



**Republic v Nairobi City County; Ojienda & Company Advocates (Exparte)  
(Application 185 of 2018) [2024] KEHC 3734 (KLR) (19 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 3734 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
APPLICATION 185 OF 2018**

**J NGAAH, J  
APRIL 19, 2024**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**NAIROBI CITY COUNTY ..... RESPONDENT**

**AND**

**OJIENDA & COMPANY ADVOCATES ..... EXPARTE**

**RULING**

1. The application before court is a motion dated 16 November 2023 expressed to be brought under sections 1A, 1B, 3A of the *Civil Procedure Act*, cap. 21. The main prayers in the motion are in the following terms:

“

- “2. That this Honourable Court be pleased to issue notice to show cause order against the Chief Officer Finance and County Secretary County Government of Nairobi to attend court and show cause why he should not be cited for contempt of court order issued on 17<sup>th</sup> December 2020.
- 3. That the honourable court be pleased to find the Chief Officer Finance and County and Secretary in contempt of court for willful and deliberate disobedience of the court decree dated 17<sup>th</sup> December 2020.
- 4. That the Chief Officer Finance Nairobi County and County Secretary, County Government of Nairobi be committed to civil jail on such terms as the



honourable court may deem fit unless and until they purge the contempt by honoring the court's order dated 17<sup>th</sup> of December 2020.”

The applicant also seeks costs of the application.

2. The motion is supported by an affidavit by Mr. Seth Ojienda who has sworn that he is an advocate of this Honourable Court and the proprietor of M/s. Ojienda & Company Advocates.

According to Mr. Ojienda's affidavit, this Honourable Court issued a decree on 17 December 2020 compelling the Chief Officer, Finance and County Secretary, County Government of Nairobi, to effect some payment to the firm of M/s. Ojienda & Company Advocates.

3. Despite the decree with the penal notice having been extracted and served upon the Chief Officer Finance and the County Secretary, County Government of Nairobi, they have disobeyed the order. It is for this reason that the applicant is seeking an order to find the two officers of the County government to be in contempt of court and, therefore, they ought to be committed to civil jail on such terms as this Honourable Court may deem fit unless the contempt is purged.
4. No response was filed in response to the application and when the application came up for hearing on 19 December 2023, Mr. Ojienda only submitted as follows:

“The application is dated 16 November 2023, we pray for prayer2. We can come back at a later date for the two persons to appear.”

5. Section 5 of the Judicature Act, cap. 8, is the legal basis upon which proceedings for contempt are taken. According to this provision of the law, the law to be applied is that applied in England and that a committal order can only be appealed against as if it was a criminal conviction. The section reads as follows:

#### Contempt of court

- (1) The High Court and the Court of Appeal shall have the same power to punish for contempt of court as is for the time being possessed by the High Court of Justice in England, and such power shall extend to upholding the authority and dignity of subordinate courts.
  - (2) An order of the High Court made by way of punishment for contempt of court shall be appealable as if it were a conviction and sentence made in the exercise of the ordinary original criminal jurisdiction of the High Court.
6. In *Christine Wangari Gachege versus Elizabeth Wanjiru Evans & 11 Others* (2014) eKLR the Court of Appeal reiterated that the only statutory basis for contempt of court as far as the Court of Appeal and the High Court are concerned is this provision of the law. At the time of rendering its decision, the court was optimistic that the Kenya Contempt of Court Bill, 2013 which was then pending for tabling before parliament would be passed into law that would finally extricate us from the English law and practice in contempt of court applications. The Bill was indeed debated and as a result the Contempt of Court Act No. 46 of 2016 was enacted. This piece of legislation was, however, short-lived because it was declared unconstitutional in November 2018 in *Kenya Human Rights Commission versus Attorney General & Another* (2018) Eklr. Apparently, it had been passed without public participation and was also held to be an affront to the independence of the judiciary.
  7. Since the law that purported to repeal the Judicature Act was voided, the result was that we reverted to Section 5 of the Act on matters contempt. The net effect of annulling the Contempt of Court Act, 2016 was that it was as if the Act never existed. It was void ab initio and no action taken upon it, including



the purported repealing of the *Judicature Act* can be said to be valid. (see *MacFoy v United Africa Company Appeal No.67 of 1960* (Privy Council).

8. But there is no much substance in this provision of the law other than the obligation placed upon courts to ascertain, at any given time, the law applicable in England for punishment and, certainly, the procedure for committal for contempt. In discussing this point, the Court of Appeal noted that it is up to the Court of Appeal (and, of course, the High Court) to ascertain the applicable law of contempt in the High Court of Justice in England, at the time an application (for contempt) is brought. To this end, the court adopted the words of H.G. Platt, J. and D.C Porter, Ag. J. (as they then were) In the matter of an application by Gurbaresh Singh & Sons Ltd, Miscellaneous Civil Case No. 50 of 1983 where they noted as follows:

“The second aspect concerns the words of section 5- “for the time being”, which appear to mean that this court should endeavour to ascertain the law in England at the time of the trial, or application being made. Sometimes it is not known, or may not be known exactly, what powers the court may have. It seems clear that the *Contempt of Court Act* 1981 of England is the prevailing law and the procedure is still that set out in order 52 of the Supreme Court Rules.”

9. Again, in the *Kiru Tea Factory Limited versus Stephen Maina Gathiga & 14 Others* case (supra), the Court of Appeal acknowledged, inter alia, that Section 5 of the *Judicature Act* cap. 8 grants the Court of Appeal (and this Honourable Court) jurisdiction to punish for contempt. The court also noted as follows:

“In exercising jurisdiction, both the High Court and this Court are enjoined by Section 5 of the *Judicature Act* to ascertain the applicable law of contempt in the High Court of Justice in England at the time an application is brought before our courts.”

10. The law now applicable in England is the Civil Procedure (Amendment No. 3) Rules, 2020. The scope of the rules on contempt proceedings is defined in rule 81.1; Rule 81.2 is the interpretation part and Rule 81.3 states how an application for contempt should be made. The rest of the rules in that Part 81 provide for the requirements of a contempt application (81.4); service of a contempt application (81.5); cases where no application is required (81.6); directions for hearing of contempt proceedings (81.7); hearings and judgments in contempt proceedings (81.8); Powers of the court (81.9); and, applications to discharge committal orders (81.10).

11. Rule 81.4 on the requirements of a contempt application and which is of particular relevance to this application 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.

According to rule 81.4- (2) (c), (d) and (e), proof of service is necessary and under rule 81.4- (2) (e) a penal notice on the order served is mandatory.

12. The requirements to serve the order or judgment personally and the need for indorsement of a penal notice on the order or judgment, among other requirements in a contempt of court application, are not new. In this country, they have been litigated upon over the years. 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 indorsement on the face of the order 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 ...”

13. Service of the order alleged to have been violated in this case had been served on the alleged contemnors’ advocates; the court said of this service as follows:

“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.”

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

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 underlining is ours). 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.”

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.”

15. As noted earlier in this ruling, the applicant’s application was not opposed as no response was filed. But Even without the response, the applicant still had to satisfy this Honourable Court that he has met the requisite conditions for the order to hold the alleged contemnors to be in contempt of court.
16. There is no proof that the alleged contemnors were served with the order or decree they are said to be in contempt of. As matter of fact, as the title of these proceedings show, the alleged contemnors have not even been named in the application as respondents. On this question of service of the order and the penal notice, Mr. Ojienda has sworn as follows:

“3. That despite the decree with a penal notice being extracted and served upon the respondent, the Chief Officer Finance and County Secretary, County Government of Nairobi has willfully and blatantly disobeyed the court order and has shown contempt for the dignity of the court.”

Apart from this bare statement, there is no evidence of when, where and how the alleged contemnors were served.

17. It is also apparent on the face of the decree that, despite Mr. Ojienda suggesting that the decree was indorsed with the penal notice, no such notice was indorsed, warning the alleged contemnors that disobedience of the order would be in contempt of court and would attract penal consequences. In the absence of this indorsement, service of the decree, assuming it was served, would have been of no consequence as far as contempt of court proceedings are concerned.



18. In the ultimate, I find the application dated 16 November 2023 incompetent and it is hereby dismissed.  
I make no order as to costs. It is so ordered.

**SIGNED, DATED AND DELIVERED ON 19 APRIL 2024**

**NGAAH JAIRUS**

**JUDGE**

