



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MACHAKOS**  
**SUCCESSION CAUSE NO. 543 OF 2013**

**IN THE MATTER OF THE ESTATE OF MICHAEL JOHN MULNDI KATHUKU (DECEASED)**

**ELIZABETH MULANDI**

**EDWARD MULANDI.....PETITIONERS**

**VERSUS**

**FAUSTINA NGINA.....RESPONDENT**

**RULING**

**The Application**

The Petitioners have filed an application by way of a Notice of Motion dated 31st August 2016, in which they are seeking orders that the Respondent herein be committed to civil jail for a term of six months for contempt of court, and for willfully disobeying the order of this Court issued on 24th May 2016.

The Petitioners had previously made another application by way of a Notice of Motion dated 14th April 2016, in which they were seeking orders of a temporary injunction against the Respondent and her servants and/ or agents restraining them from destroying trees, vegetation and house erected on Plot No.1520 situated at Kilungu Village, Ngandani Sub-Location in Kikumbulyu Location. The said application came up for *inter partes* hearing on 24th May 2016, when it was ordered that *status quo* should be maintained, in that the said Plot No.1520 should be preserved and no trees or vegetation thereon should be destroyed.

The Petitioners allege that the Respondent has failed, and/ or refused to comply with the above stated order despite being duly served with the said order, and has been cutting down trees in the said Plot No. 1520 for sale. The 1st Petitioner filed a supporting affidavit sworn on 31st August 2016, in which she averred that the Petitioners reported the Respondent's activities to the police, and that she was summoned by the Officer Commanding Station and told to refrain from cutting down trees, but she ignored the same and continued with the tree cutting.

Further, that the police arrested one person who was found cutting down trees under the instructions of the Respondent, and took the tree logs to the police station. The Petitioners annexed copies of pictures of the trees they allege were cut by the Respondent; of the statement made at the police station of the person arrested while cutting trees in which he stated that the Respondent had given him work to cut down trees in the subject parcel of land; and of an assessment report on the damaged trees which were assessed at Ksh.188,797.60/= by Kenya Forest Service

The Petitioners also filed a Further affidavit sworn on 7th November 2016 by one Peter Muendo Keli,

who averred that he is a process server of this Court duly authorized to serve court process documents, and holds a current and valid process service certificate, a copy of which he attached. He stated that upon receiving instructions from the Petitioners' Advocates, he served the Respondent with a copy of the order at Syembeni area of Kibwezi, accompanied by the 1st Petitioner who took him to the Respondent's home on Friday 27th May 2016 at around 2.30pm, and that the Respondent acknowledged the order but refused to sign his copy and he left her with her copy.

The Petitioners' learned counsel, Muchoki Kangata Njenga & Co. Advocates, filed written submissions dated 3rd February 2017, wherein reliance was placed on the decision in **North Tetu Farmers Co. Ltd v Joseph Nderitu Wanjohi [2016] eKLR** on the application of Part 81 of the English Civil Procedure Rules to contempt of court proceedings by virtue of section 5 of the Judicature Act, and it was submitted that they had complied with the procedure in the said Rules.

Further, that they had demonstrated the four elements that must be proved to make the case for civil contempt, which were that they had proved to the required standard which is higher than in civil cases that the terms of the order were clear and unambiguous and were binding on the Respondent; the Respondent had knowledge of or proper notice of the terms of the order; the Respondent has acted in breach of the terms of the order; and that the Respondent's conduct was deliberate.

### **The Response**

The Respondent filed a replying affidavit to the Petitioners' application dated 14th November 2016, in which she denied being personally served with the orders issued on 24th May 2016, and stated that the Petitioners have no authority to sue on behalf of the estate of the deceased, for no person has been officially appointed administrator by the court pursuant to an application for grant of letters of administration.

The Respondent's counsel, Maosa & Company Advocates, filed written submissions dated 21st December 2016, wherein he relied on the decision in **Mawan -vs- Mawan** that a party must be personally served with a court order before the element of contempt can be invoked against the party alleged of disobedience. Further, that the process server in his further affidavit sworn on 7<sup>th</sup> November, 2016 stated that he served the orders on 27th May, 2016, six months earlier, and never swore an Affidavit of Service in terms of the provisions of Order 5 Rule 15 of the Civil Procedure Rules. Therefore, that at the present moment, there is no valid affidavit of service to demonstrate that the Respondent was actually served with the court order complained of.

### **The Issues and Determination**

The substantive law that applied at the time of the alleged contempt was the English law on committal for contempt of court by virtue of section 5(1) of the Judicature Act, which section provided that:

**“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 that power shall extend to upholding the authority and dignity of subordinate courts.”**

The said section of the Judicature Act was since repealed by the Contempt of Court Act No 46 of 2016 which came into force on 13<sup>th</sup> January 2017.

The applicable English Law in this respect was Part 81 of the English Civil Procedure Rules of 1998 as variously amended, which part repealed in most part the Rules of the Supreme Court that previously applied, including Order 52 and parts of Order 45 of the Rules of the Supreme Court. The law on the personal service of court orders is now found in Rule 81.8 of the English Civil Procedure Rules. The said rule provides that unless the court dispenses with service, a judgment or order may not be enforced by way of an order for committal unless a copy of it has been served on the person required to do or not do the act in question. Rule 81.6 of the English Civil Procedure Rules specifically provides that the method of service shall be personal service, which is effected by leaving the order with the person to be served.

Rule 81.9 (1) of the English Civil Procedure Rules of 1998 is also clear that a judgment or order to do or not do an act may not be enforced unless there is a prominently displayed a warning to the person that disobedience to the order would be a contempt of court punishable by imprisonment, a fine or sequestration of assets. Under sub-rule (2) of the said Rule, it is only in the case of an undertaking to do or not to do an act which is contained in a judgment or order where the notice of penal consequences may be dispensed with.

This Court notes that Kenyan courts have also held that personal service of orders and a penal notice is a requirement in contempt of court proceedings, and reference is made to the Court of Appeal decisions in **Nyamogo & Another v Kenya Posts and Telecommunications Corporation, (1994) KLR 1**, and **Ochino & Another v Okombo & 4 others (1989) KLR 165** in this respect. It must be pointed out at the outset that there must be strict compliance with the law when punishing for contempt of court as the proceedings are quasi criminal and punitive in nature, with a penalty being provided for the offence of imprisonment and/or payment of a fine.

There are thus three issues before the court for determination arising from the pleadings and submissions highlighted in the foregoing. The first is whether there was personal service of the orders issued by the court on 24th May 2016 and a notice of penal consequences on the Respondent. Secondly, if there was such service, whether the Respondent is culpable for contempt of court. The last issue is if the Respondent is found culpable, whether the Petitioners can be granted the remedies sought

Coming to the facts of the present application, the Respondent has raised the preliminary issue of the locus of the Petitioners to bring the application, on the ground that they have not been issued with a grant of letters of administration. The reason why power is vested in courts to punish for contempt of court is to safeguard the rule of law which is fundamental in the administration of justice. Therefore any party who is aggrieved by disobedience of a court order has locus to initiate contempt of court proceedings, as does the Court on its own motion.

In the case of **Teachers Service Commission vs Kenya National Union of Teachers & 2 others [2013] Eklr**, Ndolo J. in this regard observed that:-

**“The reason why courts will punish for contempt of court then is to safeguard the rule of law which is fundamental in the administration of justice. It has nothing to do with the integrity of the judiciary or the court or even the personal ego of the presiding judge. Neither is it about placating the applicant who moves the court by taking out contempt proceedings. It is about preserving and safeguarding the rule of law.”**

The Petitioners’ application is therefore properly before this Court.

The personal service of the order alleged to have been disobeyed has also been disputed by the Respondent. This Court notes that no affidavit of service was filed in Court after the issue of the orders of 24<sup>th</sup> May 2016 demonstrating the service of the orders on the Respondent, and it is only the Further Affidavit sworn on 7<sup>th</sup> November 2016 by a process server and filed in Court on 10<sup>th</sup> November 2016 that attests to such service. This affidavit was filed after the alleged contempt of court had taken place and months after the orders alleged to have been disobeyed had been issued. It cannot therefore be relied upon as evidence of service of the orders on the Respondent before the alleged contempt, given that the law must be strictly complied with in contempt proceedings.

This Court however has powers to dispense with the personal service of an order under Rule 81.8 (1) of the English Civil Procedure Rules, wherein it is provided that in the case of an order requiring a person not to do an act, the court may dispense with service of a copy of the order if it is satisfied that the person has had notice of it either by being present when the order was given or made; or by being notified of its terms by telephone, email or otherwise. It is however only in the stated circumstances that a court can dispense with personal service of orders in contempt court proceedings,

It is also the position as argued by the Petitioners and as has been held in several judicial decisions that if

personal awareness of the court orders by the alleged contemnors is demonstrated, they will be found culpable of contempt even though they had not been personally served with the penal notice. See in this regard the decisions in Kenya Tea Growers Association vs Francis Atwoli & Others , Nairobi High Court Constitutional Petition No 64 of 2010, Husson v Husson, (1962) 3 All E.R. 1056, Ronson Products Ltd v Ronson Furniture Ltd (1966) RPC 497, and Davy International Ltd vs Tazzyman (1997) 1 WLR 1256 .

For this court to dispense with personal service of the orders issued on 24th May 2016 and to find that the Respondent was aware of the court's order, the Petitioners must therefore show that the Respondent was personally aware of the court order through some other means other than personal service. The notification and awareness of the orders required is personal to the person sought to be committed for contempt of court.

There is no record or evidence in this respect to show that the Respondent was in Court on the date the said orders were granted as argued by the Petitioners. This Court cannot therefore find that the Respondent was personally aware of the orders 24th May 2016 as at the date of their alleged disobedience.

Arising from the foregoing, I find that as the Respondent was not personally served or shown to be personally aware of the orders issued by the court on 24th May 2016, she cannot be found culpable of disobeying the same or be cited for contempt of court .

The prayers sought in the Petitioners' Notice of Motion dated 31st August 2016 are accordingly declined for the foregoing reasons, and each party shall meet their respective costs of the said Notice of Motion.

Orders accordingly.

**Dated, signed and delivered in open court at Machakos this 30<sup>th</sup> day of March 2017.**

**P. NYAMWEYA**

**JUDGE**