



Republic v Attorney General & another; Ogalo & another (Exparte) (Judicial Review 336 of 2019) [2025] KEHC 3869 (KLR) (Judicial Review) (26 March 2025) (Ruling)

Neutral citation: [2025] KEHC 3869 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
JUDICIAL REVIEW 336 OF 2019
RE ABURILI, J
MARCH 26, 2025**

BETWEEN

REPUBLIC APPLICANT

AND

**THE HON ATTORNEY GENERAL 1ST RESPONDENT
PRINCIPAL SECRETARY, MINISTRY OF ENVIRONMENT & NATURAL
RESOURCES 2ND RESPONDENT**

AND

**YONA WAGALA ELKANA OGALO EXPARTE
TOBIAS OMONDI WAGALA EXPARTE**

RULING

1. On 26th April 2013, which is now close to twelve years ago, judgment was entered in favour of the exparte applicant in the sum of kshs 724,700 being general and special damages arising from the fatal injuries suffered by the deceased Emily Achieng Ogalo, whose estate the exparte applicants herein represent. This was in Nairobi Chief Magistrate’s Court Civil Suit No, 42 of 2006.
2. The claim arose out of a fatal shooting on 9/1/2005 at Sarang’ombe Village in Kibera, Nairobi when Forest Guards attached to the Ngong Forest in the course of their duties negligently, carelessly and recklessly shot at the deceased in what was described as a stray bullet thereby fatally wounding her.
3. To be precise, therefore, the cause of action arose on 9/1/2005 which is now twenty years and two months.



4. The exparte applicants who are legal representatives of the estate of the deceased have been inside the court corridors for the past 19 years waiting for justice and they are still counting on. In other words, this case has been pending for the last 19 years, despite judgment being rendered in favour of the exparte applicants on 26th April, 2013.
5. And as is the norm with claims against the Government, no execution by way of attachment and sale of movable or immovable property can be levied. The estate of the deceased has therefore had to undergo the pain of delayed justice for all the 19 years.
6. On the other hand, courts are forever blamed for delaying cases and for creating backlog. The question is, what happens when the court issues decrees for enforcement by the National or County Governments but no action is taken to enforce those decrees?
7. In this case, and in line with the requirements under the *Government Proceedings Act*, the exparte applicants who are decree holders served the respondents/ judgment debtors with certified copy of judgment and proceedings in the primary suit, decree and certificate of costs as well as certificate of order against the Government. This was vide letter dated 7/12/2016, besides the earlier demands for settlement of decree which bore no fruit. As at 20th September 2016 which was three years since judgment was rendered, when the certificate of order against the government was being extracted, the decretal sum had risen to Kshs 1,077,022 inclusive of costs and interest accruing.
8. On 20th November, 2019, the decree holders who are the exparte applicants herein filed a chamber summons dated the same day seeking leave of this Court to institute judicial review proceedings for mandamus to compel the respondents to settle decree. Leave to apply was granted on the same day by Mativo J who has since been elevated to the Court of Appeal. On the 4th December 2019, the substantive Notice of motion dated 26th November, 2019 was filed.
9. The said application was heard inter partes and on 10th June, 2022, judgment was delivered granting judicial review order of mandamus compelling the Principal Secretary, Ministry of Environment to settle decree in Nairobi CMCC 42 of 2006. The applicants were also awarded costs of the application.
10. A bill of costs dated 14th October, 2022 was filed and served upon the respondents and finally taxed inter partes and a certificate of taxation issued on 6th June, 2023 for Kshs 234,850.
11. On 16/6/2023, the exparte applicants' counsel wrote and forwarded to the respondents all the documents including proceedings, judgment, decree, certificates of costs and of taxation, certificate of order against the government, judgment in the primary suit and for mandamus together with letters demanding for payment. A reminder was made on 5/3/2024 with the latter threatening to apply for contempt of court but still, no payment was made.
12. Vide a Notice of motion dated 20th May 2024, the exparte applicants through their counsel filed an application seeking leave to be granted to institute contempt of court proceedings against Eng. Festus Ng'eno, the Principal Secretary, Ministry of Environment and Natural Resources now known as the State Department for Environment and Climate Change, Notice to show cause why contempt of court proceedings should not be instituted against him and that the said Principal Secretary be committed to civil jail for six months or such other punishment the court may deem fit and just to impose for being in contempt of this court's judgment of 10th June, 2022. They also sought for costs of the application.
13. Among the grounds in support and further supported by the depositions in the affidavit sworn by Tobias Omondi Wagala are that disobedience of court orders diminishes and weakens the integrity, honour and power of the court and that the Principal Secretary has blatantly disregarded the court's orders which has denied the decree holders/ applicants their fruits of lawful judgment.



14. Evidence of service of the decree, certificate of order against the government, certificate of taxation and judgment are all exhibited on record together with demands for payment of the decretal sum.
15. The respondents filed grounds of opposition dated 9th December, 2024 contending that the application as drawn is fatally defective, incompetent and an abuse of court process. That the alleged contemnor, Eng. Festus K. Ng'eno is not the Principal Secretary Ministry of Environment, that there is no proof of service of the Notice of motion dated 20th May 2024 upon the alleged contemnor, that the application offends Article 50 of *the Constitution*, that the application is based on mere belief, suspicion and speculations, contradictory allegations hence incapable of any determination and that it is an abuse of court process and lacking in merit.
16. The application was argued orally on 28/1/2025 and Mr. Munene Litigation counsel in seeking to have the application adjourned informed the court that he had had a telephone conversation with the Legal Officer of the 2nd Respondent the previous day and that they were seeking 60 days to settle the decree, after a supplementary budget.
17. The exparte applicants' counsel submitted reiterating the contents of the application and maintaining that there was service of the application upon the respondents that is why they filed grounds of opposition. Further, that the application was against the holder of the office, even if Eng. Ng'eno was not the PS Ministry of Environment.
18. Mr. Munene on behalf of the respondents submitted that Eng. Ng'eno was not the PS Ministry of Environment and he was not served with any application that his client was willing to pay only that they needed more time.

Determination

19. I have considered the application as presented, the opposition thereto and oral arguments for and against. The issue for determination is whether the application has merit.
20. The procedure existing before the enactment of the *Contempt of Court Act* which Act was declared unconstitutional was restated by the Court of Appeal in *Christine Wangari Gachege vs. Elizabeth Wanjiru Evans & 11 Others* [2014] eKLR. In that case, the Court found that under Rule 81.4 of the English Civil Procedure Rules is the one that deals with breach of judgment, order or undertaking. The English law on committal for contempt of court was applied by virtue of section 5(1) of the *Judicature Act* which provided that:

The High Court and the Court of Appeal shall have the same power to punish for contempt of court as is for the time being possessed by the High Court of Justice in England, and that power shall extend to upholding the authority and dignity of subordinate courts.
21. Therefore, the procedure for contempt of court proceedings is under Order 52 of the Rules of the Supreme Court Judicature in England as amended from time to time which provided as follows:
 - a. an application to the High Court of England for committal for contempt of court would not be granted unless leave to make such an application had been granted.
 - b. An application for leave must be made ex parte to a judge in chambers and be supported by a statement setting out the particulars of the applicant as well as those of the person sought to be committed and the grounds on which his committal was sought, and by an affidavit verifying the facts relied on.



- c. The applicant must give notice of the application for leave not later than the preceding day to the Crown Office.
 - d. Where an application for leave was refused by a judge in chambers the applicant may apply afresh to a divisional court for leave within 8 days after the refusal by the Judge.
 - e. When leave had been granted, the substantive application by a motion would be made to a divisional court.
 - f. The motion must be entered within 14 days after the granting of leave; if not, leave shall lapse.
 - g. The motion together with the statement and affidavit must be served personally on the person sought to be committed, unless the court thought otherwise.
22. I will first deal with the question of service.
23. I have in this ruling given the history of this matter right from 2005 when the deceased was fatally wounded by officers serving in the then Ministry of Environment and Natural Resources as Forest Officers. The case in the lower court and as transmitted to this court for enforcement of decree by way of mandamus was defended throughout. The bill of costs too was well defended during taxation and all the instruments of the court were served upon the Attorney General as required under section 21 of the *Government Proceedings Act*.
24. The application for leave to apply for the contempt proceedings too was served upon the Attorney General and that is why they filed grounds of opposition. The Attorney General has been an active participant and Mr. Munene did inform the court that all that their client, the Ministry of Environment needed was more time to settle the decree after supplementary budget.
25. The applicant is at the stage of applying for leave to institute contempt of court proceedings following failure by the 2nd respondent to settle the decree. The respondents cannot claim that they were not served. That claim has no merit at this stage, considering that the claim has been pending for over 20 years and the respondents have actively participated at every stage. Furthermore, if leave to commence contempt of court proceedings is granted, the court will direct service of the application upon the person and office holder who is the accounting officer of the Ministry, responsible for settling the decree, to be cited for contempt.
26. The next question is whether Eng. Festus K. Ng'eno is the Principal Secretary, Ministry/ State Department of Environment and if not, whether the application for leave to commence contempt proceedings against him as the PS Environment is fatally defective and incompetent as claimed by the respondent counsel.
27. Section 43 of the *Interpretation and General provisions Act*, Chapter 2 Laws of Kenya provides for Powers and duties of holder of office as follows:
- Where a written law confers a power or imposes a duty on the holder of an office as such, then, unless a contrary intention appears, the power may be exercised and the duty shall be performed by the person for the time being holding that office.
28. Under section 44 of the same Act, on Power to appoint by name or office;
- Where the President, a Minister, a public officer or a public body is empowered by a written law to appoint a person to perform any functions or hold any office, he or it may either



appoint a person by name or appoint the holder of a named office to perform the functions or hold the office in question.

29. Section 45 of the Act concerns Reference to holder of office includes person discharging functions of that office and stipulates that:

In this Act and in any other written law, instrument, warrant or process of any kind, a reference to a person holding an office shall include a reference to any person for the time being lawfully discharging the functions of that office.

30. Sections 43 and 45 of the *Interpretation and General Provisions Act* imply that the officers should be identified by their offices. Section 43 is on powers and duties of the holder of an office. It provides that where a written law conferred a power or imposed a duty on the holder of an office as such, then, unless a contrary intention appeared, the power may be exercised and the duty shall be performed by the person for the time being holding that office.
31. It follows that it is the holder of the office, at any particular time, that counts such that if in an application such as the instant one, the holder was to be identified by his own personal name, it would be impossible to arrest or punish him or subject him to any other process necessary in contempt of court proceedings if at the time such process was taken, a different officer was in occupation of that office. Thus, the officer who may have been named in the application by his personal identification but who had, for one reason or another, left that office may not be in a position to purge his contempt for the simple reason that he was no longer inclined to discharge the duties and functions of that office.
32. Section 45 of the Act as cited above makes that point clear. It states that a reference to a person holding an office shall include a reference to any person for the time being lawfully discharging the functions of that office.
33. Therefore, the person lawfully discharging the functions of an office at the time is the relevant person to the application before me and not the name, and therefore it would be futile to name any particular individual by his name in contempt of court proceedings.
34. To agree to take the respondent's argument would mean that as long as the application for contempt was pending for determination, a fresh application with all the attendant procedures has to be taken every time there is a change in the office of the accounting officer. That, in my humble view, would be an absurdity.
35. Under section 5 of the Judicature Ct on Contempt of Court, (1)The High Court and the Court of Appeal shall have the same power to punish for contempt of court as is for the time being possessed by the High Court of Justice in England, and such power shall extend to upholding the authority and dignity of subordinate courts.(2)An order of the High Court made by way of punishment for contempt of court shall be appealable as if it were a conviction and sentence made in the exercise of the ordinary original criminal jurisdiction of the High Court.
36. Although recent court decisions show that leave to commence contempt of court proceedings is not necessary, nonetheless, the applicant is already before the Court and there is no prejudice if leave to apply is granted. see Christine Wangari Gachege Vs Elizabeth Wanjiru Evans & 11 Others (2014) eKLR where the Court of Appeal opined that leave is not required where contempt proceedings relate to Judgment, order or undertaking as in the instant case. See also Akoyo v Permanent Secretary, State Department for Devolution; Attorney General (Interested Party) (Application 440 of 2018) [2023] KEHC 23189 (KLR) (Judicial Review) (6 October 2023) (Ruling).



37. Accordingly, the application herein for leave to commence contempt proceedings is not incompetent or an abuse of court process by merely naming Eng. Festus Ng'eno as the Principal Secretary, Ministry of Environment when he is not. Furthermore, the respondent has not disclosed the person who is the current Principal Secretary for the said Ministry. I reiterate that it matters not the name of the Principal Secretary, but that it matters the office holder at the particular time when an order is made since offices remain while office holders change from time to time as is the norm in the public service.
38. Having cleared the hurdle concerning the office holder, I now turn to the merit of the application for leave to commence contempt of court proceedings. While doing so, I must resist the temptation to declare the 2nd respondent to be in contempt of court until such contempt of proceedings are commenced against the said respondent and the person found to be in contempt, after the hearing is given the opportunity to be heard on the same.
39. What is critical at this moment is to establish whether prima facie, the applicants have demonstrated that they have a decree for mandamus which has not been settled and whether efforts to have the said decree settled have been futile hence the need to commence contempt of court proceedings against the judgment debtor.
40. Without delving much into the merits of the intended contempt proceedings, from the record which I have examined in detail from the history of this matter, there is no evidence that the decree has been settled.
41. The applicants have exhausted all the available avenues for execution of decree against the Government and what remains is the last process of seeking out this court to have the judgment debtor be cited for contempt, a process that would have been unnecessary if the judgment debtor would have been sensitive to the court decree and the risk of accruing interest and escalating costs that now burden the tax payer.
42. Suffice to say that the law and punishment for contempt of court does not exist to protect the personal dignity of the Judiciary nor private right of the parties or litigants, but the fundamental supremacy of the law which is challenged. see the case of Teachers Service Commission vs Kenya National Union of Teachers and Two Others, (2013) e KLR for the observation made in Johnson vs Grant, (1923) SC 789; Kenya Tea Growers Association vs Francis Atwoli and 5 Others, (2012) e KLR and Econet Wireless Ltd vs Minister for Information & Communication of Kenya & Another, (2005) e KLR.; Hadkinson vs Hadkinson, (1952) All ER 567 and Wildlife Lodges Vs County Council of Narok and Another, [2005] 2 EA 344 HCK that court orders must be obeyed.
43. For the above reasons, I am satisfied that the applicants have satisfied this court that they are entitled to leave to apply. I hereby grant leave to the ex parte applicants to commence contempt of court proceedings against the Principal Secretary, Accounting Officer, Ministry/State Department of Environment, Climate Change and Forestry for failure to settle decree for mandamus issued by this Court on 10th June 2022 arising from judgment and decree in Nairobi CMCC No. 42 of 2006 rendered on 26th April, 2013.
44. The substantive motion for contempt of court shall be filed and served upon the office holder/ accounting officer/ Principal Secretary, Department of Environment, Climate Change and Forestry within 21 days of this ruling.
45. Costs shall be in the main motion. Mention on 21/5/2025 for directions on the main motion if filed or to confirm settlement.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 26TH DAY OF MARCH, 2025



R.E. ABURILI
JUDGE

