by the applicant's affidavit sworn on 19<sup>th</sup> December, 2025 giving the history of this matter wherein costs were awarded to him in the primary Judicial review Proceedings in JR E1089 of 2020 and taxed at Kshs 1543,758, a certificate of taxation and certificate of order against the government issued and served upon the respondents and that it was only upon failure to settle that he filed these proceedings. Judgment was delivered issuing mandamus compelling settlement on 14<sup>th</sup> May 2025 and served the said decree upon the respondents on 22<sup>nd</sup> August, 2025, who were nonetheless in court on the judgment date represented by counsel.
4. The applicant deposes that court orders are not mere suggestions but binding on parties and that such obedience is for maintenance of the Rule of Law and order and authority and dignity of the court. That a decree has property in it for the decree holder hence failure to settle decree is deprivation of such property which act is impermissible constitutionally.
5. According to the applicant, the respondents had flagrantly disobeyed the court decree thereby rendering the said decree useless.
6. In response, the respondents filed a replying affidavit sworn by Mr. Kepha Onyiso Deputy Chief State Counsel in the 1<sup>st</sup> respondent's Ministry on 7<sup>th</sup> November, 2025 deposing that the office is ready and willing to settle decree, but that it is constrained by budgetary allocation by the National treasury. That the failure to settle is not intentional but financial constraints

and bureaucratic processes in Government and that there exist several other claims which need to be settled. That the respondent stands to suffer adversely should the application be allowed and that there was no proof of personal service effected on the Principal Secretary Dr. Raymond Omollo; that it is in the interest of justice that time be allowed to settle the decree.

### **Oral Submissions**

7. The application was argued orally on 22<sup>nd</sup> March, 2026. In her oral submissions, Ms Namukuru relied on the case of **Koilel & Koilel**, though with no full citation and submitted that there is a clear court order, there is knowledge of the court order and there is willful disobedience of the order issued pursuant to the judgment of 14/5/2025. She submitted that the Respondents had at all times been represented in this case, were served with the order, that they were present on the judgment date yet they deny personal service. She relied on the **Shimmers Plaza** case where it was held that knowledge of court order dispenses personal service.
8. Onto the third element of willful disobedience, she urged that the deposition of lack of budgetary allocation is not a defence since a party cannot hide behind budgetary allocation to fail to settle decree. That no proposal by the respondent on a payment plan had been made. She urged the court to find the accounting officer to be in contempt of court.
9. In response, Mr. Kariuki counsel for the respondents submitted relying on the replying affidavit of Kepha Onyiso dated 16/2/2026. He submitted that

the Respondents was willing to settle decree and that once funds are availed by Treasury, it will be paid. He regretted the delay which he submitted, was not intentional but occasioned by the bureaucratic processes in the Government of Kenya. he asked for time to pay and when asked by the Court as to whether the Ministry had forwarded to him any evidence that it sought allocation to settle this decree, he answered in the negative.

10. In a rejoinder, Ms Namukuru submitted that there was no application to extend time to settle the decree.

### **Analysis and determination**

11. I have considered the application and the response thereto. The main issue for determination is whether the prayers sought are available.

12. The applicant decree holder seeks for an order that Notice do issue to the respondent accounting officer to appear in person and show cause why he should not be held in contempt of court orders of this court issued on 14<sup>th</sup> May, 2025. However, a notice to show cause is an order that can only issue after the court has established that there is contempt of court and called upon the contemnor to appear and mitigate. At this stage, it is premature for this court to issue such an order.

13. On the second prayer that the accounting officer, be cited for being in contempt of court orders and be committed to civil jail to a term not exceeding six months, the second limb of this prayer, being committal to civil jail can only be made after the alleged contemnor has been convicted of

contempt, accorded an opportunity to mitigate and or purge the contempt and only after it is evident that the contemnor continues to be contumaciously contemptuous, would the court order for civil jail. Civil jail comes at the very tail end of the contempt proceedings, not at the commencement as is the case herein.

14. Onto the question of whether there was contempt of Court by the Respondents herein, the elements of contempt were discussed in the Paper, **“Contempt in Modern New Zealand”**, Issue Paper 36/NZLC, IP36 dated May 2014, at chapter 7 on **“Proving the Elements of Civil Contempt”**, as follows:

***“7.18 There are essentially four elements that must be proved to make the case for civil contempt. The applicant must prove, to the criminal standard of beyond reasonable doubt, 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, normally as the result of personal service;***

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

***and***

***(d) the defendant’s conduct was deliberate.”***

15. In **Samuel M.N. Mweru & Others v National Land Commission & 2 others [2020] eKLR** Mativo J. (*as he then was*) additionally outlined the elements of contempt and held as follows: -

***“40. It is an established principle of law that [45] in order to succeed in civil contempt proceedings, the applicant has to prove***

***(i) the terms of the order,***

***(ii) Knowledge of these terms by the Respondent,***

***(iii) Failure by the Respondent to comply with the terms of the order.***

***Upon proof of these requirements the presence of wilfulness and bad faith on the part of the Respondent would normally be inferred, but the Respondent could rebut this inference by contrary proof on a balance of probabilities....”***

16. Thus, the four elements that must be proved to make a case for Civil Contempt must be present and albeit the proceedings are civil in nature, it is well established that the degree of prove is almost that of beyond reasonable doubt but definitely higher than on balance of probability.

17. Contempt is conduct that impairs the fair and efficient administration of justice. Section 5 of the Judicature Act confers jurisdiction on the superior courts to punish for contempt.

18. In **T. N. Gadavarman Thiru Mulpad v Ashok Khot And Anor [2006] 5 SCC**, the Supreme Court of India emphasized on the dangers of disobeying Court orders, thus:

*“Disobedience of this Court's order strikes at the very root of the rule of law on which the judicial system rests. The rule of law is the foundation of a democratic society. Judiciary is the guardian of the rule of law. Hence, it is not only the third pillar but also the central pillar of the democratic State. If the judiciary is to perform its duties and functions effectively and remain true to the spirit with which they are sacredly entrusted to it, the dignity and authority of the Courts have to be respected and protected at all costs. Otherwise, the very corner stone of our constitutional scheme will give way and with it will disappear the rule of law and the civilized life in the society. That is why it is imperative and invariable that Court's orders are to be followed and complied with.”*

19. Contempt of Court is in the nature of criminal proceedings and, therefore, proof of a case against a contemnor is higher than that of balance of probability. This is because liberty of the subject is usually at stake and the applicant must prove wilful and deliberate disobedience of the court order, if he were to succeed. This was aptly stated in **Gatharia K. Mutikika v Baharini Farm Limited [1985] KLR 227**, that:

***“A contempt of court is an offence of a criminal character. A man may be sent to prison. It must be proved satisfactorily.... It 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 criminal cases. It is not safe to extend it to offences which can be said to be quasi-criminal in nature.”***

20. Considering the four elements of contempt of court set out in the cited cases above, I find that the terms of the mandamus order made on 14<sup>th</sup> May, 2025 are clear, the alleged contemnor was represented throughout these proceedings by officers from Office of the Attorney General who is the Principal Legal Advisor to the National Government and who also received the order and demand for settlement on 22<sup>nd</sup> August 2025.

21. The costs, subject of these judicial review mandamus proceedings, were awarded in the primary proceedings being JR E1089 of 2020 in which the respondents fully participated and were served with the Certificate of Order Against the Government dated 18<sup>th</sup> December, 2020 which is now approaching six years ago.

22. There is no evidence that the accounting officer ever included the certificate of order against the government in the budgeting process, seeking funds from the National Treasury, before or after the mandamus orders herein. Public funds are not expended randomly, even if to satisfy a decree of the

court. The failure to budget for the decretal amount herein and to demonstrate to this court what efforts the accounting officer is making to settle the said costs is evidence of contumacious disobedience of court orders.

23. Neither is there evidence that the accounting officer has made any request to the National Treasury for permission to re allocate funds from one vote towards settlement of the certificate of order against the government in this matter, from the time the mandamus order was issued and served.

24. The affidavit of Mr. Kepha Onyiso the Deputy Chief State Counsel in the accounting Officer's office deposes the accounting officer is willing to settle the decretal sum for the decree of mandamus, states that they are constrained by budgetary constraints and government bureaucracy and that there are several other decrees requiring settlement.

25. However, there is no such evidence of request for the budget for settlement of the subject decree of this Court, made in the last financial year. Not a scintilla of evidence that during this years' budget, a request was made so that settlement can be effected once the 2026/2027 allocation is released. The deposition that they are willing to settle while at the same time deposing that there was no personal service in the proceedings that the accounting officer wholly participated in through counsel, with Mr. Kariuki counsel being present in court on 14<sup>th</sup> May 2025 when the judgment for mandamus

was pronounced, is a mockery of the rule of law and administration of justice.

26. This court cannot, therefore, be persuaded that the failure to pay is due to constraints of budget or that the accounting officer was not served personally with the mandamus order. Knowledge of the order as demonstrated by Mr. Kepha Onyiso's affidavit, since the 1<sup>st</sup> respondent could not be willing to pay what he is not aware of or advised of by the Attorney General, supersedes personal service. See **Shimmers Plaza Limited v National Bank of Kenya Limited [2015] KECA 945 (KLR)** citing **Lenaola J** (as he then was) in the case of **Basil Criticos Vs Attorney General and 8 Others [2012] eKLR** where the learned Judge pronounced himself as follows and I agree that:

*“...the law has 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”*

27. In the circumstances, I am satisfied that the applicant has established to the required standard, that the alleged contemnor, accounting officer, the 1<sup>st</sup> respondent office holder has acted willfully and deliberately in breach of the terms of the mandamus order of 14th May, 2025 order and that his conduct demonstrates unwillingness and defiance of this Court's order made on 14<sup>th</sup> May, 2025.

28.I find the 1<sup>st</sup> respondent, the Principal Secretary, Ministry of Interior and Coordination of National Government, to be guilty of contempt of court orders of mandamus issued on 14<sup>th</sup> May, 2025 and I convict him accordingly.

29.Mention on 25<sup>th</sup> May, 2026 for mitigation.

30. I so order.

**Dated, Signed and Delivered virtually at Nairobi this 22<sup>nd</sup> Day of April, 2026**

**R.E. ABURILI  
JUDGE**

ORIGINAL