



Otieno, Ragot & Co Advocates v County Secretary, County Government of Kisumu & 2 others (Miscellaneous Civil Application E185 of 2022) [2023] KEHC 19475 (KLR) (27 June 2023) (Judgment)

Neutral citation: [2023] KEHC 19475 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
MISCELLANEOUS CIVIL APPLICATION E185 OF 2022**

MS SHARIFF, J

JUNE 27, 2023

BETWEEN

OTIENO, RAGOT & CO ADVOCATES APPLICANT

AND

**COUNTY SECRETARY, COUNTY GOVERNMENT OF KISUMU 1ST
RESPONDENT**

**COUNTY EXECUTIVE MEMBER FINANCE, COUNTY GOVERNMENT OF
KISUMU 2ND RESPONDENT**

COUNTY GOVERNMENT OF KISUMU 3RD RESPONDENT

JUDGMENT

1. This ruling is in relation to the application dated November 21, 2022 in which the applicant seeks the following reliefs;
 - a. The court does find the respondents in contempt of the court for willful disobedience of the orders of the court made on September 29, 2022.
 - b. Upon finding as above, the court be pleased to direct that the 1st and 2nd respondents be arrested and they be sentenced to serve such a prison sentence for such a period of time as the court may in its discretion direct for being in contempt of the orders made on September 29, 2022.
 - c. further to the above, the court be pleased to impose fine or mete out such additional punishment as it may deem appropriate to the respondents.
 - d. Upon finding the persons named in contempt of court, the court be pleased to direct them to purge the contempt in such a manner as the court may direct



failing which they be denied any further audience until such a time as they will have purged the contempt.

e. Costs of the application.

2. The application is grounded on the fact that the applicant's bill of costs in respect of services rendered in Kisumu HCC 26 of 2005 was taxed on November 27, 2020 in the sum of Kshs 377,873, 193.40. Subsequently, a certificate of costs was issued on 23/2/2021 and adopted as a judgement of the court on 9/6/2021. Thereafter, the applicant extracted a certificate of costs against government but the respondents have not complied yet.
3. The applicant subsequently filed a Judicial Review Application No. Kisumu HC Misc No. 83 of 2020 for orders of mandamus which was allowed and a decree issued compelling the respondent to pay up the judgment sum. The decree was duly served upon the respondents who have persistently failed comply thereto to the applicant's detriment.
4. The respondents opposed the application through the replying affidavit of Edris Omondi, the 3rd respondent's principal legal advisor who depones inter alia that the respondents have never been served with an order in relation to the application and has not known the process served who deponed having carried out the service. He disputes their advocates attending court on 29/9/2022 and have never given any undertaking on the payment of the sum since there was nothing in that day's proceedings that could have warranted an undertaking.
5. He depones that the orders sought cannot issue for the reason that; service was not effected upon himself, there is no proof of contempt of the orders given on 10/12/2018, there are no interim orders currently in force against the respondents, the orders made on 24/10/2022 is defective for not carrying the mandatory penal notice, the orders were ambiguous and finally that it is unconscionable to punish the respondents for acts they were not aware of.
6. The application was canvassed by way of written submissions. The applicant submits that the respondents were duly served by way of mail and physically. That even then, their counsel was in court on the date judgement was delivered. That in light of that, the respondents cannot feign non-service. That in any event, as held in *Oilfield Movers Limited v Zahara Oil and Gas Limited* (2020) eKLR, personal service and service is no longer a prerequisite for successful prosecution of contempt. Further reliance is placed on the authority in *Shimmers Plaza Limited v National Bank of Kenya* (2015) eKLR.
7. That despite knowledge of the contents of the order, the respondents have failed to comply and they should therefore purge the contempt by paying up the sum.
8. The respondent on the issue of whether service was effected upon them, that the process server did not state the specific person who was served with the order. Reliance is placed on the authority in *Yalwala v Indimuli* (1989) KLR 373 and *James Kanyita Nderitu & another v Marios Philotas Ghikas & another* (2016) eKLR.
9. On the issue of whether the service on the unnamed clerk was sufficient, it is contended that this failure offends the law on personal service and the guidelines given in *Republic v Business premises tribunal & 2 others* (2014) eKLR.
10. On whether knowledge of the order supersedes service, it is argued that the respondents had no knowledge of the order and they had made no undertaking in relation to compliance with the order. Reliance is sought in *Nyamodi Ochieng Nyamogo & another v Kenya Posts and Telecommunication Corporation* Nbi Civil Appeal No. 264 of 1993.



11. On whether the respondents failed to comply with the terms of the order, it is submitted that there was no evidence that the respondents were served with the order and therefore no order to be complied with.
12. On whether the failure to comply with the order was deliberate, it is argued that the duty of establishing that the respondent's conduct was willful is upon the applicant. That in the instant case, the applicant has not adduced any evidence that the respondents acted willfully. The authorities in *Sheila Cassat Issenberg & another v Anthony Macatha Kinyanjui* (2021) eKLR and *Samuel M.N.Mweru & others v National Land Commission & 2 others* (2020) eKLR.

Analysis and determination.

13. The application before me is that of contempt of court by the respondents who have failed to make payment to the applicant despite court orders to that effect. The respondents' opposition is basically anchored on the contention that the order directing them to pay the applicant was not served upon them.
14. Basically, the issue revolves around the order given by this court on 29/9/2022 issued by the court. According to the annexures supplied by the applicant, the proceedings of 29th September, 2022 is in relation to J.R Application Number E013 of 2021 which was coming up for judgement on that day. In that day's proceedings, Mr David Otieno advocate appeared for the applicant and Ms Awuor Otieno appeared for the respondents.
15. As contended by the respondents, they were not served with the order requiring them to settle the amount. My attention on this issue has been drawn to 2 authorities thus; *Shimmers Plaza Limited v National Bank of Kenya Limited* [2015] eKLR where it was held that –

“Would the knowledge of the judgment or order by the advocate of the alleged contemnor suffice for contempt proceedings” We hold the view that it does. This is more so in a case such as this one where the advocate was in Court representing the alleged contemnor and the orders were made in his presence. There is an assumption which is not unfounded, and which in our view is irrefutable to the effect that when an advocate appears in court on instructions of a party, then it behoves him/her to report back to the client all that transpired in court that has a bearing on the client's case.”
16. The other one is *Basil Criticos v Attorney General and 8 others* [2012] eKLR Lenaola J. (as he then was) pronounced himself as follows:-

“... the law has changed and as it stands today knowledge supersedes personal service where a party clearly acts and shows that he had knowledge of a Court Order; the strict requirement that personal service must be proved is rendered unnecessary.”
17. A perusal of the record of proceedings reveals that at the time of delivery of judgement giving rise to the orders, the respondents were well represented by counsel and the service of the order upon them was additional notice, otherwise the presence of their counsel in court when the order was made is sufficient knowledge of the existence of the said order.
18. The order issued on that day compelled the 1st and 2nd respondents to pay the applicant the decretal sum specified in that decree. The respondents deny service upon them of this order.



19. As stated by case law, the ingredients to be satisfied before one successfully prosecutes a contempt application was stated by Mativo j in *Samuel M. N. Mweru* (*supra*) where the learned judge held;

It is an established principle of law that in order to succeed in civil contempt proceedings, the applicant has to prove;

- (i) the terms of the order,
- (ii) Knowledge of these terms by the Respondent,
- (iii) Failure by the Respondent to comply with the terms of the order.

Upon proof of these requirements the presence of willfulness and bad faith on the part of the Respondent would normally be inferred, but the Respondent could rebut this inference by contrary proof on a balance of probabilities.

.....:-

There are essentially four elements that must be proved to make the case for civil contempt. The applicant must prove to the required standard (in civil contempt cases which is higher than civil cases) that:-

- (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; and
- (d) the defendant's conduct was deliberate.”

20. On the first ingredient, there is no doubt about the terms of the order; the order as exhibited by the applicant required that the 1st and the 2nd respondents to pay the applicant sums of money contained therein. To the contrary, the respondents argue that the order is ambiguous for failure to carry the mandatory penal notice.
21. The second ingredient relates to the knowledge of the terms of the order. There is no doubt the respondents participated in the proceedings and their advocate was in court on the day of the judgement. There cannot be any doubt the terms were understandable to them.
22. On the failure by the respondents to comply with the terms of the order, the respondents merely maintained that they had no knowledge of the order and that the order was ambiguous. Having found in the preceding paragraphs that the respondents actually had notice of the order, I find that the respondents cannot feign ignorance and say that they have failed to perform as ordered due to want of knowledge of the existence of the order. The persistent non-compliance by the Respondents has not been explained at all in their response to this application.
23. In the circumstances of the matter herein and the available evidence, I am inclined to find that the applicant has made out a case sufficient to find the respondents in contempt of court. I therefore proceed to find that the 1st and 2nd respondents being employees of the 3rd respondent are in contempt of the court's orders made on September 29, 2022 and issued on October 24, 2022.
24. The 1st and 2nd respondents in their personal capacities and as holders of the respective offices are directed to appear in court on 6th day of June 2023 for purposes of sentencing.



DELIVERED, DATED AND SIGNED AT KISUMU THIS 27TH DAY OF JUNE 2023.

MWANAISHA. S. SHARIFF

JUDGE

In the presence of :

M/S Oduor holding brief for Mt Otieno David for the Applicant/Advocates

N/A by Mtalaki Law Advocates LLP for the Respondents

