



**SMEC International Property Limited v Principal Secretary, Ministry of East African
Community and Regional Development & another (Application E025 of 2021)
[2023] KEHC 22837 (KLR) (Judicial Review) (29 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 22837 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
APPLICATION E025 OF 2021
J NGAAH, J
SEPTEMBER 29, 2023**

BETWEEN

SMEC INTERNATIONAL PROPERTY LIMITED APPLICANT

AND

**PRINCIPAL SECRETARY, MINISTRY OF EAST AFRICAN COMMUNITY
AND REGIONAL DEVELOPMENT 1ST RESPONDENT**

ATTORNEY GENERAL 2ND RESPONDENT

A contempt of court order without a penal notice warning is not enforceable

The main issues for determination were what was the applicable law for contempt of court in Kenya and what was the procedure of serving a notice for contempt of court. The High Court held that with the repeal of the Contempt of Court Act, the operational laws and procedures for contempt of court was section 5 of the Judicature Act which referenced Laws of England. As such courts were obliged to follow the procedure set out in the Civil Procedure (Amendment No 2) Rules of England in contempt proceedings. On the notice, the High Court held that an order served upon contemnors notifying them that they were accused of contempt that was not endorsed with a penal notice warning the contemnors that disobedience of the order would be a contempt of court punishable by imprisonment or a fine was not enforceable.

Reported by John Ribia

Statutes – operational law – contempt of court – operational law after the repeal of the Contempt of Court Act - with the repeal Contempt of Court Act, what were the operational laws and procedures for contempt of court in Kenya - whether an order served upon contemnors notifying them that they were accused of contempt that was not endorsed with a penal notice warning the contemnor that disobedience of the order would be a contempt of court punishable by imprisonment or a fine was enforceable – Judicature Act (cap 8) section 5; Civil Procedure Act (cap 21) section 1A; Civil Procedure Rules, 2010, (cap 21 Sub Leg) Order 51 Rule 1; Civil Procedure (Amendment No 2) Rules of England, 2012 rule 81.



Civil Practice and Procedures – contempt of court – notice – penal notice warning the contemnor that contempt of court was punishable by imprisonment - whether an order served upon contemnors notifying them that they were accused of contempt that was not endorsed with a penal notice warning the contemnor that disobedience of the order would be a contempt of court punishable by imprisonment or a fine was enforceable - Civil Procedure Act (cap 21) section 1A; Civil Procedure Rules, 2010 (cap 21 Sub Leg) Order 51 Rule 1; Civil Procedure (Amendment No 2) Rules of England, 2012 rule 81.

Brief facts

It was the applicant's case that an order of *mandamus* was issued against the principal secretary, Ministry of East African Community and Regional Development compelling him to pay the amount of Kshs. 759,909/ = comprising a decretal amount and costs. The decree was served upon the respondent and the Attorney General's office on April 28, 2022. But as at the date of filing the application, the 1st respondent had not settled the decree. It was for that reason that the applicant has filed the instant application that sought orders for the principal secretary to be held in contempt and to be committed to civil jail.

Issues

- i. What were the operational laws and procedures for contempt of court in Kenya with the repeal Contempt of Court Act?
- ii. Whether an order served upon contemnors notifying them that they were accused of contempt that was not endorsed with a penal notice warning the contemnor that disobedience of the order would be a contempt of court punishable by imprisonment or a fine was enforceable.

Relevant provisions of the Law

Civil Procedure (Amendment No. 2) Rules, 2012 (Laws of England)

Rule 81. Enforcement of judgment, order or undertaking to do or abstain from doing an act

81.4 (1) *If a person—*

(a) *required by a judgment or order to do an act does not do it within the time fixed by the judgment or order; or*
(b) *disobeys a judgment or order not to do an act, then, subject to the Debtors Acts 1869(5) and 1878(6) and to the provisions of these Rules, the judgment or order may be enforced by an order for committal.*

(2) *If the time fixed by the judgment or order for doing an act has been varied by a subsequent order or agreement of the parties under rule 2.11, then references in paragraph (1)(a) to the time fixed are references to the time fixed by that subsequent order or agreement.*

(3) *If the person referred to in paragraph (1) is a company or other corporation, the committal order may be made against any director or other officer of that company or corporation.*

(4) *So far as applicable, and with the necessary modifications, this Section applies to undertakings given by a party as it applies to judgments or orders.*

(Rules 81.17(3) and (4) make provision for cases in which both this Section and Section 6 (Committal for making a false statement of truth or disclosure statement) may be relevant.)

(5) *If a judgment or order requires a person to deliver goods or pay their value—*

(a) *the judgment or order may not be enforced by a committal order under paragraph (1);*

(b) *the person entitled to enforce the judgment or order may apply to the court for an order requiring that the goods be delivered within a specified time; and*

(c) *where the court grants such an order, that order may be enforced under paragraph (1).*

Requirement for service of a copy of the judgment or order and time for service

81.5 (1) *Unless the court dispenses with service under rule 81.8, a judgment or order may not be enforced under rule 81.4 unless a copy of it has been served on the person required to do or not do the act in question, and in the case of a judgment or order requiring a person to do an act—*



- (a) the copy has been served before the end of the time fixed for doing the act, together with a copy of any order fixing that time;
 - (b) where the time for doing the act has been varied by a subsequent order or agreement under rule 2.11, a copy of that subsequent order or agreement has also been served; and
 - (c) where the judgment or order was made under rule 81.4(5), or was made pursuant to an earlier judgment or order requiring the act to be done, a copy of the earlier judgment or order has also been served.
- (2) Where the person referred to in paragraph (1) is a company or other corporation, a copy of the judgment or order must also be served on the respondent before the end of the time fixed for doing the act.
- (3) Copies of the judgment or order and any orders or agreements fixing or varying the time for doing an act must be served in accordance with rule 81.6 or 81.7, or in accordance with an order for alternative service made under rule 81.8(2)(b).

Method of service – copies of judgments or orders

81.6 Subject to rules 81.7 and 81.8, copies of judgments or orders and any orders or agreements fixing or varying the time for doing an act must be served personally.

Dispensation with personal service

81.8 (1) In the case of a judgment or order requiring a person not to do an act, the court may dispense with service of a copy of the judgment or order in accordance with rules 81.5 to 81.7 if it is satisfied that the person has had notice of it—

- (a) by being present when the judgment or order was given or made; or
 - (b) by being notified of its terms by telephone, email or otherwise.
- (2) In the case of any judgment or order the court may—
- (a) dispense with service under rules 81.5 to 81.7 if the court thinks it just to do so; or
 - (b) make an order in respect of service by an alternative method or at an alternative place.

Requirement for a penal notice on judgments and orders

81.9 (1) Subject to paragraph (2), a judgment or order to do or not do an act may not be enforced under rule 81.4 unless there is prominently displayed, on the front of the copy of the judgment or order served in accordance with this Section, a warning to the person required to do or not do the act in question that disobedience to the order would be a contempt of court punishable by imprisonment, a fine or sequestration of assets.

(2) An undertaking to do or not do an act which is contained in a judgment or order may be enforced under rule 81.4 notwithstanding that the judgment or order does not contain the warning described in paragraph (1).

How to make the committal application

81.10 (1) A committal application is made by an application notice under Part 23 in the proceedings in which the judgment or order was made or the undertaking was given.

(2) Where the committal application is made against a person who is not an existing party to the proceedings, it is made against that person by an application notice under Part 23.

- (3) The application notice must—
- (a) set out in full the grounds on which the committal application is made and must identify, separately and numerically, each alleged act of contempt including, if known, the date of each of the alleged acts; and
 - (b) be supported by one or more affidavits containing all the evidence relied upon.
- (4) Subject to paragraph (5), the application notice and the evidence in support must be served personally on the respondent.
- (5) The court may—
- (a) dispense with service under paragraph (4) if it considers it just to do so; or
 - (b) make an order in respect of service by an alternative method or at an alternative place.



Held

1. In order to convict for contempt of court it must be demonstrated to the satisfaction of court that the alleged contemnors were served with the order which they were accused to be in contempt of. The decree was served upon the contemnor. He swore an affidavit admitting that he was aware of the decree which he was alleged to be in contempt of. The question of whether he was served or not did not arise.
2. Although the order was served, it was lacking in one material respect: it was not endorsed with a penal notice warning the contemnor that disobedience of the order would be a contempt of court punishable by imprisonment or a fine. That omission would appear to be minor but it was an omission that was fatal to contempt of court proceedings.
3. Section 5 of the Judicature Act was the statutory basis upon which proceedings for contempt were taken. But the provision of the law said nothing more than remind the courts that the law to be applied was that applied in England and that a committal order could only be appealed against as if it was a criminal conviction. The Contempt of Court Act was declared unconstitutional in November 2018 in *Kenya Human Rights Commission versus Attorney General & Another* (2018) eKLR as it had been passed without public participation and was also held to be an affront to the independence of the judiciary. The result was that the courts reverted to Section 5 of the Judicature Act on matters contempt.
4. Section 5 of the Judicature Act had nothing much in it in terms of substance and procedure other than the obligation placed upon these courts to ascertain, at any given time, the law applicable in England for punishment and, certainly, the procedure for committal for contempt. In England, the procedure for contempt of court proceedings, including commencement, prosecution and punishment for contempt of court was, until 2012, encapsulated in Order 52 Rules 1 to 4 of the Rules of the Supreme Court of England(RSC). These Rules were made under the Supreme Court of Judicature Act, 1873, otherwise known as the Judicature Act, 1873. The Judicature Act, 1873 abolished a cluster of courts in England and Wales dating back to medieval periods, some with overlapping judicial powers, and in their place established the Court of Appeal, the High Court and the Crown Court all together to be known as the Supreme Court of Judicature. The Supreme Court of Judicature shouldn't be confused with the Supreme Court of the United Kingdom which was established only on October 1, 2009 to assume the judicial functions of the House of Lords. On October 1, 2012, the Civil Procedure (Amendment No. 2) Rules, 2012 came into force and Part 81 thereof effectively replaced Order 52 of the Rules of the Supreme Court in its entirety. That particular part provided different procedures for different form of violations.
5. Under English Laws the application notice and the affidavit or affidavits must be served personally on the respondent unless the court dispensed with service if it considered it just to do so, or the court authorizes an alternative method or place of service.
6. Whereas the Court of Appeal in *Woburn Estate Limited v Margaret Bashforth* [2016] eKLR, and *Christine Wangari Gachege versus Elizabeth Wanjiru Evans & 11 Others* (2014) eKLR suggested that courts in Kenya did not always have to keep tabs on the applicable law in England in order to punish for contempt. Until such a time that Kenya had its own locally made rules on procedure and prosecution of applications for contempt of court, the courts had to rely on the latest rules applicable in England, of with such modifications as were necessary and, at any rate, to the extent that they were applicable to Kenyan circumstances.
7. Despite the introduction of various statutory provisions upon which contempt of court proceedings could be founded, section 5 of the Judicature Act had neither been amended nor repealed. Section 38 of the Contempt of Court Act attempted to repeal it but, as earlier noted, that Act was declared unconstitutional and therefore section 5 of the Judicature Act remained intact. With its existence, the provision of the law remained a legitimate basis upon which courts embraced not only the substantive



law applicable in England in contempt of court applications but also the procedures that would be adopted in such applications.

8. Rule 81.9 Civil Procedure (Amendment No. 2) Rules, 2012 (Laws of England) provided that there shall 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. Without that display the judgment or order could not be enforced unless it was an undertaking contained in a judgment or order.
9. It was apparent on the face of the decree served upon the respondents, that there was no permanent display on the front copy of the order served a warning to the alleged contemnor that disobedience to the order would be contempt of court as prescribed by the rules.

Application dismissed with no orders as to costs.

Citations

Cases

Kenya

1. *Gachege, Christine Wangari v Elizabeth Wanjiru Evans & 11 others* Civil Application 233 of 2007; [2014] KECA 840 (KLR) - (Explained)
2. *Kenya Human Rights Commission v Attorney General & Law Society of Kenya* Constitutional Petition 87 of 2017; [2018] KEHC 9656 (KLR) - (Explained)
3. *Mwangi HC Wang'ondu v Nairobi City Commission* Civil Appeal No 95 of 1988 - (Explained)
4. *Nyamondi, Ochieng Nyamongo & another v Kenya Posts & telecommunications Corporation* Petition 204 of 1993; [1993] KECA 37 (KLR) - (Explained)
5. *Woburn Estate Limited v Margaret Bashforth* Civil Appeal 18 of 2015; [2016] KECA 472 (KLR) - (Explained)

Texts

Hogg, QM., (Lord Hailsham) et al (Eds) (1995), *Halsbury's Laws England* London: Butterworth 4th Edn Vol 17 para 13

Statutes

Kenya

1. Civil Procedure Act (cap 21) section 1A- (Interpreted)
2. Civil Procedure Rules, 2010 (cap 21 Sub Leg) order 51 rule 1 - (Interpreted)
3. Contempt of Court Act (cap 8F) In general - (Cited)
4. Government Proceedings Act (cap 40) section 21(3)- (Interpreted)
5. Judicature Act (cap 8) section 5, 5(1)- (Interpreted)

United Kingdom

1. Civil Procedure (Amendment No 2) Rules, 2012 part 81 - (Interpreted)
2. Contempt of Court Act, 1981 - In general (Cited)
3. Rules of the Supreme Court Rules, 1873 order 45 rules 5, 7; order 52 rules 1 - 4 - (Interpreted)
4. Supreme Court of Judicature Act (cap 66) In general- (Cited)

Advocates

None mentioned



RULING

1. The application before court is a motion dated June 16, 2022 expressed to be filed under section 5 of the Judicature Act, cap. 8 section 1A of the Civil Procedure Act and order 51 rule 1 of the Civil Procedure Rules. The applicant has also invoked section 21(3) of the Government Proceedings Act, cap. 40. Two principal prayers which the applicant seeks have been phrased as follows:
 - “2 That the principal secretary in the ministry of East African Community and Regional Development be held in contempt of court for failure to pay up on the *mandamus* decree dated March 29, 2022.
 3. That this honourable court commit the Principal Secretary in the Ministry of East African Community and Regional Development to civil jail for such period as this court shall deem necessary for being defiance (sic) of the orders of this honourable court.”
2. The application is supported by the affidavit of Chike Uchendu who has sworn that he is the general manager of the applicant company.
3. It is the applicant’s case that an order of *mandamus* was issued against the principal secretary, ministry of East African community and regional development compelling him to pay the amount of Kshs. 759,909/= comprising a decretal amount and costs.
4. The decree was served upon the respondent and the Attorney General’s office on April 28, 2022. But as at the date of filing the application, the 1st respondent had not settled the decree. It is for this reason that the applicant has filed the instant application.
5. Dr. Belio Kipsang, the Principal Secretary in the ministry of State Department for regional and Northern Corridor Development, Ministry of East African Community and Regional Development swore a replying affidavit opposing the application.
6. According to him, his aware that the judgement which the applicant seeks to enforce arises from Nairobi High Court Commercial Case No. 305 of 2017. He has gone further to state that is aware that the judgement was delivered on November 22, 2019 according to which the Ministry of East African Community was liable to pay the applicant 378.176 Australian dollars and that the interest on the above amount was to be calculated at LIBOR rate +2% together with costs which were assessed at Kshs. 759,909/=.
7. The ministry has on several occasions written to the National Treasury to release the funds to settle the decree but no allocations have been made yet for settlement of this decree. In summary, it is the 1st respondent’s position that he is not in a position to settle the decretal sum due to budgetary constraints. He urges that the decretal sum has remained unpaid not necessarily because of any ill will or hostility against the applicant but that he has taken active steps to settle the decree and that he will pay the full decretal sum as and when settlement funds are made available to it by the National Treasury. He is, therefore, seeking for more time to pay.
8. One of the important features of contempt of court proceedings is that in order to convict for contempt of court it must be demonstrated to the satisfaction of court that the alleged contemnors were served with the order which they are accused to be in contempt of. In this application there is no doubt that the decree was served upon the contemnor. He has sworn an affidavit admitting that he is aware of the



decree which he is alleged to be in contempt of. It follows that the question whether he was served or not does not arise.

9. Although the order was served, it is lacking in one material respect: it was not endorsed with a penal notice warning the contemnor that disobedience of the order would be a contempt of court punishable by imprisonment or a fine. This omission may appear to be minor but as will become clearer in due course, it is an omission that is fatal to contempt of court proceedings.
10. The law on this subject of contempt has been discussed by this honourable court and the Court of Appeal in several decisions. Every time this subject has arisen my first port of call has been section 5 of the *Judicature Act*, cap. 8 which, I note the applicant has invoked as one of the provisions under which its application has been made.
11. Section 5 of the *Judicature Act*, cap. 8 remains the statutory basis upon which proceedings for contempt are taken. But this provision of the law says nothing more than remind the courts that the law to be applied is that applied in England and that a committal order can only be appealed against as if it was a criminal conviction. It reads as follows:

Contempt of court

- (1) The High Court and the Court of Appeal shall have the same power to punish for contempt of court as is for the time being possessed by the High Court of Justice in England, and such power shall extend to upholding the authority and dignity of subordinate courts.
 - (2) An order of the High Court made by way of punishment for contempt of court shall be appealable as if it were a conviction and sentence made in the exercise of the ordinary original criminal jurisdiction of the High Court.
12. In *Christine Wangari Gachege versus Elizabeth Wanjiru Evans & 11 Others* [2014] eKLR the Court of Appeal reiterated that the only statutory basis for contempt of court as far as the Court of Appeal and the High Court are concerned is this provision of the law. It was optimistic, however, that the Kenya Contempt of Court Bill, 2013 which was then pending for tabling before parliament would be passed into law that would finally extricate us from the English law and practice in contempt of court applications. The Bill was indeed debated and as a result the *Contempt of Court Act* No. 46 of 2016 was enacted. This piece of legislation was, however, short-lived because it was declared unconstitutional in November 2018 in *Kenya Human Rights Commission versus Attorney General & Another* [2018] eKLR. Apparently, it had been passed without public participation and was also held to be an affront to the independence of the judiciary. The result was that we reverted to Section 5 of the Judicature Act on matters contempt.
 13. But as has been noted, a critical look of the provision of the law shows that there is nothing much in it in terms of substance and procedure other than the obligation placed upon these courts to ascertain, at any given time, the law applicable in England for punishment and, certainly, the procedure for committal for contempt. In discussing this point the court of Appeal noted that it is up to the Court of Appeal (and I add, the High Court too) to ascertain the applicable law of contempt in the High Court of Justice in England, at the time an application (for contempt) is brought. To this end the court adopted the words of H.G. Platt, J and DC Porter, Ag J (as they then were) In the matter of



an application by Gurbaresh Singh & Sons Ltd, Miscellaneous Civil Case No 50 of 1983 where they noted as follows:

“The second aspect concerns the words of section 5- “for the time being”, which appear to mean that this court should endeavour to ascertain the law in England at the time of the trial, or application being made. Sometimes it is not known, or may not be known exactly, what powers the court may have. It seems clear that the Contempt of Court Act 1981 of England is the prevailing law and the procedure is still that set out in order 52 of the Supreme Court Rules.”

14. The question that then follows is what was the position in England on this subject of contempt at time material to the applicant’s application.
15. In England, the procedure for contempt of court proceedings, including commencement, prosecution and punishment for contempt of court was, until 2012, encapsulated in order 52 rules 1 to 4 of the Rules of the Supreme Court (RSC). These Rules are made under the Supreme Court of Judicature Act, 1873, otherwise known as the Judicature Act, 1873. The Judicature Act, 1873 abolished a cluster of courts in England and Wales dating back to medieval periods, some with overlapping judicial powers, and in their place established the Court of Appeal, the High Court and the Crown Court all together to be known as the Supreme Court of Judicature. The Supreme Court of Judicature shouldn’t be confused with the Supreme Court of the United Kingdom which was established only on October 1, 2009 to assume the judicial functions of the House of Lords.
16. On October 1, 2012, the Civil Procedure (Amendment No. 2) Rules, 2012 came into force and Part 81 thereof effectively replaced order 52 of the rules of the Supreme Court in its entirety. This particular part provides different procedures for different form of violations. For instance:

Rules 81.4-committal for “breach of a judgment, order or undertaking to do or abstain from doing an act.”

Rule 81.11- Committal for “interference with the due administration of justice” (applicable only in criminal proceedings).

Rule 81.16 – Committal for contempt “in the face of the court”, and

Rule 81.17 - Committal for “making false statement of truth or disclosure statement.”

Rule 81.4 (breach of judgment, order or undertaking) would be a relevant rule in the present application. The Court of Appeal explained that the application must be made in the proceedings in which the judgment or order was made or the undertaking given. As far as its form is concerned, the court said “the application notice must set out fully the grounds on which the committal application is made and must identify separately and numerically, each alleged act of contempt and be supported by affidavit(s) containing all the evidence relied upon”.

17. Further “the application notice and the affidavit or affidavits must be served personally on the respondent unless the court dispenses with service if it considers it just to do so, or the court authorizes an alternative method or place of service”.
18. In a more recent decision in Woburn Estate Limited v Margaret Bashforth [2016] eKLR, the same Court of Appeal suggested that courts in Kenya do not always have to keep tabs on the applicable law in England in order to punish for contempt. While discussing its decision in Christine Wangari Gachege versus Elizabeth Wanjiru Evans & 11 Others (*supra*), the court held we need not keep our



ears to the ground on the trends of the law of contempt as applied and practised in English courts. Instead, we have sufficient legislation of our own on this subject and the only missing link are the rules of procedure.

19. My humble view is that until such a time that we have our own locally made rules on procedure and prosecution of applications for contempt of court, we still have to rely on the latest rules applicable in England, of course with such modifications as are necessary and, at any rate, to the extent that they are applicable to our circumstances. It is worth bearing in mind that despite the introduction of various statutory provisions upon which contempt of court proceedings may be founded, section 5 of the *Judicature Act* has neither been amended nor repealed. Section 38 of the *Contempt of Court Act* attempted to repeal it but, as earlier noted, that Act was declared unconstitutional and therefore section 5 of the *Judicature Act* remains intact. With its existence, this provision of the law remains a legitimate basis upon which courts embrace not only the substantive law applicable in England in contempt of court applications but also the procedures that would be adopted in such applications. This is so particularly in circumstances where our local legislation may be found lacking in some respect, in which event, there would be nothing wrong in resorting to the law and practice in the High Court of Justice in England.
20. On the particular question of enforcement of judgments and orders, besides rule 81. 4 of the *Civil Procedure (Amendment No. 2) Rules, 2012* which the Court of Appeal made reference to in *Christine Wangari Gachege versus Elizabeth Wanjiru Evans & 11 Others (supra)*, other rules (in the same Procedure Rules) which I find relevant where judgments or orders have been violated are rules 8.5, 8.6, 8.8, 8.9 and 8.10. It is necessary that I reproduce this whole set of rules verbatim for better understanding.

Rule 81. states as follows:

Enforcement of judgment, order or undertaking to do or abstain from doing an act

81.4

- (1) If a person—
 - (a) required by a judgment or order to do an act does not do it within the time fixed by the judgment or order; or
 - (b) disobeys a judgment or order not to do an act, then, subject to the Debtors Acts 1869(5) and 1878(6) and to the provisions of these Rules, the judgment or order may be enforced by an order for committal.
- (2) If the time fixed by the judgment or order for doing an act has been varied by a subsequent order or agreement of the parties under rule 2.11, then references in paragraph (1)(a) to the time fixed are references to the time fixed by that subsequent order or agreement.
- (3) If the person referred to in paragraph (1) is a company or other corporation, the committal order may be made against any director or other officer of that company or corporation.



- (4) So far as applicable, and with the necessary modifications, this section applies to undertakings given by a party as it applies to judgments or orders.

(Rules 81.17(3) and (4) make provision for cases in which both this section and section 6 (committal for making a false statement of truth or disclosure statement) may be relevant.)

- (5) If a judgment or order requires a person to deliver goods or pay their value—
- (a) the judgment or order may not be enforced by a committal order under paragraph (1);
 - (b) the person entitled to enforce the judgment or order may apply to the court for an order requiring that the goods be delivered within a specified time; and
 - (c) where the court grants such an order, that order may be enforced under paragraph (1).

Requirement for service of a copy of the judgment or order and time for service

81.5

- (1) Unless the court dispenses with service under rule 81.8, a judgment or order may not be enforced under rule 81.4 unless a copy of it has been served on the person required to do or not do the act in question, and in the case of a judgment or order requiring a person to do an act—
- (a) the copy has been served before the end of the time fixed for doing the act, together with a copy of any order fixing that time;
 - (b) where the time for doing the act has been varied by a subsequent order or agreement under rule 2.11, a copy of that subsequent order or agreement has also been served; and
 - (c) where the judgment or order was made under rule 81.4(5), or was made pursuant to an earlier judgment or order requiring the act to be done, a copy of the earlier judgment or order has also been served.
- (2) Where the person referred to in paragraph (1) is a company or other corporation, a copy of the judgment or order must also be served on the respondent before the end of the time fixed for doing the act.
- (3) Copies of the judgment or order and any orders or agreements fixing or varying the time for doing an act must be served in



accordance with rule 81.6 or 81.7, or in accordance with an order for alternative service made under rule 81.8(2)(b).

Method of service – copies of judgments or orders

81.6 Subject to rules 81.7 and 81.8, copies of judgments or orders and any orders or agreements fixing or varying the time for doing an act must be served personally.

Dispensation with personal service

81.8

- (1) In the case of a judgment or order requiring a person not to do an act, the court may dispense with service of a copy of the judgment or order in accordance with rules 81.5 to 81.7 if it is satisfied that the person has had notice of it—
 - (a) by being present when the judgment or order was given or made; or
 - (b) by being notified of its terms by telephone, email or otherwise.
- (2) In the case of any judgment or order the court may—
 - (a) dispense with service under rules 81.5 to 81.7 if the court thinks it just to do so; or
 - (b) make an order in respect of service by an alternative method or at an alternative place.

Requirement for a penal notice on judgments and orders

81.9

- (1) Subject to paragraph (2), a judgment or order to do or not do an act may not be enforced under rule 81.4 unless there is prominently displayed, on the front of the copy of the judgment or order served in accordance with this Section, a warning to the person required to do or not do the act in question that disobedience to the order would be a contempt of court punishable by imprisonment, a fine or sequestration of assets.
- (2) An undertaking to do or not do an act which is contained in a judgment or order may be enforced under rule 81.4 notwithstanding that the judgment or order does not contain the warning described in paragraph (1).

How to make the committal application

81.10

- (1) A committal application is made by an application notice under Part 23 in the proceedings in which the judgment or order was made or the undertaking was given.



- (2) Where the committal application is made against a person who is not an existing party to the proceedings, it is made against that person by an application notice under Part 23.
- (3) The application notice must—
 - (a) set out in full the grounds on which the committal application is made and must identify, separately and numerically, each alleged act of contempt including, if known, the date of each of the alleged acts; and
 - (b) be supported by one or more affidavits containing all the evidence relied upon.
- (4) Subject to paragraph (5), the application notice and the evidence in support must be served personally on the respondent.
- (5) The court may—
 - (a) dispense with service under paragraph (4) if it considers it just to do so; or
 - (b) make an order in respect of service by an alternative method or at an alternative place.

21. One of the salient features of these rules is captured in rule 81.9 that there shall 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. Without this display the judgment or order may not be enforced unless it is an undertaking contained in a judgment or order.

22. Many of the rest of the requirements are nothing new. They are, by and large, a carryover of the order 52 of the *Rules of the Supreme Court* and thus they have not only been existence prior to the commencement of the *Civil Procedure (Amendment No. 2) Rules, 2012* but they have also been litigated upon from time to time. 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 October 25, 1993, and November 1, 1993, therefore, is a wasted effort.”

23. The court described personal service as “an elementary but mandatory procedural rule which in contempt proceedings has (been) prescribed “personal service”.
24. 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.



25. This court in Court of Appeal Civil Appeal No 95/1988 *Mwangi HC 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 January 26, 1988, in support of his application, the order alleged to have been disobeyed by the respondent was served on the respondent on August 31, 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.”

26. 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.

27. As far as the applicant's application is concerned, it is apparent on the face of the decree served upon the respondents, that there is no permanent display on the front copy of the order served a warning to the alleged contemnor that disobedience to the order would be contempt of court as prescribed by the rules. In view of this omission and, taking into account what the law and authorities say, the inevitable conclusion that I have to come to is to dismiss the applicant's application. It is hereby dismissed.

28. I make no orders as to costs since the decree is yet to be fully satisfied. It is so ordered.

SIGNED, DATED AND DELIVERED AT NAIROBI ON 29 SEPTEMBER 2023

NGAAH JAIRUS

JUDGE

