



Mutula v Nairobi City County Government (Being the natural & presumptive legal successor of the defunct City Council of Nairobi) (Application 4 of 2019) [2024] KEHC 728 (KLR) (Judicial Review) (2 February 2024) (Ruling)

Neutral citation: [2024] KEHC 728 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
APPLICATION 4 OF 2019
J NGAAH, J
FEBRUARY 2, 2024**

BETWEEN

FELICITY MUTETE MUTULA APPLICANT

AND

NAIROBI CITY COUNTY GOVERNMENT (BEING THE NATURAL & PRESUMPTIVE LEGAL SUCCESSOR OF THE DEFUNCT CITY COUNCIL OF NAIROBI) RESPONDENT

RULING

1. The application before court is the applicant’s motion dated 7 August 2023 in which the applicant seeks the following orders:
 1. That this Honourable Court be pleased to find and hold the Respondent's County Executive Officer Committee Member of Finance in contempt of Court.
 2. That the contemnor be committed to civil jai for a period of 6 months for having disobeyed and contemned the order granted on 4th June 2019 in such place as this Court may please.
 3. That this Court finds that the actions of the contemnor in contempt.
 4. That this Honourable Court be pleased to grant such orders and directions as may be appropriate in the circumstances.
 5. That the costs of this application be borne by the contemnor.”



2. The application is expressed to be brought under section 5(1) of the Judicature Act, cap. 8 and Order 51 of the Civil Procedure Rules. The applicant has also invoked Rule 81 of the English Civil Procedure Rules. The application is supported by the affidavit of the applicant sworn on 7 August 2023.
3. According to the applicant, on 24 May 2013, she obtained a judgment against the County Council of Nairobi and one Kennedy Orangi Ondieki for the sum of 129,500/= and costs in Milimani Chief Magistrates Court Civil Case No. 3707 of 2008.
4. As at 31 July 2023, costs had accrued interest of Kshs. 78,453.93 and the total amount owed to the applicant stood at Kshs. 632,348.19.
5. On 4 June 2019 the applicant obtained an order of *mandamus* according to which the respondent was ordered to pay Kshs. 409,171/=.
6. On 28 October 2021, the respondent is alleged to have been issued with a demand enclosing a penal notice, judgment, decree and certificate of costs but to date the amount has not been paid.
7. Neither the alleged contemnor nor the respondent filed any response to the application.
8. At the hearing of the application, Ms. Onsongo, the learned counsel for the applicant, asked the court to allow the application in terms of prayers 1, 2 and 4.
9. I must state at the outset that this application is similar to one that was struck out in a ruling delivered by this Honourable Court on 5 March 2021.
10. In the ruling I noted as follows:

Weighed against this threshold the applicant's motion falls short in several respects of which the three prominent ones are, first, the order or judgment was not served on the contemnor; secondly, even if it was served, the requisite warning that disobedience to the order or judgment would be contempt of court punishable by imprisonment, a fine or sequestration of assets was not displayed; thirdly, there is no evidence that the alleged contemnor was served with the application for contempt.

In the affidavit in support of the applicant's present motion, the applicant has sworn that she notified the contemnor of the order of mandamus vide her advocates' letter dated 17 June 2019 in which the order for mandamus was enclosed. The letter, a copy of which is exhibited to the applicant's affidavit shows that it was served not on the addressee, who is named in the letter as "County Executive Committee (CEC) Member of Finance" but that it was received at the "Office of County Attorney, Nairobi City County". Again, there is nothing to suggest that the order itself was received in the same manner that the letter was received.

As far as service of the motion is concerned, there is an affidavit of service sworn on 8 November 2019 by one David K. Kivindu, who has described himself as a licensed process server. The pertinent parts of the affidavit read as follows:

2. That on 18th day of October 2019, at about 9:00 am, I received Notice of Motion dated 8th October 2019 and listed for hearing on 18 November 2019, with instructions to effect service of the same upon Nairobi City County Government at their offices located on the 12th floor of City Hall Annexe, City Hall way, P.O. Box30075-00100 Nairobi, opposite Supreme Court Building.



3. That on the same day I proceeded to the offices of the above mentioned 12th floor legal department and upon arrival around 11:12 am, I personally served a copy of the Notice of Motion upon their legal officer who accepted service by retaining a copy and acknowledging receipt on the front page of the original, which is returned herewith to this honourable court duly served upon the respondents.”

It is apparent from the applicant’s counsel’s letter of 17 June 2019 and the affidavit of service of 8 November 2019 that the alleged contemnor was not served with the order of *mandamus* and neither was he served with the application seeking to commit him for contempt of court. The order itself was not endorsed with the requisite notice of the consequences that are likely to follow if it was disobeyed.”

11. The threshold to which reference was made in this passage was the English Civil Procedure (Amendment No. 2) Rules, 2012. They have since been amended and the applicable rules are now the Civil Procedure (Amendment No. 3) Rules 2020 which apply to this country by virtue of section 5 of the *Judicature Act*. Rule 84.1 of those rules requires that the order which the alleged contemnor is in contempt of must not only be served but must also be endorsed with the penal notice. It reads as follows:

12. It reads as follows:

81.4. —Unless and to the extent that the court directs otherwise, every contempt application must be

- (1) 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).
13. The applicant’s application falls short of the two conditions of personal service and the endorsement of the order with the penal notice. This is clear from the applicant’s own affidavit where she has sworn in paragraph 16 as follows:
16. That on 28th October 2021, the respondent was issued a demand enclosing a penal notice, judgment, decree and certificate of costs. To date, the same has not been responded to. I mark “D” and exhibit hereto a copy.”
14. It is clear from this statement that the alleged contemnor was not served. The party to whom a ‘demand’ is said to have been sent rather than served is the one named as the respondent in the proceedings, which is the Nairobi City County Government. The alleged contemnor, the County Executive Member for Finance, is neither included in the proceedings as a party nor was he served with the order or decree which is the basis of these proceedings.
15. 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.
16. In *Nyamodi Ochieng Nyamogo & Another v Kenya Posts & Telecommunications Corporation* [1994] eKLR 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 ...”

17. 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.”

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

19. 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:

“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'onde 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:

“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.”

20. 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.”

As my ruling of 5 March 2021 would show, I stated in fairly clear terms the law on contempt applications and emphasised, most importantly, the need to comply with the conditions of personal service and endorsement of the order with the penal notice. The applicant appears not to have taken cue. In the circumstances, I have no other alternative except to strike out the application. It is hereby struck out but considering that there was no response filed by the respondent, I make no order as to costs. It is so ordered.

SIGNED, DATED AND DELIVERED ON 2 FEBRUARY 2024.

NGAAH JAIRUS

JUDGE

