



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT

NAKURU

CAUSE NO.124 OF 2016

JAMES MWANGI MURAYA.....CLAIMANT

VERSUS

THE COUNTY GOVERNMENT OF NAKURU.....1ST RESPONDENT

THE COUNTY SECRETARY.....2ND RESPONDENT

RULING

The claimant, by application and Notice of Motion dated 28th March, 2018 and brought under the provisions of section 1A, 1B and 3A of the Civil Procedure Act and section 12 of the Industrial Court Act, 2011 and sections 5, 7, 27 and 30 of the Contempt of Court Act is seeking for orders that;

The court be pleased to issue summons to the Nakuru County Secretary to show cause why they have failed to comply with the court judgement delivered on 7th December, 2017.

Upon failure to comply with [orders above] this court be pleased to cite the 2nd respondent for contempt of court and commit him to civil jail for a period not exceeding six (6) months and/or order for sequestration of the 1st respondent's assets thereto and/or order the respondents to pay fine as it deems just and reasonable Costs of this application.

The application is supported by the annexed affidavit of the claimant and on the grounds that judgement herein was delivered on 7th December, 2017 and a decree extracted on 28th February, 2018 and respondents served on equal date. There is deliberate noncompliance with the decree and in the interests of justice the application should be allowed for the claimant to enjoy the fruits of his judgement.

In reply, the respondents opted to make oral submissions on points of law and letting out that the application offends provisions of Order 22 and 25 of the Civil Procedure Rules with regard to rules of execution of judgements and citing respondent officers for contempt is not an appropriate mode of execution against such a party. A case made against a County Government must follow section 21 of the County Government Act where notice, service and mode of execution is set out. Even where the claimant was to comply with Order 22, to proceed and cite the respondents for contempt does not apply in a case such as this. The application is therefore not properly filed and the orders sought are not capable of being issued.

The claimant has relied on the provisions of Article 159 of the Constitution to urge the court to allow the application seeking to have the respondents show cause why they have failed to comply with the court judgement. The claimant has also relied on Civil Procedure Act section 1A, 1B and 3A. There is also application of sections 5, 7, 27 and 30 of the Contempt of Court Act, 2016.

The claimant has also invoked the provisions of section 12 of the *Industrial Court Act, 2011* but such law has since been amended with the enactment of the Employment and Labour Relations Court Act, 2011 vide Act No. 18 of 2014. The referenced statute [*Industrial Court Act*] does not apply.

The orders sought to have respondents show cause why they have failed to comply with the court judgment and failure to comply be committed to civil jail for 6 months or to have the respondents' property attached are in their nature provided for under the Contempt of Court Act, 2016. The Contempt of Court Act, 2016 has not replaced, repealed or made a review of the Civil Procedure Act and the Rules thereto. To the best of my reading of the Contempt of Court Act, 2016 and particularly as sections 30, such should not be misconstrued to apply as replacing execution proceedings set out under Rule 22 and or 25 of the Civil Procedure Rules. For meeting the ends of justice, both statutes and particularly the Civil Procedure Act and the Rules thereto serve an important purpose of ensuring each party is given a fair chance to make good a claim against them and once judgement or an order of the court has been made against such a party, there is notice sufficient to have such a party to comply. To apply the Contempt of Court Act, 2016 in a proper case where the Civil Procedure Act or the

rules should apply is to circumvent an otherwise well applied rules of execution which have well served litigants for many years. I find no justification for not using these procedures in this case.

In this regard, section 30 of the Contempt of Court Act, 2016 provides that;

1. Where a State organ, government department, ministry or corporation is guilty of contempt of court in respect of any undertaking given to a court by the State organ, government department, ministry or corporation, the court shall serve a notice of not less than thirty days on the accounting officer, requiring the accounting officer to show cause why contempt of court proceedings should not be commenced against the accounting officer.

2. No contempt of court proceedings shall be commenced against the accounting officer of a State organ, government department, ministry or corporation, unless the court has issued a notice of not less than thirty days to the accounting officer to show cause why contempt of court proceedings should not be commenced against the accounting officer.

3. A notice issued under subsection (1) shall be served on the accounting officer and the Attorney-General.

4. the accounting officer does not respond to the notice to show cause issued under subsection (1) within thirty days of the receipt of the notice, the court shall proceed and commence contempt of court proceedings against the accounting officer.

5. Where the contempt of court is committed by a State organ, government department, ministry or corporation, and it is proved to the satisfaction of the court that the contempt has been committed with the consent or connivance of, or is attributable to any neglect on the part of any accounting officer, such accounting officer shall be deemed to be guilty of the contempt and may with the leave of the court be liable to a fine not exceeding two hundred thousand shillings.

6. No State officer or public officer shall be convicted of contempt of court for the execution of his duties in good faith

I see no gap with regard to execution proceedings under the Civil Procedure Act to justify the application of the Contempt of Court Act, 2016 as correctly held in the case of **Republic versus Returning Officer of Kamkunji Constituency & The Electoral Commission of Kenya HCMCA No. 13 of 2008**, that;

Parliament intended and that the High Court has the responsibility for the maintenance of the rule of law hence there cannot be a gap in the application of the rule of law. Therefore where there is a lacuna with respect to enforcement of remedies provided under the Constitution or an Act of Parliament, or if, through the procedure provided under an Act of Parliament, an aggrieved party is left with no alternative but to invoke the jurisdiction of the Court, the Court is perfectly within its rights to adopt such a procedure as would effectually give meaningful relief to the party aggrieved. To fail to do so would be to engender and abet an injustice and as has been held before, a court of justice has no jurisdiction to do injustice. See M Mwenesi vs. Shirley Luckhurst & Another Civil Application No. Nai. 170 of 2000 and Kenya Industrial Estates Ltd vs. Transland Shoe Manufacturers Ltd. & 2 Others Civil Application No. Nai. 364 of 1999.

In this case, the provisions of Civil Procedure Act and the rules thereto should suffice. This is noting the Employment and Labour Relations Court (Procedure) Rules, 2016 where Rule 32(2) requires parties executing judgments, orders or a decree from this court to apply the procedures set out under the Civil Procedure Rules.

Effort to apply the rules contemplated for employment and labour relations claims when executing a judgement, orders or a decree of the court is imperative. There being no such effort demonstrated in this case, the orders sought at this instance are not justified.

Accordingly, application dated 28th March, 2018 is declined. Costs in the cause.

Delivered in open court at Nakuru this 15th day of May, 2018.

M. MBARU

JUDGE

In the presence of:

Court Assistants: Nancy Bor & Martin Oletiyen