



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**JUDICIAL REVIEW DIVISION**  
**JR CASE NO. 148 OF 2013**

REPUBLIC.....APPLICANT

VERSUS

ATTORNEY GENERAL.....1<sup>ST</sup> RESPONDENT

PERMANENT SECRETARY

MINISTRY OF DEFENCE.....2<sup>ND</sup> RESPONDENT

EX-PARTE

ISAIAH OCHANDA

**RULING**

The Applicant, Isaiah Ochanda, was the ex-parte Applicant in **Republic v Attorney General ex-parte Isaiah Oduor Ochanda, Nairobi High Court Judicial Review Case No. 229 of 2012**. In a judgement delivered on 21<sup>st</sup> November, 2012, I issued an Order of Mandamus directing the respondent therein to satisfy the decree in **Nairobi High Court Civil Case No. 1051 of 1996, Isaiah Oduor Ochanda v Attorney General**. Apparently, the respondent did not comply with the said order and the Applicant has now filed a notice of motion under Order 52 Rule 3(3) of the Rules of the Supreme Court of England & Section 5(1) of the Judicature Act (Cap 8) Laws of Kenya. His main prayer is that this court should cite the respondents for contempt for disobeying the court order issued in **JR No. 229 of 2012** and order that they be committed to civil jail for a period not exceeding thirty days.

The respondents opposed the application through a notice of preliminary objection. The three grounds in opposition to the application are:-

- a. **That the application contravenes Section 8 of the Office of the Attorney General Act, 2012 which shields that office from civil and criminal liability;**
- b. **That there was no personal service of the court's order on the alleged contemnors; and**
- c. **That there was no endorsement of the penal notice on the court order allegedly disobeyed by the respondents.**

In **OCHINO & ANOTHER V OKOMBO & 4 OTHERS [1989] KLR 165** the Court of Appeal held that:-

**“1. As a general rule, no order of court requiring a person to do or 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.**

**2. The copy of the order served must be indorsed 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.”**

The Court of Appeal decision is in tandem with the views expressed by the learned authors of **Halbury’s Laws of England, 4<sup>th</sup> Edition Vol 9** where at page 37 (paragraphs 61 and 62) they write that:

**“61. 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. In the case of an order requiring a person to do an act the copy must be so served before the expiration of the time within which he is required to do the act.**

**Where the order is made against an officer of a company, the order may only be enforced against an officer of the company if the particular officer has been served personally with a copy of the order; and in the case of an order requiring the company to do an act within a specified time, the copy must be served on the officer before the expiration of that time.**

**62. The copy of the order served must be indorsed with a notice informing the person on whom the copy is served that if he neglects to obey the order within the time specified or, where the order is prohibitory, if he disobeys the order, he is liable to process of execution to compel him to obey it.**

**In the case of service of an order on an officer of a company the indorsement on the order must state that, in the event of neglect or disobedience on the part of the company, the officer is liable to the process of execution.**

**The indorsement must be made on the copy of all orders which are required to be served, whether personally or not, even where the defendant on whom service is to be effected is a limited liability company.”**

This is the express language of the law and I do not find any other alternative to it.

The question is whether the Applicant complied with these mandatory requirements. The Applicant swore a verifying affidavit in support of the application and averred that the court order was served on the respondents on 23<sup>rd</sup> November, 2012. He also averred that he had annexed an affidavit of service and marked it “IOO7”. A perusal of the annexed affidavit shows that the same was sworn on 26<sup>th</sup> November, 2012 by Benard M. Musyoka and at paragraphs 2 and 3 he avers that on 23<sup>rd</sup> November, 2012 he served a court order, ruling and a forwarding letter on a clerk at the office of the Attorney General at Sheria House, Nairobi. At paragraph 4 he swears that on 26<sup>th</sup> November, 2012 he proceeded to the Department of Defence where he served the same documents on the legal officer. The said affidavit of service clearly shows that the Attorney General and the Permanent Secretary in the Ministry of Defence were never served in person. In fact the affidavit of service does not disclose the name of the clerk in the office of the Attorney General and the legal officer in the Department of Defence who were allegedly served with the court papers. Even the time of service is not disclosed. Secondly, the Applicant has not disputed the fact that no penal notice was indorsed on the court order.

The respondents are assumed not to be aware of the court order unless evidence is tabled to show that they were indeed aware of the court order and intentionally disobeyed the same.

This then brings me to the argument by counsel for the Applicant that there is no need to indorse a penal notice on a court order being served on the Attorney General since the Attorney General is lawyer. Saying that orders to be served on lawyers need not contain a penal notice will result in double standards and inconsistencies in the application of the law. Such a situation would create chaos in the administration of justice. This argument by the Applicant's counsel is untenable and the same is dismissed.

Having come to the conclusion that this application cannot succeed on the grounds of lack of personal service and indorsement with a penal notice on the copy of the order, I do not find it necessary to consider whether this application contravenes the provisions of Section 8 of the Office of the Attorney General Act, 2012.

In **KISYA INVESTMENTS LTD v ATTORNEY GENERAL & ANOTHER [2005] eKLR** the Court grappled with the issue of execution of decrees against the Government and concluded that it is imperative that the Government satisfies court orders otherwise the burden of paying interest will continue to weigh heavily on the taxpayer. The 2<sup>nd</sup> Respondent should budget for the claim herein and settle this matter once and for all. I will conclude this ruling with the words of the court in **KISYA INVESTMENTS LTD**, supra, where the court observed that:

**“It is our view that the Government in this case has failed to observe and comply with the order of this court within a reasonable time and as a result the taxpayer and the public have lost a large sum of money and could be called upon to pay further huge amounts arising purely and totally from unnecessary escalating interest on the principal sum in the decree. We sincerely hope that this shall be the last of such unnecessary cases which have resulted in wasted public funds and coffers and thereby continued to increase the burden and poverty of Kenyans.”**

It must be remembered that this matter arose as a result of injuries sustained by the Applicant while on duty with our armed forces. The delay in satisfying the decree speaks loud and clear on how we treat those who protect our interests. The respondents and in particular the 2<sup>nd</sup> respondent ought to do what is just and fair by satisfying the decree relating to this matter.

Notwithstanding what I have stated above, I find that the Applicant's application cannot succeed and the same is dismissed with costs to the respondents.

Dated, signed and delivered at Nairobi 5th day of December, 2013

**W. K. KORIR,**

**JUDGE OF THE HIGH COURT**