REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

JUDICIAL REVIEW NO. 9 OF 2021

(Before Hon. Lady Justice Maureen Onyango)

HENRY MUSEMATE MURWA.....APPLICANT

VERSUS

DR. FRANCIS OWINO, THE PRINCIPAL SECRETARY, MINISTRY OF PUBLIC SERVICE,

YOUTH AND GENDER AFFAIRS.....1ST RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

RULING

1. Before me, for determination is an Amended Notice of Motion Application dated 6th March 2019. The Applicant seeks orders THAT:

   (i) Spent

   (ii) That Dr. Francis O. Owino, the Principal Secretary, Ministry of Public Service Youth and Gender Affairs and the Hon. Attorney General be found in contempt of the orders issued on 26th of July, 2018 aforesaid and to be subsequently committed to civil jail for a period not exceeding 6 months pending payment of the decretal sums due.

   (iii) That this Court be pleased to deny the Respondent the audience in this matter until and unless they purge the contempt of court committed herein.

   (iv) That the Respondents be ordered to pay for the costs of this Application together with accrued interest immediately and upon determination of the Application herein.

2. The application is supported by the affidavit of HENRY MUSEMATE MURWA the Applicant and is based on the following grounds:

   *a) That on the 26th July 2018, this Court issued an order of Mandamus in favour of the Applicant directing the Respondents to comply with and satisfy the decree in **ELRC Cause No. 564 of 2011** in the sum of Kshs.7,033,338.00 and accrued interest not standing at Kshs.2,532,001.68.*

   b) That on 26th July 2018, the Court expressly informed the Respondents to comply with the court orders to avoid the filing of the Application for contempt.

   c) That despite having been in court and having been duly served with the Order of Mandamus, the Respondents have elected to disobey the court order and declined to

   satisfy the amount now totaling to Kshs.9,616,339.68.

   d) That the Applicant's Advocates have written to the Respondents requesting them to have regard to the court process by complying with the Certificate of Taxation but the same has borne no fruits.

   e) That it is the plain and 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 that order is varied, discharged and/or set aside.

f) That the Respondents' actions herein are an upfront attack on the integrity of our judicial process and the rule of law which actions must not be countenanced.

3. The Respondent opposed the application vide Grounds of Opposition dated 23rd April 2021. Counsel states that the Application is incurably defective and incompetent as the Ministry of Public Service and Gender Affairs ought not to be a party to the suit. This is because the Applicant was an employee at the Ministry of Lands and Housing and the 1st Respondent cannot be cited for contempt as has been done in the case herein.

4. That in **Cause No. 564 of 2011** which gave rise to this Application, the Respondents were the Public Service Commission and the Attorney General. That the 1st Respondent is no longer the Principal Secretary as presented and thus the orders of Contempt cannot issue against him as sought.

5. Counsel states that the application offends the provisions of Article 50 of the Constitution of Kenya, 2010. That the Application is based on contradictory allegations which border on speculation and hence incapable of issuance of the order sought and as such amounts to an abuse of the court process as it lacks merit and therefore ought to be dismissed.

Applicant's Submissions

6. Regarding the 1st Respondent, the Applicant submitted that the matter came up for hearing on the 4th of March, 2019 when Nyamweya J. directed that the Application be amended to specify the person who was in charge of the Ministry of Public Service, Youth and Gender Affairs to be cited for contempt as the decree was in favour of a civil servant who had been unlawfully terminated.

7. He submitted that the previous practice in enforcing a court decree is to cite the Permanent Secretary of the relevant Ministry and the Hon. Attorney General for contempt in order to get the payment effected which is the case before the Court. As such there is nothing irregular in citing the Respondents for contempt of Court Orders.

8. He submitted that the only legal way of enforcing a Decree against the Government is by way of Mandamus Order which were issued on the 26th July, 2018 which orders the Respondent has refused/failed to obey and pay the Applicant the fruits of his judgement. That reference to the Public Service Commission and/or the Ministry of Public Service Youth and Gender Affairs is just splitting hairs as both bodies are government bodies which are not independent as they draw their funding from the Treasury and are bound to satisfy a decree that emanates from their docket where the Applicant was working until he was unlawfully terminated.

9. He relied on the case of **James Kanyitta Nderitu & Another v Marion Ghikas & Another 2016 eKLR** to bolster the above argument.

10. The Applicant submitted that it is not unconstitutional for a public officer to be cited for contempt and to be committed to imprisonment for failure to honour a decree to any litigant when the public officer has disobeyed court orders directed to him to ensure payment. That the respondents are being held accountable for the responsibilities of the offices they hold and not personally liable.

11. He argued that the citing of the Respondents is premised on the provisions of the Judicature Act which remained intact when the Contempt of Court Act No. 46 of 2016 was nullified. He relied on the cases of **Faiz Ali Taib v the Hon. Attorney General & Another Misc. App. No. 64 of 2012 (Mbs)** and **Lucy Nduta Ng'ang'a v The Principal Secretary Ministry of Interior and the Hon. Attorney General JR No. 28 of 2019** to support his application.

Respondent's Submissions

12. The Respondent submitted that an application for contempt of court is personal to the alleged contemnor and since an order limiting an alleged contemnor's freedom may be issued, it is imperative that an alleged contemnor is given an opportunity to personally respond to such an application.

13. Counsel placed reliance on the Court of Appeal case of **James Kanyiita Nderitu & Another v Marios Philotas Ghikas & another [2016] eKLR** where the court upheld the Principle that where an adverse order is made against a party who is affected by it without notice to him/her, the order is liable to be set aside *ex debito justitiae*.

14. He argued that it is unconstitutional for a public officer to be sentenced to imprisonment for a public debt given that it is the government's liability to pay its debts. He added that committal and imprisonment constitutes a violation of fundamental rights and freedoms guaranteed by the Constitution under articles 28, 29, 39 and 50(1).

15. He relied on the case of **Solomon Muriithi Gitandu & Another v Jared Maingi Mburu [2017] eKLR** where the court held that -

> *"In the case of **Braeburn Limited v Gachoka and another (2007)** it was held inter alia;*
>
> > *"A person is not liable to be committed to civil jail for inability to pay a debt but a dishonest and fraudulent debtor is liable to be punished by way of arrest and committal."*

16. He further submitted that it is unconscionable for a court to hold the Respondent personally liable for the government's inability to settle

its debt; where the converse is tantamount to subjecting government officers to slavery contrary to the provisions of Article 25 of the Constitution.

17. On the Contempt of Court and Judicature Acts, the Respondents submitted that Mwita J. in **Kenya Human Rights Commission v Attorney General & another [2018] eKLR** nullified the Contempt of Court Act no. 46 of 2016 (the Act) which provided for the punishment of Contempt of Court. Given that the Act had repealed Section 5 of the Judicature Act, he submits that there is no Law on Contempt and Parliament must enact another law to punish for contempt.

18. Counsel concluded that under Article 156 of the Constitution 2010, the Attorney General is the principal legal adviser to the Government and as such he cannot be cited for contempt as the case herein. This is so because, the Attorney-General is sued by virtue of being the legal advisor to the government and not the principal party or litigant. That the order against the Attorney General must therefore fail. He prayed for the dismissal of the application.

Analysis and Determination

19. Issues for determination –

(i) Whether Section 5 of Judicature Act is still in force;

(ii) Whether Dr. Francis O. Owino is in contempt of Court orders issued on 26th July 2018;

(iii) Whether the Applicant is entitled to the orders sought.

Validity of Section 5 of Judicature Act

20. As has been submitted by the Respondent, Section 5 of the Judicature Act is one of the provisions that were repealed by the Contempt of Court Act 2016.

21. The Contempt of Court Act was however declared unconstitutional by the Court in **Kenya Human Rights Commission v Attorney General & Another (2018) eKLR.**

22. The Respondent has submitted that there is no law on contempt given that the Contempt of Court Act repealed Section 5 of the Judicature Act which provided for the procedure for contempt prior to the enactment of the Contempt of Court Act.

23. I do not agree with the Respondent. Having been declared

unconstitutional, all the provisions of the Contempt of Court Act, including the repeal of Section 5 of the Judicature Act, became a nullity. It is as if the Contempt of Court Act was never enacted. This means that Section 5 of the Judicature Act was reinstated following the nullification of the Contempt of Court Act.

24. This was the positon taken by the Court in **Republic v Kajiado County & 2 Others ex parte Kilimanjaro Safari Club Limited** which I agree with where the Court stated –

> *"This section was repealed by section 38 of the Contempt of Act of 2016, and as the said Act has since been declared invalid, the consequential effect in law is that it had no legal effect on, and therefore did not repeal section 5 of the Judicature Act, which therefore continues to apply. In addition, the substance of the common law is still applicable under section 3 of the Judicature Act. This Court is in this regard guided by the applicable English Law which is Part 81 of the English Civil Procedure Rules of 1998 as variously amended, and the requirement for personal service of court orders in contempt of Court proceedings is found in Rule 81.8 of the English Civil Procedure Rules."*

25. Section 5 of the Judicature Act is therefore still in force.

Whether the Alleged Contemnors are guilty of contempt of Court Orders issued on 26th July 2018.

26. The Applicant wants the Court to cite Dr. Francis O. Owino in in his capacity as the Principal Secretary, Ministry of Public Service, Youth and Gender Affairs and the Attorney General in its capacity as the Government's legal adviser.

27. Mativo J. restated the test for establishing contempt in his decision in **Samuel M. N. Mweru & Others v National Land Commission & 2 others [2020] eKLR** where he stated –

"40. It is an established principle of law that in order to succeed in civil contempt proceedings, the applicant has to prove

(i) the terms of the order,

(ii) Knowledge of these terms by the Respondent,

(iii) Failure by the Respondent to comply with the terms of the order.

Upon proof of these requirements the presence of willfulness and bad faith on the part of the Respondent would normally be inferred, but the Respondent could rebut this inference by contrary proof on a balance of probabilities. Perhaps the most comprehensive of the elements of civil contempt was stated by the learned authors of the book ***Contempt in Modern New Zealand*** *who succinctly stated:-*

"There are essentially four elements that must be proved to make the case for civil contempt. The applicant must prove to the required standard (in civil contempt cases which is higher than civil cases) that:-

(a) the terms of the order (or injunction or undertaking) were clear and unambiguous and were binding on the defendant;

(b) the defendant had knowledge of or proper notice of the terms of the order;

(c) the defendant has acted in breach of the terms of the order; and

(d) the defendant's conduct was deliberate.."

28. In the instant case, there is a judgment delivered by this Court on 20th August 2015 in favour of the Applicant. There is further a judgment in Misc. Application No. 128 of 2017 delivered on 26th July 2018 in which the Applicant was granted orders as follows –

"13. In the premises, I find that the Applicant's Notice of Motion dated 4th April 2017 is merited. I accordingly grant

the following orders:

(a) An order of mandamus directed to the Principal Secretary, Ministry of Public Service Youth & Gender Affairs and the Attorney General, to comply and pay the Applicant herein, Henry Musemate Murwa, the sum of Kshs.7,033,338/=, compromising of the principal sum of Kshs.6,000,000/= and costs taxed at Kshs.1,033,338/= which were awarded in Cause No. 564 of 2011, and interest at the rate of 12% per annum from the date of judgment in Cause No. 564 of 2011 until payment in full.

(b) The Ex Parte Applicant shall have the costs of the Notice of Motion dated 4th April 2017 of Kshs.50,000/=.

29. The Respondents are aware of the two judgments as they have been represented by Counsel in all the proceedings and they filed responses in both suits. The argument by Counsel for the Respondents that neither the 1st nor the 2nd Respondent are liable because they were not parties to ELRC Cause No. 564 of 2011 is immaterial as judgment was entered against the two Respondents in JR. Misc. Application. No. 128 of 2017. In the proceedings therein, Counsel for the Respondents admitted that the money was duly owed and severally promised to rally his clients to pay. It is only after the promises were not actualized that the judgment was delivered. Having admitted the debt and having not appealed or applied to set aside the judgment, Counsel's argument cannot hold.

30. Counsel's argument that it is unconstitutional to hold a public officer liable to settle a public debt also misses the point. The prayers in the motion do not require the cited alleged contemnor to personally settle the debt. The prayers are that the alleged contemnor, being the accounting officer, having failed to obey the Court order requiring him in his capacity as accounting officer to settle the debt, has fialed to comply with the Court order.

31. The authorities cited by the Respondents in respect of personal service upon the Contemnor are no longer valid as it has been held subsequently that knowledge of the Court orders are sufficient. See Court of Appeal decision in **Shimmers Plaza Limited v National Bank of Kenya Limited [2015] eKLR** where it was held that –

"Would the knowledge of the judgment or order by the advocate of the alleged contemnor suffice for contempt proceedings" We hold the view that it does. This is more so in a case such as this one where the advocate was in Court representing the alleged contemnor and the orders were made in his presence. There is an assumption which is not unfounded, and which in our view is irrefutable to the effect that when an advocate appears in court on instructions of a party, then it behoves him/her to report back to the client all that transpired in court that has a bearing on the client's case."

32. Again in **Basil Criticos v Attorney General and 8 Others [2012] eKLR** Lenaola J. (as he then was) pronounced himself as follows:-

"... the law has changed and as it stands today knowledge supersedes personal service ..... where a party clearly acts and shows that he had knowledge of a Court Order; the strict requirement that personal service must be proved is rendered unnecessary."

33. The Respondents did not file any affidavit to contest the averments in the application. The averments by Counsel for the Respondents that Dr. Francis O. Owino is not the Principal Secretary is not supported by any evidence. Submissions cannot take the place of evidence as was stated by the Court of Appeal in **Daniel Toroitich Arap Moi v Mwangi Stephen Mureithi & Another (2014) eKLR**.

Is the Applicant entitled to the Orders Sought?

34. The Applicant has two judgments, one in Cause No. 564 of 2011 and in High Court JR 128 of 2017. The two judgments have not been set aside. No appeal has been filed in respect thereto. The two judgments are valid. The Respondents are aware of both but have since the judgments were delivered, failed to pay.

35. Dr. Francis O. Owino having not denied that he was the accounting officer at the time of service of the judgment in High Court JR 128 of 2018, I find him guilty of disobedience of this Court's Orders of 26th July 2018.

36. The said Dr. Francis O. Owino is directed to appear in Court on 28th September 2021 for purposes of sentencing.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 6TH DAY OF AUGUST 2021

MAUREEN ONYANGO

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.

MAUREEN ONYANGO

JUDGE