



**Maggy Agulo Construction Company Limited v Ministry of Public Health & 4 others (Civil Case 9 of 2021) [2025] KEHC 685 (KLR) (30 January 2025) (Ruling)**

Neutral citation: [2025] KEHC 685 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT VIHIGA  
CIVIL CASE 9 OF 2021  
JN KAMAU, J  
JANUARY 30, 2025**

**BETWEEN**

**MAGGY AGULO CONSTRUCTION COMPANY LIMITED ..... PLAINTIFF**

**AND**

**MINISTRY OF PUBLIC HEALTH ..... 1<sup>ST</sup> DEFENDANT**

**MINISTRY OF PUBLIC WORKS ..... 2<sup>ND</sup> DEFENDANT**

**COUNTY GOVERNMENT OF VIHIGA ..... 3<sup>RD</sup> DEFENDANT**

**VIHIGA COUNTY TENDER COMMITTEE ..... 4<sup>TH</sup> DEFENDANT**

**THE HON ATTORNEY GENERAL ..... 5<sup>TH</sup> DEFENDANT**

**RULING**

**Introduction**

1. The Plaintiff's Notice of Motion application dated 25<sup>th</sup> January 2022 and filed on 26<sup>th</sup> January 2022 had sought that the 3<sup>rd</sup> and 4<sup>th</sup> Defendants show cause why they should not be cited for contempt and/or be detained for a period of six (6) months for blatantly disobeying the court order that was issued on 17<sup>th</sup> November 2021.
2. Maggy Savai Agulo, swore an Affidavit in support of the said application on 25<sup>th</sup> January 2022. She stated that the 3<sup>rd</sup> and 4<sup>th</sup> Defendants had never complied with the aforesaid order in which they were to deposit the full decretal sum of Kshs 42,999,990/=.
3. She asserted that the said 3<sup>rd</sup> and 4<sup>th</sup> Defendants had flouted the orders of the court, which should not be granted in vain, with impunity. She therefore urged this court to allow the said application.
4. In response to the said application, the 3<sup>rd</sup> Defendant stated that it filed its Grounds of Opposition together with its Written Submissions on 1<sup>st</sup> July 2024. This pleading was not in the file. The court



checked the same in the e-portal but it does not seem to have been uploaded. There was, however, an indication of filing a document on the said date of 1<sup>st</sup> July 2024.

5. The Plaintiff's Written Submissions were dated 13<sup>th</sup> August 2024 and filed on 14<sup>th</sup> August 2024 while those of the 3<sup>rd</sup> Defendant were dated 27<sup>th</sup> June 2024 and filed on 1<sup>st</sup> July 2024. The 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants did not file their respective Written Submissions. The Ruling herein is therefore based on the Written Submissions by the Plaintiff and the 3<sup>rd</sup> Defendants which both parties relied upon in their entirety.

### **Legal Analysis**

6. The Plaintiff submitted that the 3<sup>rd</sup> and 4<sup>th</sup> Defendants had not given any plausible explanation why they had not deposited the decretal sum as had been ordered by the court.
7. It referred this court to Section 5 of the *Judicature Act* that gives this court jurisdiction and power to punish contemnors of contempt of court. To buttress its argument, it placed reliance on the case of Henry Musemate Murwa vs Francis Owino, Principal Secretary, Ministry of Public Service, Youth and Gender Affairs & Another [2021] eKLR where the court therein held the Principal Secretary to have been in contempt and ordered him to appear in court for sentencing.
8. It asked this court to award it costs as costs followed the event. In this regard, it referred this court to the case of Joseph Oduor Anode vs Kenya Red Cross Society [2012] eKLR where it was held that where the court did not follow the general principle that costs follow the event, then it was enjoined to give reasons for departing from the same.
9. On its part, the 3<sup>rd</sup> Defendant relied on Order 42 Rule 8 of the Civil Procedure Rules which stated that no security would be required from the government. It referred to the cases of Laikipia County Government vs Tirus Kinyua Thumbi [2020] eKLR and Nzomo (suing as the legal representative of the Estate of Nzomo Wambua (deceased) vs Makueni County Government, ELC No 355 of 2017 (2023) KEELC17418 (KLR) 3 May 23 where similar conclusions were arrived at. It submitted that it was, therefore, protected from the provisions of Order 42 Rules 6 and 7 of the Civil Procedure Rules.
10. It argued that it could also not have been able to pay the decretal sum as the same could not be released from the Exchequer without the approval of the Controller of Budget. It also pointed out that at the time the order was issued, its accounts had been frozen pursuant to an order that had been issued in Petition No E008 of 2021 Francis Angueyah Ominde & Another vs Vihiga County Executive Committee Member Finance & Economic Planning.
11. It asserted that judgment against it was still in force and submitted that the same ought to be set aside to enable it file a defence out of time.
12. It further contended that the Notice by the firm of M/S Rioba Omoboto & Co Advocates violated the provisions of Order 9 Rule 9 of the Civil Procedure Rules and the same ought to be struck out. It added that any firm that came on record pursuant to a consent form the said firm of M/s Rioba Omoboto & Co Advocates should still be struck out as the said firm of M/S Rioba Omoboto & Co Advocates were never legally on record.



13. A perusal of the Plaintiff's Notice of Motion application dated 19<sup>th</sup> April 2021 and filed on 17<sup>th</sup> May 2021 showed that it had sought leave to enter judgment against the 3<sup>rd</sup> and 4<sup>th</sup> Defendants. This was pursuant to Order 10 Rule 8 of the Civil Procedure Rules, 2010 states as follows:-

“No judgment in default of appearance or pleading may be entered against the Government without the leave of the court and any application for leave shall be served not less than seven days before the return day.”

14. On 11<sup>th</sup> November 2021, the 3<sup>rd</sup> and 4<sup>th</sup> Defendants filed a Notice of Motion application of even date. The same had sought leave to file a Statement of Defence, List of Witnesses and Witness Statements.

15. When the two (2) said applications came before Farah Amin J (as she then was) on 12<sup>th</sup> November 2017, she gave the following orders:-

“The 3<sup>rd</sup> and 4<sup>th</sup> Defendants applicants (sic) be and hereby granted leave to defend the suit on the following conditions:-

- i. That the full decretal sum together with interest accrued shall be paid into court within seven (7) days from the date hereof
- ii. That all pleadings and witness statements relied upon by the defendants shall be filed and served within 7 days from the date hereof.”

16. Order 7 Rule 1 of the Civil Procedure Rules was clear that:-

“Where a defendant has been served with a summons to appear he shall, unless some other or further order be made by the court, file his defence within fourteen days after he has entered an appearance in the suit and serve it on the plaintiff within fourteen days from the date of filing the defence and file an affidavit of service.”

17. It was not clear if interlocutory judgment was entered against the 3<sup>rd</sup> and 4<sup>th</sup> Defendants. What was evident, however, was that the 3<sup>rd</sup> and 4<sup>th</sup> Defendants were given a conditional leave to file a Statement of Defence and its documentation. There was no default clause in the said order.

18. This court did not wish to go into the question of whether or not the learned judge could grant leave hinged on a conditional deposit of the decretal sum as that was really within the purview of the Court of Appeal. She was a judge of equal and competent jurisdiction of this court and consequently, this court could not sit on appeal of her decisions. However, this court could review the orders if justification was made.

19. The only observation this court could make was that while there was no specific provision in the Civil Procedure Rules that protected the government from depositing any monies in other instances apart from when it sought a stay of execution pending appeal, Order 42 Rule 8 of the Civil Procedure Rules expressly stated that:-

“No such security as is mentioned in rules 6 and 7 shall be required from the Government or where the Government has undertaken the defence of the suit or from any public officer sued in respect of an act alleged to be done by him in his official capacity.”

20. The above notwithstanding, the fact that there was non-compliance with the court order did not necessarily point to a contempt of court. It was this court's view that the Plaintiff ought not to have focused on the non-compliance of deposit of the decretal sum because in default, it meant that the 3<sup>rd</sup>



and 4<sup>th</sup> Defendants were shut out from defending the suit and that it could proceed with the hearing of the case ex parte and on merit. Indeed, the order for the deposit of the “decretal sum” was not pursuant to a judgment where it would have sought to execute.

21. This court did not therefore find favour in the Plaintiff’s arguments that the 3<sup>rd</sup> and 4<sup>th</sup> Defendants ought to be cited for contempt as the money that was to be deposited was not a decretal sum, rather, it appeared to have been some sort of security, which a government was protected from giving.
22. Going further, this court noted that the 3<sup>rd</sup> and 4<sup>th</sup> Defendants’ Notice of Motion application dated and filed on 27<sup>th</sup> January 2022 had sought that the pleadings that had been filed by the firm of M/S Rioba Omboto & Co Advocates be expunged from the court records.
23. Notably, on 23<sup>rd</sup> September 2022, P.J. Otieno J granted M/S Githogori & Harrison Associates LLP leave to come on record for the Plaintiff herein. It was prudent that the issues relating to the Plaintiff’s representation be dealt with when determining the 3<sup>rd</sup> and 4<sup>th</sup> Defendant’s Notice of Motion application dated and filed on 27<sup>th</sup> January 2022 that had sought the expunging of all documents that were filed by the firm of M/S Rioba Omboto & Co Advocates.

### **Disposition**

24. For the foregoing reasons, the upshot of this court’s decision was that the Plaintiff’s Notice of Motion application dated 25<sup>th</sup> January 2022 and filed on 26<sup>th</sup> January 2022 was not merited and the same be and is hereby dismissed. As it would be punitive to award costs to a government against its citizen, this court deviated from the general principle that costs follow the event and hereby directs that each party will bear its own costs of this application.
25. To progress this matter further, it is hereby directed that this matter be mentioned on 7<sup>th</sup> May 2025 for further orders and/or directions.
26. It is so ordered.

**DATED AND DELIVERED AT VIHIGA THIS 30<sup>TH</sup> DAY OF JANUARY 2025**

**J. KAMAU**

**JUDGE**

