



**Mwaka (124) v County Government of Machakos; Mutie & another (Contemnor) (Miscellaneous Application E012 of 2021) [2022] KEELRC 13021 (KLR) (14 October 2022) (Ruling)**

Neutral citation: [2022] KEELRC 13021 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MACHAKOS  
MISCELLANEOUS APPLICATION E012 OF 2021  
MA ONYANGO, J  
OCTOBER 14, 2022**

**BETWEEN**

**FRANCIS MWAKA ..... APPLICANT  
124**

**AND**

**COUNTY GOVERNMENT OF MACHAKOS ..... RESPONDENT**

**AND**

**COUNTY EXECUTIVE MEMBER OF FINANCE NAOMI  
MUTIE ..... CONTEMNOR**

**COUNTY CHIEF OFFICE FINANCE CATHERINE  
NGARACHU ..... CONTEMNOR**

**RULING**

1. Before me is the notice of motion dated August 16, 2021, filed by the applicants herein seeking *inter alia* the following orders: -
  - i. Spent
  - ii. That this honourable court do order the 1<sup>st</sup> and 2<sup>nd</sup> contemnors and/or their successor in office to personally appear before this court and explain why appropriate legal sanctions ought not to be taken against them for wilful disobedience of court orders in Machakos Cm Elrc Cause Nos 1-20, 21-28, 30-36, 700-716 all of 2018, Elrc Nos 3, 8-81 all of 2019 (125 claims).
  - iii. That failure to attend court and/or to show reasonable cause to the satisfaction (sic) of the court, the contemnors be committed to civil jail for a period not exceeding 6 months or any other sanction as this honourable court may deem fit and appropriate in the circumstances.



- iv. That under its inherent jurisdictional authority, this honourable court make further orders to enforce compliance with its court decrees pending payment and/or attachment from respondent following accounts:-
    - Kenya Commercial Bank (K) Limited A/C No xxxx Machakos branch
    - Co-operative Bank A/C No xxxx Machakos Branch.
  - v. That the cost of this application and proceedings be borne by the respondents.
2. The application (the contempt application) is brought pursuant to section 3 & 12 of the *Employment and Labour Relations Court Act*, rules 9 & 38 of the *Employment and Labour Relations Court (Procedure) Rules*, section 3 & 3A of the *Civil Procedure Act*, rule 51(10) of the *Civil Procedure Rules*, section 5 of the *Judicature Act*, chapter, article 10(1), 27, 41, 159 & 162(2)(a) of the *Constitution* and enabling provisions of the law.
  3. The application is premised on the grounds that the alleged contemnors have failed to settle awards issued to the applicants, against the county government of Machakos, the respondent herein, in 125 cases being Machakos Cm Elrc cause No 1-20, 21-28, 30-36, 700-716 all of 2018 And Elrc No3, 8-81 all of 2019.
  4. The applicants seek orders to have the alleged contemnors cited for contempt for reasons that they are members of the respondent's county treasury and are responsible for mobilising resources for funding the budgetary requirement and are the accounting officers in matters of finance.
  5. There having been no response to the application as at September 24, 2022, this court issued summons for the appearance of the alleged contemnors on November 26, 2021 to explain the reasons for non-compliance with the orders arising from the judgements in the said 125 cases.
  6. On November 26, 2021, this court issued orders for warrants of arrest to be issued as against the alleged contemnors who had failed to honour the court summons.
  7. The alleged contemnors in response to this court's orders filed the following applications: -
    - i. Notice of motion dated December 3, 2021 filed by the alleged contemnors jointly seeking a suspension of the warrants of arrest and a review of the contempt proceedings.
    - ii. Notice of motion dated December 7, 2021 filed on behalf of the 2<sup>nd</sup> contemnor seeking a suspension of the warrants of arrest.
    - iii. Notice of motion dated January 10, 2022 filed on behalf of the 2<sup>nd</sup> contemnor seeking the application dated December 3, 2021 be re-certified as urgent.
  8. The alleged contemnors have challenged the contempt application on the grounds that: -
    - i. Execution against the county government is barred pursuant to section 21(4) of the *Government Proceedings Act*.
    - ii. The applicants can only execute after procuring an order of *mandamus* and their application is thus premature.
    - iii. That the applicants have filed only one miscellaneous application based on 125 suits that were before the Chief Magistrate's Court and have arbitrarily sought to consolidate such suits without leave of the court.



9. On March 23, 2022, the 1<sup>st</sup> alleged contemnor – Francis Wambua Maliti filed an application dated March 16, 2022 seeking to be struck out as a party to the suit as he had since resigned from his position as the county executive committee member of finance and economic planning.
10. Subsequent thereto, the applicants filed an application dated April 1, 2022, seeking to substitute the said Francis Wambua Maliti with the current county executive committee member of finance & economic planning, Hon. Naomi Mutie.
11. Pursuant to this court’s directions of July 15, 2022, this court allowed the 1<sup>st</sup> alleged contemnor’s application dated March 16, 2022 and the applicants’ application dated April 1, 2022 thereby substituting Francis Wambua Maliti as the 1<sup>st</sup> alleged contemnor with Hon Naomi Mutie. The court further directed that the ruling would be on the contempt application.

### **Analysis and Determination**

12. I have considered the rival pleadings and submissions filed by all the parties. It is not in dispute that there were indeed judgments entered in the Chief Magistrate’s Court. Certified copies of the decrees have been annexed to the applicants’ contempt application.

13. Section 21(4) of the [Government Proceedings Act](#) cap 40 Laws of Kenya provides:

Save as provided in this section, no execution or attachment or process in the nature thereof shall be issued out of any court for enforcing payment by the Government of any money or costs, 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.

14. It is clear from this section that there can be no execution of a civil claim against the government and by extension County Governments. Githua J in [Republic v Permanent Secretary, Ministry of State for Provincial Administration and Internal Security exparte Fredrick Manoah Egunza](#) [2012] eKLR set the tone on the specialised process of execution following the new constitutional dispensation as follows:

“In ordinary circumstances, once a judgment has been entered in a civil suit in favour of one party against another and a decree is subsequently issued, the successful litigant is entitled to execute for the decretal amount even on the following day. When the Government is sued in a civil action through its legal representative by a citizen, it becomes a party just like any other party defending a civil suit. Similarly, when a judgment has been entered against the government and a monetary decree is issued against it, it does not enjoy any special privileges with regards to its liability to pay except when it comes to the mode of execution of the decree. Unlike in other civil proceedings, where decrees for the payment of money or costs had been issued against the Government in favour of a litigant, the said decree can only be enforced by way of an order of mandamus compelling the accounting officer in the relevant ministry to pay the decretal amount as the Government is protected and given immunity from execution and attachment of its property/goods under section 21(4) of the [Government Proceedings Act](#). The only requirement which serves as a condition precedent to the satisfaction or enforcement of decrees for money issued against the Government is found in Section 21(1) and (2) of the [Government Proceedings Act](#) (hereinafter referred to as the Act) which provides that payment will be based on a certificate of costs obtained by the successful litigant from the court issuing the decree which should be served on the Hon Attorney General. The certificate of order against the government should be issued by the



court after expiration of 21 days after entry of judgment. Once the certificate of order against the Government is served on the Hon Attorney General, section 21(3) imposes a statutory duty on the accounting officer concerned to pay the sums specified in the said order to the person entitled or to his advocate together with any interest lawfully accruing thereon. This provision does not condition payment to budgetary allocation and parliamentary approval of government expenditure in the financial year subsequent to which government liability accrues

15. Time and again, the courts have found that the proper procedure for executing an award or decree against the county government would be by compelling the accounting officer to pay by way of an order of mandamus. It is only after obtaining an order of *mandamus* that a decree holder can thereafter institute contempt proceedings should the officer fail to comply.
16. In the case of *Republic v Town Clerk, Kisumu Municipality, ex parte East African Engineering Consultants* [2007] 2 EA 441 the court held as follows:

“The orders are issued in the name of the Republic and in the case of *mandamus* order its officers are compelled to act in accordance with the law. The state so to speak by the very act of issuing the orders frowns upon its officers for not complying with the law. The orders are supposed to be obeyed by the officers as a matter of honour/ and as ordered by the state. Execution as known in the civil procedure process was not contemplated and this includes garnishee proceedings. There is only one way of enforcing the orders where they are disobeyed i.e. through contempt proceedings. The applicant should therefore have enforced the mandamus order using this method. There is only one rider – an officer can only be committed where the public body he serves has funds and where he deliberately refuses to pay or where a statute has earmarked funds for payment since an officer does not incur personal liability...

17. Concurring with the finding, Odunga J (as he then was) in the case of *Republic v The Attorney General & another ex Parte James Alfred Koroso*, expressed himself as hereunder:

“In the present case the ex parte applicant has no other option of realising the fruits of his judgement since he is barred from executing against the Government. Apart from mandamus, he has no option of ensuring that the judgement that he has been awarded is realised. Unless something is done he will forever be left baby sitting his barren decree. This state of affairs cannot be allowed to prevail under our current constitutional dispensation in light of the provisions of article 48 of the Constitution which enjoins the state to ensure access to justice for all persons. Access to justice cannot be said to have been ensured when persons in whose favour judgements have been decreed by courts of competent jurisdiction cannot enjoy the fruits of their judgement due to roadblocks placed on their paths by actions or inactions of public officers.....

.....the institution of judicial review proceedings in the nature of *mandamus* cannot be equated with execution proceedings. In seeking an order for mandamus the applicant is seeking, not relief against the Government, but to compel a Government official to do what the Government, through Parliament, has directed him to do. The relief sought is not “execution or attachment or process in the nature thereof”. It is not sought to make any person “individually liable for any order for any payment” but merely to oblige a Government officer to pay, out of the funds provided by Parliament, a debt held to be due by the High Court, in accordance with a duty cast upon him by Parliament. The fact that the accounting officer is not distinct from the state of which he is a servant does not necessarily mean



that he cannot owe a duty to a subject as well as to the Government which he serves. Whereas it is true that he represents the Government, it does not follow that his duty is therefore confined to his Government employer. In mandamus cases it is recognised that when statutory duty is cast upon a public officer in his official capacity and the duty is owed not to the Government but to the public any person having a sufficient legal interest in the performance of the duty may apply to the courts for an order of mandamus to enforce it. In other words, mandamus is a remedy through which a public officer is compelled to do a duty imposed upon him by the law. It is in fact the State, the Republic, on whose behalf he undertakes his duties, that is compelling him, a servant, to do what he is under a duty, obliged to perform.

Where therefore a public officer declines to perform the duty after the issuance of an order of *mandamus*, his/her action amounts to insubordination and contempt of court hence an action may perfectly be commenced to have him cited for contempt of court. Such contempt proceedings are no longer execution proceedings but are meant to show the court's displeasure at the failure by a servant of the state to comply with the directive of the court given at the instance of the Republic, the employer of the concerned public officer and to ensure the authority and dignity of the court is maintained.

18. It is clear from the foregoing that an order of *mandamus* is a necessary pre-requisite before citing an accounting officer of a county government or of the national government for contempt of court. The order of mandamus being a prerogative order requiring performance of a duty may be properly directed to an accounting officer and thus impose a personal duty on the officer to comply. Service of a judgment/decreed and thereafter seeking to cite the accounting officer for contempt of court is premature as it would imply holding such officer personally liable for a debt owed by the Government.
19. Court orders whether they be in the form of interim orders, judgments or decrees must be obeyed. Any entity including county and national governments ought to comply. However, in the pursuit of compliance with court orders, due process must be followed. This court's inherent jurisdiction cannot be invoked to bypass procedure, more so in matters where the personal liberty of a party is at stake.
20. The applicants notice of motion dated August 16, 2022 is thus dismissed for being premature. I will make no order as to costs.

**DATED, SIGNED AND DELIVERED AT MACHAKOS ON THIS 14TH DAY OF OCTOBER 2022**

**MAUREEN ONYANGO**

**JUDGE**

