



Republic v County Executive Committee Member, Finance and Economic Planning, Nairobi City County Government & another; Ngenza (Exparte Applicant) (Judicial Review Application E014 of 2023) [2025] KEHC 4300 (KLR) (Judicial Review) (31 March 2025) (Ruling)

Neutral citation: [2025] KEHC 4300 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
JUDICIAL REVIEW APPLICATION E014 OF 2023
RE ABURILI, J
MARCH 31, 2025**

BETWEEN

REPUBLIC APPLICANT

AND

THE COUNTY EXECUTIVE COMMITTEE MEMBER, FINANCE AND ECONOMIC PLANNING, NAIROBI CITY COUNTY GOVERNMENT 1ST RESPONDENT

THE CHIEF OFFICER FINANCE, OF COUNTY GOVERNMENT OF NAIROBI 2ND RESPONDENT

AND

KENNEDY WAINAINA NGENZA EXPARTE APPLICANT

RULING

1. The application before this court is the ex parte Applicant’s application dated 25th June 2024 and brought under Section 5 of the *Judicature Act*, Section 3A of the *Civil Procedure Act* and Rule 81.10 of the Civil Procedure(Amendment No.2) Rules,2015. The application seeks the following orders:
 1. Spent.
 2. Spent.
 3. That Summons be issued for personal attendances of the County Executive Committee Member, Finance and Economic Planning, Nairobi City County Government and the Chief Officer, Finance of County Government of Nairobi, before the Honourable Court for hearing



of the present application for Contempt for disobedience of orders of this Honourable Court as issued in the Decree dated 27th October 2023, and the said County Executive Committee Member, Finance and Economic Planning, Nairobi City County Government and the Chief Officer, Finance of County Government of Nairobi to continue personally attending Court on all occasions until determination of the application;

4. That the County Executive Committee Member, Finance and Economic Planning, Nairobi City County Government, and the Chief Officer, Finance of County Government of Nairobi, the cited Contemnors herein do stand committed to civil jail for a period that this Honourable Court shall determine for contempt of Court, for knowingly and wilfully violating and disobeying the Decree of the Honourable Court issued on 27th October 2023;

In addition to (4) above;

5. That an order for sequestration of the personal property of the County Executive Committee Member, Finance and Economic Planning, Nairobi City County Government, and the Chief Officer, Finance of County Government of Nairobi, be issued for contempt of court, in that being aware of the Orders of this Honourable Court as issued 27th October 2023, knowingly and wilfully violated and/or disobeyed and/or disregarded and or thwarted and undermined the effect and purpose of the said order and or knowingly and wilfully failed to take reasonable steps to ensure that the said orders were obeyed;
6. That the incumbent County Executive Committee Member, Finance and Economic Planning, Nairobi City County Government, and Chief Officer, Finance of County Government of Nairobi, being in persistent breach of their legal duty under Section 21 (1) and (3) of the Government Proceedings Act, and being in contempt of Court's Decree, and therefore in persistent breach of their duty under the Public Officers Ethics Act and Chapter 6 of the Constitution of Kenya, be and are hereby determined as unfit to continue holding public office as County Executive Committee member, Finance and Economic Planning, Nairobi City County Government and the Chief Officer Finance County Government of Nairobi, respectively;
7. That as a consequence of the Order in(6) above, a consequential Order be and is hereby issued ordering the incumbent County Executive Committee Member, Finance and Economic Planning, Nairobi City County Government and Chief Officer, Finance of County Government of Nairobi, to forthwith vacate the office in any event within 48 hours of the Order of Court and the incoming County Executive Committee Member, Finance and Economic Planning, Nairobi City County Government and the Chief Officer, Finance of County Government of Nairobi, be and are hereby ordered to forthwith comply with the Decree of Court issued on 27th October 2023;
8. That the costs of and occasioned by this application be paid by the cited contemnor on indemnity basis.

2. The application is supported by the affidavit of Kennedy Wainaina Ngenga sworn on 25th June 2024.
3. The Applicant's case is that the County Executive Committee Member, Finance and Economic Planning, Nairobi City County Government, and the Chief Officer, Finance of County Government of Nairobi, are in gross contempt of the Decree of this Honourable Court, dated 27th October 2023.
4. The court is said to have on 27th October 2023, issued an order of Mandamus ordering and directing the County Executive Committee Member for Finance and Economic Planning of the Nairobi City



- County Government, to satisfy the Certificate of Order against Government dated 11th October 2022, issued in Nairobi High Court Civil Case No. 63 of 2017; Kennedy Wainaina Ngenga vs. County Government of Nairobi, within 14 days of service of the Judgment and Order.
5. According to the Applicant the Demand, Decree of Court, together with the penal notice advising that any non-compliance therewith would be punishable for contempt of Court were duly served upon the Committee Member and the Chief Officer Finance, 10th June 2024.
 6. However, the Applicant urges that despite service, and notice the Respondents have wilfully refused to satisfy the Certificate of Order against County Government and the Certificate of Order for Costs against Government both of which are dated 11th October 2022.
 7. The Applicant in support of the position that court orders ought to be obeyed relies on the cases of Central Bank of Kenya & Another vs. Ratilal Automobiles Limited & Others Civil Application No. Nai. 247 of 2006, B vs. Attorney General [2004] 1 KLR 431 and Econet Wireless Kenya Ltd vs. Minister for Information & Communication of Kenya & Another [2005] 1KLR 828.
 8. It is also the Applicant's case that the Respondents actions violate his fundamental rights to property under Article 40 and fundamental right to access justice, including realization of a Decree of Court, under Article 48 of *the Constitution*.
 9. The Applicant also filed written submissions dated 15th July 2024.
 10. In his submissions, the ex parte applicant urges that where there exists a valid Order of this Honourable Court, 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 discharged. Further that the uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or void.
 11. It is also submitted that the obligation is not optional but rather mandatory as was observed by the Constitutional Court of South Africa in Kristen Carla Burchell vs Barry Grant Burchell Case No 364/2005 where the court observed that *the Constitution*, which upholds the rule of law and supremacy, mandates the judicial authority in courts and that failure to enforce court orders can undermine confidence in legal recourse, potentially affecting the rule of law and the ability to resolve civil disputes.
 12. The Applicant relies on the book Contempt in Modern New Zealand which it is submitted has laid down the basis for the determination of several contempt proceedings both internationally and within our jurisdiction, as cited by Mativo. J in the case of North Tetu Farmers Co. Ltd v. Joseph Nderitu Wanjohi [2016] eKLR.
 13. It is also submitted that the Order of mandamus dated 27th October 2023 was couched in plain terms, unequivocal and was clearly addressed to the 1st Respondent herein. The Applicant's submission is that the order also gave a clear timeline within which compliance of the order was to be effected.
 14. According to the ex parte Applicant, pursuant to section 148 of the *Public Finance Management Act*, the 2nd Respondent being the Chief Officer, Finance of the County Government of Nairobi, and as such in charge of managing the county government finances is equally liable for the satisfaction of the Certificate of Order against Government 11th October 2022 and the Certificate of Order for Costs against Government dated 11th October 2022.
 15. On the Respondent's knowledge of or proper notice of the terms of the order the Applicant refers to the definition of notice as provided under the Black's Law Dictionary 9th Edition. He continues to



submit that as adequately averred in the Affidavit by the Applicant, sworn on 25th June 2024 in support of the present Application, the Decree was served upon the Respondents, and service endorsed as seen on the face of the said decree. The ex parte Applicant also filed an affidavit sworn on 25th June 2024 by Monica N. Werimo an advocate of the High Court of Kenya.

16. On what constitutes contemptuous conduct the ex parte Applicant places reliance on the case of Sam Nyamweya & 3 others v Kenya Premier League Limited & 2 others [2015] eKLR where the court observed that contempt of court refers to willful defiance or disrespect towards the court, challenging its authority or the supremacy of the law in civil or criminal proceedings.
17. The ex parte Applicant further submits that having established that the court order was clear and unambiguous and was binding on the Respondents, and further that the Respondents had proper knowledge of the order and notice had been duly issued, personally upon them, they had an unfettered obligation to abide to the order of this Honourable Court and the actions complained of herein therefore amounted to willful and deliberate defiance of and or disrespect towards the Court.
18. According to the Applicant, it is imperative that this court takes harsh actions as against the Respondents and reliance is placed on the case of Shimmers Plaza Limited vs National Bank of Kenya Limited [2015] eKLR where the court observed that court orders must be obeyed without impunity, as they are mandatory and individuals cannot choose whether to obey them. Further that courts should not tolerate disobedience, as it absolves them of their constitutional duty and dignity. The court also observed that punishment is necessary to prevent anarchy.
19. Further reliance is also placed in the case of Kenya Human rights Commission vs Attorney General & Another [2018] eKLR where Justice Mwita quoted the case of Canadian Metal Co. Ltd vs Canadian Broadcasting Corp (No.2) [1075] 48 D. LR (30) where it was held that court orders should not be disobeyed, as it would lead to anarchy and undermine the administration of justice and as such courts must punish those who violate their power to maintain the rule of law and the development of society. Further that without this power, courts would be helpless, erode public confidence, and endanger the rule of law. It was also observed that the court's ability to enforce its process and to maintain its dignity and respect is crucial for maintaining the rule of law.
20. In conclusion the ex parte Applicant submits that he is a successful litigant, whose win is being thwarted by the Respondents owing to the willful and deliberate failure to abide to the order of this Honourable Court. It is his case that these illegal actions occasion burden on him and reduce this Honourable Court to a futile institution. The Respondents' actions it is urged are a deliberate act to obstruct justice, which should and ought not be countenanced by the Honourable especially noting that the said actions are premised at frustrating and defeating the substance of a lawful and valid order of this Court.

Analysis and Determination

21. From the affidavit evidence, and submissions by the Applicant on record and the applicable law and decided cases, the issues for determination are whether the 1st and 2nd Respondents are guilty of contempt of court order issued on 27th October 2023 and if so, what orders should this court make in the circumstances.
22. It is not in contention that there is a valid order of this court that is clear and unambiguous. The alleged contemnors also do not deny service or knowledge of the said order seeing that no response to the application was filed before this court.
23. It is important for the court to point out that the Respondents were not denied an opportunity to file their responses. In its directions issued on 27th June, 2024, the Court explicitly allowed the



Respondents to submit their responses to the present application. These directions were duly served on the Respondents by the ex parte Applicant on 28th June, 2024. However, despite this opportunity, the Respondents had still not filed their responses as of 5th February, 2025 when the matter was before me for directions on the ex parte Applicant's instant application for contempt. Remarkably on the said date, the Respondents' counsel unexpectedly sought leave to file the Respondents' response and written submissions.

24. The Court denied this request for leave, noting that the excuse offered by the Respondents' counsel that they were waiting for Judge Ngaah to preside over the matter as per directions given by Judge Chigiti was not persuasive. This is because it was common knowledge that Judge Ngaah had been transferred, and, in any event, the Respondents could not reasonably justify waiting since June 2024 to file their responses and submissions based on this premise. There was therefore no valid reasons for the delay in filing the responses and written submissions.

25. Returning to the primary issue before the Court, contempt is defined in Black's Law Dictionary (Ninth Edition) as follows:

“Conduct that defies the authority or dignity of a court. Because such conduct interferes with the administration of justice, it is punishable usually by fine or imprisonment.”

26. Contempt, strictly defined, refers to actions that hinder the fair and efficient operation of the justice system. Contempt of court involves more than simply enforcing compliance with court orders. Superior courts have the power to hold litigants in contempt when they fail to follow court directives a critical measure for preserving both the authority and credibility of the judicial system. As a result, when a court is asked to find a litigant in contempt, it is not only resolving the specific grievance of the successful party but also safeguarding the broader public interest.

See the case of *Samuel M. N. Mweru & Others v National Land Commission & 2 others* [2020] eKLR.

27. In the Scottish case of *Stewart Robertson vs Her Majesty's Advocate*, 2007 HCAC63, Lord Justice Clerk stated that:

“Contempt of court is constituted by conduct that denotes willful defiance of or disrespect towards the court or that willfully challenges or affronts the authority of the court or the supremacy of the law, whether in civil or criminal proceedings”.

28. In the case of *Kenya Tea Growers Association Vs Francis Atwoli and 5 Others* [2012] eKLR Lenaola J (as he then was in the High Court) cited with approval the case of *Clarke and Others Vs Chadburn & Others* [1985] 1All E.R (PC), 211 in which the Court observed that:

“I need not cite authority for the proposition that it is of high importance that orders of the courts should be obeyed, willful disobedience to an order of the court is punishable as a contempt of court, and I feel no doubt that such disobedience may properly be described as being illegal....even if the Defendants thought that the injunction was improperly obtained or too wide in its terms, that provides no excuse for disobeying it. The remedy is to vary or discharge it”.

29. However, the court in the case of *Econet Wireless LTD vs. Minister For Information & Communication of Kenya & Another* [2005] eKLR held that:

“Where an application for committal for contempt of court orders is made the court will treat the same with a lot of seriousness and urgency and more often will suspend any other



proceedings until the matter is dealt with and if the contempt is proven to punish the contemnor or demand that it is purged or both. For instance, an alleged contemnor will not be allowed to prosecute any application to set aside orders or take any other step until the application for contempt is heard. The reasons for this approach are obvious- a contemnor would have no right of audience in any court of law unless he is punished or purges the contempt.”

30. From the foregoing, it is trite that contempt of court proceedings and applications are subtle and criminal in nature and would impose criminal sanctions if a conviction followed.

31. In Kenya, the *Contempt of Court Act* was declared unconstitutional by the Court in Kenya Human Rights Commission v Attorney General & Another (2018) eKLR. This means that Section 5 of the *Judicature Act* was reinstated following the nullification of the *Contempt of Court Act*. This was the position taken by the Court in Republic v Kajiado County & 2 others Exparte Kilimanjaro Safari Club Limited [2019] eKLR which I concur with and wherein the Court stated that:

“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.”

32. In Samuel M. N. Mweru & Others v National Land Commission & 2 others [2020] eKLR Mativo J. (as he then was in the High Court) restated the test for establishing contempt of court and stated that:

“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.”

33. The question therefore is, has the ex parte Applicant established a case for the citation of the alleged contemnors for contempt of court orders?
34. As has been stated herein above it is not in contention that there exists a valid order of this court dated 27th October 2023 whose terms are clear and unambiguous and binding on the Respondents.
35. It is also not in contention that the Respondents are aware of the court's order as is evidenced by a copy of the decree annexed to the affidavit of service sworn by Monica N. Werimo on 25th June 2024. The decree bears the stamps of the CECM-Finance & Economic Planning, Nairobi City County, Chief Officer, Finance and Economic Planning and the stamp of the Office of the County Attorney, Nairobi City County.
36. This clearly demonstrates that the documents were received by the occupants of the mentioned offices. Additionally, the court observes from the record that the Respondents have frequently been represented by counsel and, therefore, cannot claim ignorance of the ongoing proceedings in this case.
37. It is this court's humble opinion that Respondents' conduct is deliberate seeing that they are aware of the subsisting court order dated 27th October 2023 and yet they have failed to comply with the same.
38. As the court's order of 27th October 2023 stands unchallenged and is therefore valid, the Respondents have no option but to comply with the same. The Respondents have not stated that it was impossible to comply with the lawful court order and or what circumstances have made it impossible for them to comply. They must be reminded that court orders are not suggestions.
39. Taking all the above into consideration, I thus find the Respondents herein guilty of disobedience of this Court's Orders issued on the 27th October 2023 and convict the holders of the 1st and 2nd Respondent offices for being in contempt of the said court order and direct that they appear before this court.
40. Applicant shall have costs of the application.
41. Mention on 19th May, 2025 for purposes of mitigation before sentencing.
42. I so order.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 31ST DAY OF MARCH, 2025

R.E. ABURILI

JUDGE

