



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CIVIL APPEAL NO.35 OF 2000**

**NICONA CONSTRUCTION CO. LTD.....PLAINTIFF**

**VERSUS**

**KEN SOUTH PLASTIC CO. LTD.....1ST DEFENDANT**

**ANNE KILELE.....2ND DEFENDANT/APPLICANT**

**THE ESTATE OF THE LATE WALTER KILELE.....3RD DEFENDANT**

**IN THE MATTER OF AN APPLICATION BY THE APPLICANT FOR LEAVE TO APPLY FOR  
AN**

**ORDER OF COMMITTAL FOR CONTEMPT OF COURT DIRECTED TO THE  
RESPONDENT**

**IN THE MATTER OF THE JUDICATURE ACT (CHAPTER 8 OF THE LAWS OF KENYA)**

**AND ORDER 52 OF THE SUPREME COURT OF ENGLAND PRACTICE RULES**

**IN THE MATTER OF AN ORDER GIVEN BY THE HONOURABLE JUSTICE EMUKULE**

**ON THE 5/2/2013 DIRECTED TO THE RESPONDENT**

**RULING**

The *ex parte* applicant, Anne Kilele, brought the notice of motion dated 7th March, 2013 praying that this court be pleased to order that the respondent (Mr. James Mwangi) be committed to civil jail for contempt of an order of the court given on 5th February, 2013.

The application is brought under Section 5 of the Judicature Act, Chapter 8 of the Laws of Kenya, and

under Order 52 Rules of the Supreme Court and is premised on the applicant's statement dated 25th February, 2013 and an affidavit verifying the statement sworn on the same date.

The grounds on which the application is premised are that the respondent has blatantly disobeyed and continues to disobey a lawful order given by this Honourable court; that leave to commence these proceedings has been granted. Further the said order has been duly served upon respondent who proceeded in utter disregard and contempt of this court's order by refusing and/or failing to retribute.

In the affidavit sworn in support of the application the applicant has, *inter alia*, deposed that in compliance with the orders of this court she deposited the sum of Kshs.1,166,913.50 as security for the release of her motor vehicle which had been attached. While application was pending for taxation of a bill filed by the respondent, the latter, without notifying her withdrew his bill and replaced it with a new bill. The new bill was taxed ex parte as the respondent represented to the court that he had served her. Thereafter, the respondent applied for the release of the deposit which applicant had deposited in court. Upon learning about the respondent mischief, she moved the court for an order directing the respondent to retribute the deposit. An order given by this court on 5th February, 2013 the court directed the respondent to retribute by depositing the money which had been released to him within 14 days. The said order of the court was duly served upon the respondent, who failed to comply with its terms within the stipulated time and at all. For these reasons the applicant believes that the respondent is in contempt of court.

In the submissions filed by the applicant it is pointed out that despite having been served with the application the respondent never filed any reply. Maintaining that the respondent was served with the order of the court which clearly warned him of the consequences of none compliance, the applicant has submitted that the respondent is clearly in contempt of an order of this court and should be punished accordingly.

The Court Appeal in **Mwangi H.C Wangondu v. Nairobi City Commission** Civil Appeal No. 95 of 1988 (the authority relied on by the applicant) stated as follows:-

**“The procedure for committal for civil contempt in England where an order of sequestration is sought is set out under the Rules of the Supreme Court (R.S.C), Order 45 and 46 and in Halsbury's Laws of England, Vol.9 (4th Edition) under the heading “Contempt of Court”. Briefly the effect of these provisions is that 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. The copy of the order served must be endorsed with a notice informing the person on whom the copy is served that if he disobeys the order, he is liable to the process of execution to compel him to obey it. This requirement is important because the court will only punish as a contempt, a breach of injunction if satisfied that the terms of the injunction are clear and unambiguous, that the defendant has proper notice of the terms and that breach of the injunction has been proved beyond reasonable doubt.(Emphasis mine).**

Applying the above test to the peculiar circumstances of this case, I find for a fact that the order allegedly served on the respondent satisfied the legal requirement as to clarity and endorsement with a notice informing the respondent about the consequences of disobeying the order. This notwithstanding, for the

applicant to succeed on her quest to have the respondent punished for the alleged contempt of the court, she must prove to the satisfaction of this court that a copy of the order was served on the respondent personally or that the respondent had proper notice of the terms. See Jacob Zekediah Ochino & Another v. George Aura Okombo & 5 others Nairobi Civil Appeal No.36 of 1989.

To prove service on the respondent the applicant has relied on the affidavit of service sworn by Bashir Mumbaha (annexture ANK11). In that affidavit is is deposed, in paragraph 2, 3, 4, 5, 6, 7, 8 and 9 as follows:-

**“2.THAT on 6th February 2013 I received from W.G Wambugu & Co. Advocates copies of the Order dated 5th February 2013 with instructions to serve the same upon Mr. James Njogu Mwangi t/a Elan Traders, Nelea Plaza, 2nd Floor, Ngara Road, Nairobi.**

**3.THAT on the same day I proceeded to Nelea Plaza, Elan Traders and upon my arrival I introduced myself to Peter, one of the staff of Elan Traders and stated the purpose of my visit by inquiring the whereabouts of Mr. James Njogu Mwangi.**

**4.THAT Peter informed me that Mr. James Njogu Mwangi was not present, Peter called James Mwangi and he informed him that I was there at their office with a court Order from Nakuru Court.**

**5.THAT the said James Njogu Mwangi instructed Peter through the cell phone to receive the Order on his behalf but not to acknowledge on the principal copy.**

**6.THAT on 16th February 2013 I proceeded to their Thika Office situated at Tabby House, 2nd Floor P50, and upon my arrival I found the office was closed and found out that they do not work on Saturday.**

**7.THAT on 22nd February 2013 at about 11.00 am I proceeded again to Nellea Plaza, 2nd Floor, Elan Traders and upon my arrival I introduced myself to Joseph Kahoro one of the staff of Elan Traders and stated the purpose of my visit thereby inquiring the whereabouts of Mr. James Njogu Mwangi, Mr. Joseph Kahoro called Mr. James Njogu Mwangi through his cell phone and he informed him that I was there with the Order to serve upon him.**

**8.THAT Mr. James Njogu Mwangi informed him to accept the order on his behalf.**

**9.THAT around 12.30 pm, Joseph Kahoro accepted the Order on behalf of James Njogu Mwangi by way of signing on the principal copy of which is hereby returned to this Honourable Court duly served.”**

It is clear from this affidavit that the deponent did not serve the respondent personally as at law required. Can the respondent be said to have had proper notice of the terms of the order on the basis of the alleged service on one of his members of staff?

My answer is in the negative. I say this because the evidence of the deponent as regards the respondent giving instruction to one of his member's of staff to receive the order is hearsay and to that extent inadmissible.

The upshot of the foregoing is that the applicant has failed to persuade this court that the respondent was personally served, as at law required and/or that the respondent had proper notice of the order.

For the foregoing reasons I find and hold that contempt of the order of this court has not been proved to the required standard. Consequently, I dismiss it with no orders as to cost.

**Dated, Signed and Delivered at Nakuru this 28th day of February, 2014.**

**H.A OMONDI**

**JUDGE**