



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT KISUMU**

**MISC. APPLICATION NO. 223 OF 2010**

**BETWEEN**

**MARGARET AJWANG JURA** suing as the administrator of the estate  
of **HEZBON OSSOREY JURA ODONGO (deceased)** ..... **APPLICANT**

**AND**

**KENYA RAILWAYS CORPORATION** ..... **RESPONDENT**

**RULING**

1. Hezbon Ossorey Jura Odongo died on 30<sup>th</sup> December 2013 still waiting for the fruits of his judgment. He was an employee of Kenya Railways Corporation (“the Corporation”). After being retrenched he filed suit against the Corporation namely; ***Kisumu CMCC No. 464 of 2003***. He obtained a decree for the sum of **Kshs. 879,652/-**. The decree was not settled causing him to file an application for mandamus being ***Kisumu HC Misc. 25 of 2009***. On 23<sup>rd</sup> March 2009, the court granted an order mandamus, “***directed to the managing director Kenya Railways to pay Kshs. 4,620,777.85.***”

2. In order to enforce the decree, the applicant obtained leave to commence contempt proceedings against the then Managing Director of the Corporation on 15<sup>th</sup> April 2009. The application for contempt was heard and in a ruling delivered on 9<sup>th</sup> March 2012, Ali-Aroni J., declined to commit the Managing Director for want of service but stated that;

*Court cannot watch flagrant disobedience of its orders and keep mum. Under section 1A and B of the Civil Procedure Act this court is under a duty to ensure that substantive justice is achieved. For the said reasons the counsel for the respondent is hereby directed to produce the Secretary to the respondent to explain the delay on payment of the decretal sum within 14 days of this ruling.*

3. The applicant thereafter filed an application to garnishee the Corporation’s account but this application was dismissed by Muchelule J., on 22<sup>nd</sup> July 2013. Leave to commence contempt proceedings against the Managing Director was granted by Maina J., on 30<sup>th</sup> September 2015.

4. What is before me today is the Notice of Motion dated 12<sup>th</sup> October 2015 and it seeks the following orders;

*[2] That the Managing Director of Kenya Railways Corporation Atanas Maina Kariuki to show cause why he should not be committed to civil jail.*

[3] That the applicant herein be granted orders to commit the respondent for contempt proceedings Managing Director Atanas Maina and the Corporation Secretary of Kenya Railways for refusing to obey mandamus order issued by this court and dated 15<sup>th</sup> April 2009 and disobeyed several times.

[4] That in the alternative the Managing Director's property be attached to satisfy the order of the court.

[5] That cost of this application be provided for.

5. The application was initially heard by Chemitei J., and in a ruling dated 10<sup>th</sup> March 2016, he expressed the view that, *"To drag the applicant through the requirement of personal service after the elaborate procedure is to me a miscarriage of justice and bow to technicalities."* He however dismissed the application on the ground that the matter had abated following the death of the applicant. On 29<sup>th</sup> June 2016, I reviewed the dismissal order and reinstated the application being heard today.

6. The grounds upon which the application is based are not contested. The tenor and thrust of the grounds of opposition dated 11<sup>th</sup> August 2016 is that the alleged contemnor has not been personally served by the order and accompanying penal notice and as such the application is incompetent, bad in law and likely to lead to deprivation of fundamental right to freedom. Mr Mwesigwa, counsel for the respondent, forcefully argued that personal service is mandatory and cannot be dispensed with before an application for contempt is heard. He referred to the ruling of Ali-Aroni J., where she stated that;

*[A] contemnor has to be served personally with the order and an accompanying penal notice. The managing director was not served as such, a legal officer accepted service. This court following the strict measures laid down in the matters of contempt cannot grant the orders sought for the reason above. This court accordingly declines to grant the orders being sought for.*

7. While I accept that the alleged contemnor was not have been served personally, the matter does not end there. I am constrained to reject the arguments made by the respondent for several reasons. In ***Shimmers Plaza Limited v National Bank of Kenya Limited*** NRB CA Civil Appeal No. 33 of 2012 [2015]eKLR the Court of Appeal recognised that;

*[T]his Court has slowly and gradually moved from the position that service of the order along with the penal notice must be personally served on a person before contempt can be proved ..... Kenya growing jurisprudence right from the High Court has reiterated that knowledge of a court order suffices to prove service and dispense with personal service for purposes of contempt proceedings. For instance, Lenaola J., in the case of ***Basil Criticos v Attorney General and 8 Others*** ..... This position was affirmed by this Court in several other cases including in the ***Wambora Case [Justus Kariuki Mate & Another v Hon. Martin Nyaga Wambora & Another Civil Appeal No. 24 of 2014]***.*

8. As the history of the matter I have outlined shows, the decree remains unsatisfied since 2009. No appeal is pending against the judgment or the order granting the order of mandamus. The Corporation has attempted to set aside the judgment without success. The judgment creditor had been denied the fruits of its judgment by statutory shield to avoid payment. The Corporation and its officers cannot assert that they are not aware of the judgment in light of the history of this matter. The issue is simple and straightforward; whether the Corporation has settled the judgment debt it was commanded by the court to pay. To proceed further with this litigation along the trajectory intended by the Corporation will undermine the fundamental cause of justice and will be an affront the provisions of **Article 159(2) (b) and (d)** of the Constitution which requires that justice shall not be delayed and that justice shall be administered without undue regard to technicalities.

9. The approach I have taken in this matter is summarised in ***Republic v Permanent Secretary Office of the President Ministry of Internal Security & Another ex-parte Nassir*** NRB HC Misc. JR No. 132 of

2010 [2014]eKLR where Odunga J., observed as follows;

*[35] It is therefore clear that apart from the fact of the existence of a judgement against the government, the law recognises that due to the special role played and the central position held by the Government in the management of the affairs of the country, there is a necessity for further proceedings to be undertaken before the judgement can be implemented.*

*[36] Where a party has complied with all the procedures leading to the grant of an order of mandamus to subject the party to the normal procedures relating to contempt of court proceedings would engender a miscarriage of justice yet Article 159(2)(b) mandates that justice ought not to be delayed. To take a successful litigant in circles when adequate notices have been given to the Government to settle a decree would be to turn the legal process into a theatre of the absurd.*

*[37] Accordingly I do not agree with the submissions made by the Respondent that even after an order of mandamus is issued the decree holder ought to be subjected to the technicalities of personal service and the penal notice. Such requirements are necessary in my view in the usual application for contempt where but not in judicial review orders of mandamus compelling a public officer to carry out a duty imposed by statute.*

10. These sentiments apply with equal force to the Corporation, which as the record reflects, is aware of the judgment and decree against it. It must be recalled that the power to punish for contempt is preserve the rule of law and maintain the dignity of the court. The fact that a poor widow is left to chase the decree entered in favour of her deceased husband eight years ago against a State Corporation makes the court look powerless and undermines public confidence in the efficacy of the judicial process.

11. Turning back to the issue at hand I hold that the purpose of service is to enable the alleged contemnor respond to the allegations made against him. The order I am making is intended to give the alleged contemnor an opportunity to make his representation and show why the Corporation has not settled the decree. It is not intended to deny his fundamental right or freedom to liberty. This matter must now be brought to an end without further delay or expense.

12. I now order as follow;

***ATHANAS KARIUKI MAINA is hereby summoned to attend court on 20<sup>th</sup> August 2016 to show cause why he should not be committed to civil jail or why the court should not allow the decree-holder to proceed with execution against him by way of attachment and sale of his assets for failing to ensure that the applicant is paid.***

**DATED and DELIVERED at KISUMU this 16<sup>th</sup> day of August 2016.**

**D.S. MAJANJA**

**JUDGE**

Mr Mwamu instructed by Mwamu & Company Advocates for the applicant.

Mr Mwesigwa instructed by Behan Okero & Company Advocates for the respondent.