



Njenga v County Executive Committee Member, Finance & Economic Planning, Nairobi County Government & another (Application E014 of 2023) [2024] KEHC 6632 (KLR) (Judicial Review) (7 June 2024) (Ruling)

Neutral citation: [2024] KEHC 6632 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
APPLICATION E014 OF 2023**

J NGAAH, J

JUNE 7, 2024

BETWEEN

KENNEDY WAINAINA NJENGA APPLICANT

AND

COUNTY EXECUTIVE COMMITTEE MEMBER, FINANCE & ECONOMIC PLANNING, NAIROBI COUNTY GOVERNMENT 1ST RESPONDENT

CHIEF OFFICER, FINANCE NAIROBI COUNTY GOVERNMENT 2ND RESPONDENT

RULING

1. On 27 October 2023, the applicant obtained a judgment against the 1st respondent in judicial review proceedings to enforce settlement of a decree obtained in this Honourable Court's case no. 63 of 2017. The decree that was subsequently extracted from the judgment of 27 October 2023 is in the following terms:

“Decree:

Claim For:

- a). An order of Mandamus to direct and compel the County Executive Committee Member, for Finance and Economic Planning of the Nairobi City County Government to satisfy the Certificate of Order against Government dated 11th October 2022, issued in Nairobi High Court Civil Case No. 63 of 2017; Kennedy Wainaina Njenga vs. County Government of Nairobi, within 14 days of service of the judgment and order of court herein.;



b) an order for costs.

This matter coming up for hearing virtually on 18th September 2023, before Hon. Mr. Justice J. Ngaah and upon hearing Counsels (sic) for the applicant, and counsel for the respondent and whereas the matter coming up for delivery of judgement virtually on 27th of October 2023 before Honourable Mr. Justice J. Ngaah in the presence of counsel for the applicant and counsel for the respondent.

It Is Hereby Ordered: -

1. That the applicant's motion dated 13th February 2023 is allowed in terms of prayer (a).
2. The applicant will have costs of the application.

Given under my hand and seal of this Honourable Court this 27th day of October, 2023.

Dated at Nairobi this 1st day of November 2023

Signed

Deputy registrar High Court of Kenya, Nairobi.”

2. The applicant is aggrieved that this order has not been complied with and for this reason he has now filed an application for contempt against the two respondents. He has moved this Honourable Court by way of an application notice dated 21 November 2023 expressed to be brought under Section 5 of the *Judicature Act*, Cap. 8, Section 3A of the *Civil Procedure Act*, Cap. 21, and Rule 81.10 of the Civil Procedure (Amendment No. 2), Rules, 2015, apparently of England.
3. Prayer 1 and 2 in the application sought for certification of the application as urgent and that it be heard on priority basis. Those prayers have been spent. The rest of the prayers have been framed as follows:

“

- “3. That Summons be issued for personal attendances of the County Executive Committee Member, Finance and Economic Planning, Nairobi City County Government and the Chief Officer, Finance of County Government of Nairobi, before the Honourable Court for hearing of the present application for Contempt for disobedience of orders of this Honourable Court as issued in the Decree dated 27th October 2023, and the said County Executive Committee Member, Finance and Economic Planning, Nairobi City County Government and the Chief Officer, Finance of County Government of Nairobi, to continue personally attending Court on all occasions until determination of the application;
4. That the County Executive Committee Member, Finance and Economic Planning, Nairobi City County Government, and the Chief Officer, Finance of County Government of Nairobi, the cited Contemnors herein do stand committed to civil jail for a period that this Honourable Court shall determine for contempt of Court, for knowingly and willfully violating and disobeying the Decree of the Honourable Court issued on 27th October 2023;

In addition to (4) above;



5. That an order for sequestration of the personal property of the County Executive Committee Member, Finance and Economic Planning, Nairobi City County Government, and the Chief Officer, Finance of County Government of Nairobi, be issued for contempt of court, in that being aware of the Orders of this Honourable Court as issued 27th October 2023, knowingly and willfully violated and/or is obeyed and/ or disregarded and or thwarted and undermined the effect and purpose of the said order and or knowingly and willfully failed to take reasonable steps to ensure that the said orders were obeyed;
6. That the incumbent County Executive Committee Member, Finance and Economic Planning, Nairobi City County Government, and Chief Officer, Finance of County Government of Nairobi, being in persistent breach of their legal duty under Section 21 (1) and (3) of the *Government Proceedings Act*, and being in contempt of Court's Decree, and therefore in persistent breach of their duty under the Public Officers Ethics Act, No. 4 of 2003 and Chapter 6 of *the Constitution* of Kenya, be and are hereby determined as not fit to continue holding public office as County Executive Committee Member, Finance and Economic Planning, Nairobi City County Government and the Chief Officer, Finance of County Government of Nairobi, respectively;
7. That as a consequence of the Order in (6) above, a consequential Order be and is hereby issued ordering the incumbent County Executive Committee Member, Finance and Economic Planning, Nairobi City County Government and Chief Officer, Finance of County Government of Nairobi, to forthwith vacate office and in any event within 48 hours of the Order of Court, and the incoming County Executive Committee Member, Finance and Economic Planning, Nairobi City County Government, and the Chief Officer, Finance of County Government of Nairobi, be and are hereby ordered to forthwith comply with the Decree of Court issued on 27th October 2023;
8. That the costs of and occasioned by this application be paid by the cited contemnor on indemnity basis.”

4. The application is supported by the affidavit of the applicant himself sworn on 21 November 2023.

The respondents did not file any response to the application.

5. In an application for citation for contempt for disobedience of a court order the court would be concerned about whether the ruling or order extracted therefrom was served. Similarly, if it is a judgment that is alleged to have been disobeyed, the court will consider whether the judgment or decree was served on the alleged contemnors.
6. The form the decree or order takes is also an important consideration. Apart from the requirement that the order directed at the alleged contemnor must be clear and unambiguous in its terms, it must also be endorsed with a penal notice.
7. Because contempt of court proceedings are quasi-criminal in nature, the court must also be satisfied that they have been served upon the alleged contemnors.



These requirements, among others, are encapsulated in the Civil Procedure (Amendment No. 3) Rules 2020 of England which apply to this country by dint of section 5 (1) of the [Judicature Act](#), cap.8. This provision of the law states 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.

8. 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.

9. But there is nothing much in it in terms of substance and procedure 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 that Court (and certainly this court too) to ascertain the applicable law of contempt in the High Court of Justice in England, at the time an application (for contempt) is made. 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.”

10. Part 81 of the Civil Procedure (Amendment No. 3) Rules 2020 is current the law in England governing applications for contempt and, for our purposes, it is the law that was in place when the instant application was made.

11. Under this Part, there are rules on various aspects of an application for contempt. Rule 81.3, for instance, is on how the application for contempt is made. Rules 81.4, which is of particular relevance to this application, is on the requirement of a contempt application. 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.

12. It is noted that rule 81.2 (c) requires personal service unless the court or the parties dispense with service. And rule 81.4(2) (e) requires that the order be endorsed with the penal notice.



As far as service of the application is concerned rule 81.5 states as follows:

81.5.—

- (1) Unless the court directs otherwise in accordance with Part 6 and except as provided in paragraph (2), a contempt application and evidence in support must be served on the defendant personally.
- (2) Where a legal representative for the defendant is on the record in the proceedings in which, or in connection with which, an alleged contempt is committed—
 - (a) the contempt application and evidence in support may be served on the representative for the defendant unless the representative objects in writing within seven days of receipt of the application and evidence in support;
 - (b) if the representative does not object in writing, they must at once provide to the defendant a copy of the contempt application and the evidence supporting it and take all reasonable steps to ensure the defendant understands them;
 - (c) if the representative objects in writing, the issue of service shall be referred to a judge of the court dealing with the contempt application; and the judge shall consider written representations from the parties and determine the issue on the papers, without (unless the judge directs otherwise) an oral hearing.

13. As I have noted every time this kind of applications have been brought to my attention, some of these requirements are not that novel. They have been applied and also litigated upon over the years.

14. 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 ...”

15. 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.”

16. 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 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’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:

“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.”

17. Turning to the applicant’s application, the dark cloud hanging over it is whether the decree which the respondents are alleged to be in contempt of was personally served. In answer to this question, one need not look any further than the applicant’s deposition in paragraph 5 of his affidavit on this question. The applicant has sworn as follows:

“I am informed by my Advocates on record which information I believe to be true that, upon extraction of the Decree of Court, a demand was fashioned enclosing the Decree of Court, and addressed to the 1st Respondent and duly copied to the 2nd Respondent demanding compliance with the said Decree, together with the penal notice advising that any non-compliance therewith would subject the Respondents to punishment for contempt of Court, which demand were duly served upon the Contemnors on 1st November 2023. Now produced and marked as annexure KWN-2 is a copy of the Demand enclosing and forwarding the Decree dated 27th October 2023.”

18. The demand that is said to have been fashioned is a letter dated 1 November 2023 by the applicant’s advocates addressed to the County Executive Committee Member, Finance and Planning of the County Government of Nairobi and copied to the County Secretary, County Attorney and Chief Finance Officer.
19. Apart from this letter, there is no proof from a process server detailing the circumstances under which alleged contemnors were served, in particular, where when and how they were served.
20. It is true that a copy of the letter dated 1 November 2023 exhibited to the applicant’s affidavit is stamped with the office stamps of the County Attorney, the County Secretary and the County Executive Committee Member for Finance and Economic Planning of the County Government of Nairobi but that, in itself does not show who received this letter. The stamping of the letter per se is not sufficient proof that the alleged contemnors were served.
21. In any event, since it is the letter, and not the order, that was stamped, it cannot be assumed that the order was enclosed in the letter only because the letter says so. Service of the order does not necessarily have to be accompanied by a letter for the simple reason that the order is assumed to speak for itself. It follows that proof of service of the order without any accompanying letter would be sufficient for purposes contempt of court application. The court seized of a contempt of court application would be more interested in the service of the order than in a letter purporting to forward the order.
22. That said, following rule 81.4 (2) (c) of the Civil Procedure (Amendment No. 3) Rules 2020 and following the Court of Appeal decision in *Nyamodi Ochieng Nyamogo & Another versus Kenya Posts & Telecommunications Corporation* (supra), I am not satisfied that service of the decree on the respondents was effective service. I would decline the applicant’s application on this ground. Accordingly, the application is hereby dismissed. Considering that the respondents did not file any response, I make no order as to costs. It is so ordered.

SIGNED, DATED AND DELIVERED ON 7 JUNE 2024

NGAAH JAIRUS



JUDGE

