



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**JUDICIAL REVIEW CASE NO. 276 OF 2015**

**REPUBLIC.....APPLICANT**

**VERSUS**

**PRINCIPAL SECRETARY, MINISTRY OF DEFENCE.....RESPONDENT**

**EX PARTE: GEORGE KARIUKI WAITHAKA**

**RULING**

**The Application**

1. The Applicant herein was the Plaintiff in **Milimani CMMCC No 9749 of 2003 - George Kariuki Waithaka vs the Attorney General & Another**, wherein judgement was delivered on 4<sup>th</sup> September 2014 in his favour of as against the Attorney General, who was representing the Respondent herein. The Respondent was ordered to pay the Applicant damages of Kshs 3,261,865/= in the said judgement. A Certificate of Order against the Government was then issued by the said Court on 10<sup>th</sup> April 2015 for the sum of Kshs 3,858,527.59/=, being the decretal sum and interest thereon as at that date.

2. The Applicant thereupon brought judicial proceedings herein by way of a Notice of Motion dated 7<sup>th</sup> October 2015, seeking an order of mandamus to compel the Respondent to pay him an amount of Kshs 3,858,529.59, with interest at the rate of at 12 per cent per annum from 10<sup>th</sup> April 2015 until payment in full. The said orders were granted by this Court (Odunga J.) in a judgment delivered on 13<sup>th</sup> July 2016.

3. The Applicant alleges that the Respondent did not comply with the said orders, and he then served the Respondent with a Notice to Show Cause dated 19<sup>th</sup> October 2017 as to why contempt proceedings should not be commenced against him, and also filed an application for contempt of court proceedings on 31<sup>st</sup> October 2017. The Applicant was subsequently granted leave to commence contempt proceedings against the Respondent by this Court (Odunga J.) in a ruling delivered on 12<sup>th</sup> February 2018.

4. The application to cite the Respondent for contempt of court was then filed by way of a Notice of Motion dated 6<sup>th</sup> April 2018, in which the Applicant is seeking the following orders:

**a. That Saitoti Torome, the Principal Secretary, Ministry of Defence be committed to civil jail for a period of six (6) months or any other period or any other sanction as this Honourable Court may deem fit and appropriate.**

**b. That the costs of this application be provided for.**

5. The Application is premised on the grounds on its face and the Applicant's supporting affidavit sworn on 6<sup>th</sup> April 2018. The Applicant also craved leave of the Court to refer to the other pleadings in this matter, specifically his verifying affidavit in support of his application for leave to commence judicial review proceedings, and the substantive Notice of Motion Application for judicial review orders.

6. The Applicant avers that the decree from the judgement delivered on 4<sup>th</sup> September 2014 in **Milimani CMMCC No 9749 of 2003** was extracted on 2<sup>nd</sup> March 2015, and his advocate thereafter wrote a letter to the Attorney General asking to settle the amount. Further, that a certificate of order against the Government was issued on the 10<sup>th</sup> April 2015 and served through the process server upon the Attorney General. He contended that despite the demand and service of the decree and certificate of order against the Government, the Respondent has refused to settle the amounts claimed.

7. It was his case that on 30<sup>th</sup> August 2016, the Respondent was served with a copy of this Court's order of 13<sup>th</sup> July 2016, but he has declined to pay. He averred that the Respondent has deliberately disobeyed this Court's orders and committed contempt of court, thereby undermining the authority of this Court and rule of law, and also contravened the Applicant's right to access this Court and justice in contravention of Article 48 of the Constitution.

8. The Applicant further elaborated in his supplementary affidavit that despite the Court explaining in its ruling that the court is obliged to satisfy a decree, the Respondent proceeded to proffer that the Ministry has been ignoring decrees under which it is liable to pay decree holders over Kshs 4 billion. Further, that the Respondent admitted that there is a decree issued against his Ministry and informed the court that he was arranging for the payment.

9. It is the Applicant's case that when a party is represented by an advocate, the court processes are served through the advocates and not personally. He deposed that a person who does not controvert facts by the other side is deemed to have accepted them, and therefore the Respondent is deemed to have accepted facts touching on correspondence exchanged between his advocates and those touching on service on his Ministry. Further, that the Respondent was served through the issue of *Daily Nation* on the of 17<sup>th</sup> May 2018 as was ordered by the court, and also through the normal offices of the Attorney General and himself.

10. In addition, that on the 2<sup>nd</sup> December 2015 the Respondent was represented by a counsel who told the Court that the Respondent's Ministry was arranging to pay him the money, and requested that the matter be mentioned on 2<sup>nd</sup> February 2016 to confirm payment. That the parties consequently agreed that the matter be mentioned on 2<sup>nd</sup> February 2016, but the promised payment was never effected. The Applicant annexed copies of the affidavits of service of the Notice of Motion dated 6<sup>th</sup> April 2018 on the Applicant.

### **The Response**

11. The Respondent opposed the Application through a replying affidavit he swore on 25<sup>th</sup> June 2018. The Respondent denied that he was served with any order, decree, or notice to show cause, and stated that he is therefore a stranger to the allegation that he ignored this Court's order. He confirmed that he is the Accounting Officer in the Ministry of Defence as provided for under the Public Finance Management Act, and contended that any liability or expenditure incurred against the Government can only be defrayed from moneys provided for by Parliament.

12. However, that Parliament has not provided any monies or adequate funds for it to settle any claims, including the Applicant's. The Respondent contended that the satisfaction of decrees and judgement is deemed to be expenditure by Parliament, and as a result it must be justified in law and provided for in Government expenditure. The Respondent averred that the Ministry of Defence currently has several outstanding decrees in excess of four billion shillings, which it is unable to settle due to financial constraints. Further, that the Ministry of Defence can only be accountable for what it received and the Ministry has not received any allocation to settle the current claim.

13. According to the Respondent, since he has not received any money he cannot be held personally liable for a debt that is public debt. He averred that contempt of court proceedings are not execution proceedings but are quasi criminal in nature, and every effort should be made to uphold the constitutional liberties of the Respondent, with observance of the Constitutional procedural minimums provided under Article 25, 47 and 50 of the Constitution.

### **The Determination**

14. After the hearing of this application, the parties filed their respective initial submissions on the application. However, while this ruling was still pending, the High Court (J. Chacha Mwita) in a judgment delivered in **Kenya Human Rights Commission v Attorney General & Another [2018] eKLR** on 9<sup>th</sup> November 2018 declared sections 30 and 35 of the Contempt of Court Act to be inconsistent with the Constitution and null and void, and also declared the entire Contempt of Court Act No 46 of 2016 invalid for lack of public participation as required by Articles 10 and 118(b) of the Constitution and for encroaching on the independence of the Judiciary. This Court thereupon directed the parties to file supplementary submissions on the effect of the said decision on the applicable law on contempt of Court.

15. Kamau Kuria and Company Advocates, the Advocates for the Applicant filed initial submissions dated 15<sup>th</sup> August 2018, and supplementary submissions dated 26<sup>th</sup> November 2018, while K. Wanyoike, a State Counsel at the Office of the Attorney General's Chambers only filed the initial submissions dated 16<sup>th</sup> October 2018 on behalf of the Respondent.

16. The Applicant defined contempt of court as “conduct that defies then authority or dignity of the court or legislature” and relied on section 4(1)(a) of the Contempt of Court Act which defines contempt of court to include civil contempt which means wilful disobedience of any judgement decree, direction, order or other process of a Court or wilful breach of an undertaking given to Court.

17. The Applicant submitted that the proceedings were taken out to ensure the rule of law is preserved and that the Respondent is held accountable for its failure to pay the decretal sum. He cited 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** 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.

18. Reliance was also placed in this regard on the case of **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**. The Applicant reiterated relying on the case of **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.

19. The Applicant further submitted that under section 5 of the Contempt of Court Act every superior court has the power to punish for contempt of court on the face of the Court, to uphold the dignity and authority of the court. The Supreme Court decision in **Board of Governors, Moi High School Kabarak And Another vs Malcom Bell, (2013) e KLR** and the Court of Appeal decision in **Akber Abdullah Kassam Esmail vs Equip Agencies Ltd and 4 Others, (2014) eKLR** were cited by the Applicant for the position that the Court has inherent authority to punish for contempt of court.

20. The Applicant pointed out that by the time of filing the instant application, the rules contemplate under section 37 of the Contempt of Court Act had not yet been promulgated and that the lacuna must be filled with reference to section 24 of the General Provisions and Interpretation Act. They therefore relied on the Court of Appeal decision of **Christine Wangari Gachege vs Elizabeth Wanjiru Evans and 11 Other, (2014) eKLR** for the procedure to be followed as set out therein.

21. The position of the Applicant on the procedure to be followed was that the application notice and the affidavit or affidavits must be served personally on the Respondent unless the court dispenses with service if it considers it just to do so, as was held in **Justus Kariuki Mate and another vs Martin Nyaga Wambora and another, (2014) eKLR** and **Christine Wangari Gachege vs Elizabeth Wanjiru Evans and 11 Others, (2014) eKLR**.

22. Further, it must be proved that an order was duly served personally upon the respondent or that such service was not, in the circumstance of the case, necessary and was waived; and that the Respondent has wilfully disobeyed the order or that he has wilfully failed to obey the order as held in the case of **J.Z. Ochino and Another vs George A. Okombo, Nairobi Civil Appeal No. 30 of 1989** In addition, that knowledge of an order supersedes personal service and relied on the case of **Kenya Tourist Development Corporation vs Kenya National Capital Corporation & Another, Nairobi High Court Civil Case No. 6776 of 1992**. The Applicant also relied on the Court of Appeal case of **Kenya Bus Services v Susan Muteti, Nairobi Civil Appeal No 15 of 1992** for the proposition that an advocate is a special agent authorised to Act for his Client, and by virtue of serving him the respondents were served.

23. The Applicant further submitted, relying on the case of **Republic v Permanent Secretary, Ministry of State for Provincial Administration and Internal Security ex-parte Frederick Manoah Egunza, (2012) eKLR**, that section 21(3) of the Government Proceedings Act imposes on an accounting officer a statutory duty to pay the sums in an order to the person entitled or his advocate, and does not condition payment on budget allocation. Furthermore, that the Respondent had not demonstrated what steps if any were taken to ensure the paying of the decretal sum and interest to the Applicant.

24. On the burden and standard of proof, the Applicant relied on section 109 of the Evidence Act 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. The case of **Republic v County Chief Officer Finance and Economic Planning, Nairobi City County (Ex parte David Mugo Mwangi, (2018) Eklr** was cited for this position.

25. Therefore, that the burden of proof in contempt proceedings involving state organs, Government Department ministries or Corporation is on the accounting officer. In addition, that the standard of proof is beyond reasonable doubt as stated in the case of **Mutitika vs Baharini Farm Ltd, [1985] KLR 229**, which standard the Applicant opined he had met.

26. On the applicable penalties, the Applicant submitted that section 27(b) of the Contempt of court Act makes it an offence to wilfully disobey a Court order, and section 28 outlines the punishment for contempt of court to be a fine not exceeding two hundred thousand shillings or to imprisonment for a term not exceeding six months or both. He pointed to the case of **James H Gitau Mwaura v Attorney General and Another, (2015) eKLR** for this proposition. He therefore urged the court to order the Respondent to purge the Contempt immediately and be penalised to pay two hundred thousand personally and in default be imprisoned for two months.

27. It was also the Applicant's submission that the correct attitude is that displayed by the Courts in **Fred Matiangi the Cabinet Secretary Ministry of interior and Co-ordination of National Government v Miguna Miguna and 4 others (2018) eKLR** and **Refrigerator and Kitchen Utensil Ltd v G.P. Shah and Others, Civil Appeal No. Nai 39 of 1990** where the courts refused to hear any party in contempt until such a time that he or she purges it.

28. Further, that costs of the suit are awarded at the discretion of the court or judge under section 27 of the Civil Procedure Act, and that the discretion should be judiciously exercised. Reliance was placed on the case of **Jasbir Singh Rai and 3 Others v Tarlochan Singh Rai and 4 others, ( 2014) eKLR** and **Republic vs Communication Authority of Kenya and Another ex-parte legal Advice Centre aka Kituo Cha Sheria, (2015) eKLR** for the applicable principles to the awarding of costs.

29. Lastly, the Applicant's position in his supplementary submissions on the applicable law in light of the decision that declared the Contempt of Court Act unconstitutional in **Kenya Human Rights Commission v Attorney General & Another (supra)**, was that the effect of the said decision was to restore section 5 of the Judicature Act, and consequently, the procedure applicable in contempt of Court matters is as explained by the Court of Appeal in **Christine Wangari Gachege vs Elizabeth Wanjiru Evans and 11 Others, (supra)**, which found that the applicable law is as contained in Part 81 of the English Civil Procedure Rules.

30. The Respondent on his part submitted that any liability of expenditure incurred by the Government can only be defrayed from money provided for by Parliament, which has not provided the Ministry of Defence with the funds. That it can only be accountable with what it has received. They submitted that the Respondent are not in a position to settle the decretal sum together with the interests accrued and will do so as soon as the funds are available.

31. Further, that the Respondent has not in any way disregarded the orders of the court and has every intention of complying with the same. In addition, that the burden of proving wilful disobedience can only be discharged if it's shown that there exists means to fulfil the decree but the officer in charge still fails to do so. The Respondent relied on the case of **Republic vs Town Clerk, Kisumu Municipality ex-parte East African Engineering Consultants (2007) 2 EA 441** for this proposition.

32. Lastly, it was also contended that section 21(4) of the Government Proceedings Act states that no execution or attachment shall be issued by the Court for enforcing any such money or costs, and no person shall be individually liable under any order for the payment by the Government or any Government department, or any officer of the Government as such of any such money or costs.

33. I have considered the submissions made by the Applicant and Respondent, and note that at the time of the filing of the

Applicant's application, the applicable law on the procedure in contempt of Court proceedings against a government officer such as the Respondent was provided in section 30 of the Contempt of Court Act of 2015 which states as follows:

**“(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.”**

34. The Contempt of Court Act is however no longer operative as from the date of the judgment declaring it unconstitutional in **Kenya Human Rights Commission v Attorney General & Another** (supra). I am therefore obliged to revert to the provisions of the law that operated before the enactment of the Contempt of Court Act, to avoid a lacuna in the enforcement of Court's orders. It was in this respect observed in **Republic vs. Returning Officer of Kamkunji Constituency & The Electoral Commission of Kenya HCMCA No. 13 of 2008**, that the High Court has the responsibility for the maintenance of the rule of law, hence there cannot be a gap in the application of the rule of law.

35. In addition, where there is a lacuna with respect to enforcement of remedies provided under the Constitution or an Act of Parliament, or if, through the procedure provided under an Act of Parliament, an aggrieved party is left with no alternative but to invoke the jurisdiction of the Court, the Court is perfectly within its rights to adopt such a procedure as would effectually give meaningful relief to the party aggrieved, in exercise of the inherent jurisdiction granted to the Court by section 3A of the Civil Procedure Act to grant such orders that meet the ends of justice and avoid abuse of the process of Court.

36. Lastly, it was also noted in **Kenya Human Rights Commission vs Attorney General & Another** (supra) that the Court has inherent powers to enforce its orders under Article 159 of the Constitution as follows:

**“57. Article 159 of the constitution recognizes the judicial authority of courts and tribunals established under the constitution. Courts and tribunals exercise this authority on behalf of the people. The decisions courts make are for and on behalf of the people and for that reason, they must not only be respected and obeyed but must also be complied with in order to enhance public confidence in the judiciary which is vital for the preservation of our constitutional democracy. The judiciary acts only in accordance with the constitution and the law (Article 160) and exercises its judicial authority through its judgments decrees orders and or directions to check government power, keep it within its constitutional stretch hold the legislature and executive to account thereby secure the rule of law, administration of justice and protection of human rights. For that reason, the authority of the courts and dignity of their processes are maintained when their court orders are obeyed and respected thus courts become effective in the discharge of their constitutional mandate.**

**58. In Nthabiseng Pheko v Ekurhuleni Metropolitan Municipality & another CCT 19/11(75/2015). Nkabinde, j observed that:-**

**“The rule of law, a foundational value of the constitution, requires that the dignity and authority of the courts be upheld. This is crucial, as the capacity of courts to carry out their functions depends upon it. As the constitution commands, orders and decisions issued by a court bind all persons to whom and organs of state to which they apply, and no person or organ of state may interfere in any matter, with the functioning of the courts. It follows from this that disobedience towards courts orders or decisions risks rendering our courts impotent and judicial authority a mere mockery. The effectiveness of court orders or decisions is substantially determined by the assurance that they will be enforced.”**

**59. In the case of Canadian Metal Co. Ltd v Canadian Broadcasting Corp(N0.2) [1975] 48 D.LR(30), the court stated that;**

**“To allow court orders to be disobeyed would be to tread the road toward anarchy. If orders of the court can be treated with disrespect, the whole administration of justice is brought into scorn... if the remedies that the courts grant to correct... wrongs can be ignored, then there will be nothing left for each person but to take the law into his own hands. Loss of respect for the courts will quickly result into the destruction of our society.”**

**60. Courts therefore punish for contempt to insulate its processes for purposes of compliance so that the rule of law and administration of justice are not undermined. Without this power or where it is limited or diminished, the court is left helpless and its decisions would mean nothing. This ultimately erodes public confidence in the courts; endangers the rule of law, administration of justice and more importantly, development of society. That is why the court stated in Carey v Laiken [2015] SCC17 that;**

**“Contempt of court rests on the power of the court to uphold its dignity and process. The rule of law is directly dependent on the ability of the courts to enforce their process and maintain their dignity and respect”**

**61. It is therefore a fundamental rule of law that court orders be obeyed and where an individual is enjoined by an order of the court to do or to refrain from doing a particular act; he has a duty to carry out that order. The court has a duty to commit that individual for contempt of its orders where he deliberately fails to carry out such orders. (Louis Ezekiel Hart v Chief George 1 Ezekiel Hart (-SC 52/2983 2nd February 1990). And in Hon. Martin Nyaga Wambora and Another v Justus Kariuki Mate & Another [2014] eKLR, the Court stated the duty to obey the law by all individuals and institutions is cardinal in the maintenance of rule law and administration of justice.**

**62. It is therefore clear that the importance of the judiciary in the maintenance of constitutional democracy cannot be overemphasized. In order to achieve this constitutional mandate, the judiciary requires the power to enforce its decisions and punish those who disobey, disrespect or violate its processes otherwise courts will have no other means of ensuring that the public benefit from the judgments they hand down and the orders and or directions made on their behalf. When stripped of this power courts will be unable to guarantee compliance with their processes and will certainly become ineffective in the discharge of their duties and performance of their functions with the ultimate result that the public, as trustees of the rule of law, will be the major victim.”**

37. The procedure existing before the enactment of the *Contempt of Court Act* 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*, which 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.”**

38. This section was repealed by section 38 of the Contempt of Act, which Act is now no longer operative, however, 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.

39. The said rule provides that unless the court dispenses with service, a judgment or order may not be enforced by way of an order

for committal unless a copy of it has been served on the person required to do or not do the act in question. Rule 81.6 of the English Civil Procedure Rules specifically provides that the method of service shall be personal service, which is effected by leaving the order with the person to be served.

40. This Court notes that Kenyan courts have also held that personal service of orders and a penal notice is a requirement in contempt of court proceedings, and reference is made to the Court of Appeal decisions in **Nyamogo & Another v Kenya Posts and Telecommunications Corporation**, (1994) KLR 1, and **Ochino & Another v Okombo & 4 others** (1989) KLR 165 in this respect.

41. It is also the position and it has been held in several judicial decisions that if personal awareness of the court orders by the alleged contemnors is demonstrated, they will be found culpable of contempt even though they had not been personally served with the orders and penal notice. See in this regard the decisions in **Kenya Tea Growers Association vs Francis Atwoli & Others**, Nairobi High Court Constitutional Petition No 64 of 2010, **Husson v Husson**, (1962) 3 All E.R. 1056, **Ronson Products Ltd v Ronson Furniture Ltd** (1966) RPC 497, and **Davy International Ltd vs Tazzyman** (1997) 1 WLR 1256 .

42. As regards culpability, the act or omission constituting disobedience of an order may be intentional, reckless, careless or quite accidental and totally unavoidable. An intentional act may be done with or without an intention to disobey the order, and with or without an intention to defy the court. The element of contumacy, which requires flagrant defiance of, the authority of the court, is no longer necessary to establish breach of a court order. It is now established that the mental element for liability for contempt arising out of disobedience is simply that the disobeying party either intended to disobey, or made no reasonable attempt to comply with the order. See in this respect the English House of Lords decision in **Heatons Transport (St Helens) Ltd v Transport and General Workers Union** (1973) AC 15.

43. In addition, it was held in **Mwangi H.C. Wangondu vs Nairobi City Commission**, Nairobi Civil Appeal No. 95 of 1998 that the threshold of proof required in contempt of Court is higher than that in normal civil cases, and one can only be committed to civil jail or otherwise penalized on the basis of evidence that leaves no doubt as to the contemnor's culpability.

44. Applying these principles to the present application, the prior proceedings on the Notice to Show Cause before J. Odunga show that the Respondent therein was the then Principal Secretary in the Ministry of Defence, Amb. Kirimi P. Kaberia. No evidence was provided by the Applicant to show personal service of the orders of this Court of 13<sup>th</sup> July 2016 on the current Respondent and Principal Secretary in the Ministry of Defence who is sought to be committed for contempt of Court, namely Saitoti Torome, who also stated in his replying affidavit that he was not served with the orders or decree of the Court.

45. However, the Court notes that the said Respondent did file an affidavit in reply to the Notice to Show Cause on 4<sup>th</sup> December 2017 sworn on the same date, wherein he avers that he had become aware of the judgment by this Court on payment of the decretal sum in **Milimani CMMCC No 9749 of 2003**, and was seeking to appeal the same, and that the Ministry had not budgeted for the same.

46. Furthermore, the Respondent was served with the application citing him for contempt of Court by way of advertisement in in the *Daily Nation* of 17<sup>th</sup> May 2018, pursuant to leave granted to the Applicant to do so, as shown by the affidavit of service that was filed in court on 25<sup>th</sup> June 2018, and sworn by one Josphat Kioko on 20<sup>th</sup> June 2018. It is also notable in this regard that the counsel for the Respondent did appear in Court to defend the said application for contempt of court, and did seek time to pay the decretal sum. It is therefore evident from the pleadings and submissions made that the Respondent was aware of the orders of this Court of 13<sup>th</sup> July 2016.

47. 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 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].

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 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.”

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.

49. The Respondent also relied on the provisions of section 21(4) of the Government Proceedings Act to argue that the said provisions exempt him from contempt of court Proceedings. The said section provides as follows:

“Save as provided in this section, no execution or attachment or process in the nature thereof shall be issued out of any court for enforcing payment by the Government of any money or costs, and no person shall be individually liable under any order for the payment by the Government or any Government department, or any officer of the Government as such, of any money or costs.”

50. From a plain reading of the said sub-section, a government official is only exempt from personal liability for a government debt that is due from the government, but does not provide that a government official has immunity from obeying court orders as to the payment of a government debt, nor excuse such disobedience.

51. I accordingly find that that as the Respondent was aware of the orders issued by the court on 13<sup>th</sup> July 2016, and has not shown

any steps taken to satisfy the decretal sum due to the Applicant as compelled in the said orders, he is culpable of disobeying the same and for contempt of court. The Applicant's Notice of Motion dated 6<sup>th</sup> April 2018 is thus largely merited.

52. However, given the Respondent's request to be given more time to effect the said payments, and the chequered history of the instant contempt of Court proceedings, the Court will grant him the opportunity to purge the contempt, and as a way of mitigating the sentence. I accordingly order as follows:

- a. The Respondent's sentencing for contempt of court is suspended pending any actions the Respondent may want to take to purge the contempt.
- b. Further directions will be given by this Court as to the date for sentencing of the Respondent, upon hearing the Applicant and Respondent on any actions taken to purge the contempt.
- c. The Respondent shall meet the costs of the Notice of Motion dated 6<sup>th</sup> April 2018.

53. Orders accordingly.

**DATED AND SIGNED AT NAIROBI THIS 4<sup>TH</sup> DAY OF FEBRUARY 2019**

**P. NYAMWEYA**

**JUDGE**



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