Varma, The Registered Trustee of Arya Pratinidhi Sabha Eastern Africa v Ogaro, The Principal Parklands Arya Girls High School & another (Environment & Land Case E060 of 2022) [2022] KEELC 15348 (KLR) (7 December 2022) (Ruling)

Neutral citation: [2022] KEELC 15348 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND CASE E060 OF 2022

JO MBOYA, J

DECEMBER 7, 2022

BETWEEN

SWARAN VARMA, THE REGISTERED TRUSTEE OF ARYA PRATINIDHI SABHA EASTERN AFRICA ..... PLAINTIFF

AND

RHODA OGARO, THE PRINCIPAL PARKLANDS ARYA GIRLS HIGH SCHOOL ..... 1ST DEFENDANT

BOARD OF MANAGEMENT, PARKLANDS ARYA GIRLS HIGH SCHOOL ..... 2ND DEFENDANT

RULING

Introduction and Background

1. Vide Notice of Motion dated the July 27, 2022, the Plaintiff/Applicant has sought the following Orders:

    i. That this Honourable Court be pleased to certify this Application as urgent and at first instance an *ex-parte* order be issued in terms of the succeeding prayer.

    ii. That the OCS Parklands Police Station do enforce and ensure full compliance of the Court's Order made on March 8, 2022.

    iii. That the Defendants show cause why they should not be held in Contempt of Court for having expressly breached and acted in violation of the Orders made on March 17, 2022 and March 8, 2022.

iv. That the Defendants be detained in civil jail for a term of Six (6) months for disobeying the Order made on February 17, 2022 and served upon them on February 18, 2022.

v. That the Defendants be detained in civil jail for a term of six months for disobeying the Order made on March 8, 2022 and served upon them on March 29, 2022 and July 25, 2022.

vi. That costs of this application be to the Plaintiff.

2. The instant Application is premised and anchored on the various grounds that have been enumerated in the body thereof. Besides, the application is supported by the affidavit of the Plaintiff/Applicant sworn on the July 27, 2022 and to which the Plaintiff/Applicant has annexed assorted documents, inter-alia, photographs of (sic) construction being undertaken within the compound of the 2nd Defendant/Respondent.

3. Upon being served with the subject Application, the Defendants/Respondents responded thereto vide Replying affidavit. For completeness, there is the Replying affidavit sworn by Roda Ogaro on the October 20, 2022 and also the Replying affidavit of Dr. Opondo, similarly sworn on even date.

4. Suffice it to point out that the Application herein came up for hearing on the October 19, 2022, whereupon directions were issued to the effect that the application was to be canvassed by way of written submissions.

5. For clarity, the Parties thereafter proceeded to and filed their respective Written submissions.

Sumbissions By The Parties:

i. Plaintiff's/applicant's Submissions:

6. The Plaintiff/Applicant herein filed written submissions dated the October 26, 2022 and in respect of which the counsel for the Plaintiff/Applicant has raised, highlighted and amplified three issues for due consideration.

7. First and foremost, counsel for the Plaintiff/Applicant has submitted that the Plaintiff/Applicant filed and lodged an application before the honourable court dated the February 16, 2022, wherein same sought for various reliefs, inter-alia, an order of temporary injunction to restrain the Defendants/Respondents from undertaking various activities over and in respect of the named property.

8. Further, counsel for the Plaintiff added that upon the filing of the said application, same was duly placed before the honourable court whereupon the application was certified urgent and thereafter the court proceeded to and issued orders for maintenance of *status quo*, which effectively barred the construction or further building on the suit property.

9. On the other hand, counsel for the Plaintiff has added that upon receipt of the orders of the court which were issued on the February 17, 2022, same caused the said orders to be served upon the Defendant's/Respondent's by way of electronic mail. For clarity, it has been stated that the service was effected on the February 18, 2022.

10. Secondly, counsel for the Plaintiff/Applicant has also submitted that the application dated the February 16, 2022, was thereafter set down for inter-partes hearing on the March 8, 2022 and on which date the application was duly heard and disposed of vide order issued on even date.

11. Besides, counsel further submitted that the orders of the court which were issued on the March 8, 2022, were thereafter extracted and sealed by the Deputy Registrar of honourable court on the 2March 2, 2022.

12. For completeness, counsel for the Plaintiff/Applicant contended that after the extraction and upon the sealing of the orders which were issued on the March 8, 2022, same proceeded to and served the said orders upon the Defendants/Respondents.

13. In this respect, counsel has added that the orders which were duly extracted on the March 22, 2022 were served vide electronic mail, as well as physically upon the Defendant's/Respondent's

14. Suffice it to point out that counsel for the Plaintiff/Applicant has therefore referred to and relied upon the affidavit of service sworn by one Josephine Mbaila on the May 23, 2022, to vindicate the contention that indeed the Defendants/Respondents were duly served.

15. Thirdly, counsel for the Plaintiff/Applicant has submitted that despite being duly served with the orders of the court issued on the February 17, 2022 and the March 8, 2022, respectively, the Defendants/Respondents, have proceeded to and continued with the construction on the suit property and within the prescincts of the school.

16. At any rate, counsel for the Plaintiff/Applicant has invited the Honourable court to take cognizance of the various Photographs, which have been attached to and exhibited vide the supporting affidavit sworn on the July 27, 2022.

17. Premised on the foregoing, counsel for the Plaintiff/Applicant has therefore contended that the actions by and on behalf of the Defendants constitutes and amounts to willful disobedience and disregard of lawful court orders.

18. Consequently and in this regard, counsel for the Plaintiff/Applicant has therefore invited the Honourable court to find and hold that the Defendants/ Respondents are in Contempt of the Impugned Orders and thereafter to cite and punish the Defendants/Respondents for contempt.

b. Defendants'/respondents 'submissions:

19. The Defendants/Respondents herein filed written submissions dated the October 30, 2022 and in respect of which same has highlighted and amplified two issues for consideration by the Honourable court.

20. Firstly, counsel for the Defendants has submitted that the 1st and 2nd Respondents were never served with the impugned orders which were issued on the February 17, 2022 and March 8, 2022, respectively.

21. Consequently, counsel for the Defendants/Respondents has added that to the extent that same were never served with the said court orders, the Defendants/Respondents were therefore neither aware of nor conversant with the terms of the court orders.

22. To this end, counsel for the Defendant/Respondent has therefore submitted that without being knowledgeable or aware of the impugned orders, it would be inappropriate to find and hold that the Defendants/Respondents acted in contempt of the impugned court orders.

23. Secondly, counsel for the Defendants/Respondents has submitted that the Defendants/Respondents herein do not have any personal stake and interests in the development that are being carried out and undertaken within the named school.

24. For clarity, the Defendants/Respondent have pointed out that the impugned constructions are being undertaken by the Ministry of Education in a bid to facilitate the expansion of the Physical Infrastructure in the named school.

25. In view of the foregoing, counsel for the Defendant/Respondent has submitted that it would be harsh and oppressive to cite and punish the Defendants/Respondents for the impugned activities, which are being undertaken by Parties other than themselves.

26. Finally, counsel for the Defendants/Respondents have submitted that the Jurisdiction of the Honourable Court to punish for contempt, ought to be exercised with due circumspection and extreme caution, so as not to occasion grave injustice.

27. In the premises, counsel for the Defendants/Respondents has therefore invited the honourable court to find and hold that the subject application is not merited and same ought to be dismissed.

Issues For Determination:

28. Having reviewed the Application dated the July 27, 2022, together with the Supporting affidavit thereto and having taken into account the Replying affidavits filed on behalf of the Defendants/Respondents; and having similarly considered the written submissions filed on behalf of the Parties, the following issues do arise and are thus worthy for determination;

    i. Whether the Defendants/Respondents were duly served with the orders issued by the Honourable Court or better still, Whether the Defendants/Respondents were knowledgeable of the terms of the impugned orders of the court.

    ii. Whether the Defendants/Respondents have disobeyed or contravened the terms of the orders of the court or better still, whether the Defendants are guilty of contempt.

Analysis And Determination

Issue Number 1; Whether the Defendants/Respondents were duly served with the orders issued by the honourable court or better still, Whether the Defendants/Respondents were knowledgeable of the terms of the impugned orders of the court.

29. The Plaintiff/Applicant herein has contended and averred that the Defendants/Respondents have willfully and deliberately acted contrary to and in contravention of the two sets of the court orders, which were issued on the February 17, 2022 and the March 8, 2022, respectively.

30. Having contended that the Defendants/Respondents have willfully disobeyed the lawful court orders, it was incumbent upon the Plaintiff/Applicant to demonstrate that indeed the impugned orders were duly served upon the Defendants/Respondents.

31. In the alternative, the Plaintiff/Applicant was also at liberty to demonstrate and prove that even though the Defendants/Respondents were not present at the time of the rendition of the impugned orders, same were however knowledgeable and aware of the terms of the said orders.

32. Suffice it to point out that the burden of establishing and proving service of the impugned court orders or better still knowledge on the part of the Defendants/Respondents laid on the shoulders of the Plaintiff/Applicant.

33. In the premises, it is now appropriate to interrogate the totality of the evidence placed on record by the Plaintiff/Applicant to discern whether the Defendants/Respondents were duly served with the impugned court orders.

34. In this regard, it is imperative to note that the Plaintiff/Applicant has contended that the first set of orders, namely, the orders that were issued on the February 17, 2022, were duly served vide electronic mail on the February 18, 2022.

35. To this end, the Plaintiff/Applicant has annexed and exhibited a copy of the email, to show that indeed that the impugned orders was duly served upon the Defendants/Respondents.

36. However, it is common ground that despite annexing a copy of the email dispatch documents, which shows that there were three attachments, the Plaintiff/Applicant has however failed to attach a copy of the electronic certificate to authenticate and verify the contents of the electronic mail dispatch document which has been attached.

37. There is no gainsaying that the electronic mail evidence, which has been exhibited, was indeed downloaded and printed vide an electronic devise or gadget. Consequently, it was incumbent upon the Plaintiff/Applicant or better still his advocate on record to ensure compliance with the provisions of section 106B of the *Evidence Act*, Chapter 80 Laws of Kenya.

38. In the absence of an electronic certificate, which is a mandatory requirement by dint of the law, it is common knowledge that the impugned document is rendered useless and of no legal consequence.

39. Put differently, the impugned electronic document/evidence, which is not accompanied with the requisite electronic certificate as required under the law, is therefore devoid of probative value.

40. In this respect, it is appropriate to take cognizance of the holding the Court of Appeal in the case of *Speaker of The County Assembly of Kisumu & another v the Clerk Kisumu County Assembly Service Board & others* [2015] eKLR, where the court stated as hereunder;

> (1) In our view, this is a mandatory requirement which was enacted for good reason. The court should not admit into evidence or rely on manipulated (and we all know this is possible) electronic evidence or record hence the stringent conditions in sub-section 106B(2) of that Act to vouchsafe the authenticity and integrity of the electronic record sought to be produced. For ease of reference, we wish to reproduce Section 106B of the *Evidence Act* in its entirety:
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> > "106B (1) Notwithstanding anything contained in this Act, any information contained in an electronic record which is printed on a paper, stored, recorded or copied on optical or electro-magnetic media produced by a computer (herein referred to as computer output) shall be deemed to be also a document, if the conditions mentioned in this section are satisfied in relation to the information and computer in question and shall be admissible in any proceedings, without further proof or production of the original, as evidence of any contents of the original or of any fact stated therein where direct evidence would be admissible.
>
> (2) The conditions mentioned in subsection (1), in respect of a computer output, are the following—

(a) the computer output containing the information was produced by the computer during the period over which the computer was used to store or process information for any activities regularly carried out over that period by a person having lawful control over the use of the computer;

(b) during the said period, information of the kind contained in electronic record or of the kind from which the information so contained is derived was regularly fed into the computer in the ordinary course of the said activities;

(c) throughout the material part of the said period, the computer was operating properly or, if not, then in respect of any period in which it was not operating properly or was out of operation during that part of the period, was not such as to affect the electronic record or the accuracy of its content; and

(d) the information contained in the electronic record reproduces or is derived from such information fed into the computer in the ordinary course of the said activities.

(3) Where over any period, the function of storing or processing information for the purposes of any activities regularly carried on over that period as mentioned in paragraph (a) of sub section (2) was regularly performed by computers, whether—

(a) by combination of computers operating in succession over that period; or

(b) by different computers operating in succession over that period; or

(c) in any manner involving the successive operation over that period, in whatever order, of one or more computers and one or more combinations of computers,then all computers used for that purpose during that period shall be treated for the purposes of this section to constitute a single computer and references in this sections to a computer shall be construed accordingly.

(4) In any proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following—

(a) identifying the electronic record containing the statement and describing the manner in which it was produced;

(b) giving such particulars of any device involved in the production of that electronic record as may be appropriate for the purpose of showing that the electronic record was produced by a computer;

(c) dealing with any matters to which conditions mentioned in sub-section (2) relate; and

(d) purporting to be signed by a person occupying a responsible position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate), shall be evidence of any matter stated in the certificate and for the purpose of this subsection it shall be sufficient for a matter to be stated to be the best of the knowledge of the person stating it.

(5) For the purpose of this section, information is supplied to a computer if it is supplied thereto in any appropriate form and whether it is so supplied directly or (with or without human intervention) by means of an appropriate equipment whether in the course of activities carried on by any official, information is supplied with a view to its being stored or processed for the purpose of those activities, that information, if duly supplied to that computer, shall be taken to be supplied to it in the course of those activities."

67. In relation to this case, the relevant conditions in that section are (a) if the computer output was recorded by a person having lawful control over the computer used; (b) if the output was recorded in the ordinary course of that person's activities using a computer or some other electronic devise and fed into a computer that was properly operating throughout the material period; and (c) if that person gives a certificate that to the best of his knowledge, the output is an electronic record of the information it contains and describes the manner in which it was produced.

68. The *Evidence Act* does not provide the format the certificate required under sub-section 106B(2) thereof should take. The certificate can therefore take any form including averments in the affidavit of the recorder.

41. Additionally, it is also appropriate to adopt and endorse the holding in the case of *Samwel Kazungu Kambi v Nelly Ilongo the Returning Officer, Kilifi County & 2 others* [2017] eKLR, where the Honourable Court observed as hereunder;

21. Sub-section (4) of Section 106B requires a certificate confirming the authenticity of the electronic record. Such a certificate should describe the manner of the production of the record or the particulars of the device. The certificate could also have the signature of the person in charge of the relevant device or the management of the relevant activities.

22. The source of the photocopies of the photographs annexed to the affidavit sworn by the Petitioner in support of the Petition was not disclosed. The device used to capture the images was unknown. The person who took the photographs was not named. The person who processed the images was not named. The Petitioner was not an eyewitness to the incident and he could not therefore tell the court that the photographs were a true reflection of the incident he witnessed.

42. As concerns service of the orders which were issued on the March 8, 2022, the Plaintiff/Applicant has contended that same were duly served vide electronic mail as well as physical service.

43. For coherence, the Plaintiff/Applicant has similarly attached a copy of the electronic mail bearing the date of July 25, 2022. For clarity, same has been attached and exhibited as annexure YBP 3.

44. On the other hand, it has also been contended that the same orders were similarly served upon the 1st Defendant/Respondent on the March 29, 2021. In this regard, the Plaintiff/Applicant has annexed an affidavit of service sworn by one Josephine Mbaila. See annexure YPB 2.

45. In respect of service vide electronic mail, it is worthy to note and recall that the dispatch/ acknowledgement slip which has been exhibited has not been accompanied by the requisite Electronic certificate.

46. Consequently and in the premises, it is my finding and holding that the purported service at the foot of the said electronic mail document/slip, is neither authentic nor valid. For coherence, the provisions of order 5 rule 22 A and B of the Civil Procedure Rules, which allows service vide Electronic means ought to be read alongside the named provisions of the *Evidence Act*, Chapter 80, Laws of Kenya.

47. Notwithstanding the foregoing, I must now return to the issue of service upon the 1st Defendant, in the manner articulated vide the affidavit of service sworn on the May 23, 2022, which has been sworn by one, Josephine Mbaila.

48. Suffice it to point out that the process server contends that same proceeded to the offices of the 1st Defendant/Respondent on the 29th March 2022 and upon arriving at the 1st Defendant's offices, same (the process server) found the 1st Defendant in office.

49. Besides, the process server has further stated that upon finding the 1st Defendant/Respondent, the 1st Defendant informed her (the process server) to leave the documents with the secretary.

50. Other than the foregoing, the process server has further added that she indeed complied with the direction of the 1st Defendant/Respondent and actually left the named documents, inter-alia, the court order with the secretary.

51. Further, the process server has averred that she went back to the Defendant school, with a view to procuring and obtaining the secondary copies from the 1st Defendant on the March 30, 2022. However, the process server has contended that upon arrival at the school same found that the 1st Defendant had taken both copies including the duplicate copies.

52. Notwithstanding the foregoing, the process server has further stated and added that the 1st Defendant/ Respondent did not sign any copies.

53. Be that as it may, the process server has contended and averred that the 1st Defendant/Respondent was therefore duly served with the named court documents, inter-alia, the court order.

54. From the contents of the affidavit of service, a number of issues do arise and which are worthy of interrogation and consideration.

55. First and foremost, there is the question as to which court order was availed to the process server and which same was endeavoring to serve on the March 29, 2022. Could it be the order issued on the February 17, 2022, or the Order issued on the March 8, 2022?

56. For coherence, paragraph 2 of the affidavit of service does not specify the details and particulars of the impugned order that was allegedly handed over to the process server for service and which is at the foot of the named Affidavit of service.

57. The second issue that does arise relates to whether indeed the 1st Defendant/Respondent was duly served. In this regard, if the process server truly found and met the 1st Defendant/Respondent in her office on the March 29, 2022, then why would the process server go and leave the documents with the secretary and not the principal party who was to be served.

58. The third issue concerns the veracity of whether or not the impugned documents were truly left with the 1st Defendant's/Respondent's secretary either in the manner alluded to in the affidavit of service or at all.

59. To this end, if the process server was indeed abreast of her mandate and duty, in terms of the provisions of order 5 of the *Civil Procedure Rules, 2010*, then the process server was obliged to procure and established the name of the secretary with whom the documents were being left for purposes of eventual handing over of same to the 1st Defendant/Respondent.

60. Sadly, the process server herein neither procured the names of the purported secretary, nor did the process server even obtain, inter-alia, her Cell-phone number whatsoever, or such other details, which would be helpful in ascertaining the identity of the purported Secretary.

61. Given the manner in which the affidavit of service has been crafted, it is difficult, if not impossible to authenticate whether indeed the process server went to the office of the 1st Defendant/Respondent or even left the document for service with any secretary.

62. In my humble view, it behooved the process server to ensure that the affidavit of service was comprehensive, apt and succinct. Simply put, the Affidavit of service needed to contain the requisite details as envisaged by the provisions of order 5 of the *Civil Procedure Rules*.

63. Other than the foregoing, there is also the doubt arising out of the affidavit of service. For clarity, the doubt touches on, why would the process server be serving a copy of (sic) the Plaint, verifying affidavit, summons to enter appearance and a court order together with annexures on the 1st Defendant/Respondent, yet it was purported that the said documents had hitherto been served on the February 18, 2022.

64. Clearly, something is amiss. If the Defendants/Respondents had been duly served with the documents named and alluded to at the foot of annexure YPB 1, then there was no need to reserve similar documents on the March 29, 2022.

65. At any rate, it is also imperative to note that the Plaintiff/Applicant has also purported to have reserved the court order issued on the March 8, 2022 vide email of July 25, 2022. See annexure YPB 3.

66. The question that then arises is why would the Plaintiff/Applicant be purporting to have been serving similar documents over and over again.

67. In my humble view, there is doubt as to whether or not the Defendants/Respondents were duly served with the named court orders, prior to or before the filing of the instant application.

68. Premised on the foregoing, I am constrained to find and hold that the benefit of doubt ought to be resolved in favor of the Defendants/Respondents.

69. Be that as it may, having found and held that the Defendants/Respondents were not duly served with the named court orders prior to and before of the mounting of the current application, I am of the view that the Defendants/Respondents were therefore neither aware nor knowledgeable of the terms and tenor of the impugned court orders.

70. For completeness, it is appropriate to state that if evidence was placed before the court that the Defendants/Respondents were duly aware of the terms and tenor of the impugned court orders, then the honourable court would be at liberty to find and hold that knowledge supersedes service.

71. In this respect, it is appropriate to reiterate the holding of the Court of Appeal in the case of *Shimmers Plaza Ltd v National Bank of Kenya Ltd* [2015] eKLR, where the Court of Appeal stated and observed as hereunder;

> " Earlier on, this Court in Christine Wangari Gachege -vs- Elizabeth Wanjiru Evans & 11 Others,(*supra*) when dealing with the same issue concerning the applicability of English Law of contempt in our Courts had this to say:
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> > Following the implementation of the famous Lord Woolf's Access to Justice Report, 1996', the Rules of the Supreme Court of England are gradually being replaced with the Civil Procedure Rules, 1999. Recently on October 1, 2012 the Civil Procedure (Amendment No. 2) Rules, 2012 came into force and part 81 thereof effectively replaced Order 52 of the Rules of the Supreme Court of England in its entirety." (Emphasis by underline)
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> Consequently a careful consideration must be had to the provisions of the Contempt of Court Act of 1981 Act and PART 81 of Civil Procedure (Amendment No. 2) Rules, 2012 with regard to contempt proceedings in Kenya. The Contempt of Court Act of 1981 of England is described as:
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> > " "An Act to amend the law relating to contempt of court and related matters."
>
> The scope of the said part 81 as provided under Rule 81.1 is limited to contempt of court, penal, contempt and disciplinary provisions of the County Courts Act 1984, and allows a person to be;
>
> > " (a) guilty of contempt of court; or
> >
> > (b) punishable by virtue of any enactment as if that person had been guilty of contempt of the High Court, to pay a fine or to give security for good behaviour, as it applies in relation to an order of committal."
> >
> > This also applies to the High Court and Court of Appeal.
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> Part 81
>
> (Applications and Proceedings in Relation to Contempt of Court) provides for four different natures or forms of violations under contempt of court, that is,
>
> a. Committal for "breach of a judgment, order or undertaking to do or abstain from doing an act" provided for under Rule 81.4.
>
> b. Committal for "interference with the due administration of justice" (applicable only in criminal proceedings) provided for under Rule 81.11.
>
> c. Committal for contempt "in the face of the court", provided for under Rule 81.16.
>
> d. Committal for "making false statement of truth or disclosure statement." provided for under Rule 81.17.

Of the four forms of violations, only the contempt for "breach of a judgment, order or undertaking to do or abstain from doing an act" has an outlined procedure of service of the order and the penal notice under rule 81.5, 81.6, 81.7 and 81.8.

According to rule 81.9 all judgments or orders to do or not do an act may not be enforced in contempt proceedings unless 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, has been prominently displayed, on the front of the copy of the judgment or order served. Consequently, the court order and penal notice must be served simultaneously. The terms of the rule are set out below:

> "81.9 (1) Subject to paragraph (2), a judgment or order to do or not do an act may not be enforced under rule 81.4 unless there is prominently displayed, on the front of the copy of the judgment or order served in accordance with this Section, 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.
>
> (2) The following may be enforced under rule 81.4 notwithstanding that they do not contain the warning described in paragraph (1)—
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> a. an undertaking to do or not do an act which is contained in a judgment or order; and
>
> b. an incoming protection measure.
>
> (3) In this rule, "incoming protection measure" has the meaning given to it in rule 74.34(1).
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> (Paragraphs 2.1 to 2.4 of the Practice Direction supplementing this Part and form N117 contain provisions about penal notices and warnings in relation to undertakings.)"

Rule 81.5 governs service of the judgment and or order which must carry a penal notice. Service must be carried out before the expiry of the period to perform an act. Rule 81.6 provides that service must be done personally but this may be dispensed with by the court under rule 81.8. The full text of Rule 81.5 provides as follows:-

> "(1) Unless the court dispenses with service under rule 81.8, a judgment or order may not be enforced under rule 81.4 unless a copy of it has been served on the person required to do or not do the act in question, and in the case of a judgment or order requiring a person to do an act – the copy has been served before the end of the time fixed for doing the act, together with a copy of any order fixing that time;

where the time for doing the act has been varied by a subsequent order or agreement under rule 2.11, a copy of that subsequent order or agreement has also been served;

and

> c. Where the judgment or order was made under rule 81.4(5), or was made pursuant to an earlier judgment or order requiring the act to be done, a copy of the earlier judgment or order has also been served.

2. Where the person referred to in paragraph (1) 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.

3. Copies of the judgment or order and any orders or agreements fixing or varying the time for doing an act must be served in accordance with rule 81.6 or 81.7, or in accordance with an order for alternative service made under rule 81.8(2)

(b).

"As a general rule under rule 81.6 all service under this breach should be personal service unless the court dispenses with the personal service under rule 81.8. Rule 81.6 provides as follows.

" 81.6 subject to rules 81.7 and 81.8, copies of judgments or orders and any orders or agreements fixing or varying the time for doing an act must be served personally."

Rule 81.8 subjects the dispensation of service of copies of a judgment or order to the issue of notice of the judgment and the courts discretion. It provides that:-

"(1) In the case of a judgment or order requiring a person not to do an act, the court may dispense with service of a copy of the judgment or order in accordance with rules 81.5 to 81.7 if it is satisfied that the person has had notice of it –

by being present when the judgment or order was given or made; or by being notified of its terms by telephone, email or otherwise.

(2) In the case of any judgment or order the court may – dispense with service under rules 81.5 to 81.7 if the court thinks it just to do so; or

b. make an order in respect of service by an alternative method or at an alternative place."

The issue of dispensation of service under Rule 81.8 has been divided into two parts, that is,

i. with regard to breach of a judgment or order undertaking to prohibit a person from doing an act on one part and

ii. the breach of any judgment or order, on the other part.

As per rule 81.8, dispensation of service on the basis of notice or knowledge of the terms of an order will only apply to a court judgment or order requiring a person not to do an act, that is, a prohibitory order. The dispensation of service under rule 81.8

(1) is subject to whether the person can be said to have had notice of the terms of the judgment or order. The notice of the order is satisfied if the person or his agent can be said to either have been present when the judgment or order was given or made; or was notified of its terms by telephone, email or otherwise. In our view, 'otherwise' would mean any other action that can be proved to have facilitated the person having come into knowledge of the terms

of the judgment and/or order. This would definitely include a situation where a person is represented in court by counsel. Once the applicant has proved notice, the respondent bears an evidential burden in relation to willfulness and mala fides disobedience. This Court in the Wambora case (supra) affirmed the application of these requirements.

72. Either way, I come to the conclusion that the Defendants/Respondents were neither duly served nor made aware of the terms of the impugned court orders prior to the filing of the application for contempt.

73. Consequently and in the premises, my finding and holding in respect of the first issue is in the negative.

Issue Number 2; Whether the Defendants/Respondents have disobeyed or contravened the terms of the orders of the Honourable court or better still, whether the Defendants are guilty of contempt.

74. Other than the requirement that a contemnor be duly served with the named court order or be made aware of the terms thereof, it is also common ground that the act or omission that forms the basis of the contempt proceedings must be duly/ sufficiently proved and established.

75. In respect of the subject matter, it was contended that despite there being orders of the court restraining and prohibiting the Defendants/Respondents from proceedings with construction and buildings within the school compound, the Defendants/Respondents have disobeyed and continued to build within the school compound.

76. In short, the activity that is contended to constitute or amounts to contempt/willful disobedience relates to continuation of buildings within the school compound.

77. For completeness, what I understand the Plaintiff/Applicant to be stating is that the Defendants/ Respondents have since concluded the construction of one set of class rooms and began yet another one.

78. Suffice it to point out that the Plaintiff/Applicant has since attached and annexed assorted photographs showing the kind of construction that is (sic) being carried out within the school compound. For clarity, the assorted photographs have been marked as YPB 5.

79. However, despite the fact that the Plaintiff/Applicant has annexed the assorted photographs, there is no gainsaying that the photographs have not been accompanied by an electronic certificate in line with Section 106B of the *Evidence Act*, Chapter 80, Laws of Kenya.

80. I have held, elsewhere herein before that in the absence of the requisite electronic certificate, the impugned document, which is sought to be relied upon would be rendered useless and without any probative meaning.

81. In this regard, though the photographs have been attached and exhibited, I must point out that their attachment/annexure is merely for cosmetic purposes.

82. Put differently, the assorted photographs, which have been annexed and exhibited by and on behalf of the Plaintiff/Applicant cannot be used or relied upon to prove the existence of the impugned construction.

83. Perhaps, I need to add and reiterate that a court of law must be guided and bound by the rule of law and not sympathy/empathy.

84. In any event, it is imperative to note that contempt proceedings must be proved with requisite strictness given that a Party may very well be deprived of his/her liberty.

85. Consequently, if the Plaintiff/Applicant was keen to prove and establish willful disobedience of the lawful court orders, then same must endeavor to and comply with the established rules pertaining production and adduction of evidence.

86. Be that as it may, I am afraid that the totality of the documents that have been placed before the court, have not risen or satisfied the requisite proof to warrant the Defendant/Respondents being cited and punished in the manner sought by the Plaintiff/Applicant herein.

87. As pertains to the burden and standard of proof in respect of contempt proceedings, it is appropriate to state, reiterate and underscore that allegations of contempt must be proved to the intermediate standard. For clarity, this is the standard above balance of probabilities but below beyond reasonable doubt, the latter that applies exclusively, to Criminal cases and not otherwise.

88. To this end, I beg to adopt and reiterate the holding of the Court of Appeal in the case of *Gatharia K Mututika v Baharini Farm Ltd* [1985] KLR 227, where the court stated and observed hereunder;

> " A contempt of court is an offence of a criminal character. A man may be sent to prison. It must be proved satisfactorily.... It must be higher than proof on a balance of probabilities, almost but not exactly, beyond reasonable doubt. The standard of proof beyond reasonable doubt ought to be left where it belongs, to wit criminal cases. It is not safe to extend it to offences which can be said to be quasi-criminal in nature.
>
> However, the guilt has to be proved with such strictness of proof as is consistent with the gravity of the charge... Recourse ought not to be had to process of contempt of court in aid of a civil remedy where there is any other method of doing justice. The jurisdiction of committing for contempt being practically arbitrary and unlimited, should be most jealously and carefully watched and exercised with the greatest reluctance and the greatest anxiety on the party of the judge to see whether there is no other mode which is not open to the objection of arbitrariness and which can be brought to bear upon the subject... applying the test that the standard of proof should be consistent with the gravity of the alleged contempt... it is competent for the court where contempt is alleged to or has been committed, and or an application to commit, to take the lenient course of granting an injunction instead of making an order for committal or sequestration, whether the offender is a party to the proceedings or not."

89. Additionally, the circumstances under which a person may be cited and punished for contempt were also addressed and discussed in the case of *Sheila Cassatt Issenberg & another v Antony Machatha Kinyanjui* [2021] eKLR, where the court held as hereunder;

> "59. In Peter K Yego & others v Pauline Wekesa Kode, (Acc No. 194 of 2014, the court stated that "it must be proved that one had actually disobeyed the court order before being cited to contempt."
>
> 60. And in Katsuri Limited v Kapurchand Depor Shah [2016] eKLR, citing Kristen Carla Burchell v Barry Grant Burchell (Eastern Cape Division case No 364 of 2005), it was stated that "in order for an applicant to succeed in civil contempt proceedings, the applicant has to prove (i) the terms of the order, knowledge of the terms by the respondent, failure by the respondent to comply with the terms of the order."

61. The Cromwell J, writing for the Supreme of Canada in Carey v Laiken, 2015 SCC 17 (16th April 2015), expounded on the three elements of civil contempt of court which must be established to the satisfaction of the court, thus:

    i) The order alleged to have been breached "must state clearly and unequivocally what should and should not be done." This ensures that a party will not be found in contempt where an order is unclear. An order may be found to be unclear if, for example, it is missing an essential detail about where, when or to whom it applies; if it incorporates overly broad language; or if external circumstances have obscured its meaning.

    ii) The party alleged to have breached the order must have had actual knowledge of it. It may be possible to infer knowledge in the circumstances, or an alleged contemnor may attract liability on the basis of the willful blindness doctrine.

    iii) The party alleged to be in breach must have intentionally done the act that the order prohibits or intentionally failed to do the act that the order compels. (emphasis)

90. Premised on the foregoing, I similarly come to the conclusion that no credible evidence has been placed before the honourable court to warrant a finding that indeed the Defendants/Respondents have willfully disobeyed and disregarded the lawful court orders.

Final Disposition

91. Having duly considered and analyzed the totality of the evidence and the submissions that were placed before the honourable court, it must have become apparent and evident that the Plaintiff/Applicant has fallen short of satisfying the requisite threshold to warrant citation of the Defendants/Respondents.

92. In any event, it is imperative to reiterate that a Party seeking to prove and establish contempt is obliged to tender and adduce sufficient evidence to prove the acts complained of.

93. For the avoidance of doubt, a charge of contempt is bound and/or likely to culminate into the contemnor being sent to Jail. Consequently, such a charge must be proved with the requisite strictness before a court of law can act on same.

94. Notwithstanding the foregoing, I have come to the conclusion that the Application dated the July 27, 2022, has not been duly or suitably proved. Consequently the said Application be and is hereby dismissed with costs.

95. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 7TH DAY OF DECEBER 2022.

OGUTTU MBOYA

JUDGE

In the Presence of;

Benson Court Assistant.

N/A for the Plaintiff/Applicant.

Mr. Philip Kaingu for the Defendants/Respondents