



**Republic v Attorney General & 2 others; Gathari (Exparte)  
 (Judicial Review Miscellaneous Application 252 of 2015)  
 [2024] KEHC 2396 (KLR) (Judicial Review) (28 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 2396 (KLR)

**REPUBLIC OF KENYA  
 IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
 JUDICIAL REVIEW  
 JUDICIAL REVIEW MISCELLANEOUS APPLICATION 252 OF 2015  
 JM CHIGITI, J  
 FEBRUARY 28, 2024**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**HON ATTORNEY GENERAL ..... 1<sup>ST</sup> RESPONDENT**

**THE SOLICITOR GENERAL ..... 2<sup>ND</sup> RESPONDENT**

**THE PERMANENT SECRETARY, MINISTRY OF EDUCATION SCIENCE AND  
 TECHNOLOGY ..... 3<sup>RD</sup> RESPONDENT**

**AND**

**LUCY MUTHONI GATHARI ..... EXPARTE**

**JUDGMENT**

1. Before this Honourable Court is the Applicants Notice of Motion application dated 19<sup>th</sup> October, 2023.
  1. That the 2<sup>nd</sup> and 3<sup>rd</sup> Respondent herein, namely the Solicitor General in the office of the Attorney General, Ho. Shadrack J. Mose and the Principal Secretary Ministry of Education, Science and Technology, Dr. Richard Belio Kipsang be cited for contempt of court for conscious and deliberate disregard, defiance and disobedience of this Court’s Orders made on 19<sup>th</sup> October, 2021.
  2. That the Honourable Court do issue warrants of arrest against the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents being Hon. Shadrack J. Mose and Dr. Richard Belio Kipsang until satisfaction and/or



3. Payment of Kshs. 1,428,573=72 being the last certificate of costs issued on 12<sup>th</sup> April, 2023 by the Taxation Court.
4. That the officer in charge of Vigilante House be ordered to carry out arrest and detention of the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents and have the Respondents in custody until compliance with court orders.
5. That this court be at liberty to issue further or other orders as it may deem appropriate for the end of justice to attain.
6. That the Applicant be awarded the costs of this Application.

#### **Applicant's case;**

2. The Respondents have demonstrated manifest in disregard of Court Orders as follows and have refused /neglected to satisfy the decretal sum in the certificate of costs herein, as stipulated in the attached schedule.

Date:

29th March 2011

18th July 2016

19th October 2021

20th October 2023

11th December 2023

3. Through the Judgment dated 29<sup>th</sup> March 2011, in CMCC Number 8847 of 2003 the applicant Plaintiff/Decree Holder was awarded the Sum of KShs.455, 086.00. A decree was extracted and thereafter served on the Respondents.
4. She thereafter instituted Judicial Review proceedings for Orders via Notice of Motion (JR. Misc Application No.252 Of 2015). Judgment was subsequently issued on 25<sup>th</sup> July, 2016.
5. She subsequently secured and served a with an updated Certificate of Costs issued on 12<sup>th</sup> April 2023.
6. The certified copies of the Decree issued on 25<sup>th</sup> July, 2016; Certificate of costs dated 7<sup>th</sup> March, 2017; Certificate of Order against the Government issued on 11<sup>th</sup> April, 2017 were served on the Respondents with the bank account details of her Advocates.
7. Despite numerous reminders to the Respondents to settle the decretal sum plus interest, the Respondents have failed, refused or neglected to pay the aforesaid sum.

#### **Respondent's case;**

8. In opposing the Application, the Respondents rely on our replying affidavit dated 13<sup>th</sup> December 2014 and respond as hereunder. Dr. Belio R. Kipsang confirms that the office is keen in settling the matter and the process of settling the same is at an advanced stage.
9. He informs the court that a request has already been made to the National Treasury for a budget allocation which has already been approved and the money was allocated to the Ministry for the financial year 2023/2024. The Ministry is currently in the process of processing the payment towards settlement of the claim.



10. He says that the delay was occasioned by financial constraints and bureaucratic processes on the part of Government as there exist several other claims which need to be settled.

**Analysis and determination:**

11. Having considered the application and the rival Submissions and each party's arguments, I find that the only issue for determination before this Court is whether the Respondents are liable for contempt of court.
12. The respondents do not deny that they were served with the certified copies of the Decree issued on 25<sup>th</sup> July, 2016; Certificate of costs dated 7<sup>th</sup> March, 2017; Certificate of Order against the Government issued on 11<sup>th</sup> April, 2017 were served on the Respondents with the bank account details of her Advocates.
13. Dr. Belio R. Kipsang the 3<sup>rd</sup> respondent confirms that the office is keen in settling the matter and the process of settling the same is at an advanced stage. He informs the court that a request has already been made to the National Treasury for a budget allocation which has already been approved and the money was allocated to the Ministry for the financial year 2023/2024.
14. The argument that the Ministry is currently processing the payment towards settlement of the claim does not offer closure. The further argument that the delay was occasioned by financial constraints and bureaucratic processes on the part of the Government as there exist several other claims which need to be settled cannot form the basis for denying an innocent decree access to her funds.
15. The *High Court (Organization and Administration) (General) Rules*, 2016 under Part VIII – Procedure Relating to Contempt of Court, provides that:

Rule 39 provides that:

- “(1) The object of this Part is to—
  - (a) uphold the dignity and authority of the Court;
  - (b) ensure compliance with the directions of the Court;
  - (c) ensure the observance and respect of due process of law;
  - (d) preserve an effective and impartial system of justice; and
  - (e) maintain public confidence in the administration of justice as administered by court.
- (2) The Court has power to—
  - (a) punish a person for contempt on the face of the Court; and
  - (b) uphold the dignity and authority of subordinate courts.
- (3) The Court has the same jurisdiction, power and authority in respect of contempt of subordinate courts as it has in contempt before it.



16. The Supreme court in the case of *Republic v Ahmad Abolfatbi Mohammed & Another* Criminal Application No. 2 of 2018 stated as follows on the necessity to punish for contempt;

“(23) Authorities on the necessity to punish for contempt are legion. We have considered those provided by the respondent, and also cite the following, in affirmation of the principle.

(24) In *Econet Wireless Kenya Ltd v Minister for Information & Communication of Kenya & Another* [2005] 1 KLR 828 Ibrahim J (as he then was) relied on the Court of Appeal decision in *Gulabchand Popatlal Shah & Another* Civil Application No. 39 of 1990 (unreported), where the Court of Appeal stated as follows:

“It is essential for the maintenance of the Rule of Law and order that the authority and the dignity of our Courts are upheld at all times. The Court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors... In *Hadkinson v Hadkinson* [1952] 2 All E.R. 567, it was held that: 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. 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.”

(25) In *Att-Gen. v Times Newspapers Ltd.* [1974] A.C. 273, Lord Diplock stated:

“... There is an element of public policy in punishing civil contempt, since the administration of justice would be undermined if the order of any court of law could be disregarded with impunity.”

(26) The Court of Appeal in *A.B. & Another v R.B.*, *Civil Application No. 4 of 2016* [2016] eKLR cited with approval the Constitutional Court of South Africa’s decision in *Burchell v. Burchell*, Case No.364 of 2005 where it was held:

“Compliance with court orders is an issue of fundamental concern for a society that seeks to base itself on the rule of law. *The Constitution* states that the rule of law and supremacy of *the Constitution* are foundational values of our society. It vests the judicial authority of the state in the court and requires other organs of the state to assist and protect the court. It gives everyone the right to have legal disputes resolved in the courts or other independent and impartial tribunals. Failure to enforce court orders effectively have the potential to undermine confidence in recourse to law as an instrument to resolve civil disputes and may thus impact negatively on the rule of law.”

(27) Ojwang, J (as he then was) in *B v Attorney General* [2004] 1 KLR 431 that:

“The Court does not, and ought not to be seen to, make Orders in vain; otherwise the Court would be exposed to ridicule, and no agency of the Constitutional order would then be left in place to serve as a guarantee for legality, and for the rights of all people.”



(28) It is, therefore, evident that not only do contemnors demean the integrity and authority of Courts, but they also deride the rule of law. This must not be allowed to happen.”

17. The Respondent in its defense also claims that the Ex parte applicant has no claim against it and that it is not able to satisfy the decree at the moment due to insufficient budgetary allocation.

18. The Court in the case of *Republic v Principal Secretary, Ministry of Defence Ex parte George Kariuki Waitbaka* [2019] eKLR held as follows on the issue of budgetary allocation;

“The defence of non-allocation of funds by Parliament was also raised by the Respondent in the present application in his replying affidavit. Odunga J. in his ruling of 12<sup>th</sup> February 2018 extensively dealt with the defence as follows:

“As regards lack of budgetary allocation, Githua, J in *Republic v Permanent Secretary, Ministry of State for Provincial Administration and Internal Security Ex parte Fredrick Manoah Egunza* [2012] eKLR expressed herself as follows:

“In ordinary circumstances, once a judgment has been entered in a civil suit in favour of one party against another and a decree is subsequently issued, the successful litigant is entitled to execute for the decretal amount even on the following day. When the Government is sued in a civil action through its legal representative by a citizen, it becomes a party just like any other party defending a civil suit. Similarly, when a judgment has been entered against the government and a monetary decree is issued against it, it does not enjoy any special privileges with regards to its liability to pay except when it comes to the mode of execution of the decree. Unlike in other civil proceedings, where decrees for the payment of money or costs had been issued against the Government in favour of a litigant, the said decree can only be enforced by way of an order of mandamus compelling the accounting officer in the relevant ministry to pay the decretal amount as the Government is protected and given immunity from execution and attachment of its property/goods under Section 21(4) of the *Government Proceedings Act*. The only requirement which serves as a condition precedent to the satisfaction or enforcement of decrees for money issued against the Government is found in Section 21(1) and (2) of the *Government Proceedings Act* (hereinafter referred to as the Act) which provides that payment will be based on a certificate of costs obtained by the successful litigant from the court issuing the decree which should be served on the Hon Attorney General. The certificate of order against the Government should be issued by the court after expiration of 21 days after entry of judgment. Once the certificate of order against the Government is served on the Hon Attorney General, Section 21(3) imposes a statutory duty on the accounting officer concerned to pay the sums specified in the said order to the person entitled *or* to his advocate together with any interest lawfully accruing thereon. This provision does not condition payment to budgetary allocation and parliamentary approval of Government expenditure in the financial year subsequent to which Government liability accrues.” [Emphasis mine].

26. I associate with the said decision and it is therefore my view that settlement of decretal sum by the Government whether National or County does not necessarily depend on the availability of funds. This position was appreciated by this Court in *Wachira Nderitu, Ngugi & Co.*



*Advocates v The Town Clerk*, City Council of Nairobi Miscellaneous Application No. 354 of 2012 in which this Court pronounced itself as follows:

“I have however considered the other issues raised by the respondent with respect to its debt portfolio as against its financial resources. It is neither in the interest of this Court nor that of the ex parte applicant that the respondent should be brought to its knees. The Court appreciates and it is a matter of judicial notice that most of the local authorities are reeling under the weight of the debts accrued by their predecessors and that they are trying to find their footing in the current governmental set up. Accordingly, I am satisfied based on the material on record that the respondent ought to be given some breathing space to arrange its finances and settle the sum due herein.”

27. In my view a party facing financial constraints is at liberty to move the Court for appropriate orders which would enable it to settle its obligations while staying afloat. That however, is not a reason for one to evade its responsibility to settle such obligations. In other words, financial difficulty is only a consideration when it comes to determining the mode of settlement of a decree but is not a basis for declining to compel the Respondent to settle a sum decreed by the Court to be due from it. That objection therefore fails.”
48. Non-allocation of funds by Parliament is not an acceptable defence or justifiable excuse for non-payment of decretal sums ordered to be paid by Government officials, in the absence of any evidence of any attempts made by the responsible Government official to commence the process of such allocation. In the present case, this is particularly relevant given that the present contempt of Court proceedings commenced in April 2017, and the Respondent did not indicate what steps if any, have been taken since then to effect payment of the monies due to the Applicant.”
19. The Respondent’s argument that it lacks budgetary allocation is therefore not a valid reason for failing to comply with this court’s orders.
20. The age of the matter speaks to the number of budgetary cycles that have come and gone. This Honourable Court issued orders on 19<sup>th</sup> October, 2021 consenting to filing of contempt proceedings against the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents in this matter if payment of funds due to me will not have been paid within 12 months of the orders.
21. Years have come and gone since consent to file for contempt was granted to me by Court. The court has been patient with the judgment debtor. The decree holder has waited for her funds for long.

**Disposition:**

22. The applicant has made out a case for grant of the orders sought.

**Order:**

23. The Applicant dated 19<sup>th</sup> October, 2023 is allowed in the following terms:
  1. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents herein, namely the Solicitor General in the office of the Attorney General, Hon. Shadrack J. Mose and the Principal Secretary Ministry of Education, Science and Technology, Dr. Richard Belio Kipsang are hereby cited for contempt of court for the conscious and deliberate disregard, defiance and disobedience of this Court’s Orders made on 19<sup>th</sup> October, 2021.



2. The matter shall be listed for mitigation and sentencing on 4<sup>th</sup> April, 2024 in open court.
3. The Applicant shall have the costs.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 28TH FEBRUARY, 2024**

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**J. CHIGITI (SC)**

**JUDGE**

