



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA
AT NAIROBI
PETITION NO. 32 OF 2020

(Before Hon. Mr. Ocharo Kebira on 21st March 2022)

BETWEEN

DR. DAVID KAMAU NDEGE.....PETITIONER

-VERSUS-

PRINCIPAL SECRETARY, MINISTRY OF HEALTH1ST RESPONDENT

MINISTRY OF HEALTH 2ND RESPONDENT

THE HONOURABLE ATTORNEY GENERAL.....3RD RESPONDENT

-AND-

THE PUBLIC SERVICE COMMISSION1ST INTERESTED PARTY

NATIONAL QUALITY CONTROL LABORATORY.....2ND INTERESTED PARTY

RULING

1. The Application before this Court is an Application dated 8th November, 202` wherein the Petitioner/Applicant has sought for the following orders;

- a. That for reasons to be recorded the Application herein be certified extremely urgent.
- b. That this Honourable Court be pleased to cite the Principal Secretary of the Ministry of Health M/Susan Mochache for contempt of this Court decree/order/Judgment issued by Hon. Justice Ongaya J. On 23rd October, 2020 in Petition No.32 of 2020.
- c. That consequently the Principal Secretary M/s Susan Mochache be arrested and committed to civil jail for a period of six months or such other period as the Court may determine for contemptuous disobedience of the decree/order/judgment issued by Hon. Justice Ongaya on 23rd October 2020 in Petition No.32 of 2020.
- d. That this Honourable Court be pleased to issue any other orders deemed fit in the circumstances for this Application.

2. The Application is anchored on the grounds obtaining on the face of it, and those obtaining in the supporting affidavit sworn on the 8th day of October, 2021.

3. The Application is opposed by the Respondent based on the grounds of opposition dated 22nd November, 2021, and the replying affidavit sworn on the 8th December, 2021 by Susan Mochache, CBS.

4. When the Application came up for hearing, the Court directed that the same be canvassed by way of written submissions, which submissions the parties filed.

The Applicant's Application

5. The Petitioner/Applicant stated that on the 23rd October, 2020 Justice Ongaya delivered a judgment on the Petition herein via video link in the presence of Ms. Beatrice Akuno, the state Counsel for the Respondents, and his Counsel.

6. It was further stated the said judgment decreed that;

a. The declaration that the Petitioner is entitled as against the Respondent and all persons the protection of his fundamental rights and freedom enshrined in the bill of rights which applies to all and bind all state organs including but not limited to fair labour practices, the right not to be subjected to torture in any manner, whether physical or psychological or treated or punished in a cruel in human, or degrading manner and the Respondent are under a duty to observe the provisions enshrined in Articles, 10, 13 and 232 of the Constitution with regard to the contract with the Petitioner.

b. The declaration that the decision of the Respondent and their agent to show cause contained in the letter Ref.No.19891267861/138 dated 5th September, 2018 and all consequential processes was in contravention of the Constitution and the same are null and void *ab initio*.

c. An order of certiorari is hereby issued to quash the decision of the Respondent and their agents and show cause contained in the letter Ref.No.19891267861/138 dated 5th September, 2018 together with all consequential processes thereof.

d. The order of mandamus compelling the 1st and 2nd Respondents to with immediate effect pay the Petitioner, in arrears his salary since 2010 as a Pharmacist in job group Q currently stationed at the 2nd interested party, from when it was stopped and henceforth continue paying his monthly salary as he continues with the discharge of his duties; and to pay all withheld pay as at the date of this judgment by 31st December, 2020, failing interest to accrue thereon at Court rates from the date of this judgment till final payment and the payment being less PAYE at the rate prevailing the date of this judgment.

e. The Respondent to pay the Petitioner's costs of the Petition.

7. The Petitioner/Applicant further stated that his advocate on record extracted the decree and obtained a copy of the judgment, both of which he caused to be served upon the person of the Principal Secretary of Health, Ms. Susan Mochache and the office of the Attorney General on the 6th November, 2020. The service was acknowledged by way of stamping receipt on the 6th November, 2020.

8. The Petitioner/Applicant contended that the service was effected notwithstanding that during delivery of the Judgment Counsel for the Respondents was present.

9. It was further stated that the Respondent lodged in this Court a notice of appeal dated 23rd October, 2020 signifying their intention to assail the judgment by way of an appeal. However subsequently they never filed any application for stay of execution or appeal. There has been no order for stay of execution of the decree granted at all.

10. That the contemnor has since the 23rd October, 2020 to date been in breach of the decree, and more particularly order No.4, she has refused and/or declined to get the Petitioner back into the payroll and or the otherwise pay him his salary whether on going or in arrears. This notwithstanding numerous reminders and pleas by the Petitioner/Applicant.

11. The Petitioner/Application contends that he has written more than four different letters at different occasions requesting the contemnor to honour the judgment in paying his salary. All the letters have not attracted any response or reaction from her.

12. The Petitioner asserted that this action of the contemnor has led to a violation of his fundamental rights, including the right to fair labour practices; the right not to be subjected to torture in any manner, whether physical or psychological or treated or punished in a cruel, inhumane, or degrading manner, and acted with impunity in violation of the principle of the rule of law and contrary to the principles of public service enshrined in Articles 10, 73 and 232 of the Constitution.

13. He states further that the blatant refusal to obey a valid decree/judgment/order of this Court amounts to contempt of Court and contemnor's actions are an affront on the administration of justice.

14. The Applicant further contends that it is imperative for maintenance of the rule of law and order that the sanctity and dignity of this Court be upheld at all times. Contemnors should always be responsible for their acts of deliberate disobedience of Court orders. It is an unqualified obligation of every person against or in respect of whom, an order is made by a Court of competent jurisdiction to obey it unless and until the order is discharged.

The Respondent's Response

15. The Respondent opposed the Applicant's application by asserting that no bill of costs has been taxed in this matter and a certificate of costs issued. Too that a certificate of Judgment against Government was not issued.

16. That consequently, the Application is incompetent bad in the law and an abuse of the Court process for reasons that there has not been compliance with the provisions of the Government Proceedings Act, that require a certificate against Government to issue to enable a settlement.

17. The application is additionally bad in law for failing to comply with Order 29 Rule 3 of the Civil Procedure Rules 2010 which equally required the Applicant to make an Application to Court and obtain a certificate of costs against Government.

18. The Application herein was prematurely lodged.

The Petitioner's/Applicant's Submissions

19. In his written submissions Counsel for the Petitioner states that notwithstanding the Court's order of mandamus that was issued herein on the 23rd October, 2020 compelling the contemnor to reinstate the Petitioner/Applicant to the payroll, she has totally refused and/or declined. Consequently, to date he remains on zero salary in spite of being on duty.

20. That the contemnor is not only in contempt of this Court and in breach of Applicant's employment contract but has continued to subject him to inhuman treatment and unfair labour practices, despite the Applicant's requests the contemnor has not found it necessary to provide reasons for the failure to pay the him. This, contrary to the Applicant's right to fair administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

21. Counsel singles out three issues for determination that he holds emerge from the material placed before this Court thus:

- i. whether constitutional Petitions (particularly brought under Article 22 of the Constitution) are subject to the Civil Procedure;
- ii. Whether the Respondent's Grounds of Opposition dated 22nd November, 2021 are irrelevant to the instant contempt proceedings;
- iii. whether the 1st Respondent is in contempt of Court.

22. On the first issue Counsel submitted that Rule 7 of the Employment and Labour Relations Court (Procedure) Rules provides; -

"A party which wishes to institute a Petition shall do so in accordance with the Constitution of Kenya (Protection of Rights and Fundamental Freedoms and Enforcement of the Constitution).

Practice and procedure Rules 2013 (2) of person who wishes to institute judicial review proceedings shall do so in accordance with Section 8 and 9 of the Law Reforms Act and order 53 of the Law Procedure Rules (3) notwithstanding anything contained in this Rule a party is at liberty to seek the enforcement of any constitutional rights and freedoms and any Constitutional provision in a Statement of Claim or other suit filed before the Court"

23. It was submitted further that Constitutional Petitions are not governed by the provisions of the Civil Procedure Rules. Reliance was placed on the decision in **Francis Angueyah Ominde & Another -Vs- Vihiga County Executive Committee Members, Finance Economic Planning and 3 Others; Controller of Budget and 10 others Interested Parties**; where the Court held:

"It should be pointed out that the constitutional Petitions are governed and regulated by the Constitution of Kenya (Protection of Rights and Freedom Practice and Procedure Rules 2013, so far as procedure and processes are concerned. They are not subject to the Civil Procedure Rules, which governs processes that are brought under the Civil Procedure Act, Cap. 21 Laws of Kenya. So far as procedure is concerned the Constitution of Kenya (Protection of Right and Freedoms) Practice and Procedure Rules, 2013 captures the spirit of Article 159 (4) (d) of the Constitution, which is an injunction against Constitutional Proceedings being hostage to technicalities of procedure and which enjoins Courts to protect and promote the principles of the Constitution. The focus is trained on substance rather than process. The Constitution of Kenya (Protection of Right and Freedoms) practice and procedure Rules 2013 are more flexible compared with the provisions of the Civil Procedure Rules with respect to who may bring proceedings and the manner of initiating the proceedings."

24. And in **John Florence Maritime Services Limited and Another Vs Cabinet Secretary, Transport and Infrastructure and 3 Others (2021) eKLR** where the Supreme Court of Kenya held;

"(107) the Court when determining a constitutional Petition is empowered to look beyond the process and not only examine but decree into the merits of a matter or a decision. The essence of merit review is the power to substitute a decision which the Court do when determining a constitutional Petition.

Further the Court is empowered to grant not just judicial review orders but any other relief, it deems fit to remedy any denial, violation or infringement of or a threat to a right or fundamental freedom in the Bill of Rights"

25. It was further submitted that the Petition herein was heard and determined by grant of *inter alia* the order of mandamus under the Constitution of Kenya (protection of rights and fundamental freedom) Practice and Procedure Rules 2013 and not the Civil Procedure Rules 2010. Therefore, the Respondents should not be heard to invoke the provision of order 29 Rule 3 of the Civil Procedure Rules and or Section 21 of the Government Proceedings Act.

The Respondents and 1st Interested Party's Submissions.

26. For them it was submitted that two issues emerge for determination namely; -

a. Whether execution against Government can be conducted before taxation and issuing of a certificate of costs against the Government.

b. Who bears the costs of the Application?

27. On the first issue, Counsel for the Respondents and the interested party, argue that the Application and the Petition are incompetent, bad in law and an abuse of the Court Process for the reason that the same do not comply with section 21 of the Government Proceedings Act which requires a certificate of order against the Government to be served and that no execution can take place before taxation.

28. The section provides:

“21. Satisfaction of orders against the Government.

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, and 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 on that behalf made by or on behalf of that person at any time after the expiration of twenty-one days from 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 concerning particulars of the order.

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.

3. If the order provides for payment of any money by way of damages or otherwise, or of any costs the certificate shall state the amount 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 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 or any amount payable, or any part thereof, shall be suspended, and if the certificate has not been issued may order any such direction to be inserted therein.

4. 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 payment by Government, or any Government department or any officer of the Government as such, of any money or costs.

5. This section shall, with necessary modifications, apply to any Civil proceedings by or against a County Government, or any proceedings in connection with any arbitration in which the County Government is a party.”

29. She submits that by reason of the above stated provision, no order of payment can be effected by the Government, a Government department or Government office before taxation and more importantly before a certificate against Government is extracted and served.

30. Counsel submits that the instant application is for mandamus to enforce payment from the Government, an Application which is premature. It has been made before the relevant certificate has been issued and served. In support of this submission Counsel seeks fortification in the decision in **High Court judicial Review Miscellaneous Application No. E029 of 2021; Republic -vs- National Police service Commission and another Ex-parte Dr. Major (Retired) Shadrack Mutia Muiru**.

31. The application additionally is bad in law for failing to comply with Order 29 Rule 3 of the Civil Procedure Rules, 2010 which equally required the Applicant to make an application to Court and obtain a certificate of costs against Government.

32. Counsel puts further reliance on the decision in **Republic -vs- County Secretary Kiambu County & 2 others Ex-parte Daniel K. Mwaura t/s Karuru Mwaura & Company Advocates [2021] eKLR** where Justice Nyamweya held:

“In the premises, the current proceedings are premature, as the requisite procedures have not been followed by the Ex-parte Applicant, and the Notice of Motion dated 7th December, 2020 is accordingly struck out with no order as to costs.

The Ex-parte Applicant is however at liberty to commence fresh judicial review proceedings against the Respondents for an order of mandamus, once all the necessary procedures, including those in the Government proceedings Act have been complied with.”

33. And the decision in **Obadia Mutisya Kitonyi -vs- Attorney General; Director and Pensions Department & Another [Ganishee] [2021] eKLR**, where Justice Maureen Onyango held:

“Since the decretal sum included unspecified amount of costs and other awards, the Government cannot be compelled to pay a figure that is not clear unless the same is subjected to taxation.”

34. That costs must be first taxed before execution, Counsel buttressed her submissions by citing the decision in **Kartar Singh Dhugar & Co. Limited -vs- Lianard Holdings Limited [2017] eKLR**, where the Court held:

“I entirely concur with this observation of the Court and the legal principles in the above referred to authorities. That to execute a decree before costs are ascertained the leave of the Court is required under section 94 of the Civil Procedure Act. Indeed, section 94 of the Civil Procedure Act being a statutory provision overrides the provisions of Order 36 referred to herein. In this case there is no evidence that such leave was ever sought and granted in this matter.”

35. On the objective for the insistence of a taxation of costs before execution of the decree or any act in pursuit of a payment under a decree of Court, Counsel cited the holding in **Exad Suppliers and General Contracts -vs- NCPC in Misc. Civil case No. 639 of 2009 [UR]** thus:

“In my view, the necessity for leave to be obtained where a party intends to execute before taxation is to obviate situations where a judgment-debtor is likely to be confronted with two sets of execution proceedings. In respect of the same decree i.e. for the principal sum and costs. This is a recognition of the fact that in a civil action the main aim is compensation and the process should not be turned into a punitive voyage.”

36. The Applicant should have the bill of costs taxed and the necessary certificate of order against extracted first before pursuing the settlement of the decree in this matter, she submitted.

Analysis and Determination

37. From the material placed before me by the parties, I distil the following issues as the issues for determination in this Application.

- a. Whether the Petitioner/Applicant can be allowed to pursue payment of the sums under the Judgment herein, without 1st extracting and serving a certificate of order against Government.
- b. Whether the Applicant/Petitioner can be allowed to pursue the sum of the Judgment herein, without 1st causing his party and party costs to be taxed and a Certificate of Costs issued and served.
- c. Whether the Contemnor is guilty of contempt of the Court’s decree in this matter.
- d. Who should bear the costs of this suit.

a. Whether the Petitioner/Applicant can be allowed to pursue payment of the sum under the Judgment herein without extracting and serving a Certificate of Order against Government.

38. Before I delve further into consideration of this issue, it is imperative to state from the onset that the submissions by the Respondent and the Interested Party have been coached in a manner as though they are in address against both the Petition, and the Application dated 8th November 2011. That is an unnecessary confusion. The Petition was conclusively dealt with, and *inter alia* the orders of mandamus issued. Consequently, I will consider the submissions only to the extent that they are relevant to the Application before me.

39. No doubt that, Post-Judgment in this matter, there has not been issued a certificate of order against Government, at the Application of the Petitioner/Decree-holder or any person or at all and, party and party bill costs upon basis of the award in the judgment has not been filed for taxation and/or taxed.

40. The Petitioner/Applicant contends as hereinabove stated that he resorted to filing the instant Application out of frustration by the Contemnor’s failure, neglect and or refusal to pay him, his salary arrears as contemplated in the mandamus relief that was granted in the decree.

41. On the other hand, I get the Respondents asserting that the law has a clear, elaborate and mandatory on a post-judgment path that a person holding a decree against the Government, Government Department, Officer of the Government or County Government, must travel before the decree can be settled. They rely on the provisions of Section 21 of the Government Proceedings Act and the Civil Procedure Act and Civil Procedure Rules, section 94, and order 29, respectively.

42. The Petitioner, held that the law relied on by the Petitioner/Applicant is not relevant to the matter at hand which was originated by a Petition pursuant to the provisions of Article 22 of the Constitution. That therefore, the Protection of Rights and Fundamental Freedoms Practice and Procedure Rules, 2013, come into play.

43. I have keenly considered the provisions of the Practice and procedure Rules herein above mentioned. I am of the view that they do not provide for post-judgment events like execution and objections arising from execution of decrees in constitutional matters that have been commenced, proceeded with and determined in accordance with the Rules, and how they are supposed to be handled. By reason of this premise alone, one is able to see the essence of invoking known but relevant procedures obtaining in other statutes or legislation. To agree with the school of thought that in the situation the Court should invoke its inherent powers and give orders that it deems just, would be a recipe for confusion and inconsistency. This end product thereof will be loss of public confidence in our judicial system.

44. Section 21 of the Government Proceedings Act sets out an elaborate procedure that must be followed by decree holders, post-judgment in pursuit of the fruits of their judgments. I do not see Any justification that can drive this Court into a conclusion that the procedure is inapplicable to the instant matter, or matters that are commenced, proceeded with and concluded, under Article 22 of the Constitution and the “Mutunga Rules” Nothing in the Rules oust the applicability of the provisions. In any event the Rules being a subsidiary legislation cannot oust provisions of a statute.

45. I am entirely in agreement with the firm Jurisprudence expressed in the authorities cited by Counsel for the Respondents, that the procedure is mandatory and a certificate of order against Government must be obtained and served, before execution is commenced or any action taken in pursuit of the fruits of the decree.

46. The Court has considered all the submissions cited by Counsel for the Petitioner, in support of the Application herein, with due respect I find them irrelevant. They are not applicable to the post Judgment events in matters like the Petition herein.

47. I am of the view that the law provides for the certificate in mandatory terms for a purpose. The accountability purposes. The certificate is an accounting document.

Of the certificate of costs

48. That for same reason as hereinabove brought forth I find that the provisions of the Civil Procedure Act, section 94 and Rules Order 29 Rule 3 of the Civil Procedure Rules, 2010, applicable in the matter herein. The Petitioner must first file and have taxed his party and party costs, have a certificate extracted, in compliance with the provisions of the Government Proceedings Act, before commencing enforcement of the decree. I agree with the holding in **Kartar Singh Dhugar & Co. Limited -vs- Linarid Holdings Limited [2017]** [supra].

Of the Contempt

49. Having found that the Petitioner has not complied with the post Judgment steps that are mandatory, before commencing his pursuit for enforcement of the Judgment as required of him by law, his Application stands on lose ground. It must collapse. It is hereby dismissed.

50. The wording of section 21 of the Government Proceedings Act is in a way that the accounting officer cannot pay out sums of a decree to a decree-holder or his Advocate without the Certificate which I have said is an accounting document. It shall not make sense therefore to proceed to consider whether or not there has been contempt of the Court decree, when it is clear that the documents that would enable settlement of the decree have not been obtained by the Applicant, and availed to the accounting officer.

51. In conclusion, let the Petitioner comply with the provisions of section 21 of the Government proceedings Act and section 94 of the Civil Procedure Act. Have the costs taxed, extract and serve the certificate against Government. It is only after this and if there is failure to comply with the decree in any manner, that he shall be at liberty to initiate contempt proceedings.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 21ST DAY OF MARCH, 2022

OCHARO KEBIRA

JUDGE

Delivered in presence of:

Akuno for the Respondents.

Mr. Masika for the Petitioner.

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 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.

A signed copy will be availed to each party upon payment of Court fees.

OCHARO KEBIRA

JUDGE