



**Republic v Attorney General & 4 others; Mwende (Exparte);  
Kilemba (Interested Party) (Application 343 of 2016)  
[2023] KEHC 26941 (KLR) (Judicial Review) (15 December 2023) (Ruling)**

Neutral citation: [2023] KEHC 26941 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
JUDICIAL REVIEW  
APPLICATION 343 OF 2016  
J NGAAH, J  
DECEMBER 15, 2023**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**ATTORNEY GENERAL ..... 1<sup>ST</sup> RESPONDENT**

**INSPECTOR GENERAL OF POLICE ..... 2<sup>ND</sup> RESPONDENT**

**REGIONAL POLICE OFFICER, NAIROBI ..... 3<sup>RD</sup> RESPONDENT**

**OCPD EMBAKASI ..... 4<sup>TH</sup> RESPONDENT**

**OCS REUBEN POLICE POST ..... 5<sup>TH</sup> RESPONDENT**

**AND**

**ANNE MWENDE ..... EXPARTE**

**AND**

**BERNARD IMOSIA KILEMBA ..... INTERESTED PARTY**

**RULING**

1. Before court is the applicant’s notice of motion dated 4 March 2019 but said to have been ‘further amended’ on 16 May 2023. The application is expressed to be brought under section 1A, 1B, 3A of the Civil Procedure Act, cap. 21 and Order 51 rule 1 of the Civil Procedure Rules.



2. The two primary prayers in this application have been expressed as follows:
  - “2. That this Honourable Court do issue a notice to show cause against Mr. Japheth Koome to show cause why he should not be committed to civil jail for disobeying court order issued on the 28<sup>th</sup> day of July 2017.
  3. That the 2<sup>nd</sup> respondent herein, Mr. Japheth Koome be cited for contempt of court and committed to civil jail for a term not exceeding 6 months for disobeying this court order issued on 20<sup>th</sup> day of July 2017.”
3. The application is supported by the applicant’s affidavit sworn on 16 May 2023. According to the applicant, this Honourable Court made an order of mandamus directing the Inspector General of police to lodge an inquiry into a shooting incident in which the applicant was involved. The incident is said to have happened on 23 October 2006 at Reuben police post. According to the order of the court, the inquiry ought to have commenced within 30 days of the date of service of the order upon the Inspector General of police.
4. The applicant was informed by her advocates, which information she verily believed to be true, that the order was served upon the Inspector General of police on 8 September 2017 and that it was received by the 2<sup>nd</sup> respondent. However, the Inspector General of police has never initiated the inquiry as directed by the court, hence the instant application.
5. In response to the application, the 1<sup>st</sup> respondent filed a notice of preliminary objection dated 6 June 2023. He says that the application is fatally defective for the reason that the application does not show the law under which it has been brought to court.
6. In submissions filed on behalf of the applicant, the learned counsel for the applicant contended that it is not mandatory that an applicant cites the law on which an application is based and that, in any event, such an omission is not fatal to an application. In this regard the applicant relied on the decision of the Supreme Court of Kenya in *Hermanus Phillipus Steyn versus Giovanni Gnecci-Ruscione* (2013) eKLR where it was held, inter alia, that:

“It is trite law that a court of law has to be moved under the correct provisions of the law. We note that this court is the highest court of the land. The court, on this account, will in the interests of justice, not interpret procedural provisions as being cast in stone... Consequently, the failure to cite article 163 (5) would not be fatal to the applicant’s cause.”
7. As far as the application for contempt is concerned, the applicant relied on the decision in *Samuel M.N. Mweru & Others versus National Land Commission & 2 Others* (2020) eKLR for the submission that, to prove contempt, all that the applicant has to show is first, the terms of the order, second, knowledge of the terms by the respondent and third, failure by the respondent to comply with the terms of the order. It is his case that he has satisfied all the three conditions and, therefore, her application merits the orders she has sought.
8. The 1<sup>st</sup> respondent, on the other hand, has insisted that the applicant ought to have cited section 5 of the *Judicature Act* cap.8 as the basis upon which her application is founded and that the omission to do so has rendered her application fatally defective.
9. Section 5 of the *Judicature Act* is the appropriate place to begin with in the determination of the applicant’s application. It states 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.
10. There is nothing much in substance in this provision of the law except to 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.
11. 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. At the time of rendering its decision, the court was optimistic 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. Since the law that purported to repeal the was voided, the result was that we reverted to Section 5 of the [\*Judicature Act\*](#) on matters contempt.
12. I would not deem the omission by the applicant to state this law on the face of the application as the law under which the application is brought to be fatal to her application. If there was any other law on applications for contempt such that the omission would be said to leave the court in doubt as to which of the competing sets of law the applicant intended to invoke, there would be some merit in the argument that failure to state the specific law is fatal to the application. This, however, should not be understood to mean that an applicant in any other case is at liberty to omit to invoke the particular provisions of the law under which he brings an application to court. Citation of the law forms not only the legal basis upon which applications are brought but it also defines the boundaries within which those applications ought to be interpreted and the extent to which a court may exercise its power. The court should not be left to speculate which of the possible laws applicable to any particular case the applicant intended to apply.
13. That said, the current law on contempt applicable in England and which would apply to this country by dint of section 5 of the [\*Judicature Act\*](#) are the Civil Procedure (Amendment No. 3) Rules, 2020. The scope of these rules is defined in rule 81.1; Rule 81.2 is the interpretation part and Rule 81.3 states how an application for contempt should be made. The rest of the rules in that Part 81 provide for the requirements of a contempt application (81.4); service of a contempt application (81.5); cases where no application is required (81.6); directions for hearing of contempt proceedings (81.7); hearings and judgments in contempt proceedings (81.8); Powers of the court (81.9); and, applications to discharge committal orders (81.10).
14. Rule 81.4 on the requirements of a contempt application and which is of particular relevance to this application reads as follows:

81.4



- (1) Unless and to the extent that the court directs otherwise, every contempt application must be supported by written evidence given by affidavit or affirmation.
- (2) A contempt application must include statements of all the following, unless (in the case of (b) to (g)) wholly inapplicable—
  - (a) the nature of the alleged contempt (for example, breach of an order or undertaking or contempt in the face of the court);
  - (b) the date and terms of any order allegedly breached or disobeyed;
  - (c) confirmation that any such order was personally served, and the date it was served, unless the court or the parties dispensed with personal service;
  - (d) if the court dispensed with personal service, the terms and date of the court's order dispensing with personal service;
  - (e) confirmation that any order allegedly breached or disobeyed included a penal notice;
  - (f) the date and terms of any undertaking allegedly breached;
  - (g) confirmation of the claimant's belief that the person who gave any undertaking understood its terms and the consequences of failure to comply with it;
  - (h) a brief summary of the facts alleged to constitute the contempt, set out numerically in chronological order;
  - (i) that the defendant has the right to be legally represented in the contempt proceedings;
  - (j) that the defendant is entitled to a reasonable opportunity to obtain legal representation and to apply for legal aid which may be available without any means test;
  - (k) that the defendant may be entitled to the services of an interpreter;
  - (l) that the defendant is entitled to a reasonable time to prepare for the hearing;
  - (m) that the defendant is entitled but not obliged to give written and oral evidence in their defence;
  - (n) that the defendant has the right to remain silent and to decline to answer any question the answer to which may incriminate the defendant;
  - (o) that the court may proceed in the defendant's absence if they do not attend but (whether or not they attend) will only find the defendant in contempt if satisfied beyond reasonable doubt of the facts constituting contempt and that they do constitute contempt;
  - (p) that if the court is satisfied that the defendant has committed a contempt, the court may punish the defendant by a fine, imprisonment, confiscation of assets or other punishment under the law;
  - (q) that if the defendant admits the contempt and wishes to apologise to the court, that is likely to reduce the seriousness of any punishment by the court;



- (r) that the court's findings will be provided in writing as soon as practicable after the hearing; and
- (s) that the court will sit in public, unless and to the extent that the court orders otherwise, and that its findings will be made public. (Emphasis added)

15. According to rule 81.4- (2) (c), (d) and (e) proof of service is necessary and where it is dispensed with, the terms and date of the court's order dispensing with personal service must be proved.
16. Under rule 81.4- (2) (e) a penal notice on the order served is mandatory.
17. Turning back to the applicant's application there is no proof that the order was served on the alleged contemnor. What was served was a letter in which the order is alleged to have been enclosed. At least, this is what I gather from paragraph 5 of the affidavit in support of the application. It reads as follows:

“That I am informed by my advocates on record and which information I verily believe to be true that they did duly serve the said court order issued on the 20<sup>th</sup> day of July 2017 on the 8<sup>th</sup> day of September 2017 specifically on the 2<sup>nd</sup> respondent whose office received the same by stamping on the forwarding letter thereon dated the 10<sup>th</sup> day of August 2017. (Annexed is a copy of the letter dated 10.08.2017 addressed to the Inspector General of Police marked A.M-2’)”

18. This cannot be said to be personal service. For purposes of contempt of court proceedings, it was ineffective service and, therefore, the court cannot not proceed on the presumption that the alleged contemnor was served personally with the order.
19. But even if the alleged contemnor was personally served, the applicant's application will still fail because the order alleged to be served was not endorsed with the penal notice. The notice, as it is apparent from rule 81.4- (2) (e) of the Civil Procedure (Amendment No. 3) Rules, 2020, is mandatory.
20. The requirements, in a contempt of court application, to serve the order or judgment personally and the need for indorsement of a penal notice on the order or judgment are not new. In this country, they have been litigated upon over the years. 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 with 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 ...”



21. 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.”

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

24. 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.

25. In the ultimate, for reasons I have given, I am inclined to reach the conclusion that the applicant’s application falls short of the threshold necessary to cite the respondents for contempt. It is hereby dismissed. Parties will bear their respective costs. It is so ordered.

**SIGNED, DATED AND DELIVERED ON 15 DECEMBER 2023**

**NGAAH JAIRUS**

**JUDGE**

