



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

JUDICIAL REVIEW MISC. APPLICATION NO. 134 OF 2017

NASIBO DABASO JILLO..... APPLICANT

VERSUS

THE PRINCIPAL SECRETARY

MINISTRY OF DEFENCE.....1ST RESPONDENT

THE COMMANDER, KENYA ARMY.....2ND RESPONDENT

RULING

Introduction

1. The application before me is the Notice of Motion dated 15.2.2018 seeking:

1) THAT this application be certified urgent

2) THAT Saitoti Torome, the Principal Secretary and Accounting Officer in the Ministry of Defence, the 1st Respondent herein be summoned to Court to show cause why he should not be cited for contempt and be committed to prison for such period of time not exceeding six months and or until he purges the contempt.

3) THAT costs of this application be borne by the 1st Respondent.

2. The grounds of the application are set out on the body of the motion and the supporting affidavit sworn by the applicant on 15.2.2018. In brief the applicant contends that this Court entered judgment of Kshs.3,000,000 in his favour on 19.6.2015. In petition No. 11 of 2013 for unlawful dismissal. Thereafter a bill of costs was taxed in his favour on 23.6.2016 at Kshs.197,412. The said decreed sum and costs were never paid despite service of the Decree and order against the Government. He therefore filed this suit seeking order of mandamus to compel the respondents to settle the decree, costs and interest which stood at Kshs.3,990,398 as at 2.10.2017. The court entered judgment as prayed on 7.12.2017 and the applicant served the judgment and decree on 11.12.2017 and 23.1.2018 respectively. The new judgment debt was not paid the Respondent being fully aware of the same and as such, the Applicant brought this motion because he believes that the 1st respondent's conduct undermines the authority and dignity of this Honourable Court.

3. The 1st Respondent filed Replying affidavit on 16.5.2018 opposing the motion admitting that he is aware of the judgment delivered on 19.6.2015 of Kshs.3,000,000 and has since instructed counsel to appeal. He further admitted being aware of the order of mandamus issued on 7.12.2017 compelling him to pay Kshs.3,990,398 against which he has also filed a Notice of Appeal. He further contended that the decretal sum payable in accordance with the decree against the government was not allocated in the budget of the Ministry of defence and can only be paid if factored in the next year financial budget. He therefore denied being in contempt of court because he has not acted in wilful disobedience of the decree of this court.

Applicant's submissions

4. The applicant has submitted that the first Respondent who is the Accounting officer of the Second Respondent has willfully disobeyed the Court order issued on 7.12.2017 contrary to the mandatory provisions of section 21(3) of the Government Proceedings Act. In his view, the said provisions leave no room for the Accounting Officer of the government to elect whether or not to comply with the order from the court. Consequently, according to the applicant, the failure by the first Respondent to comply with the order of mandamus is intentional and deliberate and it amounts to wilful disobedience of the certificate of order against the Government and the order of mandamus issued by this court.

5. The applicant has urged that the disobedience of the court orders by the first respondent and failure to do a statutory duty imposed by the court is in consonance with failure to uphold the rule of law, which is one of the National Values and Principles of governance under Article 10 of the constitution. In brief therefore, the applicant submits that by disobeying the court orders to pay the decreed sum, the first Respondent is acting in contravention of the constitution of this country and should be cited for contempt of court.

6. The applicant has further urged that there is no justifiable reason as to why the court order had to be disobeyed. He contended that no appeal has been preferred against the judgment delivered on 19.6.2015 and the costs taxed on 23.6.2016. That there is also no order staying the proceeding herein. The only reason being cited for the none compliance or disobedience according to the applicant is lack of budgetary allocation plus sum certified by the court order. He however relied on **Republic Vs Permanent Secretary Ministry of State for Provincial Administration and Internal Security & Another exparte Fredrick Manaoah Egunza cited in Estate of Harun Thungu Wakaba vs Attorney General & Another [2015]eKLR** to urge that carrying out the statutory duty to pay under section 21(3) of GPA by the Accounting officer is not subject to budgetary allocation and parliamentary approval of Government expenditure in the financial year subsequent to which Government liability accrues.

7. He urged the Court to act firmly against the first respondent for his consistent and brazen defiance of order and decree of the court which has utterly reduced the confidence of the citizens to the court. He relied on the **Board of Governors Moi High School Kabarak Vs Malcom Bell & Another** where the Supreme Court described the power to punish for contempt of court as the power to safeguard itself against contemptuous or disruptive intrusion from elsewhere.

Respondent's Case

8. The first respondent denied that he has acted in wilful disobedience of the court order or decree. He submitted that the burden of proof on the part of the person alleging contempt of court is not discharged unless he shows that there exist means to fulfill the defence but the Accounting officer still fails to comply. He relied on **Replic v Town Clerk Kisumu Municipality, Exparte East African Engineering Consultants [2007]2 EA 441** and **Africa Management International Communication Limited vs Joseph Mathenge Mugo & Another** to urge that an officer can only be committed to civil jail if the entity has funds and the officer deliberately refuses to pay or where a statute has earmarked funds for payment since the officer does not incur personal liability.

9. The first respondent has contended that the applicant is yet to serve the decree issued in this suit and the sum involved is substantive amount, which requires budgetary allocation, and which has not yet been done. For the foregoing two reasons, the first respondent denies that he has acted in contempt of court. He further relief on section 21(4) of the GPA and section 30(6) of the Contempt of Court Act to urge that no execution can be done against an officer personally or contracted of contempt of court for the execution of his duties in good faith.

10. He concluded by urging the court to dismiss the application because he is not in contempt of Court and therefore cannot be held personally liable. He described committal to civil jail as unconstitutional and no longer execution proceedings and cited **Ziporah Wambui Mathara [2010]eKLR and R vs Attorney General & Another exparte James Alfred Koroso [2013]eKLR** to support that view. He further urged the court to find that the correct procedure was not followed before bringing the application for contempt and cited **Jacob Zedekiah Ochino & Another vs George Aora Okombo & 34 Others** to support the view that the correct procedure must strictly be followed in bringing contempt application because of its criminal character.

Analysis and Determination

11. There is no dispute that there exists judgment and decree of this court in this suit of which the respondents are aware of and are still not satisfied. The issue for determination herein is whether the orders sought by the applicant should be granted.

12. The procedure for instituting contempt proceedings against an Accounting Officer of Government is provided for under section 30 of the Contempt of Court Act of 2016. Subsection (2) provides in mandatory terms that:

“(2) No contempt of Court proceedings shall be commenced against 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 proceeding should not be commenced against the accounting officer.”

13. The Act does not state the nature of the Notice to be served under section 30(2). Even if I was to free myself from the Yoke of procedural technicalities by dint of Article 159 of the constitution, and treat the motion herein as the Notice to show cause within the meaning of section 30(2) of the Contempt of Court Act, I would take the Replying Affidavit by the first respondent as sufficient explanation that he is not in contempt of Court in respect of the judgment and decree issued by the Court herein. First, the applicant has not proved that he served the decree on the first respondent. Second he has not proved that he obtained a certificate of order against the government in this suit and served it upon the first respondent within the meaning of section 21(3) of the GPA. Without such prove, the court cannot summon the first respondent to show cause why he should not be cited for contempt.

Order sought

14. In view of the foregoing finding, I decline to grant the orders sought by the applicant.

Disposition

15. The notice of motion dated 15.2.2018 is dismissed for being for lack of merits. Each party to bear his own costs.

Dated, Signed and Delivered in Open Court at Nairobi this 28th day of September 2018

ONESMUS N. MAKAU

JUDGE