Kiragu (Suing as administrator of the Estate of the Late Samuel Kiragu Michuki) v Governor, Nairobi City County & another (Application 20 of 2015) [2023] KEHC 22834 (KLR) (Judicial Review) (29 September 2023) (Ruling)

Neutral citation: [2023] KEHC 22834 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

JUDICIAL REVIEW

APPLICATION 20 OF 2015

J NGAAH, J

SEPTEMBER 29, 2023

BETWEEN

MOLLY WAMBUI KIRAGU ..... APPLICANT

SUING AS ADMINISTRATOR OF THE ESTATE OF THE LATE SAMUEL KIRAGU MICHUKI

AND

GOVERNOR, NAIROBI CITY COUNTY ..... 1ST RESPONDENT

COUNTY SECETARY, NAIROBI CITY COUNTY ..... 2ND RESPONDENT

RULING

1. The application before court is the applicant's motion dated 25 April 2022 expressed to be filed under Order 51 Rule 1 of the Civil Procedure Rules,2010, Section 3A of the *Civil Procedure Act* and Sections 4(1)(a),5,30 of the *Contempt of Court Act*, 2016. The application seeks the following orders:

    1. That a Notice to Show Cause does issue to the 1st and 2nd Respondents/Contemnors to show cause why contempt of court proceedings should not be commenced against them for disobedience of the orders of this Honourable Court (Hon. Justice G.V. Odunga) issued on 20th November,2015.

    2. That this Honourable Court does issue such orders as it may deem fit to grant in the interest of justice.

    3. That the costs of this Application be provided for."

2. The application is supported by an affidavit sworn by the applicant on 25 April,2022. The applicant has introduced herself as the "administrator" (sic) of the estate of the late Samuel Kiragu Michuki.

3. According to Kiragu, she obtained a decree against Nairobi City Council in this Honourable Court, being High Court Civil Suit No. 1239 of 1995 against Nairobi City Council of Nairobi and one David Mutava Mulwa. The decree was in the following terms:

    a. The judgment be entered in favour of the Plaintiff (Molly Wambui Kiragu Suing as: Administrator of the Estate of the late Samuel Kiragu Michuki) against the Defendants (David Mutava Mulwa—1st Defendant and City Council of Nairobi (now Nairobi City County-2nd Defendant) jointly and severally.

    b. The deceased (Samuel Kiragu Michuki) was the rightful owner of Plot No.B43 Sec.2.

    c. A mandatory injunction was issued directing and compelling the Defendants to put the Plaintiff in possession of Plot No. B43 Sec.2.

    d. A mandatory injunction was issued directing and compelling the 15t Defendant to, remove any structures that he may have put on Plot No. B43 Sec.2.

    e. A permanent injunction was issued restraining the 1st and 2nd defendants, their servants or agents from interfering with the plaintiff's quiet possession of Plot No. B43 Sec.2.

    f. The Plaintiff was to be allocated an alternative plot within the same vicinity or be paid the market and/or commercial value of a similar plot by the 2nd Defendant.

    g. The Defendants were to jointly and severally pay the Plaintiff the costs of the suit to be taxed off and certified by the taxing Officer of this Honourable Court."

4. The Nairobi City Council or its successor, the County Government of Nairobi did not comply and settle the decree and so the applicant instituted the present suit in which she obtained an order of mandamus on 20 November 2015 compelling Nairobi City County to satisfy the decree. But the respondents have not complied with this order hence the instant application.

5. On service of the order to the respondents, the applicant has sworn that her advocates wrote to the respondents on two separate occasions more particularly on 11 January 2017 and 13 March 2017 asking them to comply with the decree issued on 8 September, 2009 in High Court Civil Case No. 1239 of 1995.

6. The respondents opposed the application and filed a preliminary objection in which they urged that the application offends Section 21 of the *Government Proceedings Act* cap 40 and that the applicant is not clear on what the respondents are in contempt of. The respondents have also urged that the respondents are not aware of the existence of the order compelling them to settle the decree in issue and that the application is, in any event, res judicata.

7. Besides the preliminary objection, the respondents also filed grounds of objection which are, more or less a replica, of the grounds raised in the preliminary objection.

8. Without delving much into the parties' written submissions, it is apparent from the applicant's own pleadings and affidavits that the order which the respondents are alleged to be in contempt was not served upon the respondents. What the applicant's counsel is said to have written to the respondents about is the decree obtained in High Court Civil Case No. 1239 of 1995.

9. For the avoidance of doubt, this is what the applicant has sworn in her own affidavit as far as service of the order is concerned:

> "7. That on 12 January 2017 the respondents herein were served with a letter dated 11th January 2017 by my advocates on record and which letter they acknowledged receipt. The said letter demanded that they do comply with the decree issued on 8th September, 2009 in High Court Civil Case Number 1239 of 1995 as directed by this Honourable Court in this suit. (Annex's herein and marked "MWK-3" is a copy of the said letter).
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> 8. That after about two (2) months, having not received any response from the respondents, the respondents herein were on 15th March 2017 again served with another letter dated 13th March, 2017 by my advocates on record and which they also acknowledged receipt. The said letter was a reminder to them of the letter dated 11th January, 2017 which had been served upon them but which had not elicited any response from them and whose content is as outlined in paragraph 7 herein above. The said letter dated 13th March 2017, also gave notice to the respondents that if they did not comply with the orders of this Honourable Court as stated herein above, contempt proceedings were going to be instituted against them. (Annexed herein and marked and marked MWK-4 is a copy of the said letter).

10. Assuming that the respondents were served with the decree issued in High Court Civil Case No. 1239 of 1995, contempt of court proceedings could only have been instituted in that suit and not in this suit. This suit, as both parties agree, was for an order for mandamus to compel the respondents to comply with the decree issued in High Court Civil Case No. 1239 of 1995. I am not convinced that it was even necessary, in the first place, for the applicant to institute this suit ostensibly to enforce the decree in High Court Civil Case No. 1239 of 1995. Contempt of court proceedings could properly have been taken in that earlier suit, in my humble view.

11. But that is beside the point. The point here is this- while respondents are alleged to be in contempt of the order of mandamus made in these proceedings by Odunga, J. (as he then was) on 20 November 2015, the applicant says that her counsel wrote to the respondents about the decree in High Court Civil Case No. 1239 of 1995. There is no evidence and neither has any suggestion been made that the respondents were served with order of 20 November 2015.

12. In contempt of court proceedings, service of the order the alleged contemnors are said to be in contempt of is crucial.

13. In the case of Nyamodi Ochieng Nyamogo & Another versus Kenya Posts & Telecommunications Corporation (1994) eKLR, the Court of Appeal considered the twin issues of the necessity for personal service of both the order and the application for contempt and the endorsement on the face of the order with what is popularly referred to as 'the penal notice', As far as service is concerned the Court of Appeal noted as follows:

> The law on the question of service of order stresses the necessity of personal service. In Halsbury's Laws of England (4th Ed) Vol 9 on p 37 para 61 it is stated:
>
> "61. Necessity of personal service.
>
> As a general rule, no order of court requiring a person to do or abstain from doing any act may be enforced unless a copy of the order has been served personally on the person required to do or abstain from doing the act in question ..."

> Where the order is made against a company, the order may only be enforced against an officer of the company if this particular officer has been served personally with a copy of the order ..."

14. Service of the order alleged to have been violated in this case had been served on the alleged contemnors' advocates; the court said of this service as follows:

> Keeping the importance of personal service of the order in mind we now take a look at the aforesaid two copies of the order both of which bear the stamp of Wetangula & Co Advocates, in acknowledgement of receipt of the said orders. Service on Wetangula & Co does not constitute personal service on any of the three officers. It is a personal service on each one of them that is required to be effected by law. Service of the two orders on Wetangula & Co, Advocates, on 25th October, 1993, and 1st November, 1993, therefore, is a wasted effort."

15. The court described personal service as "an elementary but mandatory procedural rule which in contempt proceedings has (been) prescribed "personal service".

16. And on the need for endorsement of the order with the requisite warning of penal consequences, the court stated as follows:

> "Mr Lakha pointed out other flaws to which we will now turn our attention. He referred to the order and also to the application itself and pointed out the absence of a notice in the form of an endorsement thereon of penal consequences. It is not disputed that the copies of the order alleged to have been served on the three alleged contemnors and handed in by Mr Nowrojee during the hearing (instead of having been annexed to the application) do not bear any such endorsement of penal consequence. Section 5(1) of the *Judicature Act* has given this Court the same power to punish for contempt of court as is for the time being possessed by the High Court of Justice in England. In England rule 5 of order 45 R S C 1982 Ed, governs the method of the enforcement by the Court of its judgments or orders in circumstances amounting to contempt of court (p766). Order 45/7 deals with matters relating to "Service of copy of judgment, etc, pre-requisite to enforcement under rule 5". (The underlining is ours). The relevant procedural obligation is succinctly stated in order 45 rule 7/5 of the RSC 1982 Ed as follows:
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> > "It is a necessary condition for the enforcement of a judgment or order under rule 5 by way of sequestration or committal, that the copy of the judgment or order served under this rule should have the requisite penal notice indorsed thereon."
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> "And a couple of paragraphs later is given the form that an endorsement is required to take, in the following words in the case of a judgment or order requiring a person to abstain from doing an act:
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> > "If you, the within named A B disobey this judgment (or order) you will be liable to process of execution for the purpose of compelling you to obey the same."
>
> "A similar form with suitable alterations is given in the case of an order against a corporation.

This Court in Court of Appeal Civil Appeal No 95/1988 Mwangi H C Wang'ondu v Nairobi City Commission (UR) confirmed the mandatory nature of the requirement of endorsement of notice of penal consequence on the order in the following words:

> "In the present case, according to the affidavit of the appellant sworn on 26th January, 1988, in support of his application, the order alleged to have been disobeyed by the respondent was served on the respondent on 31st August, 1987, and a copy of that order which was annexed to the affidavit did not carry a notice of the penal consequences of disobedience as required by the Rules. It is clear from this that the appellant did not comply with the mandatory provisions of section 5(1) of the *Judicature Act* with the result that his application was incompetent. It must follow that there was no valid application for contempt of court before the judge."

17. The court concluded its discussion on this point by stating as follows:

18. As the copies of the orders produced before us are not so endorsed as required under the mandatory provisions of section 5(1) of the *Judicature Act* (cap 8) this application is incompetent and deserves to be dismissed on this account also.

19. This second aspect of endorsement of the order with the penal notice is of little relevance in this application having come to the conclusion that the order, the basis of the applicant's quest for contempt proceedings, was not served.

20. Another deficiency that I have noted in the applicant's application is that it is made under a law that was declared unconstitutional. The *Contempt of Court Act* No. 46 of 2016 which the applicant has invoked was declared unconstitutional in November 2018 in Kenya Human Rights Commission versus Attorney General & Another (2018) Eklr. I am not aware of any decision in the Court of Appeal that overturned the judgment in this case and if there is any, it was not brought to my attention by any of the parties.

21. For the foregoing reasons, I am inclined to come to the conclusion that the applicant's application is incompetent and bad in law. It is hereby dismissed. I make no orders as to costs. It is so ordered.

Signed, dated and delivered on 29 September 2023

Ngaah Jairus

JUDGE