



REPUBLIC OF KENYA



**KENYA LAW**  
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**Muigai & 3 others v Estate of Captain Kariuki (DCD). - SVC No. 020788 & 8 others  
(Civil Appeal 241 of 2017) [2022] KECA 1138 (KLR) (21 October 2022) (Judgment)**

Neutral citation: [2022] KECA 1138 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPEAL 241 OF 2017  
HM OKWENGU, F SICHALE & S OLE KANTAI, JJA  
OCTOBER 21, 2022**

**BETWEEN**

**PROF. GITHU MUIGAI ..... 1<sup>ST</sup> APPELLANT  
MR. NJEE MUTURI ..... 2<sup>ND</sup> APPELLANT  
AMB. RACHEL OMAMO ..... 3<sup>RD</sup> APPELLANT  
AMB. PETER KABERIA ..... 4<sup>TH</sup> APPELLANT**

**AND**

**ESTATE OF CAPTAIN KARIUKI (DCD). - SVC NO. 020788 .. 1<sup>ST</sup> RESPONDENT  
WOI GEORGE NGUGI GITAU - SVC NO. 020725/101825 ..... 2<sup>ND</sup> RESPONDENT  
WOI PHILIP NGUI KABUTHI - SVC NO. 020750 ..... 3<sup>RD</sup> RESPONDENT  
SSGT. GEORGE MUOKI (THRO ALICE MUOKI) - SVN NO.  
020733 ..... 4<sup>TH</sup> RESPONDENT  
SGT. JORAM GATHU BORO - SVC NO. 020989/101853 ..... 5<sup>TH</sup> RESPONDENT  
SGT. LEONARD REPHO NGURE - SVC NO. 02155/101889 . 6<sup>TH</sup> RESPONDENT  
CPL FRANCIS MBERERE NJIHIA - SVC NO. 021233 ..... 7<sup>TH</sup> RESPONDENT  
CPL JOHNSON MAKUNGU MUVEA - SVC NO. 022271 ..... 8<sup>TH</sup> RESPONDENT  
ESTATE OF SSGT. GEORGE MBURU - SVC NO. 020739 ..... 9<sup>TH</sup> RESPONDENT**

*(Being an appeal from the Ruling and Orders of the Employment and  
Labour Relations Court of Kenya at Nairobi (Mbaru J). delivered  
on 9th March, 2017 in ELRC J Misc. R Application No. 7 of 2016)*



## JUDGMENT

1. On March 9, 2017 the Employment and Labour Relations Court (ELRC) (Mbaru, J) delivered a ruling in which it allowed a motion filed by the respondents herein who were nine (9) former employees of the Kenya Airforce Service whose services had been terminated. In the Ruling, the High Court found the appellants Prof Githu Muigai, Njee Muturi, Amb Rachel Omamo and Amb Peter Kaberia guilty of contempt of court in regard to the court order made by the ELRC (Mbaru J) on October 13, 2016. The court directed that the appellants attend court on March 16, 2017 on which date it issued warrant of arrest against the appellants.
2. Naturally, the appellants who were aggrieved by the orders of March 13, 2017, lodged an appeal raising 9 grounds which included the learned Judge acting in disregard of clear constitutional and statutory provisions including Articles 156 and 222 of the *Constitution of Kenya 2010*, by finding the Attorney General and the Solicitor General in contempt of court for non-payment of decretal amount, yet they were only in the matter as legal advisers and representatives of the government; holding the 1<sup>st</sup> and 2<sup>nd</sup> appellants personally liable for the payment of the decretal sum arising from the judgment contrary to Article 156 of the *Constitution*; finding the 1<sup>st</sup> and 2<sup>nd</sup> appellants in contempt of court, contrary to the provisions of Section 12 of the *Government Proceedings Act*; holding the appellants who are all public officers, in contempt of court and personally liable for the payment of the decretal amount arising from the judgment entered on October 22, 2014 in Nairobi Industrial Court Petition No 49 of 2012, contrary to section 21(4) of the *Government Proceedings Act*; finding the appellants in contempt of court contrary to the provisions of Article 50 of the *Constitution*; issuing warrants of arrest on March 16, 2017 against the appellants without ascertaining that the penal notice had been served upon them; and finally, finding that the Contempt of Court Act 2016 was not applicable when it was in force at the time of the hearing and ruling of the court.
3. The genesis of the dispute leading to the impugned ruling was a petition filed in the ELRC against the Attorney General. The petitioners, who are the respondents herein claimed that their constitutional rights were grossly violated as they were subjected to: inhuman and degrading treatment; torture and denial of right to personal liberty; deprivation of their property and proprietary right; and violation of their right to employment, resulting in deprivation of human right to earn a living.
4. The petitioners sought various declarations including; a declaration that their arrest, detention and torture, violated their constitutional rights and freedoms; that their removal from the Kenya Airforce Service and the Armed Forces was unconstitutional and violated their constitutional rights and freedom; that their dismissal and discharge from the Kenya Airforce Service and the Armed Forces was unlawful and unconstitutional; that the failure to pay them their dues and appropriate pension is unconstitutional; that they are entitled to clearance of their names and service with the Kenya Airforce, and that they are entitled to general damages for the said violations.
5. The Attorney General did not file any reply to the petition and in a judgment delivered on October 22, 2014, the ELRC (Ndolo, J) found in favour of the petitioners and awarded a global figure of Kshs 8 Million to each of the petitioners as general damages for the violations that they had suffered. Apparently, the petitioners' efforts to execute the judgment proved an uphill task, and by a notice of motion dated July 14, 2016, the petitioners sought an order of mandamus to compel the Principal Secretary in the Ministry of Defence to pay the petitioners Kshs 72,820,868 together with costs and interest, being the decretal sum that they had been awarded in their constitutional petition.



6. This application was heard by the ELRC (Mbaru, J) who delivered a ruling on October 13, 2016, granting the application and issuing an order of mandamus directing the Attorney General and the Principal Secretary in the Ministry of Defence, to pay the petitioners Kshs 82,820,868 together with costs and interest.
7. By an amended notice of motion dated December 16, 2016 filed in the High Court by the petitioners pursuant to leave granted on December 15, 2016, the petitioners sought to have the present appellants who were then holding the position of Attorney-General, Solicitor General, Cabinet Secretary in charge of Ministry of defence and Principal Secretary/Accounting officer in the Ministry of defence, respectively, personally summoned to court and punished for contempt of court for failure to comply with the orders issued on October 13, 2016, for payment of the petitioners, despite the order having been extracted and served upon them.
8. The 4<sup>th</sup> Appellant Amb Peter K Kaberia, Principal Secretary and Accounting Officer in the Ministry of Defence, responded to the motion through a replying affidavit that was sworn on January 30, 2017. He deposed that the Ministry of Defence had only become aware of the matter after the *ex parte* hearing, and that they had sought leave to file an appeal out of time, and the Court of Appeal had granted leave. He explained the procedure in settling such decretal amount which procedure included, a decree holder availing through the State Law Office, a certificate of the order against the government, the decree, and a certificate of costs. He stated that in this case, the decretal amount was a colossal sum of Kshs 72,820,868 which amount was not allocated in the budget for the Ministry of Defence for that year. As such, the amount could only be factored in the next financial year's budget. He swore that the delay in payment of the decretal amount was not intentional nor an act of disobedience of the court order.
9. The learned Judge (Mbaru, J), in the ruling delivered on March 9, 2017, rejected the explanation of the appellants and found all the appellants guilty of contempt of court, stating in part as follows:

“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. In this case it is part of the record that the hearing of the application filed by the applicants have been adjourned to allow the respondents to consult and make effort to settle the decretal amount. The insistence that the decretal sum is colossal yet there is no effort to reduce the same on the face of the Court orders and especially the order of mandamus is evidence enough that the respondents as cited are in contempt of court. Such defence cannot purge contempt. The respondents are collectively and jointly held to account.”
10. The appellants moved to this Court, and by a ruling delivered on March 22, 2017, this Court issued an order of stay of execution of the orders of the ELRC issued on March 9, 2017, and the consequential warrant of arrest issued on March 16, 2017, pending the hearing and determination of the appellants' appeal.
11. The appellants subsequently filed the appeal, and the respondents filed a notice of motion dated August 14, 2017 under Rules 82(1) and 84 of the *Court of Appeal Rules*, seeking to have the record of appeal dated July 18, 2017 filed by the appellants on July 19, 2017 struck out, on the grounds that there was no appeal before the Court, as the record of appeal was filed out of time without leave of the Court. In addition, that the appeal is against the order made on March 9, 2017 while the letter dated March 16, 2017 requesting for proceedings and court order, was in regard to the order dated March 16, 2017 against which no appeal has been preferred.



12. In regard to the substantive appeal, the appellants filed written submissions in which they maintained that the appeal is valid as the notice of appeal was filed on March 10, 2017, within 14 days of the decision, and was served upon the respondents on March 14, 2017, while the letter requesting for copy of ruling of March 9, 2017, was filed on March 10, 2017, and the Deputy Registrar had issued a certificate of delay on October 10, 2017. The appellants maintained that the record of appeal was filed within 60 days as directed by the Court of Appeal, and that the supplementary record of appeal was filed with leave of the Court.
13. The appellants cited *City Chemists (NBI) Mohammed Kasavuli suing for and on behalf of the estate of Halima Wamukoya Kasavuli v Orient Commercial Bank Limited Civil Application No. Nai 302 of 2008*, urging the Court to apply the overriding objective principle to cure procedural defects in order to achieve fair, just, speedy and proportionate disposal of the matter before it.
14. The respondents also filed written submissions in which they opposed the appeal. They identified two issues for determination. Firstly, whether the appeal is valid, and secondly, whether the appellants herein should be held personally liable for contempt of court orders issued by the superior court.
15. In regard to the former issue, the respondents submitted that the appeal is not valid because the appellants failed to serve the respondents with the letter requesting for typed proceedings in regard to the ruling, subject of the appeal; that the appeal was filed without a proper record of appeal; that a supplementary record of appeal was filed without leave of Court two months after the respondents had filed an application seeking to strike out the record of appeal; that the appellants were directed by the Court to file the record of appeal within sixty days but failed to do so; and that the appeal should be dismissed with costs for having been filed out of time.
16. For the avoidance of doubt, what is before us is an appeal against the order that was made by Mbaru, J on March 9, 2017. The notice of appeal in regard to this order was filed on March 10, 2017 and served on the respondents' advocate on March 14, 2017. That is clear from the record of appeal which was filed on July 18, 2017. Under Rule 82 of the *Court of Appeal Rules, 2010* that were then in force, the appellant was required to file the memorandum of appeal and the record of appeal within 60 days from the date the notice of appeal was filed.
17. On the face of the record, the record of appeal in regard to this appeal, was filed more than 60 days from the date of the impugned judgment. However, the appellant relies on the proviso to Rule 82 which allows the Court in computing the period of 60 days to exclude the time taken to prepare and avail the record of proceedings, provided that an appellant has applied for copies of proceedings in writing within 30 days from the date of impugned decision, the letter bespeaking the proceedings has been served on the respondent, and the Registrar has certified the period excluded as required for preparation of the proceedings.
18. The appellants relied on an affidavit that was sworn by Saitoti Torome, to which was attached a ruling by this Court dated May 26, 2017, in which the Court issued an order of stay of execution of the orders issued by the ELRC on March 9, 2017, and the consequential orders issued by the same court on March 16, 2017, and further directed the appellants to file their appeal within 60 days from the date of the Court's Ruling. The record of appeal filed on July 18, 2017 was filed 53 days from the date of the Ruling of this Court, and was therefore filed within the 60 days that was given by the Court. The notice of appeal was against the ruling of March 13, 2017. As the orders made on March 16, 2017 were consequential orders arising from the Ruling of March 13, 2017, the notice was proper as the appeal extended to the consequential order. We find that the appeal is properly before the Court and dismiss the respondents' arguments in this regard.



19. As regards the substantive appeal, it is not disputed that the ELRC delivered judgment in favour of the respondents, and that the decree arising from that judgment remains unsatisfied. The issues that arise for our determination are whether the appellants acting as public officers are personally liable for the government's failure to pay the decretal sum to the respondents, and if the answer is positive, whether the appellants were in contempt of the court order, as to justify their committal for contempt.
20. In regard to the issue of liability, the respondents maintained that the appellants were liable for contempt of court, as they were well represented by counsel in the judicial review application; that the ruling was delivered in the presence of the appellants counsel in whose presence the court gave direction for the appellants to be produced in court on March 16, 2017; that the appellants having failed to attend court to explain why they failed to comply with the order of mandamus that was issued on October 13, 2016 for payment of the respondents, the court issued warrants of arrest in order to ensure that the dignity of the court, justice and the rule of law were protected.
21. The respondents argued that government officials were only exempt from personal liability for a government debt that is due from the government, but has no immunity from obeying court orders regarding payment of a government debt. The respondents relied on a decision of the Constitutional Court of South Africa, *Burchell v Burchell* Case No 364/2005, wherein it was stated:
- “Compliance with court orders is an issue of fundamental concern for a society that seeks to base itself on the rule of law. The constitution states the rule of law and the supremacy of the constitution are foundational values of our society. It vests the judicial authority of the State in the courts and requires other organs of State to assist and protect the courts. It gives everyone the right to have legal disputes resolved in the courts or other independent and impartial tribunals. Failure to enforce court orders effectively, has the potential to undermine confidence in recourse to law as an instrument to resolve civil disputes and may thus impact negatively on the rule of law.”
22. As evident from the notice of appeal and the record of appeal, the appeal before the Court is against the ruling of the ELRC delivered on March 9, 2017. The appellants are not challenging the original judgment of the court delivered in favour of the respondents on October 22, 2014. In other words, they have not taken issue with the judgment of Ndolo, J that was subject of the execution, resulting in the order of March 9, 2017. In the judgment the petitioners were each awarded Kshs 8,000,000 as general damages, and the appeal arises from the execution proceedings in regard to that judgment
23. Section 21 of the *Government Proceedings Act* provides for satisfaction of orders made against the government as follows:
- “(1) Where in any civil proceedings by or against the government, or in proceedings in connection with any arbitration in which the government is a party, any order (including an order for costs) is made by any court in favour of any person against the government, or against a government department, or against an officer of the government as such, the proper officer of the court shall, on an application in that behalf made by or on behalf of that person at any time after the expiration of 21 days from the date of the order or, in case the order provides for the payment of costs and the costs require to be taxed, at any time after the costs have been taxed, whichever is the latter, issue to that person a certificate in the prescribed form containing particulars of the order:



Provided that if the court so directs a separate certificate shall be issued with respect to the costs (if any) ordered to be paid to the applicant.

2. A copy of any certificate issued under this section may be served by the person in whose favour the order is made upon the Attorney General.
3. If the order provides for the payment of any money by way of damages or otherwise, or of any costs, the certificate shall state the amount so payable, and the Accounting Officer for the Government department concerned shall, subject as hereinafter provided, pay to the person entitled or to his advocate the amount appearing by the certificate to be due to him together with interest, if any, lawfully due thereon:

Provided that the court by which in any such order as aforesaid is made or any court to which an appeal against the order lies, may direct that pending an appeal or otherwise, payment of the whole of any amount so payable or any part thereof, shall be suspended and if the certificate has not been issued may order any such direction to be inserted thereon.

2. Save as aforesaid, no execution or attachment or process in the nature thereof shall be issued out of any such court for enforcing payment by the Government of any such money or costs as aforesaid, and no person shall be individually liable under any order for the payment by the Government or any Government department, or any officer of the Government as such, of any money or costs.” (Emphasis added)

24. From the above Section, the following are the requirements in executing a decree against the government. First, the decree holder must apply for and obtain a certificate in the prescribed form containing particulars of the order. Secondly, the certificate must state the amount required to be paid by way of damages or otherwise, and any costs (unless a separate certificate has been issued for costs).

Thirdly, the decree holder or his advocate must serve the Hon. Attorney General with the certificate. Fourthly, upon production and service of the stated documents, the Accounting Officer for the government department concerned, shall pay to the decree holder or his advocate the amount appearing on the certificate together with interest if any. Finally, the court which issued a decree or the court to which an appeal against the order lies may issue an order of stay of execution.

25. As already adverted to, it is not disputed that there was a judgment delivered by the ELRC in favour of the respondents as against the Attorney General, and that the respondents have made unsuccessful efforts to execute the judgment, including obtaining an order of mandamus for the accounting officer to satisfy the judgment. On March 9, 2017, the learned Judge of the ELRC (Mbaru, J) found the appellants to be in contempt of court for failing to make payments to the respondents in regard to the award made by the Court. The appellants have argued that the orders made against the 1<sup>st</sup> and 2<sup>nd</sup> appellants, who are Attorney General and Solicitor General respectively, contravene Article 156 and 222 of the Constitution as well as section 21(4) of the Government Proceedings Act.

26. Article 156 of the Constitution provides for the office of the Attorney General and the powers of the Attorney General as the principal legal adviser to the government who has authority to represent the national government in court or in any other legal proceedings. The Article does not address the issue of personal liability of the Attorney General. Article 222 of the Constitution addresses the issue of government expenditure before the annual budget is passed and provides for the national assembly authorizing the withdrawal of money from the consolidated fund where the Appropriation Act for a financial year has not been assented to or is not likely to be assented to by the beginning of the financial year.



27. Section 21(4) of the [Government Proceedings Act](#) which we have already set out at paragraph 23 specifically prohibits execution or attachment process for enforcing payment by the government against an individual officer of the government, and provides that no officer shall be individually liable under any order for payment by the government or any government department. This means that the appellants who were all officers of the government could not be held personally liable for payment of a debt due from the government.
28. Furthermore, although the appellants did not avail a copy of the original application that resulted in the Ruling of October 13, 2016, in that Ruling the learned Judge refers to a notice of motion dated July 18, 2016 in which an order of mandamus was sought in the following terms:
- “An order of mandamus to compel the Principal Secretary of the Ministry of defence to pay the ex- parte applicants Kshs72,820,868 together with costs and interests being the decretal sum arising out of Constitutional Petition (ELRC) No. 49/2013 (Estate of Capt Kingaru and 8 others v the AG”.
29. The learned Judge upon considering the application found that there was no compelling reason why the application for *mandamus* that was otherwise merited should not be granted. The learned Judge then issued an order of mandamus directed at the respondents, whom in that application were the Attorney General and the Principal Secretary Ministry of Defence that is the 1<sup>st</sup> and 4<sup>th</sup> appellants herein. From the record of proceedings, it is evident that the 2<sup>nd</sup> and 3<sup>rd</sup> appellants were later joined in the contempt proceedings following directions and leave that was granted by the ELRC, for amendment of the application for contempt. This was highly irregular as the order, subject of the contempt proceedings that was issued on October 16, 2016 was not directed at the 2<sup>nd</sup> or 3<sup>rd</sup> appellants and the 1<sup>st</sup> appellant was only included as the Principal Legal Adviser of the government representing the government department, and not in his personal capacity. The contempt proceedings were therefore defective in so far as 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> appellants were concerned.
30. We appreciate the frustration of the court due to the flagrant disobedience of court orders by those in government who should lead the way in demonstrating respect to the court. However, a court of law must be guided by the law and the rule of law must prevail in all its actions. The court cannot afford to flex its muscle by sensationalizing issues. Section 21(4) of the [Government Proceedings Act](#), protects government officers from personal liability. The 1<sup>st</sup> to 3<sup>rd</sup> appellants were therefore not personally liable for the government debt. Moreover, the 1<sup>st</sup> to 3<sup>rd</sup> appellants had no role to play in the satisfaction of the decree against the government or government department. They could not therefore be held responsible for the failure to obey the court order that required satisfaction of the decree made in favour of the respondents.
31. Under section 21(3) of the [Government Proceedings Act](#) payment of the amounts due to the respondents was to be made by the Accounting Officer for the Department of Defence. Neither the Attorney General, nor the Solicitor General nor the Cabinet Secretary for the Ministry of defence had any role to play in effecting the payment. The 4<sup>th</sup> appellant swore an affidavit confirming that he was the accounting officer at the material time. The only explanation he gave for failing to make payment to the respondents was the fact that the amount was over Kshs 72 million, and that the amount had not been budgeted for. The 4<sup>th</sup> appellant did not explain efforts, if any, that had been made to provide for this sum or make any assurance of future payments. As at the time the appeal was being heard, almost five years had lapsed from the date the order of mandamus was issued, yet no payment had been made. The issue of budgetary allocation cannot, therefore, hold. We find that the 4<sup>th</sup> appellant who was the



accounting officer, was indeed in contempt of the court order as it was his responsibility to obey the order and ensure that the decree of the court was satisfied.

32. We come to the conclusion that the learned Judge erred in finding all the appellants “collectively and jointly liable” for contempt of court. For these reasons, we allow the appeal as against the 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> appellants, but dismiss the appeal as against the 4<sup>th</sup> appellant and award costs of the appeal to the respondents.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 21ST DAY OF OCTOBER, 2022.**

**HANNAH OKWENGU**

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**JUDGE OF APPEAL**

**F. SICHALE**

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**JUDGE OF APPEAL**

**S. ole KANTAI**

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**JUDGE OF APPEAL**

*I certify that this is a true copy of the original*

*Signed*

**DEPUTY REGISTRAR**

