



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

APPLICATION NO. 173 OF 2016

REPUBLIC.....APPLICANT

VERSUS

PRINCIPAL SECRETARY

MINISTRY OF HEALTH.....RESPONDENT

ex parte: **SUSAN WAMAITHA KAMAU**

RULING

The applicant's motion is dated 28 February 2017 and is stated to be filed under sections 4(1) (a), 5(b), 28 and 30 of the Contempt of Court Act, No. 46 of 2016 and section 21 (3) of the Government Proceedings Act, cap. 40. The prayers in the motion read as follows:

“1. That the respondent, herein namely the principal secretary for Ministry of health be cited for contempt of court for conscious and deliberate disregard, defiance and disobedience of this court's orders issued on 13th September 2016 requiring the respondent to pay the sum of Kshs. 396, 261/=.

2. That the honourable court do (sic) issue a notice to the respondent, the principal Secretary Ministry of health, under section 30 (2) of the Contempt of Court Act (2016), to appear before court and show cause why the court should not commence contempt of court proceedings against him.

3. That if the principal Secretary shall fail to show proper cause as to why he should not be punished for contempt of court, the court does convict him accordingly and pass sentence for contempt of court.

4. That this court be at liberty to issue further orders as it may deem appropriate for the end of justice.

5. That the costs of this application be borne by the respondent.”

The application is supported by the applicant's own affidavit sworn on 28 February 2017.

It is premised on grounds that on 13 September 2016, this Honourable Court issued an order of mandamus directed at the respondent, compelling him to pay the applicant the sum of Kshs. 396, 261/= . On 28 October 2016 the order was served upon the respondent and his legal representative.

The applicant complains that the respondent has deliberately and blatantly refused to pay the decretal amount even after he was served with the order of mandamus. The respondent's inaction, the applicant has urged, amounts to wilful and blatant disobedience of the court's order.

The respondent opposed the application.

In the replying affidavit sworn on 20 September 2021 by Judith Chimau, the respondent's learned counsel, it was admitted that indeed David Kamau Muhia (who I understand was succeeded in title by the present applicant) obtained judgment against the Honourable Attorney General and the medical superintendent of the Rift Valley Provincial General Hospital in Nakuru Chief Magistrates' Court Civil Case No. 357 of 2004. The decretal sum together with costs and interest was Kshs. 332, 558.60 and was paid by the Ministry of Health on 16 November 2017.

It is the respondents' case that according to section 4 (4) of the Limitation of Actions Act No. 21 of 1968, the arrears in respect of the judgment which the applicant is pursuing cannot be recovered. In the respondent's understanding, time for any claim for such arrears expired on 7 September, 2013 which date marked the end of the sixth year after the date on which interest became due, judgment having been issued on 27 July 2006 while the decree and certificate of costs had been issued on 6 September 2007.

The record shows that an order of mandamus in this matter was granted by Aburili, J. on 13 September 2016. The order was in the following terms:

"1. That an order of mandamus be and is hereby granted compelling the principal secretary Ministry of Health, to settle the decretal sum in Nakuru CMCC No. 357 of 2004, David Kamau Muhia v Hon Attorney General and Medical Superintendent, Rift Valley General Hospital by paying the decretal sum outstanding of Kshs. 396, 261.

2. That the decretal sum above be paid within 90 days from the date of this order.

3. That in default, the ex parte applicant be at liberty to institute contempt of court proceedings to enforce the mandamus order.

4. That each party bears its own costs of these judicial review proceedings."

It is the disobedience of this order that precipitated the motion of 28 July 2017. When the application came up for hearing before Aburili, J. on 6 December 2017, the learned judge found the application to be unopposed. To quote the learned judge:

"The application dated 28th February 2017 is unopposed. It seeks among other prayers orders for notice to show cause to issue against the PS, Ministry of Health to explain why he cannot be cited for contempt for non-compliance with mandamus orders of this court issued on 13th September 2016.

The court did on 26th September 2017 grant the respondent 75 days within which to settle the decree of mandamus but to date no settlement has been made. This was made by consent of all the parties. In the premises, I find that the appropriate order to issue at this moment is to issue notice to show cause against the respondent as stipulated in section 30 of the Contempt of Court Act, 2016. The deputy registrar is hereby directed to issue cause (sic) to be served upon the PS, Ministry of Health in his official capacity, notice to show cause giving him 30 days to show cause why he cannot be cited for contempt of court for failure to settle decree as per mandamus order of 13th September 2016. Notice to show cause on 20 March 2018. The applicant shall have costs of the notice to show cause which will be heard on..." (Emphasis added).

This passage of the learned judge's ruling suggest that the application dated 28 July 2017 was not disposed in its entirety since the only substantive prayer granted was that of notice to show cause. I suppose this might have been informed by the understanding that owing to the nature of the application, the consideration of the prayer for committal would depend on the respondent's reaction to the notice to show cause.

Be that as it may, following the order of this Honourable Court, the learned deputy registrar did issue the notice, on 15 February 2018, directed at the respondent. According to that notice, the respondent was required to appear before court on 20 March 2018. However, the respondent did not appear in court as directed but Ms. Chimau, the learned counsel for the respondent did. The record shows that proceedings were, once again, taken before Aburili, J. and were captured as follows:

“Mr. Wamae (the learned counsel for the applicant):

We served the notice to show cause against the principal secretary. The last time we appeared there was an indication of a discharge voucher. We received a DV for 332,558.60 as full and final payment but my client refused to sign the voucher as full and final settlement less 63, 750.40. We have written to the Attorney General asking for reason but no response has been received.

Miss Chimau:

I thought the applicant had already been paid. The file is in accounts office. There is a procedure for the Kshs. 63,750.40. She should take the sum released and initiate a process for the balance which might take long. The payments advises (sic) went earlier than these proceedings.

Wamae:

We served decree of this court on 28th October 2016 for Kshs 396, 261. Our client can only sign for the partial payment and the balance to be remitted.

Court:

The respondent to process the payment of the available sum and arrange to clear the balance which is not part of the amount in the discharge voucher.

The applicant’s counsel to engage the office of the Attorney General for recovery of the balance thereof as per decree of this court on 21st October 2016. Mention before Deputy Registrar to confirm payment on 8th May 2018.” (Emphasis added).

The matter came in court on 8 May 2018 as directed by the court. This time round, neither the respondent nor his counsel appeared in court. They were absent on several subsequent occasions whenever this matter came up but on 17 July 2018, Ms Chimau appeared. The applicant had not been paid as earlier directed by the court; Ms. Chimau explained the reason for failure to pay as follows:

“Chimau:

Procedure is lengthy. We had a new accounting officer hence the delay. I ask for patience. The Ministry has complied.”

The court (Mativo, J) was prepared to give the respondent time. It rescheduled the matter for mention in these terms:

“Court:

Mention to confirm payment on 22nd October 2018.”

The matter was again mentioned on a number of occasions for this purpose throughout 2018 and 2019 but apparently the payments were not forthcoming. On one of these occasions, on 9 September 2019 to be precise, Ms Chilaka who apparently was standing in for Ms Chimau informed the court as follows:

“Ministry is awaiting funds from treasury to be able to transmit it to the AG’s account for onward transmission to the account of the applicant. Application for 30 days to do so.”

The court (Bwononga, J.) then extended the notice to show cause for the respondent to appear in court on 12 November 2019.

On 17 February 2020, Ms Chimau again told the court she was in the process of advising the ministry to make a payment of the interest of Kshs. 63,000/=. This is the submission the learned counsel made again on 25 May 2021. To quote her, the learned

counsel stated as follows:

“we are yet to receive payment from ministry. We pray for more time because there are procedures that payment has to go through before money is released.”

From these record of events, it is clear that the court has not only ordered the respondent to pay a certain sum which has been established as the outstanding balance due to the applicant but also the respondent has time and again in the course of these proceedings acknowledged owing the applicant the sum in question.

It follows that the affidavit sworn by Ms Chimau in response to the applicant’s application questioning the legality or the extent of the applicant’s claim is diametrically inconsistent with the position that the respondent has consistently adopted in these proceedings with respect of the applicant’s application and, in particular, with regard to the outstanding amount arising out of the decree obtained in Nakuru Chief Magistrates Court Civil Case No. Case No. 357 of 2004.

But even if the respondent was to be taken at his own argument, it is, in my humble view, a bit late in the day for him to be heard questioning either the extent of the applicant’s claim or its validity. I say so because there has been no attempt to challenge the orders made by this Honourable Court according to which it has been decreed that the sum which the applicant demands is legitimately due and owing.

In the ultimate, I have to reach the conclusion that the respondent has not given any reason why this Honourable Court should not find him in contempt of its order.

It is also not lost to the court that despite the fact that the respondent was served with the notice and given a chance to show cause why contempt proceedings should not proceed against him or be cited for contempt, he has spurned that opportunity. His conduct leaves this Honourable Court with no other alternative except to find him in contempt of court. I so hold and hereby order the respondent to appear in court on 14 March 2018 for mitigation and sentencing or to show cause why he should not be committed to civil jail. Orders accordingly.

SIGNED, DATED AND DELIVERED ON 28TH JANUARY 2022

NGAAH JAIRUS

JUDGE



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