General & another v Ochanda (Civil Appeal 265 of 2017)
[2024] KECA 272 (KLR) (8 March 2024) (Judgment)

Neutral citation: [2024] KECA 272 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 265 OF 2017

KI LAIBUTA, A ALI-ARONI & JM MATIVO, JJA

MARCH 8, 2024

BETWEEN

ATTORNEY GENERAL ..... 1ST APPELLANT

PRINCIPAL SECRETARY, MINISTRY OF DEFENCE ..... 2ND APPELLANT

AND

ISAIAH OCHANDA ..... RESPONDENT

(Judgement dated 24th May, 2017 delivered by Aburili, J)

JUDGMENT

1. In order to properly contextualize the appellants' grounds of appeal and to fully appreciate the arguments presented in support thereof, it is necessary to highlight, albeit briefly, the 27 year old history of this litigation culminating in the judgement dated 24th May, 2017 delivered by Aburili, J, the subject of this appeal.

2. On 20th May 1987, the respondent, then an employee of the Kenya army during and in the course of his duties sustained severe neck injuries which rendered him paraplegic. On 13th April 1995, his employer terminated his services on medical grounds. He blamed the 1st appellant for the injuries. Vide a plaint dated 18th October 1996 and amended on 5th November 2010, he sued the Hon. Attorney General in HCC No. 1051 of 1996 at the High Court of Kenya at Nairobi seeking recovery of costs of medical expenses incurred; future medical expenses; general damages; special damages; damages for breach of duty of care; discharge and medical assessment board benefits; costs of the suit and interests thereon. On 2nd March 2011, 15 years of pursuit for justice, the High Court (Rawal, J., as she then was) passed judgment in his favour ordering the 1st appellant to pay him:

    a. the balance of the pension due and payable to him;

    b. the balance of the medical expenses as at 1996 on production of receipts;

c. general damages in respect of pain suffering and loss of amenities - Kshs.1,000,000/=;

d. special damages of Kshs.6,500,000/= in respect of future medical expenses; and

e. costs and interests.

3. However, the appellants failed to satisfy the decree. Aggrieved by that failure, the respondent obtained an order of mandamus in JR. Misc. Application No. 229 of 2012 compelling the appellants to satisfy the decree. However, the appellants did not comply with the said order. This prompted the respondent to institute JR Misc No. 148 of 2013 seeking an order that the 2nd Respondent be committed to prison for contempt of court. Korir, J. (as he then was) dismissed the application for want of personal service upon the contemnors/appellants.

4. Aggrieved by the dismissal, the respondent appealed to this Court in Isaiah Ochanda vs Attorney General & Another [2016] eKLR. On 9th December 2016, this Court (E. M. Githinji, G.B.M. Kariuki and P.M. Mwilu, JJ.A.) allowed the appeal and referred the matter to the High Court. The learned judges stated as follows regarding the question of service:

> "There was an affidavit of service by Bernard Musyoka, a process server, that on 23rd November 2012, he served the order of mandamus and the Ruling of the High Court together with the accompanying letter on a clerk at the office of the Attorney General, who acknowledged receipt by signing on the copy; and that, on 26th November 2012, he served the same documents upon the Legal Officer of the Department of Defence, who acknowledged service by stamping the main copy with the official stamp.
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> The accompanying letter dated 23rd November 2012 from the appellant's advocates to the two respondents stated in part:
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> "The above captioned and the order annexed there refer. Kindly oblige by making settlement as ordered herein. TAKE NOTICE, that should we not hear from you within seven (7) days of service hereof upon yourselves, we have instructions to move the court for contempt proceedings. The result whereof is well known to you."

5. The learned justices proceeded to state as follows:

> " The copy of the said accompanying letter bore the official stamp of each of the respondents and signature of the person on whom the documents were served. Neither of the two respondents filed a replying affidavit to the application for committal, either showing cause why the application should not be allowed, or denying service.
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> Service of court processes on the Government is prescribed in Order 5 rule 9 Civil Procedure Rules,
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> 2010 thus;
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> "9(1). The provisions of this order shall have effect subject to section 13 of the Government proceedings Act, which provides for the service of documents on the Government for the purpose of or in connection with civil proceedigs by or
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> 2. Service of documents in accordance with the said section 13 shall be effected –
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> a. by leaving the document within the prescribed hours at the office of the Attorney General, or any agent whom he has nominated for the purpose but in either case, with a person belonging to the office where the document is left; or

(b) .....;

3. All documents to be served on the Government for the purposes of or in connection with any civil proceedings shall be treated for purposes of these rules as documents in respect of which personal service is not required.

4. In this rule, "documents" includes writs, notices, pleadings, orders, summonses, warrants and other documents, proceedings and written communications. Section 13 of the *Government Proceedings Act* aforesaid merely provides that all documents required to be served on the Government in civil proceedings shall be served on the Attorney General.

6. The appeal justices were satisfied that the service was effected and underscored that personal service was not mandatory in the circumstances of this case. They further stated:

> "The proceedings initiated by the appellant in the High Court were in the nature of civil proceedings for enforcement of a decree for payment of money against the Government. Both the *Government Proceedings Act* and the Civil Procedure Rules specifically provide that personal service is not required in such proceedings. Furthermore, the application before the court was for civil contempt as opposed to criminal contempt, which would have necessitated a specific charge by the prosecuting authority, it is apparent that the court relied on general rules which do not specifically provide for service of court documents, including court orders on the Government. As rule 3 of the Orders aforesaid expressly provides that all documents to be served on the Government, documents relating to civil proceedings are excluded from personal service. The specific provisions in our law prevail over the general rules on the question of service."

7. Regarding the Penal Notice, they stated that the notice letter was for all intents and purposes an effectual penal notice because the object of the general rules has been substantially achieved. They stated:

> "...The principle purpose of the inherent jurisdiction bestowed on the courts is to vindicate the authority of the court so that its orders are obeyed for the proper administration of justice. The procedural protection in the nature of personal service and penal notice in the general rules are designed to give the alleged contemnor a fair hearing in view of the fact that contempt proceedings attract criminal sanctions. However, the procedural protection should not be construed in a manner that abrogates or renders the jurisdiction of the court to punish for disobedience of its order practically inoperative. In an appropriate case, the court retains the discretion to dispense with procedural protection in the interest of justice, more so now that Article 159(2)(d) of *the Constitution* ordains that justice shall be administered without undue regard to procedural technicalities. Had we found that personal service was required and was not done or that penal notice was not given, we would have in the circumstances of this case, dispensed with the general rules."

8. In summation, the Court of Appeal allowed the respondent's appeal with costs and restored the application for hearing. They directed the respondent to file an amended application within 30 days from the date of the judgment. They also directed that the amended application be heard before a judge other than Korir, J.on the merits. They further ordered that the respondents in the amended application were at liberty to file any appropriate response to the application within 14 days of service.

9. Taking cue from the Court of Appeal decision, the respondent filed the Notice of Motion dated 9th December 2016 seeking orders that the 2nd appellant be cited for contempt of the court's order

issued on 21st November 2012 in Miscellaneous Judicial Review application No. 229 of 2012 and order that he be committed to civil jail for a period not exceeding 30 days. He also prayed for costs of the application. The application was premised on grounds that on 2nd March 2011 the respondent obtained a judgment against the appellants for Kshs.19,078,191.78 and subsequently the Bill of Costs was taxed in the sum of Kshs.351,518.90. Further, a certificate of order against the Government was issued on 14th November 2011 for Kshs.22,916,828.34, which was served upon the appellant vide a letter dated 28th November 2011 receipt whereof the 1st appellant acknowledged by stamping the same. He contended that, despite being served with the said orders, the appellants continued to disobey the order with impunity.

10. The application was heard by Aburili, J., who in her judgment dated 24th May 2017, the subject of this appeal, recalled the history of the case and observed that some of the grounds cited by the appellants had the effect of reviewing the Court of Appeal decision. She stated:

> 29. In this case, the applicant's list and copy of documents filed on 23rd December 2016 shows that the Department of Defence, Legal Service Branch, received the order of mandamus on 22nd August 2016 which order is dated 21st November 2012 was also served on the Attorney General, the Principal Legal advisor to the National Government, and also the Principal defendant/respondent in the main suit. There is also a letter by Y. K. Kirui Colonel for Principal Secretary, dated 31stAugust 2016 addressed to the applicant's advocate Ngugi B. G. and Company Advocates referring to the letter of 15th August 2016, and requesting to be provided with the extracted order to enable them to act as appropriate.
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> 30. The question is, is Mr. Kepha Onyiso, litigation counsel, who signed the grounds of opposition in this matter, and who filed submissions opposing this application for contempt of court, being honest with his submissions and grounds of opposition filed on behalf of the respondent when he claims that the affidavit of service filed by the applicant lacked material particulars."
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> 31. The outright answer is a resounding no. I find that the respondent who has not filed any affidavit denying that there is a valid judgment and decree and or certificate of order against the government and or stating that there is an appeal or stay of execution of decree, is being mischievous and dishonest with the court and obstructive of the administration of justice. He is to say the least, by conduct, obstructing the cause of justice by deliberately using procedural technicalities to defeat justice and to circumvent the rule of law.
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> 32. The decree in question has remained unenforced for over 20 years now. The case in the High Court was heard by Rawal, J. (as she then was), interpartes and the respondent was and has for all these years known or been made aware of the judgment of the court and actively participated in the Judicial Review proceedings for mandamus before contempt of court proceedings were initiated. That being the case, the respondent cannot be heard to pretend not to know which court order is due for compliance.
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> 33. Court orders are never issued in vain. They are issued for compliance, however idiotic so that the person who considers the order idiotic is at liberty to challenge it. The respondent has not challenged the Judicial Review order of mandamus issued in this matter by Honourable Korir J. the application for contempt of court was dismissed but the Court of Appeal handed the applicant a lifeline. It is therefore disturbing that the respondent is raising the same technicalities as he did prior to the Court of Appeal's decision and which technicalities have the effect of reviewing the Court of Appeal decision.

34. The conduct of the respondent betrays the rule of law, not the dignity of the judge who issued the order of mandamus compelling the Permanent Secretary to settle decree in HCC 1051 /1996 by way of making payment to the applicant. The order was re-served on the office of the Permanent Secretary on 23rd November 2016 which was not the first time of service.

35. This court cannot help but find that the Permanent Secretary Ministry of Defence had deliberately and brazenly disobeyed the order of this court issued on 22nd November 2012 dated 21st November 2012 compelling him to pay to the applicant decretal sum in HCC 1051/1996 as per the certificate of order against the government.

36. The respondent is hiding under the provisions of Section 21(4) of the *Government Proceedings Act* That provision cannot cushion the Permanent Secretary against the order of mandamus which commands performance of a public duty by the accounting officer."

11. The learned judge proceeded to state as follows:

47. In this case, my view is that provided the procedure for citing the alleged contemnor/creditor is followed in the manner provided for in law, the requirement of due process comparable to that in Article 50(1) of *the Constitution* is guaranteed to the contemnor.

48. Consequently, the respondent's submission that committal to civil jail is unconstitutional is cheap, escapist and devoid of any legal substance. The case of Zipporah Wambui Mathara relied on by the respondent is outmoded and is distinguishable as the judge therein (Koome, J. as she then was) was clear that there were other alternative modes of executing decree, before resorting to committal to civil jail which should have been the last resort. Moreso, the case in question did not involve decree against the Government but against a private person. 49. Throughout the proceedings leading to these contempt of court proceedings, the respondent has not indicated any reason why the decree subject matter of these mandamus proceedings has not been settled for over 20 years, despite several pleas by the exparte applicant decree holder who is said to be paraplegic and whose life expectancy continues to shrink day by day such that he may never live to enjoy the fruits of his lawful judgment.

50. The ex parte applicant has for the last over 20 years been rendered a pious explorer and beggar in the judicial process. His human dignity has in my view been abused by the refusal to settle a money decree in his favour. I take judicial notice of the fact that treatment for a paraplegic is costly in the absence of medical insurance for majority of Kenyans."

12. The learned judge found that the office holder and Accounting Officer/Principal Secretary, Ministry of Defence guilty of contempt of the court order dated 21st November 2012 issued on 22nd November 2012. She convicted him for contempt of court. However, it was her view that it would be prudent to afford the 2nd respondent a hearing before imposing the punishment. She directed the 2nd appellant to be served to attend court for hearing before sentence. However, the 2nd appellant did not attend court as directed. Instead, the appellants preferred this appeal seeking to overturn the impugned judgment citing 5 grounds, which can be reduced into 2, namely: whether the elements of contempt were proved; and whether the 2nd appellant could properly be found personally liable for contempt in the circumstances of the case.

13. The respondent did not attend the virtual hearing of this appeal, nor did he file submissions. However, this court after satisfying itself that all the parties were served with the Hearing Notice electronically by way of e-mail directed the hearing of the appeal to proceed, the respondent's absence and failure to file submissions notwithstanding.

14. The appellants' counsel Mr. Kioko relied on the written submissions dated 12th February 2018, which he also highlighted orally. He submitted that, under section 21 (4) of the *Government Proceedings Act*, no government officer should be held personally liable for monies owed by the government. He cited Kisya Investment Ltd vs Attorney General and R.L. L. Odupoy, [2005] eKLR in support of the proposition that the essence of the foregoing proposition is that it protects and insulates the government against any form of execution or attachment of its property, assets, funds or personnel in or during the enforcement of any judgment, decree, or other orders of the court against it or, any other person.

15. Additionally, counsel submitted that considering that government funds are provided by the national treasury after a detailed process which involves many people, it was implausible to single out the 2nd appellant for contempt. He faulted the learned judge for failing to appreciate that under the law of contempt, personal service is mandatory and cited Shimmers Plaza Ltd vs National Bank, Civil Appeal No. 33 of 2012. Further, he submitted that there was no evidence that the order was endorsed with a Penal Notice and cited Jacob Zedekiah Ochino vs George Aura Okombo and 4 Others, Civil Appeal No. 36 of 1989. Lastly,counsel faulted the learned judge for what he termed as having:

> " made no serious reference to the relevant law of contempt at the time which was section 5 of the *Judicature Act* and the *Contempt of Court Act* of 1981 that required the contemnor be served personally and the relevant order be endorsed with a penal notice. She merely relied on the Court of Appeal judgment that held that personal service was no necessary. That holding does not bind this bench."

16. For starters, a reading of the history of this litigation reproduced earlier leaves no doubt that the appellants have not been candid in this appeal. First, they failed to disclose that this same dispute was the subject of a previous appeal, that is Isaiah Ochanda vs Attorney General & Another [2016] eKLR. Much as the Court of Appeal referred the matter back to the High Court for hearing of the respondent's application on merits, it is important to mention that the appellants before the High Court argued the same grounds which they are arguing in this appeal which were determined by the Court of Appeal in the above-mentioned appeal.

17. A person who approaches a Court or a Tribunal for grant of relief, equitable or otherwise, is under a solemn obligation to candidly disclose all the material which have a bearing on the adjudication of the issues raised in the case. In other words, he owes a duty to the court or the Tribunal to bring out all the facts and refrain from concealing/suppressing any material facts within his knowledge or which he/she could have known by exercising diligence expected of a person of ordinary prudence. If he is found guilty of concealment of material facts or making an attempt to pollute the pure stream of justice, the court not only has the right but a duty to deny relief to such person. This position was underscored in one of the earliest decisions on the subject in 1917 in R. vs Kensington Income Tax Commissioner [1917] 1 KB 486.

18. A party is under a duty to disclose to the court or tribunal all relevant information even if it is not to his or her advantage. (See Brinks-Mat Ltd vs Elcombe [1988] 3 ALL ER 188). The duty of a litigant is to make a full and fair disclosure of the material facts. The material facts are those which it is material for the court or Tribunal to know in dealing with the issues before the court or Tribunal. The duty of disclosure therefore applies not only to material facts known to a litigant, but also to any additional facts which he would have known if he had made inquiries.

19. The second reason why we say that the appellants are not candid is that the history of this litigation was enumerated by Aburili, J.in the judgment the subject of this appeal. Curiously, the relevant pages

of the judgment detailing the previous history of this litigation, and specifically the earlier application, which was dismissed by Korir, J., the ensuing appeal and the arguments propounded by the appellants in opposition to the said application, and in opposition to the said appeal and the finding by the Court of Appeal have been omitted from the record of appeal.

20. The judgment appealed against in this appeal appears at pages 43 to 62 of the record. The omitted pages of the judgment under appeal are: (i) part of paragraph 2 of the impugned judgment, (ii)paragraphs 3 to 11 of the impugned judgment, and (iii) part of paragraph 13 of the said judgment. We cannot ignore this omission for several reasons. First, considering the relevance of the previous litigation to this appeal and the contents of the omitted pages, serious doubts emerge as to whether the omission was inadvertent. It took the industry and diligence of this court to locate the complete judgment at the Kenya law website, thanks to modern technology.

21. Second, principally, owing to the said omission, the Record of Appeal does not conform with Rule 64 (4) of the Court of Appeal Rules, 2022, which provides:

> (4) For the puropses of an appeal from the decision of a superior court in exercise of its appe;;ate juridiction, the record of appeal shall contain documents relating to the prceedings in the trial court correspoding as nearly as may be to the documents specified in sub-rule (2) and copies of the following documents- (a) the petition of appeal; (b) the record of proceedings; (c) the judgment; and (d) the order, if any."

22. A reading of the above provision leaves no doubt that this appeal is fundamentally flawed because the Record of Appeal is incomplete. The word “shall” deployed in the above provision connotes a mandatory prescription.

23. Aburili, J. in the judgment now the subject of this appeal after finding the 2nd appellant guilty of contempt stated that it was improper to sentence him without affording him a hearing. She directed that he be served to attend court to be afforded a hearing before sentence. Despite being served, he did not attend court, so, the learned judge proceeded to sentence him to 30 days imprisonment.

24. The other reason why we find the appellants conduct wanting is that after the sentence, the appellants appealed against the sentence in Civil Appeal No. 402 of 2017, Attorney General and Principal Secretary, Ministry of defence vs Isaiah Ochanda, which was heard by Okwengu, Omondi and Mativo, JJ.A. on 19th October 2022. During the hearing of this appeal, this court drew the attention of the appellants’ counsel to the existence of the said appeal and sought to know why they preferred two appeals from the same case instead of amending the earlier appeal or consolidate both. However, no explanation was offered as to why the appellants maintained two active appeals emanating from the same judgment, one challenging the judgment and the other challenging the sentence.

25. Filing multiple actions on the same matter between the same parties even where there exists a right to bring the action is regarded as an abuse of court process. The abuse lies in the multiplicity and manner of the exercise of the right rather than exercise of right per se. A respondent is vexed with several actions over the same subject matter. The abuse consists in the intention, purpose and aim of person exercising the right, to harass, irritate, and annoy the adversary and interface with the administration of justice. Courts of justice are open to all. Article 22 of *the Constitution* guarantees every person the right of access to the courts. Article 48 guarantees the right to access justice. But this right is not absolute. In exceptional cases, the courts will draw the line. They will shut their doors. Courts have an inherent right and power to prevent an abuse of their processes and to protect their integrity.

26. The issues hitherto addressed are sufficient to dismiss this appeal.

However, we shall address the appeal on merit. The appellants' argued that the Permanent Secretary is not personally liable. This same issue was addressed by the Court of Appeal in the earlier appeal. It stated:

> "Section 21(3) of the Government Proceeding Act provides that the responsible officer is the accounting officer of the responsible Ministry of the Government. Nevertheless, section 21(4) provides, in essence, that, no officer of the Government shall be individually liable for payment of money or costs ordered against the Government or any Government department or any officer of the Government. The appellant needs to amend the application to identify the responsible officers before any executable order can be granted.
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> For the foregoing reasons: 1. The appeal is allowed with costs and the application is restored to hearing.
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> 2. The appellant to file an amended application within 30 days of this judgment 3. The amended application be heard before a judge other than Korir, J. on the merits. 4. The respondents in the amended application are at liberty to file any appropriate response to the application within 14 days of service."

27. The other issue urged by the appellants is alleged lack of personal service and absence of Penal Notice. Again, this same issue was addressed by the Court of Appeal and dismissed. The Court of Appeal was categorical that there was an affidavit of service by one Bernard Musyoka, a process server, deposing that on 23rd November 2012 he served the order of mandamus and the Ruling of the High Court and accompanying letter on a clerk at the office of the Attorney General who acknowledged receipt by signing on the copy, and that, on 26th November 2012, he served the same documents upon the Legal Officer of the Department of Defence, who acknowledged service by stamping the main copy with the official stamp.

28. The other grounds cited in this appeal is the alleged failure to serve a Penal Notice. Again, this same ground was considered and dismissed by the Court of Appeal in the same dispute between the parties in this appeal. The Court of Appeal was categorical that the notice letter served upon the respondents was for all intents and purposes an effectual penal notice because the object of the general rules was substantially achieved.

29. Finally, by mounting this appeal citing the same ground which were raised, considered and determined by this Court in the previous appeal between the same parties involving the same subject matters, the appellants are ingenuously indirectly inviting this court to sit on an appeal on its own decision. We decline the invitation to do so.

30. For the above stated reasons, we dismiss this appeal. Since the respondent did not file any submissions or attend the hearing, we make no orders as to costs.

31. Orders accordingly

DATED AND DELIVERED AT NAIROBI THIS 8TH DAY OF MARCH 2024.

DR. K. I. LAIBUTA

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JUDGE OF APPEAL

ALI-ARONI

.....

JUDGE OF APPEAL

J. MATIVO

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR