



**Rono v Principal Secretary, Ministry of Defence & another (Application 113 of 2018)  
[2023] KEHC 22868 (KLR) (Judicial Review) (29 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 22868 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
JUDICIAL REVIEW  
APPLICATION 113 OF 2018  
J NGAAH, J  
SEPTEMBER 29, 2023**

**BETWEEN**

**JOHN CHERUIYOT RONO ..... APPLICANT**

**AND**

**PRINCIPAL SECRETARY, MINISTRY OF DEFENCE ..... 1<sup>ST</sup> RESPONDENT**

**HONOURABLE ATTORNEY GENERAL ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. The application before court is a motion dated 28 July 2021 expressed to be filed under section 5 of the [Judicature Act](#), section 3 and 3 A of the [Civil Procedure Act](#) and Order 51 Rule 1 of the [Civil Procedure Rules](#). The prayers in the motion have been phrased as follows:
  - “(a) That the hon Permanent Secretary Ministry of Defence Dr. Ibrahim Mohammed be cited for contempt of court for disobeying the orders of this honourable court issued on October 7, 2020 and be committed to civil jail for a term of six (6) months and or be ordered to purge the contempt on this courts terms that deems fit (sic).
  - (b) summons be issued against the said respondent Dr. Ibrahim Mohamed the Permanent Secretary for Ministry of Defence to appear before this honourable court and show cause why he should not be committed to civil jail for such a time as the Court may deem fit and just.



(c) that the said Hon. Dr. Ibrahim Mohammed Permanent Secretary Ministry of Defence be compelled to abide by the orders issued on October 7, 2020 within such a time as the Honourable Court may deem fit.”

2. The applicant has also sought for the order for costs of the application.
3. The application is supported by the affidavit of John Cheruiyot Rono. He has sworn that judgment in this matter was issued on 7 October 2020. The respondents have failed to comply with the judgment and make the payment and it is for this reason that he seeks the 1<sup>st</sup> respondent to be committed to civil jail for contempt of court.
4. The respondents did not appear and neither did they file any response to the application. However, the application still has to be determined on its own merits.
5. Disobedience of a court order or judgment is the foundation for contempt of court proceedings against the contemnor. It is, therefore, a necessary prerequisite that before one is held to be in contempt it must be demonstrated that he was aware of the order or judgment he is alleged to be in contempt of.
6. There is an affidavit of service filed by the applicant’s process server in which he has sworn that the respondent was served personally. Since this is not contested, the court would proceed on the assumption that indeed the 1<sup>st</sup> respondent was served.
7. But personal service is just one of the conditions that an applicant has to meet in contempt of court proceedings. The other condition is a warning to the alleged contemnor of the penal consequences that may ensue if the order is not complied with. In this regard, there has to be permanently displayed on the front copy of the judgment or order served a warning to the person required to do or not to do the act in question that disobedience to the order would be contempt of court punishable by imprisonment, a fine or sequestration of assets. It has been held that without this display, the judgment or order may not be enforced unless it is an undertaking contained in a judgment or order.
8. The need to comply with these conditions, amongst other conditions, is a question that has been settled by the Court of Appeal in its previous decisions where this question has arisen.
9. In the case of *Nyamodi Ochieng Nyamogo & Another versus Kenya Posts & Telecommunications Corporation* (1994) eKLR, for instance, 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 of what with what is popularly referred to as ‘the penal notice’ were discussed. 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 ...”



The court further noted:

“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.”

10. The court described personal service as “an elementary but mandatory procedural rule which in contempt proceedings has (been) prescribed “personal service”.
11. 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:

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.

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:

“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’onde 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.”

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

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.

13. The applicant’s application falls short of the second condition. The decree that was served was not endorsed with the penal notice. As the Court of Appeal has clearly stated, where the order or decree is not clearly endorsed with the penal notice, the application is incompetent and has to be dismissed. Accordingly, the applicant’s application is hereby dismissed. Considering that the decree has not been settled, I make no order as to costs. It is so ordered.

**SIGNED, DATED AND DELIVERED AT NAIROBI ON 29 SEPTEMBER 2023**

**NGAAH JAIRUS**

**JUDGE**

