



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA**

AT NAIROBI

MILIMANI LAW COURTS

MISC. CIVIL APPLICATION NO. 92 OF 1998

**IN THE MATTER OF GUARDSHIP OF INFANTS ACT (CAP 144 OF
THE LAWS OF KENYA)**

AND

**IN THE MATTER OF INFANTS EDWIN WAITHAKA AND DENNIS
MUREITHI**

B E T W E E N

1. WAITHAKA KAREITHI

2. WARAU WAITHAKA.....RESPONDENT/PLAINTIFF

AND

JACK KAGUU GITHAE.....APPLICANT/DEFENDANT

R U L I N G

On 24th August 1998, this court in setting aside its earlier order issued the following orders

‘.....that the child Denies Mureithi taken by the respondents plaintiff be returned to the applicant defendant.

The applicant contends that the respondent have not complied with the said order and he is now back to court and seeks orders to institute contempt of court proceedings against them for breach of the said court order, and that pending the hearing and determination of the substantive application the respondents be denied audience by the court unless and until they pay the contempt. He also prays for an order that the respondents be jointly and/or severally be committed to jail for a term of six months for

breach of a court order.

During the hearing of this applicant the main point that was argued before me is whether or not service of the Penal Notice was proper. Council for the respondent submitted that his client had not been personally served with the Penal Notice, in which case the application should fail.

However, the applicant maintains that they were served with the Penal Notice on 19th October 1998. I have perused the affidavit of service and it clearly indicates that the Penal Notice was served upon a Mr. Irungu, who was identified as a son of the respondents. He declined to sign the Penal Notice. In my opinion that cannot be effective service of a Penal Notice. It would have led more credence had several attempts been made to serve the notices on the respondents personally specially in view of the very serious consequence of non-compliance with the said notice.

The requirement under order V rule 12 which makes it clear that such service can only be served on any adult member of the defendants or the plaintiff family as in this case in instances where the defendant or the person to be served cannot be found. It is therefore imperative that efforts to trace the said party be made in all instances. The process server has not indicated having made any efforts towards that end. He depones that upon arriving at the home of the plaintiff, he did not find them but that he served the notice on their son. That was done at the first attempt.

For the above reasons, I find that service was not properly effected and I decline to grant the orders that are being sought in this application.

The applicant shall bear the costs of the application.

Dated and delivered this 30th day of January 2001.

JEANNE W. GACHECHE

COMMISSIONER OF ASSIZE

Delivered in the presence of Mr. G. Oluoch for the respondent and Mr. Ogola holding brief for Mr. M. Kariuki for the applicant.