



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

JUDICIAL REVIEW MISC. APPLICATION NO. 143 OF 2020

REPUBLIC.....APPLICANT

VERSUS

THE COUNTY GOVERNMENT OF KITUI.....RESPONDENT

FAIRPLAN SYSTEMS LIMITED EX PARTE

JUDGEMENT

1. The Ex parte Applicant herein is before this court vide an application dated 22nd July 2021 which seeks the following orders;

(i) *THAT this matter be certified urgent, and service be dispensed with in the first instance.*

(ii) *THAT Mr. Ben Katungi, the Respondent's County Executive Committee Member for Finance, Ministry of Finance and Economic Planning, do appear before this Honourable Court and show cause why he should not be cited for contempt of court for failing to pay to the ex-parte Applicant Kshs. 500,584/= being the amount due to the ex-parte Applicant as certified Party & Party Costs as per the judgment order of this court issued on 21st June 2021.*

(iii) *THAT this Honourable Court be pleased to find and hold that Mr. Ben Katungi, the Respondent's County Executive Committee Member for Finance, Ministry of Finance and Economic Planning, is in contempt and has disobeyed the order the Court issued on 21st June 2021.*

(iv) *THAT Mr. Ben Katungi be punished for contempt of court and be committed to civil jail for a period not exceeding six (6) months.*

(v) *THAT costs of this application be borne by the Respondent.*

2. The application is supported by the grounds on its face and verified by the supporting affidavit of Arch. Julius M. F. Mutunga, the Managing Director of the Ex-parte Applicant dated 22nd July 2021.

3. Mr. Mutunga asserted that he was aware that an order of judgment dated 21st June, 2021 directing the Respondent to pay to the Ex-parte Applicant Kshs. 500,584/= was issued by the court and that a demand letter for payment of the said amount together with the order were served upon Mr. Ben Katungi, by way of courier on 14th July 2021 and by way of personal service on 15th July 2021.

4. Mr. Ben Katungi being the Respondent's County Executive Committee Member for Finance, Ministry of Finance and Economic Planning, is under an obligation to obey the Court, however, despite service and demand for payment of the sum due he has deliberately disobeyed the order.

5. It was deposed that it is in the interest of justice that he appears before this Honourable Court to show cause why he should not be cited for contempt of court for failing to pay to the ex-parte Applicant Kshs. 500,584/=. The deponent averred that he was aware that the Respondent had received its budgetary allocation for 2021-2022 together with funds to pay pending bills.

RESPONSE

6. There is no response on record on behalf of the Respondent.

SUBMISSIONS

7. The application was canvassed by way of written submissions. The ex parte applicant herein filed written submissions dated 22nd October, 2021 in which it identified 2 issues for determination as follows;

(i) *Whether Mr. Ben Katungi should be punished for contempt of court order issued on 14th July 2021.*

(ii) *Who bears costs of this application.*

8. Learned counsel cited the Section 21(3) of the Government Proceedings Act which imposes a statutory duty on the Accounting Officer of the Government to pay the money specified in a Certificate of Order against Government to the person so entitled or to his advocate. Further it was submitted that pursuant to Section 103 (2) (a) and (3) and Section 148 (2) and (3) of the Public Finance Management Act, No.8 of 2012 (PMFA), a County Executive Committee Member for Finance is the Accounting Officer of a County Government. This Court has also numerously amplified the above provisions.

9. To support this argument learned counsel cited the case of **Republic -vs- County Chief Officer, Finance & Economic Planning, Nairobi City County Ex parte Stanley Muturi [2018] eKLR** as follows;

"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."

10. To further buttress this argument learned counsel also cited the case **Soloh Worldwide Interenterprise vs. County Secretary Nairobi County & Another [2015] eKLR**.

11. It was contended that failure by an Accounting Officer to comply amounts to contempt of court as was held in the case of **Republic -vs- County Chief Officer, Finance & Economic Planning, Nairobi City County Ex parte Stanley Muturi supra** where the court held as follows;

"In my view the failure by the accounting officer of a State organ, government department, ministry or corporation to put into motion steps 5 necessary for the settlement of or obedience of court decisions or facilitation of such settlement is prima facie evidence of neglect."

12. In his argument, Mr. Lutta submitted that Mr. Ben Katungi was under an obligation to comply with the court's order dated 21st June, 2021 and that court orders must be obeyed by any person even public officers. Further, that his continued disobedience offends the provisions of Article 159(1) of the Constitution, 2010.

13. Learned counsel submitted that the Respondent's disobedience amounts to a breach of the ex parte Applicant's constitutional rights as provided under Article 47. The ex parte applicant contended that since execution proceedings cannot be executed against

the Respondent this is the only way that it can realize the fruits of the judgment made in its favour.

14. The case of **HADKINSON -vs- HADKINSON (1952) 2 ALL ER56** was also cited where the court held as follows;

“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 unless and until it 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.”

15. Mr. Lutta submitted that in order to ensure proper dispensation of justice and to protect and promote the rule of law Mr. Ben Katungi must be punished. In support of this argument counsel cited the case of **Republic v County Chief Officer, Finance & Economic Planning, Nairobi City County Ex Parte Stanley Muturi** (*supra*) where it was held as follows;

*“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.”

16. On who bears the cost it was submitted that had Mr. Katungi complied with the court order, the application before this court would not have been made and as such the Respondent ought to pay for costs.

17. In conclusion, Mr. Lutta submitted that this court ought to exercise its authority as conferred by section 5 of the Judicature Act. It was urged that Mr. Katungi ought to be punished for unmitigated contempt of court and committed to civil jail for a period not exceeding six months. Counsel sought for the application to be allowed as prayed.

18. In its written submissions dated 29th October, 2021, learned counsel acting for the Respondent submitted that it is willing to pay the sum of Kshs. 500,584/= being the costs due. Further, that no court order has been disobeyed and the Ex parte Applicant has no basis to institute contempt proceedings.

19. Learned counsel urged that for a person to be punished for contempt certain ingredients must be present as was held in the case of **Cecil Miller v. Jackson Njeru & Another [2017] eKLR** where the court held as follows;

“a) The terms of the order (or injunction or undertaking were clear and unambiguous and were binding on the defendant.

b) The defendant had knowledge of or proper notice of the terms of the order.

(c) The defendant has acted in breach of the terms of the order.

(d) The defendant conduct was deliberate.”

20. It was contended that the ex parte Applicant has failed to demonstrate that the Respondents have willingly fully failed, refused or neglected to obey the order. To support this argument counsel cited the case of **Samuel M.N. Mweru & Others v National Land Commission & 2 Others [2020] eKLR**.

21. In conclusion, learned counsel urged the court to find that the Respondent is not in contempt as it has at all times been ready to pay the sum owed. Further, that the Applicants are not entitled to the orders sought and the same should be dismissed with costs to the Respondents.

22. Having considered the facts of the case and each party's argument, the issue for determination is whether the prayers sought by the applicant are merited. I note that it is not in dispute that an order of mandamus compelling the Respondent herein to pay to the Applicant the sum of Kshs. 500,584/= was issued by this court on 14th July, 2021 and served upon the Respondent. This has at the very least been confirmed by the Respondent in its written submissions.

23. The Respondent in its written submissions alleges that it has not declined to clear the decretal sum owed yet it is not clear on when it intends to do the same. No plausible reason has been given by the Respondent as to why the said amount has not been cleared to date and in its defense the Respondent argues that Mr. Katungi should not be punished for contempt as the ex parte Applicant has failed to prove that the Respondent has intentionally declined to pay the amounts owed.

24. It is clear that there is no evidence that suggests that the said decree has been set aside or varied by this Court or on appeal or that the Order of Mandamus issued by this Court has been stayed or set aside and therefore the orders remain in force.

25. The question whether it is the accounting officer who bears the obligation to satisfy the decree is a settled one. The court in **Council of Governors & Others vs The Senate [2015] eKLR** addressed this issue and stated;

“The Petitioners have also sought the interpretation of the term “Accounting Officer”. In that regard, Article 226 of the Constitution provides;

(1) Act of Parliament shall provide for -

(a)

(b) The designation of an accounting officer in every public entity at the National and County level of Government.

(2) The Accounting Officer of a National public entity is accountable to the National Assembly for its financial management, and the Accounting Officer of a County public entity is accountable to the County Assembly for its financial management.

Pursuant to this provision, Parliament enacted the Public Finance Management Act. The appointment and designation of a County Government Accounting Officer is provided for under Section 148 of that Act, as follows;

1. A County Executive Committee member for finance shall, except as otherwise provided by law, in writing designate accounting officers to be responsible for managing the finances of the county government entities as is specified in the designation.

2. Except as otherwise stated in other legislation, the person responsible for the administration of a County Government entity, shall be the Accounting Officer responsible for managing the finances of that entity.

It therefore follows that “an accounting officer” for a County Government entity is the person so appointed and designated as such by the County Executive Committee Member for Finance under Section 148 of the Public Finance Management Act. Indeed, Section 148 (3) of the Public Finance Management Act mandates the County Executive Committee Member for Finance to ensure that each County government entity has an accounting officer as provided for under Article 226(2) of the Constitution.

As regards the Accounting Officer for the County Assembly, Section 148(4) of the Public Finance Management Act provides that; “The Clerk of the County Assembly shall be the accounting officer of the County Assembly”.

Having found as we have, it follows that the question posed by the Petitioners as to whether the County Governor is an Accounting Officer, must be answered in the negative. He is not an Accounting Officer and we have said why.”

26. The Executive Committee member of a County Government responsible for finance has the duty to appoint an accounting officer and where he fails to appoint one or does not disclose such a designated officer, the responsibilities of an accounting officer fall on his shoulders. In **Solo Worldwide Inter-Enterprises vs County Secretary Nairobi County and Another [2016] eKLR** the court held;

“It therefore follows that the person who has the overall financial obligation for the purposes of the affairs of a County Government must be the County Executive in Charge of Finance and unless he shows otherwise, he 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 an application for mandamus where orders are sought to compel the satisfaction of a decree against a County Government, the proper person to be a respondent ought to be the said County Executive in Charge of Finance unless he discloses that he had in fact appointed an accounting officer for that purpose.....”

27. Is it necessary to punish for contempt" The Supreme Court in **Republic v Ahmad Abolfathi Mohammed & Another [2018] eKLR** made the following observations:

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

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

“It is essential for the maintenance of the Rule of Law and order that the authority and the dignity of our Courts are upheld at all times. The Court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors... In HADKINSON v. HADKINSON (1952) 2 All E.R. 567, it was held that: It is the plain and unqualified obligation of every person against or in respect of whom an order is made by a Court of competent jurisdiction, to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or void.”

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

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

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

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

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

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

[28] It is, therefore, evident that not only do contemnors demean the integrity and authority of Courts, but they also deride the rule of law. This must not be allowed to happen. We are also conscious of the standard of proof in contempt matters. The standard of proof in cases of contempt of Court is well established. In the case of Mutitika v. Baharini Farm Limited [1985] KLR 229, 234 the Court of Appeal held that:

*“In our view, the standard of proof in contempt proceedings must be higher than proof on the balance of probabilities, almost but not exactly, beyond reasonable doubt...The standard of proof beyond reasonable doubt ought to be left where it belongs, to wit, in criminal cases. It is not safe to extend it to an offence which **can be said to be quasi-criminal in nature.**”*

[29] The rationale for this standard is that if cited for contempt, and the prayer sought is for committal to jail, the liberty of the contemnor will be affected. As such, the standard of proof is higher than the standard in civil cases. This power, to commit a person to jail, must be exercised with utmost care, and exercised only as a last resort. It is of utmost importance, therefore, for the respondents to establish that the alleged.” contemnor’s conduct was deliberate, in the sense that he or she willfully acted in a manner that flouted the Court Order.”

28. In the case of **Republic v County Chief Officer, Finance & Economic Planning, Nairobi City County (Ex Parte David Mugo Mwangi) [2018] eKLR**, the Court made the following observations;

*“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 honorable 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. Rital 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.....”

*“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.”

29. I think I have made enough reference to case law to demonstrate that obedience of court orders is a serious matter. Any lapse in enforcement of court orders is a sure invite to a total breakdown of law and order and the rule of law as we know it. The inevitable result would be anarchy and an erosion of our social fabric. This court has an obligation to stand firm and guard against such an eventuality. This, it would achieve, by strict enforcement of its orders. There is evidence that the respondent is the officer obligated to settle the decree herein. He has knowledge of the order. He has not settled the amount or explained inability to pay or sought flexible payment terms. On the whole no compelling reasons have been brought before this Court as to why the Respondent has failed to comply with this court’s order dated 21st June 2021. It is safe to infer that that the respondent’s conduct is deliberate, in the sense that he has *willfully acted in a manner that flouted the Court Order.*

30. I find the respondent in contempt of the orders of this court for which he should be punished. Accordingly, I order that Mr. Ben Katungi appear in person before this court on 25th April 2022 to show cause why he should not be committed to civil jail. In default of appearance, a warrant of arrest is to issue. The Applicant will have the costs of the application.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 21ST DAY OF APRIL 2022.

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A. K. NDUNG’U

JUDGE



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