REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

JUDICIAL REVIEW DIVISION

APPLICATION NO. 677 OF 2017

REPUBLIC.....APPLICANT

-VERSUS-

THE PERMANENT SECRETARY

MINISTRY OF DEFENCE.....1ST RESPONDENT

HON. ATTORNEY GENERAL.....2ND RESPONDENT

ex parte:

1. **JOEL BERNARD LEKUKUTON**
2. **JOSEPH KIPKURUI ROTICH YOPSOI**
3. **JASON LEARIONG**
4. **JAMES LESIOPAL LONGIPO**
5. **WILLIAM LEADUMA SEKETIAN**

RULING

On 29 June 2020, this Honourable Court (Mativo, J.) issued a notice to the 1st respondent to show cause why contempt proceedings should not be commenced against him. By a motion dated 26 January 2021, the *ex parte* applicants applied to have the 1st respondent served by way of substituted service after they failed to serve him in person. The application for substituted service was allowed on 22 February 2021. The applicants proceeded to serve the 1st respondent as directed.

On 29 March 2021, the 1st respondent was cited for contempt when he failed to appear in court and on 2 June 2021 he was sentenced to serve a term of six months in civil jail for contempt of court.

Against this background, the respondents filed a motion dated 1 July 2021 seeking to set aside the order committing the 1st respondent to civil jail on the ground that he was not personally served with the notice to show cause. It is this motion that is now the subject of this ruling.

The motion is filed under section 1A and 1B of the Civil Procedure Act, cap. 21 and Order 51 Rule 1 of the Civil Procedure Rules, 2010. The prayers in the motion have been framed as follows:

"

1. The application be certified as urgent and service thereof be dispensed with in the first instance.

2. The sentencing order given on 21st June 2021 be stayed pending hearing and determination of this application inter partes.

3. The execution of the contempt orders given on the 21st June 2021 against the Principal Secretary, Ministry of Defence be stayed pending the hearing and determination of this application inter-partes.

4. The sentencing order given on 21st June 2021 be lifted, vacated and/or set aside.

5. The contempt orders issued against the Principal Secretary, Ministry of Defence be stayed, lifted, vacated and/or set aside.

6. Costs of this Application be provided for."

The affidavit in support of the application has been sworn, not by the principal secretary himself, but by one Francis Mutie who has described himself as 'the Secretary Administration of the Ministry of Defence'.

Mutie has sworn that he only learnt of the order made on 21 June 2021 through the media. His counsel advised him, which advice he verily believes to be true, that this Honourable Court made an order on 9 March 2020 requiring a notice to show cause to be served upon the 1st respondent in person and that to date, that order has never been vacated.

Nonetheless, Mutie has sworn further that his Ministry is currently operating on a strained budget and no funds have been allocated for settlement of court decrees obtained against the Ministry in the current and previous financial years. According to Mutie, the applicants' claim against the Ministry is what he has described as 'a colossal sum' and which, apparently for that reason, has to be factored in the Ministry's budget before any payment is authorised.

Mutie has urged that neither the 1st respondent nor his Ministry has control over budgetary allocations and therefore it is unfair and improper to hold the 1st respondent accountable for his ministry's budgetary constraints and failure to settle the decretal sum in particular.

The ex parte applicants opposed the application and filed a replying affidavit in that regard; the affidavit was sworn by the 2nd applicant on his own behalf and on behalf of the rest of the applicants.

The applicant's case is that the 1st respondent has no right of audience until he has purged his contempt. In any event, the 1st respondent has not suggested when he intends to settle the decretal sum despite the fact that the applicants obtained judgment way back in 2017.

As far as the question of personal service is concerned, the applicants have urged that the 1st respondent was served as directed by the court and, in any event, he was aware of the court orders.

One need not look any further than the pleadings and affidavits filed and generally the record to find answers to most, if not all, of the questions raised in the affidavit of Mutie.

I must, however, note at the outset that unlike in the application for mandamus in which the respondent swore his own affidavit replying and opposing the motion dated 5 December 2017 in which the applicant sought for the substantive order of mandamus, he has not sworn the affidavit contesting the instant application. With a lot of respect to Mutie who has sworn the affidavit, the orders which the 1st respondent has sought to impeach are directed at the Principal Secretary as an individual and since it is his own liberty at stake, he was ideally placed to swear his own affidavit.

The rationale is easy to see; the question, for instance, whether one has been personally served can only be answered by the individual who is alleged to have been served. In this case it is only the Permanent Secretary himself who can say whether he was served or not.

And having sworn the affidavit in response to the application for mandamus, it is intriguing, to say the least, the Principal Secretary chose not to swear an affidavit in an application where his own personal liberty is at stake.

In the replying affidavit sworn in response to the application for mandamus, Saitoti Torome, who was the then Principal Secretary in the Ministry of Defence, acknowledged that the he had not only read the application for the order of mandamus but also that the application had been explained to him by his counsel.

Among the documents exhibited in the application are the judgment and the decree which the applicant sought to enforce and a certificate of order against government. Now, if the Principal Secretary is taken at his own word, that he read and understood the application, the allegation that he is not aware of the certificate of order against the government and decree is simply not true. In any event, if the Principal Secretary was of the firm position that he had not been served with these documents and therefore, the motion for the order of mandamus was premature, that argument could only have been raised and entertained in the proceedings in which that order was sought.

If leave to file the motion was granted *ex parte* it was open to the Principal Secretary to move the court to set it aside on the ground that the Permanent Secretary was not aware of these documents. He never did that and, apparently, he never took up the issue when the motion came up for hearing and determination.

In the ruling delivered on the application for mandamus, Mativo, J held as follows:

"I have considered the respective parties' submissions. I have read the papers. I note that the judgment was rendered on 14.11.2017. There is no evidence that the respondents participated in the trial. There is evidence that the decree delivered was served upon the respondent. I find that the applicant has demonstrated grounds for the court to grant the orders sought. I allow the application and grant the orders sought in terms of paragraph 1 of the application dated 6.6.2018."

So, once the motion was determined and the order of mandamus granted, it is not open to the 1st respondent to reopen the issue that ought to have been addressed at the hearing of the substantive motion. In short, he cannot be heard to be questioning the legitimacy of the mandamus order at this stage of the proceedings. The least he ought to have done, if he was dissatisfied with the order, was to appeal against it.

That said, the depositions made by Mutie in his affidavit in support of the application are no different from those made by Saitoti Torome in the replying affidavit to the motion for the substantive order of mandamus with respect to the Ministry's position on settlement of the decretal sum. Torome swore as follows:

"6. That I am the accounting officer in the Ministry of Defence as provided for under the provisions of the Public Finance Management Act, Number 18 of 2012 of the Laws of Kenya.

7. That I am aware that any liability or expenditure incurred against the Government can only be defrayed from moneys provided for by the Parliament.

8. That Parliament has not provided the Ministry of Defence, with adequate funds nor has it been allocated any moneys to settle any claims including the applicant's herein. Further, the current budgetary allocation has been immensely reduced.

9. That currently the ministry has several decrees exceeding Kshs. 4 Billion for which it has been unable to settle due to financial constraints. The settlement of such huge claims at once paralyses the ministry.

10. That I am aware that satisfaction of decrees and judgements is deemed to be expenditure by Parliament and as a result it must be justified in law and provided for in government expenditure.

11. That the Ministry of Defence can only be accountable for what is received and the ministry has not received any allocation to settle the current claim.

12. That it would be manifestly unjust for the applicants to hold the Ministry liable yet the ministry is not in control of the funds."

The affidavit was sworn on 30 August 2018. Almost four years down the line, the 1st respondent still maintains the same position that he cannot pay until Parliament has allocated his ministry the necessary vote.

Having consistently maintained the position that the 1st respondent's ministry has no allocations for settlement of court decrees, it is safe to conclude that the argument that the 1st respondent was not served with the decree and certificate of order against the government is merely an afterthought. Going by the position that the 1st respondent has taken which, no doubt, is not legally tenable, it does not matter whether he was served or not; he just wouldn't pay, either way.

Talking of service, it is true that the Court (Mativo, J.) reiterated the need to have the 1st respondent served personally with the notice to show cause why he should not be committed to civil jail for contempt of the mandamus order. This was when the learned judge ruled on the applicants' application for a notice to issue to the 1st respondent to appear in court and show cause why he should not be committed for contempt of court. The ruling is relatively short and it reads as follows:

"I have considered the notice of motion dated 19. 11.2019 together with the statement and the verifying affidavit and the annextures. I have studied the grounds in support of the application. In addition, I have considered the ground of opposition filed by the respondent. Additionally, I have carefully referred to the arguments advanced for both parties. The arguments advanced by the respondent counsel, in my view suggest that the respondent has already been (sic) for guilty of contempt, which is not the case.

Before me is an application seeking an order that the permanent secretary ministry of defence Dr. Ibrahim Mohamed attends this court to show cause why he should not be committed to civil jail for failing to comply with an order of this court. The application before me is merited considering the case and the material before me. Showing cause, as I understand it is an opportunity to the respondent to explain the reasons if any for the failure or at least give an excuse to the court. I am persuaded that the applicant has established grounds for the court to issue the N.T.S.C.

The alleged failure to serve the order fails because the respondent has all along been represented by an advocate and the jurisprudence, our emphasis that knowledge of the order is sufficient. However, notice to show cause must be served personally because it has consequences.

Accordingly, I make the following order;

a) Notice to show cause be and is hereby issued to one Dr. Ibrahim Mohamed, Permanent Secretary Ministry of Defence to attend court on 16. 6. 2020 to show cause why contempt proceedings should not be commenced against him."

The applicants' attempt to serve the 1st respondent personally proved futile and therefore by an application dated 26 January 2021, they moved the court to have the 1st respondent served by way of substituted service. The grounds upon which the application was filed are clear from the affidavit of service sworn by Joel Mwanzia Velela, a process server. He swore, *inter alia*:

"2. That on 15th January 2021, I received a Notice to Show Cause issued on 12th January 2021 by this Honourable Court in duplicate from the firm of Osoro Juma & Co. Advocates with instructions to serve the same upon the principal Secretary

Ministry of Defence Dr. Ibrahim Mohamed.

3. That on the same day i.e. 15th January 2021 at around 10.00 am, I proceeded to the office of the aforesaid Principal Secretary Ministry of Defence Dr, Ibrahim Mohamed which is located at Ulinzi house Nairobi with a view to effect service upon him. On arrival I introduced myself to the Military police officers manning the security at the main gate and the purpose of my visit. The said military officers who were six in number and who all declined to disclose their names to me denied me entry but called and introduced to me their liaison officer who doubles as the legal (court) clerk by the name Mr. Wafula. Once again I introduced myself to him (Mr. Wafula) and the purpose of my visit.

4. That the said Mr. wafula who became personally known to me at the time of service in turn requested me to wait at the waiting room for some minutes as he called and consulted his seniors on receiving the service. After 10 Minutes he came back and told me that after consulting one of his bosses by the name Mr Mutuku he had informed him that the service of the aforesaid Notice to show cause could only be served personally on the aforesaid principal secretary Ministry of Defence. He further informed me that it would be difficult for me to be allowed in the premises by the soldiers to serve the principal secretary and so advised me to advise counsel prosecuting the case to make an application in court for substituted service otherwise there was no one in the legal department who was ready to accept service on behalf of the said permanent secretary ministry of defence Dr. Ibrahim Mohamed. At that juncture it became clear to me that it was very difficult to access the principal secretary ministry of defence Dr. Ibrahim Mohamed and effect service upon him and so I left without servicing him with the notice to show cause."

It is against this background that the applicants sought to have the 1st respondent served by way of substituted service. Their application was not opposed and neither did the respondents or any of them make any attempts to cross-examine the process server on his affidavit and, in particular, on the difficulties he swore that he had encountered when he attempted to serve the 1st respondent personally as directed by this Honourable Court.

In these circumstances the application was allowed and in so doing, I made the order that the Principal Secretary be served by way of substituted service through an advertisement in the Daily Nation Newspaper or the Standard Newspaper. The two are papers of national circulation.

Once I was satisfied that the 1st respondent had been served when the matter came before me on 29 March 2021, I cited the 1st respondent for contempt and scheduled the matter for sentencing on 7 June 2021. He was eventually sentenced *in absentia* on 21 June 2021 to serve six months in prison.

While agree that personal service is the most effective service where liberty of an individual is concerned, the 1st respondent cannot be heard to be insisting on such service when the court allowed applicants to serve him by substituted service. It is true, as it has been urged by the 1st respondent, that previously the court had directed that the 1st respondent be personally served with the notice to show cause but it would be ridiculous for the 1st respondent to insist on personal service when he had literally insulated himself from such service. When the court ordered that the Principal Secretary should be personally served, it did not thereby hand him the licence to evade service or stall the court process.

In these circumstances the respondent's application does not have merit.

However, despite all the flaws in the 1st respondent's application, the court is prepared to bend over backwards and give the Principal Secretary a second chance. In this regard I hereby suspend the order citing the Principal Secretary for contempt and committing him to civil jail on condition that he will satisfy the decree in compliance with the order of mandamus made on 26 March 2019 within two months of the date of this ruling. In default, this order will automatically be vacated and the Principal Secretary, Ministry of Defence will be committed to civil jail as ordered on 21 June 2021. It is so ordered. I make no orders as to costs. Orders accordingly.

DATED, SIGNED AND DELIVERED VIA VIDEO LINK ON 21ST FEBRUARY 2022

NGAAH JAIRUS

JUDGE