



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT MERU

CAUSE NO. 26 OF 2018

Formerly

Nyeri ELRC Cause No.256 of 2016

(Before D.K.N Marete)

KENNEDY DAVID MWANIKI NYAGA.....CLAIMANT

VERSUS

COUNTY GOVERNMENT OF THARAKA NITHIRESPONDENT

RULING

This is an application dated 23rd April, 2019 and seeks the following orders of court;

1. *That this Application be certified urgent.*
2. *That the Respondent's County Secretary, its County Executive Member Finance and/or its County Chief Accountant be personally summoned to show cause why they should not be committed to Civil Jail for the disobedience of the court order/decreed dated 21st March, 2019.*
3. *That the costs of this application be paid by the Respondents.*

It is grounded as follows;

1. *That judgment in this suit was entered by this court on the 3rd July, 2018.*
2. *That the Applicant duly served the Judgment, decree, certificate of costs dated 21st March, 2019 and 26th March, 2019.*
3. *That the Respondent's County Secretary, County Executive Member Finance and/or its County Chief Accountant have ignored and failed/refused and/or neglected to satisfy the said judgment, order and or decree inspite of having duly acknowledged receipt thereof.*
4. *That the conduct of the Respondent grossly undermined (sic) the dignity and authority of this honourable court and has subjected it to contempt in the eyes of the public.*
5. *That in the circumstances, it is necessary that this honourable court restores its dignity and honour and public confidence in its justice process by issuing the orders herein sought.*
6. *Interest of justice and to avoid abuse of the court process.*

The Respondent in her Grounds of Opposition to the motion dated 19th June, 2020 prays that the application be dismissed with costs to herself. These came out as follows;

- i) *That the application is misconceived, untenable and bad in law and an abuse of the court process since it is contemptuous of*

Section 21 of the Government Proceedings Act Cap 40 Laws of Kenya.

ii) That the respondent's officers proposed to be committed to civil jail have not wilfully disobeyed or disregarded the orders of the court since they have not received money and they cannot be held personally liable for a judgment debt that is public debt.

iii) That the respondent's officers proposed to be committed to civil jail should not be held personally liable for government liability and lack of funds in the County Government.

The Claimant/Applicant in his written submissions dated 8th July, 2020, narrates and in detail sought to be relied on as follows;

Section 21 of the Government Proceedings Act, Cap 40, and Laws of Kenya deals with the Obligation of the Government to satisfy orders made against it.

Section 21 (3) reads: "If the order provides for the payment of any money...or costs... The certificate shall state the amount so payable and the Accounting Office for the Government department concerned shall...pay to the person entitled or to his Advocate...?"

Section 1A, (3) of the Civil Procedure Act, Cap 21 Laws of Kenya state: A party to Civil proceedings, or an Advocate for such a party is under a duty to assist the court to further the overriding objective of the Act and, to that effect, to participate in processes of the court and to comply with the directions and orders of the court.

Section 5 (1) of the Judicature Act, Cap 8, Laws of Kenya state: "The High Court... shall have... power to punish for contempt of court..." This court has the status of the High Court.

Section 12 (3) of the Employment and Labour Relations Act, No. 20 of 2011 states: "in exercise of its jurisdiction under this Act, the court shall have power to make any of the following orders-

(viii) any other appropriate relief as the court may deem fit to grant". The prayers sought in this application fall under the category of "other appropriate relief"

Section 13 of the Employment and Labour Relations Act, No.20 of 2011 states: A judgment, award, order or decree of the court shall be enforceable in accordance with the rules made under the Civil Procedure Act".

It is his further submission that the grounds of opposition dated 19th June, 2020 are belated and filed outside the time limits stipulated by order 51 (14) (2) of the Civil Procedure Rules and should therefore be struck out.

Additionally, the Claimant submits that these grounds are frivolous and lack any sense of merit. This is as follows;

...the Application dated 23rd April, 2019 simply seek to 1st summon the Respondent's Accounting officers to "**show cause**" and not to "**jail them**". This relief is a valid and lawful relief which the court (**under the stated statutory provisions**) has the power to issue. These are the officers who should go to jail on behalf of the County Government if the court thereafter deems their conduct to amount to contempt, upon failure to show sufficient cause why the court decree should not be satisfied.

The respondent in written submissions dated 23rd December, 2020

The Respondent filed the grounds of opposition dated 19th June, 2020 seeking dismissal of the application. The respondent contends that the application is misconceived, untenable and bad in law and an abuse of the court process since it is contemptuous of Section 21 of the Government Proceedings Act Cap 40 Laws of Kenya because the respondent's officers proposed to be committed to civil jail should not be held personally liable for government liability and lack of funds in the County Government.

The Claimant submitted that the respondent is an institution (not a person), and therefore the only reasonable way to enforce its compliance with court orders is by summoning and/or punishing its accounting officers as named in prayer to of the notice of motion dated 23rd April, 2019.

Again, Section 21 (4) of the Government Proceedings Act Cap 40 Laws of Kenya provides;

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.

She further sought to rely on the authority of **Josphat Gathee Kibuchi v Kirinyaga County Council (2015)**, eKLR the court observed that;

"...a county government is part of the state or government. The constitution of Kenya established two levels of government being the national and the county government. The provision of Section 21 of the Government Proceedings Act are therefore applicable to proceedings relating to a county government"

"...I have already pointed out that the Government Proceedings Act is applicable to county governments. The respondent cannot

execute the judgment against the county government otherwise than in accordance with the law. The law does not allow execution against the government unless an order of mandamus is obtained. The respondent has no other option of realizing the fruits of his judgment apart from applying for the relevant order against the right officer of the county government. I come to a conclusion that the warrants of arrest issued against Joe N.Muriuki on 22st January, 2015 in his capacity as the County Secretary of the defendant should be lifted...

The issue for determination is the place and application of the writ of mandamus in execution of decrees against the government, and in particular County Governments. The bold and budging issue is whether Section 21 of the Government Proceedings Act can now be used as a cover for impunity or inertia on the part of governments in the execution of decrees against them.

This court has had occasion to navigate the space of Rule 21 of the Governments proceedings Act, chapter 40 Laws of Kenya against the provisions of Section 1A and 1B and 3 of the Civil Procedure Act chapter 21, Laws of Kenya and the Employment and Labour Relations Act, 2011 respectively. This provide the essence and basis of the oxygen principle (OO or overriding objective of courts.) In the authority of **Francis Atanasio Kithure v County Government of Meru and Another, 2021 eKLR** where the court in dismissing an application on this subject by way of preliminary objection upheld the place of the overriding objective of the court as enunciated under Section 3 and 1A and 1B of this Employment and Labour Relations Court Act, 2011 and the Civil Procedure Act thereof. This is as follows;

I view this application as one wholly boardering on the meaning and nature of procedural technicalities. What is it? What are they?

The constitution and statutes envisage procedural technicalities to be rules of procedure whose consequence is to inhibit the substance of the law and reality. Ofcourse, these are a creation of the law and statutes. Section 21 of the Government Proceedings Act and Section 3 and 3 A of the Employment and Labour Relations Court Act and Civil Procedure Code comprise such legitimate technicalities. They offer guideline on process and procedure.

*The overriding objective, also referred to as the double o (oo) or oxygen principle comes out and urges courts to deal with a view to meting out the ends of justice. This is in agreement with the provisions of Article 159 (2) d of the Constitution of Kenya, 2010 above cited. This is further illustrated in the authority of **Abdirahman Abdi also known as Abdirahman Muhumed Abdi V. Safi Petroleum Products Ltd. & 6 others, Civil Application No. Nai. 173 of 2010** where a notice of appeal was served on the respondent out of time and without leave of court. Upon being asked to strike it out, (Omolo, Bosire and Nyamu JJ.A) observed thus;*

“The overriding objective in civil litigation is a policy issue which the court invokes to obviate hardship, expense, delay and to focus on substantive justice.....”

In the days long gone the court never hesitated to strike out a notice of appeal or even an appeal if it was shown that it had been lodged out of time regardless of the length of delay. The enactment of Sections 3A and 3B of the Appellate Jurisdiction Act, Cap 9 Laws of Kenya, and later, Article 159 (2) (d) of the Constitution of Kenya, 2010, changed the position. The former provisions introduced the overriding objective in civil litigation in which the court is mandated to consider aspects like the delay likely to be occasioned, the cost and prejudice to the parties should the court strike out the offending document. In short, the court has to weigh one thing against another for the benefit of the wider interests of justice before coming to a decision one way or the other. Article 159 (2) (d) of the Constitution makes it abundantly clear that the court has to do justice between the parties without undue regard to technicalities of procedure.”

Whereas this court agrees with the principle and philosophy behind the need to institute an application for the writ mandamus in government proceedings, the same must now be justified by the circumstances of the case. With the numerousy of government as a consequence of devolution, it behoves upon parliament to rethink and restructure this legal and procedural requirement to entrench palatability. This is because, in the first place, it’s foundations are victorian, if not outrightly medieval.

The Claimant/Respondent’s case is that his is not a quest for jailing or in any manner harassing or annoying the public officers cited. This is a call for them to show cause in a situation where they have refused or neglected to meet the decree despite service. There is therefore nothing obnoxious with the application. I agree.

Like was expressed in **Francis Atanasio Kithure**, supra, Section 21 of the Government Proceedings Act was intended to aide good governance but not to frustrate and stumble it as is intended by the Respondent in this cause.

This is such similar case. What benefits would anyone derive from going all the way through the rigmarole of seeking a writ of mandamus in such circumstances? If this is not undue hardship, then, I do not know.

I am therefore inclined to allow the application and order relief as follows;

1. That the Respondent’s County Secretary, its County Executive Member Finance and/or its County Chief Accountant be personally summoned to show cause why they should not be committed to Civil Jail for the disobedience of the court order/decreed dated 21st March, 2019.
2. That the cost of this application shall be borne by the respondent.

Dated and delivered at Nyeri this 23rd day of March, 2021.

D.K.Njagi Marete

JUDGE

Appearances

1. Miss Mbogo holding brief for Murango Mwenda for the respondent
2. Miss Muriuki holding brief for Eddy Njiru for the claimant