



**Republic v Principal Secretary Ministry of Defence & another; Jillo (Decree holder)
(Miscellaneous Case 134 of 2017) [2023] KEELRC 1014 (KLR) (2 May 2023) (Ruling)**

Neutral citation: [2023] KEELRC 1014 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
MISCELLANEOUS CASE 134 OF 2017**

JK GAKERI, J

MAY 2, 2023

BETWEEN

REPUBLIC APPLICANT

AND

THE PRINCIPAL SECRETARY MINISTRY OF DEFENCE ... 1ST RESPONDENT

THE COMMANDER KENYA ARMY 2ND RESPONDENT

AND

NASIBO DABASO JILLO DECREE HOLDER

RULING

1. Before the court for determination is a Notice of Motion by the Applicant dated March 30, 2022 seeking orders that;
 1. This Honourable Court do find that the 1st Respondent, The Principal Secretary, Ministry of Defence failure to make good of this Honourable Court Decree as issued on June 19, 2015 is an act in contempt of court.
 2. Upon grant of pray 1 herein above, this court do issue summons to Dr Ibrahim M Mohamed CBS, the Principal Secretary of Ministry of Defence to personally appear in court and show cause why he should not be committed to civil jail for contempt of court for a period of six months and or until he purges the contempt.
 3. This Honourable Court be pleased to grant such other order as it shall deem just, fit and appropriate in the circumstances.
 4. Costs of this contempt proceedings be borne by the contemnor herein.



2. The application is based on the grounds set out on its face and the Supporting Affidavit sworn by the Applicant in March 2022.
3. The applicant depones that by a judgement entered on June 19, 2015, the court awarded the applicant the sum of Kshs 3,000,000/= and after taxation, a Certificate of Taxation for the sum of Kshs 197,412/= was issued and a certificate of order against the Government for Kshs 3,990,398.00 issued in 2017.
4. That in Judicial Review Proceedings filed in 2017, judgement was entered in the applicant's favour and an Order of Mandamus issued for the 1st Respondent to pay Kshs 3,990,398/= and service was effected upon the Attorney General.
5. That the 1st Respondent was served at his physical address on December 13, 2017 and January 25, 2018 at the Department of Defence as well as by EMS.
6. That attempts by the applicant to have the 1st Respondent make good the decree have fallen through.
7. That a similar suit dated February 15, 2018 failed because of the now struck out Contempt of Court Act, 2016.
8. It is the applicant's case that the 1st Respondent has wilfully declined to pay the decretal sum plus costs and interest and the court order was clear and unambiguous.
9. That the 1st Respondent's conduct undermines the authority and dignity of the court.

Response

10. The Respondents responded by a Replying Affidavit sworn by Joseph M Mutuma, the Acting Chief Financial Officer, Ministry of Defence on February 8, 2023.
11. The affiant deposes that he was aware that the Ministry had several decrees exceeding Kshs 4,000,000,000/= which it is unable to settle due to financial constraints.
12. That satisfaction of decrees and judgement is deemed to be expenditure by Parliament and must be justified in law and provided for in government expenditure and the Ministry of Defence had not received any allocation to settle the current claim owing to the current austerity measures taken by the Government.
13. That the Respondent had initiated the settlement process in August 2022 and was still interested in negotiations.
14. That the Respondents had not refused, neglected or ignored to settle the applicant's claim as alleged but is constrained financially and are still desirous of exploring the out of court option.

Applicant's Submissions

15. Counsel for the applicant submitted on the conditions for citing the 1st Respondent for contempt of court and the rebuttal.
16. On the first issue, counsel relied on Section 5(1) of the Judicature Act as the foundation of the law of contempt as held in Republic v Attorney General & another Ex Parte Mike Maina Kamau (2020) eKLR.
17. Counsel submitted that in order to succeed, the applicant must prove,
 - i. the terms of the order were clear and unambiguous and binding on the defendant.



- ii. the defendant had knowledge of or proper notice of the terms of the order.
 - iii. the defendant acted in breach of the terms of the order, and
 - iv. the defendant's conduct was deliberate as discussed in Contempt in Modern New Zealand.
18. That there should be evidence of wilfulness and bad faith on the part of the Respondent.
 19. According to counsel, the applicant had satisfied all the conditions for citing the 1st Respondent for contempt of court since the matter has been pending since 2016 when the Ruling on Taxation and Certificate of Taxation were served upon the Respondents.
 20. As to whether the 1st Respondent had demonstrated that he was not in contempt of court, counsel submitted that court orders are not issued in vain as courts have demonstrated in legions of decisions.
 21. That the Principal Secretary failed to pay the decretal sum in Petition 11 of 2013 notwithstanding a judgement and no evidence had been availed to show that the Ministry of Defence had applied for allocation of funds for the claim.
 22. That the grounds of opposition are similar to those in the earlier application.
 23. Reliance was made on the sentiments of Githua J. in *Republic v Permanent Secretary, Ministry of State for Provincial Administration and Internal Security, Ex Parte Fredrick Manoah Egunza* (2012) eKLR to urge that payment of decretal sums in civil suits by the Government was not dependent on budgetary allocation and Parliamentary approval.
 24. That non-allocation of funds by Parliament was not acceptable as a defence or excuse for non-payment of decretal sums.
 25. That the Respondent's letters inviting the applicant for negotiations were written on a without prejudice basis and thus not admissible as there was no binding agreement.
 26. The decision in *Lochab Transport Ltd v Kenya Arab Orient Insurance Ltd* (1986) eKLR was cited as authority for the proposition as well as urge that the Respondent's letter should be expunged from the record.

Respondent's submissions

27. Counsel for the Respondents submitted that the failure to comply with court orders by the 1st Respondent was not deliberate as confirmed by the Senior Chief Finance Officer in the Replying Affidavit.
28. That the austerity measures by the Government had limited the Ministry's ability to settle claims and an audit of pending bills was ordered after the change of Government.
29. Counsel relied on the decision in *Braeburn Ltd v Gachoka & another* (2007) 2 EA 67 to urge that deprivation of a person's liberty must be based on proof beyond reasonable doubt that the person has means and has refused or neglected to pay.
30. Counsel submitted that the Respondent had demonstrated good faith in that it had invited the applicant for negotiations though the applicant did not respond and that the failure to pay was occasioned by circumstances beyond the control of the 1st Respondent and was ready to pay the amount by instalments.



31. Counsel also relied on the decisions in *Republic v Town Clerk, Kisumu Municipality Ex Parte East Africa Engineering Consultants* (2007) eKLR and *Kiarie Mbugua v Njoki Mbugua* to urge that the circumstances in this case do not warrant an enforcement action as it was only a delay not refusal to pay.
32. Reliance was also made on Section 21(4) of the *Government Proceedings Act*.
33. Finally, counsel urged the court to exercise its discretion by declining to issue the orders sought against the 1st Respondent.
34. Reliance was also made on the decision in *Wachira Karani V Bildad* (2016) eKLR to emphasize the need for courts to dispense substantive justice.

Findings and Determination

35. It is common ground that the applicant sued the Respondents in 2013, obtained judgement against the Respondents and the sum of Kshs.3,990,398.00 remain outstanding since 2016.
36. An order of mandamus directing the 1st Respondent to pay the sum of Kshs 3,990,398/= made pursuant to a Judicial Review Application dated October 2, 2017 was not honoured and an Application to cite the 1st Respondent for contempt dated February 15, 2018 failed on account of non-compliance with the provisions of Section 30(2) of the *Contempt of Court Act*, 2016 which was subsequently declared unconstitutional in *Kenya Human Rights Commission v Attorney General & another* (2018) eKLR which appear to have inspired the instant application which seeks similar orders.
37. The singular issue for determination is whether the Notice of Motion dated March 30, 2022 is merited.
38. The principles governing contempt of court are well settled.
39. Overall, contempt of court is the mechanism which ensures that court decisions and orders are fulfilled by all and sundry.
40. In *Republic v Attorney General & another Ex Parte Mike Maina Kamau* (2020) eKLR, Mativo J stated as follows;

“ Court orders must be obeyed at all times in order to maintain the Rule of Law and good order. This of course means that the authority and dignity of courts must be upheld at all times and this differentiates civilized societies from those applying the law of the jungle. It is the duty of the court not to condone deliberate disobedience of its orders nor waiver from its responsibility to deal decisively and firmly with contemnors. The court does not, and ought not to be seen to make orders in vain; otherwise, the court would be exposed to ridicule and no agency of the constitutional order would then be left in place to serve as a guarantee for legality and for the rights of all people.

A court order is binding on the party against whom it is addressed and until set aside remains valid and is to be complied with. It is a crime to unlawfully and intentionally disobey a court order.”

41. Similar sentiments were expressed in *Canadian Metal Co Ltd v Canadian Broadcasting Corp* (No 2) (1975) 48 DLR (30), *Kenya Human Rights Commission v Attorney General & another* (*supra*).
42. As correctly submitted by the Applicant’s counsel for an applicant to succeed in an application for contempt, certain conditions must be fulfilled. The essentials were catalogue in *Contempt in Modern New Zealand* (*supra*).



43. From the documentary evidence on record, it is abundantly clear that the 1st Respondent was aware of the court orders, having been served by the applicant's counsel and the orders were not only clear and unambiguous, but also binding on him and did not honour the court orders as ordained by law. It is not in dispute that the decretal sum should have been paid as early as 2016, but was remaining outstanding.
44. It requires no belabouring that the applicant has fulfilled the first three conditions of an application for contempt. However, the last of the elements is the requirement that the defendant's conduct was deliberate.
45. In determining whether the conduct of the 1st Respondent was deliberate, the court is guided by the sentiments of Mativo J in *Republic v Attorney General & another Ex Parte Mike Maina Kamau (supra)*,
- “The test for when disobedience of a civil order constitutes contempt has come to be stated as whether the breach was committed deliberately and mala fides. A deliberate disregard is not enough, since the non-complier may genuinely, albeit mistakenly, believe he/she is entitled to act in the way claimed to constitute the contempt. In such a case, good faith avoids infraction. Even a refusal to comply that is objectively unreasonable may be bona fide (though unreasonableness could evidence lack of good faith).
- These requirements that is the refusal to obey should be both wilful and mala fides, and that unreasonable non-compliance, provided it is bonafide does not constitute contempt ...
- They show that the offence is committed not by mere disregard of a court order but by the deliberate and intentional violation of the courts dignity repute or authority that this evinces. Honest believe that non-compliance is justified or proper is incompatible with that intent ... ”
46. According to *Black's Law Dictionary*, 10th Edition, bad faith denotes dishonesty of belief, purpose or motive.
47. From the documents on record, it is evident that after the judgement in Judicial Review was delivered on 7th December, 2017, the 1st and 2nd Respondents filed a Notice of Appeal dated 22nd December, 2017 and requested for copies of proceedings and judgement which were ready by 25th January, 2018. However, no appeal was filed and the applicant extracted the draft decree dated 16th January, 2018 and a demand for payment was made to the Attorney General on 11th December, 2017.
48. Strangely, contempt proceedings against the then Principal Secretary, Mr. Saitoti Torome were instituted on 15th February, 2018 which the court dismissed on account of the provisions of the then Contempt of Court Act, 2016.
49. Nothing much appear to have transpired until the 2nd half of 2022 when the 1st Respondent by letters dated 1st August, 2022 and 29th December, 2022 invited the applicant for negotiations on payment of the decretal sum.
50. It is unclear as to what transpired and if any meeting took place at all.
51. The Principal Secretary of the Ministry of Defence at the time was Dr. Ibrahim M. Mohamed, the 1st Respondent in the instant Application who had interacted with the suit for sometime and may have been persuaded that a negotiated payment plan was the best option.



52. In the Replying Affidavit, the Respondents affirm their desire to settle the matter through a negotiated settlement and denied having defied court orders.
53. However, the argument that funds had not been provided by Parliament for purposes of payment of the applicants decretal sum is of no moment in light of several judicial authorities on the issue of finances and in particular the sentiments of Githua J. in *Republic v Permanent Secretary, Ministry of State for provincial Administration & Internal Security & another Ex Parte Fredrick Monoah Iguzab* (*supra*).
54. For the foregoing reasons, the court is satisfied and finds that the applicant has failed to establish on a balance of probabilities that the 1st Respondent's conduct was deliberate and mala fides.
55. Similarly, the Notice of Motion dated 30th March, 2022 sought orders against Dr. Ibrahim M. Mohamed CBS the then Principal Secretary Ministry of Defence, personally to appear in court to explain why he should not be committed to civil jail for a period of six months or until he purges the contempt.
56. The court takes judicial notice of the fact that the said Dr. Ibrahim M. Mohamed ceased to be the Principal Secretary of the Ministry of Defence on 2nd December, 2022 when a new Principal Secretary was appointed and the specific order cannot issue against Dr. Ibrahim M. Mohamed CBS as he is no longer the holder of the office.
57. In light of the foregoing, the court is not persuaded that the orders sought are merited at this stage.
58. Significantly, the foregoing does not in any way negate, repudiate or rescind the 1st Respondent non-negotiable duty to honour the decision of this court delivered on 7th December, 2017.
59. Consequently, the Notice of Motion dated 30th March, 2022 is disallowed with no orders as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 2ND DAY OF MAY 2023

DR. JACOB GAKERI

JUDGE

Order

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with order 21 rule 1 of the *Civil Procedure Rules*, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by article 159(2)(d) of the *Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under article 48 of the *Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

DR. JACOB GAKERI

JUDGE

