Githinji v County Secretary Nairobi City County & another (Miscellaneous Application 151 of 2018) [2023] KEHC 22446 (KLR) (Judicial Review) (25 September 2023) (Ruling)

Neutral citation: [2023] KEHC 22446 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

JUDICIAL REVIEW

MISCELLANEOUS APPLICATION 151 OF 2018

J NGAAH, J

SEPTEMBER 25, 2023

BETWEEN

GEORGE MURIITHI GITHINJI ..... APPLICANT

AND

COUNTY SECRETARY NAIROBI CITY COUNTY ..... 1ST RESPONDENT

COUNTY TREASURER NAIROBI CITY COUNTY ..... 2ND RESPONDENT

RULING

1. By way of a motion dated 15 November 2021 expressed to be brought under Articles 48 and 159 of *the Constitution*; sections 1A, 1B, 3A and 63 of the *Civil Procedure Act*, cap. 21; and, section 5 of the *Judicature Act* cap. 8, the applicant has moved this Honourable Court for the following orders:

> " 1. That summons be issued ex parte against the 1st respondent, the County Secretary Nairobi City County to appear before this court to show cause why contempt of court proceedings should not be commenced against him for failure to comply with the order of mandamus issued on 10th June 2021.
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> 2. That summons be issued ex parte against the 2nd respondent, the County Executive Officer, Finance and Economic Planning Nairobi City County, to appear before this court to show cause why contempt of court proceedings should not be commenced against him for failure to comply with the order of mandamus issued on 10th June 2019.
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> 3. That the 1st respondent herein, the County Secretary Nairobi City County, be convicted for contempt of court and thereafter be committed to civil jail for

a period of six months for his disobedience of the orders of mandamus issued herein on 10th June 2019.

4. That the 2nd respondent herein, the County treasurer, County Executive Officer, Finance and Economic Planning Nairobi City County, be convicted for contempt of court and thereafter be committed to civil jail for a period of six months for his disobedience of the orders of mandamus issued herein on 10th June 2019."

2. Besides these orders, the applicant also sought for an order for the respondents to pay the costs of the application and for any other order that this Honourable Court may deem fit to grant.

3. The application is supported by the affidavit of George Muriithi Githinji.

4. The applicant's case is brief and straightforward. He obtained judgment against Nairobi City Council and two others in the magistrates' court, being Nairobi Chief Magistrate's Court Civil Case No. 6311 of 2008. The judgment was for a sum of Kshs. 319,000/= together with costs and interest. Subsequently, he obtained a decree on 17 October 2013 for the total sum of Kshs. 418, 218/=.

5. On 10 June 2019, the applicant instituted judicial review proceedings for the order of mandamus to compel the respondent to pay the decretal sum. This Honourable Court (Mativo, J. as he then was), granted the order of mandamus which was subsequently served upon the respondents on 9 February 2021. It is the applicant's case that at the time of filing the instant application, the order had not been complied with.

6. According to the applicants, the respondents are in contempt of court and ought to take responsibility for the disobedience of the court order. The applicant is said to have suffered and continues to suffer loss and prejudice on account of non-payment of the decree.

7. David Oseko filed a replying affidavit sworn on 14 January 2019 opposing the application. Oseko has sworn that he is the acting County Attorney in the Nairobi City County.

8. According to Oseko, the respondents were not aware of the alleged judgment entered against them until the applicants filed the suit, apparently out of which the order of mandamus was obtained.

9. Nonetheless, the applicant's advocates wrote to the Nairobi City County proposing an out-of-court settlement. The County is still open to this proposal and willing to settle the decree. As a matter of fact, the applicant's proposal had been forwarded to the chief finance officer who advised that the applicant's claim would be considered for payment in the June 2019/2020 budgetary circle.

Analsysis and determination

10. I have considered the parties' submissions I respect of the positions they have adopted on the applicant's motion.

10. 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 the instant application, an affidavit of service sworn on 9 February 2021 by one Mathew Mwanzia Paul, a court process server, states that on the material date, he received copies of a letter dated 3 February 2021 together with the court order dated 10 June 2019 issued in this cause and a decree dated 17 October 2013 issued in Milimani CMCC No. 6311 of 2008 from the firm of Mugo Githinji & Co. Advocates who instructed him to serve them upon the respondents.

11. Mwanzia has stated that he served the respondents in the following manner:

> " SUBPARA 3)
>
> That on the same day at about 09.00 am, I proceeded to the 1st respondent's offices located at City Hall 1st floor, where upon arrival at the reception I met a middle aged lady who introduced herself as Phyllis and I equally introduced myself to her and the purpose of visit. She confirmed to me that she had authority to receive the documents on behalf of the respondent.
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> 4) That later on the same day at about 09:30 am, I proceeded to the 2nd respondent's offices located at City Hall 1st floor, where upon arrival at the reception I was received by a middle aged lady who introduced herself as Aisha and I equally introduced myself to her and the purpose of visit. She confirmed to me that she had authority to receive the documents on behalf of the respondent.
>
> 5). That I tendered the said documents to them respectively which they accepted service by stamping on my copies."

12. What has been stamped as having been received, is the letter dated 3 February 2021. Neither the order of mandamus nor the copy of the decree bear any stamp showing that they were received by any of the respondents. There is, therefore, reasonable doubt that the respondents were served with the pertinent order of mandamus.

13. I note that neither the two respondents has sworn an affidavit denying that he was served with the order. However, in contempt proceedings, it is incumbent upon the applicant to prove that the alleged contemnor or contemnors were effectively served. Once there is sufficient proof of service, the burden shifts to the contemnors to prove that they were not served as alleged.

14. But even if it was to be assumed that the order was served, it was not endorsed with a penal notice warning the contemnorsthat disobedience of the order would be a contempt of court punishable by imprisonment, a fine or sequestration of assets. An order without this endorsement is lacking in its material respects and cannot enforced in contempt of court proceedings.

15. On these two grounds, the applicant's application is bound to fail.

16. The law on this subject of contempt has been discussed by this Honourable Court and the Court of Appeal in several decisions. One of the decisions in which I considered this issue was Judicial Review Application No. 67 of 2019 Vincent Malika Alushula versus Joseph Wairagu Irungu, Principal Secretary Ministry of Water and Sanitation & Attorney General.

17. Section 5 of the *Judicature Act*, cap. 8 remains the statutory basis upon which proceedings for contempt are taken. I note that the applicant has correctly invoked this particular provision in his application. 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.

18. In Christine Wangari Gachege v 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 v 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.

19. 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 D.C 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."

29. The court further interrogated what the "High Court of Justice of England" entails and noted that according to the court system in England, it is that level of the court that comprises three divisions; the Queen's Bench, the Chancery and the Family Divisions. The court's jurisdiction to punish for contempt of court is drawn from both the statute, which is the *Contempt of Court Act*, 1981 and the common law.

21. However, 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 court reminded us that the Supreme Court of Judicature shouldn't be confused with the Supreme Court of the United Kingdom which was established only on 1st October, 2009 to assume the judicial functions of the House of Lords.

22. It then summarised the procedure for contempt of court proceedings under Order 52 of the Rules of the Supreme Court Judicature as follows:

> " i. An application to the High Court of England for committal for contempt of court will not be granted unless leave to make such an application has been granted.
>
> ii. An application for leave must be made ex parte to a judge in chambers and be supported by a statement setting out the particulars of the applicant as well as those of the person sought to be committed and the grounds on which his committal is sought, and by an affidavit verifying the facts relied on.
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> iii. The applicant must give notice of the application for leave not later than the preceding day to the Crown Office.
>
> iv. Where an application for leave is refused by a judge in chambers the applicant may apply afresh to a divisional court for leave within 8 days after the refusal by the Judge.
>
> v. When leave has been granted, the substantive application by a motion would be made to a divisional court.
>
> vi. The motion must be entered within 14 days after the granting of leave; if not, leave shall lapse.
>
> vii. The motion together with the statement and affidavit must be served personally on the person sought to be committed, unless the Court thinks otherwise."

23. On 1 October 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).
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> 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".

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".

24. 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 stated as follows:

> "When Christine Wangari Wachege (supra) was decided on 14th February, 2014 the only substantive law with respect to the general power of the High Court or this Court to punish for contempt of court was section 5 of the *Judicature Act*. Of course, in respect of injunctions section 63 (e) of the Civil Procedure Rules, makes provisions. The practice has therefore with regard to the general powers, been to ascertain both the prevailing substantive law and procedure in England at the time the application was brought. Today that position has drastically changed, starting with the establishment of the Supreme Court which was not envisaged when section 5 of the *Judicature Act* was enacted. By Act No.7 of 2011, Article 163 (9) of *the Constitution* was operationalised by the enactment of the *Supreme Court Act* (CAP 9A), which among other things, makes express provision for the power of the Supreme Court to punish for contempt. Under section 29 of the *Environment and Land Court Act*, it is an offence punishable, upon conviction to a fine of not exceeding Kshs. 20,000,000 or to imprisonment for a term not exceeding two years, or to both, if any person refuses, fails or neglects to obey an order or direction of the court given under the Act. In contrast, under section 20 (7) and (8) of the *Employment and Labour Relations Court Act*, 2011 any person who without reasonable cause fails to comply with an order duly given in respect of attendance to court, furnishing of such particulars as may be required, giving of evidence before the court or producing of any relevant documents, or who when required by an order to furnish information or to make any statement or to furnish any information, knowingly gives the information or makes a statement which is false or misleading in material particular, commits an offence, and upon conviction is liable to a fine not exceeding one million shillings or to imprisonment for a term not exceeding two years or to both.

25. The *High Court (Organization and Administration) Act* which was passed in 2015 now expressly donates to the High Court the power to punish for the disobedience of its orders. It provides-

"36. (1) A person who –

a. assaults, threatens, intimidates or willfully insults a judge, judicial officer or a witness, involved in a case during a sitting or attendance in a court, or while the judge, judicial officer or witness is travelling to and from a court;

b. willfully and without lawful excuse disobeys an order or directions of the court in the course of the hearing of a proceeding;

c. within the premises in which any judicial proceeding is being heard or taken, or within the precincts of the same, shows disrespect, in speech or manner, to or with reference to such proceeding, or any person before whom such proceeding is being heard or taken;

d. having been called upon to give evidence in a judicial proceeding, fails to attend, or having attended refuses to be sworn or to make an affirmation, or having been sworn or affirmed, refuses without lawful excuse to answer a question or to produce a document, or remains in the

room in which such proceeding is being heard or taken after the witnesses have been ordered to leave such room;

e. causes an obstruction or disturbance in the course of a judicial proceeding;

f. while a judicial proceeding is pending, makes use of any speech or writing misrepresenting such proceeding or capable of prejudicing any person in favour of or against any parties to such proceeding, or calculated to lower the authority taken;

g. publishes a report of the evidence taken in any judicial proceeding that has been directed to be held in private;

h. attempts wrongfully to interfere with or influence a witness in a judicial proceeding, either before or after he or she has given evidence in connection with such evidence;

i. dismisses a servant because he or she has given evidence on behalf of a party to a judicial proceeding; or

j. commits any other act of intentional disrespect to any judicial proceedings, or to any person before whom such proceeding is heard or taken, commits an offence.

(2) .....

(3) A person who commits an offence under subsection (1) shall, on conviction be liable to imprisonment for a term not exceeding five days, or to a fine not exceeding one hundred thousand shillings, or to both.

(4) In exercise of its powers under this section, the Court shall observe the principles of fair administration of justice set out in Article 47 of *the Constitution*." (our emphasis)

26. Section 39 (2) (g) enjoins the Chief Justice to make Rules to provide for, among other things, the procedure relating to contempt of court. Purely as a matter of interest and comparison, section 35 of the *Court of Appeal (Organization and Administration) Act*, 2015, headed "Contempt of Court" stipulates that; -

"35. (1) Subject to the provisions of any other law, the Court shall have power to punish for contempt.

(2) A person who, in the face of the Court –

(a) assaults, threatens, intimidates, or insults a judge of the Court, the Registrar of the Court, a Deputy Registrar or officer of the Court, or a witness, during a sitting or attendance in Court, or in going to or returning from the Court;

(b) interrupts or obstructs the proceedings of the Court; or

(c) without lawful excuse disobeys an order or direction of the Court in the course of the hearing of a proceeding, commits an offence.

(3) In the case of civil proceedings, the willful disobedience of any judgment, decree, direction, order, or other process of a court or willful breach of an undertaking given to a court constitutes contempt of court.

(4) In the case of criminal proceedings, the publication, whether by words, spoken or written, by signs, visible representation, or otherwise, of any matters or the doing of any other act which –

(a) scandalizes or tends to scandalize, or lowers or tends to lower the judicial authority or dignity of the court;

(b) prejudices, or interferes or tends to interfere with, the due course of any judicial proceeding; or

(c) interferes or tends to interfere with, or obstructs or tends to obstruct the administration of justice, constitutes contempt of court.

(5) A police officer, with or without the assistance of any other person, may, by order of a judge of the Court, take into custody and detain a person who commits an offence under subsection (2) until the rising of the Court.

(6) The Court may sentence a person who commits an offence under subsection (1) to imprisonment for a period not exceeding six months, or a fine not exceeding five hundred thousand shillings, or both.

(7) A person may appeal against an order of the Court made by way of punishment for contempt of court as if it were a conviction and sentence made in the exercise of the ordinary original criminal jurisdiction of the Court." (our emphasis)

27. We have gone to this great length to demonstrate how, before the passage of these legislations the powers of the High Court and this Court to punish for contempt of court were dynamic and kept shifting depending on the prevailing laws in England. Today each level of court has been expressly clothed with jurisdiction to punish for contempt of court. The only missing link is the absence of the rules to be followed in commencing and prosecuting contempt of court applications. In order to completely emancipate ourselves from English law on contempt of court, the Chief Justice, as required under the aforesaid legislations ought to make rules for commencing and prosecuting applications for contempt of court."

28. Thus, 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.

29. 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 to be 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.

30. 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.

31. Some of what one would regard as salient features of these Rules are, in a summary way, as follows:

1. Disobedience of a court order or judgment is a foundation for contempt of court proceedings against the contemnor.
2. Where the contemnor is a company or other corporation, the committal order may be made against any director or other officer of that company.
3. The judgment or order in question must be served on the person required to do or not to do the act in question unless the court expressly dispense with personal service.
4. Where the person required to do or not to do an act is a company or other corporation, a copy of the judgment or order must also be served on the alleged contemnor.
5. Judgments and orders must be served personally.
6. The court may, however, dispense with personal service if it is satisfied that the contemnor had notice of the judgment or order:
    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.
7. The court may also dispense with personal service if it thinks it is just to do so or may make an order in respect of service by an alternative method or an alternative place.
8. 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.
9. The contempt of court application shall be made by an application notice in the same proceedings in which the judgment or order was made.

10. The application notice must 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 must also be supported by one or more affidavits containing all the evidence relied upon.

11. The application notice and the evidence in support must be served personally on the respondent although the court may dispense with service under paragraph (10) if it considers it just to do so; or may make an order in respect of service by an alternative method or at an alternative place.

32. Many of these 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 ..."

33. 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."

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

35. 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.

36. 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."

37. 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.

38. The applicant's application must be considered from the foregoing perspective.

39. As far as service of the order is concerned, I am not satisfied that the respondents were personally served.

40. The second reason why I find the applicant's application lacking is 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 punishable by imprisonment, a fine or sequestration of assets.

41. For these reasons, I decline the applicant's motion but I make no orders as to costs since the decree is yet to be fully settled. It is so ordered.

DATED, SIGNED AND DELIVERED ON 25 SEPTEMBER 2023

NGAAH JAIRUS

JUDGE