Republic v Mwaura & 12 others; Obura & another (Exparte) (Application 126 of 2020) [2024] KEHC 44 (KLR) (Judicial Review) (15 January 2024) (Ruling)

Neutral citation: [2024] KEHC 44 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

JUDICIAL REVIEW

APPLICATION 126 OF 2020

J NGAAH, J

JANUARY 15, 2024

BETWEEN

REPUBLIC ..... APPLICANT

AND

BERNARD MWAURA & 12 OTHERS ..... RESPONDENT

AND

OOKO ERICK OBURA ..... EXPARTE

RICHARD CYOI WAFULA ..... EXPARTE

RULING

1 The applicant's application is dated 25 March 2022. It is expressed to be brought under section 5(1) of the *Judicature Act*, cap. 8 and Section 3A of the *Civil Procedure Act*, cap. 21. The main prayers in the motion have been framed as follows:

> " 1. That the respondents be and are hereby cited for contempt for disobedience of the court orders issued on July 1, 2021.
>
> 2. That an order of committal be and is hereby made against the respondents to prison for a period of six (6) months."

2. The applicants have also asked for costs of the application.

3. The application is supported by the affidavit of Richard Cyoi Wafula who is named as the 2nd applicant in these proceedings.

4. According to the 2nd applicant, on 1 July 2021, this Honourable Court issued the order of certiorari quashing the decision of the respondents to indefinitely suspend the 2nd applicant from Royal Nairobi Golf club. He has, however, not enjoyed the fruits of his judgment because the respondents have declined to activate his club membership card which he claims is the only means by which he can access and utilise the facilities at the club.

5. By a letter dated 26 October 2021, the respondents demanded Kshs. 855, 667/= from the 2nd applicant which they claimed he owed the club. In the same letter, the 2nd applicant was charged the sum of Kshs. 670,590/= which he claims was fraudulently loaded to his card. He was also surcharged a fee of 10% for the clubhouse expenditure; a claim that in the 2nd applicant's view, was unwarranted.

6. Again, by the respondents' letter dated 11th of March 2022, the 2nd applicant was charged for subscription for which he had been suspended from the club on 23 March 2020.

7. In response to the respondents' claims, the 2nd applicant's advocates wrote to the respondents a letter dated 17 February 2022, addressing what the 2nd applicant has described as "gross violation of his rights", contrary to the orders issued by this Honourable Court. Rather than address the 2nd applicant's concerns, the respondents wrote to the 2nd applicant informing him that he risked being struck off from club membership if he did not comply with the respondents' demands.

8. As at the time of filing the instant application, the 2nd applicant had been denied access to the club in violation of the judgment of this Honourable Court. It is for this reason that he now seeks the respondents to be committed to civil jail for a term of six months for disobeying the orders of this Honourable Court.

9. The respondents opposed the applicant's application by way of a replying affidavit sworn by Lucas Oluoch. Oluoch has sworn the affidavit on his own behalf and on behalf of the rest of the respondents.

10. In the affidavit, the respondents have acknowledged that indeed a judgement was rendered by this Honourable Court on 1 July 2021 according to which Nyamweya, J., as she then was, issued an order of certiorari quashing the decision of the club suspending the applicants and denying them access to the club indefinitely pending finalisation of the investigations that were then underway. Nonetheless, the court held that the orders of mandamus, prohibition and injunction were not merited in terms sought by the applicants because, if they were granted, the club would thereby be prevented from discharging its functions and duties, including disciplinary proceedings or action against the applicants, in the future.

11. It is the respondents' case that while the club was stopped from suspending the applicant pending investigations, nothing stopped the club from continuing with the investigations and subjecting the applicants to disciplinary proceedings provided that due process and procedure under the club's articles of association and by-laws were followed. It is in this context that the 2nd applicant was notified that his account was in arrears of Kshs. 873, 157/= made up of Kshs. 670,589/= of what has been described as "unpaid EMV transactions" and Kshs. 202.567/= on account of outstanding subscriptions, unpaid cheques and bank charges for unpaid cheques and surcharges.

12. The 2nd applicant responded by a letter dated 9 April 2022 in which he agreed to pay his outstanding subscriptions but requested for a waiver of the sum of Kshs. 670,590/=. His request was accepted and he was asked to pay Kshs. 70,177/= instead. The 2nd applicant paid this latter sum and his club membership was reinstated. In the circumstances, according to the respondents, the applicant's application has been overtaken by events. More importantly, the respondents have denied that the club

or its directors and senior management are in contempt of the judgment of this Honourable Court dated 1 July 2022.

13. The parties respective counsel filed written submissions which I have had opportunity to consider.

14. According to the 2nd applicant, where contempt is committed by a company, the officers of the company, who at the time of the alleged contempt, were in charge and responsible for the conduct of the affairs of the company, are deemed to be guilty of contempt. In this submission, the 2nd applicant's counsel relied on the case of *Jones versus Lipman & Another* (the full citation has not been provided). The respondents who are directors and senior staff of the Nairobi Golf-Club are thus culpable for contempt.

15. On whether it was necessary to serve the respondents with the order of the court, the applicants have submitted that it was not necessary because the respondents ought to have known the existence of the judgment in question and, in any event, they were represented by their advocates. To this end, the 2nd applicant has relied on the decision in *Oilfield Movers Limited versus Zahara Oil and Gas Limited* (2020) eKLR where the court held that knowledge of a court order can be inferred from knowledge of the order by an advocate for the party alleged to be in contempt of the order.

16. It is also submitted that the respondents are in contempt of the judgment of the court because they never conducted any investigations into the alleged fraudulent activities of the 2nd applicant yet they proceeded to conduct disciplinary hearing against the applicant contrary to the Nairobi Golf Club's by-laws, in particular, by-law no. 14.1 thereof. The applicant has also been denied entry to the club and his membership card has been blocked.

17. On their part, the respondents have reiterated that that owing to the subsequent developments in the wake of the judgement of this Honourable Court, which they are alleged to be in contempt of, the application has been overtaken by events. For instance, the applicant's membership to the club and access to its facilities have been reinstated and, in these circumstances, the orders sought would be in vain. In this submission, the respondents have relied on this Honourable Court's decision in *Kenya Women Finance Trust versus Raphael Okeyo Sangra & Another* (2021) eKLR and *B versus Attorney General* (2004) 1 KLR 431.

18. It has also been submitted on behalf of the respondents that the respondents were neither served with the order of the court which they are alleged to be in contempt nor the penal notice warning them of the consequences of disobedience. They have urged that service of the order and the penal notice is a mandatory requirement in contempt of court proceedings. In this respect they have cited the written works of Arlidge, Eady & Smith on *Contempt*, 2nd Edition, in which the authors have stated at pages 742 and 743 that where a committal is sought, although the court has power to dispense with service of the notice of motion, personal service will generally be insisted upon unless there is clear evidence of evasion and that the attendance of the alleged contemnor at the hearing does not per, of itself, waive the need for service. It is stated in this book that it is also necessary to establish service of the order which is alleged to have been disobeyed by leaving a copy thereof with the person to be served. The importance of personal service of the order where the committal is sought, it has been urged, is to enable the person bound by the order, to know what conduct would amount to a breach. In further support of this argument, the respondents cited the decision in *Mike Maina Kamau Versus Honpourable Franklin Bett & 6 Others* (2012) eKLR.

19. In any event, the respondents have urged, even if it was to be assumed that they were served, they are not in contempt of the orders of this Honourable Court. It is their argument that all they have done

is to hold a hearing in accordance with Article 20 of the Memorandum and Articles of Association of the club and its by-laws with respect to the 2nd applicant's outstanding dues.

20. And with that, the respondents concluded their submissions.

21. Disobedience of a court order or judgment is the foundation for contempt of court proceedings against the contemnor. It is, therefore, a necessary prerequisite that before one is held to be in contempt, it must be demonstrated that he was aware of the order or judgment he is alleged to be in contempt of. In other words, proof of service of the order or judgment is necessary unless, for reasons to be stated, the court dispenses with service of the order or judgment on the alleged contemnor.

22. But service is just one of the conditions that an applicant has to meet in contempt of court proceedings. One other condition is a warning to the alleged contemnor of the penal consequences that may ensue if the order is not complied with. In this regard, there has to permanently displayed on the front copy of the judgment or order served a warning to the person required to do or not to do the act in question that disobedience of the order would be contempt of court punishable by imprisonment, a fine or sequestration of assets (in case of a company). It has been held that without this display, the judgment or order may not be enforced unless it is an undertaking contained in a judgment or order.

23. The need to comply with these conditions, amongst other conditions, is a question that has been settled by the Court of Appeal in its previous decisions where this question has arisen.

24. In the case of *Nyamodi Ochieng Nyamogo & Another versus Kenya Posts & Telecommunications Corporation* (1994) eKLR, for instance, the twin issues of the necessity for personal service of both the order and the application for contempt and the endorsement on the face of the order of with the penal notice were discussed. As far as service is concerned, the Court of Appeal noted as follows:

> " The law on the question of service of order stresses the necessity of personal service. In *Halsbury's Laws of England* (4th Ed) Vol 9 on p 37 para 61 it is stated:
>
> > " 61. Necessity of personal service.
> >
> > 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 ..."
>
> Where the order is made against a company, the order may only be enforced against an officer of the company if this particular officer has been served personally with a copy of the order ..."

25. The court further noted:

> " Keeping the importance of personal service of the order in mind we now take a look at the aforesaid two copies of the order both of which bear the stamp of Wetangula & Co Advocates, in acknowledgement of receipt of the said orders. Service on Wetangula & Co does not constitute personal service on any of the three officers. It is a personal service on each one of them that is required to be effected by law. Service of the two orders on Wetangula & Co, Advocates, on 25th October, 1993, and 1st November, 1993, therefore, is a wasted effort."

26. The court described personal service as "an elementary but mandatory procedural rule which in contempt proceedings has (been) prescribed "personal service".

27. And on the need for endorsement of the order with the requisite warning of penal consequences, the court stated as follows:

> " Mr Lakha pointed out other flaws to which we will now turn our attention. He referred to the order and also to the application itself and pointed out the absence of a notice in the form of an endorsement thereon of penal consequences. It is not disputed that the copies of the order alleged to have been served on the three alleged contemnors and handed in by Mr Nowrojee during the hearing (instead of having been annexed to the application) do not bear any such endorsement of penal consequence. Section 5(1) of the *Judicature Act* has given this Court the same power to punish for contempt of court as is for the time being possessed by the High Court of Justice in England. In England rule 5 of order 45 R S C 1982 Ed, governs the method of the enforcement by the Court of its judgments or orders in circumstances amounting to contempt of court (p766). Order 45/7 deals with matters relating to "Service of copy of judgment, etc, pre-requisite to enforcement under rule 5". The relevant procedural obligation is succinctly stated in order 45 rule 7/5 of the RSC 1982 Ed as follows:
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> > "It is a necessary condition for the enforcement of a judgment or order under rule 5 by way of sequestration or committal, that the copy of the judgment or order served under this rule should have the requisite penal notice indorsed thereon."
>
> And a couple of paragraphs later is given the form that an endorsement is required to take, in the following words in the case of a judgment or order requiring a person to abstain from doing an act:
>
> > "If you, the within named A B disobey this judgment (or order) you will be liable to process of execution for the purpose of compelling you to obey the same."
>
> A similar form with suitable alterations is given in the case of an order against a corporation.
>
> This Court in Court of Appeal Civil Appeal No 95/1988 Mwangi H C Wang'ondu v Nairobi City Commission (UR) confirmed the mandatory nature of the requirement of endorsement of notice of penal consequence on the order in the following words:
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> > "In the present case, according to the affidavit of the appellant sworn on 26th January, 1988, in support of his application, the order alleged to have been disobeyed by the respondent was served on the respondent on 31st August, 1987, and a copy of that order which was annexed to the affidavit did not carry a notice of the penal consequences of disobedience as required by the Rules. It is clear from this that the appellant did not comply with the mandatory provisions of section 5(1) of the *Judicature Act* with the result that his application was incompetent. It must follow that there was no valid application for contempt of court before the judge."

28. The court concluded its discussion on this point by stating as follows:

> " As the copies of the orders produced before us are not so endorsed as required under the mandatory provisions of section 5(1) of the *Judicature Act* (cap 8) this application is incompetent and deserves to be dismissed on this account also."

29. Rule 85.5 of the Civil Procedure (Amendment No. 3) Rules 2020 of England which would apply to contempt of court proceedings in this country by dint of section 5 of the *Judicature Act*, cap. 8 also require that the order or judgment be served and be endorsed with the requisite notice. It reads as follows:

81.4

(1) Unless and to the extent that the court directs otherwise, every contempt application must be supported by written evidence given by affidavit or affirmation.

(2) A contempt application must include statements of all the following, unless (in the case of (b) to (g)) wholly inapplicable—

a) the nature of the alleged contempt (for example, breach of an order or undertaking or contempt in the face of the court);

(b) the date and terms of any order allegedly breached or disobeyed;

(c) confirmation that any such order was personally served, and the date it was served, unless the court or the parties dispensed with personal service;

(d) if the court dispensed with personal service, the terms and date of the court's order dispensing with personal service;

(e) confirmation that any order allegedly breached or disobeyed included a penal notice;

(f) the date and terms of any undertaking allegedly breached;

(g) confirmation of the claimant's belief that the person who gave any undertaking understood its terms and the consequences of failure to comply with it;

(h) a brief summary of the facts alleged to constitute the contempt, set out numerically in chronological order;

(i) that the defendant has the right to be legally represented in the contempt proceedings;

(j) that the defendant is entitled to a reasonable opportunity to obtain legal representation and to apply for legal aid which may be available without any means test;

(k) that the defendant may be entitled to the services of an interpreter;

(l) that the defendant is entitled to a reasonable time to prepare for the hearing;

(m) that the defendant is entitled but not obliged to give written and oral evidence in their defence;

(n) that the defendant has the right to remain silent and to decline to answer any question the answer to which may incriminate the defendant;

(o) that the court may proceed in the defendant's absence if they do not attend but (whether or not they attend) will only find the defendant in contempt if satisfied beyond reasonable doubt of the facts constituting contempt and that they do constitute contempt;

(p) that if the court is satisfied that the defendant has committed a contempt, the court may punish the defendant by a fine, imprisonment, confiscation of assets or other punishment under the law;

(q) that if the defendant admits the contempt and wishes to apologise to the court, that is likely to reduce the seriousness of any punishment by the court;

(r) that the court's findings will be provided in writing as soon as practicable after the hearing; and

(s) that the court will sit in public, unless and to the extent that the court orders otherwise, and that its findings will be made public. (Emphasis added).

Of particular relevance is Rule 84.4 (2)(a) and (c).

30. The applicants' application falls short of the two conditions of personal service and the endorsement of the order with the penal notice. And the applicants do not dispute that the respondents were not served. This I gather from their counsel's submission which is as follows:

> " 20. The respondents have not denied knowledge of the orders of this Honourable Court issued on 1st July 2021, even though they claim that they were not served with the said order. The ex parte applicant however submits, that as directors and senior managerial staff of Royal Nairobi Golf club, they ought to have known, as they were duly represented by the advocates on record."

31. This is the sort of argument which was dismissed by the Court of Appeal in *Nyamodi Ochieng Nyamogo & Another versus Kenya Posts & Telecommunications Corporation* (supra) where the order, the subject of the contempt proceedings, was served, not on the alleged contemnors, but on their advocates. The Court said of this service, thus:

> " Service on Wetangula & Co does not constitute personal service on any of the three officers. It is a personal service on each one of them that is required to be effected by law. Service of the two orders on Wetangula & Co, Advocates, on October 25, 1993, and November 1, 1993, therefore, is a wasted effort."

32. In the instant application, the judgement was not even served on the respondents' advocates because, according to the applicants, those advocates, for the reason that they represented the respondents, were aware of the judgement.

33. As the judgement was not served, the question of whether it was indorsed with the penal notice need not arise. But for the record, the judgement was lacking in this respect too so that even if it had been served, it would have been of little or of no consequence for purposes of contempt of court proceedings.

34. The Court of Appeal has clearly stated, where the order or decree is not clearly endorsed with the penal notice, the application is incompetent and has to be dismissed.

35. In the ultimate, I find the applicant's application to be fatally defective and incompetent. It is hereby dismissed with costs. It is so ordered.

SIGNED, DATED AND POSTED ON THE CTS ON 15 JANUARY 2024

NGAAH JAIRUS

JUDGE