



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MISCELLANEOUS CIVIL APPLICATION NO. 222 OF 2016

IN THE MATTER OF THE CIVIL PROCEDURE ACT CAP 21 LAWS OF KENYA

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

COUNTY CHIEF OFFICER,

FINANCE & ECONOMIC PLANNING,

NAIROBI CITY COUNTY.....RESPONDENT

EX PARTE: DAVID MUGO MWANGI

RULING

Introduction

1. On 21st February, 2017, I directed that the Respondent do appear before this Court in the company of the County Executive in Charge of Finance to show cause why contempt of court proceedings cannot be commenced against them. That direction was issued pursuant to section 30 of the *Contempt of Court Act*, 2016 which provides as hereunder:

1. Where a State organ, government department, ministry or corporation is guilty of contempt of court in respect of any undertaking given to a court by the State organ, government department, ministry or corporation, the court shall serve a notice of not less than thirty days on the accounting officer, requiring the accounting officer to show cause why contempt of court proceedings should not be commenced against the accounting officer.

2. No contempt of court proceedings shall be commenced against the 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 of court proceedings should not be commenced against the accounting officer.

3. A notice issued under subsection (1) shall be served on the accounting officer and the Attorney-General.

4. If the accounting officer does not respond to the notice to show cause issued under subsection (1) within thirty days of the receipt of the notice, the court shall proceed and commence contempt of court proceedings against the accounting officer.

5. Where the contempt of court is committed by a State organ, government department, ministry or corporation, and it is proved to the satisfaction of the court that the contempt has been committed with the consent or connivance of, or is attributable to any neglect on the part of any accounting officer, such accounting officer shall be deemed to be guilty of the contempt and may with the leave of the court be liable to a fine not exceeding two hundred thousand shillings.

6. No State officer or public officer shall be convicted of contempt of court for the execution of his duties in good faith.

2. In this application, which was commenced by way of Notice of Motion dated 3rd July, 2017, the applicant herein, **David Mugo Mwangi**, now seeks the following orders:

1. THAT this court be pleased to find the Chief Accounting Officer, the County Executive in Charge of Finance and the County Chief Officer, Finance and Economic Planning of the Nairobi County in contempt of Court.

2. THAT the contemnors be committed to civil jail for such terms as this Court may deem fit unless or until they purge their contempt by honouring this Court's order given on 13th September, 2016;

3. THAT this Court be pleased to grant leave to the ex parte applicant to fine each of the contemnors a sum of Kshs 200,000.00

4. THAT the costs of this application be borne by the Respondents.

3. According to the applicant, on 13th September, 2016, the respondent was ordered to honour the decree in the Subordinate Court which Court had itself decreed that the respondent pays the applicant a sum of Kshs 516,362.52 with effect from 10th December, 2015 together with interest thereon at 12% p.a till payment in full.

4. According to the applicant, despite the decree/order in this case having been extracted and served upon the respondent, and a return of service of the decree/order as well as penal notice has been filed in Court, the respondent has blatantly disobeyed a court order and shown contempt for the dignity of the court hence the orders sought herein.

5. It was averred that the Notice to show cause was duly served on the contemnors but no cause has been shown.

Respondent's Case

6. In opposition to the application the Respondent filed the following grounds of opposition:

1. That the application is fatally incompetent and incurably defective.

2. That the application herein is premature, misconceived and bad in law and the respondents will raise a point of law, to be determined in limine that contempt proceedings cannot lie as against the 1st and 3rd respondents as stipulated by Section 30(1) of the Contempt of Court Act, 2016.

3. That the application herein is premature, misconceived and bad in law and the respondents will raise a point of law, to be determined in limine that the honourable court has

never issued a notice of not less than thirty days to the accounting officer, the 2nd respondent herein requiring him/her to show cause why contempt of court proceedings should not be commenced against the accounting officer as required by Section 30(2) and (3) of the Contempt of Court Act, 2016

4. That the application herein is premature, misconceived and bad in law in that Section 30 of the Contempt of Court Act, 2016 does not provide for committal to civil jail where a stated organ, government department, ministry or corporation is guilty of contempt of court in respect of any undertaking given to a court by the state organ, government department, ministry or corporation and as such the honourable court cannot grant pray (b)

5. That the notice to show cause dated 17th May 2017, is not in compliance with Section 30(2) and (3) of the Contempt of Court Act, 2016 and cannot form the basis of contempt proceedings against the respondents since the honourable Justice G.V. Odunga made an order on 15th May 2017 requiring the respondents to attend court on 5th June 2017 to show cause why contempt proceedings should not be commenced against them. The said period is substantially less than the 20 days period prescribed by the contempt of Court Act.

6. That the respondents and more so the 2nd respondent has not consented or connived to commit the alleged contempt of court.

7. That the court order issued on 13th September 2016 was issued against the wrong party. Therefore the claim by the applicant against the respondents for contempt of Court is null and void. The applicant cannot found a cause of action by instituting a wrong party.

8. That the respondent does not owe any duties or obligations to the applicant. In any case, the respondent should have been the one to move to court and claim damages from the applicant for the wrongful institution and waste of this honourable court's time.

9. That the respondent avers that the County Government Responsibilities with respect to management and control of Public Finance under the Public Finance Management Act Cap 412C of the Laws of Kenya gives the duty to pay out funds from the county treasury upon the county executive committee member in charge of finance and not the 1st respondent as indicated in the orders given on 13th September 2016.

10. That further, the alleged contemnors, are public officers and are prohibited in Law; under Sections 196 and 197 of the Public Finance Management Act (2012) from paying the applicant as ordered for it would be an offence to spend any public funds without any prior authorization.

11. That the county government has various competing interests for in the budget, this honourable court to allow for the applicant's claim to be factored in the forthcoming budget as approved by the county assembly since the county executive cannot expend money not approved in the budget. It will amount to illegality.

12. That this application is frivolous, vexatious and lacks merit and ought to be dismissed.

13. That the application is an abuse of precious judicial time and it is in the interests of justice and fairness that the instant application be dismissed with costs to the respondent.

7. Apart from the said grounds the Respondents swore a replying affidavit in which it was deposed that the court order dated 23rd September 2016 which the applicant purports to be blatantly disobeyed by the respondent was neither served upon the respondent nor its advocate as alleged by the applicant. In the Respondents view therefore, the application is fatally incompetent and incurably defective.

8. It was further contended that the said application is premature, misconceived and bad in law and that the applicant misled the court to issue order of mandamus against the respondent. In any case, the county government responsibilities with respect to management and control of public finance under the **Public Finance Management Act, Cap 412C** of the Laws of Kenya provides that the statutory duty to pay out funds from the County Treasury vests in the County Executive Committee members in charge of Finance and not the respondent.

9. To the Respondents, the order sought by the applicant do not lie as against the respondent as there is no statutory duty imposed upon the respondent to act as demanded. That such order should therefore be referred to the to the County Executive Committee members in charge of finance and not the respondent herein who is wrongly suited.

10. It was contended that the applicant had not stated under which law the cited respondent had a duty to act as demanded and that the applicant cannot claim that the respondent is in contempt of court hereof and that the respondent has no authority to act as ordered.

11. The Respondents averred that the county government responsibilities with respect to management and control of public finance under the **Public Finance Management Act** Cap 412C of the Laws of Kenya gives the duty to pay out funds from the county treasury upon the county executive committee member in charge of finance and not the respondent herein thus the respondent herein is wrongly suited. Accordingly, the claim by the applicant against the respondent for contempt of court is null and void as the applicant cannot found a cause of action by instituting a wrong party.

12. To the Respondents, the applicant's application is frivolous, vexatious and totally devoid of merit and *mala fides* for the reason *inter alia*, that the applicant's application dated 28th October 2016 was a waste of this honourable courts time and that the applicant should have in the first place directed its claim of contempt to the county executive committee member in charge of finance and not the respondent herein. Further, the alleged contemnors, is a public officer and is prohibited in law; under sections 196 and 197 of the **Public Finance Management Act** (2012) from paying the applicant as ordered for it would be an offence to spend any public funds without and prior authorization

13. The Respondents took the position that they do not owe any duties or obligations to the applicant. In any case, the respondent should have been the one to move to court and claim damages from the applicant. In any case, the respondent should have been the one to move to court and claim damages from the applicant the wrongful institution and waste of this honourable court's time.

14. In the Respondents' view, the balance of convenience tilts in favour of the respondent for the respondent has clearly established that the applicant had wrongfully instituted it. Knowing that the respondent has no authority to act as demanded by the court order hence the applicant has no right to the prayers sought in the application dated 28th October 2016. Accordingly, the applicant has no prima facie case with a probability of success to warrant any prayer sought as no infringement of the law has been established.

15. It was averred that sine the county government has various competing interests catered for in the budget, this court to allow for the applicant's claim to be factored in the forthcoming budget as approved by the county assembly since the county executive cannot expend money not approved in the budget as approved by the county assembly since the county executive cannot expend money not approved in the budget. It will amount to illegality.

16. The 5th respondent averred that the application is abuse of precious judicial time and it is in the interests of justice and fairness that the instant application be dismissed with costs to the respondent.

Determination

17. I have considered the issues raised herein. It is clear that most of the issues raised by the Respondents were dealt with in the application that sought that the Respondents show cause why these contempt of

court proceedings cannot be commenced. Accordingly I do not intend to revisit the same.

18. According to Act No. 46 of 2016, ***Contempt of Court Act***, 2016, contempt includes civil contempt and means wilful disobedience of any judgment, decree, direction, order, or other process of a court or wilful breach of an undertaking given to a court. It is therefore clear that the wilful disobedience of a judgement, decree or order properly constitutes

19. It is clear that under section 30 thereof before any civil contempt of court proceedings are instituted in disobedience of a judgement, decree or order, the applicant must first move the Court to issue a notice to show cause against the accounting officer of the State organ, government department, ministry or corporation concerned. Such notice is to be served on both the accounting officer and the Attorney General. If no response to the notice is received, the Court may then at the expiry of the said thirty days' notice period proceed to commence contempt of court proceedings against the concerned accounting officer. In my view the thirty days' period is meant to enable the Attorney General to give legal advice to the entity concerned and thus avoid the necessity of contempt proceedings. Where however the entity believes that contempt of court proceedings ought not to be commenced, the entity is required to within the said period show cause, in my view preferably by way of an affidavit why the said proceedings ought not to be commenced. The Court will then determine whether cause has been shown or not based on the material before it. Without the rules of procedure having been promulgated it is therefore my view that an application for notice ought to be accompanied by an affidavit and that application may be heard *ex parte* since the merits thereon may be dealt with when the cause is shown by the entity or public officer concerned.

20. Where no cause is shown and the contempt of court proceedings are commenced, the Court can however only find that officer guilty of contempt upon satisfactory proof that the said contempt has been committed with the consent or connivance of, or is attributable to any neglect on the part of the accounting officer. Such officer will then be liable to a fine not exceeding two hundred thousand shillings.

21. With respect to the contempt of court proceedings subsequent to the issuance of the notice to show cause, section 7(3) of the said Act provides that:

“...any proceedings to try an offence of contempt of court provided for under any other written law shall not take away the right of any person to a fair trial and fair administrative action in accordance with Articles 47 and 50 of the Constitution.”

22. It is now clear that it is the accounting officer of a State organ, government department, ministry or corporation that is legally bound to satisfy a decree, See **Shah vs. Attorney General (No. 3) Kampala HMC No. 31 of 1969 [1970] EA 543** where the Court expressed itself, *inter alia*, as follows:

“Mandamus is essentially English in its origin and development and it is therefore logical that the court should look for an English definition. Mandamus is a prerogative order issued in certain cases to compel the performance of a duty. It issues from the Queen’s Bench Division of the English High Court where the injured party has a right to have anything done, and has no other specific means of compelling its performance, especially when the obligation arises out of the official status of the respondent. Thus it is used to compel public officers to perform duties imposed upon them by common law or by statute and is also applicable in certain cases when a duty is imposed by Act of Parliament for the benefit of an individual. Mandamus is neither a writ of course nor of right, but it will be granted if the duty is in the nature of a public duty and especially affects the rights of an individual, provided there is no more appropriate remedy. The person or authority to whom it is issued must be either under a statutory or legal duty to do or not to do something; the duty itself being of an imperative nature... In cases where there is a duty of a public or quasi-public nature, or a duty imposed by statute, in the fulfilment of which some other person has an interest the court has jurisdiction to grant mandamus to compel the fulfilment...The foregoing may also be thought to be much in point in relation to the applicant’s unsatisfied judgement which has been

rendered valueless by the refusal of the Treasury Officer of Accounts to perform his statutory duty under section 20(3) of the Government Proceedings Act. It is perhaps hardly necessary to add that the applicant has very much of an interest in the fulfilment of that duty...Since *mandamus* originated and was developed under English law it seems reasonable to assume that when the legislature in Uganda applied it to Uganda they intended it to be governed by English law in so far as this was not inconsistent with Uganda law. Uganda, being a sovereign State, the Court is not bound by English law but the court considers the English decisions must be of strong persuasive weight and afford guidance in matters not covered by Uganda law...English authorities are overwhelmingly to the effect that no order can be made against the State as such or against a servant of the State when he is acting "simply in his capacity of servant". There are no doubt cases where servants of the Crown have been constituted by Statute agents to do particular acts, and in these cases a *mandamus* would lie against them as individuals designated to do those acts. Therefore, where government officials have been constituted agents for carrying out particular duties in relation to subjects, whether by royal charter, statute, or common law, so that they are under a legal obligation towards those subjects, an order of *mandamus* will lie for the enforcement of the duties...With regard to the question whether *mandamus* will lie, that case falls within the class of cases when officials have a public duty to perform, and having refused to perform it, *mandamus* will lie on the application of a person interested to compel them to do so. It is no doubt difficult to draw the line, and some of the cases are not easy to reconcile... It seems to be an illogical argument that the Government Accounting Officer cannot be compelled to carry out a statutory duty specifically imposed by Parliament out of funds which Parliament itself has said in section 29(1) of the Government Proceedings Act shall be provided for the purpose. There is nothing in the said Act itself to suggest that this duty is owed solely to the Government...Whereas *mandamus* may be refused where there is another appropriate remedy, there is no discretion to withhold *mandamus* if no other remedy remains. When there is no specific remedy, the court will grant a *mandamus* that justice may be done. The construction of that sentence is this: where there is no specific remedy and by reason of the want of specific remedy justice cannot be done unless a *mandamus* is to go, then *mandamus* will go... In the present case it is conceded that if *mandamus* was refused, there was no other legal remedy open to the applicant. It was also admitted that there were no alternative instructions as to the manner in which, if at all, the Government proposed to satisfy the applicant's decree. It is sufficient for the duty to be owed to the public at large. The prosecutor of the writ of *mandamus* must be clothed with a clear legal right to something which is properly the subject of the writ, or a legal right by virtue of an Act of Parliament... In the court's view the granting of *mandamus* against the Government would not be to give any relief against the Government which could not have been obtained in proceedings against the Government contrary to section 15(2) of the Government Proceedings Act. What the applicant is seeking is not relief against the Government but to compel a Government official to do what the Government, through Parliament, has directed him to do. Likewise there is nothing in section 20(4) of the Act to prevent the making of such order. The subsection commences with the proviso "save as is provided in this section". The relief sought arises out of subsection (3), and is not "execution or attachment or process in the nature thereof". It is not sought to make any person "individually liable for any order for any payment" but merely to oblige a Government officer to pay, out of the funds provided by Parliament, a debt held to be due by the High Court, in accordance with a duty cast upon him by Parliament. The fact that the Treasury Officer of Accounts is not distinct from the State of which he is a servant does not necessarily mean that he cannot owe a duty to a subject as well as to the Government which he serves. Whereas it is true that he represents the Government, it does not follow that his duty is therefore confined to his Government employer. In *mandamus* cases it is recognised that when statutory duty is cast upon a Crown servant in his official capacity and the duty is owed not to the Crown but to the public any person having a sufficient legal interest in the performance of the duty may apply to the Courts for an order of *mandamus* to enforce it. Where a duty has been directly imposed by Statute for the benefit of the subject upon a Crown servant as *persona designata*, and the duty is to be wholly discharged by him in his official capacity, as distinct from his capacity as an adviser to or an instrument of the Crown,

the Courts have shown readiness to grant applications for *mandamus* by persons who have a direct and substantial interest in securing the performance of the duty. It would be going too far to say that whenever a statutory duty is directly cast upon a Crown servant that duty is potentially enforceable by *mandamus* on the application of a member of the public for the context may indicate that the servant is to act purely as an adviser to or agent of the Crown, but the situations in which *mandamus* will not lie for this reason alone are comparatively few...*Mandamus* does not lie against a public officer as a matter of course. The courts are reluctant to direct a writ of *mandamus* against executive officers of a government unless some specific act or thing which the law requires to be done has been omitted. Courts should proceed with extreme caution for the granting of the writ which would result in the interference by the judicial department with the management of the executive department of the government. The Courts will not intervene to compel an action by an executive officer unless his duty to act is clearly established and plainly defined and the obligation to act is peremptory...On any reasonable interpretation of the duty of the Treasury Officer of Accounts under section 20(3) of the Act it cannot be argued that his duty is merely advisory, he is detailed as *persona designate* to act for the benefit of the subject rather than a mere agent of Government, his duty is clearly established and plainly defined, and the obligation to act is peremptory. It may be that they are answerable to the Crown but they are answerable to the subject...The court should take into account a wide variety of circumstances, including the exigency which calls for the exercise of its discretion, the consequences of granting it, and the nature and extent of the wrong or injury which could follow a refusal and it may be granted or refused depending on whether or not it promotes substantial justice... The issue of discretion depends largely on whether or not one should, or indeed can, look behind the judgement giving rise to the applicant's decree. Therefore an order of *mandamus* will issue as prayed with costs."

23. It is true that the County Executive in Charge of Finance is the one under obligation to pay funds, in the capacity as the accounting officer. It must always be remembered that a judicial review application is neither a criminal case nor a civil suit hence the application ought to be brought against the person who is bound to comply with the orders sought therein. In this case the person against whom the contempt proceedings ought to be commenced is the County Executive in Charge of Finance of the Nairobi County Government who is mentioned as one of the persons against whom the order is sought. In my view the mere fact that other persons are similarly mentioned does not render the application fatally incompetent as this is merely a misjoinder of parties. An issue as to the effect of misjoinder in judicial proceedings was the subject of determination in Republic Ex Parte the Minister for Finance & The Commissioner of Insurance as Licensing and Regulating Officers vs. Charles Lutta Kasamani T/A Kasamani & Co. Advocate & Another Civil Appeal (Application) No. Nai. 281 of 2005 in which the Court of Appeal stated:

"Suffice it to say that a defect in form in the title or heading of an appeal, or a misjoinder or non-joinder of parties are irregularities that do not go to the substance of the appeal and are curable by amendment...Is the form of title to the appeal as adopted by the Attorney General in this matter defective or irregular? We think not, as we find that it substantially complies with the guidelines set out by this Court". [Emphasis added].

24. This was the position adopted in Consolata Kihara & 21 Others vs. The Director of Kenya Trypanosomiasis Research Institute Nairobi H.C. Misc. Appl. No. 594 of 2002 [2003] KLR 582, where it was held that issues of joinder and misjoinder of parties are not of significance where no miscarriage of justice or any form of injustice is alleged as a result of the choosing of parties to the litigation. This position is even more relevant to proceedings in the nature of judicial review which are neither criminal nor civil and particularly in application for *mandamus* where what is sought is the enforcement of a decree against the respondent not in his personal capacity but in his official capacity. In such circumstances, the respondent is simply being compelled to facilitate the payment as opposed to imposing personal liability.

25. It is therefore my view that misjoinder or non-joinder ought not on its own be the basis upon which an

otherwise competent application is to be dismissed where the substance of the reliefs sought can still be realised notwithstanding the irregularity.

26. Article 159(2)(d) of the Constitution enjoins this Court to administer justice without undue regard to technicalities of procedure, as long as the rules of natural justice are adhered to. At the end of the day the entity which is bound to settle the decree is the County Government and not the said officer in his personal capacity. Misjoinder of parties in County Governments was also considered in **Council of Governors & Others vs. The Senate Petition No. 413 of 2014** where it was held that:

“...the role of the Governor under Section 30(3) (f) of the County Governments Act is critical in fiscal management at the County level. He is the Chief Executive Officer and the buck stops with him in the management of county resources. It is critical that such a provision exists so as to ensure responsibility of public resources which would ultimately enhance the national values as provided for under Article 10 of the Constitution as well as the spirit and tenor of constitution.”

27. As regards the existence of the competing interests, **Githua, J** in **Republic vs. Permanent Secretary, Ministry of State for Provincial Administration and Internal Security Exparte 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].

28. 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 vs. 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.”

29. 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.

30. It must however be remembered that Court orders are not made in vain and are meant to be complied with. If for any reason a party has difficulty in complying therewith, the honourable thing to do is to come back to court and explain the difficulties faced by the need to comply with the order. Once a Court order is made in a suit the same is valid unless set aside on review or on appeal. In Econet Wireless Kenya Ltd vs. Minister for Information & Communication of Kenya & Another [2005] 1 KLR 828, Ibrahim, J (as he then was) stated:

“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. 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”.

31. This position was confirmed by the Court of Appeal in Refrigerator & Kitchen Utensils Ltd. vs. Gulabchand Popatlal Shah & Others Civil Application No. Nai. 39 of 1990. In Wildlife Lodges Ltd vs. County Council of Narok and Another [2005] 2 EA 344 (HCK) the Court expressed itself thus:

“It was the plain and unqualified obligation of every person against or in respect of whom an order was made by a Court of competent jurisdiction to obey it until that order was discharged, and disobedience of such an order would, as a general rule, result in the person disobeying it being in contempt and punishable by committal or attachment and in an application to the court by him not being entertained until he had purged his contempt. A party who knows of an order, whether null or valid, regular or irregular, cannot be permitted to disobey it...It would be most dangerous to hold that the suitors, or their solicitors, could themselves judge whether an order was null or valid – whether it was regular or irregular. That they should come to the court and not take upon themselves to determine such a question. That the course of a party knowing of an order which was null or irregular, and who might be affected by it, was plain. He should apply to the court that it might be discharged. As long as it existed it must not be disobeyed...If there is a misapprehension in the minds of the defendants as to the reasonable meaning of the order, then the expectation of them is that they would have made an application to the court for the resolution of any misunderstanding and this would have been the lawful course...In cases of alleged contempt, the breach for which the alleged contemnor is cited must not only be precisely defined but also proved to the standard which is higher than proof on a balance of probabilities but not as high as proof beyond reasonable doubt...The inherent social limitations afflicting most people in a developing country such as Kenya have the tendency to restrict access to the modern institutions of governance, and more particularly to the judiciary which is professionally run, on the basis of complex procedures and rules of law. Yet, this same Judiciary is generally viewed as the impartial purveyor of justice, and the guarantor of an even playing ground for all, a perception which ought to be strengthened, through genuine respect for the courts of justice, and through compliance with their orders. Consistent obedience to court orders is

required, and parties should not take it upon themselves to decide on their own which court orders are to be obeyed and which ones overlooked, in the supposition that this oversight will not impede the process of justice...Justice dictates even-handedness between the claims of parties; and if it be the case that the plaintiff/applicant has not been accorded a level playing ground for the realisation of its economic activities, a matter that of course can only be established through evidence in the main suit, then the court ought to provide relief, by applying the established principles of law, one of these being the law of contempt...An *ex parte* order by the court is a valid order like any other and to obey orders of the court is to obey orders made both *ex parte* and *inter partes* since the Court by section 60 of the Constitution is the repository of unlimited first instance jurisdiction, and in this capacity it may make *ex parte* orders where, after a careful and impartial consideration, it is convinced that issuance of such an order is just and equitable. There is nothing potentially oppressive in an *ex parte* order, since such an order stands open to be set aside by simple application, before the very same court...Where a party considers an *ex parte* order to cause him undue hardship, simple application will create an opportunity for an appropriate variation to be effected thereto; and therefore there will be no excuse for a party to disobey a court order merely on the grounds that it had been made *ex parte* and this argument will not avail either the first or the second defendant”.

32. In Central Bank of Kenya & Another vs. Ratilal Automobiles Limited & Others Civil Application No. Nai. 247 of 2006, the Court of Appeal held that Judicial power in Kenya vests in the Courts and other tribunals established under the Constitution and that it is a fundamental tenet of the rule of law that court orders must be obeyed and it is not open to any person or persons to choose whether or not to comply with or to ignore such orders as directed to him or them by a Court of law.

33. In Wildlife Lodges Ltd vs. County Council of Narok and Another [2005] 2 EA 344 (HCK) the Court expressed itself thus:

“It was the plain and unqualified obligation of every person against or in respect of whom an order was made by a Court of competent jurisdiction to obey it until that order was discharged, and disobedience of such an order would, as a general rule, result in the person disobeying it being in contempt and punishable by committal or attachment and in an application to the court by him not being entertained until he had purged his contempt. A party who knows of an order, whether null or valid, regular or irregular, cannot be permitted to disobey it...It would be most dangerous to hold that the suitors, or their solicitors, could themselves judge whether an order was null or valid – whether it was regular or irregular. That they should come to the court and not take upon themselves to determine such a question. That the course of a party knowing of an order which was null or irregular, and who might be affected by it, was plain. He should apply to the court that it might be discharged. As long as it existed it must not be disobeyed...If there is a misapprehension in the minds of the defendants as to the reasonable meaning of the order, then the expectation of them is that they would have made an application to the court for the resolution of any misunderstanding and this would have been the lawful course...In cases of alleged contempt, the breach for which the alleged contemnor is cited must not only be precisely defined but also proved to the standard which is higher than proof on a balance of probabilities but not as high as proof beyond reasonable doubt...The inherent social limitations afflicting most people in a developing country such as Kenya have the tendency to restrict access to the modern institutions of governance, and more particularly to the judiciary which is professionally run, on the basis of complex procedures and rules of law. Yet, this same Judiciary is generally viewed as the impartial purveyor of justice, and the guarantor of an even playing ground for all, a perception which ought to be strengthened, through genuine respect for the courts of justice, and through compliance with their orders. Consistent obedience to court orders is required, and parties should not take it upon themselves to decide on their own which court orders are to be obeyed and which ones overlooked, in the supposition that this oversight will not impede the process of justice...Justice dictates even-handedness between the claims of parties; and if it the case that the plaintiff/applicant has not been accorded a level playing

ground for the realisation of its economic activities, a matter that of course can only be established through evidence in the main suit, then the court ought to provide relief, by applying the established principles of law, one of these being the law of contempt...”

34. Court orders are not meant for cosmetic purposes. They are serious decisions that are meant to be and ought to be complied with strictly. As was held in **Teacher’s Service Commission vs. Kenya National Union of Teachers & 2 Others Petition No. 23 of 2013**:

“The reason why courts will punish for contempt of court is to safeguard the rule of law which is fundamental in the administration of justice. It has nothing to do with the integrity of the judiciary or the court or even the personal ego of the presiding judge. Neither is it about placating the applicant who moves the court by taking out contempt of court proceedings. It is about preserving and safeguarding the rule of law. A party who walks through the justice door with a court order in his hands must be assured that the order will be obeyed by those to whom it is directed. A court order is not a mere suggestion or an opinion or a point of view. It is a directive that is issued after much thought and with circumspection. It must therefore be complied with and it is in the interest of every person that this remains the case. To see it any other way is to open the door to chaos and anarchy and this Court will not be the one to open that door. If one is dissatisfied with an order of the court, the avenues for challenging it are also set out in the law. Defiance is not an option.”

35. It was therefore appreciated by Ojwang, J (as he then was) in **B vs. 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.”

36. In this case there is no reason why the Respondents have not satisfied the order of this Court. Section 30(5) and (6) of the ***Contempt of Court Act*** provides that:

5. Where the contempt of court is committed by a State organ, government department, ministry or corporation, and it is proved to the satisfaction of the court that the contempt has been committed with the consent or connivance of, or is attributable to any neglect on the part of any accounting officer, such accounting officer shall be deemed to be guilty of the contempt and may with the leave of the court be liable to a fine not exceeding two hundred thousand shillings.

6. No State officer or public officer shall be convicted of contempt of court for the execution of his duties in good faith.

37. Section 109 of the ***Evidence Act*** provides that:

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

38. This burden is known as the evidentiary burden of proof in legal parlance. In this case, it is my view that once the judgement creditor proves that he has a decree in his favour, which decree remains unsatisfied, the burden must shift to the respondent to satisfy the Court that the inability to satisfy the decree is not due to collusion, consent, connivance or neglect on the part of its accounting officer. To paraphrase the position of the Court of Appeal in **Kenya Posts & Telecommunications Corporation vs. Paul Gachanga Ndarua Civil Application No. Nai. 367 of 2001** and **ABN Amro Bank, N.K. VS. Le Monde Foods Limited Civil Application No. 15 of 2002**, all an applicant in the position of the applicant herein can reasonably be expected to do, is to swear, upon reasonable grounds, that the Respondent’s accounting officer has consented to or connived at the commission of the contempt or has neglected to take the necessary steps to comply with the order of the Court. In my view the failure by the accounting officer of a State organ, government department, ministry or corporation to put into motion steps

necessary for the settlement of or obedience of court decisions or facilitation of such settlement is *prima facie* evidence of neglect. It is simply not enough for such officer to say that he or she had informed the Treasury about the pending decision. He or she must show what steps he/she has taken in order to ensure that the decision is complied with. The applicant is not for example expected to go into the bank accounts operated by a State organ, government department, ministry or corporation to see if there is any money there. As was held in **Kenya Posts & Telecommunications Corporation vs. Paul Gachanga Ndarua**, (supra):

“...the property a man has is a matter so peculiarly within his knowledge that an applicant may not reasonably be expected to know them. In those circumstances, the legal burden still remains on the applicant, but the evidential burden would then have shifted to the Respondent...”

39. Similarly the financial status of a judgement debtor is peculiarly within his knowledge and the failure to satisfy the Court that its accounts are in “the red”, in my view, can only lead to a presumption that the contempt has been committed with the consent or connivance of, or is attributable to the neglect on the part the accounting officer, thus rendering such accounting officer guilty of the contempt.

40. In this case, the accounting officer is clearly the County Executive Committee member in charge of Finance of the Respondent herein.

41. Consequently, it is hereby directed that the said County Executive Committee member in charge of Finance do appear before this Court for purposes of sentencing.

42. Costs of the application are awarded to the applicant.

43. It is so ordered.

Dated at Nairobi this 6th day of February, 2018

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Khayega for the ex parte Applicant

Mr Dulo for the Respondent

CA Ooko