REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW DIVISION

JUDICIAL REVIEW CIVIL APPLICATION NO. 67 OF 2019

VINCENT ALUSHULA.....APPLICANT

AND

MR. JOSEPH WAIRAGU IRUNGU PRINCIPAL SECRETARY MINISTRY

OF WATER AND SANITATION.....1ST RESPONDENT

THE HONOURABLE ATTORNEY GENERAL.....2ND RESPONDENT

RULING

The application before court is the applicant's motion amended on 16 May 2019; it is brought under section 5 of the Judicature Act (cap.8), section 5 of the Contempt of Court Act, No. 46 of 2016, Sections 1A, 1B, 3 and 3A of the Civil Procedure Act, cap. 21 and Order 51 Rule 1 of the Civil Procedure Rules, 2010. The main prayer in the motion is framed as follows:

> **"a) THAT Mr. Joseph Wairagu Principal Secretary of the Ministry of Water Irrigation and Sanitation be and is hereby committed to civil jail for a period not exceeding six (6) months for contempt of court for willfully failing, neglecting or otherwise not paying to the applicant the decretal amount, costs and interest ordered to be paid to the applicant by the court unless in the meantime he pays the sum of Kshs. 1, 973, 054.00 as at 30th April, 2019."**

The applicant also sought for the costs of the application.

The applicant's counsel, Mr. Livingstone Maina Ombete swore the affidavit in support of the motion; in it counsel set out the chronology of the events that were triggered by a road traffic accident involving a Government registration number GK Q 378 and the applicant's wife. The latter perished in the accident. The applicant successfully sued the 2nd respondent for damages in Kakamega Chief Magistrates Court Civil Case No. 290 of 2012; on 15 July 2015, the court awarded him Kshs. 1, 245,000/= as damages under the heads of loss of dependency, pain and suffering and, special damages. He was also awarded costs and interest at court rates accruing from the date of the judgment.

For whatever reason, the 2nd respondent did not settle the decretal sum as ordered by the court or at all. This failure prompted the applicant to initiate judicial review proceedings against him in Judicial Review Application Number 5 of 2016, in this Honourable Court, sitting at Kakamega. In those proceedings, the applicant sought and obtained an order of mandamus against the second respondent. In its pertinent part, the decree extracted from the judgment in the Kakamega suit reads as follows:

> **"IT IS HEREBY ORDERED AND DECREED:**
>
> **THAT an order for mandamus be and is hereby issued to compel the Hon. Attorney-General to pay to the applicant the decretal amount of Kenya Shillings One Million Three Hundred and Seventy Five Thousand Seven Hundred and Twenty Five (Kshs. 1,375, 725.00) as at 13th day of April, 2016 together with interest at court rate from 14th day of April, 2016 until payment in full.**

THAT the Hon. Attorney- General to pay to the applicant costs of these proceedings and interest thereon at court rate from the 14th day of November, 2016 until payment in full."

The decree was issued by the Deputy Registrar of the High Court at Kakamega on 19 December 2016.

After the applicant obtained this decree, his counsel wrote eight letters to the office of the Attorney-General pleading with him to advise the Ministry of Water & Irrigation, apparently the parent ministry whose vehicle was involved in the fateful accident, to pay the applicant the amount due to him but without much success. There is no indication that the ministry will honour the decree and settle it hence the need for a committal order.

Ms. Annette Nyakora, the learned counsel for the respondent opposed the application; in her grounds of objection dated 22 October 2019 counsel urged that the application is defective, incompetent and an abuse of the process of the court; that the application was premised on the Contempt of Act and section 5 of the Judicature Act which have since been declared unconstitutional; that accordingly, there is no substantive law to commit any one for contempt of court and for these reasons this Court does not have jurisdiction to determine this application. That, in any event, the 1st respondent has never been served with any letter; all the applicant's letters on the award made by the court, the decree and the mandamus order have been directed to the Honourable Attorney General; the latter is not liable for settlement of the decree as he is not the accounting officer for the Ministry of Water and Sanitation.

Non-compliance with court orders or judgments and the appropriate sanctions to be applied in cases of such disobedience is a question that has been litigated upon perhaps as long as orders and judgments have been made by the courts. As far as our circumstances are concerned, whenever the question of contempt of court has arisen, the first port of call has been section 5 of the Judicature Act, cap. 8 which provides 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.

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. It was optimistic, however, 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. This implies that we reverted to Section 5 of the Judicature Act on matters contempt.

But as has been noted, a critical look of the provision of the law shows that there is nothing much in it in terms of substance and procedure other than the obligation placed upon these 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."

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.

However, 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 courted 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 1st October, 2009 to assume the judicial functions of the House of Lords.

It then 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."

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".

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".

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 keeps 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 14th February, 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 the 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."

What I understand the Court of Appeal to be saying is that we need not keep our ears to the ground on the trends of the law of contempt as applied and practised in English courts. On the contrary, we have sufficient legislation of our own on this subject and the only missing link are the rules of procedure.

I would say 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.

On the particular question of enforcement of judgments and orders, besides Rule 81. 4 of the Civil Procedure (Amendment No. 2) Rules, 2012 which the Court of Appeal made reference to in **Christine Wangari Gachege versus Elizabeth Wanjiru Evans & 11 Others (supra),** other Rules (in the same Procedure Rules) which I find relevant where judgments or orders have been violated are Rules 8.5, 8.6, 8.8, 8.9 and 8.10. It is necessary that reproduce this whole set of Rules verbatim for better understanding.

Rule 81. states as follows:

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.

Some of what one would regard as salient features of these Rules are, in a summary way, as follows:

1. Disobedience of a court order or judgment is a foundation for contempt of court proceedings against the contemnor.

2. Where the contemnor is a company or other corporation, the committal order may be made against any director or other officer of that company.

3. The judgment or order in question must be served on the person required to do or not to do the act in question unless the court expressly dispense with personal service.

4. Where the person required to do or not to do an act is a company or other corporation, a copy of the judgment or order must also be served on the alleged contemnor.

5. Judgments and orders must be served personally.

6. The court may, however, dispense with personal service if it is satisfied that the contemnor had notice of the judgment or order:

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.

7. The court may also dispense with personal service if it thinks it is just to do so or may make an order in respect of service by an alternative method or an alternative place.

8. There shall be permanently displayed on the front copy of the judgment or order served a warning to the person required to do or not to do the act in question that disobedience to the order would be contempt of court punishable by imprisonment, a fine or sequestration of assets. Without this display the judgment or order may not be enforced unless it is an undertaking contained in a judgment or order.

9. The contempt of court application shall be made by an application notice in the same proceedings in which the judgment or order was made.

10. The application notice must 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 must also be supported by one or more affidavits containing all the evidence relied upon.

11. The application notice and the evidence in support must be served personally on the respondent although the court may dispense with service under paragraph (10) if it considers it just to do so; or may make an order in respect of service by an alternative method or at an alternative place.

Many of these requirements are nothing new; they are, by and large, a carryover of the Order 52 of the Rules of the Supreme Court and thus they have not only been existence prior to the commencement of the **Civil Procedure (Amendment No. 2) Rules, 2012** but they have also been litigated upon from time to time. 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 …"

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

> **"Keeping the importance of personal service of the order in mind we now take a look at the aforesaid two copies of the order both of which bear the stamp of Wetangula & Co Advocates, in acknowledgement of receipt of the said orders. Service on Wetangula & Co does not constitute personal service on any of the three officers. It is a personal service on each one of them that is required to be effected by law. Service of the two orders on Wetangula & Co, Advocates, on 25th October, 1993, and 1st November, 1993, therefore, is a wasted effort."**

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

And on the need for endorsement of the order with the requisite warning of penal consequences, the court stated as follows:

> **"Mr Lakha pointed out other flaws to which we will now turn our attention. He referred to the order and also to the application itself and pointed out the absence of a notice in the form of an endorsement thereon of penal consequences. It is not disputed that the copies of the order alleged to have been served on the three alleged contemnors and handed in by Mr Nowrojee during the hearing (instead of having been annexed to the application) do not bear any such endorsement of penal consequence. Section 5(1) of the Judicature Act has given this Court the same power to punish for contempt of court as is for the time being possessed by the High Court of Justice in England. In England rule 5 of order 45 R S C 1982 Ed, governs the method of the enforcement by the Court of its judgments or orders in circumstances amounting to contempt of court (p766). Order 45/7 deals with matters relating to "Service of copy of judgment, etc, pre-requisite to enforcement under rule 5". (The underlining is ours). The relevant procedural obligation is succinctly stated in order 45 rule 7/5 of the RSC 1982 Ed as follows:**
>
> > **"It is a necessary condition for the enforcement of a judgment or order under rule 5 by way of sequestration or committal, that the copy of the judgment or order served under this rule should have the requisite penal notice indorsed thereon."**
>
> **"And a couple of paragraphs later is given the form that an endorsement is required to take, in the following words in the case of a judgment or order requiring a person to abstain from doing an act:**
>
> > **"If you, the within named A B disobey this judgment (or order) you will be liable to process of execution for the purpose of compelling you to obey the same."**
>
> **"A similar form with suitable alterations is given in the case of an order against a corporation.**
>
> **This Court in Court of Appeal Civil Appeal No 95/1988 Mwangi H C Wang'ondu v Nairobi City Commission (UR) confirmed the mandatory nature of the requirement of endorsement of notice of penal consequence on the order in the following words:**
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> > **"In the present case, according to the affidavit of the appellant sworn on 26th January, 1988, in support of his application, the order alleged to have been disobeyed by the respondent was served on the respondent on 31st August, 1987, and a copy of that order which was annexed to the affidavit did not carry a notice of the penal consequences of disobedience as required by the Rules. It is clear from this that the appellant did not comply with the mandatory provisions of section 5(1) of the Judicature Act with the result that his application was incompetent. It must follow that there was no valid application for contempt of court before the judge."**

The court concluded its discussion on this point by stating as follows:

> **As the copies of the orders produced before us are not so endorsed as required under the mandatory provisions of section 5(1) of the Judicature Act (cap 8) this application is incompetent and deserves to be dismissed on this account also.**

When considered from this legal perspective, the applicant's motion is found wanting in several respects the first of which is that it is itself a distinct suit separate from the one in which the mandamus order was made; as noted this order was granted in **Kakamega High Court Judicial Review Application No. 5 of 2016** and not in the present 'suit'. Needless to repeat, the contempt of court application ought to be made in the same proceedings in which the judgment or order was made.

Secondly, it is clear from the applicant's counsel's affidavit that the alleged contemnor was neither served personally with the order of mandamus nor has he been served with the present application. All the communication regarding the mandamus order was directed at the Honorable Attorney General. Indeed, it is the Attorney General to whom the mandamus order is mistakenly directed but the person who is alleged to the contemnor is a different person; this only compounds the applicant's application even further.

Thirdly, irrespective of the target of the mandamus order, the order itself was not endorsed with the notice of penal consequences in the event of disobedience.

I have stated elsewhere that some of these procedural appear so mundane that one may be tempted to wave Article 159 (2) (d) of the Constitution and cry out aloud that in exercising judicial authority, courts ought to administer justice without undue regard to procedural technicalities. My answer to this argument would be that where liberty of an individual is threatened, what one may regard as 'a procedural technicality' is as much important as the substantive law. The 'procedural technicality' cannot be ignored where one's constitutional right to freedom is likely to be curtailed or is threatened.

Without belabouring the point, I would reiterate the words of the Court of Appeal in **Woburn Estate Limited v Margaret Bashforth** (supra) where it stated as follows:

> **"We reiterate that contempt proceedings being of quasi –criminal in nature and since a person may lose his right to liberty, each stage and step of the procedure must be scrupulously followed and observed. We bear in mind the often-cited passage attributed to Lord Denning In Re Bramblevale Ltd [1970] 1 CH 128 at page 137 that;**
>
> > **"A contempt of court is an offence of criminal character. A man may be sent to prison for it. It must be satisfactorily proved showing that when the man was asked about it, he told lies. There must be some further evidence to incriminate him."**

More than two decades earlier, the same court had emphasized the same point in **Nyamodi Ochieng Nyamogo & Another versus Kenya Posts & Telecommunications Corporation** (supra) where it noted as follows:

> **"The consequences of a finding of disobedience being penal, the party who calls upon the Court to make such a finding must show that he has himself complied strictly with the procedural requirements and his failure to so comply cannot be answered by merely saying that the other side was aware or ought to have been aware of what the order required him to do."**

For the reasons I have given I find and hold the applicant's motion dated 14 March 2019 and amended on 16 May 2019 to be incompetent and an abuse of the process of the court; it is hereby struck out. I make no orders as to costs considering that the decretal sum has been acknowledged as outstanding.

SIGNED, DATED AND DELIVERED ON 5TH MARCH 2021.

NGAAH JAIRUS

JUDGE