



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENTAL AND LAND COURT AT NAIROBI**  
**HCCC NO. 2044 OF 1993**

**KENYA ACCOUNTANTS SECRETARIES**  
**NATIONAL EXAMINATION BOARD..... PLAINTIFF**

**VERSUS**

**PAUL KIPKEMOI CHEMNG'OREM.....1<sup>ST</sup> DEFENDANT**  
**THE COMMISSIONER OF LANDS.....2<sup>ND</sup> DEFENDANT**  
**THE ATTORNEY GENERAL (Sued on behalf of**  
**THE DIRECTOR OF SURVEY).....3<sup>RD</sup> DEFENDANT**  
**AD CAPITAL PROPERTIES GROUP LIMITED.....4<sup>TH</sup> DEFENDANT**

**RULING**

**Introduction**

The Plaintiff is seeking to have the 4th Defendant and its Directors, Joshua Chepkwony and Hellen Chepkwony, committed for contempt of court by way of committal to civil jail, and the demolition of the 4th Defendant's office block that is alleged to encroach into the portion of land that is the subject of the dispute herein. The Plaintiff and 4th Defendant canvassed the application for committal for contempt of court in written submissions filed in court and oral submissions made during a hearing held on 18th September 2013.

**The Plaintiff's Case**

The Plaintiff's application is in a Notice of Motion dated 7/2/2013, and is premised on the grounds that on 1<sup>st</sup> October 2012, this court issued a temporary injunction restraining the 4<sup>th</sup> Defendant, its officers, servants or agent from further constructing on the disputed portion of land on LR 209/11447 (hereinafter referred to as "the disputed portion of land"), pending the hearing and determination of the suit. Further, that the 4<sup>th</sup> Defendant was duly represented at the said court appearance when the ruling was read out, and that on 2<sup>nd</sup> November 2012, the Plaintiff's Advocates served the court order upon the 4<sup>th</sup> Defendant's

authorized official, one Carol Simba. However, that despite the said court order, the 4<sup>th</sup> Defendant has continued to construct on the disputed portion of land.

These facts are deponed to in a supporting affidavit and further affidavit sworn by the Plaintiff's Chief Executive Officer, Pius Mungai Nduathi on 7/2/2013 and 20/6/2013 respectively. He stated that the court orders were served upon the 4<sup>th</sup> Defendant's duly authorized officer, one Carol Simba who accepted service. He attached a copy of the affidavit of service photographs of the construction on the disputed portion of land, and of letters sent to the Defendant's Advocates requesting them to stop the construction.

The Plaintiff's counsel filed written submissions dated 20th June 2013 in which she argued that the injunction orders that were served on the 4th Defendant had a penal notice at the back page of the injunction, and it was served upon Carol Simba a lawyer who accepted service as shown in the affidavit of service filed in court. It was submitted that the legal position for service on a corporation is that some appropriate person has been properly served as stated in Order 52 Rule 3(1) of the Supreme Court Practice Rules and the decision in **R v The Minister, Ministry of Medical Services & Others, Nairobi High Court Misc. Civil Application No 316 of 2010**. It was further argued by the counsel that the Supreme Court Practice Rules applied by virtue of section 5 of the Judicature Act which provides that the High Court shall have the same power to punish for contempt of Court as the High Court of Justice in England.

The counsel further submitted that Plaintiff's Advocates attempted service of the Notice of Motion on the 4th Defendant but was unable to do so, and they were served by way of registered post pursuant to the provisions of Order 5 Rule 3 (b) of the Civil Procedure Rules, and an affidavit of service to this effect was filed in court on 20th June 2013. The counsel argued in this respect that under Rule 81.8 and Rule 81.10 (5) of the Civil Procedure Rules in England allows for exceptions to, and dispensation of personal service of the orders and Notice of Motion respectively. The Plaintiff's counsel in her oral submissions relied on the decision in **Ronson Products Limited vs Ronson Furniture Limited (1966) RPC 497**.

The Plaintiff's counsel in addition argued that the 4th Defendant and its directors have not denied knowledge of the court order dated 1st October 2012 . Further, that the 4th Defendant was represented its Advocates during the court appearances during the hearing of the injunction application, and its Director swore affidavits in opposition to the said application. Further, that the Plaintiff's Advocates wrote to the 4th Defendant's Advocates requesting them to ask the 4th Defendant to cease from constructing on the disputed portion of land. The counsel also stated that the 4th Defendant's in his replying affidavits to the contempt application stated that he had perused the court order and yet continued with the construction in contravention of the said order. The counsel relied on the decisions in **Husson v Husson, (1962) 3 All E.R. 1056, R v The Minister, Ministry of Medical Services & Others, Nairobi High Court Misc. Civil Application No 316 of 2010, Kenya Tea Growers Association vs Francis Atwoli & Others ,Nairobi High Court Constitutional Petition No 64 of 2010 and Ronson Products Ltd v Ronson Furniture Ltd (1966) RPC 497** for the position that knowledge of a court order was enough to meet the threshold for contempt of court proceedings.

Lastly, the counsel for the Plaintiff argued that it is undisputed that construction has proceeded on the disputed portion of land and that the Plaintiff had filed affidavits and annexed photographs to this effect. Further, that it was incumbent upon the directors of the 4th Defendant to ensure that the court orders were observed.

### **The 4<sup>th</sup> Defendant's Case**

The 4th Defendant opposed the said Notice of Motion in a replying affidavit and further affidavit sworn by its Director, Joshua Chepkwony on 14/2/2013 and 8/7/2013 respectively. He stated that that neither the order of this court granted on 1<sup>st</sup> October 2012 nor any Penal Notice has ever been served upon the 4<sup>th</sup> Defendant or on its directors, or any other person duly authorized to accept service of court process on behalf of the 4<sup>th</sup> Respondent. Further, that neither Carol Simba nor Jamii Telecom Limited are officers of the 4<sup>th</sup> Respondent, nor are they duly authorized to accept service on behalf of the 4<sup>th</sup> Respondent or its

directors.

The 4<sup>th</sup> Defendant's counsel filed written submissions dated 8th July 2013 wherein he argued that the Plaintiff's application for committal to contempt and the evidence in support of the same does not meet the threshold required, as the mandatory requirements of personal service of the order, motion for contempt and penal notice upon the alleged contemnors had not been adhered to, and as stated in **Emma Wanjiku Ndungu vs Francis Njoroge Kamau & 4 Others, (2012) e KLR** and **Augustine Maret Rukunga vs Agnes Njeri Ndungire & Another, Nairobi H.C.C.C No. 2160 of 1998.**

The counsel submitted that it is a cardinal principle of law that contempt proceedings may not be enforced against a person, unless he or she has been personally served with the order or judgment that prohibits him from committing a particular act or compels him to do an act. Further, that pursuant to section 5 of the Judicature Act, the applicable law of the High Court of England that applies for contempt of court proceedings are the United Kingdom's Civil Procedure Rules which replaced the Supreme Court Practice Rules.

The counsel submitted that Part 81 of the said Civil Procedure Rules and Practice Direction 81 of England require personal service of an order or judgment under Rules 81.5 and 81.6 of the said Rules, for the order or judgment to be enforced in contempt of court proceedings. The counsel also relied on the Court of Appeal decisions in **Nyamogo & Another v Kenya Posts and Telecommunications Corporation, (1994) KLR 1**, and **Loise Margaret Waweru v Stephen Njuguna Githuri, Nairobi Civil Appeal No. 198 of 1998** on the requirement of personal service. It was submitted that no evidence was brought of the personal service on the two directors namely Joshua Chepkwony and Hellen Chepkwony, sought to be committed to civil jail for contempt of court.

The counsel for the 4<sup>th</sup> Defendant also argued that no proper service was effected on the 4th Defendant as required by Order 48 Rule 2 and Order 5 Rule 3 of the Civil Procedure Rules of Kenya on service of orders and documents on corporations. It was submitted that service on a corporation under the said provisions requires service on the secretary, director or a principal officer of the corporation, and that neither Jamii Telkom Limited nor Carol Simba were a secretary, director or principal officer of the 4th Defendant. Further, that Carol Simba was not duly authorised to accept service on behalf of the 4th Defendant, and the counsel relied on the decision in **Loise Margeret Waweru v Stephen Njuguna Githuri (supra)** in this respect.

On the issue of personal service of the penal notice the counsel argued that it is a mandatory requirement under Rule 81.9 of the English Civil Procedure Rules, and Practice Direction 81 of the said rules. Further, that it has also been held to be a requirement by various Court of Appeal decisions including in **Nyamogo & Another v Kenya Posts and Telecommunications Corporation, (1994) KLR**. Lastly, the counsel for the 4<sup>th</sup> Defendant submitted that the personal service of the Notice is a mandatory requirement under Order 52 Rue 3 of the Supreme Court of England Practice Rules, and as held in in **Loise Margeret Waweru v Stephen Njuguna Githuri (supra)** and **Augustine Marete Rukunga vs Agnes Njeri Ndungire & Another, Nairobi HCCC No 2160 of 1998.**

### **The Issues and Determination**

Order 40 Rule 3 of the Civil Procedure Rules provides for the consequences of breach of an order of injunction, and states that in cases of disobedience, or of breach of any such terms, the court granting an injunction may order the property of the person guilty of such disobedience or breach to be attached, and may also order such person to be detained in prison for a term not exceeding six months unless in the meantime the court directs his release. The procedure to be followed in making such an application is provided under order 51 of the Civil Procedure Rules that provides for the mode of filing, serving and hearing of applications brought under the Civil Procedure Rules.

It is not disputed that the Notice of Motion herein by the Plaintiff dated 7<sup>th</sup> February 2013 seeking the committal of the 4<sup>th</sup> Defendant and its Directors was filed and served in accordance with the provisions of

Order 51 of the Civil Procedure Rules. It is my opinion that the English law on the procedure for committal for contempt of court that applies by virtue of section 5(1) of the Judicature Act only does so when a lacuna exists in the Kenyan procedural rules. Order 51 of the Kenyan Civil Procedure Rules does not require the personal service of the notice of motion brought under Order 40 Rule 3 of the Civil Procedure Rules on the alleged contemnors. This Court therefore does not consider the issue of personal service of the said Notice of Motion a requirement in Kenya in the case of applications for committal for contempt of court brought under Order 40 Rule 3 of the Civil Procedure Rules of 2010 .

There are thus three issues before the court for determination arising from the pleadings and submissions highlighted in the foregoing. The first is whether there was personal service of the orders given by this court on 1<sup>st</sup> October 2013 and of a penal notice on the 4<sup>th</sup> Defendant and its directors. Secondly, if no such service was effected, whether this court can dispense with the personal service of the said orders and penal notice on the alleged contemnors. The last issue is whether the alleged contemnors should be committed for contempt of court.

Personal service of the orders alleged to have been disobeyed and of a penal notice is a requirement in proceedings for committal for contempt of court as a result of the application of English law, which has traditionally insisted on compliance with certain procedural safeguards before courts could exercise their jurisdiction to punish for contempt of court. This insistence arose from the arbitrary nature of contempt of court proceedings as courts essentially apply a summary jurisdiction, and also because of the threat that is presented by such proceedings to the liberty of the alleged contemnors.

The Kenyan courts have also as a result held personal service of orders and a penal notice to be a requirement in contempt of court proceedings, and reference is made to the Court of Appeal decisions in Nyamogo & Another v Kenya Posts and Telecommunications Corporation, (1994) KLR 1, and Ochino & Another v Okombo & 4 others (1989) KLR 165.

The applicable English Law in this respect is Part 81 of the English Civil Procedure Rules of 1998 as variously amended, which part repealed in most part the Rules of the Supreme Court that previously applied, including Order 52 of the Rules of the Supreme Court. The law on the personal service of court orders is now found in Rule 81.8 of the English Civil Procedure Rules. The said rule provides that unless the court dispenses with service, a judgment or order may not be enforced by way of an order for committal unless a copy of it has been served on the person required to do or not do the act in question.

Further, that when that person 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. The law on service on corporations in Kenya is in Order 5 Rule 3 of the Civil Procedure Rules that provides as follows:

**“Subject to any other written law, where the suit is against a corporation the summons may be served—ration the summons may be served—**

**(a) on the secretary, director or other principal officer of the corporation; or**

**(b) if the process server is unable to find any of the officers of the corporation mentioned in rule 3 (a)—**

**(i) by leaving it at the registered office of the corporation;**

**(ii) by sending it by prepaid registered post or by a licensed courier service provider approved by the court to the registered postal address of the corporation; or**

**(iii) if there is no registered office and no registered postal address of the corporation, by leaving it at the place where the corporation carries on business; or**

**(iv) by sending it by registered post to the last known postal address of the corporation.”**

Rule 81.6 of the English Civil Procedure Rules specifically provides that the method of service shall be personal service, which is effected by leaving the order with the person to be served. The requirement for a penal notice on the order being served is found in Rule 81.9 of the English Civil Procedure Rules, which state that an order to do or not do an act may not be enforced by way of committal proceedings unless there is prominently displayed, on the front of the order served, 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.

The Plaintiff herein argued that a process server of the High Court, one Martin Kuria, effected personal service of the orders given by this court on 1<sup>st</sup> October 2012 on the 4<sup>th</sup> Defendant on 2<sup>nd</sup> November 2012. This allegation is denied by the 4<sup>th</sup> Defendant. I have perused the affidavit of service sworn by the said process server on 29<sup>th</sup> January 2013 and filed in court on 30<sup>th</sup> January 2013. He stated as follows at paragraph 3 thereof:

**“That on the same day I proceeded to the offices of Ad Capital Properties Group Ltd located on Kunde Road, off Korosho Road, Valley Arcade Nairobi, and served the same upon Caroline Simba, who is known to me, the legal officer of the Fourth Defendant. She informed me that she is authorized to accept service on behalf of the Fourth Defendant. She acknowledged service of the order by stamping and signing my original copy. The duly served copy of the order dated 1<sup>st</sup> November 2012 is annexed hereto marked as ‘MKK’.”**

I have also perused the served order that was attached to the said affidavit of service and note that it is stamped as received by Jamii Telcom Limited of P.O Box 4719-00100. In addition, there was a penal notice on the reverse side of the said order. There is however no indication on the served order that the said Caroline Simba received the order, nor of a stamp or any other indication of receipt by any officer of the 4<sup>th</sup> Defendant. There was also no affidavit of service produced as evidence by the Plaintiff attesting to the service of the orders granted on 1<sup>st</sup> October 2012 on Hellen Chepkwony and Joshua Chepkwony, the two directors of the 4<sup>th</sup> Defendant sought to be committed to civil jail for contempt of court.

It is the finding of this court after examining the evidence produced by the Plaintiff that there was no personal service of the orders of this court or of a penal notice on the 4<sup>th</sup> Defendant and or its Directors in light of the applicable law on such personal service. I am also guided in this respect by the Court of Appeal decision in Nyamogo & Another v Kenya Posts and Telecommunications Corporation, (1994) KLR 1 that service upon a corporation’s advocates does not constitute personal service upon its officers.

The Plaintiff has argued that this finding notwithstanding, such personal service can be dispensed with by this court, and that this is allowed under the English Law. Indeed it is the case that the court can dispense with the personal service of an order under Rule 81.8 (1) of the English Civil Procedure Rules wherein it is provided that in the case of an order requiring a person not to do an act, the court may dispense with service of a copy of the order if it is satisfied that the person has had notice of it either by being present when the order was given or made; or by being notified of its terms by telephone, email or otherwise.

The above-stated circumstances are therefore the only ones in which this court can therefore dispense with the personal service in the circumstances of this case, as the orders granted by this court on 1<sup>st</sup> October 2012 restrained the 4<sup>th</sup> Defendant from selling the disputed property and or undertaking construction thereon, and therefore falls in the category of orders envisaged in Rule 81.8 (1) of the English Civil Procedure Rules.

The Plaintiff brought evidence to show that they notified the Advocates of the 4<sup>th</sup> Defendant of the orders alleged contemnors. However, the notification and awareness of the orders required is personal to the person sought to be committed for contempt of court, and no evidence of such personal notification and/or awareness on the part of the alleged contemnors was brought by the Plaintiff. The argument by the Plaintiff that the 4<sup>th</sup> Defendant’s director’s stated that he had read the court orders in the replying

affidavit he filed in court after the application for contempt of court had been filed cannot be upheld, as the material time for notification and/or awareness of a court order in contempt of court proceedings can only be before the acts giving rise to the alleged contempt are committed.

It is also on this ground that the decisions in Kenya Tea Growers Association vs Francis Atwoli & Others , Nairobi High Court Constitutional Petition No 64 of 2010, Husson v Husson, (1962) 3 All E.R. 1056, Ronson Products Ltd v Ronson Furniture Ltd (1966) RPC 497, Davy International Ltd vs Tazzyman (1997) 1 WLR 1256 are distinguished, as in those cases the personal awareness of the court orders by the contemnors was demonstrated, even though they had not been personally served with the court orders.

It was also argued by the Plaintiff in this regard that the courts discretion is wide and unfettered in dispensing with personal service of orders. Such wide and unfettered discretion only applies in the circumstances stated in Rule 81.1(2) of the English Civil Procedure Rules, which provides that in the case of committal proceedings for orders and judgments other than those requiring a person not to do an act, the court may dispense with personal service of the judgment or order if it thinks it just to do so; or may make an order in respect of service by an alternative method or at an alternative place. It has already been noted by the court that the circumstances in this application were different, as the orders herein required the 4<sup>th</sup> Defendant not to do an act, to which different rules on dispensation of orders apply.

This court cannot therefore dispense with the service of the order upon the alleged contemnors for the above reasons. There having been no personal service and no dispensation by the court of the personal service of the orders and penal notice, I have no option but to find that the 4<sup>th</sup> Defendant and its directors cannot be committed for contempt of court. This is mainly for the reason that the observance of the requirement of personal service of the orders and penal notice unless dispensed with, is a prerequisite before one can be found culpable for contempt of court. The Plaintiff's Notice of Motion dated 7<sup>th</sup> February 2013 accordingly fails, and the costs of the said Notice of Motion shall be in the cause.

I wish to however conclude by stating that in light of the fact that evidence was brought by the Plaintiff that showed construction on the disputed portion of land, and pursuant to the powers granted to this court by section 3A of the Civil Procedure Act, the Plaintiff is hereby directed to properly and personally serve the orders of this court granted on 1<sup>st</sup> October 2012 and a penal notice on the 4<sup>th</sup> Defendant and its Directors, and shall be at liberty to apply for committal for contempt of court in the event of further disobedience of this court's orders.

Orders accordingly.

**Dated, signed and delivered in open court at Nairobi this \_\_\_\_14<sup>th</sup>\_\_ day of \_\_\_\_January\_\_\_\_, 2014.**

**P. NYAMWEYA**

**JUDGE**