



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MERU

CIVIL CASE NO. 146 OF 2012

JOSEPHINE MUTHINJA.....PLAINTIFF/APPLICANT

-VS-

LILIAN MUTHAMIA.....1ST DEFENDANT/RESPONDENT

NICHOLAS MWENDA.....2ND DEFENDANT/RESPONDENT

KENYA WOMEN FINANCE TR.....3RD DEFENDANT/RESPONDENT

RULING

1. The applicant JOSEPHINE MUTHINJA through a Notice of Motion dated 24th September, 2012 brought pursuant to the provisions of Section 3 and 3A of the Civil Procedure Act and Order 40 Rule 3(1) of the Civil Procedure sought the following orders:-
 - i. ***That the Honourable Court do commit the 1st respondent Lillian Muthamia and 2nd respondent Nicholas Mwenda to prison for 6 months or such other period as the honourable court may deem fit as they have out rightly disobeyed orders of this honourable court issued on 27th July, 2012.***
 - ii. ***That costs of this application be in the cause.***
2. That before the application could be heard and determined on merits the respondents filed a Notice of preliminary objection on the grounds inter alia:- that the applicant did not seek leave to institute contempt proceedings as required by the provisions of Section 5 of the Judicature Act, which Notice of Preliminary objection was eventually dismissed on 28th November, 2012.
3. The applicant's application is premised mainly on the ground that the Honourable court had on 27th July, 2012 issued an order of injunction restraining the respondents from auctioning/or disposing plaintiff's applicants goods removed by the respondents from the plaintiff's school on 13th July, 2012 and that the court had ordered the respondent to return the applicant's goods pending the hearing and determination of this suit.
4. The plaintiff/applicant has averred that the said court's order was duly and personally served upon the respondents on 3rd August 2012 and that the respondents in total defiance of the said court order proceeded and sold the applicant's goods and/or refused to return the same as ordered by the

court.

5. The applicant further contend that the 1st and 2nd respondents in their affidavits had not denied service since their advocate was in court on 25th July, 2012 when court orders were made after their adjournment was rejected by court.
6. The respondents through 1st and 2nd respondents are opposed to the instant application contending that they were never served with the court's order issued on 27th July, 2012 and further averred that when the application for adjournment was rejected the matter proceeded ex parte resulting in the instant orders.
7. The respondents further contend that they had instructed their advocate on record to seek leave to put in a replying affidavit where they were to raise all the issues in response to the application since the time the application and the orders were made, the sale had already taken place and though the court ordered for the return of goods, the same could not have been possible in view of the fact that the execution had taken place and further as they had instructed their advocate to file an application dated 6th August, 2012 for stay of orders made on 25th July, 2012 which is still pending.
8. The respondents further contend that the supporting affidavit sworn by Mr. Kirimi Mbogo dated 24th September, 2012 does not specify who was served on 19th July, 2012 but states a lady who introduced herself as the Branch Manager. The said order was given on 18th July, 2002 and issued on 18th July, 2012 and has no penal notice.
9. That I have carefully considered the notice of motion, submissions and authorities relied upon by the parties herein in support and in opposition of their respective opposing positions. Mr. Kirimi Mbogo, learned Advocate in his affidavit of service dated 7th July, 2012 and supporting affidavit dated 24th September, 2012 allegedly effected service of the court order upon Lillian Muthamia who accepted service on her behalf and that of 2nd and 3rd respondents. The order purportedly served was issued on 18th July, 2012 and not the order granted on 25th July, 2012 and issued on 27th July, 2012. The copy of alleged said order has not been annexed to the affidavit of service.
10. MS. Lucy Mathiu in her affidavit of service dated 6th August, 2012 stated that she received an order issued by the court at Meru dated 27th July, 2012 and on 3rd August, 2012 served the same upon the 1st defendant by tendering copies to her but she refusing to sign her copy. She did incidentally annex copy of the purported served order.
11. It is evidently clear from the court record that both the orders dated 18th July, 2012 and 27th July, 2012, as extracted, the orders did not have penal notice as required by law but rather than applicant filed a notice of penal notice later through her advocate dated 30th July, 2012.
12. In the case of **OCHINO & ANO V OKOMBO & 4 OTHERS (CIVIL APPEAL NO.36 OF 1989)** the learned Judges of Appeal observed as follows"-

“the power to deal with contempt of court is provided for under Section 5 of the Judicature Act (CAP 8) and Order 39 Rule 2 (3) (now Order 40) of the Civil Procedure Rules. we have to follow the procedure and practice in England. As we read the law, the effect of the English provision is that as a general rule, no Order of court requiring a person to do or to abstain from doing any act may be enforced (by committing him for contempt) 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.” (Emphasis mine)

13. In the instant application bearing in mind the facts lacking in the affidavit of service by both Mr. Kirimi Mbogo learned Advocate and MS Lucy Mathiu, the process server, it is impossible to tell if indeed personal service was effected upon the respondents. None of them knew the respondents before. None of them said a particular person who knew the respondents introduced them to them and none of the respondents is said to have admitted that she or he was the particular person who was named in the order of the court or the application.
14. A quick perusal of the two extracted orders reveals that none of them had the requisite panel notices. The proposed penal notice issued later is dated 30th July, 2012 which is duly signed by the applicant's advocate meaning in effect that he had usurped the powers of this honourable court by purporting to issue penal notice. It is further not clear whether the said penal notice was served separately and significantly it should be noted that both the notice and the orders bear different dates. There is no assertion in the affidavits of service of the Penal Notice. That even if the penal notice was said to have been served it was not issued by this court. The same will be of no value to the applicant's application as the same is tainted with illegality hence it is null and void and can't be relied upon by the applicant to support this application.
15. On the issue that has been alluded to by the applicant that the respondents have not denied service and that they were all aware of the court's order since the same was made in presence of their advocate in court that cannot be further than the truth since the respondents have categorically denied in their affidavits being personally served and further the fact that their advocate was aware of the orders cannot be equated to personal service. The nature of the application before this court requires personal service and parties cannot be held liable or be published due to the fact that their advocates were aware of court's order. An Advocate can make mistake or ignore or fail to disclose the nature of the court's order to his/her respective clients or even mislead his/her clients or be negligent altogether. In this case of see **KARIUKI & 2 OTHERS V MINISTER FOR GENDER, SPORTS, CULTURE & SOCIAL SERVICES & 2 OTHERS MISC CIVIL APPL NO. 389 OF 2004** HON. Mr. Justice I. Lenaola held:-

“That service on the alleged contemnor’s advocate did not constitute personal service and even if the alleged contemnor had knowledge of the court order he would not be liable for contempt.”

16. In the instant application the respondent's counsel was present in court when the order was made. The fact that the contemnor's advocates was present in this case that did not constitute personal service or knowledge of the court's order by contemnor. The applicant ought to have gone a step further to get the order, with panel notice and personally effected service upon the two respondents. Similarly in the case of **MWANGI MANGONDU V NAIROBI CITY COMMISSION CIVIL APPEAL NO. 95 OF 1988**, it was stated as follows:

“this requirement is important because the court will only punish as a contempt a breach of injunction if satisfied that that the terms of the injunction are clear and unambiguous, that the defendant has proper notice of the terms and that breach of injunction has been proved beyond reasonable doubt.”

17. In view of the above reasons and having come to the above conclusion, I am unable to find and hold that the respondents were personally served with the court's order with requisite penal notice and consequently find the applicant's application without merits and accordingly dismiss the application dated 24th September, 2012 with no order as to costs.

DATED, DELIVERED AND SIGNED AT MERU THIS 19TH DAY JUNE, 2014.

J. A. MAKAU

JUDGE

DELIVERED IN OPEN COURT IN THE PRESENCE OF:

1. MR. KIRIMI MBOGO FOR APPLICANT

2. M/S MUTHIKE FOR RESPONDENT

J. A. MAKAU

JUDGE