



Ecta (K) Limited v Machakos County Government; County Executive Committee Member for Finance and Economic Planning Machakos County Government (Contemnor) (Application E186 of 2022) [2024] KEHC 9581 (KLR) (Judicial Review) (2 August 2024) (Ruling)

Neutral citation: [2024] KEHC 9581 (KLR)

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

**JUDICIAL REVIEW
APPLICATION E186 OF 2022**

**J NGAAH, J
AUGUST 2, 2024**

BETWEEN

ECTA (K) LIMITED APPLICANT

AND

MACHAKOS COUNTY GOVERNMENT RESPONDENT

AND

**COUNTY EXECUTIVE COMMITTEE MEMBER FOR FINANCE AND
ECONOMIC PLANNING MACHAKOS COUNTY
GOVERNMENT CONTEMNOR**

RULING

1. The application before court is a notice of motion dated 15 November 2023 expressed to be brought under section 5 of the *Judicature Act*, cap. 8; Section 39 of the High Court (Organisation and Administration) Act, 2015 and Rule 39(4), High Court (Organisation and Administration) (General) Rules 2016. The applicant seeks the following orders:

- “ 1. This application be heard ex parte in the 1st instance
- 2. This Honourable Court be pleased to cite the County Executive Committee Member for Finance and Economic Planning as the accounting officer of Machakos County Government for contempt of court for deliberately and knowingly disobeying the court orders issued on 29th September 2023.
- 3. This Honourable Court be pleased to issue summons to be served upon the County Executive Committee Member for Finance and Economic Planning as



the accounting officer of Machakos County Government to appear in person before this Honourable Court to show cause why he should not be committed to civil jail for a term of six (6) months for deliberately disobeying orders of this honourable court issued on 29th of September 2023.

4. The County Executive Committee member for Finance and Economic Planning as the accounting officer of Machakos County Government, be fined such sum that the Honourable Court deems fit for being in contempt of court orders issued on 29th September 2023.
 5. This Honourable Court compels County Executive Committee member for Finance and Economic Planning as the accounting officer of Machakos County Government to immediately pay the applicant the sum of Kenya shillings 13,942,214.44 together with interest at the rate of 12% per annum from 13th of April 2022 until payment in full.
 6. The respondent and contemnor do pay the applicant the costs of this application.”
2. The application is based on the affidavit of Mr. Peter Kimathi who has described himself as the sales manager of the applicant. According to Mr. Peter Kimathi, on 29 September 2023, this honourable court issued an order of mandamus compelling the County Executive Committee member for Finance and Economic Planning, as the accounting officer of Machakos County Government to pay the applicant the sum of Kenya shillings 13,942,214.44 together with interest at the rate of 12% per annum from 13 April 2022 until payment in full.
 3. The order was subsequently served upon the named officer by way of email, more particularly on 8 November 2023. On 9 November 2023 the order was again served upon Mr. Erastus Mutua, the learned counsel for the County Government of Machakos. Although the alleged contemnor is aware of the order, he has failed, refused and/or neglected to comply with it and pay the applicant. In the circumstances, and in order to uphold the authority of this Honourable Court and the rule of law, the applicant has urged that it is necessary the alleged contemnor be committed to civil jail for 6 months for having disobeyed this Honourable Court’s order.
 4. No response was filed to the application and when it came up for hearing Mr. Mutua, the learned counsel for the respondents informed the court that indeed he accepted service of the order. However, he urged, the alleged contemnor has not deliberately refused to comply with the order as the applicant’s claim is one among several pending bills that the County Government of Machakos is yet to settle. He urged that the matter be settled out of court.
 5. It is trite that 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.
 6. In the case of Nyamodi Ochieng Nyamogo & Another versus Kenya Posts & Telecommunications Corporation (1994) eKLR, the Court of Appeal emphasised the need for personal service of the order



in issue and for such an order to be endorsed with the penal notice. As far as service is concerned the Court 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 ...”

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.”(Emphasis added.)

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

8. 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 penal notice. It reads as follows:

81. 4.

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- (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).

9. Of particular relevance to this application is Rule 84.4 (2)(c).

The question that arises is whether the alleged contemnor was served with the order. In order to answer this question, one need not look further than the affidavit of Mr. Kimathi which he swore in support of the application. In paragraph 3(ii) and (iii) of that affidavit, Mr. Kimathi swore as follows:

“By an email of 8th November 2023, the applicant’s advocates served the letter dated 8th November 2023, a certified copy of the order of 29th September 2023 together with a statement of account dated 19th October 2023 upon the County Executive Committee



Member for Finance and Economic Planning as the accounting officer of Machakos County. In the letter, the applicant demanded payment of the decretal sum within seven (7) days failure of which the applicant will take out an application for contempt of court. Copies of forwarding email, the letter dated 8th November 2023, the order of 29th September 2023 and the statement of account are at pages 3 to 7 of the exhibit hereto.

(iii) On 9th November 2023, the applicant served the order of 29th September 2023 upon Mr. Erastus Mutua an advocate of the High Court practising number P105/155505/18 and a county attorney at Machakos County. Mr. Mutua accepted service on behalf of the County Executive Committee Member for Finance and Economic Planning as the accounting officer of Machakos County. Copies of the acknowledged copies and the affidavit of service of Peter Ayoma are at pages 8 to 14 of the exhibit hereto.”

The email addresses of the email purportedly sent to the alleged contemnor are indicated as countysecretary@machakosgovernment.co.ke; info@machakos.go.ke; infor@machakosgovernment.co.ke; governor@machakosgovernment.com; mksoca@gmail.com .

10. No information has been given in the affidavit of Kimathi about these email addresses and, most importantly whether any of them is or was associated with the alleged contemnor. For purposes of an application for contempt, the court cannot proceed on the assumption that the alleged contemnor was personally served through any of the aforesaid email addresses.
11. I am minded that the learned counsel for the respondents has acknowledged having received the order in question but going by the decision in Nyamodi Ochieng Nyamogo & Another versus Kenya Posts & Telecommunications Corporation (supra) service of the order upon the alleged contemnor’s advocate is not enough. The court, as noted, reiterated the importance of personal service and held:

“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.”(Emphasis added.)

12. Without belabouring the point, I come to the conclusion that the alleged contemnor was not personally served and for this reason, I hold that the application is misconceived. It is hereby dismissed. Parties will bear their respective costs considering that the decretal sum has not been settled. It is so ordered.

SIGNED, DATED AND POSTED ON THE CTS ON 2 AUGUST 2024

NGAAH JAIRUS

JUDGE

3|APPLICATION NO. E186 OF 2022: RULING

