



**Akoyo v Permanent Secretary, State Department for Devolution;
Attorney General (Interested Party) (Application 440 of 2018)
[2023] KEHC 23189 (KLR) (Judicial Review) (6 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 23189 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
APPLICATION 440 OF 2018
J NGAAH, J
OCTOBER 6, 2023**

BETWEEN

MARTIN OUMA AKOYO APPLICANT

AND

**PERMANENT SECRETARY, STATE DEPARTMENT FOR
DEVOLUTION RESPONDENT**

AND

ATTORNEY GENERAL INTERESTED PARTY

Court examines legal framework for contempt, identification of government officials in contempt proceedings, and service requirements

Personal service of a court order and contempt application was mandatory unless explicitly dispensed with by the court, particularly in cases involving government officials. It was not necessary to identify the alleged contemnor by their personal name when they hold a public office; identifying them by their official title was sufficient, as the office, not the individual, was subject to compliance. Leave to file a contempt application was not required unless the case fell under specific categories outlined in the law. The court emphasized that government officials were not immune from contempt proceedings and must comply with court orders.

Reported by John Ribia

Statutes – operational law – contempt of court – operational law after the repeal of the Contempt of Court Act - with the repeal Contempt of Court Act, what were the operational laws and procedures for contempt of court in Kenya – Judicature Act (cap 8) section 5; Civil Procedure Act (cap 21) section 1A; Civil Procedure Rules, 2010 (cap 21 Sub Leg) Order 51 Rule 1; Civil Procedure (Amendment No 2) Rules of England, 2012, rule 81.

Civil Practice and Procedures – contempt of court – service – leave of court – personally identifying government officials in contempt proceedings - whether it was necessary to personally identify the alleged contemnor by name,



or if it was sufficient to refer to the office held, in cases where the contemnor was a government official - whether a Permanent Secretary, as an officer of the government, could be held in contempt and committed to civil jail for failure to comply with a court order - whether personal service of the court order and the contempt application was necessary for contempt of court proceedings, particularly when the contemnor was a government official, or if alternative methods of service could be deemed sufficient - whether it was necessary to seek leave of the court before filing a contempt of court application, particularly in cases involving disobedience of a court order by a government official - whether section 63 of the Civil Procedure Act applied to contempt proceedings against government officers - Civil Procedure Act (cap 21) section 1A; Civil Procedure Rules, 2010 (cap 21 Sub Leg) Order 51 Rule 1; Civil Procedure (Amendment No 2) Rules of England, 2012, rule 81.

Brief facts

The applicant secured a judgment against the Permanent Secretary, State Department for Devolution (respondent) in Milimani Chief Magistrates Court Civil Case No. 2057 of 2011. He obtained an amended money decree and a certificate of order in 2018. Despite serving the order of *mandamus* on the respondent, the respondent failed to settle the decree, prompting the applicant to file the instant contempt application. The application sought to have the respondent punished for disobeying the court's *mandamus* order dated December 3, 2019, which was served on March 19, 2021.

Issues

- i. What was the legal framework for contempt of court in Kenya following the annulment of the Contempt of Court Act?
- ii. Whether it was necessary to personally identify the alleged contemnor by name, or if it was sufficient to refer to the office held, in cases where the contemnor was a government official.
- iii. Whether a Permanent Secretary, as an officer of the government, could be held in contempt and committed to civil jail for failure to comply with a court order.
- iv. Whether personal service of the court order and the contempt application was necessary for contempt of court proceedings, particularly when the contemnor was a government official, or if alternative methods of service could be deemed sufficient.
- v. Whether it was necessary to seek leave of the court before filing a contempt of court application, particularly in cases involving disobedience of a court order by a government official.
- vi. Whether section 63 of the Civil Procedure Act applied to contempt proceedings against government officers.

Relevant provisions of the Law

Rule 81. Enforcement of judgment, order or undertaking to do or abstain from doing an act

81.4 (1) If a person—

(a) required by a judgment or order to do an act does not do it within the time fixed by the judgment or order; or

(b) disobeys a judgment or order not to do an act, then, subject to the Debtors Acts 1869(5) and 1878(6) and to the provisions of these Rules, the judgment or order may be enforced by an order for committal.

(2) If the time fixed by the judgment or order for doing an act has been varied by a subsequent order or agreement of the parties under rule 2.11, then references in paragraph (1)(a) to the time fixed are references to the time fixed by that subsequent order or agreement.

(3) If the person referred to in paragraph (1) is a company or other corporation, the committal order may be made against any director or other officer of that company or corporation.

(4) So far as applicable, and with the necessary modifications, this Section applies to undertakings given by a party as it applies to judgments or orders.

(Rules 81.17(3) and (4) make provision for cases in which both this Section and Section 6 (Committal for making a false statement of truth or disclosure statement) may be relevant.)

(5) If a judgment or order requires a person to deliver goods or pay their value—



- (a) the judgment or order may not be enforced by a committal order under paragraph (1);
- (b) the person entitled to enforce the judgment or order may apply to the court for an order requiring that the goods be delivered within a specified time; and
- (c) where the court grants such an order, that order may be enforced under paragraph (1).

Requirement for service of a copy of the judgment or order and time for service

81.5 (1) Unless the court dispenses with service under rule 81.8, a judgment or order may not be enforced under rule 81.4 unless a copy of it has been served on the person required to do or not do the act in question, and in the case of a judgment or order requiring a person to do an act—

- (a) the copy has been served before the end of the time fixed for doing the act, together with a copy of any order fixing that time;
- (b) where the time for doing the act has been varied by a subsequent order or agreement under rule 2.11, a copy of that subsequent order or agreement has also been served; and
- (c) where the judgment or order was made under rule 81.4(5), or was made pursuant to an earlier judgment or order requiring the act to be done, a copy of the earlier judgment or order has also been served.

(2) Where the person referred to in paragraph (1) is a company or other corporation, a copy of the judgment or order must also be served on the respondent before the end of the time fixed for doing the act.

(3) Copies of the judgment or order and any orders or agreements fixing or varying the time for doing an act must be served in accordance with rule 81.6 or 81.7, or in accordance with an order for alternative service made under rule 81.8(2)(b).

Method of service – copies of judgments or orders

81.6 Subject to rules 81.7 and 81.8, copies of judgments or orders and any orders or agreements fixing or varying the time for doing an act must be served personally.

Dispensation with personal service

81.8 (1) In the case of a judgment or order requiring a person not to do an act, the court may dispense with service of a copy of the judgment or order in accordance with rules 81.5 to 81.7 if it is satisfied that the person has had notice of it—

- (a) by being present when the judgment or order was given or made; or
- (b) by being notified of its terms by telephone, email or otherwise.

(2) In the case of any judgment or order the court may—

- (a) dispense with service under rules 81.5 to 81.7 if the court thinks it just to do so; or
- (b) make an order in respect of service by an alternative method or at an alternative place.

Requirement for a penal notice on judgments and orders

81.9 (1) Subject to paragraph (2), a judgment or order to do or not do an act may not be enforced under rule 81.4 unless there is prominently displayed, on the front of the copy of the judgment or order served in accordance with this Section, a warning to the person required to do or not do the act in question that disobedience to the order would be a contempt of court punishable by imprisonment, a fine or sequestration of assets.

(2) An undertaking to do or not do an act which is contained in a judgment or order may be enforced under rule 81.4 notwithstanding that the judgment or order does not contain the warning described in paragraph (1).

How to make the committal application

81.10 (1) A committal application is made by an application notice under Part 23 in the proceedings in which the judgment or order was made or the undertaking was given.

(2) Where the committal application is made against a person who is not an existing party to the proceedings, it is made against that person by an application notice under Part 23.

(3) The application notice must—



- (a) set out in full the grounds on which the committal application is made and must identify, separately and numerically, each alleged act of contempt including, if known, the date of each of the alleged acts; and
 - (b) be supported by one or more affidavits containing all the evidence relied upon.
- (4) Subject to paragraph (5), the application notice and the evidence in support must be served personally on the respondent.
- (5) The court may—
- (a) dispense with service under paragraph (4) if it considers it just to do so; or
 - (b) make an order in respect of service by an alternative method or at an alternative place.

Held

1. Section 5 of the Judicature Act remained the statutory basis upon which proceedings for contempt were taken. Section 5 provided that the law to be applied as that applied in England and that a committal order could only be appealed against as if it was a criminal conviction.
2. The Kenya Contempt of Court Act (annulled) was 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. Since the law that purported to repeal the was voided, the result was that Kenya reverted to section 5 of the Judicature Act on matters contempt. The net effect of annulling the Contempt of Court Act was that it was if the never existed. It was void *ab initio* and no action taken upon it, including the purported repealing of the Judicature Act could be said to be valid.
3. Section 5 of the Judicature Act had 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.
4. The Contempt of Court Act 1981 of England and Order 52 of the Supreme Court Rules (Supreme Court of England) would apply to contempt of court proceedings in Kenya but they did so only on the authority of the Judicature Act. The procedure for contempt of court proceedings, including commencement, prosecution and punishment for contempt of court was, until 2012, encapsulated in Order 52 Rules 1 to 4 of the Rules of the Supreme Court (RSC); those rules were made under the Supreme Court of Judicature Act, 1873, otherwise known as the Judicature Act, 1873. The Judicature Act, 1873 abolished a cluster of courts in England and Wales dating back to medieval periods, some with overlapping judicial powers, and in their place established the Court of Appeal, the High Court and the Crown Court all together to be known as the Supreme Court of Judicature. The Supreme Court of Judicature shouldn't be confused with the Supreme Court of the United Kingdom which was established only on October 1, 2009 to assume the judicial functions of the House of Lords.
5. The procedure for contempt of court proceedings under Order 52 of the Rules of the Supreme Court Judicature was as follows:
 1. an application to the High Court of England for committal for contempt of court would not be granted unless leave to make such an application had been granted.
 2. An application for leave must be made *ex parte* to a judge in chambers and be supported by a statement setting out the particulars of the applicant as well as those of the person sought to be



- committed and the grounds on which his committal was sought, and by an affidavit verifying the facts relied on.
3. The applicant must give notice of the application for leave not later than the preceding day to the Crown Office.
 4. Where an application for leave was refused by a judge in chambers the applicant may apply afresh to a divisional court for leave within 8 days after the refusal by the Judge.
 5. When leave had been granted, the substantive application by a motion would be made to a divisional court.
 6. The motion must be entered within 14 days after the granting of leave; if not, leave shall lapse.
 7. The motion together with the statement and affidavit must be served personally on the person sought to be committed, unless the court thought otherwise.
6. On October 1, 2012, the Civil Procedure (Amendment No. 2) Rules, 2012 came into force and Part 81 thereof effectively replaced Order 52 of the Rules of the Supreme Court in its entirety. That particular part provided different procedures for different form of violations. For instance: Rules 81.4-committal for breach of a judgment, order or undertaking to do or abstain from doing an act; Rule 81.11- Committal for interference with the due administration of justice (applicable only in criminal proceedings); Rule 81.16 – Committal for contempt in the face of the court; and, Rule 81.17 - Committal for making false statement of truth or disclosure statement.
 7. Rule 81.4 (breach of judgment, order or undertaking) was the relevant rule in the instant application. The application must be made in the proceedings in which the judgment or order was made or the undertaking given. As far as its form was concerned, the court said the application notice must set out fully the grounds on which the committal application was made and must identify separately and numerically, each alleged act of contempt and be supported by affidavit(s) containing all the evidence relied upon. Further the application notice and the affidavit or affidavits must be served personally on the respondent unless the court dispensed with service if it considered it just to do so, or the court authorized an alternative method or place of service.
 8. The Civil Procedure (Amendment No. 2) Rules, 2012 had since been replaced by the Civil Procedure (Amendment No. 3) Rules, 2020 which, among other amendments, had amended Part 81 of the Civil Procedure Rules. Thus Kenya need not keep its ears to the ground on the trends of the law of contempt as applied and practised in English courts. Instead, Kenya had sufficient legislation of its own on the subject and the only missing link were the rules of procedure.
 9. Until such a time that Kenya had its own locally made rules on procedure and prosecution of applications for contempt of court, Kenya still had to rely on the latest rules applicable in England, with such modifications as were necessary and, at any rate, to the extent that they were applicable to Kenyan circumstances.
 10. Section 5 of the Judicature Act remained the legitimate basis upon which courts embraced not only the substantive law applicable in England in contempt of court applications but also the procedures that would be adopted in such applications.
 11. The requirements to serve the order or judgment personally and the need for indorsement of a penal notice on the order or judgment were not new, among other requirements in a contempt of court application. 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 had been served personally on the person required to do or abstain from doing the act in question. Personal service was an elementary but mandatory procedural rule which in contempt proceedings had prescribed as “personal service”.
 12. Order 52 of the Rules of Supreme Court of England applied until 2012. On October 1, 2012, the Civil Procedure (Amendment No. 2) Rules, 2012 (England) (the Rules) came into force and Part 81 thereof effectively replaced Order 52 of the Rules of the Supreme Court in its entirety. Part 81 had subsequently also been amended by Civil Procedure (Amendment No. 3) Rules, 2020. The decision



in *Republic v County Council of Nakuru Ex-Parte Edward Alera t/a Genesis Reliable Equipment & 2 Others* (Judicial Review 74 of 2010; [2011] KEHC 1516 (KLR)) was made before those changes and, therefore, it was of little help to the respondent. Since Part 81 of the Rules replaced Order 52, both part 81 and order 52 could not be said to apply at the same time.

13. In the latest rules, it was not in every application that leave would be required in order for an applicant to file an application for contempt. According to Rule 81.3 (5) of the Rules, it was only in select cases that one had to seek leave. This rule provided that permission to make a contempt application was required where the application was made in relation to interference with the due administration of justice, except in relation to existing High Court or county court proceedings; an allegation of knowingly making a false statement in any affidavit, affirmation or other document verified by a statement of truth or in a disclosure statement. The applicant's application did not fall into any of the category of cases. It was not necessary for the applicant to seek leave before filing the instant application.
14. According to Rule 81.4 (2) (c) and 81.5 (1) of the Rules, personal service was mandatory unless the court dispensed with the need for service if circumstances stipulated in section obtain. The decree and the penal notice stamped with the stamps of the Ministry for Devolution and ASALS State Department for Devolution and the Attorney General showing that the documents were received in the respective offices on March 19, 2021. The respondent did not swear any affidavit denying having received any of these documents and, in the absence of any evidence to the contrary, the court was entitled to take the applicant at his word and proceed on the assumption that what he had stated was true.
15. The application was served on May 23, 2022. Apart from service of the application, there were also affidavits of service sworn by a court process server, showing that the hearing notices in respect of the contempt application were served on the respondents. The order for *mandamus* was not only brought to the attention of the respondent but he was also aware of the instant application.
16. Sections 43 and 45 of the Interpretation and General Provisions Act implied that the officers should be identified by their offices. Section 43 was on powers and duties of the holder of an office. It stated that where a written law conferred a power or imposed a duty on the holder of an office as such, then, unless a contrary intention appeared, the power may be exercised and the duty shall be performed by the person for the time being holding that office.
17. It was the holder of the office, at any particular time, that counted such that if in an application such as the instant one, the holder was to be identified by his own personal name it would be impossible to arrest or punish him or subject him to any other process necessary in contempt of court proceedings if at the time such process was taken a different officer was in occupation of that office. The officer who may have been named in the application by his personal identification but who had, for one reason or another, left that office may not be in a position to purge his contempt for the simple reason that he was no longer disposed to discharge the duties and functions of that office.
18. Section 45 of the Interpretation and General Provisions Act made that point clear. It stated that a reference to a person holding an office shall include a reference to any person for the time being lawfully discharging the functions of that office.
19. So, it was the person lawfully discharging the functions of an office at the time material to the application that mattered. It was futile to name any particular individual by his name in contempt of court proceedings. To accept the respondent's argument would mean that as long as the application for contempt was pending for determination a fresh application with all the attendant procedures had to be taken every time there was a change in the office of the accounting officer. That would be an absurdity.
20. Section 63 of the Civil Procedure Act did not apply to the instant proceedings. Section 21 (4) of the Government Proceedings Act was not subject to the provision of the law. Even then, section 63 of the



Civil Procedure Act was not the law upon which the applicant's application turned and therefore the fact that it did not apply was of no consequence in determination of the applicant's application.

Application allowed.

Orders

Applicant awarded costs.

Citations

Cases

Kenya

1. *Econet Wireless Kenya Ltd v Minister for Information & Communication of Kenya & another* Miscellaneous Application 1640 of 2003; [2005] KEHC 1767 (KLR); [2005] 1KLR 828; [2005] 1 KLR 828 - (Applied)
2. *Gachege, Christine Wangari v Elizabeth Wanjiru Evans & 11 Others* Miscellaneous Succession Cause 96 of 2000; [2007] KEHC 1824 (KLR) - (Explained)
3. *Gichoya, Joseph Peter Mbogo C/O Stephen Macharia Kimani Adv v Patrick Dennis Ok'eefee & another* Civil Case 17 of 2005; [2006] KEHC 1445 (KLR) - (Applied)
4. *Grand Creek LLC & another v Nathan Chesangmoson* Civil Case 214 of 2011; [2015] KEHC 2288 (KLR) - (Explained)
5. *Henry, O Edwin v Republic* Criminal Appeal 645 of 2010; [2015] KECA 832 (KLR) - (Explained)
6. *In the Matter of an Application by Gurbaresh Singh & Sons Ltd* Miscellaneous Civil Case No. 50 of 1983 - (Explained)
7. *Independent Electoral and Boundaries Commission & 4 others v Ndi & 312 others; Ojwang & 4 others (Amicus Curiae)* Petition E291 of 2021 & Civil Appeal E292, E293 & E294 of 2021 (Consolidated); [2021] KECA 363 (KLR) - (Explained)
8. *Kenya Human Rights Commission v Attorney General & another* Constitutional Petition 87 of 2017; [2018] KEHC 9656 (KLR) - (Applied)
9. *Murwa Henry Musemate v Francis Owino, Principal Secretary, Ministry of Public Service, Youth and Gender Affairs & another* Judicial Review 9 of 2021 - (Applied)
10. *Mwangi H C Wang'ondy v Nairobi City Commission* Civil Appeal No. 95 of 1988 - (Explained)
11. *Nyamodi, Ochieng Nyamogo & another v Kenya Posts & Telecommunications Corporation* Civil Case 1736 of 1993; [2005] KEHC 3055 (KLR) - (Explained)
12. *Owners of the Motor Vessel "Lillian S v Caltex Oil (Kenya) Ltd* Civil Appeal 50 of 1989; [1989] KECA 48 (KLR); [1989] KLR 1 - (Explained)
13. *Republic v County Council of Nakuru Ex-Parte Edward Alera t/a Genesis Reliable Equipment & 2 Others* Judicial Review 74 of 2010; [2011] KEHC 1516 (KLR) - (Explained)
14. *Republic v County Executive Committee Finance & Economic Planning Mr. Allan Mugambi & 2 others; Liteline Enterprises Limited (Exparte)* Miscellaneous Application E041 of 2021; [2022] KEHC 3016 (KLR) - (Applied)
15. *Republic v Principal Magistrate's Court at Githunguri ex-parte James Kabuha Thuo* Civil Application 491 of 20 of 2004; [2005] KEHC 25 (KLR) - (Explained)
16. *Republic v Returning Officer of Kamkunji Constituency & the Electoral Commission of Kenya ex parte Simon Mbugua* Miscellaneous Civil Application 13 of 2008; [2018] eKLR - (Explained)
17. *Woburn Estate Limited v Margaret Bashforth* Civil Appeal 18 of 2015; [2016] KECA 472 (KLR) - (Explained)
18. *Yator, David Kiptum & 23 others v Attorney General & 14 others* Civil Application 150 of 2020; [2021] KECA 874 (KLR) - (Explained)

United Kingdom

1. *Hadkinson v Hadkinson* [1952] 2 All ER 56 - (Applied)



2. *MacFoy v United Africa Company Limited* [1962] AC 152; [1961] 3 WLR 1405; [1961] UKPC 49; [1961] 3 All ER 1169 - (Explained)

Statutes

Kenya

1. Civil Procedure Act (cap 21) section 63 - (Interpreted)
2. Contempt of Court Act (cap 8F) section 38 - (Unconstitutional)
3. Government Proceedings Act (cap 40) section 21(1)(4)- (Interpreted)
4. Interpretation And General Provisions Act (cap 2) sections 43, 45- (Interpreted)
5. Judicature Act (cap 8) section 5(1)- (Interpreted)
6. *United Kingdom*
7. Civil Procedure (Amendment No 3) Rules, 2020 (Act No 747 Sub Leg) rules 81.4 (2) (c); 81.5 (1) - (Interpreted)
8. Civil Procedure (Amendment No. 2) Rules, 2012 (No 2208 of 2012) parts 23, 81; rule 81.5, 81.6, 81.8, 81.9, 81.10- (Interpreted)
9. Contempt of Court Act, 1981 (cap 49) In general- (Cited)
10. Supreme Court Rules (No 1603 of 2009) order 52 rules 1, 2- (Interpreted)

Advocates

Mr. Khayega for the applicant

Ms. Nyakora for the respondent

RULING

The application

1. The application before court is the applicant's motion dated 3 November 2021. It is expressed to be brought under section 5 (1) of the *Judicature Act* and section 63 of the *Civil Procedure Act*. The prayers in the application have been framed as follows;
 1. That the Principal Secretary, State Department for Devolution be cited for contempt of Court and be punished by way of committal to civil jail for disobedience of the court orders dated December 3, 2019.
 2. That the respondent be denied audience before this honourable court until such time as he shall have purged his contempt.
 3. That the costs of this application be borne by the respondent.
 4. That the honorable court be pleased to issue such other or further or consequential orders as may seem just and expedient.
2. The application is supported by the applicant's own affidavit sworn on 3 November 2021.

Applicant's Case

3. From what I gather in the applicant's affidavit, the facts are relatively straightforward. He obtained judgment against the Attorney General in Milimani Chief Magistrates Court Civil Case No. 2057 of 2011. He extracted a decree, which was later amended, and was subsequently issued with a certificate of order against government in accordance with the provisions of section 21 of the *Government Proceedings Act*, cap. 40. The amended decree and the certificate of order against government were issued on 13 August 2018 and 18 August 2018 respectively.



4. When the accounting officer in the Ministry of State for Special Programs, on whose behalf the Attorney General had been sued in the magistrates' court suit, the applicant initiated judicial review proceedings in this Honourable Court for the order of *mandamus* to compel him or her to settle the decree in accordance with the certificate of order against the Government.
5. The record shows that despite opposition from the Attorney General, the applicant's application was allowed and the order of *mandamus* was granted on 3 December 2019 and issued on 1 March 2021.
6. The order for *mandamus* and the penal notice are said to have been served on 19 March 2021.
7. The basis of the applicant's instant application is that despite having been served with the order of *mandamus*, the respondent, who is named as the accounting officer in the relevant ministry that was represented by the Attorney General in the civil proceedings in the magistrates' court, has ignored, neglected or refused to comply with the order and settle the decree.
8. The applicant swears that the respondent's inaction is a clear manifestation of disobedience of the court order and in order for this court to preserve its dignity, it is necessary that the respondent be punished for contempt of court.

Response

9. The respondent opposed the application by way of grounds of opposition dated 1 March 2023. The respondent's position is that the application is incurably defective, incompetent and an abuse of the court process. It is urged that the application is premised on section 5 of the *Judicature Act* yet that Act was repealed by the Contempt of Court Act cap. 46, which was itself nullified by this honourable court for being unconstitutional. As a result of the repeal of the *Judicature Act*, this honourable court has no jurisdiction to entertain proceedings for contempt of court. According to the respondent, with the repeal of the *Judicature Act*, there is no substantive or procedural law for contempt of court. Neither is there law according to which any court can entertain or punish for contempt.
10. The application is also said to be defective because the alleged contemnor has not been named and, in any case, the alleged contemnor was not served with the application and the order that is alleged to have been disobeyed. As far as section 63 of the *Civil Procedure Act*, which the applicant has invoked in this application, is concerned, it is the respondent's position that it does not apply to contempt of court proceedings against government officers. And, in this regard, the respondent has invoked section 21 (4) of the *Government Proceedings Act*. According to this provision of the law, a government officer cannot be held to be individually liable on any order for payment by the government or any government department of any money or costs and, therefore, it is contended, that committing any public officer to civil jail for a government debt is unfair and unconstitutional.

Applicant's Submissions

11. In his submissions, Mr. Khayega, the learned counsel for the applicant has urged that the nullification of the *Contempt of Court Act, 2016* did not leave a vacuum with respect to the law on contempt. He is of the respectable view that, in the wake of the annulment of the *Contempt of Court Act, 2016*, the applicable law is the law that applied prior to the enactment of the impugned Act. This law is the *Judicature Act*. For this submission, the learned counsel has cited the case of *Republic vs. Returning Officer of Kamkunji Constituency & the Electoral Commission of Kenya Ex parte Simon Mbugua* High Court Misc. Application No. 13 of 2008 where it was held, inter alia, that "Just as nature abhors a vacuum, even the enforcement of the rule of law abhors a vacuum or a gap in its enforcement and we refuse to accept jurisprudence which accepts or suggests that a gap exists in our law". Also cited in



support of this argument is this honourable court's decisions in Republic vs. C.E.C Finance & Economic Planning & 3 Others, Ex parte Liteline Enterprises Limited Miscellaneous Application No. E041 OF 2021 and Henry Musemate Murwa vs. Permanent Secretary, Ministry of Public Service, Youth & Gender Affairs & Attorney General ELRC Judicial Review No.9 of 2021. In these cases, the court was particular that that the provisions of the Contempt of Court Act having been declared unconstitutional section 5 of the Judicature Act was thereby reinstated.

12. Regarding the question of naming the alleged contemnor, counsel submitted the contemnor is clearly described on the face of the motion as the Principal Secretary, State Department for Devolution. As I understand him, the applicant need not identify the contemnor by his or her personal name for the reason that they are not permanent in those offices. Those offices are occupied by different officers from time to time. To drive home this point, it was submitted that the officer who held the particular office when the application was filed is not the same officer who was in that office at the time the submissions were filed.
13. More so, naming of an officer by his personal name in contempt of court proceedings is not a requirement under the law and an application such as the instant one wouldn't fail merely because the alleged contemnor was not identified by his personal name.
14. In answer to the question whether a government officer can be held accountable in view of section 21 (4) of the Government Proceedings Act which is to the effect that no person shall be individually liable under any order for payment by the Government or any government department any money or costs, it is submitted on behalf of the applicant that court orders ought to be obeyed by all persons and that no person can escape from consequences of disobedience merely because he is a government officer. Counsel cited the English of Hadkinson vs. Hadkinson [1952] 2 All ER 56 and Econet Wireless Kenya Ltd vs. Minister for Information & Communication of Kenya & Another [2005] 1KLR 828 in support of this argument.
15. Courts, it is urged, are bound to take action necessary to preserve their dignity and to ensure the rule of law; this action may include committal of contemnors to civil jail. In this regard, counsel relied on the case of Grand Creek LLC & Another vs. Nathan Chasangmoson [2015] eKLR where it was held that arrest and committal of a judgment debtor to prison in execution of a decree under the Civil Procedure Act and Rules is not unconstitutional as long as all the safeguards provided in law are accorded to him.

Respondent's submissions

16. Ms. Nyakora, the learned counsel for the respondent and interested party reiterated that this court has no jurisdiction to entertain contempt of court proceedings in the wake of the annulment of the Contempt of Court Act, 2016 by this honourable court in Kenya Human Rights Commission vs. The Honourable Attorney General & Another [2018] eKLR.
17. Section 5 of the Judicature Act, according to the respondent, is inapplicable because it was repealed by the Contempt of Court Act, 2016 and that the notion that we reverted to section 5 of the Judicature Act after the Contempt of Court Act was repealed is fallacious.
18. The Respondent cites the case of Independent Electoral and Boundaries Commission & 4 Others v Ndiu & 312 Others: Ojwang & 4 other (Amicus Curiae) (Petition E291 of 2021 & Civil Appeal E292, E293 & E294 of 2021 (Consolidated)) [2021] KECA 363 (KLR) (20 August 2021) (Judgment) (with dissent). It is urged that in this case, it was held that there was some merit in the argument that a court could not rely on provisions in a statute that had been declared a nullity.



19. Citing *Motor Vessel 'Lilian S' vs. Caltex Oil(K)Ltd* [1989] KLR, the learned counsel for the respondent urged that this court has to down its tools for want of jurisdiction.
20. That notwithstanding, the learned counsel for the respondent still submitted that in the absence of law on punishment for contempt in Kenya, the only other alternative is the common law and the English *Contempt of Court Act 1981* together with parts 23 and 81 of the *Civil Procedure Rules 2012* of England and order 52 rule 1 and 2 of Rules of the *Supreme Court of England*.
21. And perhaps to demonstrate the importance of these provisions of the law to our circumstances, the respondent faulted the applicant for not following them to the letter in his application. For instance, the applicant's application is said to be bad in law because the applicant did not first seek leave of the court. In support of this argument, the learned counsel for the respondent cited this honourable court's (Ouko, J. as he then was) in *Republic vs. County Council of Nakuru Ex-Parte Edward Alera t/a Genesis Reliable Equipment & 2 Others* (2011) eKLR where the learned judge adopted the procedure under order 52 of the *Supreme Court of England Practice Rules*.
22. Counsel for the respondent also cited cases of *Republic -vs- The Principal Magistrate's Court at Gitburguri Ex-Parte James Kabuha Thuo* [2005] eKLR and *Henry O. Edwin vs Republic* [2005] eKLR where it was held that that an accused person can only be charged with an offence that is known to the law and that any attempt to do otherwise is unlawful.
23. As far as service of the order or *mandamus* and the instant application is concerned, it was urged on behalf of the respondent there was no evidence that the respondent was personally served. On this particular submission, the respondent relied on the decisions in *Joseph Peter Gichoya Mbogo C/ O Stephen Macharia Kimani Adv v Patrick Dennis Ok'effee & another* [2006] eKLR; and *Nyamodi Ochieng Nyamogo & another v Kenya Posts & Telecommunications Corporation* [1994] eKLR where the court emphasised the need to adhere strictly to procedural safeguards in contempt of court proceedings.
24. Considering that contempt proceedings are criminal in nature, the respondent has urged that failure to name the respondent is fatal and in this regard, the respondent has relied on the case of *David Kiptum Yaror & 2 Others v Attorney General & 4 others* [2015] eKLR where an application similar to the present one is said to have been dismissed for failure to name the alleged contemnor.
25. As far as section 63 of the *Civil Procedure Act* is concerned, the learned counsel for the respondent submitted that this provision of the law is not applicable where public officers are concerned since the Government is insulated from execution by way of attachment of property in execution of a court decree.

Analysis and Determination

26. What I consider to be the fundamental facts in this application are not in dispute. It is not in dispute, for instance, that the respondent holds a money decree against the respondent. It is not in dispute that subsequent to this decree, the applicant obtained a judicial review relief of *mandamus* compelling the respondent to settle the decree in terms of a certificate of order against the government duly obtained from the magistrates' court. It is also not in dispute that decree has not been settled, at least, as at the time this application was filed.
27. What is in dispute is, first, whether this honourable court has the jurisdiction to entertain this application; second and closely related to the first question is whether the *Judicature Act* is applicable to contempt of court proceedings in this country. The other issues are whether leave to file the present application ought to have been obtained; whether the order of *mandamus* and the instant application



were served upon the respondent; and, whether it is necessary to name the alleged contemnor, by his personal name even if he holds a government office. The answers to these questions will yield the answer to the question whether the applicant's application will succeed and respondent held to be in contempt of court and, if so, whether the applicant would thereby be entitled to costs.

28. Some of these questions or issues are intertwined and it would be more convenient to address them together rather separately or in any particular order. But by its very nature, the question of jurisdiction and related issues have to be dealt with first. The reason is simple to see; if the court was to come to the conclusion that it is deficient of jurisdiction, there would be no reason, indeed there would be no legal basis for interrogating other issues.
29. Contempt of court applications and related factual or legal issues that arise from such applications are matters that this court has had to confront from time to time. Many of the issues that have been raised in this application are not new; they have been addressed in those previous applications. They have been litigated upon over the years not just in this court but the courts above it. In my previous decisions on this subject, I have made reference to the decisions in these courts and adopted a position which, for the sake of consistency and certainty, I see no reason for departing from in determination of this application. This, of course, is at the risk of repeating myself.
30. For the reasons that will become apparent in due course, I have consistently held that section 5 of the *Judicature Act*, cap. 8, which is at the center of the dispute on the question of jurisdiction in this application, remains the statutory basis upon which proceedings for contempt are taken. However, this provision of the law says nothing more than remind the courts that 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. It 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.
31. 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. Since the law that purported to repeal the was voided, the result was that we reverted to section 5 of the *Judicature Act* on matters contempt. The net effect of annulling the *Contempt of Court Act*, 2016 was that it was if the 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. This was the holding in *MacFoy v United Africa Company* Appeal No.67 of 1960 (Privy Council). In this last decision it was held as follows:

“If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and except it to stay there. It will collapse. So will this judgment collapse if the statement of claim was a nullity. (Emphasis added).

32. But as has been noted, a critical look at this provision of the law shows that 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 the Court of Appeal (and I add, the High 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 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.”

33. The court further interrogated what the “High Court of Justice of England” entails and noted that according to the court system in England, it is that level of the court that comprises three divisions; the Queen’s Bench, the Chancery and the Family Divisions. The court’s jurisdiction to punish for contempt of court is drawn from both the statute, which is the *Contempt of Court Act, 1981* and the common law.
34. This should resolve the first two questions whether the *Judicature Act* is still applicable and whether this court has jurisdiction to entertain contempt of court proceedings.
35. It is rather intriguing that though the learned counsel for the respondent has disputed the application of the *Judicature Act*, she still submitted that the applicable law in contempt of court proceedings would be the *Contempt of Court Act 1981* of England and order 52 of the Supreme Court Rules. To quote the learned counsel.

“As such the law on contempt that is applicable in Kenya is the *Contempt of Court Act 1981* and part 23 and 81 of the *Civil Procedure Rules 2012* of England as well as order 52 rule 1 and 2 of the *Rules of Supreme Court of England.*”

36. Of course these provisions would apply to contempt of court proceedings in Kenya but they do so only on the authority of the *Judicature Act*. It is therefore a contradiction of sorts to submit that we are free to apply the law and the procedures adopted in contempt proceedings in England and at the same time deny that the legal basis through which we import the law and the practices in England is no longer applicable ostensibly because it was repealed.



37. The procedure for contempt of court proceedings, including commencement, prosecution and punishment for contempt of court was, until 2012, encapsulated in order 52 rules 1 to 4 of the [Rules of the Supreme Court](#) (RSC); these rules are made under the Supreme Court of [Judicature Act](#), 1873, otherwise known as the [Judicature Act](#), 1873. The [Judicature Act](#), 1873 abolished a cluster of courts in England and Wales dating back to medieval periods, some with overlapping judicial powers, and in their place established the Court of Appeal, the High Court and the Crown Court all together to be known as the Supreme Court of Judicature. The court of Appeal has reminded us that the Supreme Court of Judicature shouldn't be confused with the Supreme Court of the United Kingdom which was established only on October 1, 2009 to assume the judicial functions of the House of Lords.
38. The court summarised the procedure for contempt of court proceedings under order 52 of the [Rules of the Supreme Court Judicature](#) as follows:
- i. An application to the High Court of England for committal for contempt of court will not be granted unless leave to make such an application has been granted.
 - ii. An application for leave must be made *ex parte* to a judge in chambers and be supported by a statement setting out the particulars of the applicant as well as those of the person sought to be committed and the grounds on which his committal is sought, and by an affidavit verifying the facts relied on.
 - iii. The applicant must give notice of the application for leave not later than the preceding day to the Crown Office.
 - iv. Where an application for leave is refused by a judge in chambers the applicant may apply afresh to a divisional court for leave within 8 days after the refusal by the judge.
 - v. When leave has been granted, the substantive application by a motion would be made to a divisional court.
 - vi. The motion must be entered within 14 days after the granting of leave; if not, leave shall lapse.
 - vii. The motion together with the statement and affidavit must be served personally on the person sought to be committed, unless the court thinks otherwise.”
39. On 1 October 2012, the [Civil Procedure \(Amendment No. 2\) Rules, 2012](#) came into force and part 81 thereof effectively replaced order 52 of the [Rules of the Supreme Court](#) in its entirety. This particular part provides different procedures for different form of violations. For instance:

Rules 81.4-committal for “breach of a judgment, order or undertaking to do or abstain from doing an act.”

Rule 81.11- Committal for “interference with the due administration of justice” (applicable only in criminal proceedings).

Rule 81.16 – Committal for contempt “in the face of the court”, and

Rule 81.17 - Committal for “making false statement of truth or disclosure statement.”

Rule 81.4 (breach of judgment, order or undertaking) would be a relevant rule in the present application. The Court of Appeal explained that the application must be made in the proceedings in which the judgment or order was made or the undertaking given. As far as its form is concerned, the court said “the application notice must set out fully the grounds on which the committal application is made and must identify separately and numerically,



each alleged act of contempt and be supported by affidavit(s) containing all the evidence relied upon”.

40. Further “the application notice and the affidavit or affidavits must be served personally on the respondent unless the court dispenses with service if it considers it just to do so, or the court authorizes an alternative method or place of service”.
41. The [Civil Procedure \(Amendment No. 2\) Rules, 2012](#) have since been replaced by [Civil Procedure \(Amendment No. 3\) Rules, 2020](#) which, among other amendments, have amended Part 81 of the Civil Procedure Rules. I will return to these latter amendments later.
42. In a more recent decision in [Woburn Estate Limited v Margaret Bashforth](#) [2016] eKLR, the same Court of Appeal suggested that courts in Kenya do not always have to keep tabs on the applicable law in England in order to punish for contempt. While discussing its decision in [Christine Wangari Gachege versus Elizabeth Wanjiru Evans & 11 Others](#) (*supra*), the court stated as follows:

“When Christine Wangari Wachege (*supra*) was decided on February 14, 2014 the only substantive law with respect to the general power of the High Court or this court to punish for contempt of court was section 5 of the *Judicature Act*. Of course, in respect of injunctions section 63 (e) of the *Civil Procedure Rules*, makes provisions. The practice has therefore with regard to the general powers, been to ascertain both the prevailing substantive law and procedure in England at the time the application was brought. Today that position has drastically changed, starting with the establishment of the Supreme Court which was not envisaged when section 5 of the *Judicature Act* was enacted. By Act No.7 of 2011, article 163 (9) of the [Constitution](#) was operationalised by the enactment of the [Supreme Court Act](#) (cap 9A), which among other things, makes express provision for the power of the Supreme Court to punish for contempt. Under section 29 of the [Environment and Land Court Act](#), it is an offence punishable, upon conviction to a fine of not exceeding Kshs. 20,000,000 or to imprisonment for a term not exceeding two years, or to both, if any person refuses, fails or neglects to obey an order or direction of the court given under the Act. In contrast, under section 20 (7) and (8) of the [Employment and Labour Relations Court Act, 2011](#) any person who without reasonable cause fails to comply with an order duly given in respect of attendance to court, furnishing of such particulars as may be required, giving of evidence before the court or producing of any relevant documents, or who when required by an order to furnish information or to make any statement or to furnish any information, knowingly gives the information or makes a statement which is false or misleading in material particular, commits an offence, and upon conviction is liable to a fine not exceeding one million shillings or to imprisonment for a term not exceeding two years or to both.

The [High Court \(Organization and Administration\) Act](#) which was passed in 2015 now expressly donates to the High Court the power to punish for the disobedience of its orders. It provides-

“

“ 36.

- (1) A person who –
 - a. assaults, threatens, intimidates or willfully insults a judge, judicial officer or a witness, involved in a case during a



- sitting or attendance in a court, or while the judge, judicial officer or witness is travelling to and from a court;
- b. willfully and without lawful excuse disobeys an order or directions of the court in the course of the hearing of a proceeding;
 - c. within the premises in which any judicial proceeding is being heard or taken, or within the precincts of the same, shows disrespect, in speech or manner, to or with reference to such proceeding, or any person before whom such proceeding is being heard or taken;
 - d. having been called upon to give evidence in a judicial proceeding, fails to attend, or having attended refuses to be sworn or to make an affirmation, or having been sworn or affirmed, refuses without lawful excuse to answer a question or to produce a document, or remains in the room in which such proceeding is being heard or taken after the witnesses have been ordered to leave such room;
 - e. causes an obstruction or disturbance in the course of a judicial proceeding;
 - f. while a judicial proceeding is pending, makes use of any speech or writing misrepresenting such proceeding or capable of prejudicing any person in favour of or against any parties to such proceeding, or calculated to lower the authority taken;
 - g. publishes a report of the evidence taken in any judicial proceeding that has been directed to be held in private;
 - h. attempts wrongfully to interfere with or influence a witness in a judicial proceeding, either before or after he or she has given evidence in connection with such evidence;
 - i. dismisses a servant because he or she has given evidence on behalf of a party to a judicial proceeding; or



j. commits any other act of intentional disrespect to any judicial proceedings, or to any person before whom such proceeding is heard or taken, commits an offence.

(2)

(3) A person who commits an offence under subsection (1) shall, on conviction be liable to imprisonment for a term not exceeding five days, or to a fine not exceeding one hundred thousand shillings, or to both.

(4) In exercise of its powers under this section, the Court shall observe the principles of fair administration of justice set out in Article 47 of *Constitution.*” (our emphasis)

Section 39 (2) (g) enjoins the Chief Justice to make rules to provide for, among other things, the procedure relating to contempt of court. Purely as a matter of interest and comparison, section 35 of the *Court of Appeal (Organization and Administration) Act, 2015*, headed “Contempt of Court” stipulates that; -

“35.

(1) Subject to the provisions of any other law, the court shall have power to punish for contempt.

(2) A person who, in the face of the court –

(a) assaults, threatens, intimidates, or insults a judge of the court, the Registrar of the court, a Deputy Registrar or officer of the court, or a witness, during a sitting or attendance in court, or in going to or returning from the court;

(b) interrupts or obstructs the proceedings of the court; or

(c) without lawful excuse disobeys an order or direction of the court in the course of the hearing of a proceeding, commits an offence.

(3) In the case of civil proceedings, the willful disobedience of any judgment, decree, direction, order, or other process of a court



- or willful breach of an undertaking given to a court constitutes contempt of court.
- (4) In the case of criminal proceedings, the publication, whether by words, spoken or written, by signs, visible representation, or otherwise, of any matters or the doing of any other act which –
- (a) scandalizes or tends to scandalize, or lowers or tends to lower the judicial authority or dignity of the court;
 - (b) prejudices, or interferes or tends to interfere with, the due course of any judicial proceeding; or
 - (c) interferes or tends to interfere with, or obstructs or tends to obstruct the administration of justice, constitutes contempt of court.
- (5) A police officer, with or without the assistance of any other person, may, by order of a judge of the court, take into custody and detain a person who commits an offence under subsection (2) until the rising of the court.
- (6) The court may sentence a person who commits an offence under subsection (1) to imprisonment for a period not exceeding six months, or a fine not exceeding five hundred thousand shillings, or both.
- (7) A person may appeal against an order of the court made by way of punishment for contempt of court as if it were a conviction and sentence made in the exercise of the ordinary original criminal jurisdiction of the court.” (our emphasis)

We have gone to this great length to demonstrate how, before the passage of these legislations the powers of the High Court and this court to punish for contempt of court were dynamic and kept shifting depending on the prevailing laws in England. Today each level of court has been expressly clothed with jurisdiction to punish for contempt of court. The only missing link is the absence of the rules to be followed in commencing and prosecuting contempt of court applications. In order to completely emancipate ourselves from English law on



contempt of court, the Chief Justice, as required under the aforesaid legislations ought to make rules for commencing and prosecuting applications for contempt of court.”

43. Thus, we need not keep our ears to the ground on the trends of the law of contempt as applied and practised in English courts. Instead, we have sufficient legislation of our own on this subject and the only missing link are the rules of procedure.
44. My humble view is that until such a time that we have our own locally made rules on procedure and prosecution of applications for contempt of court, we still have to rely on the latest rules applicable in England, of course with such modifications as are necessary and, at any rate, to the extent that they are applicable to our circumstances. It is worth bearing in mind that despite the introduction of various statutory provisions upon which contempt of court proceedings may be founded, section 5 of the *Judicature Act* has neither been amended nor repealed. Section 38 of the *Contempt of Court Act* attempted to repeal it but, as earlier noted, that Act was declared unconstitutional and therefore section 5 of the *Judicature Act* remains intact. With its existence, this provision of the law remains a legitimate basis upon which courts embrace not only the substantive law applicable in England in contempt of court applications but also the procedures that would be adopted in such applications. This is so particularly in circumstances where our local legislation may be found to be lacking in some respect in which event there would be nothing wrong in resorting to the law and practice in the High Court of Justice in England.
45. On the particular question of enforcement of judgments and orders, besides rule 81.4 which the Court of Appeal made reference to in *Christine Wangari Gachege versus Elizabeth Wanjiru Evans & 11 Others* (*supra*), in *Civil Procedure (Amendment No. 2) Rules, 2012* which I found relevant where judgments or orders have been violated are rules 81.5, 81.6, 81.8, 81.9 and 81.10. Prior to the amendment of part 81, this set of rules read as follows:
46. Enforcement of judgment, order or undertaking to do or abstain from doing an act
81. 4.
-
- (1) If a person—
 - (a) required by a judgment or order to do an act does not do it within the time fixed by the judgment or order; or
 - (b) disobeys a judgment or order not to do an act, then, subject to the Debtors Acts 1869(5) and 1878(6) and to the provisions of these Rules, the judgment or order may be enforced by an order for committal.
 - (2) If the time fixed by the judgment or order for doing an act has been varied by a subsequent order or agreement of the parties under rule 2.11, then references in paragraph (1)(a) to the time fixed are references to the time fixed by that subsequent order or agreement.
 - (3) If the person referred to in paragraph (1) is a company or other corporation, the committal order may be made against any director or other officer of that company or corporation.
 - (4) So far as applicable, and with the necessary modifications, this section applies to undertakings given by a party as it applies to judgments or orders.



(Rules 81.17(3) and (4) make provision for cases in which both this Section and Section 6 (Committal for making a false statement of truth or disclosure statement) may be relevant.)

- (5) If a judgment or order requires a person to deliver goods or pay their value—
- (a) the judgment or order may not be enforced by a committal order under paragraph (1);
 - (b) the person entitled to enforce the judgment or order may apply to the court for an order requiring that the goods be delivered within a specified time; and
 - (c) where the court grants such an order, that order may be enforced under paragraph (1).

Requirement for service of a copy of the judgment or order and time for service

81.

5. —

- (1) Unless the court dispenses with service under rule 81.8, a judgment or order may not be enforced under rule 81.4 unless a copy of it has been served on the person required to do or not do the act in question, and in the case of a judgment or order requiring a person to do an act—
 - (a) the copy has been served before the end of the time fixed for doing the act, together with a copy of any order fixing that time;
 - (b) where the time for doing the act has been varied by a subsequent order or agreement under rule 2.11, a copy of that subsequent order or agreement has also been served; and
 - (c) where the judgment or order was made under rule 81.4(5), or was made pursuant to an earlier judgment or order requiring the act to be done, a copy of the earlier judgment or order has also been served.
- (2) Where the person referred to in paragraph (1) is a company or other corporation, a copy of the judgment or order must also be served on the respondent before the end of the time fixed for doing the act.
- (3) Copies of the judgment or order and any orders or agreements fixing or varying the time for doing an act must be served in accordance with rule 81.6 or 81.7, or in accordance with an order for alternative service made under rule 81.8(2)(b).

Method of service – copies of judgments or orders

81.

6. Subject to rules 81.7 and 81.8, copies of judgments or orders and any orders or agreements fixing or varying the time for doing an act must be served personally.

Dispensation with personal service

81.

8. —



- (1) In the case of a judgment or order requiring a person not to do an act, the court may dispense with service of a copy of the judgment or order in accordance with rules 81.5 to 81.7 if it is satisfied that the person has had notice of it—
 - (a) by being present when the judgment or order was given or made; or
 - (b) by being notified of its terms by telephone, email or otherwise.
- (2) In the case of any judgment or order the court may—
 - (a) dispense with service under rules 81.5 to 81.7 if the court thinks it just to do so; or
 - (b) make an order in respect of service by an alternative method or at an alternative place.

Requirement for a penal notice on judgments and orders

81. 9. — (1) Subject to paragraph (2), a judgment or order to do or not do an act may not be enforced under rule 81.4 unless there is prominently displayed, on the front of the copy of the judgment or order served in accordance with this Section, a warning to the person required to do or not do the act in question that disobedience to the order would be a contempt of court punishable by imprisonment, a fine or sequestration of assets.
- (2) An undertaking to do or not do an act which is contained in a judgment or order may be enforced under rule 81.4 notwithstanding that the judgment or order does not contain the warning described in paragraph (1).

How to make the committal application

81. 10.—(1) A committal application is made by an application notice under Part 23 in the proceedings in which the judgment or order was made or the undertaking was given.
- (2) Where the committal application is made against a person who is not an existing party to the proceedings, it is made against that person by an application notice under Part 23.
- (3) The application notice must—
 - (a) set out in full the grounds on which the committal application is made and must identify, separately and numerically, each alleged act of contempt including, if known, the date of each of the alleged acts; and
 - (b) be supported by one or more affidavits containing all the evidence relied upon.
- (4) Subject to paragraph (5), the application notice and the evidence in support must be served personally on the respondent.
- (5) The court may—
 - (a) dispense with service under paragraph (4) if it considers it just to do so; or
 - (b) make an order in respect of service by an alternative method or at an alternative place.

47. These rules have been amended following the amendment of Part 81 by the [*Civil Procedure \(Amendment No. 3\) Rules*](#), 2020. The scope of the new rules 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).

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.

48. The requirements to serve the order or judgment personally and the need for indorsement of a penal notice on the order or judgment are not new, among other requirements in a contempt of court application. 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 endorsement on the face of the order of what with what is popularly referred to as ‘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 ...”

49. 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 October 25, 1993, and November 1, 1993, therefore, is a wasted effort.”

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

51. 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.”

52. 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.

53. These provisions answer most, if not the rest of the questions raised in this application, besides the questions of jurisdiction and section 5 of the Judicature Act which I have already addressed.

54. The learned counsel for the respondent relied on order 52 of the Rules of Supreme Court of England to urge that the applicant ought to have sought leave of this honourable court before filing the substantive application for contempt. She went further and cited the case of the case of Republic versus County Council of Nakuru, ex parte Edward Alera t/a Genesis Reliable Equipment & 2 Others [2011] eKLR where order 52 of the Rules of Supreme Court of England were applied.



55. Order 52 of the Rules of Supreme Court applied until 2012. As noted earlier in this judgment, on 1 October 2012, the Civil Procedure (Amendment No. 2) Rules, 2012 came into force and Part 81 thereof effectively replaced order 52 of the Rules of the Supreme Court in its entirety. Part 81 has subsequently also been amended by Civil Procedure (Amendment No. 3) Rules, 2020.
56. The decision in Republic versus County Council of Nakuru, ex parte Edward Alera t/a Genesis Reliable Equipment & 2 Others (*supra*) was made before these changes and, therefore, it is of little help to the respondent. It is also worth noting that since part 81 of the Rules replaced order 52, both part 81 and order 52 cannot be said to apply at the same time as submitted by the learned counsel for the respondent.
57. In the latest rules, it is not in every application that leave would be required in order for an applicant to file an application for contempt. According to rule 81.3 (5) of the rules, it is only in select cases that one has to seek leave. This rule reads as follows:
- (5) Permission to make a contempt application is required where the application is made in relation to—
- (a) interference with the due administration of justice, except in relation to existing High Court or county court proceedings;
- (b) an allegation of knowingly making a false statement in any affidavit, affirmation or other document verified by a statement of truth or in a disclosure statement.
58. The applicant’s application does not fall into any of this category of cases.
59. This then puts to rest the question whether the applicant ought to have sought leave before filing the instant application. The answer is that it was not necessary.
60. The next question is whether the respondent was served with the order and the application for contempt. According to rule 81.4 (2) (c) and 81.5 (1) of the Civil Procedure (Amendment No. 3) Rules, 2020, personal service of these documents is mandatory unless the court dispenses with the need for service if circumstances stipulated in section obtain.
61. Turning back to the applicant’s application, the applicant has sworn as follows with regard to service of the decree is concerned:
- “On 19.03.2021 service of both the decree from the judicial review proceedings and the penalties were effected upon the respondents and interested party herein (annexed hereto and marked as MOA 3 and 4 respectively copies of the decree and penalties that were served)”
62. I note that the decree and the penal notice stamped with the stamps of the Ministry for Devolution and ASALS State Department for Devolution and the Attorney General showing that the documents were received in the respective offices on 19 March 2021.
63. The respondent did not swear any affidavit denying having received any of these documents and, in the absence of any evidence to the contrary, the court is entitled to take the applicant at his word and proceed on the assumption that what he has stated is true.
64. As far as the application for contempt is concerned, there is also uncontroverted evidence showing that the application was served on 23 May 2022. Apart from service of the application, there are also affidavits of service respectively sworn on 7 March 2023 and 15 May 2023 by Stephen Lisiolo Makhaya, a court process server, showing that the hearing notices in respect of the contempt application were served on the respondents.



65. With this uncontroverted evidence, I am satisfied that the order for mandamus was not only brought to the attention of the respondent but he was also aware of the instant application.
66. As to whether the person holding the office of accounting officer to whom reference has been made in section 21(1) of the *Government Proceedings Act* should be named in the proceedings by his personal name instead of the title attributed to his office, I would simply say that there is no law that supports the position the respondent has taken. On the contrary, sections 43 and 45 of the *Interpretation and General Provisions Act*, cap. 2 imply that the officers should be identified by their offices.
67. Section 43 is on powers and duties of the holder of an office. It states as follows:
43. Where a written law confers a power or imposes a duty on the holder of an office as such, then, unless a contrary intention appears, the power may be exercised and the duty shall be performed by the person for the time being holding that office.
68. It is the holder of the office, at any particular time, that counts such that if in an application such as the instant one, the holder was to be identified by his own personal name it will be impossible to arrest or punish him or subject him to any other process necessary in contempt of court proceedings if at the time such process is taken a different officer is in occupation of that office. Certainly the officer who may have been named in the application by his personal identification but who has, for one reason or another, left that office may not be in a position to purge his contempt for the simple reason that he is no longer disposed to discharge the duties and functions of that office.
69. Section 45 of the *Interpretation and General Provisions Act* makes this point clear. It states as follows;
45. In this Act and in any other written law, instrument, warrant or process of any kind, a reference to a person holding an office shall include a reference to any person for the time being lawfully discharging the functions of that office.
70. So, it is the person lawfully discharging the functions of an office at the time material to the application that matters. It is easy to see from this provision the futility of naming any particular individual by his name in contempt of court proceedings. To accept the respondent's argument would mean that as long as the application for contempt is pending for determination a fresh application with all the attendant procedures has to be taken every time there is a change in the office of the accounting officer. This would be nothing short of an absurdity.
71. To the final question whether section 63 of the *Civil Procedure Act* applies to these proceedings, the short answer is that it does not. section 21 (4) of the *Government Proceedings Act* is not subject to this provision of the law. Even then, section 63 of the *Civil Procedure Act* is not the law upon which the applicant's application turns and therefore the fact that it does not apply is of no consequence in determination of the applicant's application.
72. For reasons I have stated I allow the application. The applicant will also have costs of the application. Orders accordingly.

DATED, SIGNED AND DELIVERED ON 6 OCTOBER 2023

NGAAH JAIRUS

JUDGE

