



REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

Misc Appli 55 of 2007

**IN THE MATTER OF: AN APPLICATION MADE BY AWADH SALIM FARAJ & BIDII
BWANAHERI BWANAMKUU (“THE APPLICANTS”) FOR LEAVE TO APPLY FOR AN
ORDER OF COMMITTAL TO PRISON FOR CONTEMPT OF COURT**

A N D

IN THE MATTER OF SECTION 5 OF THE JUDICATURE ACT (CAP 8)

AWADH SALIM FARAJ

BIDII BWANAHERI BWANAMKUU..... APPLICANTS

- Versus -

THE COMMISSIONER OF POLICE.....1ST RESPONDENT

THE OFFICER IN CHARGE OF ANTI TERRORISM

POLICE UNIT 2ND RESPONDENT

Coram: Before Hon. Justice L. Njagi

Court clerk - Ibrahim

Mr. Mazrui for Ex Parte Applicants

Mr. Monda h/b for Wahoro for

Respondents

RULING

On 1st February, 2007, this court ordered that certain persons named as being in police custody in Miscellaneous Criminal Case Application No. 5 of 2007, as well as those named in the twin application No. 6 of 2007, to wit, SALIM AWADH SALIM, FATUMA ADBDULRAHMAN, SAID KHAMIS MOHAMED, SALMIN MOHAMED KHAMIS, FATUMA AHMED ABDULREHMAN and HAFSUUA SWALEH ALI NABHAN be discharged and released forthwith. The court also directed that this order be served on the Commissioner of Police and the Officer in charge of Anti-Terrorism Police Unit. Apparently, SALIM AWADH SALIM and SAID KHAMIS MOHAMED were not released, either in obedience to the above order or at all. Failure to obey the order prompted the making of the present

application for orders –

1. THAT the Respondents herein, namely, the Commissioner of Police of the Republic of Kenya and the Officer in charge of Anti-Terrorism Police Unit, be committed to prison for contempt of court for their willful disobedience of the orders of the High Court, Mombasa, dated 1st February 2007 and issued on 2nd February, 2007 in Miscellaneous Criminal case Application No. 5 of 2007.
2. THAT the costs of this application be provided for.

The application is dated 23rd February, 2007, and is made by a notice of motion under section 5 of the Judicature Act, Order LII Rules 1, 3, 4, 5 and 6 of the Rules of the Supreme Court of England, and Section 3A of the Civil Procedure Act. It is supported by the annexed affidavits of AWADH SALIM FARAJ, the father to SALIM AWADH SALIM, and BIDII BWANAHERI BWANAMKUU, the mother to SAID KHAMIS MOHAMED. It is based on the grounds that, inter alia, the court order of 1st February, 2001, with a penal notice was served upon the offices of the 1st respondent on 7th February, 2007, at Vigilance House, Nairobi, by a duly approved process server and the said service was duly acknowledged; that the said order with a penal notice was also served upon the offices of the second respondent on 7th February at Nairobi Area Police Station, Nairobi, by a duly approved process server upon a Mr. Mwaniki who refused to acknowledge service; and that despite service of the aforesaid order upon the Respondents herein, the said respondents have willfully refused and/or neglected to comply with the same without explanation and/or justification. For these reasons, the applicants seek an order for committal to prison against the Respondents.

In opposition to the application, Zack Tum, an Assistant Commissioner of Police who doubles up as the Deputy Director of Operations at CID Headquarters, swore a replying affidavit on 26th March, 2006. Basically, he depones that SALIM AWADH SAID was deported to Somalia on 27th January, 2007 pursuant to a deportation declaration by the Minister in charge of Immigration and Registration of Persons. He further avers that on 31st January, 2007 when the matter was in court, this information had not been communicated to the State Counsel. The deponent also states that the court order of 1st February was not served on the Commissioner of Police personally, and that when the order was made, Salim Awadh Said was not in the custody of the Police. Finally, he states that the Commissioner of Police and the Officer in Charge, Anti Terrorism Police Unit did not in any way intend to disobey court orders, and that the court order was not capable of being complied with.

Before the application dated 23rd February, 2007 could be heard, the Hon. The Attorney General filed a Notice of Preliminary Objection to the hearing of the same on the following grounds that –

1. The applicants did not personally serve the Habeas Corpus order on the Commissioner of Police or the Officer in Charge of Anti Terrorism Police Unit as required by law as to give rise to contempt proceedings against them.
2. The Notice to the Registrar of the High Court filed contemporaneously with the application for leave without giving the mandatory one day's service notice to the Registrar of the High Court (sic).
3. The Applicants have not served the hearing notice and the application for contempt personally on the Commissioner of Police and the Officer in charge, Anti Terrorism Police Unit and the purported service by the applicant's process server does not amount to personal service of the said officers.

At the hearing of this preliminary objection, Mr. Wohoro appeared for the Attorney General for the respondent and Mr. Abdalla Mazrui appeared for the applicants. In a nutshell, Mr. Wohoro submitted that the Habeas Corpus application was not served on the Commissioner of Police personally as required by order 52 rule 3 of the Rules of the Supreme Court as applied by section 5(1) of the Judicature Act; and that the same lack of personal service extended to the Officer in charge of Anti-Terrorism Police Unit. He referred to the affidavit of service of Apollo Lusaka, and submitted that the application for leave to

institute contempt proceedings was therefore premature. Mr. Wohoro further submitted that the authorities show that personal service on the person sought to be committed is mandatory, and the applicants had failed to establish personal service.

Secondly, Mr. Wohoro submitted that an applicant must give notice of the application for leave not later than the preceding day to the Attorney-General. Although service of this notice is mandatory, in the instant case, it was given on the same day and not on the day before, thereby contravening the dictates of Order 52 rule 3.

Finally, counsel submitted that in the annexures to the affidavit of Fatima Omar Muhaji is a copy of a passenger manifest of 27th January, 2007. It shows that SALIM AWADH S. was on the plane to Mogadishu pursuant to a declaration by the Minister of State for Immigration and Registration of Persons that the said SALIM AWADH SALIM was not a citizen of Kenya and that his presence in Kenya was contrary to national interest, and that he should be removed from Kenya to his country of origin, SOMALI, immediately. This person was therefore in police custody five days prior to the court order of 1st February, 2007. Mr. Wohoro thereupon submitted that the Respondents were incapable of complying with the court order.

In his response, Mr. Mazrui for the applicants submitted that in considering an application for habeas corpus, the court has a discretion, and that a preliminary objection does not lie in respect of a matter over which the court has a discretion, and that discretion extends to affect even a person out of jurisdiction. The law allows the court discretion to overlook personal service and therefore failure to comply with the procedure as to personal service was not fatal. Counsel then submitted that the authorities cited could be distinguished as they were decided before certain changes had been made in the Rules of the Supreme Court of England. Referring to the case of ABU CHIABA MOHAMED v. MOHAMED BWANA BAKARI & ORS., Civil Appeal No. 238 of 2003, Mr. Mazrui submitted that personal service need not be personal. He also argued that if the Police Commissioner was in the cocoon of his offices, he cannot be served. Service was effected in the Office of the Police Commissioner and that failure to serve personally on the person was not a breach of procedure. Counsel then submitted that the respondents had not shown that there was no personal service, and that even if there wasn't, that was not a breach of procedure and therefore the preliminary objection fails.

Mr. Mazrui then submitted that failure to comply with the court order was contempt, ipso facto, and that there was no explanation for the failure to comply with the order for the release of SAID KHAMIS. He summed up by submitting that the respondents had failed to obey a court order and therefore they should be punished.

In a terse reply, Mr. Wohoro submitted that it had not been demonstrated that the respondents had evaded service.

Having considered the pleadings and rival submissions of both counsel, I take the view that the main issue for determination is whether the respondents were personally served and, if not, whether this was fatal. To start from the beginning, section 5(1) of the Judicature Act provides that the High Court will have power to punish for contempt of court as is for the time being possessed by the High Court of Justice in England, and that power extends to upholding the authority and dignity of subordinate courts. Under Order 52(4) of the Rules of the Supreme Court of England, where an application for an order of committal is made to a court, the application must be made by application notice and be supported by an affidavit. Paragraphs (2) and (3) of rule 4 then proceed to state –

“(2) subject to paragraph (3) the application notice, stating the grounds of the application and accompanied by a copy of the affidavit in support of the application must be served personally on the person sought to be committed.

(3) Without prejudice to its powers ... the court may dispense with service under this rule if it thinks it just to do so.”

In the instant case, there is no evidence that the court dispensed with service upon the respondents. Therefore, it was incumbent upon the applicants to effect service upon the respondents in strict adherence to Order 52 rule 4 paragraph 3. As we have seen, this paragraph requires that the application accompanied by the supporting affidavit “must” be served “personally” on the person sought to be committed. The use in that paragraph of the words “must” and “personally” speaks for itself.

Service on the respondents commenced with the service of the order of which they are accused of disobeying. According to the affidavit of service sworn by Apollo Lusaka on February, 2007, the deponent avers in paragraphs 2, 3 and 4 as follows –

“2. THAT on the 7th day of February, 2007, I received an order for service upon the Commissioner of Police and Office (sic) in charge of Anti-Terrorism Police, from Mr. Nyongesa, Advocate.

(3) THAT on the same day I proceeded to Nairobi Area Police Station, being the offices of Anti-Terrorism Police Unit and served a copy of the Order a Mr. Mwaniki (sic) who refused to sign stating that the same should be served upon Commissioner of Police (sic). This was about 4.00 p.m.

(4) THAT I immediately proceeded to Vigilance House and served a copy of the Order upon offices of the Police Commissioner who accepted service by signing on the order at 4.30 p.m. the same is returned herewith duly signed and served.”

It is evident from this deposition that neither the Police Commissioner nor the Officer in Charge of the Anti-Terrorism Police Unit was served personally. Indeed, the deponent does not even seem to know with whom he left the order. He merely served the order “upon offices of the Police Commissioner who accepted service ...” I find from these circumstances that service of the court order of 1st February, 2007, was not served personally on the respondents or any of them.

This brings us to the service of the application for the order of committal for contempt of court. In his affidavit of service sworn on 6th March, 2007, Joseph Mumangi Musila states that on the 5th day of March, 2007, he received a Hearing Notice dated 28th February, 2007 for hearing date coming up on 15th March, 2007, and an application dated 23rd February, 2007, from A.A. Mazrui & Co., Advocates who are on record for the Applicants, with instructions to serve the same upon the Commissioner of Police (1st Respondent) and the Officer In Charge of Anti-Terrorism Police Unit (2nd Respondent). He proceeds to say in paragraphs 3, 4 and 5 of his affidavit as follows –

“3. THAT on the same day at around 2.20 p.m. I proceeded to the office of the Officer in charge of Anti-Terrorism Police Unit situated in Nairobi Area Police Station, on arrival, I introduced myself and the purpose of my visit to officer (sic) acting on his behalf Mr. Kaloki who informed me that the officer was not in and told me to serve the same upon legal Officer Police Headquarters in Vigilance House along Harambee Avenue.

4. THAT I immediately went to Vigilance House 1st Floor Room 105 and effected service (sic) thereof upon Legal Officer known as Mola for both respondents The Commissioner of Police and The Officer in Charge of Anti-Terrorism Police Unit by tendering original copies and requiring signature on my copies she accepted service by rubber-stamp date and signing acknowledge received (sic) on my copies which I return to this Honourable Court having been duly served.

5. THAT after receiving both copies, she gave me the copy meant for the Officer in charge Anti-Terrorism Police Unit to take back to his office whereby I took back and gave it to Mr. Kaloki.”

From these averments, it is clear that the deponent not only failed to serve the application and hearing notice personally on any of the respondents, but that he also did not even make an effort to do so. When he left Nairobi Area Police Station, he went to Vigilance House not to serve the Commissioner of Police, or the officer in charge of the Anti-Terrorism Police Unit, but to serve the documents on the legal officer

who happily accepted them. This is a far cry from the personal service required under Order 52 rule 4 paragraph 2. The wording of that paragraph is mandatory, and the process must be served personally on the person sought to be committed. In these circumstances, as in the service of the order said to have been disobeyed, I find that the application was not served personally as required by the relevant rule.

In the case of LOISE MARGARET WAWERU v. STEPHEN NJUGUNA GITHURI Civil Appeal No. 198 of 1998, the court process server, in his affidavit of service stated that he served a copy of the order and a penal notice on the appellant by leaving it with the young man who came to the gate when he went to the appellant's house at Sunrise Estate, Nairobi. According to the process server, the young man introduced himself to him as the appellant's houseboy and told him that he was authorized by the appellant to receive any message on his behalf.

Addressing the issue of that service, the Court of Appeal said –

“There is no evidence on record to prove that the person who received the documents from Wainaina (the process server) claiming to be her servant was duly authorized by the appellant to accept service on her behalf. But whatever may be the position, service on the houseboy did not constitute personal service on the appellant.

It was held in the case of MANDER v. FALCKE [1891] 3 Ch. 488 that the notice of motion must be served personally on the respondent (even if it has an address for service) unless the court dispenses with such service on an *ex parte* application or at the hearing of the motion ... If the order is to refrain from doing an act or requires a positive act to be done evidence must be led to prove service on the respondent of the order alleged to have been disobeyed along with a penal notice”

In this case, as in the above case that the Court of Appeal was dealing with, there was no personal service on the respondents, and in the absence of this they cannot be committed for contempt of court.

Mr. Mazrui argued very energetically that failure to serve personally is not a breach of procedure. That is debatable. In an appropriate case, where it is shown on evidence that a contemnor is avoiding service, which evasion is proof that he is aware of the existence of the order sought to be served upon him, the court will not hesitate to dispense with personal service. This is because the purpose of service is to notify. Therefore, where it is proved that the person sought to be notified has prior knowledge of an order sought to be served on him, upon proof of that knowledge, personal service may be dispensed with.

In the present case, there is no evidence that the respondents or either of them was avoiding service. They should, therefore, have been personally served. As this was not done, I find that they cannot be committed for contempt of court. I accordingly uphold the preliminary objection and dismiss the application by notice of motion dated 13th February, 2007 with costs.

Dated and delivered at Mombasa this 31st day of July, 2007.

L. NJAGI

JUDGE