



Tom Ojienda & Associates v County Secretary, Nairobi City County & another (Application 314 of 2019) [2022] KEHC 11569 (KLR) (Judicial Review) (25 March 2022) (Ruling)

Neutral citation: [2022] KEHC 11569 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
APPLICATION 314 OF 2019
J NGAAH, J
MARCH 25, 2022**

BETWEEN

TOM OJIENDA & ASSOCIATES APPLICANT

AND

COUNTY SECRETARY, NAIROBI CITY COUNTY 1ST RESPONDENT

CHIEF OFFICER, FINANCE/ COUNTY TREASURER NAIROBI

COUNTY 2ND RESPONDENT

RULING

1. The motion before court is dated May 2021 and it is brought under order 40 rules 1,2 and 3 and order 51 of the *Civil Procedure Rules* 2010, sections 1A, 1B and 3A of the *Civil Procedure Act* cap. 21 and section 5 (1) of the *Judicature Act*, cap. 8. The prayers for the orders sought have been framed as follows:
 - “2. This application be certified as extremely urgent;
 3. This Honourable Court be pleased to cite the County Secretary Nairobi city County and the Chief Officer, Finance/County Treasurer Nairobi City County for being in contempt of court of the judgment and orders dated 14th May 2020 and punish them as per sections 5 of the Judicature Act for having deliberately disobeyed the order of this Honourable Court.
 4. Summons be issued against the said County Secretary Nairobi City County and the Chief Officer, Finance/County Treasurer Nairobi City County to appear before this court and show cause why they should not be committed to civil jail.



5. The costs of this application be provided for.”
2. The application is supported by the affidavit of the applicant, Prof. Tom Odhiambo Ojienda and was sworn on 5 May 2021.
3. According to the applicant, on 30 January 2017, he had an advocate/client bill of costs taxed against the respondents at Kshs. 12,716,181/=. Thereafter the deputy registrar issued a certificate of taxation for this sum.
4. On 10 May 2017, the applicant filed an application dated 9 May 2017 under section 51(2) of the Advocates Act, cap. 16 seeking to have the certificate of taxation converted to a judgement. The application was allowed and subsequently the applicant extracted a decree for the decretal sum.
5. The respondents did not pay the decretal sum and so the applicant moved the court for the order of mandamus to compel the respondents to satisfy the decree. The application was initially rejected by this Honourable Court (Ogola, J) because the applicant had not extracted and served the certificate of order against the government which is a mandatory requirement under section 21(1) the Government Proceedings Act, cap.40.
6. When the certificate was eventually obtained, the applicant served the respondents with the order; besides the order they were also served with several reminders to pay the decretal sum which as at 8 July 2019 amounted to Kshs. 15,212,036.36.
7. On 14 May 2020 the applicant obtained the order of mandamus directed at the officers of the County government of Nairobi City and it is these officers that he now seeks to be cited for contempt and punished accordingly.
8. It is his position that although the respondents are aware and, although they have been served with the order and several reminders of the order of mandamus, they have blatantly and expressly refused to settle the outstanding sum in utter disregard of the mandamus order hence the instant application.
9. The respondents opposed the motion and filed their respective affidavits to that end. Dr. Jairus Musumba swore the affidavit in his capacity as the Acting County Secretary of Nairobi City County. He swore that the county secretary of the County government of Nairobi City is not responsible for making withdrawals or payments on behalf of the Nairobi City County Government. He contends that that is an exclusive function of the county treasury as set out in section 109 of the Public Finance Management Act, 2012; in other words, the inclusion of the 1st respondent in the suit is a misjoinder.
10. Even then, the Acting County Secretary denied having been served with any sort of order for payment.
11. Mohammed Abdi Sahal, the County Chief Officer also denied in his replying affidavit having been served with the order in question. And like the 1st respondent, he denied that he is responsible for making withdrawals or payments on behalf of Nairobi City County Government.
12. I have considered the applicant’s application and the affidavits filed in response to the motion. I have also considered the submissions filed by both the learned counsel for the applicant and the respondents. One issue that stands out and which merits consideration is whether the respondents were served. The other issue which, incidentally, parties have not addressed but which is equally important in contempt of court proceedings is the form of the order that is said to have been served; in particular, whether it was properly endorsed with the penal notice.



13. It has been held that contempt of court proceedings are akin to criminal proceedings and since they may culminate in a person losing his right to liberty, each and every single stage must be scrupulously followed.
14. It was so held in *Woburn Estate Limited v Margaret Bashforth* (2016) eKLR where the Court of Appeal stated as follows:

“We reiterate that contempt proceedings being of quasi –criminal in nature and since a person may lose his right to liberty, each stage and step of the procedure must be scrupulously followed and observed. We bear in mind the often-cited passage attributed to Lord Denning *In Re Bramblevale Ltd* [1970] 1 CH 128 at page 137 that;

“A contempt of court is an offence of criminal character. A man may be sent to prison for it. It must be satisfactorily proved showing that when the man was asked about it, he told lies. There must be some further evidence to incriminate him.”
15. One of the critical steps which the court must be satisfied has been taken before a person is cited for contempt, is service upon the alleged contemnor of the court order alleged to have been breached or disobeyed.
16. According to the practice and procedure in England which is applicable to this country by virtue of section 5 of the *Judicature Act*, the judgement or order alleged to have been disobeyed must be served on the person required to do or not to the act unless the court expressly dispenses with the personal service. Service must be personal except that the court may dispense with personal service if the contemnor had notice of the judgement or order or he was notified of the terms by telephone, email or otherwise.
17. The order must also be endorsed with the warning prominently displayed on its face notifying the party to which the order is targeted that disobedience to the order would amount to contempt of court, an infraction that would attract punishment by imprisonment, a fine or sequestration of assets.
18. These requirements or steps are found in the *Civil Procedure (Amendment No. 2) Rules*, 2012 which rules apply in the Supreme Court of the Judicature in England.
19. The Court of Appeal made reference to these rules and, in particular, applied Rule 81 of these rules in *Christine Wangari Gachege v Elizabeth Wanjiru Evans & 11 Others* (2014) eKLR.
20. Of relevance to the instant application is rule 81.4, 81.5, 81.6, 81.8 and 81.9. The relevant parts of this rule read as follows:

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

81.4. —If a person—

- (1)
 - (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)



- (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) ...
- (5) ...

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

- 81.5.—Unless the court dispenses with service under rule 81.8, a judgment or order may not be
- (1) 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)
 - (c)
 - (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) ...

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.—In the case of a judgment or order requiring a person not to do an act, the court may dispense
- (1) 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.—Subject to paragraph (2), a judgment or order to do or not do an act may not be enforced under
- (1) 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)



21. It is apparent from these legal provisions that disobedience of a court order or judgment is a foundation for contempt of court proceedings against the contemnor. Where the contemnor is a company or other corporation, the committal order may be made against any director or other officer of that company. Crucially for the instant application, 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 dispenses with personal service. The court may, however, dispense with personal service if it is satisfied that the contemnor had notice of the judgment or order either because he was present when the judgment or order was given or made or he was notified of its terms by telephone, email or otherwise. 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. Again, as far as it is relevant to the instant application, 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 of 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 these requirements are nothing new; they are, by and large, a carryover of order 52 of the *Rules of the Supreme Court* and which have not only been existence prior to the commencement of the *Civil Procedure (Amendment No. 2) Rules*, 2012 which have also been litigated upon from time to time. In the case of *Nyamodi Ochieng Nyamogo & Another v Kenya Posts & Telecommunications Corporation* (1994) eKLR, for instance, the twin issues of the necessity for personal service of both the order in an application for contempt and the endorsement on the face of the order 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 ...”

23. 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 sort of 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.”

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



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

“Mr Lakha pointed out other flaws to which we will now turn our attention. He referred to the order and also to the application itself and pointed out the absence of a notice in the form of an endorsement thereon of penal consequences. It is not disputed that the copies of the order alleged to have been served on the three alleged contemnors and handed in by Mr Nowrojee during the hearing (instead of having been annexed to the application) do not bear any such endorsement of penal consequence. Section 5(1) of the Judicature Act has given this Court the same power to punish for contempt of court as is for the time being possessed by the High Court of Justice in England. In England rule 5 of order 45 R S C 1982 Ed, governs the method of the enforcement by the Court of its judgments or orders in circumstances amounting to contempt of court (p766). Order 45/7 deals with matters relating to “Service of copy of judgment, etc, pre-requisite to enforcement under rule 5”. (The underlining is ours). The relevant procedural obligation is succinctly stated in order 45 rule 7/5 of the RSC 1982 Ed as follows:

“It is a necessary condition for the enforcement of a judgment or order under rule 5 by way of sequestration or committal, that the copy of the judgment or order served under this rule should have the requisite penal notice indorsed thereon.”

“And a couple of paragraphs later is given the form that an endorsement is required to take, in the following words in the case of a judgment or order requiring a person to abstain from doing an act:

“If you, the within named A B disobey this judgment (or order) you will be liable to process of execution for the purpose of compelling you to obey the same.”

“A similar form with suitable alterations is given in the case of an order against a corporation.

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

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



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. Looking at the applicant’s application from this legal perspective, it goes without saying that the question of service of the order of mandamus according to which the respondents are required to pay the applicant certain amounts of money is central to the application.
28. The applicant’s position is that the respondents were served but the respondents have assumed a contrary stand; they deny that they were served as alleged and even if they were served, they were not the appropriate targets of the order.
29. In the affidavit sworn by Prof. Tom Odhiambo Ojienda in support of the application, he has deposed as follows on this question of service:
- “14. Despite knowledge, service and several reminders, the respondents have blatantly and expressly refused to settle the outstanding payment in utter disregard of the certificate of order extracted 9th July 2019 and the mandamus order dated 14 May 2020. The respondents have blatantly refused to obey the court’s orders and instead elected to act in outright contempt of the court orders (now shown to me and marked PT07 are copies of the reminders herein)”.
30. No affidavit is on record to support the claim that the respondents were served. There is simply no proof that the respondents were served with the order as suggested in this deposition. If the respondents were served, no doubt an affidavit of service to that effect would certainly have been filed or a copy thereof exhibited on the applicant’s affidavit to demonstrate how, when and where they were served.
31. And even assuming the order was served, the order as extracted was not endorsed with warning to the respondents that disobedience of the order would be contempt of court punishable by imprisonment, which is the punishment that the applicant wants the court to mete out against the respondents.
32. It has also not been suggested in the affidavit that the respondents were present when the judgement was given or that they were notified through any of the prescribed means.
33. In the absence of personal service and also considering that the order omitted the requisite warning to the respondents of the consequences of disobedience, I find and hold the application to be premature and misconceived. It is dismissed; however, I make no order as to costs since it is obvious that the decretal sum has not been settled and the decree sought to be enforced has not been varied, set aside or challenged in other manner whatsoever. Orders accordingly.

SIGNED, DATED AND DELIVERED ON 25 MARCH 2022

NGAAH JAIRUS

JUDGE

